



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

# Response to Consultation and Decision on price control obligations relating to retail bundles

Further specification of the wholesale price control obligation not to cause a margin squeeze in the WLA, and WCA Markets

Response to Consultation and Decision

**Reference:** ComReg Document 18/96

**Decision:** D12/18

**Version:** Final

**Date:** 19/11/2018

### Redacted Information

Please note that this is a **non-confidential** version of the Response to Consultation and Decision. Confidential information within the Response to Consultation and Decision has been indicated by the symbol ✂ and highlighted in **BLACK**. The symbol [ is used to indicate the start of confidential information and the symbol ] indicates where that confidential information ends.

# Content

Section	Page
<b>1 Introduction and Executive Summary .....</b>	<b>8</b>
1.1 Overview .....	8
<b>2 Background .....</b>	<b>15</b>
2.1 Overview .....	15
2.2 Summary of responses received.....	17
2.3 ComReg's assessment of Respondents' views.....	24
<b>3 Competition issues .....</b>	<b>32</b>
3.1 Overview .....	32
3.2 Summary of Chapter 3 of the Consultation .....	32
3.3 Summary of responses received.....	34
3.4 ComReg's assessment of Respondent's views.....	42
3.5 ComReg final position .....	57
<b>4 Exchange areas .....</b>	<b>58</b>
4.1 Overview .....	58
4.2 Summary of Chapter 4 of the Consultation .....	58
4.3 Summary of responses received.....	59
4.4 ComReg's assessment of Respondent's views.....	62
4.5 ComReg's final position .....	73
<b>5 Components of the MST .....</b>	<b>74</b>
5.1 Overview .....	74
5.2 Summary of Chapter 5 of the Consultation .....	74
5.3 Summary of responses received.....	80
5.4 ComReg's assessment of Respondent's views.....	98
5.5 ComReg's final position .....	130
<b>6 eir Sports .....</b>	<b>141</b>
6.1 Overview .....	141
6.2 Summary of Chapter 6 of the Consultation .....	141
6.3 Summary of responses received.....	142
6.4 ComReg's assessment of Respondent's views.....	150

6.5	ComReg’s final position .....	159
<b>7</b>	<b>Pre-launch and post-launch assessment of bundles .....</b>	<b>161</b>
7.1	Overview .....	161
7.2	Summary of Chapter 7 of the Consultation .....	161
7.3	Summary of responses received.....	162
7.4	ComReg’s assessment of Respondent’s views.....	167
7.5	ComReg’s final position .....	175
<b>8</b>	<b>Regulatory Impact Assessment .....</b>	<b>177</b>
8.1	Overview .....	177
8.2	Summary of Chapter 8 of the Consultation .....	179
8.3	Summary of responses received.....	180
8.4	ComReg’s assessment of Respondent’s views.....	185
8.5	ComReg’s position based on responses and latest thinking .....	188
8.6	Steps for assessing regulatory options .....	190
8.7	Step 1 - Describe the policy issue and identify the objectives .....	190
8.8	Step 2 - Identify and describe the regulatory options .....	196
8.9	Step 3 - Likely impacts on stakeholders.....	197
8.10	Step 4 - Assess the likely impact on competition: .....	205
8.11	Step 5 - Assess the impacts and choose the best option.....	205
<b>9</b>	<b>Points raised on the Draft Decision Instruments .....</b>	<b>208</b>
9.1	Overview .....	208
9.2	Summary of the respective draft Decision Instruments .....	208
9.3	Summary of the responses received.....	209
9.4	ComReg’s assessment of Respondent’s views.....	210
9.5	ComReg’s final position .....	211

# Annex

<b>Section</b>	<b>Page</b>
Annex: 1 Legal basis .....	212
Annex: 2 Overview of the bundles MST .....	214
Annex: 3 Illustrative example of the WAWNI .....	217
Annex: 4 Decision Instrument – Wholesale Local Access Market .....	218
Annex: 5 Decision Instrument – Wholesale Central Access Market .....	231
Annex: 6 Questions in the Consultation .....	244
Annex: 7 EC Response to ComReg’s Notified Draft Measures .....	247
Annex: 8 Consideration of EC comments .....	258

# List of Figures

<b>Section</b>	<b>Page</b>
Figure 1: Overview of the Consultation and the Decision. ....	14
Figure 2: Margin squeeze through bundling of SMP wholesale inputs .....	46
Figure 3: Use of WLR by OAOs on the Eircom network [REDACTED].....	52
Figure 4: National fixed broadband retail shares by platform – Q1 2018.....	64
Figure 5: Bundles market shares to Q1 2018 .....	103
Figure 6: Components of the MST Decision with changes from the Consultation .....	123
Figure 7: Example of a WAWNI [PARTIALLY REDACTED] .....	217

# List of Tables

Section	Page
Table 1: Retail broadband market shares with and without continued WCA (3b) regulation – Q4 2017 data [%<REDACTED].....	68
Table 2: Subscriber shares by platform – Q4 2017 data [%<REDACTED] .....	68
Table 3: Current NRT assessment levels.....	72
Table 4: Consultation’s proposed assessment level .....	72
Table 5: Final bundles MST assessment level.....	72
Table 6: Aggregation of tests .....	128
Table 7: NGA bundles or retail standalone services sold/offered for sale ....	131
Table 8: CGA bundles or retail standalone services sold/offered for sale ....	136
Table 9: Identified regulatory options from the Consultation.....	179
Table 10: Identified regulatory options for the Decision .....	196
Table 11 For illustrative purposes bundle by bundle MST at LRIC following this decision [%<PARTIALLY REDACTED].....	215
Table 12 Example of the portfolio MST at ATC following this decision [%<PARTIALLY REDACTED].....	216

## Chapter 1

# 1 Introduction and Executive Summary

## 1.1 Overview

- 1.1 Telecommunication products and services such as telephone line rental, calls and broadband are, to a large extent, sold in bundles. Much of the competition in the fixed line and broadband markets is based on bundles. Bundles of fixed line based telecommunication products and services are therefore important for both consumers and providers.
- 1.2 In June 2017 ComReg published a consultation and draft decision (**‘the Consultation’** including **‘the Draft Decision’**)<sup>1</sup> seeking views in relation to a proposed further specification of the price control obligations in relation to bundles in the following markets:
  - 1.2.1 The Wholesale Local Access (**‘WLA’**) at a fixed location market (**‘WLA Market’**) (also referred to as **‘Market 3a’** in the 2014 European Commission Markets Recommendation<sup>2</sup> (**‘2014 Recommendation’**)). This market was addressed in Document 16/96<sup>3</sup> (the **‘2016 WLA / WCA Market Review Consultation’**) and the subsequent draft decision;
  - 1.2.2 The Wholesale Central Access (**‘WCA’**) for mass market products market (**‘WCA Market’**) (also referred to as **‘Market 3b’** in the 2014 Recommendation) as set out in the 2016 WLA / WCA Market Review Consultation and the subsequent draft decision; and
  - 1.2.3 The Wholesale Fixed Voice Access and Call Origination (**‘FACO Market’**) market as set out in the Decision Document D05/15<sup>4</sup> (the **‘FACO Decision’**).

<sup>1</sup> Consultation on Price control obligations relating to Bundles: Further specification of the price control obligation not to cause a margin squeeze: FACO and WLA (Market 3a) and WCA (Market 3b), dated 9 June 2017

<sup>2</sup> Commission Recommendation of 9 October 2014 on relevant product and service markets (2014/710/EU) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014H0710&from=EN>

<sup>3</sup> Consultation and Draft Decision: Market Reviews – Wholesale Local Access (WLA) provided at a Fixed Location and Wholesale Central Access (WCA) provided at a fixed location for Mass Market Products, dated 11 November 2016.

<sup>4</sup> Response to Consultation and Decision: Market Review – Wholesale Fixed Voice and Call Origination and Transit Markets, dated 24 July 2015.



- 1.3 ComReg proposed in the Consultation to impose margin squeeze tests (**'MST'**) to ensure that Eircom cannot cause a margin squeeze between the prices of the wholesale regulated services it offers/sells to other authorised operators (**'OAO'**) 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. It was also proposed that the existing Net Revenue Test (**'NRT'**) which had been further specified in the retail market for Retail Narrowband Fixed Access (**'RNFA'**) in Decision Document D04/13<sup>5</sup> (the **'2013 Bundles Decision'**) would be withdrawn.
- 1.4 As a vertically-integrated operator Eircom sets two prices: a wholesale price for the input/access product and a retail price for the end-user product. A margin squeeze would occur were Eircom (as an operator with significant market power (**'SMP'**) in the relevant wholesale market) to set wholesale prices such that, given prevailing retail prices, competing OAOs would not cover their costs (e.g. sales, marketing, etc.). Equally, Eircom could set its downstream retail prices (for standalone or bundled products/services) such that OAOs competing at similar price levels would not cover their costs. Over the longer term, if OAOs cannot profitably replicate Eircom retail offers, they may exit the market (weakening competition) — which would be to the long-term detriment of end-users.
- 1.5 Five industry stakeholders (**'Respondent(s)'**)<sup>6</sup> provided responses (**'Submission(s)'**) to the Consultation, namely: BT Ireland Limited (**'BT'**); Eircom Limited (**'Eircom'**); the industry body representing alternative operators in communications market (**'ALTO'**); Sky Ireland (**'Sky'**); and Vodafone Ireland Limited (**'Vodafone'**). Eircom submitted a further response on 5 December 2017 which provided commentary on the non-confidential submissions from the other Respondents that ComReg had published in September 2017. This further response from Eircom after the consultation period has been published along with this document.
- 1.6 The Consultation was one of a suite of related consultations, the other two related consultations are:

<sup>5</sup> Price Regulation of Bundled Offers – Further specification of certain price control obligation in Market 1 and Market 4, dated 8 February 2013. To note, the NRT was initially imposed pursuant to Eircom's designation with SMP in ComReg Decision D07/61 which was withdrawn and replaced by ComReg Decision D12/14.

<sup>6</sup> ComReg published non-confidential versions of Respondents' Submissions in September 2017. See ComReg Document 17/51s (**'Respondents' Submissions'**).

- 1.6.1 The 2016 WLA / WCA Market Review Consultation, the response to which<sup>7</sup> (“**the 2018 WLA / WCA Market Review Decision**”) has been issued alongside this Decision. In the 2018 WLA / WCA Market Review Decision ComReg designated Eircom with SMP in the WLA Market and the Regional WCA Market (“**the Relevant Markets**”) and imposed remedies on Eircom in those markets including margin squeeze obligations relating to bundles, which it indicated would be set out in a separate decision, being this decision.
- 1.6.2 A consultation issued by ComReg in April 2017<sup>8</sup> (the ‘**2017 Pricing Consultation**’) which proposed to further specify the price control obligations proposed in the 2016 WLA / WCA Market Review Consultation, and which ComReg proposed to apply (as appropriate) in the Relevant Markets. The consideration by ComReg of responses to the 2017 Pricing Consultation is set out in the 2018 Pricing Decision<sup>9</sup>.
- 1.7 This Response to Consultation and Decision (the ‘**Response to Consultation**’ including ‘the **Decision**’) sets out ComReg’s final position regarding the structure and implementation of the bundles MST, in order to prevent margin squeeze(s) in relation to bundles and standalone services and the resulting damage to competition and consumer welfare. The Decision further specifies the price control obligations in relation to the WLA and WCA markets.
- 1.8 In making the Decision, ComReg carefully considered the Submissions. In addition, ComReg considered the views of its expert consultants Oxera Consulting (**Oxera**)<sup>10</sup>. In accordance with Regulation 14(2) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (the ‘**Framework Regulations**’), ComReg has also taken utmost account of the comments made by the European Commission (**EC**) in response to ComReg’s notification of the draft measures under Article 7 of the Framework Directive.

<sup>7</sup> Response to Consultation and Decision 18/94 (the “WLA/WCA Market Review Response to Consultation”). Market Review: Wholesale Local Access (WLA) provided at a Fixed Location Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products, dated 19 November 2018.

<sup>8</sup> Pricing of wholesale services in the Wholesale Local Access (WLA) market and in the Wholesale Central Access (WCA) markets: Further specification of price control obligations in Market 3a (WLA) and Market 3b (WCA). ComReg Document 17/26, 7 April 2017.

<sup>9</sup> Pricing of wholesale broadband services: Wholesale Local Access (WLA) market and the Wholesale Central Access (WCA) markets. ComReg Document 18/95, dated 19 November 2018 (the ‘**2018 Pricing Decision**’).

<sup>10</sup> For information purposes only, the Oxera report, “Amendments to the bundles margin squeeze test” (**Oxera Amendments Report**), is published as ComReg Document 18/96a. The views expressed by Oxera are not necessarily the views of ComReg.

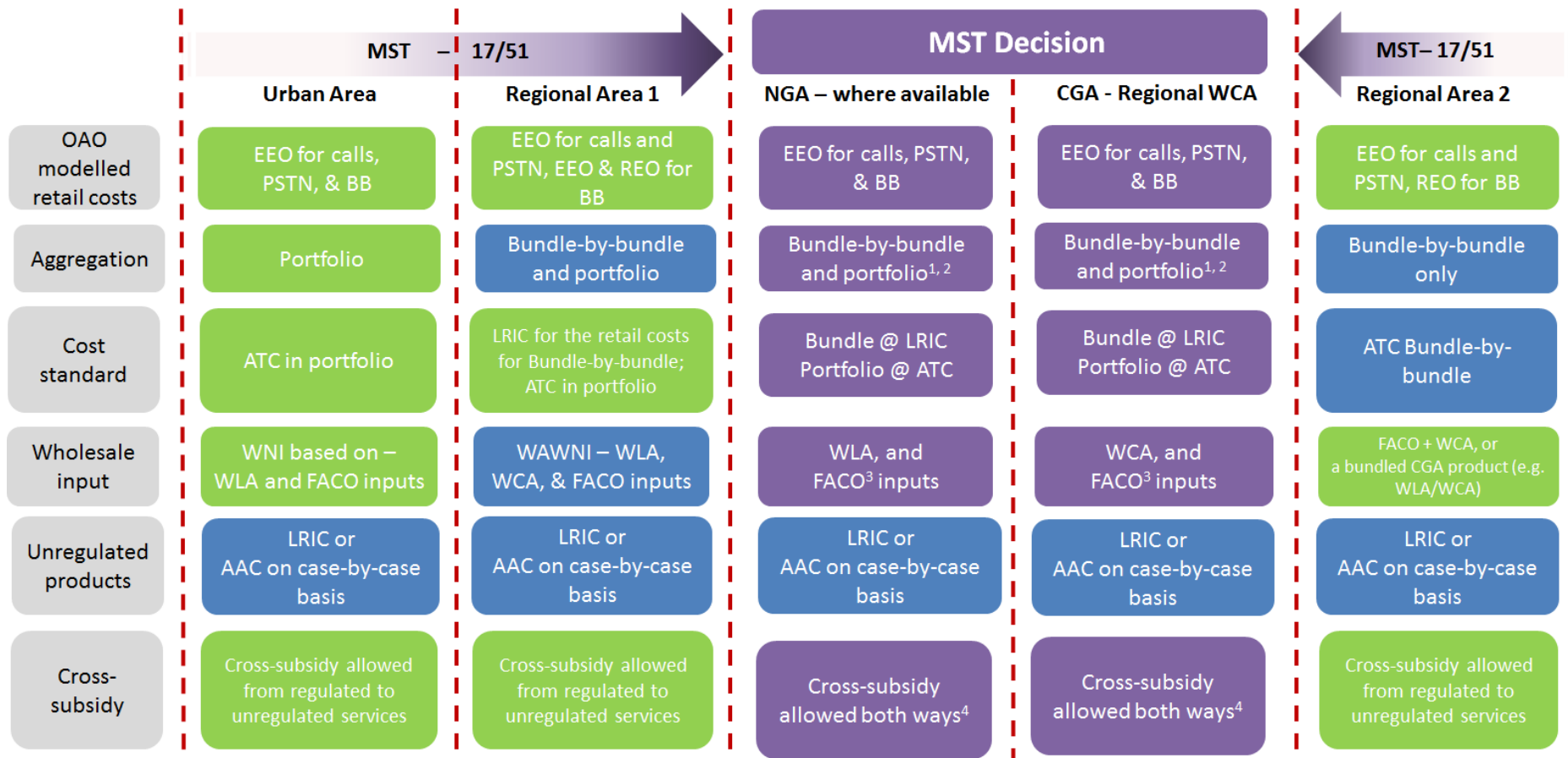
- 1.9 ComReg notified the EC, the Body of European Regulators for Electronic Communications ('**BEREC**'), and other National Regulatory Authorities ('**NRAs**') on 11 September 2018 regarding the draft measure.
- 1.10 The EC provided a comments letter to ComReg dated 10 October 2018. The letter is set out in Annex: 7 of this Decision document. The EC raised one comment concerning the need to review the retail access market, which has been considered by ComReg in Annex: 8.
- 1.11 Having reviewed the latest data available<sup>11</sup> and the Submissions to the 2017 Pricing Consultation, and having further considered both how OAOs compete (that is, nationally across a portfolio of services) and the impact of cost orientation of most wholesale inputs, ComReg has decided that a number of changes to the original proposals set out in the Consultation should be made. The MST has been altered in the following ways:
- 1.11.1 the MSTs will not be applied separately across three geographic areas (Urban Area ("**UA**"), Regional Area 1 ("**RA1**"), and Regional Area 2 ("**RA2**")) as originally proposed. Instead, MSTs relating to the WLA Market will be applied on a national basis and MSTs relating to the Regional WCA Market will be applied across that market as a whole (see Section 4.4);
  - 1.11.2 Next Generation Access ('**NGA**') based bundles will use WLA inputs (and where relevant FACO inputs) in the WLA Market (see Section 4.4). The cost stack used to evaluate these bundles will include all the relevant network elements required by OAOs to supply broadband service as well as retail costs;
  - 1.11.3 Current Generation Access ('**CGA**') bundles will use WCA inputs (and where relevant FACO inputs) in the Regional WCA Market (see Section 4.4);
  - 1.11.4 there will be two portfolios, NGA and CGA, with no cross-subsidy between them. Both portfolios will be assessed on an Average Total Cost ('**ATC**') basis (see Section 5.5);
  - 1.11.5 within each portfolio, all bundles will be assessed on a Long Run Incremental Cost ('**LRIC**') basis (see Section 5.5);

<sup>11</sup> The data used throughout this document has come from two sources: (a) ComReg's Irish Communications Market Quarterly Key Data Report Data as of Q1 2018 (Reference: ComReg 18/49). <https://www.comreg.ie/publication/quarterly-key-data-report-q1-2018/>; and (b) the November 2017 Statutory Information Requests ('**SIR**') issued by ComReg (pursuant to its powers under section 13D(1) of the Communications Regulation Act 2002 (as amended)), to Service Providers as part of the 2018 WLA / WCA Market Review Decision.

- 1.11.6 the costs of an Equally Efficient Operator (**'EEO'**) (meaning an operator that is as efficient as the incumbent) will be used as the cost standard for all retail costs for the purposes of assessing compliance with the MST (see Section 5.5);
  - 1.11.7 cross subsidisation will be allowed between regulated or unregulated services in either direction within a bundle (see Section 5.5);
  - 1.11.8 standalone retail broadband (except for fibre to the home (**'FTTH'**)) will be included in the bundles MST portfolio level assessments on a proportional basis. In the bundles MST standalone retail broadband will not be tested singly (see Section 5.5);
  - 1.11.9 acquisition costs related to eir Sports will be spread over a fixed period. Eircom may, subject to verification, use excess margin (after each portfolio's ATC assessment) if available to recover the acquisition costs sooner than over the full fixed period (see Section 6.4.2); and
  - 1.11.10 the FACO Decision Instrument has been removed as the inclusion of FACO inputs in a bundle is sufficiently addressed for replicability purposes through the bundles MST in the WLA and WCA Decision Instruments (See Section 3.4.2).
- 1.12 This document is structured as follows:
- 1.12.1 Chapter 2: sets out the background to, and rationale for, the bundles MST, and assesses responses to Question 1;
  - 1.12.2 Chapter 3: assesses responses to Questions 2 to 5 and sets out ComReg's final position on the competition issues associated with bundling. ComReg has decided that Eircom, when it offers a bundle for sale, will be required to demonstrate that it is not causing a margin squeeze between the price(s) for regulated wholesale components and the bundles and portfolios for which those components are required. ComReg has decided that the NRT can be removed;
  - 1.12.3 Chapter 4: assesses responses to Question 6 and sets out ComReg's final position on the competitive conditions. ComReg has decided that the assessment of bundles should be based on a nationally focused approach based on the type of broadband being bundled (CGA or NGA);
  - 1.12.4 Chapter 5: assesses the responses to Questions 7 to 15 and sets out ComReg's final position on the relevant components of the bundles MST. Eircom's bundles and standalone retail CGA and fibre to the cabinet (**'FTTC'**) products will be assessed as outlined in the changes in paragraph 1.9 above;

- 1.12.5 Chapter 6: assesses the responses to Questions 16 to 19 and sets out ComReg's final position of the treatment of eir Sports. ComReg has decided that a 'net costs' approach for eir Sports when included with Eircom retail broadband is appropriate, with a split between on-going and the acquisition costs;
- 1.12.6 Chapter 7: assesses the responses to Questions 20 to 22 and sets out ComReg's final position of the pre- and post-launch assessment of bundles, and on-going monitoring compliance. Eircom will be required to submit a notification to ComReg five days prior to the launch of a new/revised bundle for approval. Eircom will be required to carry out post launch monitoring of a bundle, and finally a monitoring statement will be required; and
- 1.12.7 Chapter 8: assesses the responses to Question 23 and sets out an analysis of the likely effect of the further specification of the price control obligations not to cause a margin squeeze.
- 1.12.8 Chapter 9: assesses the responses to Questions 24 to 26 and sets out ComReg's final position of the Decision Instruments.

Figure 1: Overview of the Consultation and the Decision.



1) CGA or NGA FTTC retail standalone broadband sold by Eircom will be included in the relevant CGA or NGA portfolio level assessment.  
 2) The CGA and NGA portfolios must cover the costs of all services sold in either portfolio (e.g. regulated services ATC + unregulated services LRIC).  
 3) FACO will still be represented until such time as the majority of Eircom customers are served through a managed VoBB service instead of WLR.  
 4) Regulated to unregulated and vice versa.

## Chapter 2

# 2 Background

2.1 This chapter provides the background to the Consultation, details the responses received to Question 1 of the Consultation, and provides ComReg's assessment of those responses.

## 2.1 Overview

2.2 The Consultation noted that Eircom could, absent regulation, set prices at two levels: a wholesale price for the access product required by OAOs and a retail price for its end-user product. A margin squeeze would occur were Eircom (as the operator with SMP in the relevant wholesale market) to set wholesale prices at a level at which competing OAOs could not cover their costs. Equally, Eircom could set its downstream retail prices at a level at which OAOs, after acquiring the essential wholesale inputs from Eircom's wholesale arm, could not cover their costs. Over the longer term, if OAOs cannot profitably replicate Eircom's retail offers, they may exit the market — which would be to the long-term detriment of end-users.

2.3 These issues are considered by competition law under Article 102 of the Treaty on the Functioning of the European Union ('**TFEU**')<sup>12</sup> and are typically assessed on an ex-post basis by the relevant authorities. The European Commission's Explanatory Note to the 2014 Recommendation<sup>13</sup> makes clear that the underlying purpose of the ex-ante regulatory framework is to address competition problems that originate from structural factors in the industry. For example, given the nature of the telecoms industry, high barriers to entry inhibit the emergence of effective competition, thereby justifying the imposition of ex-ante regulation. 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. Eircom has been identified as having SMP in a number of upstream markets (FACO, WLA, and WCA). These markets relate to wholesale inputs to retail products that are often bundled. As a vertically integrated operator Eircom, as set out in the 2018 WLA / WCA Market Review Decision (Chapters 6 and 11), has both the ability and incentive to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users.

<sup>12</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E102&from=EN>

<sup>13</sup> <https://ec.europa.eu/digital-single-market/en/news/explanatory-note-accompanying-commission-recommendation-relevant-product-and-service-markets>

- 2.4 ComReg's objectives, as set out in Section 12 of the Communications Regulation Act 2002 (as amended)<sup>14</sup> (**'the Communications Regulation Act'**) and Regulation 16 of the Framework Regulations are to promote competition, to contribute to 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.
- 2.5 Currently, a NRT is imposed in the RNFA market in accordance with the obligation not to unreasonably bundle services pursuant to Regulation 13(2)(d) of the Universal Service Regulations<sup>15</sup>. The obligation was imposed in 2014 following Eircom's designation with SMP in the bundled lower level voice access (**'LLVA'**) market and higher level voice access (**'HLVA'**) market in the Retail Access SMP Decision<sup>16</sup>. The detail of the NRT is further specified in the the 2013 Bundles Decision. In summary, the NRT is the price control remedy used to assess whether or not Eircom is covering its total costs when it offers / sells a bundle of services together (that contains LLVA or HLVA and broadband).
- 2.6 In 2015 the FACO Decision imposed a wholesale obligation on Eircom not to cause a margin squeeze pursuant to Regulation 13 of the Access Regulations, including with respect to single billing wholesale line rental (**'SB-WLR'**). It was also noted in the FACO Decision that ComReg would consider in a separate and subsequent consultation whether the imposition of a specific MST in the FACO Market (and elsewhere), if effectively designed and implemented, would allow for the removal of the NRT.
- 2.7 Subsequent to the 2016 WLA / WCA Market Review Consultation, ComReg in the 2018 WLA / WCA Market Review Decision, designated Eircom with SMP in the Relevant Markets and imposed remedies on Eircom in these markets including an obligation not to cause margin squeezes in relation to standalone products and bundles. This Decision covers bundles and also standalone CGA and NGA FTTC products.
- 2.8 The price control obligations applying to standalone WLA and WCA FTTH wholesale inputs in the Relevant Markets are dealt with separately in the 2018 Pricing Decision which has been issued alongside this Decision.

<sup>14</sup> The Communications Regulation Act 2002 (No. 20 of 2002), as amended. 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.

<sup>15</sup> Regulation 13(2)(d) of the Universal Service Regulations. European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011)

<sup>16</sup> ComReg, *"Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers"*, (**'ComReg Decision D12/14'**).



- 2.9 As the Consultation was the final document in the suite of the WLA / WCA Market Review consultations being published, ComReg in Question 1<sup>17</sup> provided Respondents with an opportunity to comment further on the entire package of remedies proposed.

## 2.2 Summary of responses received

- 2.10 Five responses were received to Question 1. Three respondents, ALTO, Sky, and Vodafone, were broadly supportive of the proposals. Two respondents, Eircom and BT, disagreed with the proposals.
- 2.11 ALTO agreed<sup>18</sup> with ComReg's pricing proposals and encouraged ComReg to implement them as soon as practicable. ALTO noted that there had been enough delays in the application of regulation in this area and in the governance of SMP operators.
- 2.12 Sky considered<sup>19</sup> that there was nothing in the Consultation that would undermine the proposed market definitions, SMP designations and/or obligations required to address market failures. Sky viewed constraining the extent to which Eircom can leverage market power as central to imposing an obligation not to margin squeeze on bundles in particular. Sky added that "*... Eircom are formally on the record as stating that it would protect its broadband base by using Eir Sport as leverage*" and that this highlights that there was a need to ensure that wholesale SMP remedies are not undermined through bundling strategies.
- 2.13 Sky added<sup>20</sup> that, it considered that ComReg had clearly complied with its obligations to properly consult in relation to the appropriate market definitions and assessments of market power. Sky urged a timely completion of the market reviews.

<sup>17</sup> Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA/WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.

<sup>18</sup> ALTO response to the Consultation paragraph A.1.

<sup>19</sup> Sky response to the Consultation paragraph 1.

<sup>20</sup> Sky response to the Consultation paragraphs 2 and 3.

- 2.14 Vodafone emphasised<sup>21</sup> the importance of the markets at issue to all telecoms operators and as such its view that it was imperative that “final decisions” be made at the earliest possible time. Vodafone recognised<sup>22</sup> the decline in Eircom’s retail market share, but contrasted this with Eircom’s growing share of the fixed wholesale broadband market (68% in Q1 2016 to 69% in Q1 2017 according to the ComReg Quarterly Key Data Report (‘**QKDR**’)). Vodafone suggested that *“This level of wholesale market share gives rise to concerns about eircom’s ability to exert vertical leverage into the associated retail market and thus justifies ComReg’s continuing use of margin squeeze tests in retail markets.”* Vodafone queried whether now was the appropriate time to allow additional pricing freedom to Eircom and suggested strengthening the proposed regime in key areas.
- 2.15 Vodafone observed<sup>23</sup> that NGA Very-high-bit-rate Digital Subscriber Line (‘**VDSL**’) represented 55% of Eircom wholesale volumes and considered that this demonstrated that it was appropriate to move to a cost orientation regime for these services, as it is now a mature product and current and future costs and volumes are more capable of being forecast than was previously the case. Vodafone noted<sup>24</sup> that Eircom’s retail share of the fixed and mobile broadband markets exceeds 55%, so any arguments against Eircom having SMP in fixed broadband or continued regulation is moot.
- 2.16 Vodafone encouraged ComReg to review Eircom’s quarterly presentations (which report volume increases and cost reductions, continuing and predicted) against the modelling completed by ComReg to date. Vodafone gave the example that if the higher costs due to new service level agreements referenced by Eircom in its response to the 2017 Pricing Consultation were of a material nature, then their mention in Eircom’s quarterly presentations would have been expected.
- 2.17 Vodafone indicated its support<sup>25</sup> for *“many of the remedies decided upon by ComReg”* but reiterated its view that *“... the incorrect decision has been made with regard to the deregulation of the Urban WCA Market”*. In particular, it noted its view that the evidence does not support those operators identified as providing an effective competitive constraint in that market. Furthermore, Vodafone stated its belief<sup>26</sup> that the margin squeeze obligations proposed and, in particular, the one between WLA and WCA Markets, were not sufficient to prevent Eircom manipulating the WCA Market should it decide to do so.

<sup>21</sup> Vodafone response to the Consultation paragraph 6.

<sup>22</sup> Vodafone response to the Consultation paragraph 7.

<sup>23</sup> Vodafone response to the Consultation paragraph 8.

<sup>24</sup> Vodafone response to the Consultation paragraph 9.

<sup>25</sup> Vodafone response to the Consultation paragraph 11.

<sup>26</sup> Vodafone response to the Consultation paragraph 11.

- 2.18 Vodafone agreed<sup>27</sup> with Compass Lexecon's (Vodafone's consultant) conclusions in its report (which Vodafone commissioned and submitted with its response to the 2016 WCA / WLA Market Review Consultation) on product market definition, and encouraged ComReg to address the specific points raised through "*... a more gradual removal of obligations from eircom*", which will allow the market more time to adjust.
- 2.19 Vodafone "*... point out that while the issues raised by designating certain exchanges to be in the newly defined Urban WCA market might theoretically be addressed through the sourcing of wholesale services from alternative suppliers, the switching costs and the operational impact of changing wholesale service providers effectively limit the level of competition*". Vodafone acknowledged the 'sunset period' but considered it to be too short given *inter alia* the likely switching costs. Vodafone further stated that "*We see no evidence that these switching costs, which are in effect a barrier to competition in the WCA market, have been considered and we strongly urge ComReg to address this as a matter of urgency*".
- 2.20 Vodafone urged ComReg - in the event of deregulation of the Urban WCA Market - to provide safeguards to prevent "*... serious negative distortion of competition*". Vodafone stated that, absent regulatory obligations, Eircom has the ability and incentive to engage in exploitative and or exclusionary behaviour, leading to a dysfunctional market. Vodafone concluded that if deregulation were to go ahead ComReg should retain powers to enforce sanctions if gaming occurs during the transitional period and, ultimately, the power to reverse deregulation if the market does not appear to be functioning as intended.
- 2.21 BT considered<sup>28</sup> the boundary between the Urban WCA Market and the Regional WCA Market to be unstable, given Eircom's "*re-homing*" of VUA-based exchanges. BT identified several "fundamental issues" and stated that ComReg should reconsider the boundaries and propose a system to dynamically change the boundaries.

<sup>27</sup> Vodafone response to the Consultation paragraphs 12 to 15.

<sup>28</sup> BT response to the Consultation Question 1.

- 2.22 BT outlined the impact Eircom's "re-homing" of VUA-based exchanges has had on its investments. BT stated its concern that, in the future, Eircom could potentially 'rehome' VUA traffic to an exchange site where BT is not present and could not viably reach. BT stated that if this exchange was in the Urban WCA Market, Eircom could refuse or constructively refuse to offer reasonable WCA services which would hamper BT's supply of downstream services. BT proposed that in the instance of future VUA re-homing to a site not already accessed by that operator then that exchange should automatically be designated as being in the Regional WCA Market "... *with WCA services on regulated terms re-instated immediately*". BT raised concerns about its confidence for further investment and said ComReg should "... *commence further work on the underlying foundations to the definitions of the Urban, Regional Area 1 and Regional Area 2 to resolve this "Re-homing" problem*".
- 2.23 Eircom stated its view<sup>29</sup> that insufficient economic assessment had been undertaken in the 2016 WLA / WCA Market Review Consultation to allow ComReg to determine whether the theoretical competition problems identified, arising from hypothetical pricing behaviours, are likely to occur in practice, in particular given that all the relevant wholesale inputs supplied by Eircom (except for FTTH) are already proposed to be subject to cost orientation obligations.
- 2.24 Eircom considered<sup>30</sup> that the impacts of the ability and incentives of Eircom to distort competition were overstated in the 2016 WLA / WCA Market Review Consultation and the Consultation. Eircom viewed the proposed regulatory pricing remedies as being "*complex and disproportionate*" and "*well beyond any uncompetitive market outcomes that are actually likely to occur*".
- 2.25 Eircom summarised that, in its view<sup>31</sup>, ComReg has: (a) proposed ex-ante remedies without adequate economic assessment to determine if competition concerns arise or are likely to arise; (b) not assessed the full effects of each pricing remedy, in particular the effects across multiple markets or value chains; and (c) proposed MSTs which are inconsistent in their design with the 2013 EC Recommendation<sup>32</sup>.

<sup>29</sup> Eircom response to the Consultation paragraph 26.

<sup>30</sup> Eircom response to the Consultation paragraph 26.

<sup>31</sup> Eircom response to the Consultation paragraph 27.

<sup>32</sup> European Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (hereafter the "**2013 EC Recommendation**").

*(a) Ex-ante remedies without adequate economic assessment*

- 2.26 Eircom stated its view<sup>33</sup> that ComReg's proposed bundles MST is being imposed without having defined or analysed the relevant market, which it considered to be "a segment of the retail market (for bundles of services)". Eircom observed that the retail market is no longer identified by the European Commission as being susceptible to ex-ante regulation. Eircom judged this to be problematic in two ways: firstly, that this action would be *ultra vires*<sup>34</sup> as it has failed to follow the prescribed process for the imposition of ex ante regulation and secondly, that absent analysis of the relevant market the proportionality of any proposed measure is impossible to assess.
- 2.27 Eircom viewed<sup>35</sup> the practical effect of the proposed MST as imposing a retail price control, and in light of this stated that "... ComReg now appears to suggest that it can proceed directly to the imposition of a retail price control without any preceding analysis of the relevant retail market".
- 2.28 Eircom discussed<sup>36</sup> the approach taken in relation to imposing the NRT, and concluded that ComReg is seeking to impose retail regulation on the basis of its review of the wholesale market, having failed to undertake the required Three Criteria Test in the relevant market.
- 2.29 Eircom stated its view<sup>37</sup> that the reference to access in Regulation 13 of the Access Regulations relates to wholesale access only and that ComReg's powers to regulate retail markets are found in the Universal Service Regulations. Eircom therefore asserted<sup>38</sup> that ComReg "... appears to be misdirecting itself in relation to the scope of its powers" and provided reasons for this assertion<sup>39</sup>.
- 2.30 Eircom added<sup>40</sup> to its previous points on the need for a separate analysis of the downstream market by outlining that, where unregulated services are included in a bundle, then Eircom's upstream SMP may be of little, if any, overall significance. Eircom added that it may be Eircom, not OAOs, that struggles to profitably replicate competitors' bundles, and demonstrated this by providing two diagrams outlining Eircom's market shares for pay TV and mobile services.

<sup>33</sup> Eircom response to the Consultation paragraph 31.

<sup>34</sup> Outside of ComReg's powers.

<sup>35</sup> Eircom response to the Consultation paragraph 32.

<sup>36</sup> Eircom response to the Consultation paragraphs 33 to 35.

<sup>37</sup> Eircom response to the Consultation paragraph 36.

<sup>38</sup> Eircom response to the Consultation paragraph 37.

<sup>39</sup> Eircom's response to the Consultation paragraph 37.

<sup>40</sup> Eircom response to the Consultation paragraph 38.

- 2.31 Eircom considered<sup>41</sup> that ComReg's justification of the proposed MST rests chiefly on *"identifying hypothetical mechanisms by which consumer harm could potentially occur without assessing the characteristics of the actual market in question and, in particular, whether such harm ... is actually likely to occur"*.
- 2.32 Eircom concluded by describing<sup>42</sup> why, in its view, ComReg cannot at this stage proceed as it proposed. It stated that *"Doing so would be ultra vires in the context of the regulatory framework without having either defined or analysed the relevant retail market and assessed that market as suitable for ex-ante regulation (following a Three Criteria Test) as prescribed by the Universal Services Directive and the transposing Irish regulations. Furthermore, absent such an analysis, it is simply impossible for ComReg to demonstrate – as it is required to do- that the imposition of an MST is a proportionate intervention in the specific circumstances of the market"*.
- 2.33 Eircom stated its view<sup>43</sup> that an appropriate analysis of the relevant downstream market would have led ComReg to conclude that retail level regulation is no longer required and in particular not for bundles where there is upstream regulation of key inputs. Eircom inferred<sup>44</sup> that its view (of there being no need for retail level regulation) is supported by the European Commission via the Explanatory Note to the 2014 Recommendation.

*(b) Impact of pricing remedies across markets*

- 2.34 Eircom stated its view<sup>45</sup> that ComReg had not taken account of the regulatory implications of the market analysis undertaken, and responses to the 2016 WLA / WCA Market Review Consultation. Eircom shared its view that Virgin Media and Vodafone *"supported a view that the market is subject to national retail pricing"*.
- 2.35 Eircom considered<sup>46</sup> that, as a consequence of the above, varying the downstream retail costs between different areas would result in higher prices in the Urban WCA Market, as they would be required to pass a *"more severe retail MST"* for the same retail products in the other areas. Eircom felt that this would create a pricing umbrella for its competitors to Eircom's detriment. This would have a negative impact on consumers through inefficient pricing over and above the competitive level. Eircom submitted that *"The differing remedies between defined regulatory boundaries fail to recognise the impact that they will have on eir's retail arm..."*

<sup>41</sup> Eircom response to the Consultation paragraph 40.

<sup>42</sup> Eircom response to the Consultation paragraph 42.

<sup>43</sup> Eircom response to the Consultation paragraph 44.

<sup>44</sup> Eircom response to the Consultation paragraph 45.

<sup>45</sup> Eircom response to the Consultation paragraph 46.

<sup>46</sup> Eircom response to the Consultation paragraphs 47 and 48.

(c) Consistency with the 2013 EC Recommendation

- 2.36 Eircom provided<sup>47</sup> its view and the view of its consultant<sup>48</sup> that ComReg's proposals go beyond the intended scope of the 2013 EC Recommendation on costing and non-discrimination in relation to NGA services, and also the 2014 Recommendation<sup>49</sup> on relevant markets. Eircom concluded<sup>50</sup> that "... ComReg's intervention is harming retail competition in the market and this will result in detriment to consumers in the short-medium and long-term".

*Other Considerations*

- 2.37 Eircom outlined<sup>51</sup> a number of market developments since the 2016 WLA / WCA Market Review Consultation was published which it considered led to "*more competitive outcomes and benefits for end-users*". Announcements highlighted were: an enet and SIRO agreement on infrastructure use; contract agreements between SIRO and five retailer service providers; Pure Telecom's retail expansion plan; and Imagine's development plans for wireless broadband solutions.
- 2.38 Eircom considered<sup>52</sup> that the exclusion of fixed broadband provided over fixed wireless access "*... from the retail and thereby the wholesale broadband markets would therefore seem highly incompatible with the concept that a market review should be completed on a forward-looking basis*". Eircom considered that fixed wireless access, along with mobile and satellite broadband were effective substitutes for fixed broadband, particularly in rural areas. Eircom presented and discussed<sup>53</sup> a number of figures to support its view that these forms of broadband supply were effective substitutes.

<sup>47</sup> Eircom response to the Consultation paragraphs 49 - 51.

<sup>48</sup> Brian Williamson, "Leveraging regulation into retail broadband and adjacent markets via margin squeeze - Primum non nocere", June 2017.

<sup>49</sup> European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation (hereafter, the '**2014 Recommendation**').

<sup>50</sup> Eircom response to the Consultation paragraph 51.

<sup>51</sup> Eircom response to the Consultation paragraphs 52 to 60.

<sup>52</sup> Eircom response to the Consultation paragraph 61.

<sup>53</sup> Eircom response to the Consultation paragraphs 62 to 65.

2.39 Eircom concluded<sup>54</sup> that ComReg's proposals were "... *heavily interventionist and burdensome...*" pricing remedies based on "... *flawed categorisation of the retail market*" and that ComReg had not properly taken into account a number of developments in wholesale markets. Eircom considered that there is significant market entry and expansion absent reliance on Eircom's infrastructure, and ComReg's "*heavy-handed*" proposals are not supported by the "... *increasingly dynamic infrastructure competition and the increasingly competitive state of the markets...*".

## 2.3 ComReg's assessment of Respondents' views

2.40 The responses to Question 1 have been considered, as appropriate, by ComReg in making both the 2018 WLA / WCA Market Review Decision and the 2018 Pricing Decision. Specific points raised by respondents in response to Question 1 have been considered in these two other decisions where relevant and references to the consideration of those points not directly relevant to this Decision are provided below.

2.41 ComReg acknowledges Sky's synopsis of the purpose of having an MST (see paragraph 2.12). ComReg recognises the value of timely market reviews and is aware of the potential for delaying tactics to be employed as identified by Sky (paragraph 2.13 and Sky response to the Consultation paragraph 2). ComReg, in conducting the 2016 WLA / WCA Market Review, sought to ensure that adequate time was provided to stakeholders to fully consider and understand the proposed package of remedies.

2.42 ComReg has considered Vodafone's point about increased pricing freedom (see paragraph 2.14) but considers that the MST as proposed in the Consultation is justified in the context of the available data and taking into account ComReg's aim of ensuring economic replicability for efficient competitors. Prior to making the Decision, ComReg (with the support of Oxera) has revisited the proposals in the Consultation to ensure that they are suitably designed and, where necessary, has altered certain aspects of the MST to satisfy the aim of economic replicability.

2.43 The 2018 Pricing Decision contains responses to some issues raised in Vodafone's Submission, in particular: paragraph 2.16 use of Eircom's quarterly presentations for modelling (see paragraphs 5.57, 5.58 and 7.20 of the 2018 Pricing Decision<sup>55</sup>); and paragraph 2.17 particularly the effectiveness of the MST between WLA and WCA markets (see Section 10.2 of the 2018 Pricing Decision).

<sup>54</sup> Eircom response to the Consultation paragraphs 66.

<sup>55</sup> More generally see Chapter 6 and Annex 12 of the 2018 Pricing Decision.



- 2.44 The 2018 WLA / WCA Market Review Decision contains responses to some issues raised in Vodafone's Submission; in particular: paragraph 2.15 (this Response to Consultation) - NGA VDSL wholesale cost orientation (see 2018 WLA / WCA Market Review Decision, paragraphs 7.1288 to 7.1332 and 12.306 to 12.323); paragraph 2.17 (this Response to Consultation) – deregulation of the Urban WCA market (see paragraphs 14.51 to 14.60); and paragraphs 2.18 to 2.20 removal of obligations on Eircom and the duration of the sunset period (see paragraphs 13.36 to 13.37, and 13.42 to 13.46).
- 2.45 BT's concerns as summarised in paragraphs 2.21 and 2.22 regarding the stability of the Urban WCA market, and potential transfers of services into exchanges within the footprint of the Urban WCA market are addressed through the details provided in paragraphs 7.227 to 7.250 of the 2018 WLA / WCA Market Review Decision and briefly discussed in paragraphs 4.30 to 4.32 of this Decision.
- 2.46 Eircom disagreed with a number of aspects of both the 2016 WLA / WCA Market Review Consultation, and the proposals in the Bundles Consultation. The 2018 WLA / WCA Market Review Decision responds to Eircom's positions in relation to the following points:
- 2.46.1 Insufficient economic assessment, and over-stated impacts of the ability and incentive to distort competition (paragraph 2.23 and 2.24 above), see paragraphs 14.19 to 14.25 and 14.36 to 14.50 of the 2018 WLA / WCA Market Review Decision;
- 2.46.2 Industry announcements about potential future developments since the 2016 WLA / WCA Market Review Consultation (paragraph 2.37 above), see the 2018 WLA / WCA Market Review Decision: paragraph 2.49 and Appendix 4; and
- 2.46.3 In relation to the suitability of the various forms of broadband included or not in the 2016 WLA / WCA Market Review Consultation (paragraph 2.38 above), please see the 2018 WLA / WCA Market Review Decision: paragraphs 3.156 to 3.158, and 8.50 to 8.52 in relation to retail; 4.6 to 4.17 in relation to WLA; and 9.8 to 9.11, and 9.344 in relation to WCA.
- 2.47 ComReg in each of the following three sections ("*Alleged imposition of ex-ante remedies without economic assessment*"; "*Impact of pricing remedies across markets*"; and "*Consistency with 2013 EC Recommendation*") responds to Eircom's positions:
- (a) *Alleged imposition of ex-ante remedies without economic assessment*

- 2.48 ComReg considers that Eircom's interpretation and description of the proposals relating to the bundles MST from the Consultation (paragraph 2.26 above, and as repeated at 2.32 and 2.33) is inaccurate. ComReg disagrees with (i) Eircom's interpretation of where the bundles MST is being imposed, (ii) Eircom's position that the prescribed statutory process has not been followed, and (iii) Eircom's position that the bundles MST is not proportionate.
- 2.49 Eircom's view is that the bundles MST is being imposed in a "*segment of the retail market (for bundles of services) ... no longer identified ... as being susceptible to ex-ante regulation*". ComReg agrees that no retail market for telecommunications was identified by the 2014 Recommendation as a market that should be subject to ex-ante regulation. However, as outlined by ComReg in the Consultation (paragraphs 1.3 to 1.9, and in 3.27 to 3.50) the bundles MST remedy was proposed for the wholesale markets where Eircom had either been designated (FACO) or was provisionally designated (WLA and Regional WCA) as having SMP. The goal of ComReg's bundles MST (as discussed in paragraph 1.4 to 1.6 of the Consultation) is to ensure sustainable competition for the benefit of end-users. This can only be achieved where Eircom cannot foreclose competitors dependent on Eircom's SMP wholesale products and where those competitors can profitably replicate Eircom's offers, and potentially affect competitive dynamics in the retail market.
- 2.50 ComReg disagrees with Eircom's position (see paragraphs 2.28) that the prescribed statutory process has not been followed, and therefore that the imposition of the bundles MST is *ultra vires*. A Three Criteria Test was not necessary as ComReg is not imposing the bundles MST in the retail market. ComReg considers that all the prescribed statutory processes have been followed in the markets in which the obligations were imposed, namely WLA and WCA.
- 2.51 In reply to Eircom's related concern (see paragraph 2.29) that ComReg is misdirecting itself as to the scope of ComReg's powers, ComReg disagrees with Eircom's interpretation. Regulation 13 of the Access Regulations: *Price control and cost accounting obligations* provides:

*"13. (1) The Regulator may in accordance with Regulation 8 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.*

...

*(3) The Regulator shall ensure that any cost recovery mechanism or pricing methodology that it 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.”*

- 2.52 Regulation 13 of the Access Regulations gives ComReg the power to impose a price control on Eircom (the designated SMP operator in the relevant FACO, WLA, and Regional WCA Markets in Ireland, in accordance with Regulation 8 of the Access Regulations). A purpose of this price control (i.e. the bundles MST) is to prevent Eircom from applying a “*price squeeze to the detriment of end-users*” and thus is in accordance with Regulation 13. The bundles MST relates to the “*provision of specific types of access*” i.e. wholesale access products that Eircom has SMP in (such as line rental and broadband). ComReg considers that the bundles MST imposed through this Decision, serves the following purposes: promotes efficiency and sustainable competition and maximises consumer benefits as is required under Regulation 13(3).
- 2.52.1 Efficiency will be promoted by the bundles MST as it will provide certainty for OAOs that Eircom cannot engage in a margin squeeze. The existence of the MST will ensure that operators competing in the market (Eircom and OAOs) will focus on productive and dynamic efficiencies in order to attain a competitive advantage. Operators 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.
- 2.52.2 Sustainable competition is promoted through the design of the bundles MST as it ensures that Eircom is not able to leverage its SMP 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 purchase wholesale inputs from Eircom) in making commercial decisions regarding launching and promoting their own retail bundles.
- 2.52.3 The bundles MST maximises consumer benefit as it provides a safeguard for efficient competitors from a possible margin squeeze by the SMP operator in circumstances where wholesale inputs are required by OAOs in order to replicate an Eircom retail bundle. This should help to facilitate greater regulatory certainty for longer-term competitive entry and expansion which should have a positive impact on the price, choice and quality of services ultimately delivered to end-users.

- 2.53 In relation to the view expressed by Eircom as summarised in paragraph 2.30 (and again in paragraph 2.31) that Eircom's leveraging ability cannot be determined in the abstract (i.e. absent a Three Criteria Test), Section 2.3 of the Explanatory Note to the 2014 Recommendation on markets, states "*Given the analysis conducted by the Commission ... for the markets listed in the Recommendation, a presumption exists that the three criteria are met. Therefore, NRAs do not need to reconsider them*". ComReg carried out the 2016 WLA / WCA Market Review Consultation, and 2018 WLA / WCA Market Review Decision in accordance with the 2014 Recommendation (see 4.151, 11.35, and 14.47 of that Decision). In the Consultation, ComReg investigated the variation in competitive conditions of retail broadband (as a proxy for bundles) on an exchange by exchange basis and came to the preliminary view that Eircom's ability to leverage its SMP to retail bundles is likely to vary between the three geographic areas.
- 2.54 Eircom claimed that ComReg's leveraging concerns requiring the imposition of the bundles MST are not "*self-evident*"<sup>56</sup>. This was covered in Section 3.2 of the Consultation. ComReg considers that Eircom, the SMP operator, has the ability and incentive to engage in a number of anti-competitive behaviours that could prove detrimental to its competitors and consequently consumers. Even in the presence of ex-ante regulation, SMP operators have engaged in margin squeezes.<sup>57, 58</sup> As explained in paragraph 3.16 of the Consultation:

*"Absent the proposed bundles MST, Eircom, as a vertically-integrated operator which competes downstream with bundled retail products could exert its upstream market power in those wholesale markets, where it has been found to have SMP, by causing a margin squeeze. ...this could be done by decreasing the Eircom retail bundle price ... and/or increasing one or more of the underlying wholesale prices... to the extent that downstream retail margins are not sufficient to cover retail costs. ...Eircom could vertically leverage its SMP position in the wholesale markets to the retail market, leading to less choice for consumers, reduced incentives for those remaining to innovate, and price increases post exit of competitors."*

<sup>56</sup> Eircom response to the Consultation paragraph 37.

<sup>57</sup> Conseil de la Concurrence, 'Décision n° 2009-P/K-10 du 26 mai 2009 Affaire CONC-P/K-05/0065: Base/BMB'; and Comisión Nacional de los Mercados y la Competencia, S/0391/11: Llamadas Móviles.

<sup>58</sup> *Deutsche Telekom AG v Commission of the European Communities*, Case T-271/03, Judgment of 10 April 2008, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003TA0271>.

- 2.55 Eircom's view was that the imposition of the bundles MST would be disproportionate (see 2.24, and again in 2.32). ComReg considers that the proposed imposition of the bundles MST was proportionate in relation to ComReg's obligations (see paragraphs 2.2, and 2.4 above) and to the designation as the SMP operator (FACO) and to the provisional designation (and subsequently the ultimate designation) of Eircom as the SMP operator in the identified wholesale markets (nationally in the Relevant WLA Market, and in the Regional WCA Market), and is, where appropriate (e.g. NGA services as part of a bundle) in line with the ex-ante replicability test parameters as set out in Annex II of the European Commission's Recommendation on non-discrimination obligations and costing methodologies – i.e. to ensure economic replicability is realistically achievable by OAOs.
- 2.56 Eircom said that it might not be able to profitably replicate OAO bundles (see paragraph 2.30). As stated in the Consultation (paragraph 3.20 to 3.22), and highlighted by Sky<sup>59</sup> with particular reference to eir Sports (a sports content service), Eircom, through its bundling of regulated and unregulated services, and in the absence of a requirement to prove the replicability of its bundles, could seek to strategically protect its upstream market position and/or foreclose downstream rivals..

*(b) Impact of pricing remedies across markets*

- 2.57 Eircom considered that ComReg had not taken into account the regulatory implications of the 2016 WLA / WCA Market Review Consultation and the related feedback from respondents (see paragraph 2.34 above).
- 2.58 Eircom provided an example (see paragraph 2.35 above) of its assessment of the proposed bundles MST on the cost stack of Eircom's CGA bundle price, and by extension, due to Eircom's national pricing strategy to its NGA bundles prices. Eircom calculated this impact based on the creation of the Urban WCA market (and the loss of flexibility from the Larger Exchange Areas ('LEA') as is currently the case via a weighted average wholesale network input), and the use of a less efficient operator cost benchmark which varied from EEO to Reasonably Efficient Operator ('REO') for the retail costs of broadband (which Eircom considered as being "*beyond what is contemplated*"<sup>60</sup> in the 2013 EC Recommendation).

<sup>59</sup> Sky response to the Consultation paragraph 1.

<sup>60</sup> Eircom response to the Consultation paragraph 48

2.59 ComReg carefully considered the impact of the proposed changes, and devoted Chapter 4 of the Consultation to assessing why and how the proposed bundles MST should suitably reflect the varying competitive conditions across exchanges and developments stemming from the 2016 WLA / WCA Market Review Consultation – e.g. the Urban WCA market. ComReg considers that, based on the data available for the Consultation, appropriate pricing flexibility had been afforded to Eircom through the bundles MST. ComReg has however, based on the latest available data, and responses to the Consultation, decided that the MST should be altered in certain aspects. These alterations cut across both the 2018 Pricing Decision and this Decision. Briefly the main changes are that all of the retail margin squeeze tests, except for FTTH, proposed in the 2017 Pricing Consultation for retail standalone broadband will not be imposed and will instead be assessed as part of the bundles MST in the relevant bundles portfolio level assessment; the three geographic areas as proposed (Urban Area, Regional Area 1, and Regional Area 2) will not be advanced as instead the tests will apply nationally – e.g. the Relevant WLA Market, and the Regional WCA Market. NGA bundles will use WLA inputs and the cost stack of these bundles will include the relevant network elements to supply a WCA product as well as retail costs, and for CGA bundles WCA inputs will be used. FACO inputs where relevant will be included in NGA and CGA bundles. Finally, in relation to the operator cost benchmark, ComReg has decided that this should be set at EEO for the retail costs for broadband (please see Section 5.4.1 of this Decision).

*(c) Consistency with 2013 EC Recommendation*

2.60 ComReg considers that, contrary to Eircom's view (see paragraph 2.36 above), the proposals in the bundles MST do not go beyond the intended scope of the 2013 EC Recommendation or the 2014 Recommendation, e.g. the parameters for the proposed bundles MST were in line with this. The parameters of a replicability test identified (see Recital 67<sup>61</sup>) include: downstream costs, cost standards, wholesale inputs, time period etc. Section 2.1.1 of the BEREC Guidance<sup>62</sup> confirms these parameters and these were in the Consultation. However, as discussed in paragraph 2.59, ComReg notes that moving to an EEO cost benchmark also means consistency with the 2013 EC Recommendation, which specifies that, ideally, an EEO cost benchmark should be applied.

<sup>61</sup> "The economic replicability test set out by the NRA in advance should be adequately detailed and should include as a minimum a set of relevant parameters in order to ensure predictability and the necessary transparency for operators." Recital 67 of the 2013 EC Recommendation.

<sup>62</sup> BEREC Guidance on the regulatory accounting approach to the economic replicability test. [https://www.berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/4782-berec-guidance-on-the-regulatory-account\\_0.pdf](https://www.berec.europa.eu/eng/document_register/subject_matter/berec/download/0/4782-berec-guidance-on-the-regulatory-account_0.pdf)

- 2.61 The 2013 EC Recommendation focuses on NGA services and not just bundles, Eircom's consultant said "*The recommendation has a limited amount to say about bundles*"<sup>63</sup>. The BEREC Guidance<sup>64</sup> (Section 2.4.3) agrees that the 2013 EC Recommendation "*does not go into detail about how to analyse bundles of regulated and non-regulated services*", but "*bundles must be subject to the replicability test.*" Further information as to ComReg's consistency with the 2013 EC Recommendation are detailed in paragraphs 10.119, 10.122 and 11.58 of the 2018 Pricing Decision.
- 2.62 Annex II of the 2013 EC Recommendation provides guidance focused on ensuring economic replicability of the SMP operator's wholesale services. As discussed in Section 3.2 of the Consultation this may be adhered to on a standalone basis by Eircom, but at the same time may be undermined by Eircom through its bundling strategies of purely regulated services and also regulated and unregulated services. The BEREC Guidance<sup>65</sup> (Subsection 2.2.5.2) reminds stakeholders that while the 2013 EC Recommendation is silent on this, it considers that unregulated services should be included in the margin squeeze test. In relation to Eircom's point in relation to the 2014 Recommendation please see paragraph 2.50.
- 2.63 ComReg does not agree with Eircom's final conclusion that the bundles MST proposals (see paragraph 2.39 above) were "*heavily interventionist and burdensome*" based on a "*flawed categorisation of the retail market*" and had not properly taken into account a number of developments in wholesale markets. The case for a bundles MST being imposed on the SMP operator as described in Chapter 3 of the Consultation is clear-cut due to the anti-competitive behaviours which may be exercised by Eircom as the SMP operator. Where relevant certain changes have been made to the bundles MST as originally set out in the Consultation these changes have been driven by responses to the Consultation, and an analysis of up-dated data. Oxera, in the introduction to its Amendments Report (Section 1), concluded that "*the bundles MST remedy (as amended) ... strikes an appropriate balance*", and add to this in Section 2 of its report by noting "*that the rationale for the bundles MST remains valid; namely, to restrict eircom's ability and incentive to leverage market power from wholesale markets (where eircom is designated as having significant market power, SMP) to retail markets.*" ComReg agrees with this view.

<sup>63</sup> See page 6 of the Brian Williamson paper prepared for Eircom.

<sup>64</sup> Ibid footnote 62.

<sup>65</sup> Ibid footnote 62.

## Chapter 3

# 3 Competition issues

## 3.1 Overview

- 3.1 In Chapter 3 of the Consultation, ComReg set out the potential competition issues associated with a margin squeeze by an operator with SMP in upstream markets for wholesale inputs used by other operators to sell bundles. Bundling under the current NRT, and the changes stemming from the 2016 WLA / WCA Market Review Consultation were then discussed. ComReg then asked four questions.
- 3.2 In this chapter, ComReg provides an outline of Chapter 3 of the Consultation, a summary of responses received to Questions 2, 3, 4, and 5 from the Consultation, ComReg's assessment of responses, and ComReg's final position.

## 3.2 Summary of Chapter 3 of the Consultation

- 3.3 Section 3.2 of the Consultation set out the potential competition problems arising in the case of a vertically integrated operator having SMP in upstream markets for the provision of key wholesale inputs, to which OAOs require access to compete. Absent appropriate preventative remedies an operator with SMP in upstream markets has the ability and incentive to engage in anti-competitive behaviours (i.e. absent regulation, Eircom would have the ability and incentive to reduce its competitors' abilities to compete, and/or foreclose the market to competition), impacting competitors and, ultimately, consumers in the medium to longer term (i.e. if competitors to Eircom leave the market or are deterred from investing in infrastructure, this would reduce competition and may lead to higher prices, lower levels of innovation, and less choice for consumers).
- 3.4 ComReg's preliminary conclusion<sup>66</sup> was that there was a need for an obligation to prevent bundling being used for anti-competitive purposes. Absent effective remedies, Eircom could leverage its market power in wholesale markets where it has been found to have SMP, vertically, or horizontally (via bundling) into downstream retail markets, or to protect its positions in upstream markets where it has SMP.

<sup>66</sup> Paragraph 3.23 of the Consultation.



