



Response to Consultation and Consultation on Draft Decision

Retail Calls Market Review – Call for Input on an Assessment of the Three Criteria (response to Consultation 06/51 and draft decision)

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All responses to this consultation should be clearly marked:-
“Reference: Submission re ComReg YY/NN” as indicated above,
and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5.30 pm on
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Contents

1	Executive Summary	3
	INTRODUCTION	3
	TIMEFRAME.....	3
	MARKET DEFINITION	3
	ASSESSMENT OF THE THREE CRITERIA.....	4
	PROPOSED REMOVAL OF EXISTING OBLIGATIONS	5
2	Introduction.....	6
	OBJECTIVES UNDER THE COMMUNICATIONS REGULATION ACT, 2002.....	6
	REGULATORY FRAMEWORK.....	6
	COMREG PROCEDURE.....	7
	LIAISON WITH COMPETITION AUTHORITY.....	8
	STRUCTURE OF THIS DOCUMENT	8
3	Relevant Market Definition.....	9
	SCOPE	9
	ARE CALLS FROM FIXED LOCATIONS IN THE SAME MARKET AS CALLS FROM MOBILES?	12
	ARE FIXED TO MOBILE CALLS IN THE SAME RELEVANT MARKET AS FIXED TO FIXED CALLS?.....	14
	ARE OPERATOR ASSISTED CALLS IN THE SAME RELEVANT PRODUCT MARKET AS OTHER CALLS	14
	ARE CALLS FROM PAYPHONES IN THE SAME PRODUCT MARKET AS OTHER FIXED LINE CALLS?	14
	ARE CALLS TO THE INTERNET IN THE SAME RELEVANT MARKET AS FIXED DOMESTIC CALLS?	14
	ARE CALLS TO OTHER (I.E. NON-INTERNET) NON-GEOGRAPHIC NUMBERS AND FIXED DOMESTIC CALLS IN THE SAME RETAIL MARKET?	14
	ARE FIXED SMS CALLS IN THE SAME RELEVANT MARKET AS FIXED DOMESTIC CALLS?.....	14
	ARE LOCAL AND NATIONAL FIXED CALLS IN THE SAME RELEVANT MARKET?.....	14
	ARE FIXED INTERNATIONAL CALLS IN THE SAME MARKET AS FIXED DOMESTIC CALLS?.....	14
	ARE THERE SEPARATE RELEVANT MARKETS FOR RESIDENTIAL AND NON-RESIDENTIAL CUSTOMERS?15	
	ARE VOIP CALLS IN THE SAME RELEVANT MARKET AS ALL FIXED CALLS?.....	17
	RELEVANT GEOGRAPHIC MARKET	19
	CONCLUSIONS ON MARKET DEFINITION	20
4	Retail Market Definition in the Presence of Wholesale Regulation - Assessment of the three criteria	22
	INTRODUCTION	22
	FIRST CRITERION:	23
	BARRIERS TO ENTRY AND TO THE DEVELOPMENT OF COMPETITION	23
	METHODOLOGY – ASSESSMENT IN THE PRESENCE OF REGULATION	23
	ASSESSMENT OF THE FIRST CRITERION:	24
	CONSULTATION QUESTION.....	29
	VIEWS OF RESPONDENTS	29
	CONCLUSION	30
	SECOND CRITERION:	32
	DYNAMIC ASPECTS – IS THERE A TENDENCY TO EFFECTIVE COMPETITION	32
	CONSULTATION QUESTION.....	32
	VIEWS OF RESPONDENTS	32
	UPDATED MARKET POSITION	33
	CONCLUSION	38
	THIRD CRITERION:	39
	RELATIVE EFFICIENCY OF COMPETITION LAW AND COMPLEMENTARY EX ANTE REGULATION	39
	CONSULTATION QUESTION.....	41
	VIEWS OF RESPONDENTS	41
	CONCLUSION	41
	OVERALL PRELIMINARY CONCLUSION	42
	CONSULTATION QUESTIONS	42
	VIEWS OF RESPONDENTS	43

Retail Fixed Calls Market Review- Response to Consultation

CONCLUSIONS	43
5 Proposed Removal of Retail Regulations	45
Annex A: Consultation Questions	47
Annex B: Glossary of Terms	48
Annex C: Draft Decision Instrument	51

1 Executive Summary

Introduction

- 1.1 As part of ComReg's review of the fixed retail access and calls markets¹ (markets 1-6 of the *Relevant Markets Recommendation*²), ComReg has considered the markets for retail calls. On 01 September 2004, ComReg published a national consultation on the markets for Retail Fixed Calls (ComReg Document 04/95) and on the 22 March 2005, ComReg notified to the European Commission and published the response to consultation (ComReg Document 05/26). The notified measures were accepted by the Commission.³
- 1.2 ComReg determined that before issuing a Final Decision, it was appropriate to review the findings of the market analysis in light of updated data and to take account of any market developments since the Notification. In view of the European Commission's consultation⁴ on *The Recommendation* and its preliminary finding that the retail calls markets were no longer susceptible to *ex ante* regulation, ComReg determined that it was appropriate to first assess whether the markets for fixed calls met the three criteria and as such whether *ex ante* regulation was warranted.
- 1.3 Following this, on 19 September 2006, ComReg issued a call for input on an assessment of the three criteria in relation to the markets for Retail Fixed Calls (ComReg Document 06/51). ComReg received detailed submissions from the five respondents listed below by the close of the consultation period:
 - BT Ireland,
 - Eircom,
 - Imagine Telecom,
 - Magnet Networks, and
 - Vodafone.
- 1.4 ComReg would like to thank all respondents for their submissions. Having considered the views of all respondents, ComReg sets out in this document its conclusions regarding the market review process.

Timeframe

- 1.5 The timeframe of this review is approximately two years from the date of publication of the Decision.

Market definition

- 1.6 ComReg uses a proposed working definition for the basis of an assessment of the three criteria outlined in Section 4 of this report. The market definition applied in this

¹ ComReg Document 04/95 – see extraction included in Appendix A.

² Retail Access Market Review– National Consultation (04/94) and Notification (05/25) & Retail Calls Market Review - National Consultation (04/95) and Notification (05/26).

³ Comments pursuant to Article 7(3) of Directive 2001/21/EC. Brussels, 25-04-2005

⁴ See: http://europa.eu.int/information_society/policy/ecom/doc/info_centre/public_consult/review/recommendation_final.pdf.

assessment is based on that proposed by ComReg in the consultation paper⁵ in light of consultation responses.

1.7 For the purposes of this assessment, four markets for retail calls from a fixed location are defined. These are:

- Retail residential domestic calls from a fixed location,
- Retail residential international calls from a fixed location,
- Retail non-residential domestic calls from a fixed location, and
- Retail non-residential international calls from a fixed location.

1.8 The geographical scope of the retail calls markets is Ireland.

1.9 The key change since the initial review is the identification of a split between residential and non-residential markets, in line with *The Recommendation*.

1.10 Another significant change is that further analysis has been carried out on whether Voice over Broadband (VoB) should be included in the retail calls markets. It is considered that VoB should only be included in the non-residential market. This differentiation is based on distinct levels of broadband penetration.

1.11 Furthermore, additional analysis was carried out on the degree of substitution between calls from a fixed location and calls from a mobile. ComReg maintains the view that calls from fixed locations are not in the same relevant market as calls from mobile.

Assessment of the three criteria

1.12 In a review of ComReg analysis and in light of consultation responses, ComReg considers that the first criterion, that of high and non-transitory barriers to entry, is not met in the markets for retail calls. ComReg has based its assessment on the following evidence:

- The EU Commission's initial consideration⁶ that retail calls markets in Ireland should no longer be included in the list of Recommended Markets for the application of *ex ante* regulation. In reference to the retail calls markets the Commission proposes that "wholesale regulation, including Carrier Selection and Carrier Pre-Selection obligations, significantly reduce the barriers to enter these markets"
- ComReg considers that there are few or no legal or regulatory barriers to ComReg which would constitute a high, or non-transitory barrier to entry to the retail calls markets
- Regulatory obligations for the provision of wholesale indirect access inputs such as carrier selection (CS), carrier pre-selection (CPS) and wholesale line rental (SB-WLR) enable market entry to retail calls market, with relatively low sunk costs.

⁵ ComReg Document 06/51

⁶

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/recommendation_final.pdf

- The availability of wholesale interconnection inputs, mandated under the Wholesale Call Origination and Termination Market Review⁷
- The future development of broadband as a driver for opportunities of the use of VoB for voice calling in the future. In particular, ComReg notes the potential for low barriers to entry in the provision of VoB services over an existing broadband connection.

- 1.13 In its assessment of the second criterion ComReg notes that of the four markets outlined in the definition, only one, that of non-residential international retail calls, tends towards effective competition. ComReg notes that Eircom retains a sufficiently high market share in the remaining three markets, consistent with a finding of SMP. On the other hand, ComReg's analysis suggests that there is some evidence of competitive price pressure within the calls markets. ComReg concludes that it is currently unclear whether the remaining call markets tend towards effective competition. In light of ComReg's conclusion that the markets do not fulfil the first criteria, a final determination on the second criteria is unnecessary.
- 1.14 ComReg notes that there remains scope for anti-competitive behaviour in these markets, for example, via possible excessive pricing, predatory pricing and price squeeze strategies by Eircom, which is dominant in the interconnection markets. In light of recent EU Commission competition law rulings in relation to market failure in telecommunications markets, ComReg's own analysis and the views of respondents, ComReg considers that on balance, competition law may be sufficient in addressing market failure within the relevant markets. In light of ComReg's finding on the first criterion however, a final determination on this criterion was not required. ComReg will continue to monitor these markets closely and will take action under competition law as necessary.