- 3.5 ComReg's preliminary conclusion was<sup>67</sup> that ex-post enforcement by means of competition law would be inadequate, due in particular to the risk of market foreclosure leading to consumer harm. ComReg therefore considered the imposition of ex-ante regulation to be appropriate, and proposed to further specify the proposed price control obligations not to cause a margin squeeze in the WLA, WCA, and FACO Markets to address the anti-competitive bundling concerns.
- 3.6 Section 3.3 of the Consultation outlined the current regime regulating bundles (the NRT from the 2013 Bundles Decision) and at a high-level outlined the proposed removal of regulatory obligations on WCA inputs in the Urban WCA Market from the 2016 WLA / WCA Market Review Consultation.
- 3.7 Section 3.4 of the Consultation discussed the aim and rationale of the existing NRT. ComReg also proposed to widen the definition of a bundle to avoid any regulatory gaps due to for example the combination of NGA broadband and Voice over Broadband ('VoB') or Internet Protocol Television ('IPTV'). ComReg asked if the NRT could be removed if there was appropriate wholesale regulation upstream (i.e. the bundles MST).
- 3.8 Sections 3.5 to 3.7 of the Consultation discussed how a further specification of the proposed price control obligations not to cause a margin squeeze in the WLA Market and Regional WCA Market, and current obligation not to cause a margin squeeze in the FACO Market, could address these anti-competitive bundling concerns. ComReg incorporated the findings of the 2016 WLA / WCA Market Review Consultation, and proposed, for ensuring the replicability of Eircom's bundles, that:
- 3.8.1 FACO inputs would apply in each area where relevant;
  - 3.8.2 WLA inputs would be used in the Urban WCA market in lieu of WCA inputs, as WCA inputs were proposed for deregulation in that area; and
  - 3.8.3 for the Regional WCA market, WCA or WLA inputs would be used.

<sup>67</sup> Paragraph 3.24 of the Consultation.

### 3.3 Summary of responses received

#### 3.3.1 Question 2 – Remove the NRT

- 3.9 Four responses were received to Question 2. Two respondents (ALTO and Sky) agreed with the proposal, one respondent (Vodafone) disagreed as it considered that the *“appropriate upstream regulations are not currently in place”*, and the final respondent (Eircom) agreed that the NRT could be removed, but did not agree that ComReg’s justification supported its preliminary view as set out in the Consultation. Vodafone and Eircom’s responses are outlined in more detail below.
- 3.10 Vodafone<sup>68</sup> did not agree in principle with the proposal that the NRT could be removed as a pricing remedy in Market 1 as it did not consider that the appropriate strong upstream wholesale regulations were currently in place. Vodafone did however agree that *“the NRT could be removed where strong upstream wholesale regulations are enacted”*. Vodafone did not agree that the MST suggested by ComReg was appropriate due to *“the distinction made between three geographic areas, namely Urban, Regional 1, and Regional 2”*. Vodafone encouraged *“ComReg to implement measures that would prevent any cross subsidisation between geographic markets occurring”*. Vodafone stated that it encouraged modelling to be based on REO rather than EEO as a cost benchmark, and advocated including flagship products in the portfolio product group used for modelling.
- 3.11 Eircom disagreed with the justification and general anti-competitive effects set out by ComReg in the Consultation based on a number of points<sup>69</sup>. Eircom’s responses are outlined in more detail below, they have been summarised under the following headings: alleged failure to consider all regulatory options; over-reliance on theory; and benefits of asymmetric regulation<sup>70</sup>.

#### *Alleged failure to consider all regulatory options*

- 3.12 Eircom disagreed with the justification and general anti-competitive effects set out in the Consultation. Eircom stated<sup>71</sup> that *“There is no economic reason once there is cost-orientation, to also have MSTs – given that it requires loss-making retail prices below cost with no reasonable prospect of recoupment”*. Eircom stated its view that ComReg’s foreclosure concerns are adequately addressed<sup>72</sup> through the wholesale pricing proposals in the 2017 Pricing Consultation.

<sup>68</sup> Vodafone response to the Consultation paragraphs 17 – 21.

<sup>69</sup> Eircom response to the Consultation paragraphs 67.

<sup>70</sup> Eircom response to the Consultation paragraph 69 a, b, and c.

<sup>71</sup> Eircom response to the Consultation paragraph 70.

<sup>72</sup> Eircom response to the Consultation paragraph 71.

- 3.13 Eircom considered<sup>73</sup> that “... while anchored in wholesale markets, ComReg’s proposals are in fact retail regulation through the back door”.
- 3.14 On the basis of this characterisation Eircom<sup>74</sup> went on to argue that ComReg should carry out “... an appropriate economic assessment in order to determine if the competition concerns identified by ComReg can actually manifest” and asked that ComReg “... explain expressly on what basis it has determined that it is appropriate for it to intervene in the retail market”.
- 3.15 Eircom<sup>75</sup> considered that a foreclosure concern is only valid where Eircom can sustainably prevent effective competition (firstly by very low retail prices, then, following foreclosure, very high retail prices), the after-effects of which are unaffected by the independent actions of customers and competitors. Eircom pointed to paragraphs 83 to 96 of its submission to demonstrate that this was not the case.

*Alleged over-reliance on a theoretical possibility*

- 3.16 Eircom advanced its position that “ComReg has over-relied on a theoretical possibility to justify ‘de-facto’ retail regulation and failed to consider how far other controls successfully address any foreclosure concerns”<sup>76</sup>. This high-level observation was then elaborated on by Eircom as summarised below.
- 3.17 Eircom<sup>77</sup> stated that a key assumption in all the examples provided of anti-competitive concerns is that such a firm is not subject to any regulatory remedies and in this context stated its view that the “anti-competitive concerns such as excessive pricing or leveraging from the wholesale market are already addressed by ComReg in imposing cost oriented prices, non-discrimination, transparency and cost accounting remedies at the wholesale level”. Eircom indicated its view that the anticompetitive concerns identified by ComReg in the Consultation were not factually correct (the examples provided by ComReg in the context of Eircom raising its wholesale prices) and not valid (the concern which “involves eir reducing its retail prices to the extent that it could foreclose competition”).

<sup>73</sup> Eircom response to the Consultation paragraph 72.

<sup>74</sup> Eircom response to the Consultation paragraphs 73 – 82.

<sup>75</sup> Eircom response to the Consultation paragraph 80.

<sup>76</sup> Eircom response to the Consultation page 26.

<sup>77</sup> Eircom response to the Consultation paragraphs 84 and 85.

- 3.18 Eircom<sup>78</sup> considered that the “*rationale is flawed*” as in its view there are a number of large well-resourced companies in the Irish market and “*therefore it is highly unlikely that any exclusionary predatory pricing strategy to foreclose the market would be successful*”, and adds that some of these operators “*have greater access to elements of bundles than Eir is ever likely to have*”. Eircom<sup>79</sup> considers that it did “*not have any incentive to do so*”, as it considered that a predatory pricing strategy would be undermined as it could not profitably raise prices again. Eircom considered that for a foreclosure strategy to be commercial then “*the firm imposing the margin squeeze must somehow be able to recoup the profits sacrificed*”. Eircom identified cost oriented wholesale inputs and at the retail level – Regulation 14<sup>80</sup> as limiting factors in recouping the sacrificed profits, and finally Eircom<sup>81</sup> was of the view that it would face a financial penalty under competition law for the duration of the squeeze.
- 3.19 Eircom<sup>82</sup> dismissed ComReg's stated concerns about margin squeeze and foreclosure by, in summary, submitting that “*... its entire retail customer base (including those customers representing the market share gained from the potential squeeze) would be free to churn to another retail provider when prices rise, coupled with the fact that any financial regulatory gains would be more than set off by competition-law penalties, in combination with regulatory access obligations to cost-oriented WLA services (and from retail competition using WCA market inputs), means that pursuit of such a pricing strategy would not be commercially sound and would be unsuccessful.*”
- 3.20 Eircom noted<sup>83</sup> its competitors' ability to take advantage of economies of scale in terms of network deployment, product development and content purchasing power, and further noted that these competitors “*would readily make a complaint in the event of any potential abuse of dominance*”.

<sup>78</sup> Eircom response to the Consultation paragraph 87.

<sup>79</sup> Eircom response to the Consultation paragraph 88.

<sup>80</sup> Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' rights) Regulations 2011. <http://www.irishstatutebook.ie/eli/2011/si/337/> This existing regulation gives a customer of any operator the right to leave their contract with an operator without penalty if the operator changes the terms of the previously agreed contract and the customer does not agree with the proposed changes to the contract.

<sup>81</sup> Eircom response to the Consultation paragraph 89.

<sup>82</sup> Eircom response to the Consultation paragraph 86-90

<sup>83</sup> Eircom response to the Consultation paragraph 91.

- 3.21 Eircom<sup>84</sup> took issue with ComReg's view that additional harm could occur whereby a margin squeeze could affect the competitive position of wholesale OAOs. Eircom stated its view that any exit by retailers using a competitor's wholesale inputs would *"clearly be by inefficient operators"* because either the alternative wholesales inputs were higher than Eircom's, or *"even in purchasing a lower or equivalent wholesale cost, it was still too inefficient to be able to compete at the retail level"*.
- 3.22 Eircom<sup>85</sup> queried why ComReg was not concerned with other operators' retail prices and foreclosure which may be generated through their pricing. Eircom concluded that an *ex ante* bundles MST is not consistent with the nature of the problem identified and is *"already addressed through existing legal remedies which provide appropriate behavioural constraints on all operators including eir"*.
- 3.23 Eircom<sup>86</sup> forwarded the position that *"The choice is not between ex post competition law alone and an ex ante remedy now, but between leaving greater flexibility over bundles and retail pricing with the market today alongside the option of ex ante intervention in the future"*.
- 3.24 Eircom<sup>87</sup> outlined its view that ComReg's *"argumentation fails to acknowledge that eir has strong incentives to grow demand on its network infrastructure. The investment decisions undertaken by eir require take-up from a range of retail service providers and wholesale aggregators and not just demand from eir's own retail arm"*.
- 3.25 Eircom<sup>88</sup> disagreed with the leveraging concern identified by ComReg in the discussion of margin squeezes and bundles including unregulated services in the Consultation. Eircom forwarded two possible interpretations of this concern identified by ComReg and countered them. Eircom's first interpretation *"may be that as eir has a large wholesale arm it could demand more favourable deals for unregulated services to offer as part of its retail bundles. This logic is flawed in that any provision of the unregulated services would be based on eir retail demand only and therefore no such 'leveraging' can actually occur"*. Eircom also disagreed with an example from Section 4.1.2 of Oxera's report<sup>89</sup> which discussed potential leveraging from a dual-play bundle (based on fixed voice and broadband) to a triple-play bundle (by adding an unregulated service to the original bundle) and the dependence of this due on other factors – e.g. competitors, and consumer demand.

<sup>84</sup> Eircom response to the Consultation paragraph 93.

<sup>85</sup> Eircom response to the Consultation paragraph 94.

<sup>86</sup> Eircom response to the Consultation paragraph 95.

<sup>87</sup> Eircom response to the Consultation paragraph 96.

<sup>88</sup> Eircom response to the Consultation paragraph 97.

<sup>89</sup> ComReg Document 17/51a.

*'Asymmetric regulation'*

- 3.26 Eircom<sup>90</sup> queried why ComReg is concerned that *"eir's exact retail offer is replicable"*. Eircom notes that *"Different operators have adopted different strategies and use their own strengths in bundling service together"* and notes for example the inclusion of *"one button access to Netflix"* in bundles by Vodafone or television content by Sky, respectively.
- 3.27 Eircom outlined the view that *"retail bundling is pro-competitive even when undertaken by a dominant firm"* and on that basis considered<sup>91</sup> that ComReg *"is proposing rules to regulate in minutia every element of the test on an ex-ante basis ... and so the risk of regulatory failure increases in what is a competitive and complex market"*. Eircom<sup>92</sup> suggested that there exists a disjoint between ComReg's objective for the MST - replicability, and the test's construction. Eircom considers the proposed ban on unregulated to regulated cross subsidies to be *"excessively restrictive"*, as it *"requires eir to maintain additional margin above what is actually required to replicate the bundle in its entirety"*. In Eircom's view this means that *"eir's competitors can either undercut eir's price allowing them to gain market share; or, follow eir's pricing in the confident knowledge that eir cannot compete"*. According to Eircom, this is liable to result firstly in prices being above competitive levels and secondly in a transfer of welfare from end-users to OAOs. Eircom added that it would be *"disproportionate and unjustified... to continue to apply such a price control on eir when other operators are only restricted by behavioural constraints imposed by the threat of ex-post competition law"*. Eircom<sup>93</sup> quoted its consultant's view that the *"asymmetric regulation to eir [sic] will only accentuate and entrench the advantage others in the market hold"*.
- 3.28 Eircom stated<sup>94</sup> that *"The concern ComReg has identified from indicative market shares absent wholesale regulation is addressed by it imposing wholesale regulation"*. Eircom stated its views that ComReg is *"now over-reaching its regulatory powers to further intervene in the retail market"* and that the proposals are contrary to the outcomes envisaged by Regulation 6(1) of the Access Regulations, and out of proportion to the nature of the problem identified. Eircom stated its view that *"ComReg has, without any market analysis or gathering of any evidence, identified possible theoretical foreclosure in the long-run and imposed short-term remedies despite there being a more appropriate and a less onerous option of relying on competitive market outcomes in the retail market"*.

<sup>90</sup> Eircom response to the Consultation paragraph 98.

<sup>91</sup> Eircom response to the Consultation paragraph 99.

<sup>92</sup> Eircom response to the Consultation paragraphs 100 to 101.

<sup>93</sup> Eircom response to the Consultation paragraph 102.

<sup>94</sup> Eircom response to the Consultation paragraph 103.

3.29 Eircom agreed<sup>95</sup> that a replicability test is endorsed in the 2013 EC recommendation for NGA services. However, Eircom stated the position that *“it does so in the context of recommending an appropriate regulatory price control for NGA services through a margin squeeze as an alternative to implementing cost-orientation and not both”* (Eircom’s emphasis). Eircom considered that the proposals from the 2017 Pricing Consultation are *“much more severe than regulation on comparable companies elsewhere in the EU”*.

### 3.3.2 Question 3 - MST between FACO inputs in bundle and retail price of bundle

3.30 Four responses were received to Question 3. Three respondents (ALTO, Sky and Vodafone) agreed. Eircom did not agree. Vodafone also raised points in relation to compliance with the MST more widely.

3.31 ALTO<sup>96</sup> stated that it was *“critical that Eircom are required to demonstrate that it is not causing a margin squeeze between the price(s) of the FACO components required by the OAO to replicate an Eircom retail bundle and the Eircom retail bundle price itself”*. Sky<sup>97</sup> viewed FACO as *“an important wholesale input for OAOs to purchase from Eircom wholesale if they wish to replicate an Eircom retail bundle”*. ALTO viewed the bundles MST as important as it *“enables other operators to compete on a level playing field with Eircom, using FACO alongside Eircom’s other regulated wholesale inputs”*. Vodafone<sup>98</sup> in agreeing noted that *“As the market increasingly uses bundling as a pricing and competitive strategy, it is vital that Eircom are not in a position to foreclose competition in the market by Eircom leveraging its market power, squeezing potential competitors and preventing market entry.”*

3.32 Eircom did not agree that a MST is appropriate, and stated its concern that *“the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to de facto regulation of retail tariffs”*<sup>99</sup>. Eircom relied on its declining retail market share in fixed voice to support its position that ComReg’s competition concerns arising from FACO bundles are unlikely to occur in the short to medium term. Eircom also relied upon a mixture of Eircom and ComReg data to demonstrate the shift from fixed voice calls to other service options (e.g. mobile, etc.)<sup>100</sup>.

<sup>95</sup> Eircom response to the Consultation paragraph 104.

<sup>96</sup> ALTO response to the Consultation paragraph A.3

<sup>97</sup> Sky response to the Consultation paragraph 5.

<sup>98</sup> Vodafone response to the Consultation paragraph 22.

<sup>99</sup> Eircom response to the Consultation paragraph 107.

<sup>100</sup> Eircom response to the Consultation paragraphs 108 – 117.

- 3.33 Vodafone also expressed<sup>101</sup> *“concern on actions taken relating to the oversight of MST specifically on the severity or lack thereof of punitive action being taken in the event of post-launch MST failure. Without an adequate MST there is a risk that the incumbent will be able to exploit any weakness in the regime proposed and effectively close out competition”*. Vodafone urged strict enforcement of the *“MST regulations”* for the benefit of all market operators and consumers. Vodafone suggested that *“Eircom should have a monthly obligation to ensure that the required MST is compliant”* and stated its belief that *“this can provide assurance that there is no gaming of the model taking place”*.

### 3.3.3 Question 4 - MST between WLA inputs in bundle and retail price of bundle

- 3.34 Four responses were received to Question 4. ALTO and Vodafone agreed on a qualified basis with ComReg’s preliminary view as outlined, Eircom disagreed with the proposal. Vodafone and BT raised some related issues summarised below.
- 3.35 ALTO agreed<sup>102</sup> with ComReg’s preliminary view and submitted that *“ComReg has found Eircom to have SMP in the WLA market on a national basis, so... the WLA obligation should be supported by a margin squeeze obligation on a national basis”*.
- 3.36 Eircom disagreed<sup>103</sup> with ComReg’s preliminary view and reiterated its view that *“the imposition of a retail MSTs in combination with a fixed wholesale reference point amounts to de facto regulation of retail tariffs”*. Eircom relied on its declining retail market share in fixed broadband to support its position that ComReg’s competition concerns arising from WCA bundles are unlikely to occur in the short to medium term. Eircom stated, *“... as the wholesale broadband market is already competitive in the Urban area, ComReg should consider what prevents other retail operators using WCA inputs from undertaking a margin squeeze against operators dependent on purchasing cost-oriented WLA inputs from eir”*<sup>104</sup>.
- 3.37 Eircom considered that Question 4 was misleading in respect of the components proposed for inclusion in the test in Chapter 5 of the Consultation (i.e. the weighted average wholesale network input [**‘WAWNI’**] would include WLR/POTS - which are not in the WLA / WCA markets)<sup>105</sup>.

<sup>101</sup> Vodafone response to the Consultation paragraphs 23 - 25.

<sup>102</sup> ALTO response to the Consultation paragraph A.4.

<sup>103</sup> Eircom response to the Consultation paragraphs 118 and 119.

<sup>104</sup> Eircom response to the Consultation paragraph 120.

<sup>105</sup> Eircom response to the Consultation paragraph 121.



- 3.38 Vodafone qualified its overall agreement, as it disagreed with the deregulation of the Urban WCA market, and instead stated its preference that the rules and regulations of RA1 and RA2 are equally applied to the Urban WCA<sup>106</sup>. In the event of deregulation, Vodafone stated its agreement with the requirement of an MST in the UA, but suggested that it should be designed on the same basis as set out in Vodafone's response to Question 2<sup>107</sup>.
- 3.39 BT raised a wider point that it considered that there is *"an absolute need for a WLA to WCA MST in the WCA Urban market."* BT referred its response provided in relation to the 2017 Pricing Consultation.

### 3.3.4 Question 5 - MST between WCA inputs in bundle and retail price of bundle

- 3.40 Three responses were received to Question 5. ALTO and Vodafone agreed with ComReg's preliminary view, Eircom disagreed.
- 3.41 ALTO<sup>108</sup> in agreeing submitted that *"ComReg has found Eircom to have SMP in the WLA market on a national basis, so... the WLA obligation should be supported by a margin squeeze obligation on a national basis"*.
- 3.42 Eircom disagreed with ComReg's proposal and instead considered that the imposition of a MST amounted to *de facto* regulation of retail tariffs<sup>109</sup>. Eircom suggested that there is no evidence of SMP in the wholesale market for Bitstream<sup>110</sup>. Eircom proposed<sup>111</sup> that the replicability test for bundles with FTTH is inconsistent with the 2013 EC Recommendation – due to the use of EEO and REO, and LRIC+ for flagship products only, rather than ATC for the portfolio.
- 3.43 Vodafone repeated<sup>112</sup> its concerns in relation to the prevention of *"geographic cross-subsidization"*, the need for strict enforcement and a monthly requirement to retest the MST<sup>113</sup>. Vodafone also suggested a cost adjustment from EEO to REO / Similarly Efficient Operator ('**SEO**') when modelling a real life REO operator<sup>114</sup>.

<sup>106</sup> Vodafone response to the Consultation paragraph 26.

<sup>107</sup> Vodafone response to the Consultation paragraph 27.

<sup>108</sup> ALTO response to the Consultation paragraph A.5

<sup>109</sup> Eircom response to the Consultation paragraph 123.

<sup>110</sup> Eircom response to the Consultation paragraph 124.

<sup>111</sup> Eircom response to the Consultation paragraphs 126 and 196.

<sup>112</sup> Vodafone response to the Consultation paragraphs 28 - 29.

<sup>113</sup> Vodafone response to the Consultation paragraph 29.

<sup>114</sup> Vodafone response to the Consultation paragraphs 30 – 31.

## 3.4 ComReg's assessment of Respondent's views

3.44 This section assesses the responses received and provides ComReg's replies to these and the rationale for any changes from what was proposed in the Consultation. This section uses the same headings as used in Section 3.3 to frame ComReg's assessment.

### 3.4.1 Question 2 – Remove the NRT

3.45 ComReg notes that Vodafone did not agree in principle with the proposal to remove the NRT, as it considered that strong upstream wholesale regulations are not currently in place. However, Vodafone did agree that the NRT could be removed if strong upstream wholesale regulations were enacted, as summarised in paragraph 3.10 (the distinction made between geographic areas, different treatments under different tests, and prevent intra-area cross-subsidy).

3.46 ComReg recognises Vodafone's point but considers that firstly the distinction made between geographic areas was appropriate in the Consultation based on ComReg's assessment of the data available at the time (see Sections 4.3 and 4.4 of the Consultation), which then supported the varying assessment levels between areas (see Section 5.7), and finally ComReg did not propose to permit an intra-area cross subsidy (see Sections 5.8 and 5.9)<sup>115</sup>.

3.47 A further point raised by Vodafone was its preference for using REO rather than EEO, this was discussed in the Consultation in Section 5.3 and revisited in Section 5.4.1 of this Response to Consultation.

3.48 ComReg confirms that "flagship products" will be included in the bundles MST. The bundles MST proposed that when sold in a bundle, the costs of relevant wholesale components would be included – e.g. where a bundle is being offered with 1GB fibre speed broadband then the relevant FTTH wholesale input would be included (and where sold singly, the 2018 Pricing Decision would apply).

3.49 Given the above, ComReg considers that contrary to Vodafone's stated view in response to this question, the upstream wholesale remedies as proposed in the Consultation are suitably strong to enable the NRT to be removed and a bundles MST be imposed.

<sup>115</sup> This outlined what was required to pass the bundles MST in each area on the relevant basis - bundle by bundle and / or portfolio basis.

*Alleged failure to consider all regulatory options*

- 3.50 ComReg disagrees with Eircom's assertion as summarised at paragraph 3.13 above that ComReg is imposing retail regulation "*through the back door*" (or as described elsewhere by Eircom "*de facto*" retail regulation). ComReg, as discussed in the Consultation (paragraph 3.1), is concerned with the possible anti-competitive effects of the SMP operator engaging in a margin squeeze through its retail bundling strategy. In the absence of upstream regulation, both wholesale costs and retail bundle charges could vary such that a downstream competitor of the SMP operator may not be in a position to earn a sufficient margin between its revenues and costs to enable it to trade profitably, in such an instance then economic replicability is not realistic.
- 3.51 ComReg, in paragraphs 3.3 to 3.26 of the Consultation, outlined the harm to competition that may arise due to a vertically-integrated SMP operator engaging in a margin squeeze. ComReg considers that, in order to mitigate the possibility of this anti-competitive behaviour occurring, and in order to ensure that economic replicability is possible for OAOs dependent on Eircom's wholesale inputs (e.g. Eircom causing a margin squeeze at the wholesale level through its pricing strategy for its retail bundles thereby making economic replicability for an OAO dependent on Eircom wholesale inputs unfeasible at the retail level) that it is necessary and appropriate that an obligation not to cause a margin squeeze should apply to Eircom when it sells or offers for sale a retail bundle. ComReg's aim in imposing the bundles MST is to ensure that end-users benefit from sustainable competition<sup>116</sup>, this competition can happen at the retail or wholesale level. ComReg considers that Oxera's observations in Section 2 of its Amendments Report on the rationale for the bundles MST support ComReg's view: "*We also note that only eircom (and no other operator) is designated as having SMP in the relevant wholesale markets (WLA, regional WCA and FACO). This means that only eircom has the ability and incentive to leverage its market power from relevant wholesale markets to retail markets. This is the case even with charge control remedies, as explained in section 2.1. Hence, contrary to what eircom claims about the bundles MST being imposed in the retail market, the bundles MST is a remedy in the relevant wholesale markets. Furthermore, contrary to what eircom claims, a separate analysis of retail markets is not required to motivate the imposition of the bundles MST.*"

<sup>116</sup> Regulation 13(3) of the Access Regulations.

- 3.52 Eircom disagreed with the competition problems described by ComReg in the Consultation, describing them as “*unfounded and illogical*”<sup>117</sup>, see paragraphs 3.11 to 3.15 above. However, Eircom’s response is based on the current landscape (i.e. with SMP regulation in place). In the 2016 WLA / WCA Market Review Consultation ComReg approached its assessment of the WLA and WCA markets by assuming no current SMP regulations in those markets (see Chapter 1 of that consultation). ComReg’s assessment was, and is, in line with the “Modified Greenfield Approach” set out in the Explanatory Note to the 2014 Recommendation<sup>118</sup>. Briefly, ComReg’s assessment of a market starts from the assumption that SMP regulation is not present in the market under consideration. However, regulation present in other related markets or through the general regulatory framework is also considered. This is to avoid drawing conclusions regarding the competitive structure of a particular market, which may be influenced by, or indeed premised on, existing regulation on that market. Considering how markets may function absent SMP regulation helps to ensure that SMP-based regulation is only applied (or withdrawn) in those circumstances where it is truly justified and proportionate to do so.
- 3.53 As explained in the Consultation (paragraph 3.6), the purpose of a bundles MST on Eircom’s bundle offers is to ensure that the combination of components where Eircom has been found to have SMP at the wholesale level is replicable by OAOs in the retail market. As Eircom has been identified with SMP (WLA, Regional WCA, and FACO), ComReg’s goal is to ensure that this SMP is not leveraged into downstream retail markets where Eircom’s competitors depend on Eircom’s wholesale inputs when competing with Eircom - a vertically integrated entity.
- 3.54 Absent regulation, ComReg considers that, contrary to the views shared by Eircom in its response (summarised in paragraphs 3.16 to 3.24 above), there is a very strong possibility that Eircom could exert its market power in an anti-competitive manner as outlined by ComReg in the Consultation (paragraphs 3.7 to 3.8), and in Chapters 6 and 11 of the 2018 WLA / WCA Market Review Decision. ComReg considers that Eircom absent regulation has the ability and incentive as a vertically integrated SMP operator to engage in anti-competitive behaviours. Eircom’s incentives could include:
- i. By undertaking a margin squeeze in the retail telecommunications markets – preserve or gain market share in these markets (e.g. broadband, etc.) but also in unregulated markets such as mobile, television, and content; and

<sup>117</sup> Eircom response to the Consultation paragraph 92.

<sup>118</sup> See page 8 of the Explanatory Note to the 2014 Recommendation. The Modified Greenfield Approach begins by looking at the retail market before working up the value chain to the wholesale market. The analysis of the competitive nature of these markets assumes that no SMP derived regulations are in place in the market under consideration in order to avoid circularity in the analysis.

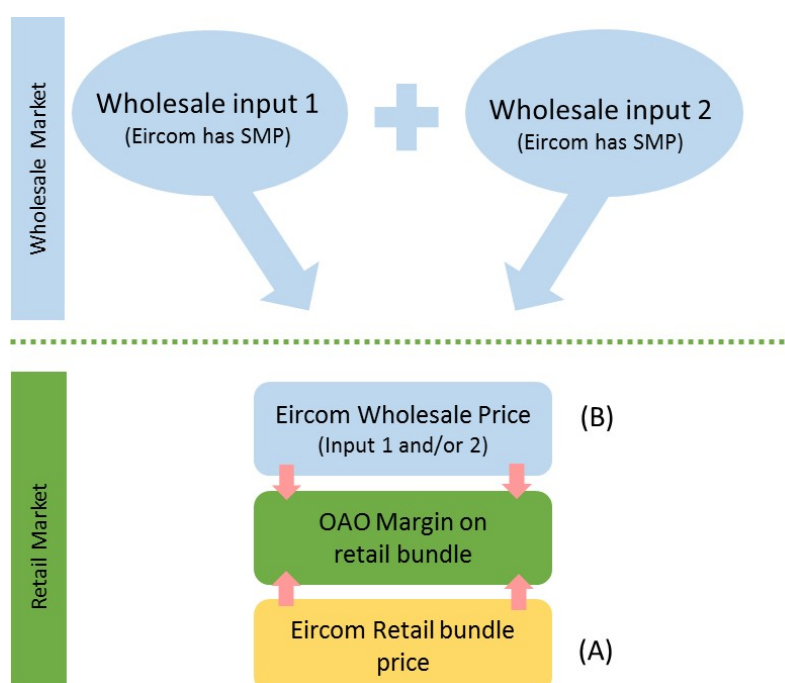
- ii. By undertaking a margin squeeze in the wholesale telecommunications markets – Eircom may seek to preserve its SMP in the FACO, WLA, and Relevant WCA Markets; and eliminate or deter competition at this level from other wholesale operators.
- 3.55 These incentives are realisable, absent regulation, because of Eircom’s ability as the SMP operator to:
- i. Eircom could decide to:
    - 1. decrease its retail bundle price (illustrated by point A in Figure 2 below); and/or
    - 2. increase one or more of the prices of the underlying wholesale input(s) (illustrated by point B in Figure 2 below);

and to the extent that Eircom’s downstream retail revenues are not sufficient to cover retail costs. This would have the effect of foreclosing competition (in the retail or wholesale markets). Eircom, in setting the price for its retail bundle at a price that does not allow an OAO to economically replicate that bundle using the relevant wholesale inputs, could have the effect of deterring competitors from entering or expanding, or, indeed, encouraging existing competitors to leave the market;

- ii. ComReg considers that even in the presence of upstream regulation, but absent a bundles MST, Eircom may satisfy the individual wholesale pricing remedies (e.g. cost orientation of the relevant wholesale service) but through the combination of such wholesale inputs into a retail bundle at a single price, engage in a margin squeeze. Oxera note in Section 2.1 of its Amendments Report that “*The presence of cost-oriented wholesale charge control remedies does not mean that eircom cannot engage in a margin squeeze. eircom’s ability to increase retail prices may be constrained by competition from wholesale access seekers and infrastructure operators. However, given that it has SMP in the relevant markets, eircom retains the ability to engage in a margin squeeze, by lowering retail prices and thus reducing OAOs’ retail margins such that they could not compete effectively.*”
- iii. Include unregulated services (e.g. content, mobile or television services, all of which are offered by Eircom) in its bundle offers and price the bundles in such a way that the bundle cannot be replicated by OAOs. Absent a bundles MST Eircom would have the ability to offer loss making bundles including such unregulated services in a bid to foreclose downstream rivals and / or stymie the ability of competitors to compete in the retail telecommunications markets;

- iv. Exploit its OAO wholesale customers (who are Eircom's competitors at the retail level) by increasing its wholesale input prices (e.g. FTTH which is not subject to cost orientation) to cause a margin squeeze for those OAOs dependent on Eircom wholesale inputs. To remain profitable an OAO may need to increase its retail price. Eircom is a vertically integrated operator so that the wholesale cost Eircom's retail arm pays is simply an internal transfer price, whereas to its retail competitors this is a real cash outlay; and / or;
- v. Undermine existing investment or potential future investment by other operators in the wholesale market. In this instance if a margin squeeze was undertaken, then the competition at this level may not be sustainable, as other operators see the demand for their wholesale service decline. Eircom in such a scenario would have reinforced its SMP in the wholesale market.

**Figure 2: Margin squeeze through bundling of SMP wholesale inputs**



3.56 ComReg continues to consider that absent effective remedies, Eircom's abilities and incentives as the SMP operator gives rise to potential anti-competitive effects which, if unchecked, could chill investment in the short term by hampering competition in the retail market for longer term profits (through increased wholesale charges or reduced retail bundle tariffs leading to foreclosure), or undermining longer-term investments undertaken in the wholesale market by stranding other wholesalers' investments, or creating a climate of uncertainty with regards to investments by competitors.

- 3.57 Eircom considered (see paragraph 3.21) that if a competitor were to exit the market because of Eircom reducing retail prices, it would be due to that competitor's inefficiency. Eircom also considered (paragraph 3.28) that ComReg's wholesale concerns are taken care of through wholesale remedies. Eircom's response ignores the fact that at a retail level, Eircom competes against retail operators, many of whom are dependent on Eircom's wholesale inputs whether directly (e.g. WCA Bitstream) or indirectly (e.g. via wholesale users of VUA) (see Table 1 and Figure 3).
- 3.58 Further, in reply to Eircom's concerns summarised in paragraph 3.22, these operators have not been identified as having SMP in wholesale markets in this jurisdiction, as Eircom has. Failing to require Eircom to demonstrate that the retail bundles Eircom offers are economically replicable could mean that there is a risk of foreclosure of OAOs from the retail market, as discussed in 3.53 to 3.56.
- 3.59 In relation to Eircom's disagreement with the leveraging concerns related to the inclusion of unregulated services (see paragraph 3.25 above), a prime example of the need to include the costs in some form for unregulated services surrounds the motivations for doing so particularly by the SMP operator. As outlined in a report prepared for Eircom's bondholders, Eircom's acquisition of Setanta Sport was to reduce churn and reinforce its broadband customer base<sup>119</sup>. Eircom's decision to offer Setanta Sport (rebranded as eir Sports) to its retail broadband customers at no charge is a classic example of bundling. A failure to require Eircom to include the cost of providing eir Sports (or more generally not testing bundles which include unregulated services) in the bundles that Eircom offers or sells could potentially undermine the ability of an OAO which is dependent on Eircom's wholesale inputs to compete in the retail market.

<sup>119</sup> ["Eircom Holdings \(Ireland\) Limited – Third quarter and nine months Unaudited Results 31 March 2018" page 26](#)

- 3.60 ComReg, in Chapters 7 and 12 of the 2016 WLA / WCA Market Review Consultation, considered the competition problems and impacts on competition and consumers for WLA and WCA markets respectively in the absence of SMP regulation, in accordance with the EC 2014 Recommendation. In the 2018 WLA / WCA Market Review Decision (Chapters 6 and 11) ComReg remains of the view that these competition problems may arise absent regulation. ComReg specifically considered whether *ex post* competition law could address competition problems in the respective markets (paragraph 7.15, and 12.15 of the 2016 WLA / WCA Market Review Consultation) and noted that any measures after the fact (e.g. under competition law) would potentially be too late to rectify market damages (i.e. a margin squeeze which may lead to foreclosure) that may occur absent regulation. The Consultation also considered competition law in place of an MST, but rejected this as inadequate given the potential consumer harm inherent in such an approach. The 2018 WLA / WCA Market Review Decision (at paragraphs 6.92 to 6.93, and 11.33 to 11.34) shares this conclusion.
- 3.61 Eircom's assertion that undertaking a margin squeeze would not be commercially sensible, is premised on the existing European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011<sup>120</sup> which give telecoms customers the right, in the event of a price change, to leave their supplier and move to another if they wish within 30 days of said price change. However, Eircom's presumption is that its competitors are able financially to withstand a margin squeeze by Eircom designed to drive other retailers from the market (through wholesale price increases and / or simultaneously retail price decreases). Such a strategy could reduce competition by encouraging exit from the market or segments of it or conversely, by deterring entry (i.e. Eircom's actions would have a foreclosure effect)<sup>121</sup>. An end-user who wishes to access the internet over a fixed service will have limited options but to use the Eircom service, and Eircom could gain the exiting operators' customers as well – this would be a successful margin squeeze strategy.

<sup>120</sup> S.I. No. 337 of 2011 - <http://www.irishstatutebook.ie/eli/2011/si/337/made/en/print>

<sup>121</sup> ComReg considers that Eircom has a degree of operational latitude available to it, for example it may make decisions regarding its investments in assets, such that the cost it incurs in the short run in practice may be lower than the cost-oriented price charged to its wholesale competitors. ComReg considers that Eircom could use such savings to fund a retail margin squeeze in the short run, prior to the cost-oriented price being adjusted for service providers (e.g. OAOs).



*Over-reliance on theory*

- 3.62 In reply to Eircom's view (see paragraphs 3.16 to 3.25 above) that ComReg "over-relied on theory" in the discussion of potential competition problems arising from a vertically integrated operator which is dominant in the wholesale market and could undertake a margin squeeze, ComReg considers that it is not necessary to provide examples of actual abuse or to provide exhaustive examples of potential abuse that could arise, absent regulation<sup>122,123</sup>. The purpose of imposing *ex-ante* obligations on any operator designated as having SMP is to ensure that it cannot use its market power either to restrict or distort competition in the relevant market, or to leverage such market power into adjacent markets<sup>124</sup>. Therefore, in considering the types of competition problems which could arise having regard to Eircom's SMP position in the various upstream markets, and its ability and incentives to engage in these behaviours, ComReg noted (in paragraph 1.5 of the Consultation) that it was not necessary to provide examples of actual abuse, or to provide exhaustive examples of potential abuse that could arise, absent regulation. Instead, the purpose of imposing *ex ante* obligations on any service provider designated as having SMP is to ensure that it cannot use its market power either to restrict or distort competition on the relevant market, or to leverage such market power onto adjacent markets.
- 3.63 The Consultation considered the types of competition problems which could arise from Eircom's SMP position in a number of markets, and the abilities and incentives present for Eircom through its retail bundles offers (paragraphs 3.7 to 3.26). Eircom's SMP position and vertically-integrated structure create a number of effects on OAOs that compete with Eircom in the retail sphere, but need to make use of Eircom's SMP wholesale inputs to access their current and potential customers. Given Eircom's SMP position in a number of wholesale markets, and its ability and incentives to engage in anti-competitive behaviours, ComReg proposed the bundles MST to ensure sustainable competition to the benefit of end-users.

<sup>122</sup> See paragraphs 7.6 and 12.6 of the 2016 WLA/WCA Market Review Consultation, and paragraphs 6.2 and 11.3 of the 2018 WLA / WCA Market Review Decision.

<sup>123</sup> Paragraph 27 of the SMP Guidelines.

<sup>124</sup> Paragraph 16 of the SMP Guidelines.

- 3.64 In the absence of regulatory intervention, there is an opportunity for an SMP operator to abuse its dominance, especially in a situation where competitors depend on inputs from a vertically integrated operator – see *Wanadoo Espana v Telefónica*<sup>125</sup> and *Deutsche Telekom AG v EC Commission*<sup>126</sup>. Oxera in Section 2.1 of its Amendments Report also noted that “*Indeed, the existence of ex ante regulation does not remove the possibility for an SMP operator to engage in margin squeeze. For example, the presence of regulated mobile termination rates did not stop margin squeezes occurring in mobile markets in Spain, or in the fixed broadband market in Germany.*”
- 3.65 ComReg continues to consider that, in the absence of a bundles MST, the ability of OAOs to compete for retail customers may be undermined if OAOs are not able to replicate Eircom’s bundle offers. ComReg considers that the harms as discussed in paragraphs 3.54 to 3.56 of the Consultation are a possible consequence of the absence of a bundles MST. This could then impact end-users through reduced choice, increased price, and reduced quality of services. ComReg is required under Section 12 of the Communications Regulation Act 2002 (as amended) to promote competition, and the interests of users. ComReg considers that the bundles MST as outlined in the Consultation safeguards efficient competitors to protect them from a margin squeeze and that this in turn promotes competition that is to the benefit of end-users.

*‘Asymmetric regulation’*

- 3.66 ComReg disagrees with the views shared by Eircom, as summarised in paragraph 3.28, and maintains it is entirely reasonable that, where an operator is identified with SMP in the provision of essential inputs necessary for others to compete in the retail market, then ComReg should ensure that competition is not foreclosed, either to existing competitors or potential entrants. See also paragraph 2.54 and Section 3.4.1.

<sup>125</sup> Case COMP/38.784, 2008/C 83/05)

<sup>126</sup> Case 280/08 [2008] ECR II-477

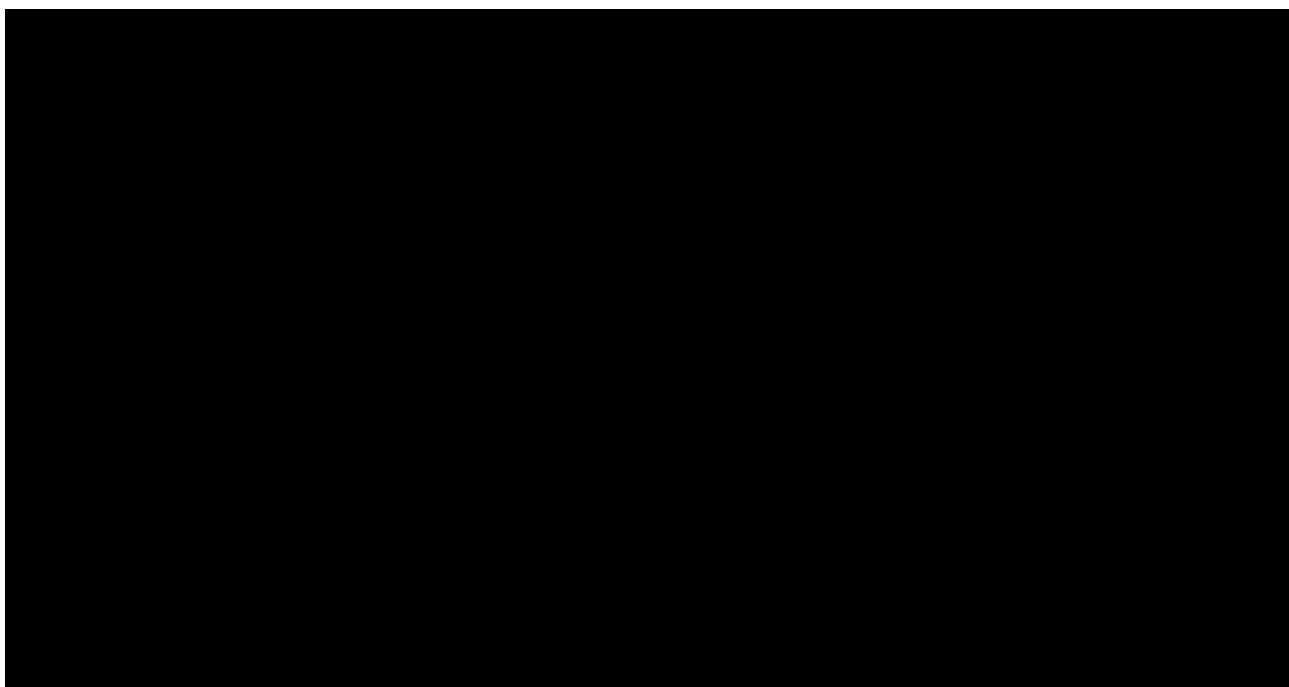
- 3.67 ComReg is not insisting, as Eircom has suggested (see paragraph 3.26 and 3.27 above), on exact bundle replication. Rather, ComReg considers that, when Eircom offers a bundle containing components which are in wholesale markets in which Eircom has been found to be the SMP operator (nationally for FACO, and WLA, and in the Regional WCA market), then Eircom should demonstrate that the combination of the price of these components, relevant network and retail costs and the retail price set by Eircom for its bundles is not causing a margin squeeze, and is therefore economically replicable by OAOs. In relation to replicability, ComReg does not consider that replicability is only possible for OAOs, by OAOs having to offer the exact same service (something that may not be possible when bundling unregulated services with regulated ones), but that Eircom is earning a sufficient margin that provides economic space for OAOs to compete in the retail market (potentially bundling different unregulated services with regulated ones).
- 3.68 In response to Eircom's concerns relating to banning cross-subsidies from unregulated to regulated as summarised at paragraph 3.27 above, ComReg has, based on the responses received, decided to remove this prohibition and further detail on this and the impact on bundles replicability is discussed in Section 5.4.10. In relation to Eircom's views on the implementation of a bundles MST with respect to the 2013 EC Recommendation for NGA services, along with cost orientation for the purposes of replicability of NGA services (paragraph 3.29), see paragraphs 3.55 and 3.64 above.

### **3.4.2 Question 3 - MST between FACO inputs in bundle and retail price of bundle**

- 3.69 In 2015 Eircom was identified as having SMP in the FACO Market. Chapter 8 of that Decision outlined that, absent SMP regulation in the FACO Market, ComReg considered that Eircom would have the ability and incentive to influence a range of competition parameters, including prices, innovation, output and the variety or quality of goods and services provided, for example, by exploiting customers, leveraging SMP into downstream and adjacent markets, and by foreclosing competition in the FACO Market. The Consultation focused on this SMP, and given the importance of this input for OAOs in serving their customers, the anti-competitive effects which may arise absent its inclusion in the bundles MST.

3.70 In response to Eircom's views as summarised in paragraph 3.32 above, for the avoidance of doubt, bundles which include FACO inputs but do not include WLA or WCA broadband were not proposed to be assessed in the bundles MST. ComReg acknowledges that fixed voice call volumes are declining in favour of other voice services. The decline in fixed voice call volumes, is not a reason to exclude FACO inputs from the bundles MST. In relation to Eircom's point that call packages included in a bundle are not the main driver behind customers' bundling preferences or operators' decisions to offer bundles that include calls, ComReg considers that the issue at hand, as discussed in the Consultation (paragraphs 3.32 – 3.38), is that FACO is a market where Eircom has been found to have SMP. Figure 3 shows the continued use by OAOs of this wholesale input from the SMP operator (Eircom) and that this has in fact increased significantly since the 2013 Bundles Decision.

**Figure 3: Use of WLR by OAOs on the Eircom network [X REDACTED]**



Source: ComReg (2018). QKDR – data as of Q1 2018.

- 3.71 While operators may at some point move from using WLR to another method of providing voice access to their customers, the data up to Q1 2018 from the ComReg QKDR (displayed in Figure 3) indicates that this input is still relevant and important. ComReg notes that the responses of ALTO, Sky, and Vodafone agree with the proposal to include FACO inputs in the bundles MST. This agreement was based on the importance of FACO inputs and the potential leveraging possible by Eircom absent the inclusion of FACO inputs in the bundles MST summarised in 3.31. Compass Lexecon outlined in its response prepared on behalf of Vodafone<sup>127</sup> to the 2016 WLA / WCA Market Review Consultation that operators will, to compete, use whatever access service they can to serve their customers. Therefore, to ensure that OAOs can replicate an Eircom bundle that includes WLR, ComReg considers that this input should be included in the cost stack of a bundle. In any case, the new definition of a bundle proposed in the Consultation (see paragraph 3.31) centres on broadband services and therefore caters for Eircom's concerns with respect to call volumes declining.
- 3.72 Where, over time, there is a movement to non-WLR access routes for broadband, then this will be reflected in the WAWNI. Removing the requirement to include the wholesale input price for WLR access routes currently would, in ComReg's view, be premature, and provide Eircom undue pricing flexibility. Similarly, in relation to voice over broadband, this is currently in the cost stack for standalone Bitstream and VUA broadband, if and when there is a movement by OAOs to this service delivery route for fixed voice calls then the WAWNI will also reflect this. In relation to Eircom's response to Question 9 (that, on a forward looking basis, managed voice over broadband ('**VoB**')) should be included instead of WLR, ComReg agrees, but considers that doing so at present would be premature. ComReg considers that, when bundles containing voice services are sold with managed VoB instead of WLR, then Eircom should separately report the number of bundles using this technology.
- 3.73 In relation to Vodafone's other points (paragraph 3.33) raised in relation to on-going compliance and regulatory gaming, these are matters beyond the immediate inclusion or not of FACO wholesale inputs and are addressed in Chapter 7.
- 3.74 ComReg concludes that, given the responses to the Consultation, ComReg's assessment of these, and evidence of FACO wholesale inputs continuing importance to OAOs then it is appropriate to include FACO wholesale inputs in the bundles MST.

<sup>127</sup> Compass Lexecon report paragraph 2.24.

3.75 However, ComReg considers that due to the definition of a bundle in the WLA and WCA Decision Instruments as being broadband plus any other service (as consulted upon), then it is unnecessary to implement the bundles MST through a FACO Decision Instrument ('DI'). ComReg considers the proposed FACO DI in the Consultation to be unnecessary, principally as: the definition of a bundle in the WLA and WCA DIs already includes bundles where FACO inputs will be bundled with broadband; separate to the bundles MST, Eircom in its provision of FACO inputs as the designated SMP operator will continue to be subject to the remedies imposed through the FACO Decision (these obligations include: access, non-discrimination, transparency, price control and cost accounting, and accounting separation); and bundles consisting of FACO plus mobile or television services account for [3< ■ ]% of bundles sold in Ireland<sup>128</sup>, (with those that Eircom sell of this amount being a fraction of this as Eircom do not sell bundles consisting of FACO plus its television service). Overall ComReg does not consider that this change will have an impact on the ability of OAOs to replicate Eircom's bundles, as OAOs using FACO inputs will not be prevented from doing so, and Eircom when it sells a bundle that contains FACO inputs will be required to include them in the bundles MST – in other words a level playing field will still be possible.

### 3.4.3 Question 4 - MST between WLA inputs in bundle and retail price of bundle

3.76 BT's response raised the need for an MST between WLA and WCA inputs, summarised in paragraph 3.39. ComReg discussed this in the 2017 Pricing Consultation, and paragraph 3.123 of the 2018 Pricing Decision confirms that such a test is in place. ComReg considers that the economic space between WLA and WCA inputs needs to be maintained to provide sufficient economic space to ensure that a wholesale margin squeeze does not arise.

3.77 Vodafone's disagreement, summarised in paragraph 3.38, is related to the proposed deregulation of WCA inputs in the Urban WCA Market. ComReg has addressed this issue in the 2018 WLA / WCA Market Review Decision (see paragraphs 9.273 to 9.276). With regard to Vodafone's other points, these are responded to in the appropriate areas: retail costs (Section 5.4.1), ban on intra-area cross subsidy (paragraph 3.46), and enforcement and monthly testing of the MST (Sections 7.4.2 and 7.4.1 respectively).

<sup>128</sup> Less than 5% of all bundles sold in Ireland.

- 3.78 Eircom also queried (see paragraph 3.36) why ComReg was not concerned about another operator's ability to cause a margin squeeze between that operator's WCA input and an operator using Eircom's WLA inputs in the UA. This is because Eircom is the sole operator identified as having SMP. It would be very difficult for a non-SMP operator to cause a margin squeeze given their lack of control over the wholesale inputs that other operators depend on.
- 3.79 ComReg maintains that the preliminary proposals as set out in the Consultation (paragraphs 3.39 to 3.44), and revisited in paragraphs 3.53 to 3.56, are appropriate. ComReg considers that when Eircom sells a bundle comprised of NGA WLA inputs, Eircom should be required to demonstrate that it is not causing a margin squeeze between the retail price of the bundle and the price of the NGA WLA components which an OAO would need to replicate bundles that Eircom offers. This is in order to avoid any of the potential anti-competitive effects as described in the Consultation<sup>129</sup>, and re-visited in paragraph 3.55 above, occurring.
- 3.80 ComReg considered limiting the extent of the obligation not to margin squeeze to just the footprint of the Urban WCA market. On the basis of the responses received in relation to the geographic areas (see Chapter 4), cost orientation on a national basis for WLA wholesale inputs (except for FTTH based VUA), and ALTO's recommendation that a national MST be used (see paragraph 3.35), ComReg is of the view that some adjustments to the MST assessments as proposed in both this Consultation and the 2017 Pricing Consultation are merited. ComReg therefore has decided to extend the bundles MST when using WLA inputs to provide NGA speed bundles to a bundle by bundle and national portfolio approach (albeit on a '*where available*' basis; see paragraphs 4.42 to 4.55 for further details). The effect of this is that, when Eircom offers an NGA bundle, then the wholesale price of the NGA WLA components, which an OAO would need to replicate that retail Eircom NGA bundle, will be included in the cost stack of the Eircom bundle offer. As identified by BT (paragraph 3.39), the economic space requirement between the price of WCA and WLA inputs ensures that efficient OAOs can replicate Eircom retail offers.

<sup>129</sup> See paragraphs 3.7 to 3.26 of the Consultation.

3.81 CGA WLA components, as explained in paragraphs 4.47 to 4.49 will no longer be included in the cost stack of an Eircom CGA bundle. Instead CGA Bitstream will be used. This means that those OAOs who choose to serve their customers via these services will be able to continue doing so. In any case, ComReg notes that there is discernible decline in broadband provided through CGA services in favour of NGA services (see Figure 1 and Table 2) and ComReg does not consider that OAOs abilities to compete will be adversely affected by this approach as Eircom's CGA WLA inputs are subject to national cost orientation, non-discrimination, transparency and access obligations. In other words an OAO intent on serving its customers via a CGA broadband service will still be able to do so.

#### 3.4.4 Question 5 - MST between WCA inputs in bundle and retail price of bundle

3.82 Eircom, as summarised in paragraph 3.42, disagreed with ComReg's preliminary view on a number of points including that there is no evidence of SMP in the WCA market. ComReg, in the 2018 WLA / WCA Market Review Decision at paragraphs 11.17 to 11.19, discusses this assertion and in paragraphs 11.27 to 11.32 of the 2018 WLA / WCA Market Review Decision refutes this. In relation to Eircom's other points, namely, inconsistency with the 2013 EC Recommendation these are discussed in Chapter 5 of this Decision (paragraphs 5.183 to 5.185), and the assertion of "*de facto*" retail regulation in paragraphs 3.50 to 3.56, and also more generally in paragraphs 2.48 to 2.55).

3.83 In relation to Eircom's position that the "flagship approach" should be used, this is possible, and the Oxera paper considered such an approach, but noted that it would require "*definition and subsequent monitoring of the flagship product, which may change as the market develops*"<sup>130</sup>. The Consultation proposed to assess all Eircom bundles under the bundles MST. This Decision does not change that. The bundles MST looks at all bundles and automatically reflects changing market dynamics (i.e. as certain bundles (and the components thereof) become more popular they will automatically represent a bigger share of Eircom's portfolio) without the need to continually redefine the test for the latest flagship product (which in any case would only be one part of the bundle being assessed). ComReg considers that the approach as consulted on is prudent, given the volume of bundles that Eircom offers and the fact that bundles with FTTH are not as popular as others. ComReg's position in relation to Eircom's interpretation of the use of a flagship approach is discussed in more detail at paragraphs 5.184 and 5.185.

<sup>130</sup> See 4.1.2 of the Oxera Recommendation – ComReg 17/51a.



- 3.84 Insofar as the bundles MST is concerned, ComReg remains of the view as discussed in the Consultation (paragraphs 3.45 to 3.50) that to avoid the potential anti-competitive behaviours<sup>131</sup> and for replicability purposes in the Regional WCA market, Eircom, when it offers a bundle using CGA WCA components, should be required to demonstrate that it is not causing a margin squeeze between the retail price and the CGA WCA components of the bundle.

### 3.5 ComReg final position

- 3.85 Having reviewed the responses received, assessed the proposals' aims in light of these, and considered further advice from Oxera, ComReg considers that the proposals as consulted upon remain broadly appropriate as a solution to the competition problems as identified. ComReg is however making some changes to the detail of the proposed tests as a result of responses to the Consultation and these are discussed in Chapters 4 and 5 as appropriate. The MST addresses the same competitive issues and is anchored in the WLA and WCA wholesale markets as the test proposed in the Consultation (as discussed in 3.75 ComReg considers that it is no longer necessary to include a FACO DI). Therefore Eircom, when it offers a bundle for sale, will be required to demonstrate that it is not causing a margin squeeze between the price(s) for regulated wholesale components required by an OAO to replicate an Eircom bundle offer and the price of the Eircom retail bundle. Further, the NRT pursuant to Market 1b and 1c of 2007, will be removed as a pricing remedy as there will now be appropriate remedies in place at the wholesale level.

<sup>131</sup> See paragraphs 3.7 to 3.26 of the Consultation.

## Chapter 4

# 4 Exchange areas

## 4.1 Overview

- 4.1 In Chapter 4 of the Consultation, ComReg provided an overview of the competitive conditions across exchanges and developments stemming from the preliminary findings of the 2016 WLA / WCA Market Review Consultation<sup>132</sup>, and how these findings should be reflected in the bundles MST.
- 4.2 In this chapter, ComReg provides an outline of Chapter 4 from the Consultation, assesses responses received to question 6 from the Consultation, provides its reasoning, and states its final position.

## 4.2 Summary of Chapter 4 of the Consultation

- 4.3 In Section 4.2 of the Consultation, ComReg presented the history of the LEA and explained the development of the LEA in terms of structural changes arising in exchange areas (e.g. alternative operator presence and evolving market shares)<sup>133</sup>.
- 4.4 In Section 4.3 ComReg discussed market developments in the LEA in terms of retail broadband, which ComReg considered as a proxy for bundles, since broadband is usually bundled.
- 4.5 In Section 4.4 ComReg outlined how the provisional findings from the 2016 WLA / WCA Market Review Consultation would be reflected in the Consultation – in particular, the deregulation of WCA inputs in the Urban WCA Market, and the continued regulation of WCA inputs in the Regional WCA Market. ComReg considered, in the Bundles Consultation, that the UA was the most competitive followed by RA1, which corresponded closely to those exchanges previously identified as being in the LEA; save for the removal of those exchanges which were identified as falling within the UA. Finally, RA2 corresponded to those exchanges which are in the more rural and remote areas of Ireland, and were previously identified as 'Outside the LEA'; being an area where ComReg considered entry prospects by alternative infrastructure providers to be limited.

<sup>132</sup> Eircom has SMP in the WLA Market (a national market); no Service Provider has SMP in the Urban WCA Market; and Eircom has SMP in the Regional WCA Market.

<sup>133</sup> For further information see the 2011 WBA Market Decision - <https://www.comreg.ie/publication-download/response-to-consultation-and-decision-market-review-wholesale-broadband-access>

- 4.6 Section 4.4 also discussed why and how the proposed bundles MST should vary by the areas proposed in the 2016 WLA / WCA Market Review Consultation. ComReg proposed that there should be varying degrees of flexibility in the bundles MST to appropriately reflect the wholesale and retail market developments in each area. This was further considered in Chapter 5 of the Consultation. Similar to the existing rules for the LEA/Outside-the-LEA areas, ComReg proposed that the boundary between RA1 and RA2 would be dynamic over the review period – i.e. exchanges can move from being in RA2 to RA1. As in the 2016 WLA / WCA Market Review Consultation the boundary of the UA was not proposed to change.
- 4.7 ComReg posed one question in relation to exchange areas in the Consultation. Question 6 is set out in Annex 7 and, in the next Section, the responses are summarised.

### 4.3 Summary of responses received

- 4.8 Five responses were received to this question. Two respondents were generally supportive of the proposals but sought changes (ALTO and Sky), one respondent disagreed (Eircom), and the remaining two thought the proposals were incorrect in certain aspects (BT and Vodafone). The responses have been summarised into the following headings: level of analysis, boundaries of the areas, pricing flexibility, redactions and data collection.
- 4.9 Several respondents have made points in their responses that fall outside the scope of this Consultation. Those points come within the scope of the 2016 WLA / WCA Market Consultation. Those points have been considered in the 2018 WLA / WCA Market Review Decision. References to the 2018 WLA / WCA Market Review Decision are provided as appropriate in this section.

#### *Level of analysis*

- 4.10 Vodafone<sup>134</sup> considered that ComReg over-relied on the examination of broadband bundles in the markets, whereas the focus should be across all retail subscription types. Vodafone encouraged ComReg to clarify that this will be the case in the revised MSTs.

<sup>134</sup> Vodafone response to the Consultation paragraph 34.

- 4.11 Eircom disagreed<sup>135</sup> with the proposed sub-geographic areas for the bundles MST. Eircom submitted that ComReg was imposing *de facto* retail regulation and queried the level of analysis undertaken in creating these areas and considered that it was not to the standard required by the 2014 Recommendation. Eircom, revisiting its response to Question 1 and 2, did not consider that a Three Criteria Test has been undertaken to enable ComReg to proceed with the proposals outlined in the Consultation.

#### *Boundaries of the areas*

- 4.12 ALTO and Sky agreed with the proposals from the Consultation but sought the obligation not to cause a margin squeeze be imposed on Eircom in the WLA market covering the UA, RA1 and RA2 footprints (i.e. nationally, not just the UA as originally envisaged). Both ALTO and Sky also requested that the footprints of each area, as defined, remain stable over the review period – that is, no movements from RA2 to RA1 to UA.
- 4.13 BT referred to its response to Question 1, where it considered that the boundaries of the UA as identified in the 2016 WLA / WCA Market Review Consultation are not stable. BT considered this to be the case due to Eircom “*re-homing*” (transferring) traffic to an exchange site where BT do not have an existing presence (for WLA services) and where it may not be viable for BT to reach. BT was concerned that Eircom could, in the future, “*re-home*” exchange areas falling within the Regional WCA Market to exchanges within the UA where BT does not have an existing presence and where Eircom would not be obligated to offer WCA services. BT described how they are dependent on a WCA service from Eircom to provide a wholesale offering to their customers. If Eircom was to refuse to offer reasonable WCA services to BT this would be a “*considerable problem*” for BT. BT therefore proposed that in the case of future “*re-homing*” to an exchange site not already accessed by an operator then that exchange should automatically be re-defined as being in the Regional WCA market immediately.
- 4.14 Vodafone,<sup>136</sup> referring to its response to the 2016 WLA / WCA Market Review Consultation<sup>137</sup>, disagreed with the deregulation of the UA, and instead proposed that the rules for RA1 and RA2 should apply equally to the UA (e.g. bundle by bundle rather than one single portfolio).

<sup>135</sup> Eircom response to the Consultation paragraphs 129 to 131.

<sup>136</sup> Vodafone response to the Consultation paragraph 33.

<sup>137</sup> Vodafone response to the 2016 WLA/WCA Market Review Consultation, paragraphs 264 to 270.

- 4.15 Eircom submitted<sup>138</sup> that the UA should be updated over time for exchanges that meet the “Urban WCA Market criteria” (as set out in the 2016 WLA / WCA Market Review Consultation), and should immediately be taken into account in the pricing remedies. Eircom justified its proposal due to its view that the delay in finalising the review of the leased line market (and the price control by cost orientation) is and has had “*a continued and substantial negative impact*” on Eircom’s leased line business.
- 4.16 Eircom also considered<sup>139</sup> that there should be no downgrading of an exchange from the UA to the RA1 or RA2 exchanges once it has met the UA criteria, e.g. exchanges classified as being in the UA cannot become RA1 or RA2 over time.

#### *Pricing flexibility*

- 4.17 Looking across the Consultation’s proposals<sup>140</sup>, Eircom considered that the variation of the assessments proposed in each area (UA, RA1, and RA2) – bundle by bundle and/or portfolio, along with the separate requirements for the standalone broadband assessments on a product by product and/or portfolio basis would lead to regulatory failure<sup>141</sup> as they created a complex set of arrangements<sup>142</sup>.
- 4.18 Eircom submitted that passing the MST will, due to Eircom’s national pricing strategy, require Eircom to set prices at the highest regulatory bar (e.g. the cost stack in the bundles MST in RA2 was proposed to have retail costs set at REO<sup>143</sup>). When combined with Eircom’s national pricing strategy this would, in Eircom’s view, cause a pricing umbrella below which Eircom prices could not fall, thereby lessening Eircom’s pricing flexibility and dampening competitive pressure on OAOs to the detriment of consumers (as OAOs could set their retail price just below the Eircom level). Eircom also commented that due to Eircom’s network deployment a number of exchanges may cover a single residential area, and these exchanges may be in different geographic areas.

<sup>138</sup> Eircom response to the Consultation paragraph 137.

<sup>139</sup> Eircom response to the Consultation paragraph 138.

<sup>140</sup> From Chapter 3 – 5 of the Consultation.

<sup>141</sup> Eircom response to the Consultation paragraph 132.

<sup>142</sup> Eircom response to the Consultation paragraph 134.

<sup>143</sup> Eircom response to the Consultation paragraphs 133, and 189

### *Redactions*

- 4.19 Sky viewed the redaction of the retail broadband market shares in each geographic area from Table 4.4 in the Consultation as unjustified, and believed ComReg was not meeting its transparency obligation. Sky viewed the information published in the QKDRs as being of a similar level of granularity. Sky urged ComReg to publish Table 4.4, to provide stakeholders with confidence that ComReg's position in the Consultation was appropriate.

### *Data collection*

- 4.20 Eircom submitted<sup>144</sup> that its retail arm does not have sufficient information to suggest updates or maintain the LEA due to OAOs undertaking alternative network investment that are not visible to them and suggested that maintaining lists of which exchange is in what area should be ComReg's responsibility.

## **4.4 ComReg's assessment of Respondent's views**

- 4.21 This section assesses the responses received and provides ComReg's reply to these and the rationale for any changes from the Consultation. As with Section 4.3, this section is in line with the key headings from the responses; level of analysis, boundaries of the areas, pricing flexibility, redactions, and data collection.

### *Level of analysis*

- 4.22 Vodafone (see paragraph 4.10 above) expressed their belief that ComReg over-relied on the examination of broadband bundles and that the focus should be on all retail subscription types instead. Broadband information (which includes both bundled and standalone broadband) remains the primary data source for decisions related to the bundles MST. This is because localised data on bundles is not available. ComReg observes in the latest QKDR<sup>145</sup> that broadband is mostly sold in a bundle, and therefore broadband services remain a suitable proxy for bundles.
- 4.23 In relation to focusing on all retail subscription types, there is an almost negligible proportion of bundles sold nationally without broadband - the amount of fixed voice plus mobile or TV bundles in Q1 2018 was [ $\approx$  ████] %<sup>146</sup>. The remaining volume of retail subscriptions are covered through standalone pricing remedies where Eircom has SMP (e.g. D03/16), or are unregulated as no retailer has SMP (e.g. mobile/IPTV).

<sup>144</sup> Eircom response to the Consultation paragraphs 135 and 136.

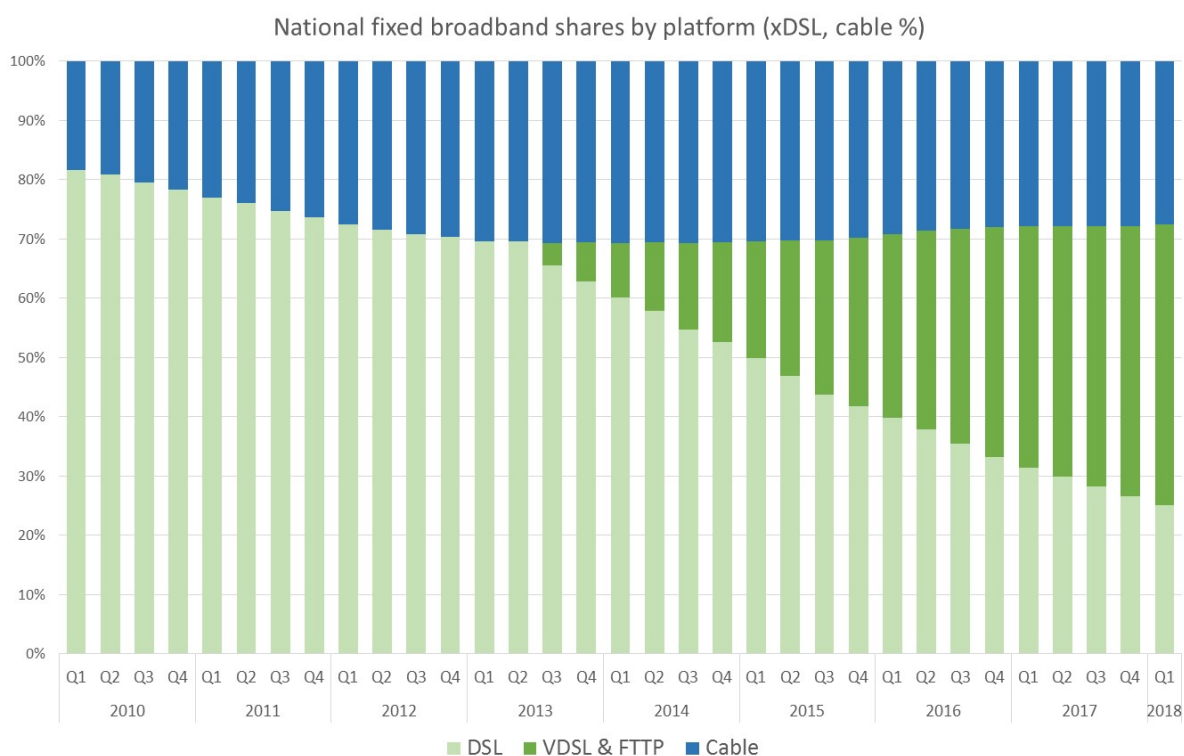
<sup>145</sup> <https://www.comreg.ie/publication-download/quarterly-key-data-report-q1-2018>

<sup>146</sup> Less than 5% of all bundles sold in Ireland.

- 4.24 Eircom (see paragraph 4.11 above) queried the level of assessment undertaken in determining whether a sub-geographic remedy was required, and whether the assessment was in accordance with the 2014 Recommendation.
- 4.25 ComReg, in the 2016 WLA / WCA Market Review Consultation, provisionally identified Eircom of having SMP in the WLA Market, and also in the Regional WCA Market. ComReg, in the 2018 WLA / WCA Market Review Decision, confirmed that Eircom has SMP (see paragraph 1.14 of the 2018 WLA / WCA Market Review Decision) in the WLA Market (see paragraph 1.12(a) of the 2018 WLA / WCA Market Review Decision), and also in the Regional WCA Market (see paragraph 1.12(c)) of the 2018 WLA / WCA Market Review Decision). ComReg considers that the imposition of remedies is within the scope of the 2014 Recommendation (see paragraphs 6.109 to 6.111, and 11.44 to 11.47 of the 2018 WLA / WCA Market Review Decision).
- 4.26 In relation to the imposition of the bundles MST, Chapter 3, and Sections 4.3 and 4.4 of the Consultation, explained that absent upstream regulatory intervention Eircom's SMP position in certain markets gives rise to a risk of consumer harm in the retail markets. A further division of the Regional WCA Market into two sub-geographic areas was proposed. This is due to differing competitive conditions existing in those exchanges, as outlined in Table 4.4, and paragraphs 4.26 to 4.38 of the Consultation. As discussed in Sections 2.3 and 3.4.1 of this Decision, ComReg rejects Eircom's assertion of "*de facto retail regulation*", and also rejects Eircom's view that they have no ability or incentive to engage in anti-competitive behaviour.
- 4.27 ComReg has, as discussed below in paragraphs 4.42 to 4.50 of this Decision, reconsidered having three distinct areas with different assessment levels applying in each area. The final approach, a 'where available' method, focuses the assessments on the regulated wholesale broadband markets, that is the WLA Market, and the Regional WCA Market. FACO wholesale inputs, where relevant to the bundle being assessed, will be included in the assessment.

4.28 In paragraph 4.22 of the Consultation ComReg identified that there had been growth overall on the Eircom network, particularly driven by the launch of VDSL. Figure 4 represents an updated view of the national fixed broadband retail shares by platform. VDSL is now the dominant form of fixed broadband access nationally at 45% of the total<sup>147</sup>. Over 70% of fixed broadband subscribers nationally are served through NGA services (Table 2 at 4.42 below) through the Eircom, SIRO and Virgin Media platforms. Excluding Virgin Media and SIRO data, the data up to Q4 2017 as used in the 2018 WLA / WCA Market Review Decision indicates that [3< [ ]% of fixed broadband subscribers nationally are served through NGA (Table 2). While NGA services are predominantly available in the UA and RA1, [3< [ ]% of Eircom subscribers in RA2 are now served through NGA, up from [ [ ]% at the time of the Consultation. Since Q4 2016 (the latest data available as presented in the Consultation) the roll-out of NGA services has continued and nationally increased by 27%, whereas CGA services decreased by 22% over the same period.

**Figure 4: National fixed broadband retail shares by platform – Q1 2018**



Source: ComReg (2018). QKDR – data as of Q1 2018.

<sup>147</sup> <https://www.comreg.ie/industry/electronic-communications/data-portal/tabular-information/>



*Boundaries of the areas*

- 4.29 In reply to ALTO's and Sky's suggestion (see paragraph 4.12 above) that the obligation not to cause a margin squeeze in the WLA Market should also cover RA1 and RA2 as well as the UA, ComReg did not consider this suggestion necessary as the bundles MST for RA1 and RA2 was specified through the WCA Decision Instrument of the Consultation. This was the case because of the other obligations proposed in the 2016 WLA / WCA Market Review Consultation (e.g. access, cost orientation, etc.), and, on an administrative basis, each new or revised bundle offer would require Eircom to submit two retail notifications under both the WLA and WCA Decision Instruments.
- 4.30 In relation to the stability of the geographic areas: ALTO and Sky sought stable (i.e. fixed) footprints over the review period. Eircom (see paragraph 4.15 above) proposed a growing UA based on exchanges meeting the UA criteria over time, and a restriction on moving exchanges to the Regional Areas (see paragraph 4.16 above). BT considered (see paragraph 4.13) the boundary of the UA to be unstable and suggested that a dynamic method to capture changes should be used.
- 4.31 The original position as stated in paragraph 4.27 of the Consultation was that the differentiated areas of the WCA Markets would not be subject to change for the period of the market review. However, in paragraphs 9.257 to 9.259 (and paragraph 12.394) of the 2018 WLA / WCA Market Review Decision, ComReg outlined its intention to undertake a 'Mid-term Assessment' that would, in the context of the WCA Product Market definition set out in that Decision, re-apply each of the criteria set out in the Decision<sup>148</sup>, and consider whether or not conditions of competition in each Exchange Area falling within the Regional WCA Market had materially changed. If so, ComReg will consider whether or not the continuing imposition of regulatory obligations in such areas within the Regional WCA Market remains appropriate. For the Regional Areas, ComReg proposed (at paragraph 4.36 of the Consultation) that those exchanges in RA2, which over time met the 'Regional Area 1' criteria, should be added to RA1. ComReg did not propose that exchanges would be downgraded from UA to RA1 or from RA1 to RA2.

<sup>148</sup> See Table 29 (paragraph 9.334) of the 2018 WLA / WCA Market Review Decision.

- 4.32 Further information on the points raised by Eircom in relation to dynamically changing the UA are covered in paragraphs 9.88, 9.257 to 9.259, 9.263 and 12.394 of the 2018 WLA / WCA Market Review Decision. As stated therein, ComReg intends to undertake a review (labelled the “Mid-term Assessment” in that Decision at paragraph 9.257) that would re-apply each of the criteria set out in the Decision and consider whether or not the continuing imposition of regulatory obligations in the Regional WCA Market remains appropriate.
- 4.33 In paragraph 4.13 above, ComReg provided a summary of BT’s concerns. BT submit that the boundaries of the UA are not stable due to Eircom “*re-homing*” services that support BT’s wholesale offering. ComReg’s view is that if Eircom refuse to make access available to such exchanges identified in the Regional WCA Market, as confirmed at the time of the 2018 WLA / WCA Market Review Decision, then this would raise concerns as to Eircom’s compliance with its access (and other) obligations. Further information is available in paragraphs 7.227 to 7.250 of the 2018 WLA / WCA Market Review Decision.
- 4.34 Vodafone disagreed (see paragraph 4.14 above) with the approach in the UA and proposed that the rules outlined for RA1 and RA2 be applied in the UA. Vodafone considered that the deregulation of the UA was inappropriate as SIRO, Virgin Media, and Vodafone do not provide a competitive constraint (to Eircom) in the UA, and the margin squeeze obligations are insufficient to prevent Eircom from manipulating the WCA Market should it decide to do so. For bundles, as discussed in paragraphs 4.18 to 4.25 of the Consultation, the expansion of investment and increased infrastructure-based competition in exchanges does not suggest that the continuation of the flexibility provided by the LEA<sup>149</sup>, through the proposed “Regional Area 1 criteria” would hinder the development of competition. Paragraphs 4.26 to 4.38 of the Consultation provided the rationale underpinning why the rules of the Regional Areas were not proposed for use in the UA.
- 4.35 Vodafone’s observations (including those of Compass Lexecon, which it commissioned to review ComReg’s analysis of the WCA Markets) are addressed in the 2018 WLA / WCA Market Review Decision – see paragraphs 9.274 to 9.325.

<sup>149</sup> These being tests at the bundle by bundle level at LRIC, combined with a portfolio level test at ATC.

*Pricing flexibility*

- 4.36 ComReg, in Chapter 5 of the Consultation, set out the proposed assessment approach for bundles based on the competition problems identified in Chapter 3, and the competitive conditions present in exchanges in Chapter 4. While Eircom may choose to pursue a national pricing strategy for the bundles it offers, ComReg, through the proposed sub-geographic pricing remedy split, was mindful that not all subscribers in all regions are able to avail of similar services in terms of broadband speeds, or indeed possible additions to their bundles (e.g. a subscriber being served through a CGA service cannot get the same speeds as an NGA subscriber, nor will they be able to add IPTV to their bundle).
- 4.37 In relation to the creation of pricing umbrellas and lessening competitive pressures on operators (see paragraph 4.18), ComReg notes that the choice of a national pricing strategy or otherwise is at the discretion of each operator. Nevertheless, for reasons set out below ComReg has now moved to apply single national obligations in each of the WLA and WCA markets which should address Eircom's concerns.
- 4.38 Table 1 provides ComReg's analysis as presented in the Consultation, having updated it using data from the 2018 WLA / WCA Market Review Decision (up to Q4 2017 based on the SIR to Service Providers), to determine if competitive conditions relevant to pricing flexibility have changed. The results are presented in Table 1.
- 4.39 Table 1 provides ComReg's updated analysis, which shows that without continued regulation of WCA inputs Eircom's retail broadband market share nationally could increase to [3< ■ ]% from [3< ■ ]% currently. However, this national perspective masks the fact that Eircom's retail market share would be higher in RA1 ([3< ■ ]%) and in RA2 ([3< ■ ]%). In the UA the potential impact of the deregulation of WCA inputs is more limited due to the presence of infrastructural competition. However, in RA2 the outcome is not as pronounced as it was when originally consulted upon (down from [3< ■ ]% to [3< ■ ]%). This change in outcome has been driven by investment in NGA services occurring in RA2 since the Consultation (see Table 2 below), which was [3< ■ ]% but has grown to [3< ■ ]% as at Q4 2017<sup>150</sup>.

<sup>150</sup> For consistency with the 2018 WLA / WCA Market Review Decision, only data up to this point is presented in Table 1 and Table 2.

**Table 1: Retail broadband market shares with and without continued WCA (3b) regulation – Q4 2017 data [REDACTED]**

	Eircom		OAOs - dependent on Eircom inputs		Virgin Media		SIRO	
	With	Without	With	Without	With	Without	With	Without
<b>Nationally</b>	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
<b>UA</b>	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
<b>Regional Area</b>	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
- RA1	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
- RA2	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED

4.40 Table 2 presents an analysis of the current distribution of subscriber shares by platform, with a split according to technology (CGA and NGA) and from a national level to the areas as proposed in the Consultation. This data has been sourced from the 2018 WLA / WCA Market Review Decision.

**Table 2: Subscriber shares by platform – Q4 2017 data [REDACTED]**

	Eircom platform		All fixed broadband Eircom, SIRO, Virgin Media	
	NGA	CGA	NGA	CGA
<b>Nationally</b>	REDACTED	REDACTED	REDACTED	REDACTED
<b>UA</b>	REDACTED	REDACTED	REDACTED	REDACTED
<b>Regional Areas</b>	REDACTED	REDACTED	REDACTED	REDACTED
- RA1	REDACTED	REDACTED	REDACTED	REDACTED
- RA2	REDACTED	REDACTED	REDACTED	REDACTED

- 4.41 In response to Eircom's comments regarding a single residential area being covered by multiple exchanges, and these exchanges then being in different geographic areas (see paragraph 4.18), the choice of Eircom exchange areas, as the relevant geographic unit, was discussed in paragraphs 10.150 to 10.155 and Appendix 5 (paragraphs A5.33 to A5.54) of the 2016 WLA / WCA Market Review Consultation. In relation to multiple exchanges covering a single residential area, it was brought to ComReg's attention through bilateral communication with Eircom in February 2018 that some exchange areas can be covered by multiple Eircom exchanges.<sup>151</sup> This occurs where, for example, some cabinets in an exchange area are routed to one exchange / Aggregation Node<sup>152</sup> and some cabinets are routed to a different exchange / Aggregation Node. ComReg does not consider that this materially affects the analysis.
- 4.42 Having reviewed the data available (displayed in Figure 4, Table 1, and Table 2), and considering Eircom and Compass Lexecon's<sup>153</sup> description of how OAOs compete (that is, nationally across a portfolio of services), and also considering cost orientation of most wholesale inputs (and Eircom's discussion of this in its response), ComReg no longer considers that an approach based on a geographic split is the most suitable method to assess bundles in the MST, nor for standalone retail broadband. Instead, an assessment approach which better reflects Eircom's SMP in relevant markets should be adopted – the “*where available*” method.
- 4.43 The effect of this method is that the assessment level will be focused on broadband technology (e.g. CGA and NGA). ComReg considers that the ‘*where available*’ method focussing on bundles/standalone retail broadband using available technology rather than defined geographic areas is more suitable to ensuring that replicability of Eircom's offers by an OAO is realistic. While the geographic areas as originally proposed would be subject to change over time and may end up as entirely NGA (due to copper switch-off, National Broadband Plan, etc.), until then, the geographic area split as originally proposed in the Consultation would permit a cross-subsidy between technologies, albeit separately limited within the UA and RA1. This cross-subsidy could adversely affect an OAO's ability to economically replicate Eircom's offers, unless that OAO had a similar proportion of customers by technology.

<sup>151</sup> Paragraph A 10.84 of the 2018 WLA / WCA Market Review Decision.

<sup>152</sup> Figure 103 in the 16/96 Consultation. An ‘Aggregation Node’ or ‘AGG node’ means a network concentration point for Access Paths.

<sup>153</sup> Provided as part of Vodafone's response to the 2016 WLA / WCA Market Review Consultation.

- 4.44 It is not in the interests of OAOs, and by extension, end-users for the original proposals to continue as OAOs might be unable to economically replicate Eircom's offers. From Eircom's perspective the proposed geographic area split risked creating pricing umbrellas that reduced Eircom's pricing flexibility (see paragraph 4.18), that is, OAOs could set their retail prices at a level below Eircom's retail price knowing that Eircom was unable to match them. Eircom considered that its national pricing strategy meant that Eircom's retail prices were set based on satisfying the highest regulatory assessment level, for example, bundle by bundle at ATC in RA2. Having considered these points ComReg concludes that the proposals as originally envisaged in the Consultation could lead to a sub-optimal outcome by lessening inter-operator competition to the detriment of final consumers and therefore the '*where available*' technology-based split ensures that OAOs compete with Eircom on a level playing field, as it prevents Eircom using margins from one regulated technology (in which it may have limited competitors) to cross-subsidise bundles in the other regulated technology where competition is keener.
- 4.45 The '*where available*' approach removes the need to maintain the LEA/Regional Area list (in relation to bundles) as is currently the case under the 2013 Bundles Decision (as was originally proposed<sup>154</sup>). ComReg consider that the '*where available*' approach suitably represents the remedies being imposed for wholesale inputs (e.g. cost orientation will apply to all wholesale inputs except FTTH). This re-orientation of the assessment addresses Eircom's concerns related to the perceived loss of pricing flexibility due to the split of the LEA into UA and RA1, and Eircom's view that the original proposals were creating a pricing umbrella that could have dampened inter-operator competition. It also ensures that Eircom's national pricing strategy, if it chooses to continue pursuing such a strategy, is not being impinged through a spill-over effect from varying assessment levels e.g. individual bundle offers in RA2 were to be assessed on ATC basis.
- 4.46 Three further points in relation to the '*where available*' method are:

<sup>154</sup> However, Eircom will need to maintain a list of exchanges within the Regional WCA Market for the purpose of the CGA MST assessment.

- 4.47 The broadband inputs to the bundles MST will be WLA VUA (POTs or standalone based) for NGA bundles, and WCA Bitstream (POTs or standalone based) for CGA bundles. As WCA Bitstream is proposed for deregulation in the UA there will be no assessment of Eircom's CGA based bundles offered for sale in that market. ComReg does not consider that this will impact on OAOs' ability to compete due to the decline of CGA services nationally (see Figure 4.), particularly in the UA, where [3< ■ ]% of broadband services using the Eircom platform<sup>155</sup> are CGA. OAOs expecting to compete in the UA, are likely to transition over time to NGA services to win or retain customers. This equally applies to Eircom given competition from other platforms (SIRO and Virgin Media) in this area. Access, non-discrimination, pricing and transparency obligations will remain on WLA CGA inputs, so an OAO continuing to use such inputs (e.g. LLU or Line Share) in the UA will be afforded the protections arising from the regulatory obligations placed on Eircom in respect of its supply of WLA.
- 4.48 The 2018 WLA / WCA Market Review Decision imposes price controls designed to ensure that Eircom does not cause a margin squeeze between FTTH based VUA and FTTH based Bitstream. This ensures that Eircom's NGA FTTH Bitstream pricing cannot undermine OAOs' NGA FTTH bundles or broadband offers. By design, this economic space ensures that the difference between the two methods of broadband access covers the backhaul and usage required to make a VUA-based service equivalent to Bitstream.
- 4.49 In Chapter 5, ComReg details how the separate assessments will be carried out on the two portfolios i.e. the sum of all CGA bundles (and standalone retail CGA broadband) and the sum of all NGA bundles (and standalone NGA retail broadband except for standalone FTTH retail broadband) using Average Total Cost (see Section 5.5). Within the two separate portfolios, assessments will also be carried out on a bundle by bundle basis using LRIC (see Section 5.5). Due to the removal of all but the FTTH retail MSTs for standalone broadband (see paragraphs 10.6 for FTTC based VUA; 10.7 for CGA WLA and 11.6 for FTTC based Bitstream; 11.7 for CGA Bitstream of the 2018 Pricing Decision), standalone broadband - be it CGA or NGA<sup>156</sup> - will be included at the respective portfolio level assessment. This avoids creating a regulatory gap in relation to the replicability by OAOs of Eircom's portfolio of retail services on a forward looking basis.

<sup>155</sup> This value drops to [3< ■ ]% when looking at all platforms – e.g. SIRO, Virgin Media and Eircom.

<sup>156</sup> Except for FTTH standalone broadband.

4.50 The following Tables demonstrate the assessments undertaken currently in the NRT, originally proposed, and the final decision. Table 3 represents the current approach under the NRT, Table 4 presents the Consultation's assessment approach, and Table 5 presents the final 'where available' approach as discussed above.

**Table 3: Current NRT assessment levels**

Area	Bundle by bundle	Portfolio	Inputs <sup>157</sup>
LEA	✓	✓	WCA and WLA either CGA and NGA
Outside the LEA	✓	X	WCA – CGA only

**Table 4: Consultation's proposed assessment level**

Area	Bundle by bundle	Portfolio	Inputs
UA	X	✓	WLA – CGA and NGA
RA1	✓	✓	WCA and WLA – CGA and NGA
RA2	✓	X	WCA – CGA only

**Table 5: Final bundles MST assessment level**

Reach of tests	Bundle by bundle	Portfolio	Inputs
NGA - All areas 'where available'	✓	✓	NGA – WLA
CGA - All except UA	✓	✓	CGA – WCA

### Redactions

4.51 Sky, as summarised in paragraph 4.19, viewed the redaction of Table 4.4 in the Consultation as unjustified. The retail broadband market shares by geographic area is commercially confidential information not of a type usually published in ComReg's QKDRs. The information in the QKDRs is at a national level, whereas that in Table 4.4 of the Consultation was on a sub-geographic level (as are Table 1 and Table 2 in this Decision).

<sup>157</sup> For the avoidance of doubt, where relevant, WLR is also included as an input when calculating the WAWNI. The tables focus on just broadband inputs given the new definition of bundles (a bundle has to have a broadband service included to qualify as a bundle for the bundles MST).

<sup>158</sup> Ibid footnote 157

<sup>159</sup> Ibid footnote 157.



### Data collection

4.52 Eircom, as summarised in paragraph 4.20, considered that its retail arm did not have sufficient information to update or maintain the listing of exchanges in each geographic area. Eircom, through its wholesale arm, currently requests ComReg to consider additions to the LEA under the 2013 Bundles Decision, and has done so on a number of occasions since that Decision was published. ComReg had intended that this process could be continued. However, given the changes occurring in terms of the technology driven split rather than the geographic area split, the requirement for updates being made to the RA1 from RA2 is removed.

## 4.5 ComReg's final position

4.53 ComReg considers that the '*where available*' approach is similar in effect to the consulted approach where different bundles MSTs were proposed for UA, RA1, and RA2. All of Eircom's bundles, except for those sold in the UA using CGA inputs, will still be assessed, but as outlined above, as the portfolios will strictly be CGA or NGA, there will be no cross subsidy between CGA and NGA bundles. As discussed in paragraphs 4.42 to 4.49, ComReg considers that this method better reflects the competitive conditions and should provide a better outcome to consumers.

4.54 Compared to the proposals in the Consultation (e.g. UA and RA1), the '*where available*' approach removes the ability for cross-subsidy from CGA based broadband bundles to NGA based broadband bundles. It removes any potential pricing umbrella and provides pricing flexibility dynamically rather than waiting for the (as proposed in the Consultation) RA1 list to be updated.

4.55 ComReg considers that assessing Eircom's bundles using the '*where available*' approach instead of through the defined UA, RA1, and RA2 ensures that consumer interests are best served when sustainable competition is possible.

## Chapter 5

# 5 Components of the MST

## 5.1 Overview

- 5.1 Chapter 5 of the Consultation detailed ComReg's preliminary views in relation to what is necessary to ensure that Eircom is compliant with an obligation not to cause a margin squeeze between the retail prices of the bundles it offers and the costs of those bundles. The chapter discussed cost benchmarks, retail costs (including standards for such costs), costs of wholesale inputs, costs of unregulated services, and other costs.
- 5.2 Consideration was also given as to the level of assessment to apply (i.e. bundle-by-bundle or portfolio level). ComReg in addition proposed details for the margin squeeze calculations for the various geographic areas.
- 5.3 ComReg discussed the use and calculation of the average customer life ("**ACL**"). ComReg gave its views for the handling of a case-by-case assessment of a bundle's reasonableness. Other possible options for the MST were also put forward. Finally ComReg provided its views on how to handle retention offers when testing for margin squeezes.
- 5.4 This chapter summarises ComReg's position in the Consultation and its reasoning. It then assesses the points raised by respondents to the various questions posed in the Consultation. ComReg then goes through the impact of changes made to the obligations for the bundles MSTs. Finally ComReg presents its conclusions and the reasoning behind those conclusions.

## 5.2 Summary of Chapter 5 of the Consultation

- 5.5 ComReg proposed that a MST should be carried out using Eircom's revenues on a monthly basis and including the costs that an OAO would incur to replicate, as appropriate, an Eircom bundle or portfolio of bundles. The aim of the proposed tests was to determine the replicability of Eircom bundles. If a bundle or portfolio (of bundles), as applicable, is replicable then in ComReg's view a margin squeeze is not taking place. See paragraphs 5.1 to 5.7 in the Consultation.
- 5.6 ComReg considered that different cost benchmarks could be applied to retail costs associated with narrowband access, calls and broadband. Potential cost benchmarks discussed were EEO, SEO and REO. The reasoning behind having different cost benchmarks was based on varying competitive states by exchange areas (e.g. competition from different infrastructure was more prevalent in the UA) which led to different levels of retail competition. See paragraphs 5.8 to 5.15

in the Consultation.

- 5.7 For narrowband voice access retail costs ComReg proposed using the EEO standard as the cost benchmark, as is used in the current NRT. ComReg cited the increase in competition for voice access as noted by Oxera and Eircom's decrease in market share in both the stand-alone and bundled voice markets as reasons for continuing with the EEO standard. See paragraphs 5.17 to 5.19 in the Consultation.
- 5.8 For retail costs of calls ComReg proposed continuing with the EEO benchmark as is currently used in the NRT. As with narrowband voice access Oxera has noted an increase in the level of retail competition and decreases in Eircom's market share of voice markets. See paragraphs 5.20 to 5.22 in the Consultation.
- 5.9 For the retail costs of broadband services ComReg proposed to align with the approach for the retail costs for standalone retail broadband from the 2017 Pricing Consultation. This approach is based on using a Discounted Cash Flow ('**DCF**') model. The input costs are based on data comprising of both audited regulatory accounts and forecasts from Eircom. The costs are adjusted to reflect those that a new broadband operator would likely incur. ComReg proposed using an EEO benchmark for the UA. This was based on the provisional findings from the 2016 WLA / WCA Market Review Consultation that retail broadband is competitive in that area. To align with the benchmarks being used for standalone broadband ComReg proposed using a mix of EEO and REO in RA1 and REO in RA2. See paragraphs 5.23 to 5.30 in the Consultation.
- 5.10 ComReg discussed the various cost standards that it considered merited consideration for the MST, see paragraphs 5.31 to 5.57 in the Consultation.
- 5.11 ComReg considered that the use of ATC would be appropriate when assessing a portfolio in light of ComReg's statutory objectives to promote entry, competition and protect the interests of end users. ComReg reasoned that ATC enables an operator to recover its efficiently incurred costs. See paragraphs 5.40 to 5.44 of the Consultation.
- 5.12 ComReg was of the preliminary view that the LRIC cost standard could be used for assessing retail costs associated with calls, line rental and broadband when assessed on a bundle-by-bundle basis. ComReg considered that this approach would be more consistent with the approach in competitive markets where operators make decisions on single and marginal bundles based on the avoidable costs of those bundles. See paragraphs 5.45 to 5.46 of the Consultation.
- 5.13 ComReg then proposed how the cost standards should apply to the UA, RA1 and RA2. See paragraphs 5.49 to 5.57 of the Consultation.

- 5.14 ComReg proposed that the MST in the UA be a one-stage test using a portfolio of all bundles in that area and based on ATC. This proposal was based on retail broadband services being competitive in the UA with WLA regulation and other operators being in a strong position to offer differentiated bundles over their own infrastructures.
- 5.15 ComReg proposed that the MST in RA1 be a two-stage test, LRIC at a bundle-by-bundle level and ATC at the portfolio level where the portfolio is all bundles in RA1. ComReg reasoned that in RA1 OAOs, who are as efficient as the incumbent, should be in a position to launch an individual bundle that does not recover its common costs in that area. ComReg also reasoned that Eircom's aggregate of bundles in a portfolio must cover its ATC to ensure OAOs that common costs would be recovered.
- 5.16 ComReg proposed that the MST in RA2 be on a bundle-by-bundle level based on ATC. The reasoning for this was that the competitive restraints in this area did not appear to be as strong as those in the other areas. Any undue flexibility provided to Eircom would not be consistent with the regulatory objective of promoting competition.
- 5.17 ComReg proposed that promotions and discounts be included in the MST and that the costs of these in a bundle in a particular exchange area be recovered from that bundle over its lifetime. See paragraphs 5.58 to 5.59 in the Consultation.
- 5.18 ComReg then discussed wholesale input costs in the MST in Section 5.6, paragraphs 5.60 to 5.95 of the Consultation. ComReg noted that in order for a bundle not to cause a margin squeeze it must cover the costs faced by an OAO seeking to replicate that bundle.
- 5.19 ComReg put forward that, as in the NRT, the cost of the wholesale network input in a MST in an exchange area should reflect the actual usage of wholesale network inputs in that area. For the UA and RA1 this requires the use of WAWNIs as different network inputs may be available to replicate a bundle. For RA2 ComReg considered that there is usually no variety in wholesale products available to replicate bundles and hence no need to construct weighted averages of wholesale network inputs. See paragraphs 5.61 to 5.62 of the Consultation.
- 5.20 ComReg proposed to continue with the calculation of separate WAWNIs for CGA and NGA services. This is based on ensuring that the WAWNIs are reflective of the average wholesale input costs incurred by an efficient operator to replicate CGA and NGA services. See paragraph 5.62 of the Consultation.
- 5.21 ComReg described what inputs would typically make up the CGA and NGA WAWNIs. See paragraphs 5.63 to 5.67 of the Consultation.

- 5.22 ComReg proposed to use the same approach to construct WAWNIs as in the current NRT. This was proposed so that WAWNI values would reflect the proportions of wholesale inputs being used by OAOs in the UA and RA1. The proposal entailed using the prices of the different Eircom wholesale access products weighted by their percentage usage and calculated both by exchange area and by service type (CGA and NGA). See paragraphs 5.69 to 5.75 of the Consultation.
- 5.23 ComReg described when it might not be appropriate to allow a downwards-only adjustment<sup>160</sup> to a WAWNI. ComReg described why it is necessary for the WAWNI calculations to be kept up to date. ComReg discussed monitoring the causality of movements in the WAWNI and from time to time seeking inputs from OAOs regarding actual wholesale input usage. ComReg laid out steps that could be taken in the case of bulk migrations. ComReg also pointed out the necessity for Eircom to ensure the underlying WAWNI information is not available to its Retail arm. See paragraphs 5.76 to 5.81 of the Consultation.
- 5.24 ComReg cited some of the arguments used previously in favour of allowing a downward adjusting only WAWNI. ComReg then outlined some of the impacts of a downward adjusting only WAWNI and came to the preliminary view that maintaining this is not justified. See paragraphs 5.82 to 5.84 of the Consultation. ComReg then asked in Question 8 if respondents agreed with the proposed removal of downward only adjustments to the WAWNI.
- 5.25 ComReg described how backhaul costs for broadband are derived. ComReg stated its understanding of Eircom not being able to apportion wholesale bandwidth at peak hour to individual retail bundles and thus backhaul charges are only available on an aggregate basis. ComReg recommended that Eircom apply the aggregate backhaul charge when assessing individual bundles. A bundle would not fail using this test but negative results would indicate to ComReg which bundles need to have further analysis. ComReg stated that underlying traffic speeds would have to be continuously updated to ensure that the costs faced by OAOs are up to date. See paragraphs 5.85 to 5.90 of the Consultation.
- 5.26 ComReg considered that in RA2 the level of competition absent regulation would be very low and that any excessive flexibility provided to Eircom could force OAOs onto a loss-making trajectory. ComReg considered that the level of flexibility provided by the proposed tests in the UA and RA1 was not appropriate for RA2. See paragraphs 5.91 to 5.93 of the Consultation.
- 5.27 ComReg was of the preliminary view that the MST should reflect all other applicable wholesale costs that are applicable to an Eircom retail bundle. Where

<sup>160</sup> Under the NRT, the WAWNIs would either be less than or equal to the current WAWNI.

there are known future changes in wholesale input costs ComReg considered that these could be used where new bundles are proposed for release or special offers are being proposed for existing bundles. ComReg made the point that bundles would still have to pass the MST based on actual costs. See paragraphs 5.94 to 5.95 of the Consultation.

- 5.28 In paragraphs 5.96 to 5.98 of the Consultation ComReg gave its preliminary view of how mailbox costs should be handled.
- 5.29 ComReg gave its view as to why it considered that LRIC is the most appropriate cost standard to apply to unregulated services in a bundle. ComReg also discussed why and when it could consider the use of Average Avoidable Cost ('**AAC**') on a case by case basis. ComReg stated that the onus is on Eircom to ensure that it is compliant with the appropriate cost standard. ComReg noted that it would be able to request additional financial statements from Eircom to prove that it is covering the costs related to unregulated services. See paragraphs 5.99-5.104 of the Consultation.
- 5.30 ComReg discussed the merits of conducting a MST on a bundle by bundle basis versus on an aggregated basis i.e. a portfolio of bundles. ComReg also considered using a combination of bundle by bundle and portfolio MSTs. See paragraphs 5.106 to 5.111 of the Consultation.
- 5.31 ComReg came to the preliminary view that a one-stage portfolio MST should be used in the UA. The portfolio would include all bundles with CGA and NGA WLA inputs and the cost standard would be ATC. This would take into account the level of retail competition in the UA and give pricing flexibility to Eircom. ComReg did not consider a one-stage portfolio MST suitable for RA1 and RA2 due to the risk of cross-subsidisation from double-play to triple-play bundles. For RA1 ComReg proposed a two-stage MST with the first stage based on bundle by bundle MSTs on a LRIC basis and the second stage based on a portfolio MST on an ATC basis. ComReg considered that in RA2 a bundle by bundle approach should be used as the majority of competitors rely on CGA Bitstream from Eircom to provide bundles. See paragraphs 5.112 to 5.118 of the Consultation.
- 5.32 ComReg discussed cross-subsidies in bundles containing unregulated products in paragraphs 5.119 to 5.129 of the Consultation. ComReg recognised that the addition of unregulated services to a bundle may be welfare enhancing if cross subsidies are permitted from the regulated elements of the bundle. ComReg proposed allowing a cross-subsidy from the margin available on the regulated element(s) of the bundle. ComReg then proposed how the MSTs should take into account cross-subsidies so as to ensure replicability by OAOs. ComReg was also of the opinion that positive margins on unregulated products should not be used to cross-subsidise a dual-play assessment.

- 5.33 ComReg gave its preliminary view of the proposed details of the MSTs for the different areas in Sections 5.8 and 5.9. These sections describe the revenue and cost components to be used on a monthly basis for the proposed MSTs in the UA, RA1 and RA2. ComReg also proposed that if a bundle fails a MST that ComReg would carry out a general assessment of the reasonableness of the bundle and could possibly conclude that Eircom did not breach its obligations.
- 5.34 ComReg discussed Average Customer Life ('**ACL**') of a bundle in Section 5.10 of the Consultation. ComReg explained that the ACL is a key component of a MST as it is used to amortise costs such as promotional discounts. ComReg then went through how it sought information from operators to be used to calculate ACL on bundles. ComReg explained its preliminary view as to why data from Eircom be included in the estimate of ACL. ComReg then proposed that an ACL of 42 months be used.
- 5.35 In Section 5.11 of the Consultation ComReg went through its preliminary views on conducting a case-by-case assessment of a bundle's reasonableness. ComReg considered that even if a bundle appears to fail the MST pre-launch there may be a number of aspects that are appropriate to take into account in assessing the bundle. ComReg said that in exceptional circumstances it might assess other factors such as retail efficiencies, bundle specific customer lifetimes and competitive assessment. For example evidence of retail efficiencies associated with a bundle once included in calculations might mean the bundle passes the MST. A longer ACL associated with a bundle might also mean the bundle passes the MST. As part of a competitive assessment ComReg also proposed to assess the impact on competing operators including the ability to enter and or remain in the market.
- 5.36 In Section 5.12 ComReg discussed other possible options for revision to the MST. ComReg gave its preliminary views on the following scenarios: when an Eircom bundle is in response to a competitor's bundle; if a different test is warranted when a bundle is found unreasonable post launch; whether monthly positive margins can be carried forward; and the handling of promotions and promotional discounts and discretionary opt-ins.
- 5.37 ComReg covered the use of retention offers and opt-ins in Section 5.13. ComReg put forward two possible methods for taking account of retention offers. The "as and when" method would be used to cost retention offers for the MST as they occurred. The second method would be to predict usage of retention offers at the time of bundle launch and include their costs from launch. ComReg's preliminary view was that the "as and when" method was the more accurate means of ensuring the replicability of a bundle.

## 5.3 Summary of responses received

5.38 In this section, ComReg provide a synopsis of the responses received to the Consultation. The non-confidential version of the responses have been published and are available as a separate annex to this Decision.

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

5.39 Three responses were received in response to Question 7. One respondent, ALTO, agreed with the proposed cost benchmarks for retail costs to be included in the bundles MST<sup>161</sup>. Eircom agreed with the proposals in relation to calls and line rental, but disagreed with the proposals for broadband, and Vodafone disagreed with the use of EEO for broadband.

5.40 Eircom<sup>162</sup> agreed with the use of EEO for call and line rental, however disagreed<sup>163</sup> with ComReg's preliminary views regarding the appropriate cost benchmarks to use for broadband costs. Eircom agreed with the use of EEO in the UA but said that ComReg failed to justify fully the proposed cost benchmarks, and that for RA1 and RA2 the proposed operator cost benchmarks (mixture of EEO and REO in RA1, and REO in RA2) are inconsistent with the competition issues identified.

5.41 Eircom although agreeing with the use of EEO in the UA, disagreed<sup>164</sup> with the methodology for doing so as described in the Consultation, as it was too simplified. Eircom then provided reasoning based on its view that the "*Urban WCA Market and the WCA retail market*" are competitive, so the use of EEO is consistent with competition law and aligns with the 2013 EC Recommendation. Eircom also provided<sup>165</sup> reasons as to why a higher cost benchmark would be inappropriate based on the national retail market shares of other operators, and that due to low barriers to geographic expansion in the retail market and the presence of large multinational broadband providers that an alternative cost benchmark is contrary to ComReg's statutory obligations and is also unwarranted.

<sup>161</sup> ALTO response to the Consultation paragraph A.7.

<sup>162</sup> Eircom response to the Consultation paragraph 139.

<sup>163</sup> Eircom response to the Consultation paragraph 140.

<sup>164</sup> Eircom response to the Consultation paragraphs 141 to 142.

<sup>165</sup> Eircom response to the Consultation paragraphs 143 to 144.



- 5.42 Eircom<sup>166</sup> disagreed with the cost benchmarks proposed for RA1 and RA2, and stated that ComReg is acting *ultra vires* in seeking to impose retail controls under the Access Regulations. Eircom also said that ComReg's proposal to use an REO cost benchmark is inconsistent with ComReg's statutory obligations and is also inconsistent with competition law and the 2013 EC Recommendation.
- 5.43 Eircom further discussed<sup>167</sup> its disagreement with the proposed cost benchmarks to apply to the retail costs for broadband through the following points outlined below:
- 5.44 Eircom<sup>168</sup> said that the Oxera recommendations<sup>169</sup> which ComReg relies on to support its preliminary views do not appear to be based on meaningful market analysis. Eircom said that a Three Criteria Test has not been carried out for the retail market. Eircom also stated that the development of infrastructure competition is irrelevant as wholesale regulation exists to address any regulatory concerns in this area.
- 5.45 Eircom<sup>170</sup> considered that the proposed use of SEO was based on "*insufficient reasoning*" and lacked cogent reasoning as to why providing economic space for small scale less efficient new entrants was appropriate. Eircom also said that ComReg had provided no evidence-based reasoning as to why certain costs should be adjusted for SEO costs or why certain costs would be higher depending on the particular exchange.
- 5.46 Eircom discussed<sup>171</sup> and provided a table to illustrate its view that its competitors have no issues replicating Eircom's headline prices or promotions.
- 5.47 Eircom considered<sup>172</sup> that ComReg has not provided any evidence that the commercial strategies of existing competitors require additional headroom depending on the area in which they are competing.
- 5.48 Eircom stated<sup>173</sup> that ComReg has not acknowledged that an SEO cost benchmark artificially raises prices above the competitive level and so leads to reductions in static efficiency, and due to the maturity of the retail market a higher cost benchmark than required also impacts long-term dynamic efficiencies.

<sup>166</sup> Eircom response to the Consultation paragraphs 145 to 146.

<sup>167</sup> Eircom response to the Consultation paragraphs 147 to 159.

<sup>168</sup> Eircom response to the Consultation paragraph 147.

<sup>169</sup> ComReg Document 17/51a

<sup>170</sup> Eircom response to the Consultation paragraph 148.

<sup>171</sup> Eircom response to the Consultation paragraph 149.

<sup>172</sup> Eircom response to the Consultation paragraph 150.

<sup>173</sup> Eircom response to the Consultation paragraph 151.

- 5.49 Eircom argued<sup>174</sup> that ComReg had not taken into account the 2016 WLA / WCA Market Review Consultation and the views of interested parties (in particular Virgin Media and Vodafone) that the market is subject to national retail pricing. Eircom said that using inconsistent retail costs would lead to higher prices in the UA – due to having to pass a more stringent test in the RA1 and RA2 for the same product.
- 5.50 Eircom said<sup>175</sup> that ComReg had provided no evidence to support its preliminary view that it is appropriate to depart from the 2013 EC Recommendation of using EEO when imposing NGA remedies. Eircom considered that failing to use EEO leads to higher than required retail prices for consumers, which has a detrimental effect on competition and also “*serve to impede efficient commercial investment in infrastructure services*”. Eircom concluded<sup>176</sup> that using EEO is consistent with the 2013 EC Recommendations on NGA services, avoids complex assessments of economies of scale, is proportionate relative to competition in the market, removes pricing umbrellas, provides regulatory and legal certainty, and supports efficient investment.
- 5.51 Eircom agreed<sup>177</sup> with ComReg’s preliminary view that a DCF model is appropriate to use in the retail MSTs, but considered<sup>178</sup> that ComReg had failed to consult on the parameters of a DCF model in both the Consultation and the 2017 Pricing Consultation and considered that ComReg could not simply carry forward a DCF Model from previous regulatory decisions.
- 5.52 Eircom<sup>179</sup> also said that a DCF model should be based on an existing EEO and not a new entrant offering exclusively standalone retail broadband products. Eircom considered<sup>180</sup> that due to the increase in competition ComReg should not place undue regulatory restriction on Eircom’s retail arm.
- 5.53 Eircom also considered<sup>181</sup> that in relation to the DCF model parameters such an operator should be assumed to maintain its market share over the DCF period.

<sup>174</sup> Eircom response to the Consultation paragraph 152.

<sup>175</sup> Eircom response to the Consultation paragraph 153.

<sup>176</sup> Eircom response to the Consultation paragraph 154.

<sup>177</sup> Eircom response to the Consultation paragraph 155.

<sup>178</sup> Eircom response to the Consultation paragraph 156.

<sup>179</sup> Eircom response to the Consultation paragraph 157.

<sup>180</sup> Eircom response to the Consultation paragraph 158.

<sup>181</sup> Eircom response to the Consultation paragraph 159.

- 5.54 Vodafone disagreed<sup>182</sup> with the use of EEO in the MST. Vodafone said REO should be used as it would be more realistic of other operators' costs. Vodafone expected<sup>183</sup> ComReg to reconcile retail costs used in MSTs to Eircom's statutory accounts. Vodafone considered that the business case for investment in fixed services is extremely challenged.
- 5.55 Vodafone said<sup>184</sup> that the application of EEO should be considered very carefully as an overly aggressive approach could result in the lowering of retail prices by Eircom to such an extent that other operators could not compete profitably.
- 5.56 Vodafone stated that the assumed retail broadband market share of 25%, as is used as a parameter in the DCF model to derive the retail costs for broadband, is too high<sup>185</sup>.
- 5.57 Vodafone urged<sup>186</sup> ComReg to consider the inclusion of a profit margin when assessing replicability at the portfolio level as otherwise there may be unintended consequences of reducing profit margins across the industry as it encourages Eircom, as a vertically integrated operator, to price bundles based on solely recovering its costs and refocussing its search for profits at the wholesale level.

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

- 5.58 Four responses were received in response to Question 8. Three respondents agreed with the proposal to remove the downward only adjustment to the WAWNI (ALTO, Sky and Vodafone), while one respondent disagreed (Eircom).
- 5.59 ALTO agreed<sup>187</sup> with the proposed removal and said that operators' actual costs were higher following significant price increases thus affording Eircom time to potentially exploit an artificially low WAWNI.

<sup>182</sup> Vodafone response to the Consultation paragraph 36.

<sup>183</sup> Vodafone response to the Consultation paragraph 37.

<sup>184</sup> Vodafone response to the Consultation paragraph 40.

<sup>185</sup> Vodafone response to the Consultation paragraph 41.

<sup>186</sup> Vodafone response to the Consultation paragraph 42.

<sup>187</sup> ALTO response to the Consultation paragraph A.8.

- 5.60 Eircom disagreed<sup>188</sup> with the proposed removal of the downward only adjustment to the WAWNI. Eircom said<sup>189</sup> that the WAWNI should not increase as a result of infrastructure competition as this would restrict Eircom's pricing flexibility in a competitive market. Eircom said the only circumstance where the WAWNI should increase is where wholesale prices are increasing. Eircom recommended<sup>190</sup> that a target wholesale mix based on efficient usage of Eircom's wholesale products be set so as to promote the interests of fair competition and produce tangible consumer results.
- 5.61 Eircom disagreed with an MST for the UA, but said<sup>191</sup> that if a retail MST is imposed for the UA then a target efficient mix of wholesale inputs should be introduced in that area immediately. Eircom cross referenced its response to Question 9 which outlined that WLR/POTS inputs should be ignored as, on a forward looking basis, WLR/POTS will be replaced by Managed VoB.
- 5.62 Sky agreed<sup>192</sup> with the proposed removal. Sky noted that Eircom increased VUA charges in September 2016 and said that because of the downward only WAWNI the NRT failed to capture the very concept it was supposed to.
- 5.63 Sky considered<sup>193</sup> that there are no grounds for not publishing the WAWNI and that ComReg's case for not publishing is nebulous at best.
- 5.64 Vodafone agreed<sup>194</sup> with the proposed removal. Vodafone also was of the opinion that WAWNI adjustments be done infrequently and transparently.
- 5.65 Vodafone considered<sup>195</sup> that the way in which Eircom's retail arm has advanced sight of the monetary value of the WAWNI creates an opportunity to offer more aggressively priced bundles.
- 5.66 Vodafone added<sup>196</sup> that the proposed removal prevents Eircom from being in the position where it could use an input in the MST that is lower than what other operators have to use.

### **5.3.3 Question 9: Do you agree with the proposed Margin Squeeze Test to be implemented in the Urban Area? Please give a detailed response with supporting data where appropriate to**

<sup>188</sup> Eircom response to the Consultation paragraph 160.

<sup>189</sup> Eircom response to the Consultation paragraph 161.

<sup>190</sup> Eircom response to the Consultation paragraph 162.

<sup>191</sup> Eircom response to the Consultation paragraph 163.

<sup>192</sup> Sky response to the Consultation paragraph 10.

<sup>193</sup> Sky response to the Consultation paragraph 11.

<sup>194</sup> Vodafone response to the Consultation paragraph 43.

<sup>195</sup> Vodafone response to the Consultation paragraph 44.

<sup>196</sup> Vodafone response to the Consultation paragraph 45.

**support your view.**

- 5.67 Three responses were received to Question 9. One respondent agreed that the proposed MST in the UA was appropriate (ALTO), Vodafone and Eircom disagreed with the proposals for varying reasons.
- 5.68 ALTO agreed<sup>197</sup> with ComReg's proposed MST for the UA.
- 5.69 Eircom did not comment directly on the question as set out, but provided a discussion on why it disagreed<sup>198</sup> with a MST where wholesale prices are cost-oriented.
- 5.70 Eircom considered<sup>199</sup> that it is incorrect that WLR/POTS be included in a WAWNI in the UA as on a forward looking basis it will be replaced by Managed VoB.
- 5.71 Eircom reiterated<sup>200</sup> its view that the WAWNI in the UA should immediately be based on a target wholesale mix of efficient usage of Eircom's wholesale products.
- 5.72 Eircom asked<sup>201</sup> ComReg to set out the logic, from the perspective of a reseller, why, if the MST is done at the aggregate portfolio level in the UA, it is not also done at that level in the individual regions. Eircom concluded that any MST assessment "*should be at the wider Broadband market portfolio level*". Eircom disagreed<sup>202</sup> with the proposed limitation on cross-subsidies.
- 5.73 Vodafone disagreed<sup>203</sup> with both the Urban WCA Market from the 2016 WLA / WCA Market Review Consultation, and also<sup>204</sup> the proposed single portfolio bundles MST for the UA. Vodafone considered that a single portfolio MST gives unfair advantage to the incumbent through cross-subsidies between bundles in the UA, but also from unregulated to regulated services. Vodafone recognised that the advantage is "*balanced somewhat*" by the use of ATC at the portfolio level and that OAOs who have invested in their own infrastructure could compete.
- 5.74 Vodafone suggested<sup>205</sup> that if a portfolio MST is to be used it should reflect the industry mix so as to "*provide better alignment*" of costs being incurred by operators and reduce Eircom's ability to game the bundle / portfolio mix to its advantage.

<sup>197</sup> ALTO response to the Consultation paragraph A.9.

<sup>198</sup> Eircom response to the Consultation paragraph 179.

<sup>199</sup> Eircom response to the Consultation paragraph 180.

<sup>200</sup> Eircom response to the Consultation paragraph 182.

<sup>201</sup> Eircom response to the Consultation paragraph 183.

<sup>202</sup> Eircom response to the Consultation paragraph 184.

<sup>203</sup> Vodafone response to the Consultation paragraph 46.

<sup>204</sup> Vodafone response to the Consultation paragraphs 47 and 48.

<sup>205</sup> Vodafone response to the Consultation paragraph 49.

- 5.75 Vodafone again recommended<sup>206</sup> that all costs modelled in the MST should reconcile back to the (Eircom's) regulated accounts.
- 5.76 Vodafone stated<sup>207</sup> that a 42 month ACL is inappropriate for the UA and that 42 months does not reflect the customer lifetimes being experienced by operators other than Eircom.
- 5.77 Vodafone also stated<sup>208</sup> that unregulated services should be included in any MST on the same basis as regulated products, and reiterated<sup>209</sup> that a profit margin element should be included as otherwise the MST would not accurately reflect the industry's true retailing costs thereby damaging retail competition.

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

- 5.78 Three responses were received in response to Question 10. One respondent, ALTO, agreed that the MST proposals for RA1 were appropriate, Vodafone overall agreed but recommended certain changes, Eircom disagreed.
- 5.79 ALTO<sup>210</sup> agreed with ComReg's proposed MST for RA1.
- 5.80 Eircom disagreed<sup>211</sup> with a MST where wholesale prices are cost-oriented, and were concerned about "*de facto retail regulation*" due to the bundles MSTs (as previously raised in response to Questions 2 - 5).
- 5.81 Eircom considered<sup>212</sup> that there was a disjoint between ComReg's stated objective for replicability and the way in which the test has been constructed – cross-subsidies between elements of the bundle can only occur in one direction (regulated to unregulated).
- 5.82 Eircom said<sup>213</sup> that the use of a portfolio approach in RA1 was welcomed, but in its view the portfolio as proposed does not go far enough in providing pricing flexibility and a single national portfolio test is more appropriate or at the very minimum there should be a single portfolio test in the Regional WCA Market.

<sup>206</sup> Vodafone response to the Consultation paragraph 50.

<sup>207</sup> Vodafone response to the Consultation paragraphs 51 and 52.

<sup>208</sup> Vodafone response to the Consultation paragraph 53.

<sup>209</sup> Vodafone response to the Consultation paragraph 54.

<sup>210</sup> ALTO response to the Consultation paragraph A.10.

<sup>211</sup> Eircom response to the Consultation paragraph 185.

<sup>212</sup> Eircom response to the Consultation paragraphs 187.

<sup>213</sup> Eircom response to the Consultation paragraph 189.

- 5.83 Eircom considered that a bundle-by-bundle test in RA1 is inappropriate<sup>214</sup>, as amongst other reasons, it provides too much weight by ComReg to the theory that retail competition in its entirety would be harmed if individual offers did not pass a MST; regulatory remedies should not be concerned about the exclusion of operators offering just a small subset of products<sup>215</sup>; a single national price reduces marketing spend and avoids customer confusion<sup>216</sup>; and the bundle by bundle approach restricts Eircom's flexibility in allocating fixed indirect and common costs<sup>217</sup>.
- 5.84 Eircom reiterated its point in relation to its response to Question 7<sup>218</sup>; that an inconsistent retail MST between areas will result in higher prices in RA1 due to the requirement of Eircom to pass a more severe retail MST for the exact same retail products as in RA2.
- 5.85 For bundles which include FTTH broadband Eircom stated<sup>219</sup> *"the application of the test is wholly inconsistent with the 2013 EC Recommendation"*. Eircom submitted that the 2013 EC Recommendation considered that the replicability test "... applies for flagship offers only and not every offer using narrowly defined "portfolios" which each must recover ATC as proposed by ComReg. ComReg has failed to take the utmost account of the 2013 EC Recommendation and has not addressed why it believes it appropriate to deviate from the recommendation".
- 5.86 Vodafone<sup>220</sup> agreed in principle with many of the elements of the proposed MST but did not agree with cross-subsidisation and the use of portfolio in RA1. Vodafone considered that the portfolio bundle mix should reflect the industry and not just Eircom's bundle and product mix – so as to better align costs faced by all retail operators, and reduce the ability of Eircom to game the bundle / portfolio mix to its advantage. Vodafone restated that unregulated services should be included in any MST on a similar basis as regulated services. Vodafone was of the opinion that not all costs were being explicitly reflected and that, combined with the exclusion of a profit margin, could thus not accurately reflect Eircom's, or the industries true retailing costs and as such would impact on competition.

### 5.3.5 Question 11: Do you agree with the proposed Margin Squeeze Test to be implemented in Regional Area 2? Please give a detailed response with supporting data where appropriate to

<sup>214</sup> Eircom response to the Consultation paragraphs 190.

<sup>215</sup> Eircom response to the Consultation paragraphs 191.

<sup>216</sup> Eircom response to the Consultation paragraphs 192.

<sup>217</sup> Eircom response to the Consultation paragraphs 193.

<sup>218</sup> Eircom response to the Consultation paragraph 194.

<sup>219</sup> Eircom response to the Consultation paragraph 196.

<sup>220</sup> Vodafone response to the Consultation paragraphs 55 and 56.

### support your view.

- 5.87 Three responses were received in response to Question 11. One respondent, ALTO, agreed that the MST proposals for RA2 were appropriate, Vodafone overall agreed but recommended certain changes, Eircom disagreed.
- 5.88 ALTO<sup>221</sup> agreed with ComReg's proposed MST.
- 5.89 Eircom disagreed<sup>222</sup> with a MST where wholesale prices are cost-oriented, and were concerned about "*de facto retail regulation*" due to the bundles MSTs (as previously raised by it in response to Questions 3, 4, 5, and 10). Eircom considered<sup>223</sup> that the bundle-by-bundle approach is inappropriate as ComReg has "*placed too much weight on the theory that retail competition would be harmed if individual offers did not pass a MST*".
- 5.90 Vodafone agreed<sup>224</sup> in principle with the proposed MST but suggested certain changes - to use an industry bundle / product mix rather than Eircom's and use the industry ACL rather than Eircom's (see Vodafone's responses to Questions 9 and 10).