Proposed Removal of Existing Obligations

- 1.15 In light of ComReg's finding that the markets for retail calls fail to meet all three criteria required to proceed with *ex ante* regulation, ComReg consults on the withdrawal of retail obligations from the calls markets.
- 1.16 It seeks input on a suitable timeframe for the withdrawal of all relevant obligations, and any additional factors which should be considered in light of removal of these obligations.

⁷ ComReg Document 07/51

2 Introduction

Objectives under the Communications Regulation Act, 2002

- 2.1 Section 12 of the Communications Regulation Act, 2002, outlines ComReg's objectives in exercising its functions. In relation to the provision of electronic communications networks, electronic communications services and associated facilities these objectives 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 European Union.
- 2.2 Any measures imposed or removed as a result of this consultation will aim to achieve these objectives.

Regulatory Framework

- 2.3 Four sets of Regulations,⁸ which transpose into Irish law four European Community directives on electronic communications and services,⁹ entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the *Privacy and Electronic Communications Directive*, was transposed into Irish law on 6 November 2003.
- 2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.¹⁰ Further, the Framework Regulations require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market.
- 2.5 As part of ComReg's review of the retail access and calls¹¹ markets (markets 1-6 of the *Relevant Markets Recommendation*),¹² ComReg considered the markets for retail

⁸ Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the Framework Regulations"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the Authorisation Regulations"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the Access Regulations"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the Universal Service Regulations").

⁹ The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the Framework Directive"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the Specific Directives"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the Authorisation Directive"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the Access Directive"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the Universal Service Directive"), OJ 2002 L 108/51; and Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the Privacy and Electronic Communications Directive"), OJ 2002 L 201/37.

¹⁰ Framework Regulations 26.

¹¹ ComReg Document No. 04/95.

¹² Retail Access Market Review– National Consultation (04/94) and Notification (05/25) & Retail Calls Market Review - National Consultation (04/95) and Notification (05/26).

calls. On 01 September 2004 ComReg published a national consultation on the markets for Retail Fixed Calls (ComReg Doc 04/95), and on the 22 March 2005 ComReg notified to the European Commission and published the response to consultation (ComReg Doc 05/26). The notified measures were accepted by the Commission.¹³

- 2.6 ComReg determined that before issuing a Final Decision, it was appropriate to review the findings of the market analysis in light of updated data and to take account of any market developments since the Notification. In addition, in view of the European Commission's consultation on *The Recommendation* and its preliminary finding that the retail calls markets were no longer susceptible to *ex ante* regulation,¹⁴ ComReg determined that it was appropriate to first assess whether the market for fixed calls met the three criteria¹⁵ and as such whether *ex ante* regulation was warranted.
- 2.7 In carrying out market definition and market analysis, ComReg is minded of the need to take the utmost account of the *Relevant Markets Recommendation* and the European Commission's *Guidelines on Market Analysis and Significant Market Power* ("*The Guidelines*").
- 2.8 Following this, on 19 September 2006, ComReg issued a call for input on an assessment of the three criteria in relation to the markets for Retail Fixed Calls (ComReg Document 06/51). ComReg received detailed submissions from the five respondents listed below by the close of the consultation period:

- BT Ireland,
- Eircom,
- Imagine Telecom,
- Magnet Networks, and
- Vodafone.

ComReg procedure

- 2.9 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services ("ECNs¹⁶ and ECSs¹⁷") via a request for information ('the Data Direction'), and from consumer surveys commissioned by ComReg, in order to carry out its respective market definition and market analysis procedures based on established economic and legal principles, and taking the utmost account of *The Guidelines*.
- 2.10 The results of ComReg's consumer surveys are referred to throughout this report. ComReg commissions market research agencies to carry out independent survey research of both residential and business consumer research regarding usage electronic communications services, including fixed, payphone and mobile services.

¹³ Comments pursuant to Article 7(3) of Directive 2001/21/EC. Brussels, 25-04-2005.

¹⁴ See: http://europa.eu.int/information_society/policy/ecom/doc/info_centre/public_consult/review/recommendation_final.pdf.

¹⁵ The presence of high and non-transitory entry barriers, the state of competition behind the barriers of entry and that the application of competition law alone would not adequately address the market failure(s) concerned. If the market passes these criteria, then a market analysis should be conducted.

¹⁶ Electronic Communications Networks.

¹⁷ Electronic Communications Services.

Liaison with Competition Authority

2.11 ComReg consulted with the Competition Authority in relation to its findings on this document and provided the Competition Authority with a summary of these findings. The Competition Authority has discussed these findings with ComReg and concluded that they were appropriate.

Structure of this document

2.12 The remainder of this consultation document is structured as follows:

- **Section 3** presents ComReg's conclusions on a working definition of the markets for fixed retail calls based on ComReg's own analysis and the views of consultation responses
- **Section 4** presents ComReg's assessment of the three criteria for the retail fixed calls markets.
- **Section 5** outlines proposals for a consultation on the removal of regulatory obligations in the retail calls markets.
- **Annex A** summarises the consultation questions asked in this document.
- **Annex B** provides a Glossary of the terms which may be used in this document.
- **Annex C** outlines the Draft Decision Instrument.