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

- 5.91 Three responses were received in response to Question 12. Eircom partially agreed, Vodafone and ALTO disagreed with ComReg's proposed ACL.
- 5.92 ALTO<sup>225</sup> submitted that ComReg should consider changing to contract life/term rather than bundle or customer life. As an alternative ALTO suggested using the average lifetime of customers that have joined in the last 4 years.
- 5.93 ALTO<sup>226</sup> said that the provisional view fails to reflect the significant shift in the pricing structure of retail bundles, and the behaviour of customers that are taking up new bundles in practice. ALTO also said that ComReg's current approach for estimating ACL is flawed because it includes Eircom's legacy customer base in the calculation.

<sup>221</sup> ALTO response to the Consultation paragraph A.11.

<sup>222</sup> Eircom response to the Consultation paragraph 197.

<sup>223</sup> Eircom response to the Consultation paragraph 198.

<sup>224</sup> Vodafone response to the Consultation paragraphs 57 and 58.

<sup>225</sup> ALTO response to the Consultation paragraph A.12, and introductory section.

<sup>226</sup> ALTO response to the Consultation introductory section page 5.



- 5.94 Eircom said<sup>227</sup> that an ACL longer than 42 months would be more appropriate for NGA services due to fibre being a more compelling product.
- 5.95 Eircom also said<sup>228</sup> that any review of the ACL should only be upward adjusting as to do otherwise would be inconsistent with ComReg's obligation to act proportionately. Eircom viewed that it would be disproportionate to make Eircom non-compliant through stricter regulation.
- 5.96 Eircom proposed<sup>229</sup> that, where margins permit and if Eircom deem it commercially prudent to do so, it should have the flexibility to write-off any promotional burden that had already been recovered within the relevant ACL periods. Eircom proposed that there should be two ACL periods, one for CGA (42 months) and one for NGA ([redacted] months). Eircom proposed that to ensure replicability at any given time of Eircom's offers "over a reasonable period" then it would at a minimum include [redacted] months of promotional costs (both on-going and previous promotions). Eircom said it would demonstrate to ComReg with compliance statements including calculations that such costs had been fully recovered. Eircom proposed<sup>230</sup> being able to recover costs of tactical promotions (e.g. coffee coupons, sports jerseys, etc.) in the same manner.
- 5.97 Eircom stated<sup>231</sup> that it is incorrect to say that ACL is tied to the bundle. Eircom said that ACL is not calculated based on a bundle and is not how ComReg described ACLs in paragraphs 5.141 to 5.148 of the Consultation.
- 5.98 Eircom also raised<sup>232</sup> concerns regarding the statement by ComReg in paragraph 5.136 of the Consultation which outlined that Eircom should be mindful of the potential risk arising that promotional costs may not be recovered over a bundle. Eircom's concerns which were subject to redaction were that [redacted]  
[redacted] ].

<sup>227</sup> Eircom response to the Consultation paragraph 203.

<sup>228</sup> Eircom response to the Consultation paragraph 204.

<sup>229</sup> Eircom response to the Consultation paragraph 205.

<sup>230</sup> Eircom response to the Consultation paragraph 206.

<sup>231</sup> Eircom response to the Consultation paragraph 207.

<sup>232</sup> Eircom response to the Consultation paragraph 210.

- 5.99 Vodafone strongly disagreed<sup>233</sup> that the ACL should be 42 months and reflected on incentives an incumbent has in seeking the longest ACL possible so as to provide the incumbent with pricing flexibility. Vodafone considered that it is overly simplistic to assume a fixed ACL over all products and bundles. Vodafone outlined its view of the impact of “excessive” ACLs on up-front discounts that attract new customers.
- 5.100 Vodafone considered<sup>234</sup> that the ACL should be based on what an entrant could reasonably expect to achieve and relate to the group of products/services being included in the MST. Vodafone also said that using Eircom data in isolation creates a bias and strongly suggested that continued use of Eircom data only would be damaging to the market. Vodafone added<sup>235</sup> that it welcomed the plan to engage further with industry to develop a solid data base for the ACL, and recognised the difficulty in gathering robust data.

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

- 5.101 Four responses were received in response to Question 13.
- 5.102 ALTO<sup>236</sup> disagreed as it says the proposal does not provide for regulatory certainty as it invites Eircom to seek to exploit the ambiguity inherent in such a proposal.
- 5.103 Eircom agreed<sup>237</sup> that a case-by-case assessment was appropriate but said it should not be taken at the individual bundle level as it provides too much weight that retail competition would be harmed if an individual offer failed to pass a MST. Eircom suggested that ComReg should also consider the materiality of the bundle and competitor’s pricing should be included in the case-by-case assessment.

<sup>233</sup> Vodafone response to the Consultation paragraphs 59 to 61.

<sup>234</sup> Vodafone response to the Consultation paragraph 62.

<sup>235</sup> Vodafone response to the Consultation paragraphs 63 and 64.

<sup>236</sup> ALTO response to the Consultation paragraph A.13.

<sup>237</sup> Eircom response to the Consultation paragraphs 211 and 212.

- 5.104 Sky disagreed<sup>238</sup> with the preliminary view. Sky said the proposal does not provide regulatory certainty. Failure to pass the MST would give a further opportunity to gain ComReg approval through an arbitrary process that would put a demand on ComReg resources and any decisions may be subject to legal challenge. Sky considered that having a clear test and obligation to pass that test make legal challenge highly unlikely.
- 5.105 Vodafone disagreed with the preliminary view, and shared a number of points on using case-by-case assessments<sup>239</sup>.
- 5.106 Vodafone said<sup>240</sup> that any adjustments to retail efficiencies should be identified by Eircom in their pre-release submission.
- 5.107 Vodafone also said<sup>241</sup> that if a bundle fails the MST then, if the model is performing correctly, there should be no change in status based on a case-by-case assessment.
- 5.108 Vodafone considered<sup>242</sup> that strict enforcement of the MST prior to launch is the least disruptive approach. Vodafone stated that if bundles fail an MST test but are allowed on a case-by-case basis there is a risk this will retrospectively be viewed as the incorrect decision only after the damage has been done in the market. Vodafone recommended that thresholds and criteria for case-by-case assessments should be published.
- 5.109 Vodafone raised<sup>243</sup> the point that there would appear to be a risk of Eircom challenging all bundles failing an MST if case-by-case judgement is allowed.
- 5.110 Vodafone reiterated<sup>244</sup> the importance of ComReg proactively monitoring all bundles post launch to compare pre-launch assumptions and post-launch outcomes, and considered<sup>245</sup> that suspending a bundle would incentivise strict adherence to the MST.
- 5.111 Vodafone said<sup>246</sup> that if ComReg implements this it should only be allowed on a highly limited basis and that any decision by ComReg to grant an exception should be notified to OAOs with the rationale and supporting data for the decision.

### 5.3.8 Question 14: Do you agree or disagree with ComReg's

<sup>238</sup> Sky response to the Consultation paragraph 13.

<sup>239</sup> Vodafone response to the Consultation paragraphs 65 to 71.

<sup>240</sup> Vodafone response to the Consultation paragraph 65.

<sup>241</sup> Vodafone response to the Consultation paragraph 66.

<sup>242</sup> Vodafone response to the Consultation paragraph 67.

<sup>243</sup> Vodafone response to the Consultation paragraph 68.

<sup>244</sup> Vodafone response to the Consultation paragraph 69.

<sup>245</sup> Vodafone response to the Consultation paragraph 70.

<sup>246</sup> Vodafone response to the Consultation paragraph 71.

**proposals in respect to other possible adjustments (detailed in Section 5.12) to the MST? Please give a detailed response with supporting data where appropriate to support your view.**

- 5.112 Three responses were received in response to Question 14.
- 5.113 ALTO<sup>247</sup> agreed with ComReg's proposals.
- 5.114 Eircom said<sup>248</sup> that ComReg has not updated its thinking regarding the nature of retail competition. Eircom also said<sup>249</sup> that ComReg "*has entirely ignored the fact that, as identified in its own market analysis consultation 16/96, the retail market is national*". Eircom stated that it does not have the economies of scale and scope across the components of bundles that others are unlikely to be able to match. Eircom said that efficient operators who have or are capable of reaching scale are in all regions.
- 5.115 Eircom stated<sup>250</sup> that the competitive assessment should be undertaken at an overall national portfolio level. Eircom reflected that if the MST was "*appropriately defined*" then there should be no need to apply a different test post-launch if a bundle is found to be unreasonable, but ComReg would need to undertake an "*appropriate competitive assessment*".
- 5.116 Eircom considered<sup>251</sup> it appropriate that margins cannot be "banked" / carried forward, and considered that a one month compliance period is too short to provide any meaningful assessment of a bundle's replicability.
- 5.117 Eircom considered<sup>252</sup> it appropriate that where it is anticipated that only a proportion of customers will avail of a discount that the MST should reflect the proportionate cost of this promotion.
- 5.118 Vodafone agreed<sup>253</sup> with ComReg's proposals. Vodafone said that ComReg should provide more clarity regarding the competitive assessment process and criteria to be used.

<sup>247</sup> ALTO response to the Consultation paragraph A.14.

<sup>248</sup> Eircom response to the Consultation paragraph 213.

<sup>249</sup> Eircom response to the Consultation paragraph 214.

<sup>250</sup> Eircom response to the Consultation paragraphs 215 and 216.

<sup>251</sup> Eircom response to the Consultation paragraph 217.

<sup>252</sup> Eircom response to the Consultation paragraph 218.

<sup>253</sup> Vodafone response to the Consultation paragraph 72.

- 5.119 Vodafone considered<sup>254</sup> that Eircom should not be allowed launch a bundle without proving that the bundle passes an MST, as otherwise market and consumer harm can occur if an MST failing bundle is offered and then has to be withdrawn. Vodafone said that Eircom should not be allowed to bank margins for use across other bundles.
- 5.120 Vodafone suggested<sup>255</sup> that ComReg give consideration to using a lower ACL (to better reflect ACLs across industry) when calculating recovery of promotional offers. Vodafone considered that customers who are likely to receive promotional offers are those who value shop more frequently and as such have lower ACLs.
- 5.121 As regards opt-ins Vodafone recommended<sup>256</sup> that a mechanism for monitoring take up of the offers should be established to ensure that the forecasts made by Eircom are reasonable. In the event of the volume of opt-ins being higher than forecast and thus causing the MST to fail, Eircom should be obliged to remove the offer immediately.
- 5.122 Vodafone considered<sup>257</sup> that any promotions or discounts should be part of the MST, and the same should apply in the case of a bundle being in response to a competitor's bundle (if unreasonable post launch, then it should be deemed to be causing a margin squeeze). Vodafone stated that a bundle must recover its costs over the lifetime of the customer and promotional offers should be included in the calculation.

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

- 5.123 Four responses were received in response to Question 15. Three respondents welcomed the proposal as appropriate (ALTO, Sky, and Vodafone) but two of these (ALTO and Sky) sought further clarity, while one respondent disagreed (Eircom).
- 5.124 ALTO<sup>258</sup> welcomed ComReg's recognition of the importance of accounting for retention promotions in the MST. ALTO also said that as a matter of logic a retention offer entails a new contract. ALTO queried how ComReg planned to allocate a value to retention promotions and sought greater transparency on such a methodology.

<sup>254</sup> Vodafone response to the Consultation paragraph 73.

<sup>255</sup> Vodafone response to the Consultation paragraph 74.

<sup>256</sup> Vodafone response to the Consultation paragraphs 75 and 77.

<sup>257</sup> Vodafone response to the Consultation paragraphs 76.

<sup>258</sup> ALTO response to the Consultation paragraph A.15.

- 5.125 Sky<sup>259</sup> welcomed the recognition of accounting for retention promotions in the MST. Sky were unclear how ComReg planned to allocate a value to retention promotions and asked for greater transparency in this regard.
- 5.126 Sky recommended that the acquisition promotion (treated as a cost) is duplicated for the percentage of customers seeking retention promotions at end of contract life and treated as an upfront cost recovered over the customer life for the purposes of the MST.
- 5.127 Eircom disagreed<sup>260</sup> that there should be a different treatment for retention offers from other promotions and considered that ComReg failed to identify the nature of the problem that it is trying to address through the proposal. Eircom considered<sup>261</sup> that ComReg's proposal ("*defining strict recovery of costs based on the re-contract duration*") does not allow<sup>262</sup> for the "*two broad commercial considerations for offering retention promotions*" and that this should merit consideration by ComReg. Eircom considered<sup>263</sup> that retention offers are pro-consumer and pro-competitive, and recognised that customers subject to such offers are free to engage with the market to seek the best offer.
- 5.128 Eircom outlined its view of two commercial considerations when deciding to offer retention promotions to customers. These were future cross-selling opportunities to such retained customers, and the incremental cost in making such offers. For future revenues<sup>264</sup>, Eircom considered that a firm (an operator) is in all scenarios (with possibly the exception of dunning<sup>265</sup>) better off by retaining a customer than losing a customer, once the entire broadband base is also at least recovering its "LRAIC+" costs.
- 5.129 Eircom considered<sup>266</sup> that the incremental costs of retaining an existing customer are "*significantly different*" to gaining a new customer, and presented a table outlining a number of cost categories (e.g. sales, billing, backhaul, marketing, etc.) based on Eircom's view of whether these are sunk or incremental costs – all bar one (billing) were viewed as entirely or majority sunk costs. The net effect of this view from Eircom would be to create two retail costs for retail broadband that would depend on whether a bundle had received a retention offer or not. Eircom considered this represented an unnecessary burden on Eircom.

<sup>259</sup> Sky response to the Consultation paragraph 14.

<sup>260</sup> Eircom response to the Consultation paragraphs 219 to 220.

<sup>261</sup> Eircom response to the Consultation paragraph 226.

<sup>262</sup> Eircom response to the Consultation paragraphs 222 to 223.

<sup>263</sup> Eircom response to the Consultation paragraph 226.

<sup>264</sup> Eircom response to the Consultation paragraphs 224 to 226.

<sup>265</sup> Making repeated and insistent demands on a customer to repay a debt.

<sup>266</sup> Eircom response to the Consultation paragraph 227.

- 5.130 Eircom suggested<sup>267</sup> that on balance using a divisor of 42 months over which to spread retention costs, while not scientific, provides a reasonable alternative methodology, and also reflects that the retained customer may stay beyond the re-contracted period, which was not present in ComReg's proposal.
- 5.131 Eircom furthered<sup>268</sup> its discussion on retention promotions by suggesting that ComReg's proposals: would be detrimental to competition; over-emphasised the impact on competition of retention offers on individual bundles; and created a disproportionate regulatory burden on Eircom as its billing system does not separately identify retention offers versus other offers.
- 5.132 Vodafone<sup>269</sup> agreed with ComReg's preliminary view on the "as and when" approach. Vodafone said that the "as and when" approach is more attuned to the realities of the market and that ComReg needs to approve retention offers in advance of them being launched.

### 5.3.10 Other Issues:

- 5.133 This Section contains other issues raised by respondents in relation to Chapter 5. These were – backhaul charges; regional handover; notional VoB charge; double counting in cost stacks, cross-subsidy limitation and the use of ATC versus LRIC.

#### *Backhaul charges:*

- 5.134 Eircom said<sup>270</sup> that the appropriate cost to take into account for broadband usage charges should be based on a calculated floor cost rather than Eircom's wholesale price for backhaul.
- 5.135 Sky commented<sup>271</sup> on backhaul charges as discussed in the 2017 Pricing Consultation, and noted that this Decision and the 2018 Pricing Decision should be explicit on the approach to backhaul charges (e.g. calculated through a linear or logarithmic methodology), and that it should be consistent with the 2018 Pricing Decision.

#### *Regional handover:*

<sup>267</sup> Eircom response to the Consultation paragraph 228.

<sup>268</sup> Eircom response to the Consultation paragraphs 229 to 232.

<sup>269</sup> Vodafone response to the Consultation paragraph 78.

<sup>270</sup> Eircom response to the Consultation paragraph 164.

<sup>271</sup> Sky response to the Consultation paragraph 12.

- 5.136 Eircom considered as part of its response to the proposed operator cost benchmark<sup>272</sup> that Eircom's regional handover wholesale product should have been factored into the Consultation, in terms of the decisions of Eircom's competitors to expand their VUA footprint and potential impacts on competition.
- 5.137 Eircom said that ComReg had given no consideration to the impact that the Regional Handover product will have on the commercial investment decisions of OAOs and the inter-relationship of this with competition from OAOs.

*Notional VoB charge:*

- 5.138 Sky considered<sup>273</sup> that the notional VoB charge included in the WAWNI should be published. Sky noted that this cost is notional and is not a confidential cost based on Eircom's own costs.

*Double counting in cost stacks:*

- 5.139 Sky asked<sup>274</sup> ComReg to explain in greater detail ComReg's concerns regarding adjusting for costs that may be counted twice within the SB-WLR and VUA cost stack.

*Cross-subsidies*

- 5.140 Eircom in response to Question 9 disagreed<sup>275</sup> with the proposed single direction limitation on cross-subsidies in the bundles MSTs.

*Use of ATC versus LRIC*

- 5.141 Eircom did not agree that ATC is the appropriate standard to use in the test<sup>276</sup>. Eircom stated that Oxera's assertion<sup>277</sup> that the recovery of ATC influences expansion and entry decisions in the market is misaligned to the retail test proposed<sup>278</sup>. Eircom said that the requirement that ATC is recovered within small piecemeal portfolios (and bundle by bundle in RA2) is not representative of the entry and exit considerations of operators in a national retail market.
- 5.142 Eircom added that the ATC cost standard is also inconsistent with the 2013 EC Recommendation<sup>279</sup>.

<sup>272</sup> Eircom response to the Consultation paragraph 150.

<sup>273</sup> Sky response to the Consultation paragraph 8.

<sup>274</sup> Sky response to the Consultation paragraph 9.

<sup>275</sup> Eircom response to the Consultation paragraph 184.

<sup>276</sup> Eircom response to the Consultation paragraph 165

<sup>277</sup> ComReg Document 17/51a

<sup>278</sup> Eircom response to the Consultation paragraph 166

<sup>279</sup> Eircom response to the Consultation paragraph 167



- 5.143 Eircom said that the ATC cost standard does not provide Eircom with the “*pricing flexibility required in a dynamic competitive retail market*”<sup>280</sup>. Eircom further said that it is required to recover the exact same average of fixed indirect and common cost across different portfolios in RA1 and on an individual bundle basis in RA2. Eircom argued that a large proportion of its downstream costs are a fixed indirect and common cost for both individual retail broadband offers and even within individual broadband portfolios. Eircom also said that by increasing the economic space that would naturally occur absent regulation ComReg is directly transferring welfare from consumers to industry.
- 5.144 Eircom argued that its downstream costs are incurred on the basis of promoting a broad portfolio of retail offers<sup>281</sup> and that, in that sense, the service increment considered is retail broadband (both CGA and NGA) including standalone and bundled offers.
- 5.145 Eircom recommended that ComReg consider the merits of a LRAIC cost standard at the individual portfolio level<sup>282</sup>. Eircom said that at the individual portfolio level an overall positive margin recognises that the firm’s activities are making a contribution to its fixed and indirect common costs.
- 5.146 In addition Eircom said that this does not mean that fixed indirect and common costs cannot be recovered through retail pricing within each portfolio but that any ex-ante allocation rule for distributing fixed indirect and common costs between portfolios of CGA and NGA retail products or between regions is merely arbitrary<sup>283</sup>.
- 5.147 Eircom said that applying an ATC test to each and every bundle is putting a “*disproportionate regulatory burden on it and is providing its competitors with unnecessary and unwarranted margin within individual WCA portfolios*”<sup>284</sup>.
- 5.148 Eircom argued that applying a higher cost standard than LRAIC at the individual portfolio level raises the prospect of chilling competition over the next regulatory pricing period<sup>285</sup>. Eircom stated that a higher cost standard than required could lead to sub-optimal and inefficient entry into the market<sup>286</sup>. Eircom said that a full ATC cost standard in piece-meal portfolios does not replicate as far as possible the commercial pricing decisions and outcomes of competitive markets<sup>287</sup>

<sup>280</sup> Eircom response to the Consultation paragraph 168

<sup>281</sup> Eircom response to the Consultation paragraph 169

<sup>282</sup> Eircom response to the Consultation paragraph 170

<sup>283</sup> Eircom response to the Consultation paragraph 171

<sup>284</sup> Eircom response to the Consultation paragraph 172

<sup>285</sup> Eircom response to the Consultation paragraph 173

<sup>286</sup> Eircom response to the Consultation paragraph 174

<sup>287</sup> Eircom response to the Consultation paragraph 175

5.149 Eircom said that ComReg should design a retail MST which recognises dynamic pricing decisions and that once LRAIC+ costs are recovered at the “*overall Broadband bundle portfolio level then ComReg’s concerns regarding market entry and expansion decisions ... are appropriately addressed*”<sup>288</sup>.

## 5.4 ComReg’s assessment of Respondent’s views

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

5.150 The proposed use of EEO/REO and REO (and SEO where REO is not available) cost benchmarks for broadband retail costs was based on the preliminary decisions in the 2017 Pricing Consultation.

5.151 Further to Eircom’s response, as summarised in paragraphs 5.40 to 5.49 (and 5.51), relating to the use of varying cost benchmarks for the retail costs for broadband depending on the geographic area, ComReg has decided that EEO should be used as the cost benchmark for the retail costs for FTTH broadband. The rationale for moving to an EEO cost benchmark for the retail costs of broadband is provided in paragraphs 10.119 and 11.58 of the 2018 Pricing Decision which for ease of reference is provided here as follows:

*10.119 – “...As the standalone retail margin squeeze obligation for FTTH based VUA relates only to those exchanges in the footprint of the Urban WCA Market, which by definition have a significant presence of other operators, an EEO cost base should be applied. In the case of the WLA Market in those exchanges associated with the footprint of the Urban WCA Market, ComReg notes that there are other large broadband providers competing with Eircom. The use of an EEO cost base in this case is appropriate because competitors in exchanges within the Urban WCA Market are likely to have similar cost functions to Eircom, and similar size of customer base, and should therefore benefit from similar economies of scale. In addition, the EEO cost base is in line with the 2013 Non-Discrimination Recommendation, which states that “Downstream costs are estimated on the basis of the costs of the SMP operator’s own downstream business (EEO test).” Therefore, ComReg considers that an EEO cost base remains appropriate for the retail margin squeeze test for standalone FTTH based VUA in the footprint associated with the Urban WCA Market. Please also see paragraph 10.126.”; and*

<sup>288</sup> Eircom response to the Consultation paragraph 176

11.58 – “...ComReg considers that the EEO cost base should be applied in the test. ComReg notes that other operators in the Regional WCA Market could realise similar economies of scope and scale to those of Eircom. ComReg notes that moving to an EEO cost base also means consistency with the 2013 Non-Discrimination Recommendation, which specifies that, ideally, an EEO cost base should be applied.”

5.152 Similarly for the cost benchmarks for the retail costs of CGA and FTTC based broadband products, (and noting that these are no longer subject to MSTs when sold singly and are not therefore considered further in the 2018 Pricing Decision), ComReg however needs to ensure that other operators, using Eircom wholesale broadband inputs, are able to replicate Eircom CGA and NGA based portfolios which would include retail broadband products sold singly (e.g. FTTC or CGA) and in bundles. ComReg considers that with the move to assessing margin squeezes on bundles based on WLA inputs on a national ‘where available’ basis and margin squeezes on bundles based on WCA inputs on a regional basis and considering the market share of the main competitors it makes sense to evaluate retail broadband costs using an EEO benchmark. ComReg agrees with the observations from Oxera regarding the appropriateness of an EEO cost benchmark’s use throughout the bundles MST, as rationalised by Oxera in Section 3.3 of its paper:

*“First, it reflects the nature of competition in the retail markets, where eircom is primarily competing with well-established OAOs that have been gaining market share and are present across the country. Therefore, the OAOs should benefit from similar economies of scale.*

*Second, eircom competes with some OAOs that offer a range of products similar to those of eircom, and should therefore benefit from similar economies of scope.*

*Third, the MST is not intended to protect inefficient entry by smaller operators. Given the efficiencies (i.e. economies of scale and scope) that OAOs are in a position to enjoy, the EEO cost benchmark is appropriate.”*

5.153 ComReg has therefore decided that EEO should be used as the cost benchmark for the retail costs for CGA and FTTC broadband. Both CGA and FTTC are well established in the market and hence it makes sense to use Eircom’s regulated accounts to determine the retail costs of broadband (separately for CGA and FTTC), and include this in the bundle by bundle and portfolio assessments as relevant.

- 5.154 ComReg considers that the retail costs for broadband should be sufficiently detailed to enable Eircom to derive a LRIC view and an ATC view of the retail costs for CGA and FTTC broadband. Separately the retail costs for FTTH broadband services shall be determined through a DCF model as specified in the 2018 Pricing Decision (see paragraphs 10.126, 10.128, 11.67, and 11.72).
- 5.155 In reply to Eircom's response, as summarised in paragraphs 5.42 and 5.44, that revisited points raised earlier by Eircom in Questions 1 and 2 (ultra-vires, and a Three Criteria Test) ComReg has addressed these points earlier (see Sections 2.3 and 3.4.1).
- 5.156 Eircom, as summarised in 5.48, said that ComReg had not considered the impact of the SEO cost benchmark. ComReg discussed this in the Consultation in paragraphs 5.9 to 5.15, and, with particular reference to the retail costs for broadband, in paragraphs 5.28 to 5.30 of the Consultation.
- 5.157 ComReg, in response to Eircom's point (summarised in paragraph 5.50), notes that the proposed cost benchmarks were not inconsistent with the 2013 EC Recommendation as in certain circumstances adjustments may be made to the EEO. However, as ComReg has decided that EEO is the appropriate cost benchmark for the retail costs for NGA broadband (see paragraph 5.151 and 5.152) then no further discussion is warranted on this point.
- 5.158 In reply to Eircom's considerations (summarised in paragraphs 5.51 and 5.53), the parameters of the DCF model, insofar as they relate to FTTH broadband (sold singly or in a bundle), are covered in paragraphs 10.126 and 11.67 of the 2018 Pricing Decision and for ease of reference are provided here:

10.126 – “ComReg notes Eircom’s views, as outlined at paragraph 10.91 above, where it considered that ComReg failed to consult on the different operator types that could be used in the DCF Model and in particular where it disagreed that the model should include one-off start-up costs. To clarify, as discussed in Chapter 10 of the Consultation, the current approach in the 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 can be adjusted to reflect the likely costs that a new retail broadband market entrant would incur. As such, the DCF approach includes one-off start-up costs, ongoing fixed and variable operating costs including capital costs and a terminal value. In addition, a number of costs<sup>289</sup> are inflated by an overhead mark-up of 25% to create an additional margin buffer to reflect the likely new retail broadband market entrant mark-up of common costs. In order to derive the total retail costs incurred by a new entrant the above cost categories can be adjusted for scale and scope depending on the chosen operator cost base i.e., REO or SEO. Please see additional details set out in Section 10.4.6 of the Consultation. ComReg considers that the DCF approach set out in the Consultation and described above remains appropriate in the context of FTTH services except for the application of the uplift / mark-up of 25% to certain retail cost categories i.e., Sales, product management and development, help desk and order handling costs. Given ComReg’s Decision to use the EEO cost base (as discussed at paragraph 10.119 above), no further adjustment is required to these specific retail costs. However, the DCF modelling approach remains appropriate given that the demand for FTTH services remains uncertain and the volumes of FTTH to date remain low. The assumption of a new entrant operator also remains valid in the context of the provision of FTTH based VUA services. Please also see ComReg’s views on the use of EEO at paragraph 10.119 above.”

<sup>289</sup> Sales, product management and development, help desk and order handling.

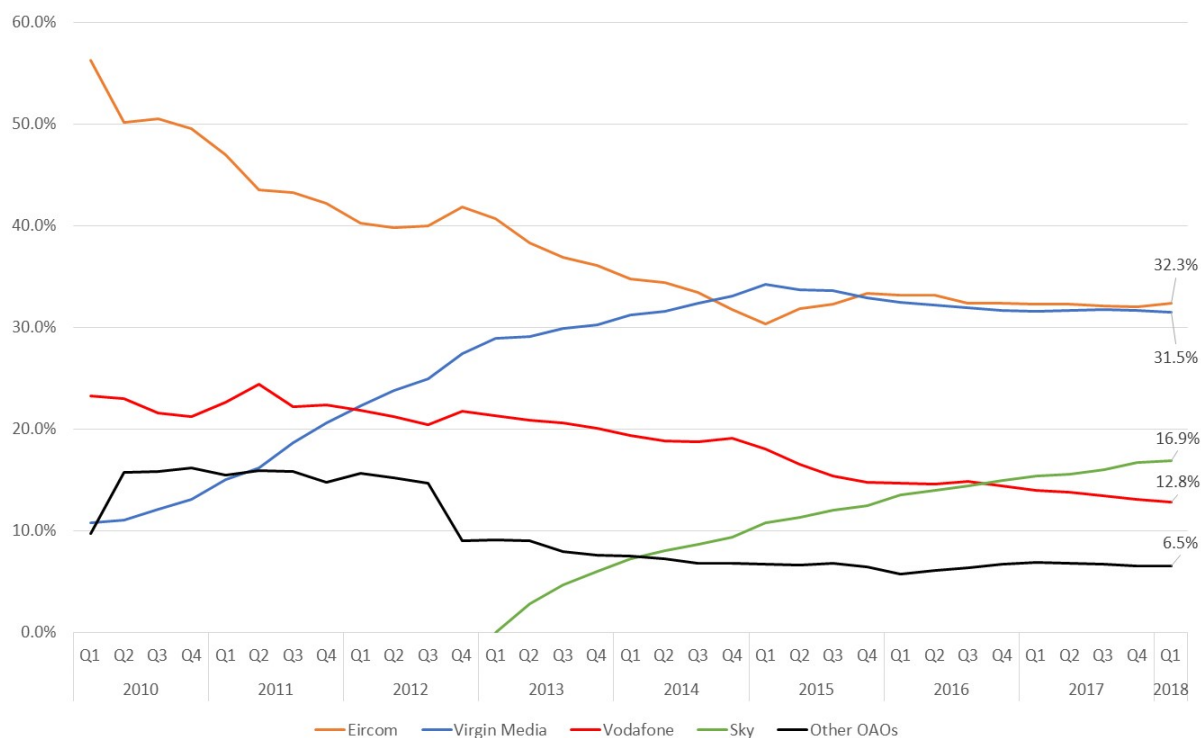
11.67 – *“Eircom argued, as outlined at paragraph 11.46 above, that ComReg had not fully consulted on the different types of operators that can be considered in the DCF model and that it failed to consult on the market share that the operator attains over the life of the model. As set out in Chapter 11 of the Consultation, The current approach in the 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 can then adjusted to reflect the costs that a new retail broadband market entrant would be likely to incur. As such, the DCF approach includes one-off start-up costs, ongoing fixed and variable operating costs including capital costs and a terminal value. In addition, a number of costs are inflated by an overhead mark-up of 25% to create an additional margin buffer to reflect the likely new retail broadband market entrant mark-up of common costs. In order to derive the total retail costs incurred by a new entrant the above cost categories can also be adjusted for scale and scope depending on the chosen operator cost base i.e., SEO or REO. Please see additional details set out in Section 11.4.7 of the Consultation. ComReg believes that the DCF approach described above and as set out in Chapter 11 of the Consultation remains appropriate in the context of FTTH services except for the application of the uplift / mark-up of 25% to certain retail cost categories i.e., Sales, product management and development, help desk and order handling costs. Given ComReg’s Decision to use the EEO cost base (as discussed at paragraph 11.58 above), no further adjustment is required to these specific retail costs. However, the DCF modelling approach remains appropriate given that. The demand for FTTH services remains uncertain and the volumes of FTTH to date remain low. ComReg therefore is of the view that the assumption of a new entrant operator also remains valid in the context of the provision of FTTH services.”*

- 5.159 Vodafone (see paragraph 5.54) made the argument that REO should be used as this would be based on other operator costs. As stated in the Consultation (paragraph 5.13) there is difficulty in getting reliable REO accounts. Vodafone said that it expects ComReg to reconcile retail costs used in MSTs to Eircom’s statutory accounts. ComReg does this at present under the NRT and will continue to do so under the MST. ComReg notes that if the retail costs were set at REO there would be a significant difficulty in reconciling to Eircom’s EEO accounts except to expect that REO costs would be greater than EEO costs.
- 5.160 In reply to Vodafone’s point as summarised in paragraph 5.55, that the use of EEO is an overly aggressive approach, ComReg disagree as discussed in paragraphs 5.151 and 5.152.
- 5.161 ComReg notes Vodafone’s statement (see paragraph 5.56) that an assumed market share of 25% is too high. The parameters of the modelling of the retail costs for broadband are as discussed above in 5.158.

5.162 Vodafone, as summarised in paragraph 5.57, considered that a profit margin should be provided for in the bundles MST. ComReg recognises this, and considers that the requirement to have a non-negative margin in order to pass a portfolio MST using ATC ensures economic replicability.

5.163 In relation to requiring a specific profit value or percentage of revenue as advocated by Vodafone, on each bundle which Eircom sell or the portfolios of Eircom’s sales, ComReg consider that an explicit value (or percentage) is not merited. As the MST requirements are similar to the NRT, ComReg does not consider that there is a need to be prescriptive about profit other than confirming that economic replicability is ensured through a non-negative margin. The market shares evident in the market under the current NRT as shown in Figure 5 below suggest that the absence of an explicit profit margin has not been detrimental to OAOs performance.

**Figure 5: Bundles market shares to Q1 2018**



Source: ComReg (2018). QKDR – data as of Q1 2018.

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

- 5.164 Both ALTO (see paragraph 5.59) and Sky (5.62) said that following significant price increases Eircom was able to exploit an artificially low WAWNI. At the time of the price increases, the WAWNI used in the NRT was adjusted by Eircom to account for the increase in input prices. Vodafone agreed (see paragraph 5.66) and noted that the proposed removal prevents Eircom from using lower priced inputs than other operators use. ComReg considers that removing the downward only adjustment to the WAWNI ensures that Eircom would not be in a position to exploit an artificially low WAWNI.
- 5.165 Contrary to Sky's suggestion (see paragraph 5.63) ComReg remains of the opinion that it would not be appropriate or necessary to publish the WAWNIs as it could encourage price following and reduce the dynamism of the market.
- 5.166 Eircom as summarised in paragraph 5.60, did not agree with the proposed removal of the downward only adjustment to the WAWNI(s). As stated in the Consultation the wholesale cost components within the MST are intended to reflect those an OAO would incur to replicate an Eircom bundle<sup>290</sup>. If the weighted mix of wholesale inputs used by OAOs is such that the WAWNI(s) increases then this needs to be reflected in the MST.
- 5.167 Eircom, as summarised in paragraph 5.61, said that if a retail MST is imposed for the UA then ComReg should ensure that a target efficient mix of wholesale inputs be introduced in this area immediately. ComReg considers that wholesale inputs should be based on their use by OAOs. Where it has been established that industry plans to move to more efficient inputs within a reasonable time-frame then a WAWNI can be used which takes this migration into account.
- 5.168 In reply to Vodafone's point, as summarised in paragraph 5.65, ComReg considers it appropriate that Eircom's downstream arm be notified of changes to the monetary value of the WAWNI at the time of the QKDR update from Eircom to ComReg. Eircom's downstream arm needs to have up-to-date WAWNIs in order to ensure that it continues to comply with the obligation not to cause a margin squeeze.

<sup>290</sup> The Consultation, paragraph 5.3



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

- 5.169 Eircom, as summarised in paragraph 5.69, did not agree with a MST where wholesale prices are cost-oriented. ComReg remains of the view that a bundles MST is required even where wholesale inputs are cost-oriented as outlined previously in paragraph 2.54 and Section 3.4.1.
- 5.170 ComReg does not agree with Eircom's statement, as summarised in paragraph 5.70, that WLR/POTS should not be included in a WAWNI but replaced by VoB. As ComReg proposed in the Consultation<sup>291</sup>, when it becomes clear (e.g. known future bulk migrations as per paragraph 5.79 from the Consultation) that OAOs will migrate from POTS based NGA services to NGA VoB services then the appropriate WAWNI will be based on the wholesale price of NGA VUA including the appropriate margin for VoB. In reply to Eircom's statement, as summarised in paragraph 5.71, as the MSTs are assessed monthly the wholesale input costs in the tests should be based on the costs using the most recently available information.
- 5.171 Eircom, as summarised in paragraph 5.72, requested ComReg to set out the logic as to why, if the MST is done at the aggregate portfolio level in the UA, why it is also not done at that level in the individual regions (RA1 and RA2). This was discussed in paragraphs 5.106 to 5.118 in the Consultation and Section 5.3.2 of the Oxera Report<sup>292</sup> (created as part of the Consultation). ComReg did not consider that a one-stage portfolio MST was appropriate for RA1 or RA2 as it would provide Eircom with more pricing flexibility than was appropriate based on the level of retail competition observed at the time of the consultation.
- 5.172 In relation to Eircom's view of limiting cross-subsidies as summarised in paragraph 5.72, ComReg agree that this has merit and assesses this further in Section 5.4.10.

<sup>291</sup> The Consultation document, paragraph 5.66.

<sup>292</sup> ComReg Document 17/51a

- 5.173 Vodafone, as summarised in paragraph 5.73, disagreed with the Urban WCA market from the 2016 WLA / WCA Market Review Consultation. This has been discussed earlier in ComReg's response to Question 1 (see Section 2.3). In reply to Vodafone's response to the bundles proposals set out in the Consultation for the UA, that the use of a single portfolio gives rise to an unfair advantage to the incumbent by enabling cross-subsidies within the portfolio and from regulated / unregulated services, the UA portfolio as proposed in the Consultation was based on the assessment of the competitive conditions within the exchanges that were identified as being in the Urban WCA market at that time – e.g. sustainable competition had developed sufficiently to enable deregulation of WCA inputs there. For the purposes of the bundles MST ComReg's proposals reflected those preliminary findings. Vodafone also recognised that the proposed pricing flexibility in the single portfolio test was balanced by the use of ATC.
- 5.174 Vodafone, as summarised in paragraph 5.74, said that if a portfolio mix is used it should reflect the "industry mix". ComReg considers that this could lessen competition amongst operators as there would effectively be no incentive to differentiate or innovate through offers. ComReg also considers that an industry mix would be impractical (e.g. gathering every operators price and bundle data) and indeed the ability to meaningfully interact about pre-launch assumptions for bundles with Eircom would be highly subjective (e.g. how could Eircom's bundles be assessed against others from the industry).
- 5.175 Vodafone, as summarised in paragraph 5.75, said that all costs modelled in the MST should be reconciled back to Eircom's regulated accounts. This is presently done and will be continued.
- 5.176 Vodafone, as summarised in paragraph 5.76, considered that the ACL of 42 months is inappropriate. Please see Section 5.4.6 for further discussion of this point.
- 5.177 ComReg does not agree with Vodafone, as summarised in paragraph 5.77, that unregulated services be included in any MST on the same cost basis as regulated products. As stated in the Consultation, paragraph 5.100, *'for unregulated services in a bundle..., ComReg considers that as these unregulated services represent markets where competition has evolved sufficiently that an approach similar to competition law is warranted. Consequently, ComReg considers that LRIC is the most appropriate cost standard when assessing the costs which need to be covered by the revenue for these services when sold in a bundle/portfolio.'*

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

- 5.178 In response to Eircom's consideration, as summarised in paragraph 5.80, that the bundles MST is "de facto retail regulation", please see Sections 2.3 and 3.4.1 of this document.
- 5.179 Eircom's concern, as summarised in paragraph 5.81, that a disjoint exists between the bundle MST's aims and the proposed tests has, insofar as the cross-subsidies element within a bundle, been addressed in Section 5.4.10.
- 5.180 In relation to Eircom's observation that the pricing flexibility, as proposed for RA1 did not go far enough (see paragraph 5.82), ComReg, as discussed in Section 4.4 has amended the bundles MST for the Regional WCA Market to one that uses both a bundle by bundle and portfolio assessment levels.
- 5.181 In response to Eircom's point as summarised in paragraph 5.83, ComReg does not agree with Eircom that a bundle-by-bundle test in RA1 as proposed was inappropriate. ComReg proposed a test using the LRIC cost standard. ComReg considers that a test at the LRIC level ensures that new bundle offers are made at levels that can be replicated by other operators dependent on Eircom wholesale products. The bundle-by-bundle level test also limits Eircom's ability to cross-subsidise from customers on older bundles to customers on new bundles.
- 5.182 ComReg recognises Eircom's point that, as summarised in 5.84, for bundles using the same broadband inputs, there could be, in the presence of a decision to follow a national pricing strategy by that operator, a possibility that due to a higher WAWNI in RA1 retail prices are higher than necessary in the UA. This outcome, is though, predicated on an operator so choosing to decide to use a national pricing strategy rather than a more localised pricing approach.

- 5.183 Eircom said (as summarised in paragraph 5.85) that for FTTH-based bundles the application of the test is wholly inconsistent with the 2013 EC Recommendation and the appropriate operator cost benchmark is EEO. ComReg does not agree with this interpretation of the 2013 EC Recommendation. As per the 2013 EC Recommendation, “NRAs may make adjustment for scale to the SMP operator’s downstream costs in order to ensure that economic replicability is a realistic prospect”. The 2013 EC Recommendation states, “A LRIC+ model should be used to calculate the incremental cost (including sunk costs) and to add a mark-up for common costs related to the downstream activities”. ComReg defined ATC in the Consultation as follows: “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.” In practice the LRIC+ approach is similar to ATC, since both approaches include a portion of common costs. The LRIC+ approach is more often used in a bottom-up model, while ATC is more referred to when calculating costs from accounting data. Given the above ComReg considers that it is following the 2013 EC Recommendation as regards cost standards.
- 5.184 ComReg considers that the approach as proposed in the Consultation provides appropriate pricing flexibility to Eircom rather than a narrow interpretation of the 2013 EC Recommendation, which also prohibits cross-subsidies from other services. Oxera discussed this in their report<sup>293</sup>: “Another approach (the proposed approach) is to tailor the design of the proposed bundles MST in a way that provides eircom with more pricing flexibility in exchange areas and service bundles for which it faces relatively more competition. Such an approach would automatically reflect changing market dynamics without the need to continually redefine the test.” As Eircom are aware the most popular NGA input used is currently FTTC, this would therefore be the flagship according to the 2013 EC Recommendation as it also provides NRAs with the ability based on national competitive circumstances to “vary the test based on specific inputs identified as the most relevant.”
- 5.185 Eircom also referred to the 2013 EC Recommendation’s discussion of flagship products for FTTH bundles. Eircom considers that the replicability test applies to flagship NGA offers only. ComReg disagree with this interpretation, and would counter that the 2013 EC Recommendation instead provides discretion as to what products should be assessed. ComReg would direct Eircom’s attention to the Annex of the 2013 EC Recommendation. Part (iv) of Annex 2 to the 2013 EC Recommendation states that:

<sup>293</sup> Oxera Report, 17/51a, p.26, first two paragraphs

*“NRAs should identify flagship products on the basis of their current and forward-looking market observations, in particular taking account of their relevance for current and future competition. This should include an assessment of retail market shares in terms of the volume and value of products based on NGA regulated wholesale inputs and, where available, advertising expenditure. Flagship products are likely to be offered as a bundle. .... In addition, NRAs should consider whether a particular retail product, which may not be among the most relevant retail products of the SMP operator, is particularly attractive to alternative operators that may focus on a certain niche or lower quality retail products. NRAs may decide to include such a product among the flagship products.”*

5.186 ComReg for simplicity and understanding of the requirements to avoid margin squeezes on a bundle (not just an individual wholesale product assessment) has decided that a test on each bundle and on a weighted average portfolio is appropriate. The ComReg solution avoids requiring Eircom to forecast future volumes and values for their own standalone retail products but also those of OAOs, and setting tests at a tighter level than in the Consultation (e.g. no cross-subsidy).

5.187 In relation to Vodafone’s points, as summarised in paragraph 5.86, ComReg discussed the use of an industry bundle mix. Please refer to paragraph 5.174 for ComReg’s response. Vodafone re-stated that unregulated services should be included in the MST on the same basis as regulated services and were concerned that not all costs were being included correctly for unregulated services in the portfolio level assessment. ComReg, as outlined in paragraph 5.100 of the Consultation, considers that unregulated services are ones where competition has developed sufficiently to enable an approach similar to competition law to be adopted. This means that the costs included for unregulated services should just be the LRIC costs, not LRIC+ or ATC of unregulated services. Finally, in relation to Vodafone’s point about the exclusion of a profit margin means that retailing costs are not truly reflected, please refer to paragraph 5.162 for ComReg’s assessment and response.

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

5.188 In response to Eircom’s consideration, as summarised in paragraph 5.89, that the bundles MST is “de facto retail regulation”, please see Sections 2.3 and 3.4.1 of this document.

- 5.189 Eircom considered (as summarised in paragraph 5.89) that the bundle-by-bundle test in RA2 to be inappropriate, as it puts too much weight on the theory that retail competition in its entirety would be damaged if individual offers did not pass a MST. ComReg disagrees with this. The aim of a bundle-by-bundle test is to ensure that competitors would be able to replicate profitably an Eircom bundle using regulated wholesale inputs from Eircom. A bundle-by-bundle test is needed where competitors to Eircom are dependant to a large extent on wholesale inputs from Eircom.
- 5.190 Vodafone's recommendation, as summarised in paragraph 5.90, of using an industry wide bundle and product mix rather than reliance on Eircom's have been discussed earlier (see paragraph 5.187).

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

- 5.191 ComReg does not agree with ALTO's suggestion (see paragraph 5.92) that contract life be used instead of ACL. From the data provided by operators (as part of the SIR issued prior to the Consultation in order get information regarding customers' lifetime) it is clear that the average lifetime of customers on individual bundles is greater than contract length. ComReg considers that special offers in headline prices can be recovered over this average lifetime. To restrict recovery of price discounts to the contract period would limit Eircom's commercial freedom unnecessarily and reduce competition in the marketplace. From the data provided by operators ComReg has not seen any evidence of the average lifetime of customers joining in the last 4 years being less than 42 months. ComReg has examined data from Eircom and other operators. This includes recent bundles from Eircom. Again ComReg has not seen evidence that the average lifetime of a customer is less than 42 months, with or without taking Eircom's customer base of older bundles into account.
- 5.192 Eircom said (see paragraph 5.94) that an ACL longer than 42 months would be more appropriate for NGA service [3< ] months. Based on the inputs received from industry through the SIR, and Eircom's confidential data submission as part of its response, ComReg does not see any justification to use a longer ACL for NGA services at present; particularly given that the source of such data was only from one operator, rather than the industry's data which was assessed as part of the Consultation.

- 5.193 Eircom, as summarised in paragraph 5.95, appear to have misunderstood ComReg's plans to engage further with industry to develop reporting on the ACL in saying that any review of the ACL should be upward adjusting only. As stated in paragraph 5.100 in the Consultation the intention is to ensure that for future reviews a solid base of data is available. For the avoidance of doubt, for the period of this decision, there will be no change in the ACL.
- 5.194 ComReg considers it reasonable that, where margins permit, Eircom should have the flexibility to write-off a promotional burden earlier than the entire life of the bundle. Under the NRT a promotional burden lasts the entire lifetime of a bundle. The cost of a promotion per customer is based on the expected ACL on a bundle. Some customers will leave earlier than the ACL and some customers will stay longer. Customers who stay past the ACL in effect cover part of the discount of the customers who leave before the ACL. In order to be able to write off promotional burdens earlier than the entire life of a bundle Eircom would need to assure ComReg that it can track this on a monthly basis in a reliable manner. The quarterly monitoring statements proposed in Chapter 7 of the Consultation and discussed in Chapter 7 of this document should assist Eircom in determining this. The same early write-off could be applied to tactical promotions (e.g. free tablets or TVs).
- 5.195 ComReg considers that the monitoring statement should ensure that promotion costs are recovered, and that the continued use of 42 months as the ACL value over which to spread promotions is appropriate.
- 5.196 In response to Eircom's comments on average customer lifetimes as summarised in paragraph 5.97, ComReg considers that the term can be applied to different scenarios. For the purpose of assessing replicability of a particular bundle the ACL on that bundle is used to calculate the amount of margin required per month per customer on average to cover promotional costs. If a customer leaves a bundle yet remains with an operator that customer is no longer contributing to recovering the promotional costs of the bundle. In paragraphs 5.141 to 5.148 in the Consultation ComReg discussed how it analysed the data provided by operators for the purposes of estimating ACL. ComReg assessed the data in different ways e.g. by bundles of services in order to try to determine ACL figures.
- 5.197 ComReg does not agree with Eircom's concerns (as summarised in paragraph 5.98) regarding the statement from the Consultation (paragraph 5.136) that Eircom should be mindful of the potential risk arising that promotional costs may not be recovered over a bundle. In reply to Eircom's confidential comment ComReg notes: [REDACTED]

- 5.198 For the avoidance of doubt, and as discussed in Chapter 7, ComReg requires Eircom to submit notifications of new or amended bundles (see Section 7.4.1). These notifications are based on estimates of the impact of promotions or price changes. In the case of promotions or similar costs directly attributable to the bundle, Eircom may spread the forecast costs over the ACL (i.e. up to 42 months).
- 5.199 A bundle may fail to attract sufficient customers or margin to ensure its promotions or similar costs attributable to the bundle are recovered at a LRIC level. In that circumstance Eircom would risk being found to be in breach of the obligation not to cause a margin squeeze.
- 5.200 Where compliance with this obligation is not being achieved, as detailed in Section 7.4.2, Eircom is required to notify ComReg immediately of such an occurrence, and Eircom will need to consider solutions to rectify the situation, which may extend to suspending the bundle.
- 5.201 ComReg has decided that in such specific instances where the movement by customers off a particular bundle gives rise to the situation just described (unrecovered costs), and where the revenue generated from those remaining customers is not sufficient to cover (on a LRIC basis) the bundle's existing promotional or other costs, then Eircom shall have the *possibility, subject to ComReg's approval* (which will only be granted where Eircom can justify that all *reasonable* steps to minimise such an outcome were taken based on monitoring the bundle's margin in good time), to recover the shortfall in unrecovered costs on this bundle from the relevant NGA or CGA portfolio of services. In other words Eircom will have to recover the unrecovered costs of this bundle from the relevant portfolio.
- 5.202 Only the revenue specific to the portfolio to which the bundle belongs can be used to cover the ATC of all services sold in that portfolio (e.g. an NGA bundle cannot be bailed out from the CGA portfolio).
- 5.203 In response to Vodafone's comments (see paragraphs 5.99 and 5.100) regarding ACL ComReg wishes to note that it based its assessment of an ACL of 42 months on the information it received from all operators, including OAOs. The assessment also related to the group of products/services being included in the MST. ComReg also had input from operators on customer lifetime prior to the SIRs being issued. None of the information supplied provided robust evidence that a customer lifetime value other than 42 months should be used. ComReg also requested in the Consultation that more information on ACLs be supplied by operators. Just one operator, Eircom, responded, however the data provided was not conducive to determining whether the claims made were valid (see 5.94 to 5.96).



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

- 5.204 Both ALTO (as summarised in paragraph 5.102) and Sky (as summarised in paragraph 5.104) said that the preliminary view from the Consultation would not provide regulatory certainty. ComReg acknowledges these points, but considers that where a bundle does not strictly pass the initial pre-launch assessment, there may, exceptionally, be reasons specific to that bundle (which should be identified and justified by Eircom) as to why it may be acceptable to allow the launch of that bundle.
- 5.205 ComReg agrees with Eircom (see paragraph 5.103) that any case-by-case assessment should take account of a bundle's materiality. However, ComReg does not agree that an assessment of competitors' pricing should be taken into account. Competitors to Eircom (in respect of this particular market) are not subject to regulation and can price at loss-making levels if so desired. To take competitor's pricing into account would amount to indirect regulation.
- 5.206 ComReg does not agree with Eircom (see paragraph 5.103) that a case-by-case assessment should not be at the individual bundle level. ComReg considers that it is precisely at the individual bundle level that a case-by-case assessment prior to launch of that bundle would be carried out. Creating a margin squeeze, at individual bundle level, could harm competition e.g. by stifling competitors abilities to compete on new bundles.
- 5.207 ComReg agrees with Vodafone (see paragraph 5.106) that it would be best to identify retail efficiencies in pre-release submissions.
- 5.208 ComReg does not agree with Vodafone (as summarised in paragraph 5.107) that if the MST model is performing correctly and a bundle fails then there should be no change in status on a case-by-case basis. It should be noted that ComReg stated (in the Consultation) that it might in exceptional circumstances assess other factors were a bundle to fail the initial MST assessment. Even then, in the case of retail efficiencies and bundle specific customer lifetime, there needs to be robust evidence provided by Eircom, which would justify taking these aspects into account for this particular bundle.
- 5.209 ComReg does not agree with Vodafone (as summarised in 5.108) that ComReg should publish thresholds and criteria for case-by-case assessments. As these are case-by-case assessment each case would have to be individually assessed on its merits.

- 5.210 ComReg does not agree with Vodafone (as summarised in paragraph 5.109) and Sky (as summarised in paragraph 5.104) that the possibility of use of a case-by-case assessment would encourage Eircom to challenge all bundles failing a MST to be reviewed on an individual basis. The case-by-case assessment is only intended for exceptional circumstances.
- 5.211 ComReg agree with Vodafone's point as summarised in paragraph 5.110. Eircom is required to pro-actively monitor its compliance with the obligation not to cause a margin squeeze; this is required to be done on an on-going basis, and where non-compliance is found is required to notify ComReg immediately. ComReg through the quarterly monitoring statement will receive confirmation that this is being done. If particular bundles which were subject to the case-by-case assessment are identified as failing the MST post-launch then ComReg will take appropriate action which could require a number of steps e.g. requiring Eircom to suspend sales of that bundle. For the avoidance of doubt if any bundle is not demonstrating compliance with the bundles MST post-launch, then the compliance approach as outlined in Chapter 7 will apply.
- 5.212 ComReg disagree with Vodafone's preference as summarised in paragraph 5.111. If ComReg decides to allow a bundle that fails the pre-launch assessment to continue on the basis of a case-by-base assessment it does not consider it necessary to supply rationale and supporting data to OAOs. If ComReg is satisfied that it is unlikely that harm to competition will occur by approving Eircom's launch of a bundle subject to the case-by-case assessment then ComReg does not see the value in providing extra information to OAOs.
- 5.213 ComReg has considered the responses on the case-by-case assessment and in particular the responses from OAOs, which highlighted a lack of clarity and concerns related to regulatory certainty, and the potential for challenge related to each case-by-case assessment. As a result ComReg has decided that it is proportionate to allow flexibility, on a strictly exceptional basis only, to individual bundles. Eircom will need to provide sufficiently robust evidence related to the specific characteristics of the bundle in question, that demonstrate to ComReg's satisfaction, that no harm to competition will occur in permitting a bundle to be launched following a case-by-case assessment.

**5.4.8 Question 14: Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in Section 5.12) to the MST? Please give a detailed response with**

### supporting data where appropriate to support your view.

5.214 ComReg, in the Consultation, discussed a number of scenarios that may impact the bundles MST: when the bundle is in response to a competitor's bundle; a different test for when a bundle is found unreasonable post launch; the ability to 'bank' / carry forward past margins to use as future discounts; promotions and promotional discounts; and discretionary promotions/opt-ins. These are addressed below for completeness. Overall ALTO (see paragraph 5.113) and Vodafone (see paragraph 5.118) agreed, but Vodafone did add that it felt that more clarity around the competitive assessment process and criteria should be provided. Eircom revisited points made earlier in its submission (see paragraph 5.114 and 5.115) which were that the retail market is national, and the competitive assessment should be done on an overall national portfolio level which Eircom deems the appropriate level.

5.215 In reply to the retail broadband market being national, ComReg agrees with Eircom. In response to Eircom's preference that the competitive assessment should be taken at the overall national portfolio level, ComReg disagrees with this. As discussed in paragraphs 4.42 to 4.45 ComReg considers that doing so would not ensure economic replicability. In relation to the use of a single national portfolio see paragraph 5.181.

#### *When the bundle is in response to a competitor's bundle*

5.216 As regards when a bundle is in response to a competitor's bundle Vodafone requested (see paragraph 5.118) more clarity on the competitive assessment process and criteria to be used. The competitive assessment process would be akin to that described in paragraphs 5.161 and 5.162 of the Consultation.

5.217 ComReg remains of the view that the bundles MST assessment should not change when a bundle is claimed to be a response to a competitor's bundle as Eircom has SMP.

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

5.218 Eircom considered (see paragraph 5.115) that a different test should not be used if a bundle is found to be unreasonable post-launch. Eircom added that the competitive assessment should be undertaken at an overall national portfolio, ComReg's position is provided in paragraph 5.215. ComReg maintains its position that a different test should not be used if a bundle is found unreasonable post launch.

#### *The ability to 'bank' / carry forward past margins to use as future*

5.219 Eircom and Vodafone agreed that it was appropriate that margins cannot be 'banked' (see paragraphs 5.116 and 5.119 respectively).

5.220 Eircom considered, as summarised in paragraph 5.116, that a one month compliance period is too short to provide any meaningful assessment. Please see Section 7.4.1 on the compliance period.

5.221 ComReg would like to point out that the proposal regarding “banking” margins also applied to not being able to carry forward margins from one bundle to another. MSTs are carried out on a monthly basis and reflect margins in that month – thus disallowing “banked” margins to be used across other bundles.

*Promotions and promotional discounts*

5.222 Vodafone suggested (see paragraph 5.120), that customers who take up promotional offers may have shorter ACLs than other customers. ComReg acknowledges this but points out that for replicability of a bundle what is important is the ACL of all customers on that bundle. There is no justification in using a shorter average customer life for one group of customers on a bundle except in the case of retention promotions which by their nature mean that the customers receiving those promotions have an average remaining lifetime less than the ACL.

5.223 ComReg maintains its position from the Consultation that Eircom’s bundles 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 lifetime or the life of the contract.

*Discretionary promotions/opt-ins*

5.224 Eircom agreed (see paragraph 5.117) that it is appropriate that the proportional costs of an opt-in promotion are included in the bundles MST. ComReg maintains its position from the Consultation that the bundles MST should reflect the cost of that opt-in promotion.

5.225 If volumes taking up discretionary promotions turn out to be such that a bundle fails a MST then ComReg will take appropriate action to deal with any competitive harm.

**5.4.9 Question 15: Do you agree or disagree with ComReg’s proposals in respect of retention offers and their treatment in the MST? Please give a detailed response with supporting data**

**where appropriate to support your view.**

- 5.226 ComReg agrees with ALTO (see paragraph 5.124) that a retention offer entails a new contract. ComReg is concerned that other operators would not be able to economically replicate bundles offered by Eircom. The costs of a retention offer on a particular bundle have to be covered by customers on that bundle. This includes customers in contract and customers out of contract (e.g. not in receipt of a retention promotion).
- 5.227 In relation to ALTO's and Sky's queries (summarised in 5.124 and 5.125 respectively) as to how a value for retention promotions should be calculated this is described in ComReg's final position on this question. Under the current NRT when a retention offer is submitted to ComReg the value(s) of the retention offer is detailed to ComReg along with the expected uptake. For example, Eircom may offer the customer €50 off their bill for staying with them rather than leaving at the end of the customer's contract; the value is therefore €50. As outlined in the Consultation, in paragraphs 5.185 and 5.186, the formula to calculate the cost of the retention offer is (cost of the offer times the number of customers forecast to take it as a percentage of all customers on that bundle, divided by the new contract duration). This will also occur under the MST.
- 5.228 Sky (see 5.126) were in favour of the up-front approach of including the costs of retention offers at the time of the bundle's initial launch. ComReg acknowledges this point, but as outlined in the Consultation (paragraph 5.188), the difficulty with such an approach is that it may needlessly restrict Eircom's pricing freedom on an individual bundle and if repeated across all of Eircom's bundles, its ability to compete on a level playing field with OAOs that are not subject to the bundles MST.
- 5.229 ComReg agrees with Eircom (see paragraph 5.127) that overall there should not be a different treatment for retention offers. The nature of the problem that ComReg is addressing is ensuring that costs of retention promotions are recovered against the bundle to which they apply and in a timeframe commensurate with the fact that the customers engaging with Eircom at this point are not new customers on the bundle.
- 5.230 ComReg does not consider future cross-selling opportunities as raised by Eircom in paragraph 5.128, to be a valid justification for treating retention offers any differently from other promotions and offers. Cross-selling opportunities apply to all Eircom customers.
- 5.231 In response to Eircom's view of retained customers also needing to have a lower retail cost for broadband included in their cost stack (see paragraph 5.129), ComReg agree that this would be burdensome and did not propose such an approach be adopted in the Consultation or in this document.

- 5.232 In reply to Eircom's consideration that using the 42 month ACL is a reasonable methodology to follow for retention costs (see 5.130), ComReg considers that retaining customers on a bundle contributes in a positive way to the ACL on that bundle. Retained customers may also stay beyond the re-contracted period. Retention costs though have to be recovered over the remaining lifetime of the bundle. As retention offers would not need to be made until sometime into the lifetime of a bundle it stands to reason that the ACL remaining on that bundle has to be less than when the bundle first launched.
- 5.233 ComReg does not agree with Eircom (see paragraph 5.131) that adjusting the bundle's costs depending on whether a promotion is a retention offer or not represents a significant unnecessary burden. Calculating the costs of a retention offer is relatively simple. ComReg assumes that Eircom is able to keep track of take-up of retention offers on a per-customer and per-bundle basis.
- 5.234 ComReg notes that it will regard a "new" bundle which has substantially the same terms and conditions as an existing bundle as being an extension to the existing bundle. In this case "up front" promotions would be regarded as being de facto retention offers and would be amortised over the contract term.