3 Relevant Market Definition

Scope

- 3.1 As noted in the Executive Summary, ComReg considered that an analysis of market characteristics and conditions within the Irish market was required in order to consider if there was sufficient evidence to conclude that the retail calls markets in Ireland do not meet the one or more of the three criteria. Such a determination would indicate that the market does not warrant *ex ante* regulation.
- 3.2 In order to assess the market in relation to the three criteria, it was necessary for ComReg to use a working definition of the retail calls markets which reflected the extent of market conditions in the Irish retail calls markets
- 3.3 This section discusses the working definition used by ComReg for the purposes of assessing the three criteria. The definition adopted for the purposes of this analysis has been adopted in light of analysis conducted and presented in the initial consultation document¹⁸, and the views and feedback respondents received by ComReg as part of its consultation on this market. This chapter briefly summarises respondent views in relation to each aspect of the market definition, and proposes a final working definition upon which the assessment of the three criteria will be conducted.
- 3.4 The broad market definition adopted by ComReg mirrors that of four retail call markets identified by the EU Commission in *The Recommendation* on relevant product and service markets¹⁹ and is defined as,
 - Publicly available local and/or national telephone services provided at a fixed location- residential
 - Publicly available local and/or national telephone services provided at a fixed location- business
 - Publicly available international telephone services provided at a fixed location- business
 - Publicly available international telephone services provided at a fixed location- residential
- 3.5 The *Framework Regulations* require that the market analysis procedure under Regulation 27 be carried out subsequent to ComReg defining a relevant market, which is to occur as soon as possible after the adoption, or subsequent revision, of *The Recommendation* on relevant product and service markets ("*The Recommendation*") by the European Commission.²⁰ In carrying out market definition and market analysis, ComReg must take the utmost account of Recommendation on the Relevant Markets and the Commission's Guidelines on Market Analysis and Significant Market Power ("*The Guidelines*"). ComReg adopted the European Commission's approach as its

¹⁸ ComReg Document 06/51

¹⁹ Commission Recommendation on Relevant Product and Service Markets, in accordance with Directive 2002/21/EC.

²⁰ Framework Regulations 26 and 27.

starting point for defining the market, such that the review was concerned with the ability of customers to use the public fixed telephone network.²¹

3.6 A consideration of the functional scope of the retail calls markets examined the following:

- Are fixed access and fixed calls in the same relevant market?
- Are calls from fixed locations in the same relevant market as calls from mobiles?
- Are fixed to mobile calls in the same relevant product market as fixed to fixed calls?
- Are operator assisted calls in the same relevant product market as other calls?
- Are calls from payphones in the same relevant product market as other fixed line calls?
- Are calls to the Internet in the same relevant product market as fixed domestic calls?
- Are calls to other (i.e. non-internet) non-geographic numbers in the same relevant product market as fixed domestic calls?
- Are fixed SMS in the same relevant market as fixed domestic calls?
- Are local and national fixed calls in the same relevant market?
- Are fixed international calls in the same relevant market as fixed domestic calls?
- Are there separate relevant markets for residential and non-residential customers?
- Are VoIP calls in the same relevant market as all fixed calls?
- What is the geographic scope of the markets?

3.7 The following discussion summarises the consultation responses on market definition, and the manner in which these responses informed ComReg's final proposed working definition of the market involved. However, given that ComReg has determined that the retail calls markets are not subject to high and non-transitory barriers, and they do not meet the first criterion, ComReg does not present a final market definition at this time. It should however be noted that responses to the consultation were generally supportive of the proposed scope of the market definition as proposed in the consultation document²².

Is there a single market for fixed access and fixed calls?

CONSULTATION PROPOSAL

3.8 In the consultation paper, ComReg considered three key questions:

- (a). Does the take-up of a combined or bundled calls and access product indicate that calls and access should be considered as part of the same market?

²¹ Commission Recommendation on Relevant Product and Service Markets, in accordance with Directive 2002/21/EC.

²² ComReg Document 06/51

- (b). Does research on consumer awareness suggest that calls and access are perceived by users to be part of the same market?
 - (c). Does the introduction of more complex bundled products render calls and access in the same market?
- 3.9 A detailed analysis as conducted by ComReg in addressing these questions can be found in the consultation document²³.

VIEWS OF RESPONDENTS

- 3.10 A number of respondents challenged ComReg's assertion that calls and access should be considered in separate retail markets. One respondent considered that the exclusion of bundled services should be based primarily upon the extent to which their availability constrained the pricing of access and calls purchased as a separate element, rather than on the actual level of take-up of bundled access and calls products. Another respondent further noted that ComReg had not specified a level at which the take-up of bundled services would be sufficiently high level to allow for access and calls to be considered in the same market. One respondent suggested that a prospective review should be conducted for a single market of retail communications services or "cluster of services", for example, where end-users purchase bundles of services e.g. triple play packages, pointing to ComReg's use of the concept of a cluster of services in its market review of wholesale mobile access and call origination (MACO).