#### 5.4.10 Other issues raised

- 5.235 Section 5.3.10 contains other issues raised by respondents in relation to Chapter 5. These were: backhaul charges; regional handover; notional VoB charge; double counting in cost stacks; cross-subsidy limitation; and the use of ATC versus LRIC.

##### *Backhaul charges:*

- 5.236 In relation to both Eircom's (see paragraph 5.134) and Sky's (see paragraph 5.135) observations surrounding backhaul charges, ComReg will in the bundles MST (as proposed in the Consultation), use the same approach to backhaul charges as set out in the 2018 Pricing Decision.
- 5.237 With regards to Eircom's point regarding the use of a price floor this was not proposed in the 2017 Pricing Consultation for NGA services; for CGA services this was considered, but as per 9.55 of the 2018 Pricing Decision this is not being advanced:

*9.55 - "A current generation price floor i.e., a margin squeeze test between the price for LLU or Line Share in the WLA Market and the price for current generation Bitstream in the WCA Market is no longer required."*

5.238 With regards to Sky's submission on the use of a logarithmic or linear methodology, and being consistent with the 2018 Pricing Decision, ComReg refers to paragraph 9.19 (provided below), and Annex 7 of the 2018 Pricing Decision:

9.19 - "... ComReg is of the view the logarithmic curve may continue as an appropriate way to set cost oriented wholesale prices if industry wishes to adopt such a pricing approach."

*Regional handover:*

5.239 Eircom said (see paragraphs 5.136 and 5.137) that Eircom's regional handover wholesale product should have been considered in the Consultation's discussion of the proposed operator cost benchmark for the retail costs for broadband included in the bundles MST. In relation to the potential impact on the operator cost benchmark of using this wholesale product, ComReg has, based on responses, decided to move to EEO for the retail costs for broadband as discussed in Section 5.4.1.

*Notional VoB charge:*

5.240 In relation to Sky's submission (see paragraph 5.138) that the notional VoB charge should be published, ComReg disagrees. ComReg consider that this price is an indicative price and publishing such would serve no purpose. Eircom have generated such a notional value in keeping with previous Decisions (e.g. D03/16). For the avoidance of doubt, Eircom have launched a managed VoB service. When the costs of this service become clearer then the managed VoB charge included in the cost stack will reflect this.

*Double counting in cost stacks:*

5.241 In reply to Sky's query on this issue (see paragraph 5.139), ComReg would like to clarify that the concern relating to potential double counts in the modelling of the cost stacks for VUA and SB-WLR has been corrected in the modelling undertaken. See paragraph 6.204 of the 2018 Pricing Decision.

*Cross subsidy limitation*

- 5.242 ComReg considers that Eircom's submission (see paragraph 5.140) regarding limiting cross-subsidies in a bundle has merit. ComReg had proposed allowing cross-subsidies in a bundle from regulated to unregulated products only. Eircom made the case that from a replicability point of view cross-subsidies should be allowed both ways. ComReg agrees that the direction of cross-subsidies would not impact replicability and also that operators make commercial decisions on the overall profitability of a bundle. Oxera in Section 3.4 of its Amendments Report for this Decision agrees that this change is appropriate as "*... what is important is the economic replicability of the bundle and the portfolio of services on which eircom and the OAOs compete. Allowing cross-subsidisation from regulated to unregulated and from regulated to unregulated services within the same bundle should not affect the ability of the OAOs to replicate the bundle or portfolio of services that they compete on with eircom.*"
- 5.243 ComReg's view is that bundles should be economically replicable i.e. that the prices of bundles cover their costs and allow for a reasonable level of profitability. Only allowing cross-subsidies from regulated to unregulated products in the MSTs could restrict Eircom's commercial freedom unduly and limit competition in the marketplace. Oxera also considers (in Section 3.4 of its Amendments Report) that:

*"Moreover, the margins on unregulated services should be competed down, reflecting competition in these unregulated markets. Allowing for the cross-subsidy also allows eircom to include unregulated services in bundles on the same basis as OAOs. This leads to more choice for consumers, while allowing efficient OAOs to compete with eircom, as eircom's revenues from its portfolio of services have to cover the average total cost (ATC) of the same services."*

Consequently ComReg is of the view that cross-subsidies between regulated and unregulated products in bundles should be permitted with no limitation as to direction. The limitation though, is that each portfolio (CGA, NGA) cannot transfer margin from one to another (e.g. there will be no single national broadband portfolio).

The Consultation at paragraphs 5.102 to 5.104 considered the use of an AAC cost standard for unregulated products and services on a case-by-case basis. All bundles will now be individually assessed on a LRIC basis including a cross subsidy each way where available. Consequently ComReg consider that the use of AAC should only occur in exceptional circumstances where Eircom can demonstrate that competition in the market generally would not be harmed and that this measure would not create material distortions.

*Use of ATC versus LRIC*



- 5.244 ComReg, in agreement with Oxera, has taken account of Eircom's submissions (as summarised in paragraphs 5.141 to 5.149) on the use of ATC in the bundles MST. Certain refinements have been made that address a number of the points made by Eircom (see Section 5.4.11.1).
- 5.245 Eircom, as summarised in paragraph 5.141, did not agree that ATC is an appropriate cost standard to use in the MST, and in paragraphs 5.143, 5.145 to 5.147 (as summarised) Eircom elaborated on why it disagreed with this cost standard through a number of related points which, inter alia, considered that: in Eircom's view it (ATC) does not provide pricing flexibility to recover fixed indirect and common costs as Eircom so chooses from its portfolios; that a LRIC cost standard should be used at the portfolio level and distributing fixed indirect and common costs is arbitrary between the various geographic areas; and requiring ATC recovery for every bundle in RA2 is disproportionate.
- 5.246 In relation to the use of ATC, ComReg and Oxera continue to be of the opinion as that stated in the Consultation paragraphs 5.41 and 5.42:

*"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 (as amended) to promote entry, 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 enables a potential entrant to recover all its efficiently incurred costs. ATC requires an operator with SMP to price at levels that include correct amounts of variable, fixed and common costs, which is the equation 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 suitable way to enable competition under regulation."*

- 5.247 In reply to the use of LRAIC+, as summarised in paragraph 5.149, ComReg do not consider that the use of this cost standard is suitable given ComReg's statutory duties discussed in 5.246. In response to the use of one overall portfolio comprised of CGA and NGA bundles, ComReg disagrees with this. As discussed in paragraphs 4.42 to 4.49 ComReg considers that doing so would not ensure economic replicability, leading to better outcomes for consumers.
- 5.248 ComReg has removed the bundle by bundle test at ATC in RA2 (see paragraphs 4.42 to 4.44). Instead each bundle will be required to cover its LRIC cost.

- 5.249 In reply to Eircom's point, as summarised in paragraph 5.144 and 5.148 the bundles MST now includes standalone broadband in the portfolio tests, which are also wider than the original portfolio level assessments as proposed (e.g. UA and RA1) – see paragraphs 4.42 to 4.49.
- 5.250 ComReg does not agree with Eircom (see paragraph 5.142) that the use of an ATC cost standard with regards to bundles is inconsistent with the 2013 EC Recommendation – see paragraph 5.183.

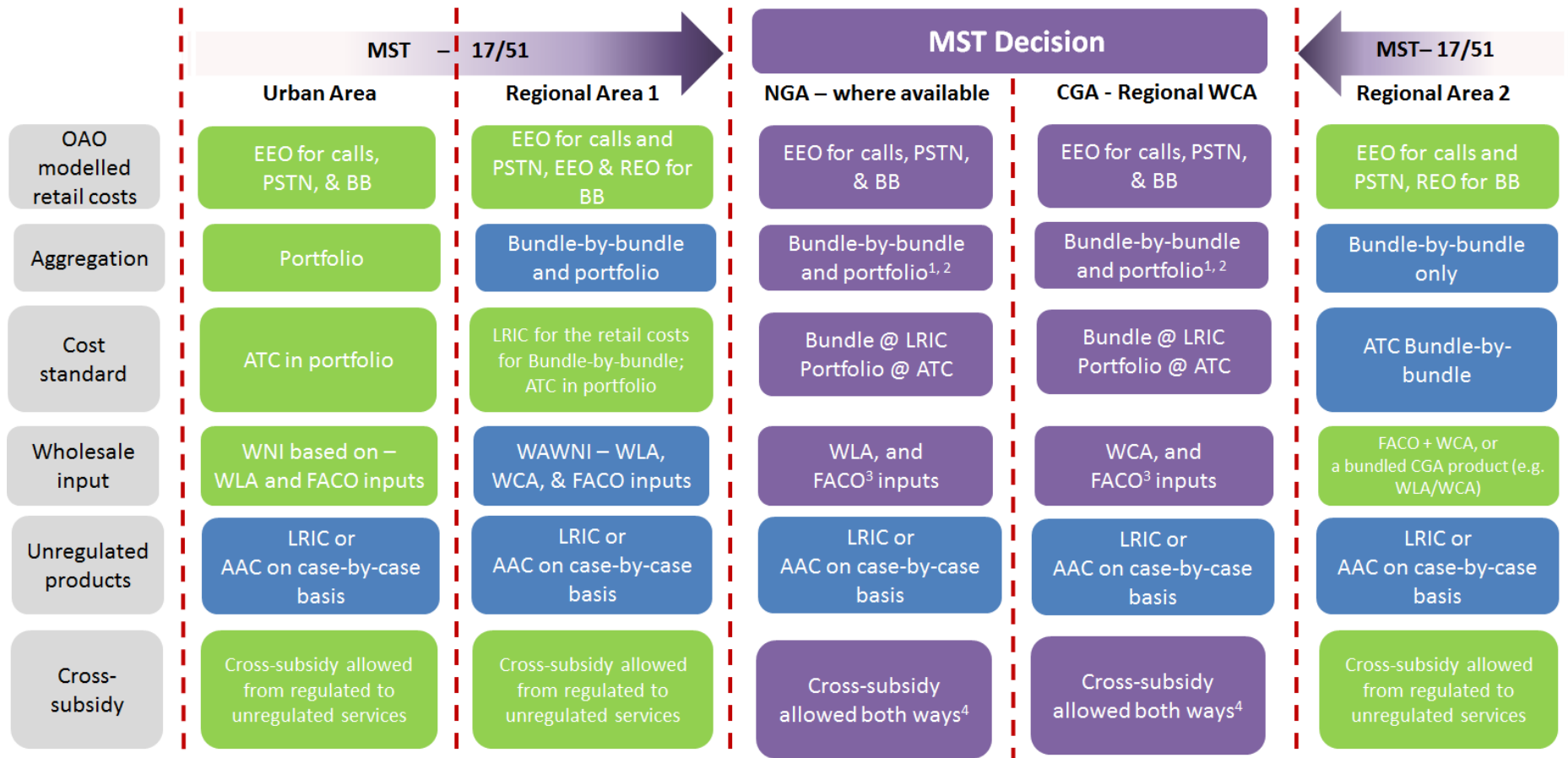
### 5.4.11 Setting out the MSTs

- 5.251 ComReg has altered its views on certain aspects of the proposed MST. ComReg's goal in imposing MSTs on the bundles and standalone retail broadband services that Eircom sells or offers for sale is to ensure that efficient operators, who are dependent on wholesale inputs from Eircom, are able to compete with Eircom. ComReg considers that this aim is met through this Decision.
- 5.252 ComReg, to assist understanding, and to provide clarity to OAOs and Eircom, now discusses updated thinking on how the bundles MST will be constructed and assessed pursuant to this Decision. This section first outlines changes from the original consultation and the rationale underlying these changes in the "Updated thinking" subsection (5.4.11.1), and the remainder of this section then sets out how the assessment of Eircom's bundles will be undertaken in the "Testing bundles" subsection (5.4.11.2).

#### 5.4.11.1 Updated thinking

- 5.253 Following discussions with Oxera, ComReg's economic advisor on the bundles MST, ComReg considers that changes to the consulted-upon bundles MST are merited. Briefly the changes are: (1) portfolio assessment approach based on the speed of available technology (CGA or NGA); (2) cost benchmarks for Eircom's retail services (broadband, calls, and line rental) set at EEO; (3) bundle assessment level will be at LRIC for each bundle wherever sold/offered for sale; (4) NGA broadband based bundles will use WLA VUA (FTTC or FTTH), and CGA broadband based bundles will use WCA Bitstream, (FACO inputs will be included as relevant in CGA or NGA bundles); (5) allowing cross-subsidy each way in a bundle – from regulated services to unregulated services and vice versa; and (6) include FTTC and CGA standalone services in the portfolio level assessments
- 5.254 In some instances these alterations lead to certain increases or decreases in regulation for Eircom. ComReg considers the adjustments are justified and well balanced overall. Where there is an increase or decrease in regulation these are spelled out below. Figure 6 presents the main movements graphically.

Figure 6: Components of the MST Decision with changes from the Consultation



1) CGA or NGA retail standalone broadband sold by Eircom will be included in the relevant CGA or NGA portfolio level assessment.  
 2) The CGA and NGA portfolios must cover the costs of all services sold in either portfolio (e.g. regulated services ATC + unregulated services LRIC).  
 3) FACO will still be represented until such time as the majority of Eircom customers are served through a managed VoBB service instead of WLR.  
 4) Regulated to unregulated and vice versa.

- 5.255 Change 1 - exchange areas, as discussed in paragraphs 4.42 to 4.45. ComReg considers that the 'where available' approach to assessing the NGA and CGA portfolio of bundles is more appropriate than continuing the use of an exchange based split of bundles. Overall for NGA bundles this move is neutral as its effect just alters the assessment structure. In terms of CGA bundles, the absence of a bundles MST in the footprint of the Urban WCA Market is not considered a significant concern for ComReg as: CGA inputs do not represent a significant proportion of the inputs used by operators there (see Table 2 in Chapter 4 [3< ■ ]% of subscribers across all platforms in the UA, and just [3< ■ % on the Eircom platform); on a forward looking basis customers in the footprint of the Urban WCA Market are more likely to be served using NGA services over time; CGA inputs will still be accessible to OAOs; these inputs are cost oriented which provides certainty to those choosing to avail of them, and finally, Eircom will not be able to include any margin from sales to customers using CGA inputs in the footprint of the Urban WCA Market in the CGA portfolio as part of the bundles MST.
- 5.256 Change 2 – cost benchmarks for the retail costs for broadband. As discussed in Section 5.4.1, ComReg will set the cost benchmark for the retail costs for broadband at EEO. For bundles based on FTTH this means that retail costs for broadband will be based on those used for FTTH consistent with the 2018 Pricing Decision (see paragraph 5.151). For bundles based on CGA or FTTC this means that Eircom's retail costs for broadband will be based on Eircom's regulated accounts (see paragraph 5.153).
- 5.257 Change 3 – bundle assessment level, as discussed in 5.106 to 5.118 of the Consultation. The assessment level can be set at either a bundle level, a portfolio of all bundles, or a two-stage approach of bundle-by-bundle and then portfolio. Given Change 1 is removing the single portfolio as originally proposed this nominally creates an increase in regulation of bundles assessed, however as Eircom have argued that it uses a single national pricing strategy anyway then this impact is tempered somewhat. The other aspect to this change, is that there was no portfolio level test proposed in RA2; this is now being introduced as part of the CGA assessment. This represents a lessening of regulation on Eircom on individual bundle offers which would have been offered for sale in RA2 due to those bundles not having to cover their ATC costs at an individual bundle level. They will still have to cover their LRIC costs at an individual bundle level. ATC costs will have to be covered at the overall CGA portfolio level. As discussed in Chapter 4 (paragraph 4.47) as the input being used in the assessment is cost oriented CGA Bitstream (standalone or POTS based) then for those OAOs continuing to serve their customers through this technology it is unlikely that issues should emerge in terms of economic replicability.

- 5.258 Change 4 – wholesale inputs in the MST, as discussed in paragraph 4.47. ComReg considers that the broadband inputs used in the bundles MST when Eircom offers a bundle for sale, should be WLA VUA (POTs or SABB based) for NGA bundles, and WCA Bitstream (POTs or SABB based) for CGA bundles. This represents a streamlining of the relevant inputs that matches the NGA and CGA split from Change 1 above. Furthermore the inclusion of backhaul charges ensures that Eircom's bundles are replicable.
- 5.259 Change 5 – allowing cross subsidies each way - discussed in 5.242 to 5.243. Overall this move better reflects the purpose of bundling by operators, and ComReg consider that this move should be positive for customers by removing the restriction on Eircom using the competitive margin left over from unregulated services after covering the LRIC costs of these services. From an OAO perspective the removal of this limitation on Eircom's ability to compete presents a competitive challenge, but it is important to recognise that the regulated wholesale inputs are accessible, almost entirely cost oriented and contained in each bundle's cost stack. Further, Eircom's bundles are required to cover their LRIC cost individually, and the portfolio of bundles sold will need to cover or exceed its ATC for regulated services, plus the LRIC of unregulated services. ComReg therefore considers that economic replicability is still feasible.
- 5.260 Change 6 – remove the separate standalone retail to wholesale MST for Eircom's sales of retail standalone broadband services, except for FTTH services. These services (FTTC and CGA) will be assessed as part of the relevant bundles portfolio level assessments. FTTH standalone services will be assessed separately as per the requirements of the 2018 Pricing Decision. ComReg as part of a wider review of the responses to the Consultation, and the 2017 Pricing Consultation, consider that, given the sufficiency of other measures (including obligations of access and transparency, as well as cost orientation), there is no need for standalone MSTs between FTTC or CGA based services and retail services sold singly, except for FTTH services sold singly. Therefore these FTTC or CGA margins will be included in the overall retail MSTs at the portfolio level of the bundles MSTs. The rationale for this is explained in the 2018 Pricing Decision – see paragraphs 10.6 for FTTC based VUA; 10.7 for CGA WLA and 11.6 for FTTC based Bitstream; 11.7 for CGA Bitstream (provided below respectively):

*10.6 - "As determined in Section 7 of the 2018 WLA / WCA Market Review Decision, it is not necessary to further specify a standalone retail margin squeeze test for FTTC based VUA. As set out in Section 7, paragraphs 7.1341 to 7.1342 of the 2018 WLA / WCA Market Review Decision, ComReg considers that as FTTC based VUA is already subject to a cost orientation obligation, as well as to other obligations including access and transparency, a standalone retail margin squeeze obligation would not be a proportionate measure and is not required. However, given the potential for Eircom to cross subsidise*

*between its retail products when sold in a bundle, the margin between FTTC based VUA and all retail services delivered by FTTC based VUA, whether sold singly or in bundle, will be assessed going forward in the overall retail margin squeeze tests as further specified in the 2018 Bundles Decision.”;*

10.7 - *“For current generation WLA services, ComReg considers that it is not necessary to have a specific retail margin squeeze test between current generation WLA services and current generation retail services. This is because of the decline in demand for current generation services in the WLA Market as well as the fact that these current generation WLA services are already subject to a cost orientation obligation, as well as to other obligations including access and transparency. Please see Section 7, paragraph 7.1340 of the 2018 WLA / WCA Market Review Decision.”;*

11.6 – *“It was proposed in the 2016 WLA/WCA Market Review Consultation<sup>294</sup> that FTTC based Bitstream would continue to be subject to an obligation not to cause a margin squeeze against retail products delivered by FTTC based Bitstream services. However, ComReg considers that a margin squeeze test alone has not been sufficient to address competition problems in the provision of FTTC based Bitstream, and as determined in Section 12 of the 2018 WLA / WCA Market Review Decision, ComReg is imposing a cost orientation obligation on FTTC based services. As set out in Section 12, paragraph 12.334 of the 2018 WLA / WCA Market Review Decision ComReg notes its expectation of the sufficiency of other measures (including obligations of access and transparency, as well as cost orientation), and so there will be no standalone margin squeeze test between FTTC based services and retail services delivered by FTTC and sold singly. However, given the incentive and potential for Eircom to cross subsidise between its retail products when sold in a bundle, all FTTC based services (sold singly or in a bundle) will be included in the overall retail margin squeeze tests as further outlined in the 2018 Bundles Decision.”; and*

<sup>294</sup> See paragraphs 13.344 to 13.348 of the 2016 WLA/WCA Market Review Consultation.

11.7 - “As set out in Section 12, of the 2018 WLA / WCA Market Review Decision, ComReg has decided not to further specify a standalone retail margin squeeze test between current generation WCA services and retail services delivered by current generation WCA services. As discussed in Chapter 4, and as determined at Section 12, paragraphs 12.340 of the 2018 WLA / WCA Market Review Decision, ComReg has also decided not to further differentiate pricing remedies within the Regional WCA Market, and so all pricing obligations apply across the Regional WCA Market. However, a retail margin squeeze obligation applies between current generation WCA services and current generation retail services delivered by current generation WCA services across the Regional WCA Market, whether sold singly or in bundle, and will be included in the overall retail margin squeeze tests as further specified in the 2018 Bundles Decision.”

#### 5.4.11.2 Testing bundles

5.261 This subsection describes how bundles and retail standalone broadband will be assessed.

5.262 As outlined in 5.4.11.1 (and Chapter 4), there will now be two over-arching portfolios. One will be NGA-based bundles and NGA standalone retail broadband services (except for FTTH standalone retail broadband), and the other will just include CGA based bundles and CGA standalone retail broadband services. The following headings are provided to assist stakeholders: testing level (aggregation of tests); cost standard; cost benchmarks of operator retail costs; case-by-case assessment of a bundles reasonableness; other possible adjustments to the MST; removal of the downward only WAWNI; average customer life; and retention offers.

*Assessment level (aggregation of tests)*

5.263 As outlined in 5.257, NGA and CGA bundles sold or offered for sale by Eircom will be subject to both bundle by bundle level assessments, and portfolio level assessments.

- 5.264 CGA and FTTC standalone retail broadband services will not be subject to individual product level assessments. However to include these services in the relevant NGA or CGA portfolio, Eircom will need to include detailed information (e.g. retail price, other revenue associated with the retail product, cost of the wholesale input, retail cost of broadband, promotional costs, backhaul usage costs, etc.) in respect of the costs and revenues associated with supplying these services. The purpose of providing the numbers, associated revenues and costs of such standalone broadband service sales is that when the portfolio test is being undertaken the calculation will accurately reflect the weighting of these services in the portfolio, for which Eircom is required to cover or exceed the ATC of all bundles and SABB services sold.
- 5.265 This is of course tempered by the requirement for the total NGA portfolio to cover the ATC of all bundles and SABB services (except for FTTH) sold, along with ComReg's review of the monitoring statements of actual bundles and SABB, and as discussed over paragraphs 5.197 to 5.201 e.g. if a bundle is unable to cover the costs of promotions provided due to customers moving off this bundle/SABB then the relevant portfolio will ensure recovery of these promotions' costs. This will ensure replicability is achievable. Eircom may separately be subject to compliance action by ComReg for such a non-compliance arising as outlined in Chapter 7.

**Table 6: Aggregation of tests**

Retail product	Bundle	Standalone retail broadband (e.g. not bundled, and no FTTH)
Individually tested?	Yes – bundle by bundle	No
Testing in portfolio?	Yes	Yes

*Cost standard*

- 5.266 Each bundle sold or offered for sale by Eircom will be assessed on a bundle by bundle basis at a LRIC cost standard.
- 5.267 The CGA portfolio and separately the NGA of bundles and standalone retail broadband services will be assessed at an ATC cost standard.

*Cost benchmarks of operator retail costs*

- 5.268 ComReg's view is that the appropriate cost benchmark to be applied in the MSTs across all retail services (broadband, retail line rental, and calls components) is EEO.



*Case-by-case assessment of a bundle's reasonableness*

5.269 ComReg consider it proportionate to undertake a case-by-case assessment before a bundle is found to be in breach of the obligation not to cause a margin squeeze.

*Other possible adjustments to the MST*

5.270 ComReg's view is that the MST should not change when a bundle is claimed to be in response to a competitor's bundle. In addition, the move to assessing individual bundles in all areas on a LRIC basis will allow Eircom more pricing freedom to respond to competitors' offers while also preventing Eircom from selling bundles at less than LRIC.

5.271 ComReg's view is that a different test should not apply post-launch if a bundle is found to be unreasonable.

5.272 ComReg's view is that margins cannot be "banked"/carried forward.

5.273 ComReg's view is that a bundle must be reasonable at all times. As stated in the Consultation, it would not make sense for promotions not to be subject to full regulatory controls. The costs of promotions on a bundle need to be covered by that bundle. To ensure that this is the case, ComReg has specified a monitoring statement that keeps track of promotions on a bundle-by-bundle basis. For those cases where a bundle is not in compliance with the obligation not to cause a margin squeeze, compliance proceedings may be initiated as per Section 7.4.2, and the unrecovered promotional costs have to be recovered from the portfolio to which that bundle belongs as described in paragraphs 5.197 to 5.201 above.

5.274 ComReg's view is that, where it is anticipated that not all customers would avail of a discretionary promotion, the MST should reflect the proportionate cost of that promotion, i.e. the take-up. As stated in paragraph 5.222 above unless there is evidence that customers who take up discretionary offers have a shorter ACL there is no justification in assuming one. The actual results of discretionary promotions/opt-ins will be tracked on a bundle-by-bundle basis through the monitoring statement. Costs of such promotions will be tracked and need to be recovered over the lifetime of the bundle to which they apply. If, as a result of shorter than expected ACLs, a margin squeeze on a bundle is created then Eircom will be required to take remedial action.

*Removal of the downward only WAWNI*

5.275 Having considered the responses to the Consultation ComReg's view is that there should not be a downward only adjustment to the WAWNI. ComReg has to ensure that bundles are economically replicable. A WAWNI that used costs lower than those that OAOs are experiencing would not ensure replicability.

*Average customer life*

5.276 Based on the data / responses provided by operators ComReg has not seen any compelling evidence that the ACL for the industry is measurably shorter or longer than 42 months. ComReg is therefore of the view that an ACL of 42 months should continue to be used for example in the calculations of predictions of promotions' costs. The monitoring statements should assist in determining actual ACL for potential future Decisions.

*Retention offers*

5.277 ComReg's view is that when a retention offer is proposed the MST should reflect the proposed retention value and the forecast of customers taking up that offer as a percentage of customers on the bundle at that point in time. If Eircom can produce data showing the remaining ACL on that bundle is expected to be greater than the re-contract period then the cost of the retention promotion can be spread over that period.

5.278 The cost of a retention promotion to be recovered by the bundle is therefore as follows: the monetary value of the retention promotion multiplied by the expected number of customers taking the retention offer, and divided by the number of customers on the bundle at that time and finally divided by either the re-contracting period or expected remaining ACL of customers on bundle at that time. Eircom's on-going monitoring obligation should assist in accomplishing this.

## 5.5 ComReg's final position

5.279 The following two sections set out ComReg's final position in relation to the MST for NGA and CGA services insofar as bundles are concerned. For FTTH broadband services sold singly, see Chapters 10 and 11 of the 2018 Pricing Decision which provides details on the MST that will apply to FTTH services when sold singly by Eircom.

### 5.5.1 ComReg's final position for NGA services bundled or sold

## singly

5.280 For bundles sold/offered using NGA FTTC or FTTH inputs, or in the case of FTTC retail broadband sold singly (i.e. not bundled with any other service), then in order to pass the MST<sup>295</sup>:

5.280.1 as regards the NGA Portfolio, the Average monthly NGA portfolio revenue per customer (Reference R5) shall be equal to or exceed the Average monthly NGA portfolio cost (Reference C13); and

5.280.2 as regards each individual bundle, the Average monthly NGA bundle revenue per customer (Reference R4) shall be equal to or exceed the Average monthly NGA adjusted bundle cost (Reference C12).

### 5.5.2 ComReg's final position for CGA services bundled or sold singly

5.281 For bundles sold/offered using CGA Bitstream inputs, or in the case of Bitstream retail broadband sold singly (i.e. not bundled with any other service), then in order to pass the MST<sup>296</sup>:

5.281.1 as regards the CGA Portfolio, the Average monthly CGA portfolio revenue per customer (Reference R5) shall be equal to or exceed the Average monthly CGA portfolio cost (Reference C13); and

5.281.2 as regards each individual bundle, the Average monthly CGA bundle revenue per customer (Reference R4) shall be equal to or exceed the Average monthly CGA adjusted bundle cost (Reference C12).

### 5.5.3 Assessment of NGA bundles/portfolio

**Table 7: NGA bundles or retail standalone services sold/offered for sale**

<b>Revenue:</b>		
<b>REF</b>	<b>ITEM (all ex VAT)</b>	<b>Description</b>
R1	Monthly bundle price	This is the full monthly price of a bundle.
R1a	Monthly NGA SABB price	This is the full monthly price of a standalone retail broadband product.
R2	Average monthly out of bundle calls	This is the average call revenue per customer per month for calls not included in the bundle. This may be based on actual revenues and volumes (post-launch

<sup>295</sup> The component references R4, R5, C12 and C13 including their computation, is detailed in Table 7.

<sup>296</sup> The component references R4, R5, C12 and C13 including their computation is detailed in Table 8.

	revenue per customer	assessment) or forecast revenues and volumes (pre-launch assessment). For post-launch assessment the revenue for each call type is taken from the Eircom billing information for calls for customers on that bundle in that billing month. Eircom bills out of bundle calls based on a call set up fee and a fee per minute of call time with any partial minute rounded up to the next minute. This total revenue for the call type outside the bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component.
R3	Average monthly out of bundle other revenue per customer	This is the average of any other monthly out of bundle product revenue – e.g. excess data usage charges on a fixed data allowance.
R3a	Average monthly out of plan other revenue per customer for NGA SABB	This is the average of any other monthly out of plan revenue – e.g. excess data usage charges on a fixed data allowance plan for NGA SABB based retail products sold outside a bundle.
R4	Average monthly NGA bundle revenue per customer <sup>297</sup>	This is the sum of the monthly bundle price ( <b>R1</b> ) plus Average monthly out of bundle calls revenue per customer ( <b>R2</b> ) plus Average monthly out of bundle other revenue per customer ( <b>R3</b> )
R4a	Average monthly NGA SABB revenue per customer	This is the sum of the monthly NGA SABB price ( <b>R1a</b> ) plus the Average monthly out of plan other revenue per customer for SABB ( <b>R3a</b> )
R5	Average monthly NGA portfolio revenue per customer	This is a weighted average of Average monthly NGA bundle revenue ( <b>R4</b> ) and the Average monthly NGA SABB revenue per customer ( <b>R4a</b> ) based on the number of customers on each bundle or standalone retail broadband service.

<sup>297</sup> There may be cross-subsidisation within a bundle between the regulated services and unregulated services within that specific bundle. Once the bundle covers or exceeds the LRIC cost of this bundle with or without unregulated services included then ComReg considers that the bundle by bundle assessment has been passed. For the avoidance of doubt, this means that the bundle by bundle assessment is satisfied once **R4** equals or exceeds **C12**.

<b>Costs:</b>		
<b>Ref</b>	<b>Item (all ex VAT)</b>	<b>Description</b>
C1	Weighted Average Wholesale Network Input (the NGA WAWNI)	<p>For NGA services (FTTC and FTTH) these are the applicable monthly prices plus all relevant wholesale costs of: POTs based VUA; Standalone VUA; and Standalone VUA plus voice (Managed VoB) network input costs in place in the WLA and FACO Markets. The FTTC and FTTH WAWNIs will be weighted by a hypothetical efficient operators usage of these inputs.</p> <p>In this context “all relevant wholesale costs” means a) additional network and other charges levied by Eircom amortised, where appropriate, over the relevant assumed customer life<sup>298</sup> plus b) other unavoidable non-retail costs which are necessary to provide a retail service<sup>299</sup>. All costs are converted to a monthly average.</p> <p>Backhaul usage costs for FTTC and FTTH broadband will as discussed in 5.236, be based on the prices as detailed in the 2018 Pricing Decision. Actual usage will be based on Eircom usage. Eircom is required to update the usage/throughput rate (based on Kbps peak hour usage) for next generation products to ensure continued compliance with its cost orientation and price setting obligations.</p>
C2	Retail costs associated with line rental per customer	These are the retail costs associated with line rental derived from Eircom’s regulatory accounts.
C3	Adjusted retail costs associated with line rental per customer	These are the retail costs associated with retail line rental (C2) less common costs less fixed indirect costs associated with the line rental included in the retail bundle offer and not the individual bundle itself (i.e. the LRIC of the retail costs of line rental).
C4	Average mailbox cost per customer	Where the bundle packages include a mailbox, the wholesale monthly price of the mailbox as published in Eircom’s Reference Interconnect Offer Price List will be used as an input cost. Consideration will be taken of the applicable average take up of the mailbox and the average mailbox cost will reflect this. Retail costs, associated with mailbox provision, as derived from Eircom regulated accounts will also be considered here.
C5	Average cost of calls per	These are the sum of the monthly wholesale and retail costs for all the calls made by customers on the bundle

<sup>298</sup> For example, backhaul costs, connection charges, co-location charges, etc.

<sup>299</sup> For example, the incremental network costs such as the cost of a line card, amortised over the relevant customer life.

	bundle per customer	under consideration divided by the number of customers on that bundle. Call costs are based on wholesale prices and Eircom's retail costs according to its latest regulatory accounts to derive an average total cost per call type and will reflect known future changes in those costs where these can be adequately verified.
C6	Adjusted cost of calls per bundle per customer	This is based on the actual costs of calls on that bundle divided by the number of customers on the bundle. The cost standard is taken from Eircom's accounts as Total Cost of Calls less common costs less fixed indirect costs (i.e. the LRIC of retail calls).
C7	Retail costs associated with broadband per customer	For FTTC these are the monthly retail costs per customer associated with retail broadband as derived from Eircom regulated accounts. For FTTH these are the monthly retail costs per customer as derived from the DCF model for FTTH broadband inputs <sup>300</sup> .
C8	Adjusted retail costs associated with broadband per customer	These are the retail costs associated with retail broadband (C7) less common costs less fixed indirect costs associated with the broadband product included in the retail bundle offer and not the individual bundle itself (i.e. the LRIC of retail costs of a broadband product).
C9	Average promotion costs per bundle / SABB product per customer	These are the costs associated with promotions and promotional discounts provided to End Users, spread over a period up to the average customer lifetime or where appropriate a shorter period (e.g. for retention promotions).
C9a	eir Sports on-going costs per bundle per customer	These are the monthly costs associated with the annual on-going costs (which includes content), for eir Sports in agreement with the net cost approach adopted for eir Sports (see Chapter 6 for further details).
C9b	eir Sports acquisition costs per bundle per customer	These are the monthly costs associated with the maximum period for the recovery of the eir Sports acquisition cost (see Chapter 6 for further details).
C10	Unregulated retail services <sup>301</sup>	These are the monthly average Long Run Incremental Costs associated with the provision of an unregulated service in a bundle, where relevant.
C11	Average monthly NGA bundle costs	This is the: Weighted Average Wholesale Network Input (C1) plus the Retail costs associated with line rental per customer (C2) plus Retail costs associated with

<sup>300</sup> See Section 5.4.1 for further information.

<sup>301</sup> For the purposes of this Decision 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.

	per customer (the ATC cost)	broadband per customer (C7) plus Average cost of calls per bundle per customer (C5) plus Average mailbox cost per customer (C4) plus Average Promotion Costs per bundle per customer (C9) plus eir Sports on-going costs per customer (C9a) plus eir Sports acquisition costs per customer (C9b) plus the LRIC of any Unregulated Services (C10) where applicable.
C11a	Average monthly NGA SABB costs per customer (the ATC cost)	This is: the Weighted Average Wholesale Network Input (C1) plus Retail costs associated with broadband per customer (C7) plus Average Promotion Costs per product per customer (C9) where applicable.
C12	Average monthly NGA adjusted bundle cost (the LRIC cost)	This is the averaged: Weighted Average Wholesale Network Input (C1) plus Adjusted retail costs associated with retail line rental per customer (C3) plus Average mailbox cost per customer (C4) plus Adjusted cost of calls per bundle per customer (C6) plus Adjusted Retail Costs Associated with Retail Broadband (C8) plus Average promotion costs (C9) plus eir Sports on-going costs (C9a) plus the LRIC of any Unregulated Services (C10) where applicable.
C13	Average monthly NGA portfolio cost	This is the weighted average by number of customers of the Average monthly NGA bundle costs per customer (C11) and the Average monthly NGA SABB costs per customer costs (C11a).

5.282 For the avoidance of doubt, the bundle by bundle assessment is satisfied once [R4](#) equals or exceeds [C12](#), and the NGA portfolio assessment is satisfied once [R5](#) equals or exceeds [C13](#).

#### Unreasonable bundle Assessment/Complementary Competitive Assessment

If a bundle does not pass the initial pre-launch MST assessment, as outlined in Sections 4.7 and 4.8 of the Decision Instruments, 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 MST, the offer for sale by Eircom of that bundle does not constitute a breach of the obligation under ComReg Decision D10/18 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, 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.

## 5.5.4 Assessment of CGA bundles/portfolio

**Table 8: CGA bundles or retail standalone services sold/offered for sale**

<b>Revenue:</b>		
<b>REF</b>	<b>ITEM (all ex VAT)</b>	<b>Description</b>
R1	Monthly bundle price	This is the full monthly price of a bundle.
R1a	Monthly SABB price	This is the full monthly price of a standalone retail broadband product.
R2	Average monthly out of bundle calls revenue per customer	<p>This is the average call revenue per customer per month for calls not included in the bundle. This may be based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre-launch assessment).</p> <p>For post-launch assessment the revenue for each call type is taken from the Eircom billing information for calls for customers on that bundle in that billing month. Eircom bills out of bundle calls based on a call set up fee and a fee per minute of call time with any partial minute rounded up to the next minute. This total revenue for the call type outside the bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component.</p>
R3	Average monthly out of bundle other revenue per customer	This is the average of any other monthly out of bundle product revenue – e.g. excess data usage charges on a fixed data allowance.
R3a	Average monthly out of plan other revenue per customer for SABB	This is the average of any other monthly out of plan revenue – e.g. excess data usage charges on a fixed data allowance plan for SABB based retail products sold outside a bundle.
R4	Average monthly CGA bundle revenue per customer	This is the sum of the monthly bundle price ( <b>R1</b> ) plus Average monthly out of bundle calls revenue per customer ( <b>R2</b> ) plus Average monthly out of bundle other revenue per customer ( <b>R3</b> ).
R4a	Average monthly CGA SABB revenue per customer	This is the sum of the monthly SABB price ( <b>R1a</b> ) plus the Average monthly out of plan other revenue per customer for SABB ( <b>R3a</b> ).
R5	Average monthly CGA portfolio	This is a weighted average of Average monthly bundle revenue ( <b>R4</b> ) plus the Average monthly SABB revenue per customer ( <b>R4a</b> ) based on the number of customers on each bundle or standalone retail broadband service.



	revenue per customer	
--	----------------------	--

<b>Costs:</b>		
<b>Ref</b>	<b>Item (all ex VAT)</b>	<b>Description</b>
C1	Weighted Average Wholesale Network Input (the CGA WAWNI)	<p>For CGA services these are the applicable monthly prices plus all relevant wholesale costs of: POTs based Bitstream; Standalone Bitstream; and Standalone Bitstream plus voice (Managed VoB) network input costs in place in the WCA and FACO Markets. The CGA WAWNI will be weighted by a hypothetical efficient operators usage of these inputs.</p> <p>In this context “all relevant wholesale costs” means a) additional network and other charges levied by Eircom amortised, where appropriate, over the relevant assumed customer life<sup>302</sup> plus b) other unavoidable non-retail costs which are necessary to provide a retail service<sup>303</sup>. All costs are converted to a monthly average.</p> <p>Backhaul usage costs for CGA broadband will as discussed in 5.236, be based on the prices as detailed in the 2018 Pricing Decision. Actual usage will be based on Eircom usage. Eircom is required to update the usage/throughput rate (based on Kbps peak hour usage) for current generation products to ensure continued compliance with its cost orientation and price setting obligations.</p>
C2	Retail costs associated with retail line rental per customer	These are the retail costs associated with line rental derived from Eircom’s regulatory accounts.
C3	Adjusted retail costs associated with retail line rental per customer	These are the retail costs associated with retail line rental (C2) less common costs less fixed indirect costs associated with the line rental included in the retail bundle offer and not the individual bundle itself (i.e. the LRIC of the retail costs of line rental).

<sup>302</sup> For example, backhaul costs, connection charges, co-location charges, etc.

<sup>303</sup> For example, the incremental network costs such as the cost of a line card, amortised over the relevant customer life.

C4	Average mailbox cost per customer	Where the bundle packages include a mailbox, the wholesale monthly price of the mailbox as published in Eircom's Reference Interconnect Offer Price List will be used as an input cost. Consideration will be taken of the average take up of the mailbox and the wholesale price will be adjusted to reflect this. Retail costs as derived from Eircom regulated accounts will also be considered here.
C5	Average cost of calls per bundle per customer	These are the sum of the monthly wholesale and retail costs for all the calls made by customers on the bundle under consideration divided by the number of customers on that bundle. Call costs are based on wholesale prices and Eircom's retail costs according to its latest regulatory accounts to derive an average total cost per call type and will reflect known future changes in those costs where these can be adequately verified.
C6	Adjusted cost of calls per bundle per customer	This is based on the actual costs of calls on that bundle divided by the number of customers on the bundle. The cost standard is taken from Eircom's accounts as Total Cost of Calls less common costs less fixed indirect costs (i.e. the LRIC of retail calls).
C7	Retail costs associated with retail broadband per customer	These are the monthly retail costs per customer associated with retail broadband as derived from Eircom regulated accounts.
C8	Adjusted retail costs associated with retail broadband per customer	These are the retail costs associated with retail broadband (C7) less common costs less fixed indirect costs associated the broadband product included in the retail bundle offer and not the individual bundle itself (i.e. the LRIC of retail costs of a broadband product).
C9	Average promotion costs on bundle / SABB product per customer	These are the costs associated with promotions and promotional discounts provided to End Users, spread over a period up to the average customer lifetime or where appropriate a shorter period (e.g. for retention promotions).
C9a	eir Sports on-going costs per customer	These are the monthly costs associated with the annual on-going costs (which includes content), for eir Sports in agreement with the net cost approach adopted for eir Sports (see Chapter 6 for further details).
C9b	eir Sports acquisition costs per customer	These are the monthly costs associated with the maximum period for the recovery of the eir Sports acquisition cost (see Chapter 6 for further details).

C10	Unregulated retail services <sup>304</sup>	These are the monthly average Long Run Incremental Costs associated with the provision of an unregulated service in a bundle, where relevant.
C11	Average monthly CGA bundle costs per customer (the ATC cost)	This is the: Weighted Average Wholesale Network Input ( <a href="#">C1</a> ) plus Retail costs associated with retail line rental per customer ( <a href="#">C2</a> ) plus Retail costs associated with retail broadband per customer ( <a href="#">C7</a> ) plus Cost of calls per bundle per customer ( <a href="#">C5</a> ) plus Average mailbox cost per customer ( <a href="#">C4</a> ) plus Average Promotion Costs ( <a href="#">C9</a> ) plus eir Sports on-going costs per customer ( <a href="#">C9a</a> ) plus eir Sports acquisition costs per customer ( <a href="#">C9b</a> ) plus the LRIC of any Unregulated Services ( <a href="#">C10</a> ) where applicable.
C11a	Average monthly CGA SABB costs per customer (the ATC cost)	This is the: Weighted Average Wholesale Network Input ( <a href="#">C1</a> ) plus Retail costs associated with retail broadband per customer ( <a href="#">C7</a> ) plus Average Promotion Costs ( <a href="#">C9</a> ) where applicable.
C12	Average monthly CGA adjusted bundle cost (the LRIC cost)	This is: Weighted Average Wholesale Network Input ( <a href="#">C1</a> ) plus Adjusted retail costs associated with retail line rental per customer ( <a href="#">C3</a> ) plus Average mailbox cost per customer ( <a href="#">C4</a> ) plus Adjusted cost of calls per bundle per customer ( <a href="#">C6</a> ) plus Adjusted Retail Costs Associated with Retail Broadband ( <a href="#">C8</a> ) plus Average promotion costs ( <a href="#">C9</a> ) plus eir Sports on-going costs per customer ( <a href="#">C9a</a> ) plus the LRIC of any Unregulated Services ( <a href="#">C10</a> ) where applicable.
C13	Average monthly CGA portfolio cost	This is the weighted average by customer of the Average monthly CGA bundle costs per customer ( <a href="#">C11</a> ) and the Average monthly CGA SABB costs per customer ( <a href="#">C11a</a> ).

5.283 For the avoidance of doubt, the bundle by bundle assessment is satisfied once [R4](#) equals or exceeds [C12](#), and the CGA portfolio assessment is satisfied once [R5](#) equals or exceeds [C13](#).

<sup>304</sup> For the purposes of this Decision 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.

**Unreasonable bundle Assessment/Complementary Competitive Assessment**

If a bundle does not pass the initial pre-launch MST assessment, as outlined in Section 4.7 and 4.8 of the Decision Instruments, 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 MST, the offer for sale by Eircom of that bundle does not constitute a breach of the obligation under ComReg Decision D10/18 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, 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.

## Chapter 6

# 6 eir Sports

## 6.1 Overview

- 6.1 In Chapter 6 of the Consultation, ComReg discussed the provision of eir Sports and provided its preliminary view on treatment of this unregulated service in the bundles MST. Given that Eircom offer eir Sports at no cost to their retail broadband subscribers the cost of this service is included in relevant retail bundles in the NRT, and was also proposed to be included in the proposed bundles MST to ensure that a similar service could be replicated by OAOs.
- 6.2 In this chapter ComReg provides a summary of Chapter 6 of the Consultation, assesses responses received to Questions 16, 17, 18, and 19, provides ComReg's assessment of those responses with reasoning, and ComReg's final position.

## 6.2 Summary of Chapter 6 of the Consultation

- 6.3 Section 6.1 of the Consultation outlined that ComReg considers that there are two methods to determine the appropriate costs of eir Sports to be included in the proposed bundles MST assessment; '*net costs*' or on the basis of the wholesale price. ComReg's preliminary view was that the net costs approach should be adopted.
- 6.4 Section 6.2 covered the appropriate time to recover costs. Costs were broken into two parts; the initial acquisition cost and the on-going costs. For the acquisition costs, periods of both 60 and 96 months were identified and it was noted that Eircom had suggested paying these back earlier from excess margin on bundles and broadband products. For on-going costs, the recovery period proposed was the period to which the content rights related.
- 6.5 Section 6.3 examined options for the recovery period of the acquisition cost – maximum payback period, or accumulated margins. ComReg's preliminary view was that a maximum payback period was preferred, given the clarity/stability it provides over time in terms of the costs to be included in the cost stack in the bundles MST assessment, along with avoiding monitoring and re-calculation which would be required under the accumulated margins approach. In the Consultation, the accumulated margin approach was identified as potentially enabling a situation of intra-area cross-subsidy and could undermine the assessments proposed in RA2 in particular.

- 6.6 In Section 6.4, ComReg outlined its preliminary view that the appropriate subscriber base should be just Eircom's retail fixed broadband subscribers who can technically get access to eir Sports. Other options discussed included those subscribers who have used the service, or adding mobile subscribers (i.e. not in a bundle) who can avail of the service. Given the stated aim for the acquisition and provision of eir Sports was to support Eircom's broadband base<sup>305</sup> then the subscriber base should be just those eligible fixed broadband subscribers to avoid any undue leveraging.
- 6.7 Section 6.5 focused on the recovery of on-going costs (including content). ComReg outlined its preliminary view that on-going costs should be recovered in the year to which they relate and be spread over the eligible fixed broadband subscriber base in that year as that approach was more aligned to a content driven service and would be more practical to review/update.
- 6.8 In Section 6.6 a number of variables included in the derivation of the costs of eir Sports were identified as being prone to change over time. ComReg's preliminary view was that the acquisition and on-going costs for eir Sports were to be included in the assessments at the relevant level in each area.

## 6.3 Summary of responses received

### 6.3.1 Appropriate time period to recover costs

- 6.9 Four respondents to the Consultation presented a number of points in relation to the recovery of on-going costs (including content). The majority of these respondents (ALTO, Sky, and Vodafone) agreed with ComReg's proposal that on-going costs should be recovered over the period to which they apply – i.e. the duration of content rights, and other in-year on-going costs. Eircom disagreed with ComReg's preliminary view and preferred a number of alternative methods which, in effect, push content cost recovery beyond the rights' duration.
- 6.10 ALTO<sup>306</sup>, outlined that an upper limit of 60 months should apply as any longer may distort competition in the market. ALTO added that Eircom should be required to account for the costs of eir Sports rights within the timeframe to which the rights apply.

<sup>305</sup> Page 36 of the *Eircom Holdings (Ireland) Limited – Third Quarter and nine months unaudited results 31 March 2017*

<sup>306</sup> ALTO response to the Consultation paragraph A.16.

- 6.11 Sky<sup>307</sup>, and Vodafone<sup>308</sup>, agreed with ComReg’s preliminary view, that on-going content costs should be recovered over the lifetime of the content. Sky stated that this reflects standard accounting treatment of programme rights costs – i.e. assets should be expensed over their useful economic lives.
- 6.12 Sky<sup>309</sup> further stated its view that Eircom’s reasons for purchasing Setanta Sport was to “*further bolster its retail position in broadband*” rather than enter the content market *per se*, and reference a report prepared for Eircom’s bondholders in this regard<sup>310</sup>, and consider that “*any potential argument that rights costs should be spread over a longer period has been rendered redundant by Eircom’s self-proclaimed reasons for market entry.*”
- 6.13 Sky<sup>311</sup> also referred to the outcome of the arguments presented by BT in their appeal of Ofcom’s final decision relating to VULA margin squeeze including BT Sport in the UK<sup>312</sup>.
- 6.14 Eircom stated<sup>313</sup> that the purchase of on-going content is a long-term strategic investment undertaken by eir Sports. Eircom stated its view that eir Sports is a business in its own right that enters contracts and assesses content opportunities separately to Eircom as a whole.
- 6.15 Eircom stated<sup>314</sup> that ComReg’s view of content needing to be recovered within the time period in which it has value, treats Eircom as a new entrant in each year of the control period but, unlike a new entrant, Eircom must always recover its ATC each year in an unregulated market due to wholesale SMP in an unrelated market. Eircom viewed the cost standard proposed as being “*... in stark contrast to the LRIC cost standard that ComReg has applied to the assessment of unregulated services in the past and the cost standard used in ex-post competition law*”. Eircom state that this proposal places a disproportionate restriction on Eircom’s pricing flexibility.

<sup>307</sup> Sky response to the Consultation paragraph 21.

<sup>308</sup> Vodafone response to the Consultation paragraph 80.

<sup>309</sup> Sky response to the Consultation paragraphs 18 to 21.

<sup>310</sup> Annual Report for Bondholders Year Ended June 30, 2016.

<sup>311</sup> Sky response to the Consultation paragraph 22.

<sup>312</sup> [Case 1238/3/3/15 BT v Ofcom](#)

<sup>313</sup> Eircom response to the Consultation paragraph 233.

<sup>314</sup> Eircom response to the Consultation paragraph 234.

- 6.16 Eircom stated<sup>315</sup> that ComReg’s proposal failed to recognise that there will not be an immediate correlation between additional rights costs and associated revenues, including impact on the subscriber base. Eircom outlined a view that content acquisition is a marketing tool for the underlying platform, and the intrinsic value of content can be used to target end-users long before airing, and is perpetual even when individual content rights expire and are replaced by others.
- 6.17 Eircom referred<sup>316</sup>, to the Brian Williamson paper<sup>317</sup> which discusses the “*phenomenon of ‘cord cutting’*”, i.e. that customers are less loyal to a platform, but are attracted to specific content. If this content moves, then so too will the customer, and this is leading to an increase in unbundling of services by consumers.
- 6.18 Eircom outlined<sup>318</sup> its opinion that a dynamic view of content costs is needed versus, in Eircom’s opinion, ComReg’s ‘*short term view*’ including that content has ‘*longer value from a consumer perspective than its finite rights*’. Eircom stated that a “... *a more specific acknowledgement in the test as to the level of flexibility required in order to recover such costs*” is needed. Eircom then discussed each of these views in detail<sup>319</sup> - summarised below:
- 6.18.1 The first view set out by Eircom was that it should have discretion to allocate the content rights period over a further 12 months<sup>320</sup> which would allow the cost of future content to more closely align to the subscriber base most likely to benefit from it; allowing Eircom to retain customers over a time greater than the individual content rights. Eircom considered that this approach to on-going content costs would recognise that content value is not solely aligned to the rights’ period within which content is aired, and would reduce short-term fluctuations due to the purchase of [3< [REDACTED] ];
- 6.18.2 The second view<sup>321</sup> proposed by Eircom is a net present value approach – to smooth out material short-term/single year content costs by spreading these over 42 months. Eircom viewed this as a suitable method for use in a wider portfolio level approach to bundles; and

<sup>315</sup> Eircom response to the Consultation paragraph 235.

<sup>316</sup> Eircom response to the Consultation paragraph 236.

<sup>317</sup> Ibid footnote 48.

<sup>318</sup> Eircom response to the Consultation paragraphs 239.

<sup>319</sup> Eircom response to the Consultation paragraphs 240 to 244.

<sup>320</sup> Eircom response to the Consultation paragraph 240.

<sup>321</sup> Eircom response to the Consultation paragraph 241.



- 6.18.3 The third view<sup>322</sup> proposed by Eircom was based on avoiding under-recovery in some later years present in the second approach, and would use a payment function that discounts the subscriber base over time.
- 6.19 Eircom stated<sup>323</sup> that the use of an inferred wholesale charge is not appropriate as Eircom “... *does not have SMP in the market and therefore such a mechanism would be contrary to ComReg’s regulatory obligations and powers*”, and went on to discuss<sup>324</sup> the need for a [§< [REDACTED] ] as necessary and cross-referred to their view<sup>325</sup> that the [§< [REDACTED] ] [REDACTED] ].

### 6.3.2 Recovery of acquisition cost

- 6.20 Three of the responses from stakeholders (ALTO, Sky, and Vodafone) accepted that the acquisition costs should be recovered over some period. Eircom disagreed<sup>326</sup> as, in its view, “... *for the purposes of the MST the purchase price for Setanta is completely irrelevant. The substantive economic issue is whether, on an on-going basis, eir sets retail prices based on actual incurred operational costs.*”
- 6.21 ALTO<sup>327</sup> commented on the fact that spreading costs over many years makes the cost per subscriber per month appear lower. This lower cost feeds into the cost stacks and “... *essentially, it means that the NRT doesn't bind*”. ALTO noted that the acquisition came with significant upsides in terms of subscribers to Eircom and other value that is difficult to assess properly.
- 6.22 Eircom stated<sup>328</sup> that the purchase of Setanta Sport provided Eircom with attractive content in the short/medium term and longer term with “the *backbone of content-centric capabilities*”, and contended<sup>329</sup> that the purchase price should be viewed as a sunk cost as it does not affect future decision making. Eircom therefore regarded the substantive issue as whether, on an on-going basis, Eircom sets retail prices based on actual incurred operational costs.

<sup>322</sup> Eircom response to the Consultation paragraph 242.

<sup>323</sup> Eircom response to the Consultation paragraph 245.

<sup>324</sup> Eircom response to the Consultation paragraph 247.

<sup>325</sup> Eircom response to the Consultation paragraph 238.

<sup>326</sup> Eircom response to the Consultation paragraph 249.

<sup>327</sup> ALTO response to the Consultation paragraph A.17.

<sup>328</sup> Eircom response to the Consultation paragraph 248.

<sup>329</sup> Eircom response to the Consultation paragraph 249.

- 6.23 Eircom's view is that there are two possible approaches<sup>330</sup> to calculate the recovery of the acquisition costs. The first approach uses a maximum payback period – to calculate the minimum costs that need to be recovered each period such that all costs are recovered by the end of the period. The second approach is a complimentary assessment to determine whether additional margins are such that the actual recovery of the acquisition cost is earlier than anticipated. At paragraph 255 of their response to the Consultation, Eircom stated, “... *the complimentary use of the first and second approach is also consistent with an EEO operator cost base. Without the complimentary second approach being implemented it would require a continued allocation in the cost stack of the acquisition cost for a cost that may have long been recovered – which results in higher than required margins and restricts eir's ability to transfer such margin back to consumers through increased value-based propositions and competitive retail offers*”.
- 6.24 Eircom disagreed<sup>331</sup> with ComReg's description of the accumulated margin option as outlined in the Consultation. Eircom did not agree with the complexity that ComReg presents of the second approach in paragraph 6.26 of the Consultation. It was not apparent to Eircom how the proposed quarterly monitoring statement aligned with an accumulated margin approach.
- 6.25 Sky considered<sup>332</sup> that a 60 month recovery period should be set as an upper limit of the time for recovery of the acquisition costs. Sky's view is that allowing for recovery over a 60 month period would be “*more than generous*” to Eircom, and that ComReg's overriding concern must be to ensure replicability of bundled offers. Sky stated its view that considering a period for recovery of acquisition costs beyond 60 months is likely to distort competition by acting as too weak a constraint on Eircom.
- 6.26 Sky referenced Oxera's report and reference to Ofcom's use of 60 months in the context of BT Sports in its VULA Margin test and noted that, unlike BT, Eircom were not required to “*launch*” a new platform, pursue content rights and start from a zero subscriber base. Sky submitted that there are solid grounds on which to argue that the acquisition costs should be recovered over the remaining life of sports rights which were novated to Eircom at the time of the acquisition.

<sup>330</sup> Eircom response to the Consultation paragraph 251.

<sup>331</sup> Eircom response to the Consultation paragraphs 252 – 254.

<sup>332</sup> Sky response to the Consultation paragraph 17.

6.27 Vodafone noted<sup>333</sup> that for clarity, certainty and transparency that the defined period approach based on the maximum payback period for the recovery of the acquisition costs seemed reasonable. Vodafone noted<sup>334</sup> (in response to Question 16) that there are highly limited direct retailing assets that could be recovered over an eight year period and instead suggested using the amortisation period suggested from Eircom's 2016 bondholder report<sup>335</sup> of four to five years.

### 6.3.3 Appropriate subscriber base

6.28 ALTO<sup>336</sup> and Vodafone<sup>337</sup> suggested that the cost of eir Sports could be spread over those who have watched or are 'active' watchers of eir Sports as they are the ones that receive value from it. ALTO suggested "*One other option for ComReg might be to consider that the cost of eir Sports should be spread only over customers that actually watch/consume eir Sports, or pay specifically for eir Sports e.g., wholesale customers. These are the customers that receive value from the content*" (emphasis added by ALTO). Vodafone, in identifying the usage by Eircom retail broadband customers was at 42% from Eircom's third quarter results presentation<sup>338</sup> stated that "... *this would, at the very least, be a starting point for determining this most appropriate divisor*".

6.29 ALTO<sup>339</sup> and Sky<sup>340</sup> viewed the failure to include Eircom's mobile subscribers in the relevant subscriber base as permitting regulatory 'gaming'. It would increase the base, thereby lowering the cost included in the bundles MST. Sky also observed that no revenue impact occurs when eir Sports is provided for free to mobile subscribers. Vodafone agreed<sup>341</sup> that including mobile subscribers in the divisor would not be appropriate.

6.30 Sky<sup>342</sup> noted that costs may actually increase due to free data charges for those mobile users who watch eir Sports on their mobiles, due to it generating zero revenue. Sky added that "... *Eircom are likely to benefit from a conservative estimate of mobile usage in the context of the MST where an average mobile user's usage profile rather than the average usage of mobile customers accessing Eir Sport is assumed*".

<sup>333</sup> Vodafone response to the Consultation paragraph 82.

<sup>334</sup> Vodafone response to the Consultation paragraph 81.

<sup>335</sup> [https://www.eir.ie/opencms/export/sites/default/content/pdf/IR/reports/2015\\_2016/quarter4/eir\\_4th\\_quarter\\_and\\_full\\_year\\_results\\_to\\_30\\_June\\_2016\\_annual\\_bond\\_document\\_1.pdf](https://www.eir.ie/opencms/export/sites/default/content/pdf/IR/reports/2015_2016/quarter4/eir_4th_quarter_and_full_year_results_to_30_June_2016_annual_bond_document_1.pdf)

<sup>336</sup> ALTO response to the Consultation paragraph A.18.

<sup>337</sup> Vodafone response to the Consultation paragraphs 83 to 85.

<sup>338</sup> [https://www.eir.ie/content/pdf/IR/presentations/2016/quarter3/eir\\_3rd\\_quarter\\_results\\_presentation\\_FY1617\\_3.pdf](https://www.eir.ie/content/pdf/IR/presentations/2016/quarter3/eir_3rd_quarter_results_presentation_FY1617_3.pdf)

<sup>339</sup> ALTO response to the Consultation paragraph A.18.

<sup>340</sup> Sky response to the Consultation paragraph 23.

<sup>341</sup> Vodafone response to the Consultation paragraphs 83.

<sup>342</sup> Sky response to the Consultation paragraph 23.

6.31 Eircom considered<sup>343</sup> that the ‘correct’ subscriber base is all end-users that can benefit from eir Sports content as, in Eircom’s view, eir Sports represents a fixed indirect and common cost, and ComReg’s exclusions to its cost recovery is counter-intuitive. Cost recovery and apportionment of costs is, in Eircom’s view, a matter for Eircom and ComReg should not attempt<sup>344</sup> to ‘restrict or rigidly attempt to enshrine through regulation how this is done’.

#### 6.3.4 Recovery of on-going costs (including content)

6.32 ALTO<sup>345</sup> agreed with the proposed treatment of eir Sports in the bundles MST, except where they suggested alterations as per its response to the recovery period for the on-going and acquisition costs.

6.33 Vodafone<sup>346</sup> agreed in principle with the proposed treatment of eir Sports in the MST.

6.34 Sky<sup>347</sup> viewed the ‘net cost’ approach as an appropriate means of assessing the costs of eir Sports to be included in the MST. Sky also expressed the view that it would be appropriate to monitor developments on wholesale pricing to compare costs under both approaches – i.e. the subscriber/inferred subscriber basis.

6.35 Eircom disagreed with the proposed treatment on a number of grounds.

6.36 Eircom stated its view<sup>348</sup> that there is a significant risk that ComReg’s approach will only impact unregulated markets, as the underlying wholesale inputs which are used in the MST are all cost oriented (except for FTTH). Eircom outlined what they consider to be a circularity in relation to the costs of eir Sports if the costs of a wholesale input rises.

6.37 Eircom submitted<sup>349</sup> that a mechanism ‘to minimise the impact of such short term fluctuations on what are long-term pricing decisions’ is needed due to the differences in the regulatory framework and commercial competitive markets, and Eircom’s concerns surrounding “... undue regulatory intervention - in a market which is not subject to SMP”.

<sup>343</sup> Eircom response to the Consultation paragraph 258

<sup>344</sup> Eircom response to the Consultation paragraph 259.

<sup>345</sup> ALTO response to the Consultation paragraph A.19.

<sup>346</sup> Vodafone response to the Consultation paragraph 86.

<sup>347</sup> Sky response to the Consultation paragraph 15.

<sup>348</sup> Eircom response to the Consultation paragraphs 261 and 263.

<sup>349</sup> Eircom response to the Consultation paragraphs 261 to 262.

- 6.38 Eircom viewed<sup>350</sup> the inclusion of eir Sports costs on a bundle by bundle basis as “restrictive” as it limits Eircom’s ability to recover “*the high fixed and sunk cost nature of finite TV content rights*”. Eircom consider that “*Applying a strict cost at an individual product level restricts the ability to attract new (or prevent churning) customers to (or from) those offers. This in turn in aggregate could prevent eir recovering those costs — which in the long-run may dampen eir’s ability to compete in the retail market or restrict eir’s competitiveness in the acquisition of sports rights or other content (an unrelated and separate market).*” Eircom’s proposals to address these issues are below.
- 6.39 Eircom states that combining a commercial and economic view of the eir Sports Costs, the on-going costs including eir Sports’ content and the acquisition of Setanta Ireland are very different. Eircom considers<sup>351</sup> the on-going costs including the eir Sport’s content to be the incremental cost of being in the sports television market, and that these costs over “*the appropriate timeframe*” could be considered similar to eir’s LRIC. Eircom states that the use of this cost standard is consistent with ComReg’s “*treatment of unregulated services to date*”.
- 6.40 Eircom view<sup>352</sup> the acquisition costs of Setanta Ireland as a one-off sunk cost and therefore consider that it has no bearing on future business decisions regarding eir Sports. Eircom considers that the cost of the corporate transaction should not be considered relevant. To the extent that this cost was relevant – which Eircom does not agree that it is - then Eircom considers that it is a fixed indirect or common cost i.e. the type of cost which is considered within the plus symbol in LRIC+.
- 6.41 Eircom submitted that<sup>353</sup> a more appropriate test would be where on-going costs (including content) are included at the individual portfolio level, and acquisition costs at LRIC+ are included at the overall portfolio level (in a single national portfolio as Eircom discussed in their response to Question 10). Eircom suggested that this approach allows updates to the subscriber base, replicability by another operator, and provides for a level of retail pricing stability to individual bundles and standalone offers.

<sup>350</sup> Eircom response to the Consultation paragraphs 263 to 265.

<sup>351</sup> Eircom response to the Consultation paragraph 269.

<sup>352</sup> Eircom response to the Consultation paragraph 270.

<sup>353</sup> Eircom response to the Consultation paragraphs 271 to 273.

## 6.4 ComReg's assessment of Respondent's views

- 6.42 ComReg notes that a variety of responses have been provided by respondents, mostly supportive of ComReg's preliminary views, while Eircom presented arguments in this section for a different approach. Eircom also repeated points raised elsewhere in their submission, and ComReg has addressed these where previously raised.
- 6.43 The provisional views are used as headings to frame ComReg's responses to the submissions received, and are now discussed in turn, providing ComReg's rationale for the concluded upon position and responses to stakeholder feedback.

### 6.4.1 Recovery period of on-going costs

- 6.44 In reply to ALTO's view as summarised in paragraph 6.10 that an upper limit of 60 months was sufficient as any longer may distort competition, ComReg recognises the impact such an upper limit would cause as the period used to recover on-going costs. ComReg did not propose such a period in the Consultation, and agrees with ALTO's second point that Eircom should be required to account for the costs of eir Sports rights within the timeframe to which the rights apply.
- 6.45 Eircom's explanation (see paragraph 6.14) for purchasing Setanta was not queried by the Consultation, or the fact that eir Sports is an unregulated service. The particular issue surrounding this unregulated service is that for no extra charge Eircom, the SMP operator, provides an unregulated service in addition to its retail broadband offers (singly or in a bundle), and that as such, the incremental cost of this service should be included in the cost stack. Failure to do otherwise could lead to anti-competitive effects as discussed earlier (see Section 3.4).
- 6.46 Eircom shared three approaches in their response on the recovery period for on-going costs – as discussed in paragraphs 6.18 to 6.18.3 above. ComReg considers that moving to any of the three options outlined by Eircom as part of its preference for a 'dynamic view' of on-going costs, would lead to subjective outcomes due to varying internal preferences and more fundamentally the rationale provided for these options rather than the method as proposed by ComReg. It is important to note that ComReg proposed in the Consultation a review mechanism to reflect, amongst other things, changes in content costs over time, eligible fixed broadband subscriber base, which would factor in changes in a suitable manner. ComReg discusses each of these drivers of the 'dynamic view' for on-going costs in turn:

*Decision making by eir Sports or Eircom*

6.47 Eircom, building on its rationale for purchasing Setanta (as summarised in paragraph 6.14), referred<sup>354</sup> to eir Sports as a “*business in its own right....that enters into commercial contracts and assesses content opportunities*”, but also stated<sup>355</sup> that eir Sports is a “*marketing tool for the underlying platform*”. It would appear that Eircom separately made the decision to provide eir Sports at no charge to eligible Eircom’s retail broadband subscribers<sup>356</sup>, but due to the risk of the ‘*phenomenon of cord cutting*’ (see below) any independence in terms of decision making (either by eir Sports or Eircom) regarding content appears moot in relation to Eircom’s stated preference of reducing churn by its broadband customer base.

*Cord cutting by customers*

6.48 As discussed in the Brian Williamson report<sup>357</sup> and Eircom’s submission (see paragraph 6.17), the outcome of this observation would suggest that any decisions surrounding content have in fact already been made. To retain customer’s on the Eircom platform, Eircom will have to continue to invest in the content they acquired at the time of the Setanta purchase and any content purchased subsequently. As Eircom consider content’s value for customers as being ‘*perpetual*’, and that these customers can be targeted in advance of the content airing<sup>358</sup>, then to ensure that customers who value this content don’t leave the platform, this would suggest that the exact content will have to be renewed, and again in the next period.

<sup>354</sup> Eircom response to the Consultation paragraph 233.

<sup>355</sup> Eircom response to the Consultation paragraph 235.

<sup>356</sup> Eircom response to the Consultation paragraph 233.

<sup>357</sup> For the avoidance of doubt ComReg have not witnessed evidence for cord cutting in Ireland through the QKDR – the data prepared for Q1 2018 has witnessed an increase in bundling of TV services.

<sup>358</sup> Eircom response to the Consultation paragraph 235.

*Correlation between content and customer joining*

- 6.49 ComReg appreciate Eircom's view as summarised in paragraph 6.16, that there is not an immediate correlation between content being acquired, advertised, and a customer choosing to join the Eircom platform (after being so motivated by new or renewed content). However, ComReg also recognise that there isn't an exact match between those who actually watch eir Sports (48%<sup>359</sup> of the current eligible fixed broadband subscriber base) and those to whom it is provided for free (the eligible fixed broadband subscriber base). Given that these costs are being spread over a higher base than watch eir Sports – by choosing to consume / watch eir Sports, then ComReg consider that this approach eliminates any concerns Eircom may have in relation to inter-period issues related to customer acquisition, and incidentally the ComReg method as proposed builds in current and prospective eir Sports users (so potential growth in the base is already included). Over the longer term, and presuming again that the cord cutting phenomenon may exist, then these customers will be "*perpetual*", and so can only be added once, which is presumably dependent on Eircom's willingness to renew content rights to retain these customers.
- 6.50 It would appear that the current focus of Eircom (as identified by Sky at paragraph 6.12) is to address broadband churn rather than growth. Needless to say any movement to a longer term view of on-going costs would lead to an adjustment to the subscriber base being used (i.e. potentially just those subscribers who watch eir Sports).

<sup>359</sup> Page 28 Eircom Holdings (Ireland) Limited – Second Quarter and Six Months Unaudited Results 31 December 2017



*ATC / LRIC for eir Sports*

- 6.51 In reply to 6.15, the 'net costs' approach is a method to determine the costs of providing eir Sports at no charge to Eircom's eligible fixed retail broadband subscribers. The 'net costs' are those costs not already covered by Eircom's external revenue from selling eir Sports to other entities. Hence the 'net costs' are the incremental costs of providing eir Sports at no charge to Eircom's eligible fixed retail broadband subscribers. ComReg is aware that content is an unregulated market. However eir Sports, unlike other unregulated services that Eircom offer in a bundle (e.g. mobile), does not make a contribution to the bundle in terms of revenue. As Eircom's retail broadband offers are not available without eir Sports, then eir Sports is a tied product and should be included as part of the relevant cost stack, similar to calls or the usage element of a broadband service. The costs of eir Sports exceed the revenue generated from actual paying customers and advertising. To ensure that this remaining cost is recovered, ComReg proposed that the '*net costs*' of this service should be included in the cost stack for those relevant offers which get eir Sports at no charge. If eir Sports were to actually cover its own LRIC as a standard unregulated service then ComReg would not need to use a '*net costs*' methodology. As long as Eircom continue to pursue a free eir Sports strategy when customers purchase a qualifying Eircom retail offer, then these '*net costs*' will need to be recovered.
- 6.52 Factors not covered in any of Eircom's proposed three 'dynamic' views (see paragraphs 6.18 to 6.18.3), include such issues as customer preferences/valuations of content, and Eircom's commitment and ability to renew content. If ComReg moved the approach to one of the options as advocated by Eircom, then these variables and the circularities inherent in decisions made in relation to these exogenous and endogenous factors may be difficult to capture in a modelling exercise. In particular, for the customer preferences/valuations, detailed qualitative and then quantitative willingness to pay type surveys would be necessary to provide any rigour to the claims made by Eircom, particularly in relation to '*perpetual*' valuations. Any deviation in the valuations would lead to fluctuations in the '*net costs*' per subscriber – which is what the "*dynamic approaches*" are at face-value attempting to avoid. A further benefit of bypassing Eircom's approach to managing this area of their organisation is that if the eir Sports or Eircom management team(s) make a decision to not renew content rights, or are unable to, then those customers that valued this content highly may leave the Eircom platform. This internal decision and all the other external factors would have to be factored into modelling any of the "*dynamic approaches*".

- 6.53 In reply to Eircom's view that ComReg's alternative approach in the Consultation – an inferred wholesale charge, is contrary to ComReg's obligations / powers (as summarised in paragraph 6.19) ComReg has engaged with Eircom since their decision to provide eir Sports at no charge to its eligible fixed retail broadband subscribers in mid-2016, and through the Consultation, outlined two possible methods to seek that the costs of this service are recovered in an appropriate manner. The preliminary view was either '*net costs*' or an inferred wholesale charge per subscriber should be used. As discussed in paragraphs 3.20 to 3.22 of the Consultation, and confirmed in this Decision (see Section 3.4.1), then it is appropriate that Eircom should be the ones responsible for recovery of the cost of providing the service beyond what is raised from external sources as otherwise this type of bundling could lead to downstream foreclosure.
- 6.54 The '*net costs*' approach as proposed already enables Eircom to reduce the total costs of eir Sports in each year by the total revenues from external sources that purchase eir Sports and advertise over the channels. ComReg notes that a similar method is used in the UK by Ofcom for BT Sport. Tied in with this is that the costs of content are spread over the period to which eir Sports has broadcast rights, the other in-year costs (e.g. production costs/presenter's salaries) should be recovered in that year. Eircom are then able to spread the costs not covered from external revenue (the '*net costs*') over all Eircom retail broadband subscribers rather than just viewers based on Eircom retail broadband, discussed in Section 6.4.3.
- 6.55 ComReg considers that the preferred method ('*net costs*') as proposed in the Consultation is, contrary to Eircom's view (and particularly the commentary subject to redaction in Eircom's response see paragraph 6.19) suitable as it had an adjustment mechanism to update the '*net costs*' for changing variables. Moving to any of the alternative approaches raised by Eircom through its response, which simply move costs into future periods, has the effect of building up costs which will at some point need to be recovered. Following such a short-term strategy actually works to reduce flexibility in future periods.

6.56 In relation to the period over which on-going content costs in particular should be recovered, ComReg agree with the responses from ALTO (see paragraph 6.10), Sky, and Vodafone (see paragraph 6.11) that investments such as content should be recovered over the period to which they have value, and recognise that standard accounting practice deems that investments should be recovered over their useful economic lives - that is, the duration of the content rights. As discussed and responded to above, Eircom in their response to this question provided a number of arguments that if acted upon would make cost recovery subjective, discretionary in Eircom's favour, or introduce circularities based on separate factors from a number of sources – (customers through their preferences over multiple periods, and wider decisions in relation to Eircom's promotions or commercial content decisions by eir Sports management).

#### 6.4.2 Acquisition costs recovery period

6.57 Eircom's response (summarised in paragraph 6.22) suggested that the acquisition cost can be considered sunk, and therefore does not affect future decision making. If a regulator were to accept this argument, that is, such an investment by an SMP operator was sunk and therefore irrelevant going forward, this would provide an incentive for an SMP operator to continue buying businesses that could be combined into bundles that they offer, which given that the acquisition costs would not be included in the bundles' cost stack would bypass the bundles MST which was established in the first instance to ensure economic replicability of the SMP operators offers is feasible.

6.58 Eircom were unclear (summarised in paragraph 6.24) as to why the accumulated margin approach would need to be verified through the proposed quarterly monitoring statement. ComReg considered this necessary as not all subscribers receive eir Sports – i.e. business subscribers, or those without broadband such as voice only products. These would therefore need to be excluded from any portfolio level calculation of margin. Not all broadband subscribers receive eir Sports – business subscribers are currently precluded from getting eir Sports at no charge – again any margins from these subscribers would need to be removed from a calculation of accumulated margin to reduce the acquisition costs of eir Sports. Most importantly though ComReg did not propose a single national portfolio for broadband in the Consultation, rather distinct areas where the costs incurred in each area were to be covered by the revenues from those areas was proposed and assessment levels that varied between areas from a single portfolio in the UA, to bundle by bundle only in RA2.

- 6.59 The calculations undertaken as part of the pre-launch notification process for retail amendments by Eircom are based on up-front estimates around the expected margin outcome. This margin is a forecast, and these may vary compared to actual outcomes. Until the post-launch monitoring of bundles performance is available, then the margin is simply notional. Permitting forecast margin to be '*accumulated*' without cross-referencing these to actuals through the proposed monitoring statement would allow unwarranted flexibility and encourage regulatory gaming, along with potentially writing off costs ahead of them actually being recovered. The monitoring statement as discussed in Chapter 7 of the Consultation and this Decision provides a record of compliance with the requirements of a bundle not to cause a margin squeeze over its lifetime.
- 6.60 ComReg is mindful that as raised by ALTO (see paragraph 6.21) and Sky (see paragraph 6.23), the longer the recovery period the lower the impact on the cost stack is, and therefore lessens the constraint through the MST on Eircom. Vodafone (see paragraph 6.27) considered that the maximum period was acceptable but also that there are few retailing assets that could be recovered over the maximum period. ComReg agrees with Vodafone's point that there are few direct retailing assets that can be recovered over a long period, and Eircom's point (see paragraph 6.23) that the longer that bundles are required to contribute to the acquisition cost impacts on the competitiveness of Eircom's bundles.
- 6.61 Therefore ComReg, in light of the changes stemming from the decision around the assessment level discussed in detail in Section 5.4.11.2 (bundle by bundle at LRIC everywhere, and the two separate '*national*' portfolios at ATC) compared to what was originally proposed, are of the view that the maximum payback period ([> 12 ] months) should continue to be used to determine the minimum required recovery each month, but this maximum period can be shortened through use of accumulated margin where it is available and after being verified through the provision of the quarterly monitoring statement. ComReg consider that this approach recognises and provides suitable pricing flexibility to Eircom in relation to both the speed of acquisition of cost recovery and is at the appropriate level (portfolio) for this type of unregulated service. The annual auditing of Eircom's regulatory accounts provides comfort to ComReg and the industry that the ability to accumulate margins to write off the acquisition cost is not being abused.

### 6.4.3 Subscriber base for recovery

- 6.62 With regards to using viewership figures as suggested by ALTO and Vodafone (see paragraph 6.28), rather than the entire eligible retail fixed broadband subscriber base to whom eir Sports is available (at no charge), while this is possible and would ensure accurate recovery across those who actually value the service, ComReg are conscious that eir Sports is an unregulated service and its introduction provides Eircom's customers with a benefit of competition and challenges OAOs to enhance their offerings. OAOs are not limited in responding to this kind of pro-consumer and pro-competitive move with respect to their offerings. Forcing Eircom to recover the costs from just those customers who value/watch eir Sports would increase the costs to be recovered from those bundles/broadband services whose subscribers watch eir Sports and would fail to take into account prospective growth and the possibility of reduced customer churn by Eircom. This would also introduce a layer of complexity, as it would require Eircom to present margins on a bundle by bundle basis tracked to individual bundles depending on who watched eir Sports or not, to demonstrate compliance with the bundles MST. More fundamentally, it would lessen the impact of such a pro-consumer development and potentially remove Eircom's and OAOs' incentives to compete.
- 6.63 Eircom proposed (as summarised in paragraph 6.28) that the number of subscribers should be all end-users to whom eir Sports is available at no charge too. As pointed out by ALTO and Vodafone (see paragraph 6.28), inflating the divisor by subscribers who do not contribute any revenue or make a contribution to the 'net costs' would have the effect of reducing the costs of eir Sports included in bundles/broadband that receive the service. As discussed in paragraph 6.53, from a regulatory perspective, particularly surrounding any possible anti-competitive leveraging into markets where Eircom has been found to have SMP, such as in the provision of broadband in the WLA Market, or in the Regional WCA Market, ComReg does have an active interest in ensuring that any incentive or ability to leverage this SMP is not permitted. Given that this service is tied to Eircom's retail broadband products at no charge, inflating the relevant subscriber base by including mobile subscribers would permit a form of regulatory gaming (as summarised in paragraph 6.29) whereby a potential goal could be to undermine the effectiveness of the bundles MST (i.e. the MST would be less binding on Eircom on a bundle by bundle basis).

- 6.64 Sky, see paragraph 6.30, raised the issue that the actual costs of zero-rating this service to mobile subscribers actually increases the costs related to that unregulated service in terms of lost data usage charges and this may impact the bundles MST unless this data charge is included in the calculations required when bundles include mobile services. In relation to zero-rating eir Sports to mobile subscribers in a bundle, the costs for the data used are calculated following monitoring and then included in the cost stack for mobile subscribers in the bundles MST.
- 6.65 Therefore, ComReg continues to be of the opinion that mobile subscribers should not be included in the subscriber base used to determine the monthly costs. If certain costs, e.g. marketing or billing, or the zero rating of data in the provision of eir Sport, are being allocated for recovery elsewhere (e.g. from mobile subscribers), then these costs can be removed from the model. This recovery from those other non-retail fixed broadband subscribers will be identifiable through Eircom's regulatory accounts.
- 6.66 Having considered all responses, and further to Section 6.4 of the Consultation, ComReg considers that setting the subscriber base as just those eligible retail fixed broadband subscribers who can technically avail of this service strikes the right balance in terms of flexibility to Eircom above just those who view it, but not including mobile subscribers which may potentially provide a mechanism to lessen the rigour of the bundles MST.

#### 6.4.4 Reviewing costs

- 6.67 No respondent specifically commented on the proposed review frequency discussed in Section 6.6 of the Consultation.
- 6.68 Sky (summarised in paragraph 6.34) did suggest monitoring commercial arrangements to generate a subscriber/inferred subscriber cost of eir Sport. The "*net costs*" approach includes the outcome of these arrangements through its calculation; Eircom's regulatory accounts will need to separately identify costs and revenues associated with eir Sports to generate the '*net costs*'.
- 6.69 As required to calculate the "*net costs*" ComReg will continue to monitor wholesale pricing agreements to confirm that the appropriate '*net costs*' of eir Sports are included in the bundles MST. This will ensure that events which lead to changes in the '*net costs*' of eir Sports (e.g. changes in: revenue, the eligible fixed broadband subscriber base, content costs, etc.) will be reflected in the bundles MST on an accurate and timely basis.

### 6.4.5 Treatment of eir Sports in the MST

- 6.70 Given ComReg's preference, as expressed in the Consultation (paragraph 6.36), to include the on-going and acquisition costs, and the support for the "net costs" method rather than any alternative, ComReg considers that there is no need to further consider the alternative approaches currently.
- 6.71 In reply to Eircom's argument subject to redaction by Eircom, [redacted] ComReg disagree with such an approach, as it would provide Eircom with undue pricing flexibility beyond what the 'net costs' approach is aiming to achieve (see also 6.63). If revenues [redacted] then the annual review method as proposed in paragraphs 6.33 to 6.35 of the Consultation (see also paragraph 6.69 above) would cater for such eventualities rather than relying on forecasts which may not reflect achievable or inevitable outcomes. ComReg would note, for the benefit of stakeholders, that such a method has already been rejected by ComReg in bilateral discussion with Eircom prior to the Consultation.
- 6.72 In response to Eircom's submission that disagreed with the proposed treatment of eir Sports in the MST to avoid unnecessary duplication of points addressed earlier, cross references to the individual aspects of this summary argument are provided. *Costs of eir Sports when included in bundle by bundle/portfolio level tests*, and *impact on unregulated markets* (as summarised in paragraph 6.35) – see paragraph 6.51; *Timeframes for cost recovery* (as summarised in paragraphs 6.37 to 6.39) – see Section 6.4.1 in relation to on-going costs, and Section 6.4.2 on acquisition costs recovery period; and finally *eir Sports as a sunk cost* (as summarised in paragraph see 6.40) - see Section 6.4.2.
- 6.73 ComReg, having considered responses from stakeholders, continues to view the 'net costs' approach as being appropriate for assessing the costs of eir Sports, and should be included in the bundles MST.

### 6.5 ComReg's final position

- 6.74 A 'net costs' method should be used, which consists of two cost categories – acquisition, and on-going costs. Costs should be reviewed at least annually, or when events occur that change costs or revenues.

- 6.75 For acquisition costs, costs should be recovered from subscribers to those bundles or retail broadband services to whom it is available. The maximum recovery period for eir Sports is [36 ] months since the acquisition, and depending on the availability of confirmed margin, through the quarterly monitoring statements, then portfolio margin may be used to reduce the acquisition cost ahead of the maximum period.
- 6.76 For on-going costs, including content, these should be covered in the period to which they apply. For content, this is the period to which the finite rights exist, for all other on-going costs, these should be recovered in the year in which they are generated.
- 6.77 The subscriber number shall be all those Eircom retail broadband subscribers (only) which can technically access eir Sports, either through standalone retail broadband, or broadband sold as part of a retail bundle.



## Chapter 7

# 7 Pre-launch and post-launch assessment of bundles

## 7.1 Overview

- 7.1 In Chapter 7 of the Consultation, ComReg outlined the requirements imposed by the 2013 Bundles Decision, and discussed whether such pre-launch and post-launch obligations would continue to be necessary if the MST proposed in the Consultation were to be imposed. ComReg also proposed that Eircom would be required to submit a quarterly bundle monitoring statement to ComReg.
- 7.2 In this chapter, ComReg provides an outline of Chapter 7 of the Consultation, assesses responses received to Question 20, Question 21, and Question 22, provides ComReg's reasoning, and states ComReg's final position.

## 7.2 Summary of Chapter 7 of the Consultation

- 7.3 In Section 7.2 of the Consultation, ComReg outlined the notification and pre-clearance approach required by the 2013 Bundles Decision versus a possible self-certification option. ComReg was of the preliminary view that it was appropriate to continue the status quo of the pre-clearance requirement, but indicated that it would welcome views on self-certification.
- 7.4 In Section 7.3 of the Consultation, ComReg addressed post-launch considerations i.e. the steps to follow should a bundle be found not to be compliant with the MST post launch.
- 7.5 Section 7.4 of the Consultation proposed a requirement that Eircom provide ComReg with a quarterly monitoring statement to formalise reporting of the post launch performance of bundles.
- 7.6 ComReg posed three questions in relation to pre and post-launch assessment of bundles and the introduction of a quarterly bundle monitoring statement in the Consultation. These were Question 20, 21 and 22 and set out in Annex 7, and in the next Section, the responses are summarised.

## 7.3 Summary of responses received

### 7.3.1 Pre-clearance requirement

- 7.7 Four responses were received in response to Question 20. Three respondents agreed that maintaining the pre-clearance requirement to monitor and verify Eircom's retail amendments was appropriate (ALTO, Sky, and Vodafone), and one respondent disagreed (Eircom).
- 7.8 ALTO<sup>360</sup> agreed with ComReg's preliminary view, and was of the view that recent history, evident from the Regulatory Governance Model reports, supported the continuation of the pre-clearance requirements. ALTO cited paragraph 7.6 of the Consultation as demonstrating that Eircom has in the past *"failed to provide notification submissions to an established standard."*
- 7.9 Sky<sup>361</sup> agreed with ComReg's preliminary view (continuation of the pre-clearance requirement) and agreed with ComReg's stated position that Eircom's awareness of the existing requirements in relation to retail amendments should assist in terms of reducing any perceived regulatory burden. Sky added its view that Eircom (based on the Regulatory Governance Model reports) *"... has often adopted an ambivalent approach as regards its regulatory obligations and consequently it is appropriate that ComReg continue to require pre-clearance of new or revised bundle offers"*.
- 7.10 Vodafone<sup>362</sup> supported pre-clearance on the basis that without it non-compliant bundles could cause damage to the market which would be difficult to correct after the fact. Vodafone noted that *"Only through the use of a robust pre-clearance obligation can the risk of market manipulation be minimised"*. In relation to self-certification<sup>363</sup> Vodafone noted that weaknesses in Eircom's self-certification processes were identified in the Cartesian review as part of the Regulatory Governance Model and that the review determined that current processes *"could create a risk that eircom fail to comply with its obligations."*

<sup>360</sup> ALTO response to the Consultation paragraph A.20.

<sup>361</sup> Sky response to the Consultation paragraph 24.

<sup>362</sup> Vodafone response to the Consultation paragraph 88.

<sup>363</sup> Vodafone response to the Consultation paragraph 89.

- 7.11 Eircom disagreed<sup>364</sup> with both the preliminary view and the self-certification options as described by ComReg. The preliminary view was considered by Eircom to be “*completely disproportionate*”. Eircom considered that such pre-notification would only be proportionate where there was “*an underlying change*” in the wholesale inputs to the test. Eircom was also of the view that “*With the exception of FTTH-based services, all other wholesale inputs are subject to cost-orientation therefore it is not apparent what regulatory powers ComReg could use to impose this [pre-clearance] requirement absent defining and imposing SMP in the retail market on eir.*”
- 7.12 Eircom outlined<sup>365</sup> that due to the competitive market dynamics in the retail market, Eircom needs to be quicker and more responsive in respect of its retail offerings and promotional activities than its competitors. Eircom outlined its two internal processes; one assessing the business case for a particular promotion or plan and the other determining regulatory compliance of that commercial decision with the NRT, which includes submission to ComReg for assessment within five days. Eircom considers that “*Going forward eir must be able to respond more effectively to market outcomes including consumer demand*”.
- 7.13 Eircom commented<sup>366</sup> that for the RA2 proposed bundle by bundle assessment, was inappropriate, and added that “*early usage patterns may not be representative*” so a longer assessment period for compliance would be appropriate (Eircom in paragraph 278 submitted six months) as forecasts are involved. Eircom also considered that flexibility to test market demand should be allowed, and indicated its view that it was “*strongly debatable*”<sup>367</sup> whether a single non-compliant offer could harm competition as “*it would have to represent a significant up-take to affect the overall portfolio weighting*”.

<sup>364</sup> Eircom response to the Consultation paragraph 274.

<sup>365</sup> Eircom response to the Consultation paragraph 275.

<sup>366</sup> Eircom response to the Consultation paragraph 276.

<sup>367</sup> Eircom response to the Consultation paragraph 277.

- 7.14 Eircom outlined<sup>368</sup> that the self-certification alternative, while preferable to pre-clearance requirement, was also not suitable as the review period is not adequate without a competitive assessment and/or the consumer numbers may not have reached an appropriate threshold to provide any meaningful assessment of forward looking margins. Eircom's proposed solution is to have a six month assessment window with a threshold of 5,000 retail subscribers prior to a statement of compliance being required. After one year, a full compliance statement could be submitted – this would in Eircom's opinion provide the optimum balance between *“ensuring eir is compliant with its regulatory obligations and providing appropriate pricing flexibility”*. Eircom reference the approach that Ofcom have adopted in this regard for the VULA MST in the UK.
- 7.15 Eircom further stated<sup>369</sup> that the pre-clearance approach is based on a misjudged concern that Eircom would deliberately launch a non-compliant bundle.

### 7.3.2 Post-launch requirements

- 7.16 Four responses were received in response to Question 21. Three respondents agreed that the post-launch requirement to monitor compliance with the obligation not to cause a margin squeeze was appropriate (ALTO, Sky, and Vodafone), while one respondent disagreed (Eircom).
- 7.17 ALTO agreed<sup>370</sup> with ComReg's preliminary view, and noted that the approach is particularly important where non-compliant offerings *“are causing material damage to the market and competitors on an ex ante basis”*.
- 7.18 Sky considered<sup>371</sup> it appropriate that Eircom should notify ComReg immediately of any occurrence of a non-compliant bundle post-launch.
- 7.19 Vodafone, in addition to its agreement, also suggested<sup>372</sup> that enforcement measures may not be sufficiently robust to deter the launch of non-compliant bundles and encouraged<sup>373</sup> ComReg to give greater consideration as to how to rectify the damage where non-compliance occurs. Vodafone cross-referred<sup>374</sup> to its answer in relation to Question 13 – which advocated *inter alia* that there should be no decisions made using a 'case-by-case' approach.

<sup>368</sup> Eircom response to the Consultation paragraph 278.

<sup>369</sup> Eircom response to the Consultation paragraph 279.

<sup>370</sup> ALTO response to the Consultation paragraph A.21.

<sup>371</sup> Sky response to the Consultation paragraph 25.

<sup>372</sup> Vodafone response to the Consultation paragraph 92.

<sup>373</sup> Vodafone response to the Consultation paragraph 93.

<sup>374</sup> Vodafone response to the Consultation paragraph 94.

- 7.20 Eircom stated its view<sup>375</sup> that it does not have any market power in the retail market, and as such it is not apparent what powers ComReg could use to enforce compliance of any Eircom retail offer in respect of a potential margin squeeze, other than through concurrent competition powers.
- 7.21 Eircom also raised<sup>376</sup> the assessment period – Eircom feel a one month compliance period is too short. Eircom stated that within a month, an individual portfolio may not be positive due to higher than average throughput/broadband usage in certain months. Eircom viewed a longer compliance period (six months) at a total portfolio level as better for long-term consumer outcomes which would be of benefit to consumers and provides more flexibility for Eircom to compete. After 12 months, a “full compliance statement” could be submitted to ComReg by Eircom.
- 7.22 Eircom queried<sup>377</sup> “why ComReg has consulted on its statutory enforcement powers in the context of retail MSTs” – as it would appear to Eir that ComReg couldn't fetter its regulatory obligations one way or the other as a result of the Consultation and that it would be a matter for ComReg to consider what steps, if any, to take.
- 7.23 Eircom noted<sup>378</sup> that the existing NRT sets out a more detailed and specific procedure for a post launch assessment of a non-compliant bundle. Eircom felt that ComReg should continue that level of specificity to provide regulatory certainty.

### 7.3.3 Quarterly monitoring statement

- 7.24 Four responses were received in response to Question 22. Three respondents agreed that the introduction of a monitoring statement was appropriate (ALTO, Sky, and Vodafone), while one respondent disagreed (Eircom).
- 7.25 ALTO<sup>379</sup> considered that the importance of ComReg monitoring and verifying Eircom's submissions cannot be understated and OAOs need to be confident that ComReg is taking all required steps to ensure that the test is being applied effectively.

<sup>375</sup> Eircom response to the Consultation paragraph 280.

<sup>376</sup> Eircom response to the Consultation paragraphs 282 to 286.

<sup>377</sup> Eircom response to the Consultation paragraph 281.

<sup>378</sup> Eircom response to the Consultation paragraph 287.

<sup>379</sup> ALTO response to the Consultation paragraph A.22.

- 7.26 Sky considered<sup>380</sup> that *“It is critical that Eircom are required to carry out regular reviews of its bundles post-launch, as it undoubtedly has an incentive to plead “ignorance” by not carrying out regular and on-going monitoring of bundles if not mandated to do so.”* Sky suggested that this behaviour was evident in the context of the Regulatory Governance Model reports.
- 7.27 Vodafone fully agreed and stated<sup>381</sup> there *“should be a requirement for eircom to provide a monitoring statement for actual performance compared to original projections on the bundles offered for sale in order to ensure continued adherence to the regulated MST... In the absence of post launch monitoring there is an incentive for Eircom to forecast more aggressive take-up and margins favourable to eircom to allow it pass the MST initially.”* Vodafone added that the *“production of a monitoring statement should increase transparency on the relationship between bundle offers and their costs over their lifetime”*.
- 7.28 Vodafone considered<sup>382</sup> that in the absence of access to the MST data, OAOs have to rely on ComReg to ensure that bundle offers cover their lifetime costs. While Vodafone do not view monitoring statements as a perfect solution, they go some way to improving the monitoring of Eircom’s compliance with the obligation not to margin squeeze. Vodafone viewed<sup>383</sup> the proposed quarterly monitoring period as too infrequent, as it would increase the risk that post-launch non-compliance continues for longer than necessary. Instead Vodafone recommends a monthly statement be required.
- 7.29 Eircom disagreed<sup>384</sup> with the proposed introduction of the monitoring statement. Eircom again noted its concern that the imposition of retail MSTs in combination with a fixed wholesale reference point amounts to *“de facto regulation of retail tariffs”*. Eircom considered that short compliance periods do not provide meaningful information on whether an offer or portfolio is replicable. Eircom viewed<sup>385</sup> the claim that the results in any given month will lead to exclusion in the market as implausible and on that basis considered that *“it should not be necessary to analyse whether short run losses or profits are being incurred in any portfolio”*. Eircom regarded<sup>386</sup> a six month period as sufficient to assess compliance at an *“overall portfolio level (provided by means of a margin squeeze model with explanatory note)”* and indicated that after a 12 month period a full compliance statement could be submitted to ComReg.

<sup>380</sup> Sky response to the Consultation paragraph 25.

<sup>381</sup> Vodafone response to the Consultation paragraphs 95 to 96.

<sup>382</sup> Vodafone response to the Consultation paragraph 98.

<sup>383</sup> Vodafone response to the Consultation paragraph 97.

<sup>384</sup> Eircom response to the Consultation paragraph 288.

<sup>385</sup> Eircom response to the Consultation paragraph 289.

<sup>386</sup> Eircom response to the Consultation paragraph 290.

## 7.4 ComReg's assessment of Respondent's views

- 7.30 This section assesses the responses received and provides ComReg's reply to these and the rationale for any changes from the Consultation.
- 7.31 ComReg notes that a variety of responses have been provided by respondents, mostly supportive of ComReg's preliminary views, while Eircom presented arguments in this section for a different, potentially more flexible approach than the proposed framework. Eircom also repeated points raised elsewhere in their submission. For clarity cross-references have been provided, where relevant.
- 7.32 The provisional views are used as headings to frame ComReg's assessment of the submissions received, and are discussed in turn, providing ComReg's rationale for the concluded upon position and responses to stakeholder feedback.

### 7.4.1 Pre-clearance requirements

- 7.33 ALTO, as summarised in paragraph 7.8, inferred that there have been past failings in terms of submissions not being of the standard required. The Consultation did not state this. Rather, it outlined the standard which information required for an assessment to be made on a particular submission needed to satisfy i.e. a finalised version of the submission is required, where the price list, and compliance statement documentation match the model provided. Where submissions are not of the required standard, then ComReg 'stop the clock' on the assessment until a complete submission is provided. Of the 69 notifications submitted in 2017, on several occasions the documentation and models were not in agreement. ComReg sought clarifications within the review period and these were provided. ComReg considers that the current pre-clearance requirement from the 2013 Bundles Decision is working as intended.
- 7.34 In relation to the observations from ALTO, Sky and Vodafone (see paragraphs 7.8 to 7.10) on the Regulatory Governance Model ("**RGM**") project, ComReg's observations are under review and the next stage in that project is being advanced. However, insofar as bundles are concerned and the potential movement from the current pre-launch assessment to any other alternative, doing so at present may be premature.

- 7.35 Vodafone, as summarised in paragraph 7.10, flagged that non-compliant bundles could cause damage to the market which would be difficult to correct after the fact and that pre-clearance reduces the risk of market manipulation. ComReg note this view and consider that the pre-clearance assessment assists in reducing the likelihood of such outcomes. ComReg reminds stakeholders that the pre-launch assessment is not a guaranteed confirmation that bundles will always be compliant; it is just a check that the bundles as envisaged at the pre-launch stage do not appear likely to cause a margin squeeze. The obligation to monitor and ensure that offered bundles do not cause a margin squeeze remains with Eircom.
- 7.36 Eircom, as summarised in paragraph 7.11, disagreed with both of the options outlined by ComReg in the Consultation, describing pre-clearance as “*completely disproportionate*” and justified only where the price of wholesale inputs change. ComReg disagree, as outlined in Section 3.4.1 of this document, absent regulation including pre-clearance there is the possibility that the SMP operator, Eircom, may through its pricing of bundles actively engage in anti-competitive behaviours to the detriment of consumers and competitors.
- 7.37 Eircom, as summarised in paragraph 7.11, also queried what regulatory powers ComReg could use to impose a pre-clearance requirement other than imposing SMP in the retail market on Eircom. ComReg addressed this point previously – see Section 3.4.1 of this Decision.
- 7.38 In relation to Eircom’s response, summarised in paragraph 7.12, that due to the competitive market dynamics in the retail market it needs to be quicker and more responsive than its competitors and the preparation of submissions to ComReg potentially delays Eircom’s launch of offers, ComReg consider that this part of Eircom’s response has two aspects – a pro-active element, and a reactive element. Both are however, within Eircom’s control.



- 7.39 For pro-active (pre-planned) offers Eircom's internal process should build in time for review, which ensures that any such commercial decisions factor in regulatory obligations pursuant to the finding of SMP (discussed in Chapter 3). A rational approach to eliminating any misunderstandings in relation to regulatory obligations would be for an operator to communicate these obligations to those decision makers involved in formulating commercial decisions. This would assist in ensuring that proposed offers comply with regulatory obligations. Eircom, given that the requirement to obtain pre-clearance in advance of bundles' being offered have been subject to this requirement for several years, should have a very robust process established at this stage. ComReg, separate to the ComReg RGM review, is aware that such a process is overseen through a [redacted]. The ComReg RGM project also provided a number of learning points which can be addressed by Eircom to further improve processes.
- 7.40 On the re-active offers, ComReg are unclear as to how Eircom could in any case respond quicker than they currently do. Eircom informed ComReg in two separate emails 9/06/2017, and 4/12/2017 that its IT system requires [redacted]. These statements were in reference to a new offer and altering an existing one. This actual constraint in implementing changes to the IT system support ComReg's position in relation to this solely theoretical and entirely self-imposed constraint on Eircom's response to "*competitive market dynamics*". Therefore, similar to the position as outlined in Sections 5.12 and 7.2 of the Consultation, and this Decision Document, ComReg does not agree that there is a need to alter the pre-clearance requirement in such instances.
- 7.41 In relation to paragraph 7.13 above, ComReg did not originally propose that bundles should be sold or offered for sale in RA2 at less than ATC. Given that our proposals have been amended in this regard as discussed in Chapter 5, Section 5.4.11.2, then this point is better covered there.

- 7.42 With regards to Eircom's suggestion of a six month compliance period, and/or the ability to "test demand", as summarised in paragraph 7.14, the purpose of the MST is to assess that Eircom's bundle offers containing wholesale components (where Eircom has been found to be an SMP operator) demonstrate that Eircom's combination of these components and the retail price set by Eircom is not causing a margin squeeze, and is therefore replicable. A six month compliance period and/or a threshold number for meeting the bundles MST assessment criteria, could (as Vodafone pointed out) cause damage to the market which would be difficult to reverse. It should be noted that many promotions are of [§< ██████████ ██████████ ], ComReg not gaining sight of these until six months post launch could force OAOs onto loss making trajectories in competing with Eircom.
- 7.43 The purpose of testing demand is also not sufficiently clear. ComReg note that a 5,000 subscriber threshold as proposed by Eircom would represent [§< ██████████ ██████████ ]. If such an option were to be permitted then there would be an incentive for Eircom to launch bundles which did not comply with the margin squeeze obligation, and if indeed the bundle did approach the threshold, then a similar yet new bundle could also be "tested" that would be subject to the 5,000 threshold as well, with the end result being that this would encourage regulatory gaming.
- 7.44 In relation to the approach that Ofcom have adopted that does look at a six monthly compliance period (and the margin's performance is assessed against the cohort of customers who joined in that period), ComReg considers that this method may work in the future. However, the ACL work with industry prior to the Consultation, [§< ██████████ ██████████ ] would indicate that this method of assessment is not feasible for use in the bundles MST.
- 7.45 Eircom, as summarised in paragraph 7.15, stated that there is a misjudged concern that Eircom would deliberately launch a non-compliant bundle. The purpose of the pre-clearance process is to demonstrate that the bundle, as forecast, complies with the bundles MST obligation not to cause a margin squeeze. As discussed in Chapter 3 of the Consultation and this Decision, ComReg considers that without such an obligation being placed upon Eircom, Eircom through its SMP in the WLA market and Regional WCA market has the ability and incentive to engage in exclusionary behaviour including but not limited to causing a margin squeeze.

## 7.4.2 Post-launch requirements

- 7.46 ComReg notes Sky's observation surrounding on-going monitoring of compliance by Eircom (as summarised paragraph 7.18 and Sky's related point as summarised in paragraph 7.26) and ComReg considers that the post-launch monitoring obligation and obligation to provide quarterly monitoring statements complement one another in this regard.
- 7.47 ComReg, in reply to Vodafone's comments, as summarised in paragraph 7.19, considers that the pre-launch assessment's purpose is to ascertain whether an offer has demonstrated (based on Eircom's forecasts) likely compliance with the obligation not to cause a margin squeeze. ComReg's review of the assessment and the approval provided by ComReg to Eircom is not a definitive finding that the proposed offer will not cause a margin squeeze, but rather that based on estimates from Eircom the offer as submitted is expected not to breach the obligation.
- 7.48 In addition, ComReg reminds stakeholders that the pre-clearance process is just that, and due to vagaries in, amongst other things, consumer consumption, the expected outcome may not always arise. ComReg did not propose that the forecast and actual outcomes have to agree (or even be within an accuracy range). To require this of Eircom would be an onerous obligation and could restrict Eircom's ability to compete thereby lessening competitive tension between operators to the detriment of pro-consumer outcomes.
- 7.49 Finally in reply to Vodafone's request regarding enforcement actions, as summarised in paragraph 7.19, ComReg's objectives<sup>387</sup> frame the approach to enforcement, and in the event of a finding of non-compliance following an investigation, ComReg, as stated in the Consultation (paragraph 7.20), may decide to use its existing statutory enforcement powers or other relevant 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). The second point in Vodafone's argument in relation to not using a case-by-case assessment to permit a bundle's launch has been discussed in Section 5.4.7.

<sup>387</sup> Promote competition, contribute to the development of the internal market, and promote the interests of users within the community

- 7.50 Eircom, as summarised in paragraph 7.20, stated its view that it does not have any market power in the retail market, and is not apparent what powers ComReg could use to enforce compliance of any Eircom retail offer in respect of a potential margin squeeze. ComReg has discussed this previously (see paragraph 2.51 and Section 3.4 on why ComReg disagrees with this interpretation).
- 7.51 In relation to Eircom's observations, as summarised in paragraph 7.21, on the assessment period and its preferred approach. ComReg considers that regardless of what assessment period is chosen the issues presented by Eircom will be present for all operators over that period e.g. higher throughput / broadband usage. ComReg's view is that using longer periods would simply reduce the impact of this higher than average throughput / broadband usage and spread it out over time for Eircom in an assessment. The opposite is true for promotions, including heavy up-front promotions – these promotional costs are spread over the ACL which means only 1/42<sup>nd</sup> is applied to the cost stack in the test pre-launch, based on the presumption that on average a customer will stay on that bundle for 42 months. Currently, given that bills are issued to retail consumers on a monthly basis, wholesale prices are set on monthly basis, and the issues as presented by Eircom work both ways. ComReg sees no need to move from the monthly assessment approach to a longer one.
- 7.52 Eircom, as summarised in paragraphs 7.22 and 7.23, is uncertain why ComReg consulted on statutory enforcement powers and also considered that ComReg should continue the existing approach (from the 2013 Bundles Decision) to post-launch compliance. ComReg has a number of options by which to enforce findings of non-compliance. In both the existing and proposed post-launch compliance approach an element of discretion is available. Relying on explicit requirements, which sit outside ComReg's standard compliance approach, is not ideal and any variation in approach adopted to non-compliance may indeed fetter ComReg's ability to assess a breach other than a strict interpretation of a specific bundles enforcement approach. For bundles the situation is also affected by the considerations discussed in Section 5.11 of the Consultation.

### 7.4.3 Quarterly monitoring statement

- 7.53 ALTO, Sky, and Vodafone's responses outlined the benefits of monitoring. ALTO (as summarised paragraph 7.25) stressed the importance of ComReg monitoring and verifying Eircom's NRT submissions. Sky (as summarised in paragraph 7.26) flagged that monitoring removes the ability of Eircom to plead ignorance in relation to its awareness of bundles failing the MST post-launch. Vodafone (as summarised in 7.27) touched on the differences between pre-launch forecasts and post-launch actual results and its view that Eircom's bundles should cover their lifetime costs.

- 7.54 Vodafone's view, as summarised see paragraph 7.28, was that while monitoring statements are welcome, quarterly is too infrequent, and monthly would be preferable. ComReg acknowledges Vodafone's points and note that compliance with the obligation not to cause a margin squeeze is required on an on-going basis. ComReg proposed a quarterly frequency so as not to create an overly burdensome process for Eircom that a monthly requirement may generate, but also to allow sufficient time to have passed to reflect the performance of bundles since their launch.
- 7.55 In relation to Eircom's points, summarised in paragraph 7.29, ComReg is of the view that the proposed monitoring statement is simply a mechanism to confirm that Eircom is and has been able to comply with its obligation not to cause a margin squeeze under the bundles MST. Being able to comply with this requirement is only possible if some form of monitoring is undertaken by Eircom on an on-going basis. A monitoring statement, as proposed, ensures that this is being conducted.
- 7.56 In relation to Eircom's proposal of an annual compliance statement, based on six month assessment periods at an "*overall portfolio level*". ComReg considers an annual compliance statement is too infrequent to provide any level of comfort on whether margin squeezes are present or have occurred, as ALTO and Vodafone variously pointed out the damage will already have been done to the market (see paragraphs 7.10, 7.17, and 7.19). ComReg considers that the proposed quarterly frequency is sufficiently frequent without creating an overly burdensome requirement on Eircom.
- 7.57 On the assertion of "*de facto regulation of retail tariffs*", ComReg disagree (see Section 3.4 for a full discussion of this assertion). See paragraph 7.51 in relation to the length of the compliance period. The assessment level as proposed was based on a month by month basis on a bundle by bundle basis, and/or at a portfolio level, ComReg discusses this Eircom point in paragraph 5.257.
- 7.58 As discussed in the Consultation in paragraphs 7.22 to 7.24, ComReg's proposed quarterly monitoring statement was to formalise the monitoring requirements of Eircom away from the current ad hoc and incomplete view provided presently ([§< [REDACTED] ]). ComReg is aware that there are costs to any increase in monitoring / data analysis. However, given that the monitoring statement is a method of confirming an existing obligation and is building on what is currently done (the NRT required on-going monitoring of compliance), then new costs, if any, should be minimal.

- 7.59 The current monitoring approach through periodic submissions, which has been in development since 2016, stemmed from bilateral discussions with Eircom based on the actual and estimated data contained in their retail notifications and queries generated from these. ComReg has found that regular monitoring has already provided a number of beneficial outcomes for ComReg, for Eircom and for consumers. Beneficial outcomes include, but are not limited to:
- 7.60 *Time saving when reviewing individual amendments* – consistent and regular data capturing processes provide increased confidence that the data underlying the particular amendments (e.g. wholesale inputs, previous promotion values, etc.) has been updated to the most recently available data. This surety enables ComReg to focus efforts and discussions on the offers themselves rather than querying whether every aspect of the model(s) are up to date or that the mechanics are suitable.
- 7.61 A further time saving is possible in scenarios where Eircom is responding to a competitor's offer (as outlined by Eircom and summarised in paragraph 7.12) or even pre-planned amendments or new bundle launches then queries based on discovering the latest available data can delay both Eircom's provision of data and eventually ComReg's response within the five day turnaround.
- 7.62 *Investigating outcomes in a changing environment* – the NRT permits promotions to be written off over the ACL. In recent years up-front offers have been used extensively across the industry. Greater knowledge of each bundle's margin performance over time through regular data capture, ensures that Eircom's bundles are meeting their obligation for the bundle to cover the costs of its provision.
- 7.63 [§< [REDACTED]  
[REDACTED]  
]; and
- 7.64 Better access to reliable data sources has removed the dependence on assumptions which [§< [REDACTED]  
[REDACTED] ]. Without the monitoring being formalised as it has, then these may not have been identified and corrected for accuracy.

- 7.65 ComReg remains of the view that receiving no submission from Eircom on on-going bundle performance is not suitable and indeed lessens the strength of the on-going compliance with the obligation not to cause a margin squeeze. An *ad hoc* approach to post-launch performance of bundles is not ideal as it is at the discretion of Eircom, places pressure on Eircom and ComReg resources and lessens Eircom management's focus on their compliance obligations. ComReg therefore remains of the view that quarterly monitoring achieves the best balance between frequency of review and potentially the trial use of self-certification rather than pre-clearance.

## 7.5 ComReg's final position

- 7.66 Having considered the responses, and provided ComReg's reply to these, ComReg is of the view that:

7.66.1 The pre-clearance requirement as proposed in the Consultation should be implemented (which maintains the current NRT approach) – Eircom will need to 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;

7.66.2 As discussed in the Consultation and presented as ComReg's preliminary view - in the event of non-compliance of a bundle (or portfolio) with the obligation not to cause a margin squeeze, ComReg should be notified immediately. If requested by ComReg, Eircom shall provide such data as may be required by ComReg to make an informed decision as to whether Eircom is maintaining its on-going compliance obligation with the bundles MST. ComReg may decide to use its existing statutory enforcement powers or other relevant 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); and

7.66.3 As discussed in the Consultation and presented as ComReg's preliminary view - a monitoring statement should be provided by Eircom on a quarterly basis. Eircom is under an obligation to monitor the margins on the bundles which they are supplying or offering for sale in the market. To understand the margin performance of bundles on an on-going basis, ComReg has decided that Eircom provide ComReg with a quarterly bundle monitoring statement for actual performance compared to the original projections provided. The purpose of this statement is to provide sufficient visibility to show that bundles are covering their costs over their lifetime.



## Chapter 8

# 8 Regulatory Impact Assessment

## 8.1 Overview

- 8.1 The purpose of a Regulatory Impact Assessment ('**RIA**') is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation, and to consider any alternative courses of action.
- 8.2 In the Consultation (paragraph 8.2), ComReg noted that its approach to the RIA took into account ComReg's RIA Guidelines<sup>388</sup>, the Department of An Taoiseach's 'Better Regulation' programme<sup>389</sup> and international best practice.
- 8.3 The RIA carried out in the Consultation considered the further specification of price control obligations which were set out in the 2015 FACO Decision and on a preliminary basis in the 2016 WLA / WCA Market Review Consultation. The focus in the Consultation was on the further specification of the price control obligations, as the underlying rationale for these obligations was considered as part of the 2015 FACO Decision and the 2016 WLA / WCA Market Review Consultation.
- 8.4 During the consultation process, ComReg considered the views of respondents, and in some cases has refined its approach to the further specification of price control obligations. The reasoning behind the evolution of ComReg's position has been set out throughout this Decision. The impact of proposed developments to the position consulted on has been discussed in the relevant chapter of this Decision.
- 8.5 In summary, ComReg has developed its position during the consultation process as follows:
- 8.5.1 The bundles MST will not be applied separately across three geographic areas as proposed. Instead, a MST relating to the WLA Market will be applied on a national basis and a MST relating to the Regional WCA Market will be applied across that market as a whole (see paragraph 4.42);

<sup>388</sup> See [ComReg Document 07/56a](#), ComReg, 'Guidelines on ComReg's Approach to Regulatory Impact Assessment', 10 August 2007 (the '**RIA Guidelines**').

<sup>389</sup> See "Revised RIA Guidelines How to Conduct a Regulatory Impact Analysis", June 2009. [http://www.taoiseach.gov.ie/eng/Publications/Publications\\_Archive/Publications\\_2011/Revised\\_RIA\\_Guidelines\\_June\\_2009.pdf](http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf)

- 8.5.1.1 NGA based bundles will use WLA inputs (and where relevant FACO inputs) in the WLA Market (see paragraph 4.43), and will include all the relevant network elements required by OAOs to supply broadband service as well as retail costs;
  - 8.5.1.2 CGA bundles will use WCA inputs (and where relevant FACO inputs) in the Regional WCA Market (see paragraph 4.43), and will include all the relevant network elements required by OAOs to supply broadband service and will include retail costs;
  - 8.5.2 there will be two portfolios, NGA and CGA, with no cross-subsidy between them. Both portfolios will be assessed on an ATC basis (see paragraphs 5.280.1 for NGA and 5.281.1 for CGA);
  - 8.5.3 within each portfolio, all bundles will be assessed on a LRIC basis (see paragraph 5.266);
  - 8.5.4 the cost benchmark to be applied in the bundles MST across all retail services (broadband, calls, and line rental) will be EEO (see paragraph 5.268);
  - 8.5.5 cross subsidisation will be allowed between regulated or unregulated services in either direction within a bundle (see paragraphs 5.242 to 5.243);
  - 8.5.6 standalone retail broadband (except for FTTH) will be included in the bundles MST portfolio level assessments on a proportional basis. Standalone retail broadband will not be tested singly (see paragraphs 5.260 and 5.264); and
  - 8.5.7 acquisition costs related to eir Sports will be spread over a fixed period. Eircom may, subject to verification, use excess margin (after each portfolio's ATC assessment) if available to recover the acquisition costs sooner than over the full fixed period (see paragraph 6.75).
- 8.6 ComReg considers that the effects of the refinements noted above represent a reduction in the complexity of the tests, while continuing to ensure that Eircom cannot leverage its SMP. ComReg overall considers that these refinements are appropriate given the latest data available, the submissions to both this Consultation and the 2017 Pricing Consultation, and the impact of cost orientation of most wholesale inputs.
- 8.7 This chapter summarised the approach to the RIA taken in the Consultation, Respondents views on the RIA, ComReg's assessment of these views, and finally an updated RIA which takes account of Respondent's comments.

## 8.2 Summary of Chapter 8 of the Consultation

- 8.8 Section 8.2 of the Consultation outlined ComReg's steps for assessing regulatory options in a RIA, which were:
- 8.8.1 Step 1: describe the policy issue and identify the objectives;
  - 8.8.2 Step 2: identify and describe the regulatory options;
  - 8.8.3 Step 3: determine the likely impacts on stakeholders;
  - 8.8.4 Step 4: determine the likely impacts on competition; and
  - 8.8.5 Step 5: assess the likely impacts and choose the best option.
- 8.9 ComReg in assessing the proposed remedies followed these steps in Sections 8.3 to 8.7 of the Consultation.
- 8.10 As explained in Section 8.3 of the Consultation, ComReg took account of the extent to which these address ComReg's relevant statutory functions, objectives and obligations, as set out in Section 12 of the Communications Regulation Act 2002 (as amended), Regulation 16 of the Framework Regulations and in Regulations 8 and 13 of the Access Regulations.
- 8.11 ComReg, in Section 8.4 of the Consultation, identified a number of specification options in relation to the proposed price control obligation not to cause a margin squeeze. These were numbered 1 to 11b – presented in the table below:

**Table 9: Identified regulatory options from the Consultation**

Option	Description
1	No MST for bundles is implemented.
2	The MST takes into account that Eircom including OAOs using its wholesale platform are facing more competition in certain areas.
3	The MST is conducted on various bases (i.e., a bundle-by-bundle and/or a portfolio test).
4	A lower cost standard for calls, line rental, and broadband retail costs and the overall appropriate cost standard for the MST.
5	The MST reflects a weighted average cost of the applicable wholesale input.
6	Allow on a case-by-case basis known future reductions in cost e.g., Mobile Termination Rates.
7	That the MST should use different cost standards for retail costs for broadband in the various areas.

8	Unregulated products and services will be included at LRIC cost standard. Cross-subsidisation is allowed from the regulated product/services to the unregulated services.
9a	New/revised bundles must be pre-notified and pre-cleared with ComReg.
9b	Eircom self-certifies that a new/revised bundle meets its obligation not to cause a margin squeeze.
10	If and when a bundle is causing a margin squeeze.
11a	The net costs of eir Sports should be included in qualifying bundles.
11b	The inferred wholesale charges for eir Sports should be included in qualifying bundles

- 8.12 Sections 8.5 and 8.6 of the Consultation assessed the likely impact on stakeholders and competition of the various options. Each option was described and assessed based on the impact on Eircom, OAOs, and Consumers (end-users).
- 8.13 Finally in Section 8.7 of the Consultation, ComReg documented its preliminary conclusion on the preferred approach on each option.

### 8.3 Summary of responses received

- 8.14 ALTO<sup>390</sup> agreed with the RIA.
- 8.15 Vodafone<sup>391</sup> generally agreed with the RIA, but added<sup>392</sup> that as *“discussed elsewhere in our response, there are certain remedies that need refining and improving. Introducing these suggested improvements will, in our view, greatly increase the effectiveness of the proposed remedies”*.
- 8.16 Vodafone concluded<sup>393</sup> by disagreeing with *“ComReg’s preliminary conclusion that no undertaking has SMP in the Urban WCA Market (and that the RIA has not been extended to consider relevant regulatory obligation in respect of this market). We stress the negative impact that will result from the incorrect market definition proposed for the Urban WCA Market. Absent sufficient regulatory obligations, Eircom has the ability and incentive to engage in exploitative and/or exclusionary behaviour. We therefore urge ComReg to implement the proposed de-regulation in a manner outlined in Section 15 above.”*

<sup>390</sup> ALTO response to the Consultation paragraph A.23.

<sup>391</sup> Vodafone response to the Consultation paragraph 99.

<sup>392</sup> Vodafone response to the Consultation paragraph 100.

<sup>393</sup> Vodafone response to the Consultation paragraph 101.