CONCLUSION

- 3.11 ComReg remains of the view that, in Ireland, calls and access products can be, and are, bought and sold separately. ComReg found no evidence that the availability of a combined calls and access product constrains the pricing of the separate elements.
- 3.12 In considering the proposal that a cluster of services should be defined, ComReg notes that the MACO market review referred to a "mobile communications" services market, based on aggregated services i.e. a "cluster" of services comprising mobile access, calls, value added voice services and SMS. In its analysis, ComReg found that individual elements were not sufficiently unbundled from other mobile retail services so as to constitute a separate product market. This is not the case in the fixed access markets where the individual components are purchased and provided in isolation.
- 3.13 ComReg notes that the European Commission was firmly of the view in the draft revised Recommendation (which remains subject to finalisation) that calls and access remained in separate markets. Furthermore, ComReg's recent market review and Decision on the retail access markets²⁴, it was determined that retail access should be defined as a separate market from calls. ComReg notes that this decision has not been appealed.
- 3.14 Finally, ComReg notes that at the end of June 2007, CPS-only paths accounted for close to 7% of all access paths. SB-WLR (combining CPS and SB-WLR) represented 16% of all access paths. As such, while the proportion of indirect access paths has grown, it remains a small part of the overall market. This suggests that even if the price for calls or access sold separately increased by a small but significant amount it is unlikely that customers would switch in sufficient numbers to fixed calls/access convergent products such as to render that price increase unprofitable.

²³ ComReg Document 06/51

²⁴ ComReg document 07/61

ComReg concludes in line with the *Relevant Markets Recommendation* that there are separate markets for publicly-available telephone services from a fixed location and for narrowband access.

Are calls from fixed locations in the same market as calls from mobiles?

CONSULTATION PROPOSAL

3.15 Since the initial review at which ComReg concluded that calls from fixed locations were in a separate market to calls from mobiles, there have been no decisions of either the Irish Competition Authority or the European Commission to the effect that there are separate markets for fixed and mobile services. Indeed, recent merger decisions of the European Commission have relied on the market definitions contained in *The Recommendation*²⁵. None of the recent decisions appear to have departed from the *Vodafone Airtouch/Mannesmann* decision²⁶ where the European Commission, as in previous decisions²⁷, confirmed the existence of a distinct product market for the provision of mobile telecommunications services. The Commission found that the key difference between mobile and fixed services was the *mobility* inherent in all mobile services (i.e. mobile numbers were associated with individuals on the move, rather than a fixed location).²⁸ This position is reflected in Ireland, where, for example, the Competition Authority cleared Eircom's acquisition of Meteor, and decided that distinct product markets existed for mobile and fixed locations.

3.16 In its consultation document, ComReg examined demand-side substitution between calls from a fixed location and calls from a mobile location based on recent trends in the following areas,

- a) Call volume,
- b) Price,
- c) Functionality, and
- d) Consumer behaviour.

3.17 ComReg also examined a range of possible supply-side factors with respect to calls from a fixed location and calls from a mobile location.

3.18 Full details on this analysis are outlined in the consultation document, and ComReg considers that this analysis remains relevant to current market conditions.

VIEWS OF RESPONDENTS

3.19 A number of respondents disagreed with ComReg's assertion with relation to fixed and mobile originating calls being in separate markets. Arguments by respondents considered that the lack of prepaid services in the fixed market could not be considered evidence of separate markets for fixed and mobile originating calls. Some

²⁵ European Commission Recommendation of 11 February, 2003 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

²⁶ Decision of 12 April, 2000 in case COMP/M.1795 - Vodafone Airtouch/Mannesmann.

²⁷ For example Decision of 13 October, 1999 in case COMP/M.1439 – Telia / Telenor, see paragraph 94.

²⁸ See, for example: Commission Decision of 10 July 2002, Case No. COMP/M.2803 – TeliaSonera; Commission Decision of 20 September 2001, Case No. COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia; Commission Decision of 20 September 2001, Case No. COMP/M.1439 – Telia/Telenor and Commission Decision of 12 April 2000, Case No. COMP/M.1795 – Vodafone Airtouch/Mannesmann.

respondents also argued that there was evidence suggesting competition between fixed and mobile services, and evidence of substitution from fixed to mobile among younger consumers. In addition, one respondent considered that a 10% price increase in fixed calls and access costs would result in a significant number of customers finding a mobile connection more attractive than fixed and sufficient in itself. Another respondent considered that a strong one-way fixed to mobile substitution effect was present, driven not only by additional mobile services but also by the fact that mobile represented good value for customers.