- 8.17 Eircom considered<sup>394</sup> that the RIA, “ignores the very high costs to eir and to consumers of ComReg continuing the highly interventionist approach that applies only to the pricing of eir’s retail bundles. In addition, the administrative costs associated with applying a highly complex ex ante MST on eir are high and continue to increase (due to more complex regulation being imposed incrementally by ComReg over time) from an on-going notification, monitoring and reporting perspective”.
- 8.18 Eircom added<sup>395</sup> that “ComReg’s concerns are theoretical in nature and rely on a number of conditions to hold in order for such outcomes to potentially manifest.” Eircom added that it was unfortunate ComReg did not carry out a Three Criteria Test before publishing the Consultation.
- 8.19 Eircom considered<sup>396</sup> that “The RIA fails to consider the relevant risk of adverse effects arising from price distortion by imposing retail price regulation. Absent an appropriate assessment of the competitive conditions on the retail market, it is simply impossible for ComReg to demonstrate that the imposition of a MST is a proportionate intervention in the specific circumstances of the market.”
- 8.20 Eircom stated<sup>397</sup> that the market analysis in “consultation 16/96 and ComReg’s market analysis Decision D05/15 constitute wholesale market and not retail market assessments” (emphasis added by Eircom). Eircom provided<sup>398</sup> its interpretation that ComReg “appears to be misdirecting itself in relation to the scope of its powers...” as “In neither of the two Regulations is there a provision for the imposition of a retail remedy on the basis of a wholesale market review only”.
- 8.21 Eircom continued by stating<sup>399</sup> that “In the event that the Access Regulations are relevant, which eir considers that they are not, eir considers that ComReg:

<sup>394</sup> Eircom response to the Consultation paragraph 291.

<sup>395</sup> Eircom response to the Consultation paragraph 292.

<sup>396</sup> Eircom response to the Consultation paragraph 293.

<sup>397</sup> Eircom response to the Consultation paragraph 295.

<sup>398</sup> Eircom response to the Consultation paragraphs 296 and 297.

<sup>399</sup> Eircom response to the Consultation paragraph 298.

- (a) *“is proposing to act inconsistently with Regulation 8 of the Access Regulations: ComReg’s market analysis consultation 16/96 and ComReg’s market analysis Decision D05/15 constitute wholesale market assessments only. Without undertaking a Three Criteria Test of the relevant retail market, consistent with the requirements of the 2014 Recommendation, it is not possible to determine whether eir has significant power such that its actions are unaffected by the independent actions of its competitors and customers. Consequently, the nature of the problems identified by ComReg in this Consultation is merely speculative.”*
- (b) *“fails to deliver the key objectives outlined in Regulation 13 (3) of the Access Regulations: By relying on too generous a cost standard (see eir’s response to Question 8), making uninformed adjustments to costs for scale (see eir’s response to Question 7) and at a disaggregated level of assessment for which competition concerns are not grounded in sound economics (see eir’s response to Question 8), ComReg’s proposals are creating a pricing umbrella in the retail market below which eir cannot compete and its competitors need not compete. As such, ComReg’s proposals clearly fail to promote efficiency, promote sustainable competition and maximise consumer benefits.”*
- (c) *“is misapplying the actual outcomes of ComReg’s proposals to the objectives of Regulation 16 of the Framework Regulations: ComReg argue that the MST promotes regulatory predictability as there is currently an NRT already in place. Predictability for consistency’s sake without further consideration is not grounded in any cogent reasoning an economic regulator should consider. Furthermore, the competitive conditions ComReg claims to have taken into account in defining different regional areas with differing MST for each of the regions is inconsistent with the national pricing strategy undertaken by retailers in the market. As such, even the most flexible region is burdened by the requirement to pass the equivalent test in the most stringent area. See eir’s response to Question 7 and Question 8. Finally, ComReg has failed to take the utmost account of both the 2014 Recommendation and 2013 EC Recommendation.”*
- (d) *“fails to deliver ComReg’s objectives as set out in Section 12 of the Act: see eir’s response b. above.”*

- 8.22 Eircom disagreed<sup>400</sup> with ComReg's view that "*absent the MST the NRT would continue*" pursuant to the 2014 Retail Fixed Voice Access market review decision, as it is "*now dated and requires re-assessment*", and as that market is no longer recognised in the 2014 Recommendation then ComReg would need to undertake a Three Criteria Test. Eircom cross-referred<sup>401</sup> to paragraph 25 in its response (which required ComReg to "*commit to revisiting...the retail fixed narrowband access market*").
- 8.23 Eircom cross-referred<sup>402</sup> to its response to Question 6 in relation to Option 2.
- 8.24 Eircom, on Option 3, considered<sup>403</sup> that the RIA failed to consider the impact of applying different remedies between "*defined regulatory boundaries*" on Eircom, OAOs and consumers.
- 8.25 Eircom expressed<sup>404</sup> its views that the RIA also failed to consider the impact of the separate WAWNIs for CGA and NGA bundles, the replacement of the LEA with the UA, and RA1, and the impact of inconsistent downstream retail costs between areas. Eircom also cross-refer to its responses to Questions 7 and 8.
- 8.26 Eircom cross-referred<sup>405</sup> on Option 4 to its observation in relation to Option 3 (see paragraph 8.24 above), and its "*Other considerations*" as presented in reply to Question 8 by Eircom.
- 8.27 Eircom, in relation to Option 5, referred<sup>406</sup> to Option 3 (see paragraph 8.24 above), and also re-presented paragraphs 133 and 189 from its submission<sup>407</sup> which discussed its estimate of the impact of the proposed bundles MST with respect to the impact on pricing flexibility for CGA bundles between the movement from the LEA to an UA, and RA1.
- 8.28 Eircom agreed<sup>408</sup> with Option 6.

<sup>400</sup> Eircom response to the Consultation paragraphs 299 to 300.

<sup>401</sup> Eircom response to the Consultation paragraphs 299 to 300.

<sup>402</sup> Eircom response to the Consultation paragraph 301.

<sup>403</sup> Eircom response to the Consultation paragraph 302.

<sup>404</sup> Eircom response to the Consultation paragraphs 303 - 304.

<sup>405</sup> Eircom response to the Consultation paragraph 305 and 306.

<sup>406</sup> Eircom response to the Consultation paragraph 307.

<sup>407</sup> Eircom response to the Consultation paragraph 308.

<sup>408</sup> Eircom response to the Consultation paragraph 309.

- 8.29 Eircom disagreed<sup>409</sup> with Option 7, as it considered that “*Without appropriate evidence...such an adjustment is purely speculative*”. Eircom expressed<sup>410</sup> its views of the impact of that by stating that “... *ComReg’s regulatory intervention will result in excessive retail prices to the detriment of Irish consumers and, by limiting competition, will hamper efficient commercial investment in infrastructure and services*”. Eircom finalised<sup>411</sup> its view on Option 7 by cross-referring to its reply to Question 7.
- 8.30 Eircom agreed<sup>412</sup> with Option 8, noting “*LRIC is consistent... it is the appropriate standard to use*”. Eircom added<sup>413</sup> on cross-subsidies, its view that “*in order to imitate the commercial decisions of all operators in a market ComReg must recognise that the replicability of a bundle is determined by the margins of the bundle in its entirety and therefore firms cross-subsidise between all elements within the bundle and bundle portfolio*”.
- 8.31 On Option 9a and 9b, Eircom cross-referred<sup>414</sup> to its reply to Question 20.
- 8.32 On Option 10 it was not apparent<sup>415</sup> to Eircom “... *what powers ComReg could use under the Access or Framework Regulations to enforce compliance of any eir retail offer in respect of a potential margin squeeze.*” Eircom also pointed<sup>416</sup> to its response to Question 21.
- 8.33 Eircom considered<sup>417</sup> in relation to Option 11a, that competitors would not view eir Sports in the “*constrained way as proposed by ComReg*”. Eircom continued by expressing that “*The acquisition of sports content and content more generally is a long term strategic investment and the ability to extract value when considering prices and cost recovery are at a broader level than the strict bundle-by-bundle proposed by ComReg. The proposed MSTs lack the required flexibility to allow eir to determine how best to recover its large fixed and indirect common cost*”.
- 8.34 Eircom considered<sup>418</sup> in relation to Option 11b that an “*inferred wholesale charge is not appropriate to be used in the test. eir does not have SMP in the market and therefore such a mechanism would be contrary to any of ComReg’s regulatory obligations and powers.*”

<sup>409</sup> Eircom response to the Consultation paragraph 310 to 311.

<sup>410</sup> Eircom response to the Consultation paragraph 312.

<sup>411</sup> Eircom response to the Consultation paragraph 313.

<sup>412</sup> Eircom response to the Consultation paragraph 314.

<sup>413</sup> Eircom response to the Consultation paragraph 315.

<sup>414</sup> Eircom response to the Consultation paragraph 316.

<sup>415</sup> Eircom response to the Consultation paragraph 317.

<sup>416</sup> Eircom response to the Consultation paragraph 318.

<sup>417</sup> Eircom response to the Consultation paragraph 319.

<sup>418</sup> Eircom response to the Consultation paragraph 320.



8.35 In relation to Section 8.7 of the Consultation, Eircom considered<sup>419</sup> that its submission to the Consultation pertained to two matters. *“The first demonstrates that the facts and reasoning used by ComReg in this Consultation are wrong. Having failed to follow the prescribed statutory process for the imposition of ex ante regulation, it would simply be ultra vires for ComReg to proceed to the imposition of a retail MST at this stage. Second, with respect to the components and workings of the MSTs, Eir has proposed alternative price control measures which better meet ComReg’s regulatory objectives and are more consistent with the 2013 EC Recommendation and ex-post competition law.”*

## 8.4 ComReg’s assessment of Respondent’s views

8.36 ComReg has considered respondents’ views shared in relation to the Consultation. Where respondents commented on issues outside the scope of this Consultation and Decision (for example, on the definition of markets) ComReg has, insofar as possible, referenced where these are addressed in the 2018 WLA / WCA Market Review Decision, and is not considered further in this Decision. The discussion below is limited to respondents’ comments on the RIA.

8.37 ComReg note Vodafone’s point (as summarised in paragraph 8.15) about the recommendations provided elsewhere in its response, and have been responded to by ComReg in the assessment of Respondent’s views throughout this Decision. In relation to Vodafone’s point as summarised in paragraph 8.16, please see paragraph 2.44 in this regard.

8.38 ComReg, in reply to Eircom’s view as summarised in 8.17, did consider the impact and proportionality of the proposed imposition of a bundles MST on the SMP operator in the RIA as part of the Consultation. ComReg’s approach to conducting the RIA was explained over Section 8.1 and 8.2 of the Consultation. The five steps identified in Section 8.2 of the Consultation were then followed through the RIA process, with cross references as relevant provided to the relevant section of the Consultation. ComReg’s objectives were identified and discussed in Section 8.3, with Section 8.4 outlining the possible specification options for a MST, and Sections 8.5 to 8.7 were devoted to determining the likely impacts on ComReg’s stakeholders given ComReg’s objectives, using the five steps.

<sup>419</sup> Eircom response to the Consultation paragraph 321.

8.39 ComReg disagree with Eircom's view as summarised in 8.18 that "*concerns are theoretical in nature*", as previously covered in paragraphs 3.62 to 3.65 of this Decision, and in relation to a Three Criteria Test, see paragraph 2.54. Similarly for Eircom's point, as summarised in paragraphs 8.19 (a retail market assessment), and 8.20 ("*ComReg misdirecting itself on scope of its powers*"), see paragraph 2.51.

8.40 In response to Eircom's observations, as summarised in paragraph 8.21:

On point A from Eircom, ComReg considers that the Access Regulations are relevant, and as discussed in 2.53 of this Decision in relation to Section 2.3 of the Explanatory Note to the 2014 Recommendation on markets, states "*Given the analysis conducted by the Commission ... for the markets listed in the Recommendation, a presumption exists that the three criteria are met. Therefore, NRAs do not need to reconsider them*";

On point B from Eircom, see paragraphs 2.58 and 2.59 which relate to Eircom's view of the impact from the proposed bundles MST, and 4.37 (pricing umbrella) and 4.44 (ComReg's rationale for altering from the geographic areas approach);

On Point C from Eircom, with respect to the Framework Regulations, ComReg is guided by the obligations imposed through the Framework Regulations as discussed in the Consultation (Section 8.3.4) which in reply to Eircom include the objective for "*promoting regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods*". ComReg continues to consider that a well-defined MST, as done through the Consultation, and this Decision could address the leveraging concerns as discussed in Chapter 3 of the Consultation, and revisited in Chapter 3 and in particular Section 3.4. On Eircom's observation related to different regional areas and differing MSTs see ComReg's response on Point B above, and finally with respect to consistency with the 2013 and 2014 Recommendations see paragraphs 2.50, and 2.60 to 2.62.

Finally on point D from Eircom, ComReg considers that as discussed in the RIA from the Consultation, the bundles MST is appropriate in light of fulfilling ComReg's objectives - see also paragraph 3.65 of this Decision.

8.41 In response to Eircom's points on the various options shown in Table 9 above from the Consultation, ComReg now replies to these observations:

- 8.42 ComReg disagrees with Eircom's view as summarised in paragraph 8.22. The NRT pursuant to Market 1b and 1c, would remain in place. In relation to an assessment of the FACO Market, ComReg, under Article 16(6)(a) of the Framework Directive, wrote to the European Commission on 25 April 2018 notifying it of a request for a two year extension with respect to the FACO Market(s) analysis timeline, and the European Commission did not object to this request.
- 8.43 In relation to Eircom's cross-reference to Question 6 in paragraph 8.23 on Option 2, a full response has been provided in Section 4.4.
- 8.44 ComReg in reply to Eircom's response as summarised in paragraphs 8.24 and 8.25, considers that the likely impact relating to Option 3 was considered in the RIA in the Consultation. Regarding Eircom's observation on Option 4, as summarised in paragraph 8.26, ComReg has considered this previously as part of the response to Questions 7 and 8 (see Sections 5.4.1 and 5.4.2).
- 8.45 ComReg in reply to Eircom's response as summarised in paragraph 8.27 on Option 5 please see paragraphs 2.57 to 2.59.
- 8.46 ComReg in reply to Eircom's response as summarised in paragraph 8.29 on Option 7, had considered this in the 2017 Pricing Consultation, as discussed in Section 5.4.1 of this Decision.
- 8.47 ComReg, in reply to Eircom's response as summarised in paragraph 8.30 on Option 8, as discussed in Section 5.4.10 of this Decision has altered the preliminary view on the limitation of cross-subsidies within a bundle.
- 8.48 In relation to Eircom's cross-reference to Question 20 in paragraph 8.31 on Option 9a and 9b, a full response has been provided in Section 7.4.1.
- 8.49 In reply to Eircom's point as summarised in paragraph 8.32 on Option 10, ComReg has discussed the post-launch requirements in Section 7.4.2 but particularly in paragraph 7.49 discuss ComReg's enforcement powers.
- 8.50 ComReg in reply to Eircom's point as summarised in paragraph 8.33 on Option 11a, has discussed the inclusion of eir Sports net costs in Section 6.4 of this Decision.
- 8.51 ComReg in reply to Eircom's point as summarised in paragraph 8.34 on Option 11b, ComReg have not advanced this option, and have decided on Option 11a as discussed in Section 6.4 of this Decision.

8.52 In reply to Eircom's views, as summarised in paragraph 8.35, which reiterate Eircom's response provided on Question 1, see paragraphs 2.48 to 2.52 in relation to the prescribed process, and 2.60 to 2.62 in relation to the 2013 EC Recommendation.

## 8.5 ComReg's position based on responses and updated thinking

8.53 When the Consultation was published, ComReg considered in detail the likely impact which the proposed pricing measures may have in terms of stakeholders and on competition. The regulatory impact of continuing with existing measures and new measures is considered at each stage of the process, and is discussed explicitly throughout the Consultation and Decision.

8.54 ComReg considers that Respondent's views on the RIA from the Consultation did not raise fundamental issues with the approach to the RIA, but rather, focused on the Options as discussed in the RIA.

8.55 The remainder of this Chapter updates the RIA which was undertaken in the Consultation, in order to reflect the development of ComReg's approach, and to take into account the views of Respondents. As Eircom has been subject to price control obligations in the WLA Market, and WCA Market to date, ComReg has focused in this RIA on the incremental impact of new or amended options. In particular, this applies to the following:

8.55.1 Continue unaltered - Options 1, 6, 9a, 10, 11a. The rationale as discussed in the RIA from the Consultation remains proportionate and justified in ComReg's view;

8.55.2 Removed options – Options 9b, and 11b. These are being removed as they are not being implemented as the alternative options to 9a and 11a;

8.55.3 Altered options – Options 3, 4, 5, and 8. These Options require amendment due to the wider changes as presented in 8.5.1 to 8.5.6 above;

8.55.4 Replaced options – Options 2 and 7, will now be Options 12 and 13. These Options require amendment due to the wider changes as presented in 8.5.1 to 8.5.6 above; and

8.55.5 New options – Options 14, and 15. These options are discussed below.

8.56 ComReg considers that Options 3, 4, 5, and 8 need to be altered specifically as:

- 8.56.1 Option 3 will need to be amended to reflect that there will be two portfolios (based on Option 2), one for NGA, and one for CGA. The assessments will be conducted on a bundle by bundle and portfolio level basis;
- 8.56.2 Option 4 will need to reflect that the two portfolios will be assessed on an ATC basis, and all bundles sold/offered for sale by Eircom will be assessed on a LRIC basis;
- 8.56.3 Option 5 will need to reflect that the WAWNI calculations will for: NGA based bundles use WLA inputs (and where relevant FACO inputs) in the WLA Market, and will include all the relevant network elements required by OAOs to supply broadband service; and for CGA bundles will use WCA inputs (and where relevant FACO inputs) in the Regional WCA Market; and
- 8.56.4 Option 8 will be altered with regards to the cross-subsidy now permitted each way - between regulated or unregulated services within a bundle.
- 8.57 ComReg considers that Options 2, and 7 need to be replaced as:
- 8.57.1 Option 2 will need to be replaced by Option 12 to reflect that the bundles MST will not be applied separately across three geographic areas (UA, RA1, and RA2) as proposed. Instead MSTs relating to the WLA Market will be applied on a national basis and MSTs relating to the Regional WCA Market will be applied across that market as a whole;
- 8.58 Option 7 will be replaced by Option 13 to reflect that the cost benchmark to be applied in the bundles MST for the retail costs for broadband will be EEO;
- 8.59 Finally in relation to the new options:
- 8.59.1 Option 14 - due to the removal of the standalone retail margin squeeze tests for CGA and FTTC broadband, as proposed in the 2017 Pricing Consultation, ComReg will include standalone retail broadband (except for FTTH) will be included in the bundles MST portfolio level assessments on a proportional basis; and
- 8.59.2 Option 15- the acquisition costs related to eir Sports will be spread over a fixed period. Eircom may, subject to verification, use excess margin (after each portfolio's ATC assessment) if available to recover the acquisition costs sooner than over the full fixed period (see paragraph 6.77).
- 8.60 We have assessed the options available and the likely impact of each one on the various stakeholders in the RIA below.

## 8.6 Steps for assessing regulatory options

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

- 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

8.62 Each step is discussed in detail below.

### 8.7 Step 1 - Describe the policy issue and identify the objectives

8.63 As the WLA and WCA Market Decisions already provide for price control obligations 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 transparency obligations. The 2018 WLA / WCA Market Review Decision has identified exchanges (those in the Urban WCA Market) which prospectively should no longer be subject to regulation regarding the WCA Market.

8.64 In setting out its Decision, ComReg has had regard to its relevant statutory functions, objectives and obligations, as set out in section 12 of the Communications Regulation Act 2002 (as amended), Regulation 16 of the Framework Regulations<sup>420</sup> and in Regulations 8 and 13 of the Access Regulations<sup>421</sup>, which are discussed in detail below.

#### 8.7.1 Regulation 8 of the Access Regulations

8.65 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*

<sup>420</sup><http://www.comreg.ie/fileupload/File/S.I.%20No.%20333%20of%202011%20Framework%20Regs%20Final.pdf>

<sup>421</sup><http://www.comreg.ie/fileupload/File/S.I.%20No.%20334%20of%202011%20Access%20Regs%20Final.pdf>

*(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:

- 8.66 There is a significant risk that Eircom could cause a margin squeeze such that the difference between the retail prices of Eircom bundles and the prices of the underlying wholesale inputs that OAOs rely on for their equivalent bundles could be too small 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 bundle offers. This could prevent OAOs competing effectively to the detriment of consumers in the long-run.
- 8.67 See paragraphs 3.1 to 3.50 of the Consultation, and Chapter 3 of this Decision for a further discussion of the points above.

Proportionate and justified:

- 8.68 ComReg considers that effective upstream regulation will permit the removal downstream of the NRT in the Retail Fixed Voice Access market.
- 8.69 See paragraphs 3.1 to 3.50 of the Consultation, and Section 3.4.1 of this Decision for a further discussion of the point above.

## **8.7.2 Section 12 of the Communications Regulation Act 2002 (as amended)**

8.70 ComReg's objectives in relation to the provision of electronic communications networks, electronic communications services and associated facilities, as set out in Section 12 of the Communications Regulation Act 2002 (as amended), are:

- (i) to promote competition;*
- (ii) to contribute to the development of the internal market; and*
- (iii) to promote the interests of users within the Community*

8.71 In particular, in relation to this RIA, in so far as the promotion of competition is concerned, ComReg shall take all reasonable measures:

- *ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;*
- *ensuring that there is no distortion or restriction of competition in the electronic communications sector; and*
- *encouraging efficient investment in infrastructure and promoting innovation.*

Promote competition:

- 8.72 Eircom, as a vertically-integrated operator which competes downstream with bundled retail products, could exert its upstream SMP to create a margin squeeze by decreasing the Eircom retail bundle price or increasing one or some of the underlying wholesale costs of inputs used by OAOs — to the extent that an OAO's margin would not be sufficient to cover its costs. Such a margin squeeze could be used by Eircom to reinforce its upstream SMP 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.
- 8.73 The MST is designed to ensure that Eircom is not able to leverage vertically or horizontally (via bundling) from the upstream market into the retail market. This should provide comfort to OAOs (who purchase wholesale inputs from Eircom) in making commercial decisions regarding launching and promoting their own retail bundles.

Encouraging efficient investment in infrastructure and promoting innovation:

- 8.74 The bundle by bundle level test will reflect the actual use by OAOs of Eircom's wholesale inputs (updated quarterly i.e., the WAWNI). A lower WAWNI allows Eircom to reduce the retail price of its bundles as it effectively has more margin in the MST. This could result in overall cheaper bundles to the benefit of end-users. This in turn should encourage Eircom to promote the use of VUA by OAOs in order to further reduce the WAWNI. The use of separate WAWNI values for FTTC and FTTH will accurately reflect the choice made by OAOs in serving customers. As discussed in Section 4.4 ComReg considers that the bundle by bundle and portfolio assessments should be focused on broadband technology (e.g. CGA and NGA) rather than geographic areas as originally proposed in the Consultation. ComReg considers that the '*where available*' method focussing on bundles/standalone retail broadband using available technology rather than defined geographic areas is more suitable to ensuring that replicability of Eircom's offers by an OAO is realistic. ComReg considers that an OAO continuing to use CGA WLA inputs will not be adversely affected by this approach as Eircom's CGA WLA inputs are subject to national cost orientation; non-discrimination, transparency and access obligations. In other words an OAO intent on serving its customers via a CGA broadband service will still be able to do so.
- 8.75 In particular, in relation to this RIA, in so far as the promotion of the interests of users within the community is concerned, ComReg shall take all reasonable measures:



- *encouraging access to the internet at reasonable cost to users.*

8.76 ComReg's proposals on promoting competition should result in bundles prices (including internet access) being competitive and therefore more likely to be of reasonable costs to user.

Promoting the interests of users within the Community:

8.77 Safeguarding efficient competitors from a possible margin squeeze by the SMP operator should help to facilitate greater regulatory certainty for longer-term competitive entry and expansion. This should have a positive impact on the price, choice and quality of services ultimately delivered to end-users.

### 8.7.3 Regulation 13 of the Access Regulations

8.78 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."*

8.79 The requirements set out in Regulation 13(1) of the Access Regulations have been discussed in the 2016 WLA / WCA Market Review Consultation in Chapters 7 and 12 and in the 2018 WLA / WCA Market Review Decision in Chapters 8 and 13. This includes an obligation on Eircom not to cause a margin (price) squeeze.

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

*"The Regulator shall ensure that any cost recovery mechanism or pricing methodology that it 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."*

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

Promote efficiency:

8.82 There are several different forms of efficiency:

- Allocative efficiency: where prices of different products result in an optimum allocation of resources based on consumers' preferences;
- Productive efficiency: the cost of producing the products is minimised; and
- Dynamic efficiency: involves improving allocative and productive efficiency over time.

8.83 The MST provides certainty for OAOs that Eircom cannot engage in a margin squeeze. The provision of the MST ensures that Eircom and OAOs competing in the market will focus on productive and dynamic 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.

8.84 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 should be to the benefit of end-users.

#### Promote sustainable competition:

8.85 Please refer to paragraphs 8.72 and 8.73 above for a detailed discussion on the impacts on competition.

#### Maximise consumer benefits:

8.86 Please refer to paragraph 8.77 above for a detailed discussion with regard to the benefits to end-users.

### **8.7.4 Regulation 16 of the Framework Regulations**

8.87 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 2002 (as amended) and/or Regulation 13 of the Access Regulations. Some other key requirements associated with Regulation 16 which have not been addressed so far as part of those discussions are set out below.

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

8.88 ComReg notified the European Commission of this Decision, along with the reasoning upon which the measures are based. ComReg have taken utmost account of any comments from the European Commission.

- 8.89 Further to Regulations 13 and 14 of the Framework Regulations, the draft measures were also made accessible to the BEREC as well as other NRAs in other EU Member States.

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

- 8.90 The NRT which was imposed 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. ComReg considers that if there is appropriate wholesale regulation upstream that the NRT will no longer be required at the retail level. 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. It is on this basis that ComReg is withdrawing the obligations contained in D04/13, when the obligation in this Decision comes into effect.
- 8.91 This should ensure regulatory consistency and predictability following the coming into force of any decisions arising from this consultation.

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

- 8.92 As set out in detail in Chapter 4 of this document (see Section 4.4), ComReg recognises that while there may be differences in structural and competitive conditions between exchanges as identified in the Consultation (UA, RA1, and RA2), having reviewed the latest data, having considered Respondent's views on competition between Service Providers, and reviewing the overall set of remedies as consulted on between the Consultation and the 2017 Pricing Consultation, ComReg no longer considers that an approach based on a geographic split is the most suitable method to assess bundles in the MST, nor for standalone retail broadband. Instead, an assessment approach which better reflects Eircom's SMP in relevant markets should be adopted – the “*where available*” method.
- 8.93 The effect of this method is that the assessment level will be focused on broadband technology (e.g. CGA and NGA). ComReg considers that the ‘*where available*’ method focussing on bundles/standalone retail broadband using available technology rather than defined geographic areas is more suitable to ensuring that replicability of Eircom's offers by an OAO is realistic. It is not in the interests of OAOs, and by extension, end-users for the original proposals to continue as OAOs might be unable to economically replicate Eircom's offers. From Eircom's perspective the proposed geographic area split risked creating pricing umbrellas that reduced Eircom's pricing flexibility (see paragraph 4.18), that is, OAOs could set their retail prices at a level below Eircom's retail price knowing that Eircom was unable to match them.

## 8.8 Step 2 - Identify and describe the regulatory options

8.94 In relation to the further specification of the price control obligation not to cause a margin squeeze, the possible specification options for the MST, as an ex-ante MST include the following:

**Table 10: Identified regulatory options for the Decision**

Option #	Description
1	No MST for bundles is implemented.
2	<i>Replaced by 12 - The MST takes into account that Eircom including OAOs using its wholesale platform are facing more competition in certain areas.</i>
3	The MST is conducted on various bases (i.e., a bundle-by-bundle and/or a portfolio test).
4	A lower cost standard for calls, line rental, and broadband retail costs and the overall appropriate cost standard for the MST.
5	The MST reflects a weighted average cost of the applicable wholesale input.
6	Allow on a case-by-case basis known future reductions in cost e.g., Mobile Termination Rates.
7	<i>Replaced by 13 - That the MST should use different cost standards for retail costs for broadband in the various areas.</i>
8	Unregulated products and services will be included at LRIC cost standard. Cross-subsidisation is allowed both ways between regulated product/services and unregulated services within a bundle.
9a	New/revised bundles must be pre-notified and pre-cleared with ComReg.
9b	<i>Removed - ComReg has decided that 9a is proportionate.</i>
10	If and when a bundle is causing a margin squeeze.
11a	The net costs of eir Sports should be included in qualifying bundles.
11b	<i>Removed – ComReg has decided that 11a is proportionate.</i>
12	The MST will be focused on available broadband technology.
13	The MST should use the EEO cost benchmark for the retail costs for broadband.

14	CGA and FTTC retail standalone broadband should be included in the bundles portfolio-level assessments.
15	The acquisition costs related to eir Sports will be recovered over a fixed period, but where possible excess portfolio margin may be used to speed this up.

## 8.9 Step 3 - Likely impacts on stakeholders

### Option 1: No MST for bundles is implemented

#### 8.95 Impact on Eircom:

- No impact on bundles including line rental; the NRT would continue to be required pursuant to RFNA (Market 1b and 1c) as there would not be sufficient wholesale regulation to permit the removal downstream of the current NRT.
- Absent the NRT and assuming that a MST was not implemented, Eircom would be subject to the obligation not to margin/price squeeze only under competition law.

#### 8.96 Impact on OAOs:

- In the absence of the NRT and assuming that the MST was not implemented, an ex-post assessment would be required after any alleged anti-competitive practice had occurred and therefore such an assessment could be too late to prevent competition and efficient infrastructure investment being adversely affected beyond repair.

#### 8.97 Impact on Consumers:

- No impact on bundles including line rental as the NRT would continue to be required pursuant to RFNA (Market 1b and 1c).
- In the absence of the NRT and assuming that a MST was not implemented consumers could lose over the medium-to-long term due to potentially higher prices and reduced innovation following OAO exit.

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

#### 8.98 Impact on Eircom:

- For CGA and NGA based bundles, the bundle by bundle assessment at LRIC allows the incumbent flexibility to price differentiate individual bundles which ultimately should benefit consumers (see paragraph 5.257).

- The CGA and NGA portfolio-level<sup>422</sup> assessment at ATC is reflective of how Service Providers compete (see paragraph 4.42) and therefore allows Eircom flexibility to price differentiate individual bundles and standalone retail broadband within the aggregate of bundles and standalone products offered in that area which should ultimately benefit end-users (see paragraph 5.257).
- The symmetry between the CGA and NGA bundle by bundle and portfolio assessments reduces the complexity of the tests as originally proposed in the Consultation, so regulatory compliance will now be clearer. ComReg considers the revised approach creates a balance between allowing the incumbent pricing flexibility (thereby promoting competition) and ensuring efficient infrastructure investment is protected.

#### 8.99 Impact on OAOs:

- The test on a LRIC basis for individual bundles ensures that OAOs can compete on a marginal cost approach. The portfolio approach, where the ATC must be recovered, ensures that on an overall business basis OAOs can compete profitably. ComReg considers that, through the use of ATC at the portfolio level, competition from OAOs is not foreclosed.

#### 8.100 Impact on Consumers:

- The pricing flexibility within the MST (between the bundle level and portfolio level assessments) ensures that consumers benefit from increased competition and will not have to face the consequences of Eircom foreclosing competitors from the market.

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

#### 8.101 Impact on Eircom:

- The LRIC cost standard for calls, line rental, and broadband retail costs (see paragraph 5.181) allows flexibility to the incumbent to offer an individual bundle that does not recover common costs.

#### 8.102 Impact on OAOs:

- OAOs may face greater competition at the bundle level, however, the portfolio test will be conducted on an ATC basis.

#### 8.103 Impact on Consumers:

<sup>422</sup> Which includes standalone retail broadband.

- The use of the LRIC cost standard for calls, line rental, and broadband retail costs for the bundle-by-bundle test allows the promotion of efficient competition to the benefit of consumers.

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

#### 8.104 Impact on Eircom:

- For CGA and NGA bundles, the approach reflecting actual use by OAOs of Eircom's wholesale inputs (i.e. the WAWNI) in these bundles ensures that the costs used in the bundles MST reflect those that OAOs have to bear. It thereby allows Eircom suitable pricing flexibility in line with the wholesale input costs of OAOs.
- The streamlining of the relevant wholesale inputs in the bundles MST when Eircom offers a bundle for sale, should simplify the tests for Eircom. ComReg considers that the relevant wholesale inputs will be: WLA VUA (POTs or SABB based) for either FTTC or FTTH NGA based bundles; and WCA Bitstream (POTs or SABB based) for CGA bundles.

#### 8.105 Impact on OAOs:

- ComReg considers that the use of separate WAWNIs (CGA, NGA FTTC, and NGA FTTH), which will be reflective of the average wholesale input costs (plus all relevant wholesale costs – e.g. backhaul, connection charges, etc.) incurred by OAOs and converted to a hypothetical efficient operator is appropriate as it ensures that for CGA and NGA services that replicability is possible for an OAO. Furthermore the inclusion of backhaul charges ensures that all relevant costs are included in the MST.
- The separate WAWNIs e.g. for CGA or FTTC or the various FTTH bundles will ensure that pricing of bundles is appropriate for the wholesale inputs that an OAO would have to incur to offer a similar service. The use of a CGA WAWNI and separate NGA WAWNIs acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom is not provided undue pricing flexibility and also ensures that the WAWNIs are reflective of the average wholesale input costs incurred by an "efficient" operator to replicate CGA and NGA bundles.

#### 8.106 Impact on Consumers:

- Customers should, as appropriate, benefit from lower priced bundles and product innovation/differentiation. OAOs that use Eircom's VUA 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 to competition to the benefit of consumers.
- Without separate NGA WAWNIs by virtue of the flexibility within the MST, Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of CGA wholesale access inputs used by OAOs. Consumers might then benefit initially from lower priced bundles from the incumbent, however, if those low priced bundles were priced anti-competitively, consumers would lose over the medium to long term due to potentially higher prices and reduced innovation following OAO exit.

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

#### 8.107 Impact on Eircom:

- Where new bundles are being proposed, or where cost reductions/special offers are being proposed, not allowing Eircom to reflect in its pricing known future changes in costs (which are supported by robust evidence), could lead to a situation where its cost stack is artificially higher than it needs to be.

#### 8.108 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.

#### 8.109 Impact on Consumers:

- Consumers should benefit from lower prices now based on known future decreases in operator input costs.

### **Option 8 Unregulated products and services will be included at LRIC cost standard. Cross subsidisation is allowed both ways between regulated product/services and the unregulated services**

#### 8.110 Impact on Eircom:

- Will enable incumbent to include unregulated products and services in bundles at competitive prices. See paragraphs 5.242 to 5.243.

#### 8.111 Impact on OAOs:

- OAOs are likely to face greater competition in bundles including unregulated services. See paragraphs 5.242 to 5.243.



#### 8.112 Impact on Consumers:

- Consumers are likely to have lower prices for bundles that include unregulated services. It may also result in more choice and innovation with bundles.

#### **Option 9a New/revised bundles must be pre-notified and pre-cleared with ComReg**

#### 8.113 Impact on Eircom:

- Eircom is currently subject to a pre-notification and pre-clearance requirement pursuant to ComReg D04/13. As ComReg is not proposing changing this Eircom will not be subject to an additional regulatory burden to its existing obligations. A potential impact on Eircom may be that it would not be able to react as quickly to competitor moves in the market as it would like.

#### 8.114 Impact on OAOs:

- The proposed approach will give OAOs legal certainty that there will be regulatory assessment of bundles provided by the SMP operator prior to their launch.

#### 8.115 Impact on Consumers:

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

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

#### 8.116 Impact on Eircom:

- Where a bundle is found to be non-compliant with the obligation not to cause a margin squeeze, Eircom must notify ComReg immediately of such an occurrence. ComReg may then intervene pursuant to its relevant statutory enforcement powers. As previously experienced, the continuation of non-compliant bundles can have very significant consequences on Eircom, OAOs and consumers and should be avoided<sup>423</sup>.

#### 8.117 Impact on OAOs:

<sup>423</sup> 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.

- 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.

#### 8.118 Impact on Consumers:

- The longer a 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 annoyance. Therefore this should be mitigated by swift and timely action by Eircom to ensure such difficulties are minimised.

### **Option 11a The net costs of eir Sports should be included in qualifying bundles/products**

#### 8.119 Impact on Eircom:

- Eircom is currently including the net costs of eir Sports in qualifying broadband bundles/products. Therefore, no additional regulatory burden.

#### 8.120 Impact on OAOs:

- OAOs are currently competing with Eircom bundles/products which include these costs. Including the net costs of eir Sports ensures that were an OAO to have duplicated Eircom's purchase of Setanta with a similar purchase it would still be able to compete using Eircom regulated inputs.

#### 8.121 Impact on Consumers:

- Consumers are likely to benefit from this content and the competitive pressure that it presents to other operators may also result in encouraging more choice and innovation within the retail market.

### **Option 12 The MST will be focused on available broadband technology**

#### 8.122 Impact on Eircom

- This Decision implements the bundles MST on a national basis rather than the three geographic areas as proposed in the Consultation. This should lessen any concern by Eircom regarding the impact on its competitiveness in relation to its approach to its bundles' pricing strategy and perceived reduction in pricing flexibility.
- The focus on broadband technology in the assessment of Eircom's bundles simplifies the assessments that Eircom will be subject to.

- Had the original proposals been implemented then Eircom may have been able to avail of an in-area cross-subsidy at the portfolio level (from CGA to NGA) in the UA, and separately in the RA1 portfolio level assessment. The separation of the assessment approach should support competition on a level playing field rather than permit a cross-subsidy.

#### 8.123 Impact on OAOs

- Supply side competitive conditions, i.e. what OAOs are able to offer/sell, should be covered through the availability of wholesale inputs (e.g. NGA [FTTC and FTTH] in the WLA Market, and CGA in the Regional WCA Market). The cost orientation of most wholesale inputs, and the split between technologies in the bundles MST should support economic replicability by efficient OAOs.
- The wider aggregation beyond the geographic areas as originally proposed should better reflect how OAOs compete over a portfolio of services nationally.

#### 8.124 Impact on Consumers

- Consumers should benefit from the pricing flexibility available in the wider portfolios for NGA and CGA bundles. This should result in lower prices and more choice for consumers.

### **Option 13 The MST should use the EEO cost benchmark for the retail costs for broadband**

#### 8.125 Impact on Eircom

- The use of an EEO cost benchmark for the retail costs for broadband reflects the competition present in the retail bundles market. It should allow increased pricing flexibility for Eircom.

#### 8.126 Impact on OAOs

- The use of EEO as the cost benchmark for the retail costs for broadband in the MST reflects the nature of competition in bundling between well-established OAOs that have been gaining market share in bundles (see Figure 5 in Section 5.4.1) and have a national presence. Eircom is competing with OAOs that offer similar ranges of bundles and should therefore benefit from similar economies of scope. OAOs may face greater competition from Eircom.

#### 8.127 Impact on Consumers

- The use of EEO in the MST should allow more competition by Eircom leading to lower prices and greater choice for consumers.

### **Option 14 CGA and FTTC retail standalone broadband should be included in the bundles portfolio-level assessments**

#### 8.128 Impact on Eircom

- Potentially provides Eircom more flexibility to compete across its CGA and FTTC standalone retail broadband services, however the requirement of each of the two portfolios (CGA and NGA) to separately cover their ATC costs means that each portfolio's revenue will need to be sufficient to cover the cost incurred in providing the portfolio of services.

#### 8.129 Impact on OAOs

- Providers compete in the retail market across a portfolio of available services (which can include standalone retail broadband) to serve their customers. The inclusion of standalone retail FTTC and CGA broadband in portfolio level assessment at an ATC level in the bundles MST ensures that OAOs are able to compete across their whole portfolio of services thereby ensuring economic replicability.
- The cost orientation, access and non-discrimination obligations, imposed on FTTC and CGA wholesale inputs, enable OAOs to access these services on a level playing field.
- Further, the requirement of Eircom's CGA portfolio to cover the ATC of all CGA bundles and CGA standalone retail broadband means that efficient OAOs are able to replicate Eircom's CGA portfolio of services. Similarly so for NGA.

#### 8.130 Impact on Consumers

- This is likely to deliver pro-consumer outcomes in that Eircom and OAOs compete across a portfolio of services, and Eircom will not be unduly constrained by having to pass separate portfolio tests for CGA and FTTC retail standalone broadband.

### **Option 15 The acquisition costs related to eir Sports will be recovered over a fixed period but, where possible, excess portfolio margin may be used to speed this up.**

#### 8.131 Impact on Eircom

- Eircom is required to recover the acquisition costs of this service in full.

- ComReg considers it suitable that, where margins from the portfolio levels permit, then flexibility in relation to the total time period to recover the acquisition costs is suitable. This means that the acquisition costs can be recovered sooner over a shorter period than the full period (which is [3< [REDACTED] ] months).

#### 8.132 Impact on OAOs

- The inclusion of the acquisition costs of eir Sports in the bundles MST ensures that an OAO seeking to replicate a similar service can do so. Failure to include the acquisition costs would effectively allow Eircom to set the difference between retail and wholesale prices in a way that would not be replicable by an efficient OAO.
- Earlier recovery of the acquisition costs is unlikely to impact efficient OAOs.

#### 8.133 Impact on Consumers

- Consumers are likely to benefit from this content and the competitive pressure that it presents to other operators may also result in encouraging more choice and innovation in retail markets.

### 8.10 Step 4 - Assess the likely impact on competition:

8.134 This is discussed under the relevant headings of “Impact on Eircom” and “Impact on OAOs’ at paragraphs 8.95 - 8.133.

### 8.11 Step 5 - Assess the impacts and choose the best option

8.135 This updated RIA reflects the development of ComReg’s approach during the consultation process, and has fully considered Respondents’ comments on the RIA conducted as part of the Consultation. ComReg has taken the likely impact of its proposed measures into account at all stages of the Consultation and in coming to this final Decision.

8.136 Having reviewed the options above (1 – 15), ComReg proposes that it is proportionate and justified:

8.137 to implement a MST for bundles. The absence of a NRT or MST could have negative impacts on consumers and competitors over the medium-to-longer term. Maintaining the NRT in its current form (Market 1b and 1c) would not be reflective of the growth in broadband and broadband dependent services (e.g. IPTV or VoB) and the changes in the composition of bundles (e.g. bundles not containing WLR).

- 8.138 to apply the MST on different bases. For bundles sold/offered by Eircom a two-part ex-ante MST will be conducted (bundle by bundle at a LRIC cost standard and portfolio at an ATC cost standard). Both tests must be passed.
- 8.139 to allow pricing below ATC for bundles (subject to the proviso that the portfolio of bundles and standalone retail broadband passes its ATC). In the context of an ex-ante regulatory tool to be applied by ComReg, ATC is the appropriate 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. ATC is the correct cost standard for the MST in light of ComReg's statutory objectives to promote competition and protect the interests of end-users. ComReg believes that, under the present market conditions in Ireland, ATC as a cost measure is appropriate to promote competition under regulation.
- 8.140 that the bundles MST should reflect a weighted average cost of the applicable wholesale inputs, plus all relevant wholesale costs (e.g. charges associated with: backhaul; connection; co-location; etc.). For CGA, NGA FTTC, and NGA FTTH bundles these will, in each case, reflect the actual average usage of the applicable wholesale inputs used by OAOs for the relevant bundle-level assessments (e.g. the FTTH 150 Mb WAWNI in a bundle-level assessment will be weighted using FTTH 150 Mb wholesale inputs: POTs based VUA, Standalone VUA and Standalone VUA plus VoB, to generate the hypothetical efficient operator's usage of these inputs).
- 8.141 to allow known future reductions in costs (e.g., Mobile Termination Rates, etc.) be included in the MST where these can be supported. ComReg believes that this will allow end-users to benefit from future known reductions in costs now.
- 8.142 that unregulated products and services included in a bundle will be assessed on a LRIC cost standard, and cross-subsidisation will be allowed both ways between regulated product/services and the unregulated services. Each bundle will be required to pass the bundle by bundle level test at LRIC, which will include all cross-subsidies.
- 8.143 that a pre-notification and pre-clearance requirement be continued. This should ensure that new/revised Eircom bundles are compliant with its obligations not to cause a margin squeeze.
- 8.144 that where bundles are found to be non-compliant with the obligation not to cause a margin squeeze Eircom must notify ComReg immediately of such an occurrence. Compliance with the obligation not to cause a margin squeeze may be pursued through ComReg's statutory enforcement powers.

- 8.145 that the relevant costs for eir Sports should be the net costs option. The inclusion of eir Sports' net costs in bundles/products amounts to ensuring that on aggregate the costs of eir Sports are covered overall, which if another operator had purchased Setanta Sport would be the calculus it would face.
- 8.146 that the MST will be focused on available broadband technology, either NGA in the WLA Market, or CGA in the Regional WCA Market.
- 8.147 that Eircom use the EEO cost benchmark for broadband retail costs in the bundles MST.
- 8.148 that CGA and FTTC retail standalone broadband should be included on a proportional basis in the bundles MST in the respective CGA and NGA portfolio-level assessments.
- 8.149 that the acquisition costs related to eir Sports be recovered in full over the fixed period, but where possible Eircom may use excess portfolio margin to speed up this recovery period.

## Chapter 9

# 9 Points raised on the Draft Decision Instruments

## 9.1 Overview

- 9.1 In Annex 4, 5, and 6 of the Consultation, ComReg set out the draft Decision Instruments relating to the further specification of the price control not to cause a margin squeeze in the FACO Market, the WLA Market, and the WCA Market.
- 9.2 In this chapter, ComReg provides an outline of the respective draft Decision Instruments from the Consultation, a summary of responses received to Questions 24, 25, and 26 from the Consultation, ComReg's assessment of responses and ComReg's final position.

## 9.2 Summary of the respective draft Decision Instruments

- 9.3 Annex 4 of the Consultation set out the draft Decision Instrument associated with the further specification of the price control not to cause a margin squeeze in the FACO Markets.
- 9.4 Annex 5 of the Consultation set out the draft Decision Instrument associated with the further specification of the price control not to cause a margin squeeze on bundles delivered by WLA in the footprint corresponding to the UA.
- 9.5 Annex 6 of the Consultation set out the draft Decision Instrument associated with the further specification of the price control not to cause a margin squeeze on bundles delivered by WCA in the Regional Market.
- 9.6 These annexes reflected the preliminary proposals from the Consultation and in particular detailed the statutory powers, relevant definitions, the scope and application, the further specification of the obligations relating to price control (how the various tests were proposed to work) including pre- and post-launch assessment of bundles, and operational aspects such as withdrawal of existing SMP obligations.
- 9.7 Briefly it was proposed that these annexes would apply in the following manner:
- 9.7.1 FACO inputs would apply in each geographic area where relevant (this was tied to the proposal that henceforth a bundle would need to have broadband plus another service to constitute a bundle);



- 9.7.2 WLA inputs would be used in the Urban WCA Market in lieu of WCA inputs as WCA inputs were proposed for deregulation in the Urban WCA Market. It was further proposed that for the Urban WCA Market there was only to be a single portfolio level assessment of bundles; and
- 9.7.3 WCA or WLA inputs would be used in the Regional WCA Market. It was further proposed that the Regional WCA Market was to be split into two geographic areas: RA1 and RA2, and bundles offered for sale/sold in either area would be subject to varying level of assessments. In RA1 a bundle by bundle and a portfolio level assessment, and in RA2 each bundle would be subject to a bundle by bundle assessment.
- 9.8 ComReg posed similar questions in each Annex as to whether Respondents considered that the draft Decision Instruments were from a legal, technical and practical perspective sufficiently detailed, clear and precise with regards to the specifics proposed.

### 9.3 Summary of the responses received

- 9.9 Four responses were received in relation to the questions asked regarding the draft Decision Instruments. Respondents to the Consultation generally did not provide detailed points to be addressed in relation to the draft Decision Instruments. To avoid unnecessary repetition, the points as provided have been summarised below:
- 9.10 ALTO confirmed<sup>424</sup> that the draft text of the proposed FACO, WLA, WCA Decision Instruments were from *“a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed”*.
- 9.11 BT considered<sup>425</sup> that the draft WLA and WCA Decision Instruments required *“updating to address the problems of re-homing and also the introduction of an MST between the WLA market and the WCA Urban market”*. BT added that they *“understand the MST already exists in the Regional areas, but if not it should be added there also”*.
- 9.12 Eircom stated<sup>426</sup> that it had no specific comments on the proposed Decision Instruments, but did share its view that it considered that *“the Decision Instruments seek to implement a regulatory measure that ComReg does not have the power to implement in the context of a wholesale market review”*.

<sup>424</sup> ALTO response to the Consultation paragraphs A. 24, A. 25, and A. 26.

<sup>425</sup> BT response to the Consultation paragraphs 25, and 26.

<sup>426</sup> Eircom response to the Consultation paragraph 322.

- 9.13 Eircom<sup>427</sup> added that *“In addition to further consultation on market definition and designation of the market as susceptible to ex-ante regulation, including market analysis and on remedy design, ComReg will need to reframe the proposed Decision Instruments such that they are reflective of the (retail market) powers found in the Universal Services Regulations, which ComReg would actually need to exercise.”*
- 9.14 Eircom also suggested<sup>428</sup> that as part of *“... reframing the Decision Instruments, ComReg may also want to consider in the interest of legal certainty including more of the specification of the MST, currently contained in Chapter 5 of the Consultation, in the Decision Instrument itself, including relevant definitions of cost standards etc.”*
- 9.15 Eircom stated<sup>429</sup> that in the draft Decision Instruments, *“Criterion 4 of the Regional Area 1 definition needs to be expanded to include FTTH NGA services”*.
- 9.16 Eircom concluded<sup>430</sup> by suggesting that ComReg should *“include in the Decision Instruments, the requirements and procedures it will follow and the relevant timelines in the event that a bundle (which eir does not consider is the appropriate level of aggregation to assess compliance) or portfolio is considered to be non-compliant by ComReg”*.
- 9.17 Vodafone<sup>431</sup> had no comment on the Decision Instruments other than to *“state it is in general agreement with the text subject to consideration of the comments provided in response to this consultation and Vodafone’s response to the main consultation (ComReg document 16/96)”*.

## 9.4 ComReg’s assessment of Respondent’s views

- 9.18 This section assesses the responses received and provides ComReg’s reply and the rationale for any change from what was proposed in the Consultation. ComReg identifies which Decision Instrument has been altered to reflect any change.
- 9.19 In relation to BT’s observations as summarised in paragraph 9.11, these are not directly related to bundles and have been discussed earlier - see Chapter 2.
- 9.20 In reply to Eircom’s response as summarised in paragraph 9.12, ComReg previously replied on this point, see Chapter 2.

<sup>427</sup> Eircom response to the Consultation paragraph 323.

<sup>428</sup> Eircom response to the Consultation paragraph 324.

<sup>429</sup> Eircom response to the Consultation paragraph 325.

<sup>430</sup> Eircom response to the Consultation paragraph 326.

<sup>431</sup> Vodafone response to the Consultation paragraphs 102, 103, and 104.

- 9.21 Similarly on Eircom's point as summarised in paragraph 9.13, ComReg disagree as discussed thoroughly in Section 2.3.
- 9.22 In relation to Eircom's preference, as summarised in paragraph 9.14, for providing more of the specification of the MST in the Decision Instruments, ComReg disagree and consider that the requirements are sufficiently clear in Chapter 5 to avoid any potential misunderstanding.
- 9.23 Given the removal from the final decision of the proposed Regional Area criteria, Eircom's point as summarised in paragraph 9.15 is no longer relevant, see Section 4.4.
- 9.24 ComReg in reply to Eircom's point, as summarised in paragraph 9.16, do not agree that such specification is required. ComReg, as explained in Chapter 7, will, in the event of non-compliance with the obligation not to cause a margin squeeze, respond in accordance with ComReg's various powers.
- 9.25 ComReg as discussed earlier (see paragraph 3.75) has decided to remove the FACO DI as the definition of a bundle under either the WLA or WCA DIs already captures the inclusion of line rental in Eircom's bundle. ComReg considers that this is appropriate as the FACO inputs which OAOs may require are still subject to access, non-discrimination, transparency, price control and accounting separation obligations (under D05/15).

## 9.5 ComReg's final position

- 9.26 ComReg has amended the draft Decision Instruments to reflect the changes that have been discussed elsewhere in this Decision.

## Annex: 1 Legal basis

### **Obligations relating to the market for wholesale local access provided at a fixed location**

A 1.1 By ComReg Document No. 18/94 (ComReg Decision D10/18), and pursuant to Regulations 25 and 27 of the Framework Regulations, Section 5 of the Decision Instrument contained in Appendix 20 (“WLA Decision Instrument”) designates Eircom as having significant market power (“SMP”) on the market for wholesale local access (the “WLA” market).

A 1.2 Under Sections 10 and 12 of the WLA Decision Instrument annexed to ComReg Document No. 18/94, and pursuant to Regulations 9 and 13 of the Access Regulations, ComReg imposes obligations relating to transparency and price control on Eircom and in particular the obligation not to cause a margin squeeze.

A 1.3 Pursuant to Regulation 18 of the Access Regulations, ComReg in this Document further specifies the obligations relating to transparency and price control contained in Sections 10 and 12 of the WLA Decision Instrument annexed to ComReg Document No 18/94.

### **Obligations relating to the market for wholesale central access provided at a fixed location**

A 1.4 By ComReg Document No. 18/94 (ComReg Decision D10/18), and pursuant to Regulations 25 and 27 of the Framework Regulations, Section 5 of the Decision Instrument contained in Appendix 21 (“WCA Decision Instrument”) designates Eircom as having significant market power (“SMP”) on the regional market for wholesale central access (the “Regional WCA” market).

A 1.5 Under Sections 10 and 12 of the WCA Decision Instrument annexed to ComReg Document No. 18/94, and pursuant to Regulations 9 and 13 of the Access Regulations, ComReg imposes obligations relating to transparency and price control on Eircom and in particular the obligation not to cause a margin squeeze.

A 1.6 Pursuant to Regulation 18 of the Access Regulations, ComReg in this Document further specifies the obligations relating to transparency and price control contained in Sections 10 and 12 of the WCA Decision Instrument annexed to ComReg Document No 18/94.

### **Consultation requirements:**

A 1.7 Regulation 12(3) of the 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.

A 1.8 On 9 June 2017, ComReg published the Consultation Document No. 17/51, entitled, "Consultation on Price control obligations relating to Bundles". ComReg received a number of submissions in response to this public consultation. ComReg has reviewed all of the submissions received in drafting this Response to Consultation and Decision Document.

A 1.9 Regulation 13(3) of the 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 European 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.

A 1.10 On 11 September 2018, ComReg notified the EC, BEREC and NRAs in other Member States regarding the draft measure.

A 1.11 On 21 September 2018, the EC issued ComReg a request for information related to the draft measure. ComReg responded to the request for information on 26 September. The EC provided a comments letter to ComReg (dated 10 October 2018) and is set out in Annex 7.

A 1.12 ComReg took utmost account of the response received from the EC and ComReg's consideration of the comment received is set out in Annex: 8.

## Annex: 2 Overview of the bundles MST

A 2.1 This annex outlines how the bundles MST will work under this Decision.

A 2.2 Table 11 demonstrates how the MST will work in practice at the individual bundle level using example values and prices. The test at this level is assessed against all relevant costs, but with retail costs on a LRIC basis. Cross-subsidies are not permissible from bundle to bundle at this level.

A 2.3 Individual CGA and NGA (FTTC) retail standalone broadband services will not be tested at this level, but rather at the relevant portfolio level test (Table 12). NGA FTTH retail standalone broadband services will be subject to a separate assessment outside the bundles MST, details on this are contained in the 2018 Pricing Decision (see paragraphs 10.128, and 11.72). For the avoidance of doubt the numbers provided below are purely for illustrative purposes only, however, under the MST (and current NRT) all relevant wholesale costs such as connection charges that any other operator would face are included as relevant in the network inputs row.

**Table 11 For illustrative purposes bundle by bundle MST at LRIC following this decision [PARTIALLY REDACTED]**

	Bundle 1	Bundle 2	Bundle 3	FTTC SABB offer
Components	Voice and broadband	Broadband and mobile	Broadband, voice, mobile and IPTV	30GB limited Broadband
<b>Revenues -</b>				
Package price	40.50	30.00	57.00	25.00
Call revenue	2.10	-	1.70	-
Broadband usage charge	-	-	-	3.20
Other revenue	0.10	-	-	-
<b>Total revenue</b>	<b>42.70</b>	<b>30.00</b>	<b>58.70</b>	<b>28.20</b>
<b>Costs -</b>				
Network inputs	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
In home costs	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Retail costs – line rental	[REDACTED]	-	[REDACTED]	-
Retail costs - broadband	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Retail costs - calls	[REDACTED]	-	[REDACTED]	-
Promotions	[REDACTED]	-	[REDACTED]	[REDACTED]
eir Sport – on-going costs	[REDACTED]	[REDACTED]	[REDACTED]	-
Backhaul charge	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Total Cost</b>	<b>36.50</b>	<b>32.90</b>	<b>47.50</b>	<b>30.50</b>
<b>Margin</b>	<b>6.20</b>	<b>-2.90</b>	<b>11.20</b>	<b>-2.30</b>
<b>Passed bundle MST?</b>	Yes	No	Yes	N/A
ComReg approval to launch	Provided	Withheld	Provided	Not tested

A 2.4 For example, any notifications related to Bundle 1 and 3 would be provided with ComReg's approval to launch once the margin is covering the LRIC costs of providing this bundle. Bundle 2 though, as the bundle's margin is insufficient to cover the LRIC costs incurred in providing this bundle, then ComReg would withhold approval to launch. The FTTC SABB offer (and similarly so for a CGA SABB offer) is not tested at an individual product level under the bundles MST, which means that while this service's retail price is insufficient to cover its LRIC costs ComReg will not compel Eircom to alter its retail prices of this service under the bundles MST.

A 2.5 Table 12 demonstrates how the MST will assess Eircom's portfolio of CGA or NGA bundles, including relevant retail standalone broadband (all except for FTTH). The test is assessed against all relevant costs including retail costs at an ATC basis. Overall the portfolio is demonstrating a positive margin, so is therefore replicable by an OAO.

**Table 12 Example of the portfolio MST at ATC following this decision [PARTIALLY REDACTED]**

	Bundle 1	Bundle 3	SABB offer
Components	Voice and broadband	Broadband, voice, mobile and IPTV	30GB limited Broadband
<b>Revenues -</b>			
Package price	40.50	57.00	25.00
Call revenue	2.10	1.70	-
Broadband usage charge	-	-	3.20
Other revenue	0.10	-	-
<b>Total revenue</b>	<b>42.70</b>	<b>58.70</b>	<b>28.20</b>
<b>Costs -</b>			
Network inputs	[REDACTED]	[REDACTED]	[REDACTED]
In home costs	[REDACTED]	[REDACTED]	[REDACTED]
Retail costs – line rental	[REDACTED]	[REDACTED]	-
Retail costs - broadband	[REDACTED]	[REDACTED]	[REDACTED]
Retail costs - calls	[REDACTED]	[REDACTED]	-
Promotions	[REDACTED]	[REDACTED]	[REDACTED]
eir Sport – total 'net costs'	[REDACTED]	[REDACTED]	-
Backhaul charge	[REDACTED]	[REDACTED]	[REDACTED]
<b>Total Cost</b>	<b>42.60</b>	<b>56.90</b>	<b>35.00</b>
<b>Margin</b>	<b>0.10</b>	<b>1.80</b>	<b>- 6.80</b>
<b>Subscriber numbers</b>	<b>450</b>	<b>470</b>	<b>30</b>
<b>Portfolio weighting</b>	<b>47%</b>	<b>49%</b>	<b>3%</b>
<b>Passed portfolio MST?</b>	Yes, as the weighted average revenue meets or exceeds the ATC of costs incurred by €0.72 (47% * €0.10 + 49% * €1.80 + 3% * -€6.80)		
<b>ComReg Response</b>	<b>Approval to launch relevant amendment(s) is provided</b>		



# Annex: 3 Illustrative example of the WAWNI

A 3.1 Chapter 5 of this Decision, details the cost components required for the bundles MST. The cost components included in the bundles MST are intended to reflect those faced by an OAO in seeking to replicate an Eircom bundle. Different wholesale access inputs can be used to provide bundles.

A 3.2 As OAOs might use different combinations of wholesale inputs to supply bundles, a practical way to reflect differential use of wholesale inputs by OAOs in the bundles MST, is to use the cost of the various wholesale inputs and weight them by OAO usage to generate the 'WAWNI'.

A 3.3 ComReg considers that the WAWNI should vary in the bundles MST between the speeds of broadband service – e.g. CGA to 1 GB NGA FTTH.

A 3.4 For example, for an Eircom bundle that comprises of FTTH 150 MB plus a voice service, the relevant WAWNI would be calculated as follows. Using the illustrative cost stack information below and assuming for this example that OAOs actual usage of the NGA FTTH 150 MB wholesale access inputs in the WLA Market indicates that the average 'typical efficient' OAO would use a blend of 60% POTS based VUA, and 40% Standalone VUA, this would result in a WAWNI for NGA FTTH 150 MB based bundles in the MST for the bundle-by-bundle assessment of €29.40 (60% @ €30.00, and 40% Standalone VUA @ €28.50).