CONCLUSION

- 3.20 ComReg notes that at present, there are no commercial offerings for hybrid fixed mobile convergence products in the Irish market at present. A ComReg consultation has opened up geographic numbers for the provision of such hybrid services²⁹, however as yet there are no hybrid, or fixed-mobile convergent products commercially available in the Irish market. It is therefore not possible at this time for ComReg to carry out a demand-side analysis of the impact of these products. ComReg recognises the impact which such products could have, and has considered this further in the context of potential competition and entry barriers (Section 4).
- 3.21 ComReg further considers that proposed alternative definitions do not accurately reflect market behaviour, in that the key differentiator between fixed and mobile access is the nature of mobile functionality and the ability to always receive and make a call – regardless of whether the person is on the move or at a fixed location.
- 3.22 Based on its detailed assessment of developments in the market, ComReg holds that fixed and mobile access are not substitutes, and are not part of the same relevant market. This is because the market evidence of increasing mobile penetration alongside stable fixed access penetration may not be a result of some customers giving up a fixed line in favour of mobile only, but may also suggest that a household is likely to have one shared fixed access line but potentially several individual mobile connections.
- 3.23 ComReg does not consider that fixed and mobile access represent sufficiently strong functional substitutes. Mobile networks are currently used primarily for voice and text-based, i.e. SMS data services³⁰. Fixed is used for voice and Internet access. The mobility element associated with mobile also indicates the absence of a sufficiently high degree of functional substitutability between fixed and mobile access.
- 3.24 The introduction and dissemination of converged fixed and mobile products and services in the Irish market could change this conclusion over time, but according to the views of operators, this is not likely to occur within the timeframe of the review.

Calls from a fixed location and calls from a mobile location are not part of the same product market

²⁹ ComReg Document 07/15

³⁰ ComReg notes that HSDPA subscriptions which enable the delivery of high speed data solutions over the mobile network currently have limited penetration in Ireland. At the end of June 2007, ComReg estimates that there were a total of 45,000 HSDPA subscribers in Ireland.

Are fixed to mobile calls in the same relevant market as fixed to fixed calls?

Are operator assisted calls in the same relevant product market as other calls

Are calls from payphones in the same product market as other fixed line calls?

Are calls to the internet in the same relevant market as fixed domestic calls?

Are calls to other (i.e. non-internet) non-geographic numbers and fixed domestic calls in the same retail market?

Are fixed SMS calls in the same relevant market as fixed domestic calls?

Are local and national fixed calls in the same relevant market?

Are fixed international calls in the same market as fixed domestic calls?

3.25 Based on its analysis, as proposed in the consultation document³¹ and on the broad agreement of all respondents, ComReg's proposal relating to a proposed definition of these market segments remains as was set out in the consultation document.

CONCLUSION

Fixed to mobile calls are in the same relevant market as fixed to fixed calls.

Operator assisted calls are ancillary to the market in which the call takes place rather than comprising part of that market itself

ComReg maintains that calls from payphones are not in the same product market as other fixed line calls.

ComReg considers that Internet access calls from a fixed location and domestic calls from a fixed location are in the same product market.

ComReg holds the view that calls to other (i.e. non-internet) non-geographic numbers and fixed domestic calls are in the same retail market.

ComReg maintains that fixed SMS should not be defined as falling within the same relevant market as voice calls

ComReg concludes that local and national fixed calls are in the same relevant market

ComReg concludes that international calls are in a separate market from domestic calls

³¹ ComReg Document 06/51

Are there separate relevant markets for residential and non-residential customers?

CONSULTATION PROPOSAL

3.26 In the initial review³², ComReg proposed that residential and non-residential customers belonged in the same relevant market based on the following analysis:

- From the demand-side, there were no barriers to switching based on user type – in response to a price increase a residential user could switch to a non-residential package and vice versa. Furthermore, there was not a sufficiently significant price or functional difference between residential and non-residential calls to justify the definition of separate calls markets.
- Also, there was a high degree of supply-side substitution in that, once issues relating to the cost of access have been addressed, a provider of non-residential calls could easily enter the market to provide residential calls and vice versa.

3.27 It was recognised in the initial review that this conclusion differed from *The Recommendation*, which proposed that separate markets could be defined for residential and business customers.

3.28 The Explanatory Memorandum notes that:

‘It is common to distinguish between business and residential markets because the contractual terms of access and service may vary. In addition, it will not normally be possible for a supplier to the business market to respond to price increases by a hypothetical monopolist in the residential market because the economics of serving customers in the two locations may be significantly different. Therefore it is appropriate to distinguish end user categories in the markets defined.’³³

3.29 ComReg signalled its intention to monitor whether differentiated residential and non-residential services were likely to develop.

3.30 ComReg carried out further analysis of the markets since the time of the initial review. In particular, ComReg revisited two key questions.

- Firstly, is there a business market which can be defined distinctly from a residential market?
- Secondly, should some parts of the non-residential calls market be narrowly defined to take account of different sets of customer characteristics?

3.31 A data direction was issued to all operators in May 2006. The data direction requested information on means of customer categorisation, pricing, product types, switching and purchasing patterns and also supply-side considerations. Based on this data, ComReg examined possible differences between residential and business customers for retail calls.

³² ComReg Document 05/26

³³ Commission Recommendation, 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 communication networks and services, page 17.

- 3.32 From a demand-side perspective, it was found that the functional element of retail calls required by residential users was similar to that of business users. However, distinctions did remain, in that in some cases non-residential customers were allocated an account manager and larger accounts were tendered for while this was never the case for residential users.
- 3.33 ComReg also considered the following factors:
- a) Pricing analysis and
 - b) Ability to switch between customer categories.
- 3.34 Full details of the analysis conducted by ComReg with respect to residential and non-residential customers are included in the consultation document³⁴.
- 3.35 ComReg concluded this analysis by expressing the view that the differentiation between residential and non-residential customers was finely-balanced, and that the case for either side was not overwhelming. For instance, it was accepted that there may be some overlap between high-end residential users and SoHo (Single Office, Home Office) or some SMEs, however, on the whole there were found to be sufficient differences from the demand- and supply-side to render it appropriate to define separate markets for residential and non-residential users. This was supported by data received in response to the aforementioned Data Direction³⁵ which showed that the number of non-residential customers availing of residential tariffs/plans/discounts schemes and vice versa was not of a scale to justify the definition of a single market.

VIEWS OF RESPONDENTS

- 3.36 One respondent, while recognising that residential and non-residential customers have different requirements and usage profiles, considered that it would be appropriate to view the two broad types of customer as different segments of the same overall market. They stated that they believed there was no clear demarcation between the residential and non-residential customer segments, underlining that the key factor in the observed overlap was the similarity in the volume of usage irrespective of whether the customer was residential or non-residential. They disputed the argument that the differing price plans and discount schemes should denote separate markets, asserting that the existence and prominence of quantity discounts underlined the point that it is the volume of usage rather than customer type that is the primary determinant of the effective rate per minute.
- 3.37 With regard to supply-side substitution, the respondent suggested that while there were some differences in the services infrastructure required to cater for the differing requirements of residential and non-residential customers, they believed that supply-side substitution would be relatively easy for those operators currently providing services to just one customer type. No evidence was provided in support of this argument. In addition, the respondent noted that some operators relied on customer self-selection and as such did not impose any switching costs between residential and non-residential tariffs.

³⁴ ComReg Document 06/51

³⁵ From the submissions provided it would seem that less than 1% of residential subscribers are on non-residential packages and vice versa.

- 3.38 A second respondent agreed with ComReg's statement that the issue of whether there are separate residential and non-residential calls markets was finely balanced. However, they disagreed with the view that the balance lies with separate markets.

CONCLUSION

- 3.39 ComReg notes that key differences are present between residential and non-residential customers such as outlined above. ComReg recognises that there is a positive correlation between higher volume usage and customers belonging to the non-residential market and similarly between lower volume usage and residential customers. However, it considers that this should not preclude the finding of separate markets.
- 3.40 Following pricing analysis and evaluation of barriers to switching, ComReg has found that residential and non-residential customers should be defined in separate calls markets. ComReg's decision in relation to this aspect of the market has been based on the fact that:
- (a) ComReg considers that there is sufficient differentiation on function or price to justify the definition of separate markets for residential and non-residential customers. This consideration is based on the availability and adoption of targeted pricing plans and discount schemes for residential and non-residential users which provide effective price differences which indicate separate markets.
 - (b) ComReg further considers that there is little evidence of switching or choosing between residential and non-residential packages offered by operators. Results from the data direction issued as part of this review suggested that operators were relatively effective in segmenting residential

ComReg concludes that there are separate markets for residential and non-residential calls.

Are VoIP Calls in the same relevant market as all fixed calls?

CONSULTATION PROPOSAL

- 3.41 In the initial review, ComReg proposed that Voice over Internet Protocol (VoIP) calls should be considered part of the retail calls market only where such calls were carried over the public switched telephone network (PSTN). ComReg noted the negligible take-up of VoIP services in Ireland at that time, and proposed that the situation would be monitored.
- 3.42 ComReg carried out detailed research into the VoIP market, in order to establish how change in the market has impacted on the manner in which VoIP calls could act as demand or supply-side substitutes for retail fixed narrowband calls, and so be considered part of the calls market. The research considered each of the issues recommended by the EC. In particular, this research focused on :
- a) Functionality;
 - b) Consumer behaviour;
 - c) Pricing; and
 - d) Competitive conditions of supply.