Figure 7: Example of a WAWNI [PARTIALLY REDACTED]

Cost Stack		FttH Products 150 Mbps	
		Standalone VUA	POTS Based VUA
WLR Rental	Monthly €		
Standalone VUA Rental	Monthly €		
POTs Based VUA Rental	Monthly €		
Connection / disconnection fees not in DCF			
Conn chg SB_WLR transfer	Monthly €		
Connection Charge VUA	Monthly €		
Disconnection Charge VUA	Monthly €		
Voice MEA	Monthly €		
<b>Total (excluding usage)</b>		<b>28.50</b>	<b>30.00</b>

# Annex: 4 Decision Instrument – Wholesale Local Access Market

## 1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

- 1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for wholesale local access provided at a fixed location as identified by the European Commission in the 2014 Recommendation and analysed by ComReg in ComReg Decision D10/18. This Decision Instrument relates to further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision D10/18.
- 1.2 This Decision Instrument is made:
- (i) Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations;
  - (ii) Pursuant to, and having regard to, the significant market power (SMP) designation of Eircom as provided for in Section 5 of the Decision Instrument at Appendix 20 of ComReg Decision D10/18;
  - (iii) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002; Regulation 16 of the Framework Regulations and Regulations 6(1), 8(6) and 13(2) of the Access Regulations;
  - (iv) Having, pursuant to Section 13 of the Communications Regulation Act 2002, complied with Ministerial Policy Directions where applicable;
  - (v) Having taken utmost account of the 2013 Recommendation and the 2010 Recommendation;
  - (vi) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken utmost account of any comments made by these parties;
  - (vii) Having had regard to the analysis and reasoning set out in ComReg Document No. 16/96 and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations;
  - (viii) Having had regard to the analysis and reasoning set out in ComReg Decision D10/18;

- (ix) Having had regard to the analysis and reasoning set out in the ComReg Document No. 17/51 and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
  - (x) Having had regard to the analysis and reasoning set out in ComReg Decision D12/18.
- 1.3 The provisions of ComReg Document No. 16/96 and ComReg Decision D10/18 as well as ComReg Document No.17/26 and ComReg Decision D11/18 together with ComReg Document No. 17/51 and ComReg Decision D12/18 shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, to the extent that there is any conflict between a decision instrument dated prior to the Effective Date (as defined in Section 2.1 of this Decision Instrument) and this Decision Instrument, this Decision Instrument should prevail.

## PART I - GENERAL PROVISIONS (SECTIONS 2 TO 3 OF THE DECISION INSTRUMENT)

### 2 DEFINITIONS

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

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

**“Access Path”** means the connection from the NTU/ONT in the End User’s premises to the Point of Handover. The Points of Handover for physical unbundling are the MDF (for metallic) and the ODF (for fibre) in the Exchange, and the Point of Handover for non-physical unbundling (virtual access) is the WEIL at the serving Aggregation Node for the End User i.e. at the MPoP;

**“Access Regulations”** means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), as may be amended from time-to-time or replaced with equivalent effect;

**“Aggregation Node”** means a network concentration point for Access Paths;

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

**“Authorisation Regulations”** means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011

(S.I. No. 335 of 2011), as may be amended from time-to-time or replaced with equivalent effect;

“**Average Total Cost**” or “**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;

“**Average monthly NGA adjusted bundle cost**” shall be construed in accordance with Reference C12 in Table 7 in Chapter 5 of ComReg Decision D12/18;

“**Average monthly NGA bundle revenue per customer**” shall be construed in accordance with Reference R4 in Table 7 in Chapter 5 of ComReg Decision D12/18;

“**Average monthly NGA portfolio cost**” shall be construed in accordance with Reference C13 in Table 7 in Chapter 5 of ComReg Decision D12/18;

“**Average monthly NGA portfolio revenue per customer**” shall be construed in accordance with Reference R5 in Table 7 in Chapter 5 of ComReg Decision D12/18;

“**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 (OJ L337, 18.12.2009, p.1);

“**Bitstream**” means a wholesale product which consists of an Access Path to the End User premises and a transmission service to a defined set of Point(s) of Handover;

“**Bitstream Plus**” is a specific implementation of the Bitstream wholesale product. The Bitstream Plus product is described in detail in Eircom’s product description “NGA Product Description Bitstream Plus” V 3.0 dated 16 June 2017, as may be amended from time-to-time or replaced with equivalent effect;

“**Bundle**” means a package of services consisting of a Retail Broadband Product(s) 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;

“**ComReg**” means the Commission for Communications Regulation, established under Section 6 of the Communications Regulation Act 2002;

“**ComReg Decision D08/10**” means ComReg Document No. 10/67 entitled “Response to Consultation Document and Final Direction and Decision, Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited”, dated 31 August 2010;

**“ComReg Decision D04/13”** means ComReg Document No. 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 D12/14”** means ComReg Document No. 14/89 entitled “Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers”, dated 28 August 2014;

**“ComReg Decision D05/15”** means ComReg Document No. 15/82 entitled “Market Review: Wholesale Fixed Voice Call Origination and Transit Markets”, dated 24 July 2015;

**“ComReg Decision D10/18”** means ComReg Document No. 18/94 ComReg Decision D10/18 entitled “Market Review: Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products, Response to Consultation and Decision” dated 19 November 2018;

**“ComReg Decision D11/18”** means ComReg Document No. 18/95 ComReg Decision D11/18 entitled “Pricing of wholesale broadband services, Wholesale Local Access (WLA) market and the Wholesale Central Access (WCA) markets, Response to Consultation Document 17/26 and Final Decision” dated 19 November 2018;

**“ComReg Decision D12/18”** means ComReg Document No. 18/96 ComReg Decision D12/18 entitled “Response to Consultation and Decision on price control obligations relating to retail bundles – Further specification of the wholesale price control obligation not to cause a margin squeeze in the WLA, and WCA Markets” dated 19 November 2018;

**“ComReg Document No. 16/96”** means ComReg Document No. 16/96, entitled “Market Reviews: Wholesale Local Access (WLA) provided at a Fixed Location; Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products: Consultation and Draft Decision”, dated 11 November 2016;

**“ComReg Document No. 17/26”** means ComReg Document No.17/26, entitled “Pricing of wholesale services in the Wholesale Local Access (WLA) market and in the Wholesale Central Access (WCA) markets: Further specification of price control obligations in Market 3a (WLA) and Market 3b (WCA)” dated 7 April 2017;

**“ComReg Document No. 17/51”** means ComReg Document No. 17/51 entitled “Consultation on Price control obligations relating to Bundles” dated 9 June 2017;

**“Decision Instrument”** means this direction and decision instrument which is made pursuant to *inter alia* Regulations 8, 9, 13 and 18 of the Access Regulations;

**“Discount”** means an offer or sale of a product at less than its standard price, for example a price reduction, including a volume related price reduction, a rebate, a reimbursement, a refund, a set-off and any other similar words or expressions;

**“Effective Date”** means the date set out in Section 10 of this Decision Instrument;

**“Eircom”** means Eircom Limited, and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Decision Instrument, the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014;

**“Electronic Communications Network(s)”** or **“ECN(s)”** shall have the same meaning as under Regulation 2 of the Framework Regulations;

**“Electronic Communications Service(s)”** or **“ECS(s)”** shall have the same meaning as under Regulation 2 of the Framework Regulations;

**“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 Undertaking;

**“Exchange”** means an Eircom network premises or equivalent facility used to house network and associated equipment, and may include a Remote Subscriber Unit (RSU). The Exchange sometimes, but not always, houses the Metropolitan Point of Presence (MPoP);

**“Fibre to the Home”** or **“FTTH”** means an access network architecture where fibre optic cable is used to connect the End User premises to the ODF in an Exchange;

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time-to-time or replaced with equivalent effect;

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

**“Margin Squeeze Test”** means the Margin Squeeze Test set out in Section 4.4 of this Decision Instrument;

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

**“Metropolitan Point of Presence”** or **“MPoP”** means the point of interconnection between the access and core networks of an Undertaking;

**“MDF”** means main distribution frame;

**“Ministerial Policy Directions”** for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, then Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004;

**“Next Generation Access”** or **“NGA”** means Access provided over Eircom’s 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 networks;

**“NGA Bundle”** means a Bundle based on NGA;

**“NGA Portfolio”** means a Portfolio based on NGA;

**“Network Termination Unit”** or **“NTU”** means the physical interface which provides the service demarcation point or Point of Handover of the wholesale service within the customer’s premises;

**“ODF”** means optical distribution frame;

**“ONT”** or **“Optical Network Terminal”** means the device that terminates the fibre Access Path at the End User’s premises;

**“Other Authorised Operators”** or **“OAOs”** means an Undertaking that is not Eircom, providing or intending to provide an ECN or an ECS, and that is deemed to be authorised under Regulation 4 of the Authorisation Regulations;

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

**“Portfolio”** means the aggregation of NGA Bundles and Retail Broadband Products (but excluding FTTH based Retail Broadband Products sold or offered for sale singly) within the WLA Market;

**“Product”** for the purposes of this Decision Instrument shall include product, service and associated facility, where appropriate;

**“Promotion”** means an offer in respect of a product which is available for a finite period of time and which offers a price reduction;

**“Retail Broadband Product”** for the purposes of this Decision Instrument, means any 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 NGA and are regulated at the wholesale level in the WLA Market

in accordance with the Decision Instrument contained in Appendix 20 of ComReg Decision D10/18;

“**WLA Market**” means the market as defined in Section 4.2 of the Decision Instrument contained in Appendix 20 of ComReg Decision D10/18;

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

“**SB WLR**” means single billing wholesale line rental;

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

“**Universal Service Regulations**” means the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (S.I. No. 337 of 2011);

“**Virtual Unbundled Access (VUA)**” means the wholesale active access product provided by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End Users’ connections at the MPoP. It allows a level of control to Undertaking similar to that afforded to the Undertaking connecting their own equipment to an unbundled Local Loop. VUA includes VUA provided on a stand-alone basis or VUA provided with SB WLR;

“**Wholesale Ethernet Interconnection Link**” or “**WEIL**” is the interconnection service provided by Eircom which enables the handover of End User traffic for various wholesale product types including but not limited to Bitstream Plus, VUA and Next Generation Access wholesale products;

“**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;

“**(the) 2014 Recommendation**” means the European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L 295, 11.10.2014, p. 79);

“**(the) 2013 Recommendation**” means the European 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);

“**(the) 2010 Recommendation**” means the European Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (2010/572/EU).



### 3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.2 This Decision Instrument relates to a further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision D10/18.

## PART II - FURTHER SPECIFICATION OF OBLIGATIONS RELATING TO PRICE CONTROL (SECTION 4 OF THE DECISION INSTRUMENT)

### 4 MARGIN SQUEEZE OBLIGATIONS

- 4.1 Section 12.12, Section 12.14 and Section 12.18 of the Decision Instrument on Wholesale Local Access contained in Appendix 20 of ComReg Decision D10/18 imposed an obligation on Eircom not to cause a margin/price squeeze in the WLA Market.
- 4.2 For the purpose of further specifying requirements to be complied with relating to the aforementioned obligation, and pursuant to Regulations 8, 13 and 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin Squeeze Test (as now set out in this Decision Instrument).
- 4.3 Eircom shall use the Margin Squeeze Test Model to demonstrate compliance with the Margin Squeeze Test. Eircom shall keep the Margin Squeeze Test Model up to date and updates by Eircom are subject to ComReg approval.
- 4.4 In order to comply with the Margin Squeeze Test:
  - 4.4.1 in respect of the NGA Portfolio, the Average monthly NGA portfolio revenue per customer (Reference R5) shall be equal to or exceed the Average monthly NGA portfolio cost (Reference C13); and
  - 4.4.2 in respect of each NGA Bundle, the Average monthly NGA bundle revenue per customer (Reference R4) shall be equal to or exceed the Average monthly NGA adjusted bundle cost (Reference C12).

- 4.5 If an NGA Bundle or, where relevant, the NGA Portfolio complies with the relevant Margin Squeeze Test, as outlined in this Section 4, it will be deemed to comply with the obligation contained in Section 12.12, Section 12.14 and Section 12.18 of the Decision Instrument contained in Appendix 20 of ComReg Decision D10/18 not to cause a margin/price squeeze. If an NGA Bundle or, where relevant, the NGA Portfolio does not comply with the relevant Margin Squeeze Test, as outlined in Section 4 above, ComReg will carry out a general assessment of the reasonableness of the NGA Bundle or, where relevant, the NGA Portfolio and may conclude that, notwithstanding the fact that the NGA Bundle or, where relevant, the NGA Portfolio fails the Margin Squeeze Test, the offer or sale by Eircom of the NGA Bundle or, where relevant, the NGA Portfolio does not constitute a breach of the obligation contained in Section 12.12, Section 12.14 and Section 12.18 of the Decision Instrument contained in Appendix 20 of ComReg Decision D10/18 not to cause a margin/price 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 NGA Bundle or where relevant the NGA Portfolio. ComReg will also consider the impact of the NGA Bundle or, where relevant, the NGA Portfolio on competition in the WLA 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.
- 4.6 For the purposes of the relevant Margin Squeeze Test Eircom shall reconcile, where possible, its ATC for the NGA Bundles or, where relevant, the NGA Portfolio to its audited separated (regulatory) accounts in accordance with ComReg Decision D08/10.

Pre-launch assessment of NGA Bundles

- 4.7 Prior to making a proposed new or revised NGA 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 NGA Bundle, complies with the obligation contained in Section 12.12, Section 12.14 and Section 12.18 of the Decision Instrument contained in Appendix 20 of ComReg Decision D10/18 not to cause a margin/price 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 NGA Bundle complies with the obligation not to cause a margin/price 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 NGA Bundle, or any other change to the price or components of an existing NGA Bundle, shall constitute the making available of a revised NGA Bundle within the meaning of this Decision Instrument.
- 4.8 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 NGA Bundle. Such prima facie approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised NGA 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 NGA 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 NGA Bundle should be granted or withheld.

Post-launch assessment of NGA Bundles / assessment of existing NGA Bundles

- 4.9 Once a new or revised NGA Bundle is made available for offer or for sale to End Users, Eircom must at all times ensure that it meets its obligation not to cause a margin/price squeeze and, in particular, ensure that it complies with the relevant Margin Squeeze Test. Eircom shall notify ComReg immediately if it believes that any NGA Bundle may not be so compliant.
- 4.10 If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation not to cause a margin/price squeeze and, in particular, Eircom's compliance with the relevant Margin Squeeze Test. 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/price squeeze.
- 4.11 Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations Eircom shall submit to ComReg on a quarterly basis a written monitoring statement with supporting documentation that adequately demonstrates its compliance with its regulatory obligations as set out in this Section 4 of this Decision Instrument.

**PART III – OPERATION AND EFFECTIVE DATE (SECTIONS 5 TO 10 OF THE DECISION INSTRUMENT)****5 STATUTORY POWERS NOT AFFECTED**

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

**6 MAINTENANCE OF OBLIGATIONS**

- 6.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, continue in force and Eircom shall comply with same.

**7 CONFLICT**

- 7.1 For the avoidance of doubt to the extent that there is any conflict between a ComReg Decision Instrument or ComReg 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 SEVERANCE

- 8.1 If any Section(s), clause(s) or provision(s), or portion(s) thereof, contained in this Decision Instrument, is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s), or portion(s) thereof, shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s), or portion(s) thereof, of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument or other Decision Instruments.

## 9 WITHDRAWAL OF SMP OBLIGATIONS

- 9.1 Pursuant to Regulations 13 and 30 of the Universal Service Regulations and Regulations 8, 13 and 18 of the Access Regulations:
- (i) Annex 3 of ComReg Decision D04/13 “Decision Instrument: Market 1” is withdrawn when the Decision Instrument contained in Annex 5 of ComReg Decision D12/18, and this Decision Instrument contained in Annex 4 of ComReg Decision D12/18, shall together take effect.
  - (ii) 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 5 of ComReg Decision D12/18, and this Decision Instrument contained in Annex 4 of ComReg Decision D12/18, shall together take effect.
  - (iii) 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 5 of ComReg Decision D12/18, and this Decision Instrument contained in Annex 4 of ComReg Decision D12/18, shall together take effect.
- 9.2 Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations, the obligations set out in Section 4 of this Decision Instrument shall only come into effect when all of the obligations set out in Sections 4 to 13 (inclusive) of the Decision Instrument contained in Appendix 20 of ComReg Decision D10/18 come into effect.

## **10 EFFECTIVE DATE**

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

**JEREMY GODFREY**

**COMMISSIONER**

**THE COMMISSION FOR COMMUNICATIONS REGULATION**

**THE 19<sup>TH</sup> DAY OF NOVEMBER 2018**

# Annex: 5 Decision Instrument – Wholesale Central Access Market

## 1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for wholesale central access for mass market products provided at a fixed location as identified by the European Commission in the 2014 Recommendation and analysed by ComReg in ComReg Decision D10/18. This Decision Instrument relates to further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision D10/18.

1.2 This Decision Instrument is made:

- (i) Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations;
- (ii) Pursuant to, and having regard to, the significant market power (SMP) designation of Eircom as provided for in Section 5 of the Decision Instrument at Appendix 21 of ComReg Decision D10/18;
- (iii) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002; Regulation 16 of the Framework Regulations and Regulations 6(1), 8(6) and 13(2) of the Access Regulations;
- (iv) Having, pursuant to Section 13 of the Communications Regulation Act 2002 complied with Ministerial Policy Directions, where applicable;
- (v) 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 environment;
- (vi) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken utmost account of any comments made by these parties;
- (vii) Having had regard to the analysis and reasoning set out in ComReg Document No. 16/96 and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations;
- (viii) Having had regard to the analysis and reasoning set out in ComReg Decision D10/18;

- (ix) Having had regard to the analysis and reasoning set out in ComReg Document No. 17/51 and having taken account of the submissions received from interested parties in response thereto following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
- (x) Having had regard to the analysis and reasoning set out in ComReg Decision D12/18.

1.3 The provisions of ComReg Document No. 16/96 and ComReg Decision D10/18 as well as ComReg Document No. 17/26 and ComReg Decision D11/18 together with ComReg Document No. 17/51 and ComReg Decision D12/18 shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, to the extent that there is any conflict between a decision instrument dated prior to the Effective Date (as defined in Section 2.1 of this Decision Instrument) and this Decision Instrument, this Decision Instrument should prevail.

## PART I - GENERAL PROVISIONS (SECTIONS 2 TO 3 OF THE DECISION INSTRUMENT)

### 2 DEFINITIONS

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

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

**“Access Path”** means the connection from the NTU/ONT in the End User’s premises to the Point of Handover. The Points of Handover for physical unbundling are the MDF (for metallic) and the ODF (for fibre) in the Exchange, and the Point of Handover for non-physical unbundling (virtual access) is the Wholesale Ethernet Interconnection Link at the serving Aggregation Node for the End User i.e. at the MPoP;

**“Access Regulations”** means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), as may be amended from time-to-time or replaced with equivalent effect;

**“Aggregation Node”** means a network concentration point for Access Paths;

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

**“Authorisation Regulations”** means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011



(S.I. No. 335 of 2011), as may be amended from time-to-time or replaced with equivalent effect;

**“Average Total Cost”** or **“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;

**“Average monthly CGA adjusted bundle cost”** shall be construed in accordance with Reference C12 in Table 8 in Chapter 5 of ComReg Decision D12/18;

**“Average monthly CGA bundle revenue per customer”** shall be construed in accordance with Reference R4 in Table 8 in Chapter 5 of ComReg Decision D12/18;

**“Average monthly CGA portfolio cost”** shall be construed in accordance with Reference C13 in Table 8 in Chapter 5 of ComReg Decision D12/18;

**“Average monthly CGA portfolio revenue per customer”** shall be construed in accordance with Reference R5 in Table 8 in Chapter 5 of ComReg Decision D12/18;

**“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 (OJ L337, 18.12.2009, p.1);

**“Bitstream”** means a wholesale product which consists of an Access Path to the End User premises and a transmission service to a defined set of Point(s) of Handover;

**“Bitstream Plus”** is a specific implementation of the Bitstream wholesale product. The Bitstream Plus product is described in detail in Eircom’s product description “NGA Product Description Bitstream Plus” V 3.0 dated 16 June 2017, as may be amended from time-to-time or replaced with equivalent effect;

**“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;

**“Communications Regulation Act 2002”** means the Communications Regulation Act 2002 (No. 20 of 2002), as amended;

**“ComReg”** means the Commission for Communications Regulation, established under Section 6 of the Communications Regulation Act 2002;

**“ComReg Decision D08/10”** means ComReg Document No. 10/67 entitled “Response to Consultation Document and Final Direction and Decision, Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited”, dated 31 August 2010;

**“ComReg Decision D04/13”** means ComReg Document No. 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 D12/14”** means ComReg Document No. 14/89 entitled “Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers”, dated 28 August 2014;

**“ComReg Decision D10/18”** means ComReg Document No. 18/94 ComReg Decision D10/18 entitled “Market Review: Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products. Response to Consultation and Decision”, dated 19 November 2018;

**“ComReg Decision D11/18”** means ComReg Document No. 18/95 ComReg Decision D11/18 entitled “Pricing of wholesale broadband services, Wholesale Local Access (WLA) market and the Wholesale Central Access (WCA) markets, Response to Consultation Document 17/26 and Final Decision” dated 19 November 2018;

**“ComReg Decision D12/18”** means ComReg Document No. 18/96 ComReg Decision D12/18 entitled “Response to Consultation and Decision on price control obligations relating to retail bundles – Further specification of the wholesale price control obligation not to cause a margin squeeze in the WLA, and WCA Markets” dated 19 November 2018;

**“ComReg Document No. 16/96”** means ComReg Document No. 16/96, entitled “Market Reviews: Wholesale Local Access (WLA) provided at a Fixed Location; Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products: Consultation and Draft Decision”, dated 11 November 2016;

**“ComReg Document No. 17/26”** means ComReg Document No. 17/26, entitled “Pricing of wholesale services in the Wholesale Local Access (WLA) market and in the Wholesale Central Access (WCA) markets: Further specification of price control obligations in Market 3a (WLA) and Market 3b (WCA)”, dated 7 April 2017;

**“ComReg Document No. 17/51”** means ComReg Document No. 17/51 entitled “Consultation on Price control obligations relating to Bundles” dated 9 June 2017;

**“CGA”** or **“Current Generation Access”** means access offered or provided exclusively over Eircom’s copper access network infrastructure and its Associated Facilities;

**“CGA Bundle”** means a Bundle based on CGA;

**“CGA Portfolio”** means a Portfolio based on CGA;

**“Decision Instrument”** means this direction and decision instrument which is made pursuant to *inter alia* Regulations 8, 9, 13 and 18 of the Access Regulations;

**“Discount”** means an offer or sale of a product at less than its standard price, for example a price reduction, including a volume related price reduction, a rebate, a reimbursement, a refund, a set-off and any other similar words or expressions;

**“Effective Date”** means the date set out in Section 10 of this Decision Instrument;

**“Eircom”** means Eircom Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Decision Instrument, the terms “subsidiary” and “related company” shall have the meanings ascribed to them in the Companies Act 2014;

**“Electronic Communications Network(s)”** or **“ECN(s)”** shall have the same meaning as under Regulation 2 of the Framework Regulations;

**“Electronic Communications Service(s)”** or **“ECS(s)”** shall have the same meaning as under Regulation 2 of the Framework Regulations;

**“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 Undertaking;

**“Exchange”** means an Eircom network premises or equivalent facility used to house network and associated equipment, and may include a Remote Subscriber Unit (RSU). The Exchange sometimes, but not always, houses the Metropolitan Point of Presence (MPoP);

**“Framework Regulations”** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time-to-time or replaced with equivalent effect;

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

**“Margin Squeeze Test”** means the Margin Squeeze Test set out in Section 4.4 of this Decision Instrument;

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

**“Metropolitan Point of Presence”** or **“MPoP”** means the point of interconnection between the access and core networks of an Undertaking;

**“MDF”** means main distribution frame;

**“Ministerial Policy Directions”** for the purposes of this Decision Instrument means the policy directions made by Dermot Ahern TD, then Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004;

**“Network Termination Unit”** or **“NTU”** means the physical interface which provides the service demarcation point or Point of Handover of the wholesale service within the customer’s premises;

**“ODF”** means optical distribution frame;

**“ONT”** or **“Optical Network Terminal”** means the device that terminates the fibre Access Path at the End User’s premises;

**“Other Authorised Operators”** or **“OAOs”** means an Undertaking that is not Eircom, providing or intending to provide an ECN or an ECS, and that is deemed to be authorised under Regulation 4 of the Authorisation Regulations;

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

**“Portfolio”** means the aggregation of both CGA Bundles and Retail Broadband Products (sold singly) as defined in this Decision Instrument within the Regional WCA Market;

**“Product”** for the purposes of this Decision Instrument shall include product, service and associated facility, where appropriate;

**“Promotion”** means an offer in respect of a product which is available for a finite period of time and which offers a price reduction;

**“Regional WCA Market”** means the market described in Section 4 of the Decision Instrument contained in Appendix 21 of ComReg Decision D10/18;

**“Retail Broadband Product”** for the purposes of this Decision Instrument, means any 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 CGA and are regulated at the wholesale level in the Regional WCA Market in accordance with Appendix 21 of ComReg Decision D10/18;

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

**“SB WLR”** means single billing wholesale line rental;

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

“**Universal Service Regulations**” means the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (S.I. No. 337 of 2011);

“**Virtual Unbundled Access (VUA)**” means the wholesale active access product provided by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End Users’ connections at the MPoP. It allows a level of control to Undertaking similar to that afforded to the Undertaking connecting their own equipment to an unbundled Local Loop. VUA includes VUA provided on a stand-alone basis or VUA provided with SB-WLR.

“**Wholesale Ethernet Interconnection Link**” or “**WEIL**” is the interconnection service provided by Eircom which enables the handover of End User traffic for various wholesale product types including, but not limited to, Bitstream Plus, VUA and Next Generation Access wholesale products;

“**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;

“**(the) 2013 Recommendation**” means the European 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); and

“**(the) 2014 Recommendation**” means the European Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ L 295, 11.10.2014, p. 79).

### 3 SCOPE AND APPLICATION

- 3.1 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.
- 3.2 This Decision Instrument relates to a further specification of the price control and transparency obligations imposed by ComReg in ComReg Decision D10/18.

## **PART II - FURTHER SPECIFICATION OF OBLIGATIONS RELATING TO PRICE CONTROL (SECTION 4 OF THE DECISION INSTRUMENT)**

### **4 MARGIN/PRICE SQUEEZE OBLIGATIONS**

- 4.1 Section 12.7, Section 12.9 and Section 12.10 of the Decision Instrument on Wholesale Central Access contained in Appendix 21 of ComReg Decision D10/18 imposed an obligation on Eircom not to cause a margin/price squeeze in the Regional WCA Market.
- 4.2 For the purpose of further specifying requirements to be complied with relating to the aforementioned obligation, and pursuant to Regulations 8, 13 and 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin Squeeze Test (as now set out in this Decision Instrument).
- 4.3 Eircom shall use the Margin Squeeze Test Model to demonstrate compliance with the Margin Squeeze Test. Eircom shall keep the Margin Squeeze Test Model up to date and updates by Eircom are subject to ComReg approval.
- 4.4 In order to comply with the Margin Squeeze Test:
  - 4.4.1 in respect of the CGA Portfolio, the Average monthly CGA portfolio revenue per customer (Reference R5) shall be equal to or exceed the Average monthly CGA portfolio cost (Reference C13); and
  - 4.4.2 in respect of each CGA Bundle, the Average monthly CGA bundle revenue per customer (Reference R4) shall be equal to or exceed the Average monthly CGA adjusted bundle cost (Reference C12).

- 4.5 If a CGA Bundle or, where relevant, the CGA Portfolio complies with the relevant Margin Squeeze Test, as outlined in this Section 4, it will be deemed to comply with the obligation contained in 12.7, Section 12.9 and Section 12.10 of the Decision Instrument contained in Appendix 21 of ComReg Decision D10/18 not to cause a margin/price squeeze. If a CGA Bundle or, where relevant, the CGA Portfolio does not comply with the relevant Margin Squeeze Test, as outlined in Section 4 above, ComReg will carry out a general assessment of the reasonableness of the CGA Bundle or, where relevant, the CGA Portfolio and may conclude that, notwithstanding the fact that the CGA Bundle or, where relevant, the CGA Portfolio fails the Margin Squeeze Test, the offer or sale by Eircom of the CGA Bundle or, where relevant, the CGA Portfolio does not constitute a breach of the obligation contained in Section 12.7, Section 12.9 and Section 12.10 of the Decision Instrument contained in Appendix 21 of ComReg Decision D10/18 not to cause a margin/price 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 CGA Bundle or, where relevant the CGA Portfolio. ComReg will also consider the impact of the CGA Bundle or, where relevant, the CGA Portfolio on competition in the Regional WCA 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.
- 4.6 For the purposes of the relevant Margin Squeeze Test Eircom shall reconcile, where possible, its ATC for the CGA Bundles or, where relevant, the CGA Portfolio to its audited separated (regulatory) accounts in accordance with ComReg Decision D08/10.

### Pre-launch assessment of CGA Bundles

- 4.7 Prior to making a proposed new or revised CGA 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 CGA Bundle complies with the obligation set out in the Decision Instrument on Wholesale Central Access contained in Section 12.7, Section 12.9 and Section 12.10 of the Decision Instrument contained in Appendix 21 of ComReg Decision D10/18 not to cause a margin/price 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 CGA Bundle complies with the obligation not to cause a margin/price 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 CGA Bundle, or any other change to the price or components of an existing CGA Bundle, shall constitute the making available of a revised CGA Bundle within the meaning of this Decision Instrument.
- 4.8 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 CGA Bundle. Such prima facie approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised CGA 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 CGA 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 CGA Bundle should be granted or withheld.



Post-launch assessment of CGA Bundles / assessment of existing CGA Bundles

- 4.9 Once a new or revised CGA Bundle is made available for offer or for sale to End Users, Eircom must at all times ensure that it meets its obligation not to cause a margin/price squeeze and, in particular, ensure that it complies with the relevant Margin Squeeze Test. Eircom shall notify ComReg immediately if it believes that any CGA Bundle may not be so compliant.
- 4.10 If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation not to cause a margin/price squeeze and, in particular, Eircom's compliance with the relevant Margin Squeeze Test. 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/price squeeze.
- 4.11 Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations Eircom shall submit to ComReg on a quarterly basis a written monitoring statement with supporting documentation that adequately demonstrates its compliance with its regulatory obligations as set out in this Section 4 of this Decision Instrument.

**PART III – OPERATION AND EFFECTIVE DATE (SECTIONS 5 TO 10 OF THE DECISION INSTRUMENT)****5 STATUTORY POWERS NOT AFFECTED**

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

**6 MAINTENANCE OF OBLIGATIONS**

- 6.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, continue in force and Eircom shall comply with same.

**7 CONFLICT**

- 7.1 For the avoidance of doubt to the extent that there is any conflict between a ComReg Decision Instrument or ComReg 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 SEVERANCE

- 8.1 If any Section(s), clause(s) or provision(s), or portion(s) thereof, contained in this Decision Instrument, is(are) found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that(those) Section(s), clause(s) or provision(s), or portion(s) thereof, shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining Section(s), clause(s) or provision(s), or portion(s) thereof, of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument or other Decision Instruments.

## 9 WITHDRAWAL OF SMP OBLIGATIONS

- 9.1 Pursuant to Regulations 13 and 30 of the Universal Service Regulations and Regulation 8, 13 and 18 of the Access Regulations:
- (i) Annex 3 of ComReg Decision D04/13 “Decision Instrument: Market 1” is withdrawn when the Decision Instrument contained in Annex 4 of ComReg Decision D12/18, and this Decision Instrument contained in Annex 5 of ComReg Decision D12/18, shall together take effect.
  - (ii) 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 4 of ComReg Decision D12/18, and this Decision Instrument contained in Annex 5 of ComReg Decision D12/18, shall together take effect.
  - (iii) 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 4 of ComReg Decision D12/18, and this Decision Instrument contained in Annex 5 of ComReg Decision D12/18, shall together take effect.
- 9.2 Pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations, the obligations set out in Section 4 of this Decision Instrument shall only come into effect when all of the obligations set out in Sections 4 to 13 (inclusive) of the Decision Instrument contained in Appendix 21 of ComReg Decision D10/18 come into effect.

## **10 EFFECTIVE DATE**

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

**JEREMY GODFREY**

**COMMISSIONER**

**THE COMMISSION FOR COMMUNICATIONS REGULATION**

**THE 19<sup>TH</sup> DAY OF NOVEMBER 2018**

## Annex: 6 Questions in the Consultation

- A 6.1 Question 1 – Do you have any further comments regarding the pricing proposals in ComReg Document 16/96 (WLA/WCA Market Review) in light of the pricing obligations further specified in this Draft Decision? Please provide reasons for your response.
- A 6.2 Question 2 - Do you agree with ComReg’s preliminary view that the NRT could be removed as a pricing remedy in Market 1 (of 2007) if there was appropriate wholesale regulation upstream? Please justify your views.
- A 6.3 Question 3 - Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze between the price(s) of the FACO wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.
- A 6.4 Question 4 - Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the footprint corresponding to the Urban WCA Market between the price(s) of the WLA components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.
- A 6.5 Question 5 - Do you agree with ComReg’s preliminary view that Eircom should be required to demonstrate that it is not causing a margin squeeze in the Regional WCA market between the price(s) of the WCA wholesale components required by an OAO to replicate an Eircom retail “Bundle” offer and the price of the Eircom retail “Bundle” itself? Please provide cogent reasoning to justify your views.
- A 6.6 Question 6 – ComReg is interested in receiving views from interested parties on the proposed UA, RA1, and Regional Area 2 as they apply to bundles.
- A 6.7 Question 7 - Do you agree with the proposed cost benchmarks for retail costs to be included in the bundles MST?
- A 6.8 Question 8 - Do you agree with our proposed removal of the downward only adjustment to the WAWNI? Please support your view with relevant data and evidence.
- A 6.9 Question 9 - Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in the UA? Please give a detailed response with supporting data where appropriate to support your view.
- A 6.10 Question 10 - Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 1? Please give a detailed response with supporting data where appropriate to support your view.

- A 6.11 Question 11 - Do you agree or disagree with the proposed Margin Squeeze Test to be implemented in Regional Area 2? Please give a detailed response with supporting data where appropriate to support your view.
- A 6.12 Question 12 - Do you agree or disagree with our provisional view that the average customer life should be 42 months? Please give a detailed response with well justified supporting data where appropriate to support your view.
- A 6.13 Question 13 - Do you agree or disagree with ComReg's preliminary views regarding the case-by-case assessment of a bundle's reasonableness in section 5.11? Please give a detailed response with supporting data where appropriate to support your view.
- A 6.14 Question 14 - Do you agree or disagree with ComReg's proposals in respect to other possible adjustments (detailed in section 5.12) to the MST? Please give a detailed response with supporting data where appropriate to support your view.
- A 6.15 Question 15 - Do you agree or disagree with ComReg's proposals in respect of retention offers and their treatment in the MST? Please give a detailed response with supporting data where appropriate to support your view.
- A 6.16 Question 16 - What are your views on the period over which Eircom needs to recover the on-going content costs of eir Sports, should the period be limited to the duration of the rights?
- A 6.17 Question 17 - What are your views on the period over which Eircom needs to recover the acquisition costs of eir Sports? Should this be a set period or should Eircom be allowed to use excess broadband margins, if available, to shorten the set period?
- A 6.18 Question 18 - What are your views on the appropriate subscriber base over which Eircom needs to recover the costs of eir Sports? Are there any methods which you view as being more suitable than ComReg's preliminary view? In your response please outline any practical issues which should be considered if such a method were to be implemented.
- A 6.19 Question 19 - Do you agree with ComReg's proposed treatment of eir Sports in the Margin Squeeze Test? If you consider another method would be more suitable can you please give details of such a method whilst being aware that content is an unregulated service.
- A 6.20 Question 20 - Do you agree or disagree with ComReg's preliminary view that a pre-clearance requirement is required ahead of Eircom launching a new or revised bundle? Please provide detailed reasoning to support your view. ComReg welcomes views from interested parties regarding the proposed approach which would allow Eircom to self-certify its compliance.

- A 6.21 Question 21 - Do you agree or disagree with ComReg's proposed approach where an Eircom bundle is considered to be non-compliant with its obligation not to cause a margin squeeze? Please explain your response and provide detailed information to support your view.
- A 6.22 Question 22 - Do you agree or disagree with ComReg's proposed approach to introduce a monitoring statement? Do you agree or disagree with ComReg's proposed approach to require this statement on a quarterly basis? Please explain your response and provide detailed information to support your view.
- A 6.23 Question 23 - Do you have any views on the Regulatory Impact Assessment above and are there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.
- A 6.24 Question 24 - Do you believe that the draft text of the proposed Decision Instrument for the FACO Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.
- A 6.25 Question 25 - Do you believe that the draft text of the proposed Decision Instrument for the WLA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.
- A 6.26 Question 26 - Do you believe that the draft text of the proposed Decision Instrument for WCA Market is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

## **Annex: 7 EC Response to ComReg's Notified Draft Measures**

A 7.1 This annex contains the non-confidential copy of letter from the EC to ComReg dated 10 October 2018.

A 7.2 ComReg's consideration of the comments received from the European Commission is set out in Annex 8.

A 7.3EC comments letter to ComReg dated 10 October 2018.



EUROPEAN COMMISSION

Brussels, 10.10.2018  
C(2018) 6788 final

Commission for Communications  
(ComReg)  
One Dockland Central, Guild Street  
D01 E4X0 Dublin 1  
Ireland

For the attention of:  
Mr. Kevin O'Brien  
Chairperson of the Commission

Fax: +35318788193

Dear Mr O'Brien,

**Subject: Commission Decision concerning Case IE/2018/2115: Wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products in Ireland – Remedies**

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

## 1. PROCEDURE

On 11 September 2018, the Commission registered a notification from the Irish national regulatory authority, Commission for Communications (ComReg)<sup>1</sup>, concerning the market for wholesale local access provided at a fixed location and wholesale central access provided at a fixed location for mass-market products<sup>2</sup> in Ireland. The notified draft measure concerns also some amendments of remedies imposed on the market for

---

<sup>1</sup> Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

<sup>2</sup> Corresponding to markets 3a and 3b in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.



retail access to the public telephone network at a fixed location and on the market for call origination on the public telephone network provided at a fixed location<sup>3</sup>.

The national consultations<sup>4</sup> ran from 7 April to 26 June 2017<sup>5</sup> and from 9 June 2017 to 11 August 2017<sup>6</sup>.

On 18 September 2018, a request for information<sup>7</sup> (RFI) was sent to ComReg and a response was received on 21 September 2018. A second RFI was sent to ComReg on 21 September 2018 and a response was received on 26 September 2018.

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

## 2. DESCRIPTION OF THE DRAFT MEASURE

### 2.1. Background

The markets for wholesale local access provided at a fixed location (WLA) and for wholesale central access provided at a fixed location for mass-market products (WCA) in Ireland were previously notified to and assessed by the Commission under cases IE/2018/2089-2090<sup>8</sup>. The retail market for access to the public telephone network at a fixed location was previously notified to and assessed by the Commission under case IE/2014/1629<sup>9</sup>. The market for fixed voice call origination was notified to and assessed by the Commission under cases IE/2015/1746 and IE/2016/1860<sup>10</sup>.

#### 2.1.1. WLA and WCA markets

##### 2.1.1.1. Market definition and SMP

ComReg defined the WLA market as including, a) Current Generation (CG) WLA products provided over copper networks, including local loop unbundling (LLU),

---

<sup>3</sup> Corresponding to markets 1 and 2 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007 Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65

<sup>4</sup> In accordance with Article 6 of the Framework Directive.

<sup>5</sup> Consultation 17/26 relating to the "Pricing Decision".

<sup>6</sup> Consultation 17/51 relating to the "Bundles Decision".

<sup>7</sup> In accordance with Article 5(2) of the Framework Directive.

<sup>8</sup> C(2018) 4786.

<sup>9</sup> C(2014) 5482.

<sup>10</sup> C(2015) 5011 and C(2016) 3034, respectively.

line share and sub-loop unbundling (SLU) products; and b) Next Generation (NG) WLA products provided over FTTx networks, including Virtual Unbundled Access (VUA) products<sup>11</sup>. The relevant geographic market was national in scope.

ComReg defined the relevant WCA market as including CG and NG products provided over copper, fibre and CATV. ComReg divided the wholesale central access market into two separate markets: (i) the Urban WCA Market, and (ii) the Regional WCA Market.

ComReg designated Eircom with significant market power (SMP) in the WLA and in the Regional WCA markets. ComReg found that the Urban WCA Market is competitive and therefore lifted regulation in this market.

#### 2.1.1.2. Remedies

ComReg imposed on Eircom the following obligations: access, transparency, non-discrimination, accounting separation, cost accounting and price control on both markets.

Regarding the price control obligation, ComReg imposed a set of obligations including cost orientation and margin squeeze tests (MST).

ComReg imposed cost orientation for a) LLU, line share, civil engineering infrastructure (CEI) and dark fibre<sup>12</sup>; b) copper bitstream; c) FTTC-based VUA and FTTC-based bitstream; and d) NG and CG ancillary services. In particular, ComReg considered that there was need to introduce (for the first time) cost orientation for FTTC services.

With respect to the margin squeeze tests, ComReg imposed a wholesale standalone MST on a) FTTH-based VUA (and FTTH-based bitstream); and b) WLA services (and WCA services)<sup>13</sup>. ComReg also proposed to impose a set of retail MSTs on a) FTTH-based VUA, FTTH-based bitstream and copper bitstream (standalone and bundles test); and on b) FTTC-based VUA, FTTC-based bitstream and copper bitstream services (bundles test)<sup>14</sup>.

ComReg further clarified that prices and costing methodologies for FTTC services (and for copper-based bitstream services) as well as the implementation of the margin squeeze tests would be further specified in the 2018 Pricing Decision and in the 2018 Bundles Decision, still to be notified to the Commission at the time.

<sup>11</sup> VUA is the wholesale product that is Eircom's implementation of VULA.

<sup>12</sup> ComReg explained that the prices for LLU, SLU, LS, CEI and dark fibre will continue to be set in line with the 2016 Access Pricing Decision (IE/2016/1858), namely by a combination of BU-LRAIC+ costing methodology and a Top-down HCA costing methodology (the revised copper access model - CAM). Indeed, the 2016 Access Pricing Decision set also indicative prices for the period 1 July 2019 – 30 June 2021 in case ComReg does not update the 2016 Pricing Decision prior to that.

<sup>13</sup> ComReg has re-imposed a margin squeeze obligation between LLU and copper-based standalone broadband. Nevertheless, in the current notification, ComReg explains that this test is no longer required.

<sup>14</sup> ComReg maintained that FTTC services (VUA and bitstream) should be subject only to a retail bundle margin squeeze test because they are cost oriented.

ComReg also considered that the costing methodology for FTTC services (and for copper-based bitstream services) should be consistent with the costing methodology applied to LLU, SLU, CEI and dark fibre.

ComReg explained that the measure notified under case IE/2018/2089-2090 and the above Pricing and Bundles Decisions would be issued simultaneously.

#### 2.1.1.3. Consultation with the Commission

The Commission issued three comments relating to a) the need to include alternative operators' FTTH network infrastructures in the market definition; b) the need for an appropriate and consistent price control of wholesale products; and c) the need for updated current generation access prices.

##### 2.1.2. *Retail market for access to the public telephone network at a fixed location*

In 2014 (Case IE/2014/1629), ComReg designated Eircom with SMP on the following three markets for retail narrowband access: a) market 1a – standalone lower level voice access (LLVA); b) market 1b - bundled lower level voice access (LLVA) and c) market 1c – high level voice access (HLVA). ComReg imposed as remedies: a WLR access, a retail price cap (subject to an increase depending on the inflation rate), the obligation not to unreasonably bundle, which encompasses the NRT (Net Revenue Test: measure aimed at avoiding a margin squeeze<sup>15</sup>), transparency and cost accounting. In its comments letter, the Commission urged ComReg to complete the assessment of the (upstream) market for call origination as soon as possible and to reassess whether the retail markets still warranted ex ante regulation without any undue delay.

##### 2.1.3. *Wholesale market for fixed access and call origination*

In 2015 (Case IE 2015/1746) ComReg defined a wholesale market for fixed access and call origination (FACO) comprising a fixed access (FA) or wholesale line rental (WLR) component and a fixed call origination (FVCO)<sup>16</sup> component. As the FACO market was not listed in the Recommendation on Relevant Markets, ComReg carried out the three-criteria test and concluded that it was still fulfilled. ComReg designated Eircom as operator with SMP and imposed the following obligations: i) access (including SB-WLR<sup>17</sup>); ii) non-discrimination; iii) transparency; iv) price control (WLR prices set with retail minus methodology) and v) accounting separation. In its comments letter, the Commission invited ComReg again to proceed with the review of the retail access market without undue delay.

<sup>15</sup> ComReg explains that the NRT is the price control remedy used to assess whether or not Eircom is covering its total costs when it offers or sells a bundle of services together (that contains LLVA/HLVA and broadband) and therefore complying with the obligation not to unreasonably bundle services. The NRT had been imposed pursuant to Regulation 13 of the Universal Service Regulations corresponding to Article 17(2) of the Universal Service Directive (notified under cases IE/2012/1381-1382).

<sup>16</sup> FVCO is defined as calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection.

<sup>17</sup> Single Billing Wholesale Line Rental.

In 2016 (Case IE/2016/1860) ComReg amended the price control remedies related to SB-WLR, switching from a retail-minus price control obligation to a cost orientation price control<sup>18</sup>. It has further specified the two high-level margin squeeze obligations<sup>19</sup> imposed in the FACO.

Also in this occasion the Commission commented on the need to review the retail access market, inviting ComReg once again to monitor developments in the retail access market and to examine without undue delay whether, in light of retail developments, regulation in the retail access (and FACO) markets remained appropriate.

## 2.2. The notified draft measures

In the present draft measures, ComReg notifies a Pricing Decision and a Bundles Decision, as anticipated in its 2018 WLA/WCA Market Review Decision notification (case IE/2018/2089-2090).

### 2.2.1. *The Pricing Decision*

ComReg proposes to further specify the price control obligations (including margin squeeze obligations) imposed in the 2018 WLA/WCA Market Review Decision in relation to the wholesale services included in the WLA market and the regional WCA market. In addition, this draft measure specifies the cost orientation obligation in the FACO Markets for wholesale voice/POTS when it is sold with FTTC services.

#### 2.2.1.1. WLA market

With respect to the obligation of cost orientation, ComReg proposes that Eircoms' rental charges in relation to FTTC based VUA and POTS based FTTC VUA shall be based on the cost incurred by an efficient operator providing those services, which shall be calculated in line with the NGA cost model<sup>20</sup>. Such costs shall be based on the combination of a BU-LRAIC+ cost methodology (for assets that cannot be reused for NGA services) and a top down HCA (for assets that can be reused) cost methodology. For the provision of interconnection, Eircom shall ensure

<sup>18</sup> According to the current regulation Eircom should apply prices based on the higher of the following: i) Eircom's TD HCA costs of providing SB-WLR nationally (with BU costs applied to the line card); and ii) BU costs in the LEA (Modified Larger Exchange Area) (with BU-LRAIC+ for non-reusable and TD HCA for reusable assets).

<sup>19</sup> The first test between retail and wholesale line rental (or SB-WLR) should ensure a sufficient margin between the respective services, so that another authorised operator can replicate Eircom's retail prices on a standalone basis. The second test is to ensure sufficient economic space between the price for POTS-based Virtual Unbundled Access (VUA) and the price for standalone VUA / NGA bitstream (including a contribution towards the cost of managed VoB), so that an operator is not dis-incentivised from moving to alternative technologies as appropriate. According to ComReg, this should ensure technological neutrality.

<sup>20</sup> The cost model is based on a scorched node approach. A tilted annuity approach is used to derive costs in the NGN Core Model for copper and fibre. The Economic Depreciation approach is used in the NGA Cost Model (the economic depreciation is determined for each network component and considers both changes in asset prices and changes in service demand).

that it recovers no more than the costs incurred by an efficient operator based on a BU-LRAIC+ costing methodology.

Regarding the margin squeeze test, ComReg proposes to specify a) the wholesale margin squeeze obligation between the price for FTTH based Bitstream and the price for FTTH based VUA, and b) the retail margin squeeze obligation for FTTH based VUA provided within the footprint of the Urban WCA market for standalone services<sup>21</sup>.

With a wholesale margin squeeze test between FTTH based Bitstream and FTTH based VUA ComReg aims to ensure that Eircom cannot set the price for FTTH based Bitstream lower than the price for FTTH based VUA as this would discourage investment in FTTH based VUA. ComReg considers that the wholesale MST between FTTH based VUA and FTTH based bitstream should be assessed on a product-by-product basis (that is, by speed/profile). Such MST between FTTH based Bitstream and FTTH based VUA would be a SEO<sup>22</sup> test based on an adjustment to Eircom's own costs to reflect the lower level of economies of scale and scope available to a hypothetical entrant with a retail broadband market share of 25%. The cost standard would be LRAIC+. Finally, such MST shall include an uplift for WACC which recognises that Eircom should earn a return on its investment.

With the standalone retail MST between FTTH based VUA (in the area corresponding to the Urban WCA market) and retail broadband delivered by FTTH based VUA, ComReg aims at preventing foreclosure and excessive prices. ComReg considers that an EEO cost base in this case is appropriate because competitors in exchanges within the Urban WCA market are likely to have similar cost functions to Eircom, and similar size of customer base, and should therefore benefit from similar economies of scale. The cost standard would be ATC<sup>23</sup> and the model type the DCF model<sup>24</sup>. The test should be assessed on a Portfolio-based-approach<sup>25</sup>.

<sup>21</sup> As per the 2018 Market Review Decision, ComReg is no longer imposing a standalone retail margin squeeze test between FTTC based VUA and retail services delivered by FTTC based VUA and sold singly. Also, there is no longer a requirement for a specific retail margin squeeze obligation between current generation WLA services and current generation retail services.

<sup>22</sup> Similarly Efficient Operator cost base.

<sup>23</sup> The Average Total Costs standard reflects all costs incurred in the provision of a product or service including variable, fixed, common and joint costs. ComReg considers that the difference between ATC and LRAIC+ in the context of retail costs is generally not material as both approaches include a portion of common costs. In addition, ComReg currently uses Eircom's Regulated Accounts to derive these retail costs, which is more akin to the ATC approach.

<sup>24</sup> ComReg explains that the DCF approach includes one-off start-up costs, ongoing fixed and variable operating costs including capital costs and a terminal value. In addition, a number of costs are inflated by an overhead mark-up of 25% to create an additional margin buffer to reflect the likely new retail broadband market entrant mark-up of common costs. In order to derive the total retail costs incurred by a new entrant the above cost categories can be adjusted for scale and scope depending on the chosen operator cost base i.e., REO or SEO.

<sup>25</sup> ComReg wants to ensure that alternative operators that are dependent on Eircom's FTTH based VUA input have a sufficient margin over a portfolio of different NGA retail broadband products, while allowing Eircom some flexibility regarding pricing in the retail market. In addition, the actual demand

Moreover, ComReg proposes to specify the transparency obligation relating to pre-notification and compliance procedures with the relevant price control obligations.

#### 2.2.1.2. WCA market

With respect to the obligation of cost orientation, ComReg proposes that Eircom's rental charges in relation to FTTC based (and POTS based FTTC) bitstream (in the Regional WCA) should be equal to the costs incurred by an efficient operator, calculated in line with the NGA cost model. Such costs shall be based on a combination of BU-LRAIC+ (for assets that cannot be reused for NGA services) and Top-Down HCA (for assets that can be reused) adjusted to reflect a SEO cost base (SEO has different scale from an efficient operator). CG bitstream and /or bitstream managed backhaul costs shall be based on a BU-LRAIC+ cost model<sup>26</sup>.

With respect to the margin squeeze test, ComReg proposes to impose a standalone retail MST between FTTH based bitstream and FTTH based retail broadband services delivered by FTTH based bitstream and sold singly<sup>27</sup>. ComReg considers that Eircom's own retail costs should be applied in the test based on an EEO cost base, as other operators in the Regional WCA market could realise similar economies of scope and scale to those of Eircom. According to ComReg, a portfolio approach should be used, as it reflects the actual patterns of demand and supply of FTTH based bitstream services and retail services delivered by FTTH based bitstream, and other operators are also likely to offer a portfolio of services (and could therefore compete with Eircom across a similar product portfolio). In addition, the demand for FTTH based products remains uncertain and ComReg believes that some flexibility can allow for price alterations within the portfolio in response to actual take-up of FTTH products. The cost standard shall be ATC.

Moreover, ComReg proposes to specify the transparency obligation relating to pre-notification and compliance procedures with the relevant price control obligations in the Regional WCA market.

#### 2.2.2. *The Bundles Decision*

ComReg proposes to impose margin squeeze tests (MST) to ensure that Eircom cannot cause a margin squeeze between the prices of the wholesale regulated services it offers to alternative operators and the price of an Eircom retail bundle of services – where those wholesale services are required as inputs by those alternative operators in order to replicate that Eircom retail bundle. ComReg also proposes to withdraw the obligation not to unreasonably bundle imposed on the market for retail narrowband fixed access (in particular in the bundled low and high level voice

---

for FTTH based products remains uncertain and ComReg believes that Eircom should be given the flexibility to price specific products above or below retail costs (provided it meets the overall portfolio margin squeeze test) so that Eircom can alter prices in response to actual take-up of FTTH products.

<sup>26</sup> Also WEILs (wholesale Ethernet Interconnection Links), BECS, BECS over WEIL shall be based on BU-LRAIC+.

<sup>27</sup> As already set in the 2018 WLA/WCA Market Review Decision, the standalone retail MST for current generation WCA services in the Regional WCA market are no longer warranted. Similarly, a MST between End-to-End bitstream (CG and NG) and bitstream (CG and NG) is no longer required.

access markets) and the relating net revenue test (NRT) which had been further specified in 2014.

The MST includes a 'bundle by bundle' and a portfolio assessment.

In particular, separate assessments will be carried out on two portfolios: 1) the sum of all CGA bundles (and standalone retail CGA broadband) and 2) the sum of all NGA bundles (and standalone NGA retail broadband except for standalone FTTH retail broadband)<sup>28</sup> based on Average Total Costs. Within each portfolio, assessments will also be carried out on a bundle by bundle basis using LRIC. The cost benchmarks for Eircom's retail services (broadband, calls and line rental) will be set at EEO. The MSTs will allow cross-subsidy from regulated services to unregulated services and vice versa within a bundle.

All Eircom's bundles (including broadband plus any other service)<sup>29</sup> shall comply with a MST<sup>30</sup>.

The broadband inputs to the bundles MST will be WLA VUA (POTS or standalone based) for NGA bundles, and WCA bitstream (POTS or standalone based) for CGA bundles.

MSTs relating to the WLA market will be applied on a national basis and MSTs relating to the Regional WCA market will be applied across that market as a whole.

According to ComReg, the bundles MST concerns all bundles and automatically reflects changing market dynamics<sup>31</sup> without the need to continually redefine the test for the latest flagship product (which in any case would only be one part of the bundle being assessed).

Finally, ComReg proposes to include the 'net costs'<sup>32</sup> of eir Sports (an unregulated service that Eircom offers at no cost to its retail broadband subscribers) in the proposed bundles MST to ensure that alternative operators can replicate those retail bundle broadband services. ComReg envisages the recovery of two cost categories: acquisition costs<sup>33</sup> and on-going costs<sup>34</sup>. In order to allow Eircom a certain level of

<sup>28</sup> There will be no cross-subsidies between the two portfolios.

<sup>29</sup> ComReg includes FACO inputs in the bundles MST when FACO inputs are bundled WLA or WCA broadband.

<sup>30</sup> The effect of this is that, when Eircom offers an NGA bundle, then the wholesale price of the NGA WLA components, which an alternative operator would need to replicate that retail Eircom NGA bundle, will be included in the cost stack of the Eircom bundle offer.

<sup>31</sup> In particular, as certain bundles (and the components thereof) become more popular they will automatically represent a bigger share of Eircom's portfolio.

<sup>32</sup> The 'net costs' are those costs not already covered by Eircom's external revenue from selling eir Sports to other entities. The costs of eir Sports exceed the revenue generated from actual paying customers and advertising. Therefore, to ensure that the remaining cost is recovered, ComReg proposes that the 'net costs' of this service should be included in the cost stack for those relevant offers which get Eir Sports at no charge.

<sup>33</sup> Costs incurred in the purchase of Setanta Sports, from Setanta Sports Broadcasting Limited by Eircom in December 2015, such as sports content rights; a television studio; current and former customer

flexibility in recovering costs of eir Sport, ComReg provides that Eircom may use a maximum recovery period of ■ months since the acquisition to recover the acquisition costs. If an excess margin is available it may be used to recover the acquisition costs ahead of the maximum period.

### 3. COMMENTS

The Commission has examined the notification and the additional information provided by the ComReg and has the following comment:<sup>35</sup>

#### **Need to urgently review the retail access market**

The Commission notes that the retail market for access to the public telephone network at a fixed location is still regulated in Ireland and the latest market review dates back to August 2014. In particular, a retail price regulation is still in place.

In the notified draft measure ComReg proposes to partially withdraw the retail price regulation obligation not to unreasonably bundle (and the relating Net Revenue Test) in view of the strength of remedies to be imposed on the upstream wholesale market. Indeed, ComReg has recently put in place wholesale regulation that is likely to render the existing retail regulation disproportionate.

The Commission has repeatedly invited ComReg to reassess the retail access market and already in 2016 (case IE/2016/1860) ComReg has informed the Commission about its intention to carry out a market review in the course of 2016 and to notify it in the fourth quarter of 2016 or first quarter of 2017. In the context of the present notification, ComReg explained that it intends to start preliminary works on the retail fixed voice access market review in parallel with its review of the FACO markets in November 2018, with a view to issuing a public consultation in the fourth quarter of 2019.

Also in view of ComReg's earlier commitments, the Commission considers the proposed timing unjustified and urges ComReg to examine without undue delay whether, in light of retail developments and wholesale regulation in place, regulation in the retail access market is still proportionate.

Pursuant to Article 7(7) of the Framework Directive, ComReg shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

---

database; and management know-how.

<sup>34</sup> All other cost incurred in providing the service, e.g. new content rights (since the acquisition), production costs / presenter salaries, etc.

<sup>35</sup> In accordance with Article 7(3) of the Framework Directive.



Pursuant to Point 15 of Recommendation 2008/850/EC<sup>36</sup> the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>37</sup> within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.<sup>38</sup> You should give reasons for any such request.



Yours sincerely,

For the Commission,  
Roberto Viola  
Director-General

<sup>36</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

<sup>37</sup> Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

<sup>38</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.

## Annex: 8 Consideration of EC comments

A 8.1 In Annex 7, ComReg set out the EC Response to ComReg's Notified Draft Measures (Case IE/2018/2115).

A 8.2 The EC commented on the need to review the retail access market. ComReg has taken utmost account of this comment and ComReg's response is set out below.

### **The need to urgently review the retail access market:**

A 8.3 In relation to the retail access market, the EC noted that:

*"The Commission notes that the retail market for access to the public telephone network at a fixed location is still regulated in Ireland and the latest market review dates back to August 2014. In particular, a retail price regulation is still in place.*

*In the notified draft measure ComReg proposes to partially withdraw the retail price regulation obligation not to unreasonably bundle (and the relating Net Revenue Test) in view of the strength of remedies to be imposed on the upstream wholesale market. Indeed, ComReg has recently put in place wholesale regulation that is likely to render the existing retail regulation disproportionate.*

*The Commission has repeatedly invited ComReg to reassess the retail access market and already in 2016 (case IE/2016/1860) ComReg has informed the Commission about its intention to carry out a market review in the course of 2016 and to notify it in the fourth quarter of 2016 or first quarter of 2017. In the context of the present notification, ComReg explained that it intends to start preliminary works on the retail fixed voice access market review in parallel with its review of the FACO markets in November 2018, with a view to issuing a public consultation in the fourth quarter of 2019.*

*Also in view of ComReg's earlier commitments, the Commission considers the proposed timing unjustified and urges ComReg to examine without undue delay whether, in light of retail developments and wholesale regulation in place, regulation in the retail access market is still proportionate."*

A 8.4 ComReg acknowledges that the retail market for access to the public telephone network at a fixed location is still regulated in Ireland, and the latest review was undertaken in 2014. ComReg, given its available resources, has prioritised conducting other market analyses with respect to other markets which have older market review periods applying to them (e.g. mobile voice call termination, wholesale high quality access, etc.). The delays in conducting the analyses were affected by historical inadequacy of resources.

A 8.5 ComReg intends to conduct a parallel review of the retail access markets along with D05/15, given that they are closely related. ComReg intends to consult on these market reviews in Q4 2019. To this end ComReg has commenced meeting with stakeholders as part of ComReg's preliminary preparations for these market reviews.

A 8.6 ComReg draws the EC's attention to the fact that, notwithstanding the delay in conducting a market analysis of the retail market for access to the public telephone network at a fixed location, ComReg has gradually been removing regulatory obligations from the associated markets. For example, through this Decision, the obligation not to unreasonably bundle is being removed given the sufficiency of the bundles MST, and from D05/15 ComReg removed certain obligations related to carrier pre-selection and single-billing wholesale line rental.