Overall preliminary conclusion on VoB

- 3.43 ComReg carried out detailed analysis of the developing VoIP market in order to ascertain whether VoB calls should be considered part of the retail calls market.
- 3.44 ComReg's findings were as follows:
- In terms of functionality, a VoB call could be substitutable for a fixed call, but VoI, VoUMA and VoLW calls could not. This indicated that the possibility of VoB calls being part of the retail fixed calls market needed to be further considered.
 - VoB was found to be dependent on broadband access. Broadband was not considered to be substitutable for narrowband because the penetration rates in Ireland were very low at the time of the analysis. Because the broadband base was relatively low compared to other member states, it was suggested that even high projected growth rates would not bring Ireland up to the current EU-15 average. Experience in other countries also showed that even with relatively high levels of broadband penetration, VoIP users remained a small proportion of broadband users, and VoB users in turn represented a small proportion of VoIP users. This suggested, as outlined in the above analysis, that VoB should not be part of the same market as retail fixed calls at this time in the residential market. However, increasing penetration and potential substitutability in the non-residential market was noted.
 - Some convergence of pricing models between fixed calls and VoB was found, and the cost of the calls was deemed to be broadly similar. However, customers needed two levels of investment to switch to this market. Firstly, they required a broadband connection. Secondly, they needed to buy an analogue-to-broadband phone adaptor. This suggested that customers would face significant switching costs, and so for residential users, the products would not be in the same market. However, the initial investment required was considered less of a constraint in the non-residential market.
 - Some degree of supply-side substitution between fixed retail calls and VoB calls was present, but it was determined that the different access requirements were likely to act as a constraint.

VIEWS OF RESPONDENTS

- 3.45 In disagreeing with ComReg's approach, one respondent noted that only very large firms who were able to afford expensive leased lines or fibre connections could use VoB and only the smallest fraction of these firms could afford those connectivity options. They considered that most businesses relied on the most basic broadband services, with contention at such a level that they were unable to use VoB.
- 3.46 Another respondent proposed that ComReg should not include IP telephony services in either of relevant markets as VoIP/VoB had not made any considerable impact on the market and its future development in Ireland remained largely uncertain. Additionally, from the end-user's perspective, VoIP/VoB was seen as lower-quality, second-line services and as such was not a substitute for first-line PSTN services.

CONCLUSION

- 3.47 Arising from its analysis ComReg considers that calls made using VoB services are sufficiently interchangeable or substitutable with other fixed calls in terms of objective characteristics and intended use. In addition, pricing considerations may lead non-residential consumers to choose VoB over fixed line call services in relation to national and international calls.
- 3.48 ComReg considers that VoB may have a significant impact on the non-residential users within the timeframe of this review, and as such its inclusion in the market for fixed non-residential is justified. Further, demand and supply conditions were found to be sufficiently different in the non-residential market to suggest that VoB calls were likely to form part of the same market as retail fixed calls within the lifetime of this review.
- 3.49 ComReg believes that taking into account likely market developments within the lifetime of the review, VoB calls should not be included in the market for fixed retail calls for residential customers. ComReg however recognises that this is a rapidly evolving market, and that any significant change, for example in market growth or in new product launch, should trigger further review. In particular, it notes that broadband penetration in Ireland has increased rapidly over the last 12 months, and is now very close to the EU average.
- 3.50 Overall, however, ComReg considers that VoB in the residential market is unlikely to have a significant market impact within the time of the review. It does recognise the likely future impact of VoB, and considers that its future impact can be further considered in terms of ComReg's assessment of the first criteria.

ComReg considers that VoB should be included in the same market as fixed non-residential calls.

Relevant geographic market

CONSULTATION PROPOSAL

- 3.51 In the initial review ComReg noted that the conditions of supply of call services were homogeneous across Ireland. These are inextricably linked with the supply of access. ComReg noted that the General Authorisation³⁶, which was required of any undertaking which intended to provide an electronic communications network or service in Ireland, was national in scope. As a result, any operator authorised to provide call services could do so on a national basis which would suggest national markets.

VIEWS OF RESPONDENTS

- 3.52 A number of respondents suggested that in light of agreements with property developers for the purpose of providing customised access and call services and which precluded other operators from servicing customers located in these developments that sub-geographic areas should be defined.
- 3.53 Three respondents agreed with the proposal that the geographic scope of the retail fixed call markets should be Ireland.

³⁶ European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003.

CONCLUSION

3.54 ComReg has noted the submissions made and has examined and analysed each element. ComReg maintains the view that service offerings, pricing behaviour and marketing arrangements within these housing developments are largely determined at the national level and there are constraints to operators determining these factors on a more localised basis. Insufficient evidence has been provided to suggest that this situation will change over the period of the review.

3.55 ComReg is of the view that so long as the national pricing constraint applies, operators engaging in these arrangements continue to determine their commercial terms and conditions on a national basis and there are constraints on them determining those terms on a more localised level, then the relevant geographic market is national.

ComReg's conclusion is that the relevant geographic market is Ireland.

Conclusions on market definition

3.56 Based on analysis conducted by ComReg, and on consultation responses, ComReg proposes drawing the following conclusions on the markets for retail calls.

- Fixed access and fixed calls are not in the same relevant market;
- Calls from fixed locations are not in the same relevant market as calls from mobile;
- Fixed to mobile calls are in the same relevant product market as fixed domestic calls;
- Operator assisted calls are ancillary to the market in which the call takes place;
- Calls from payphones are not in the same relevant product market as calls from a land line;
- Calls to the Internet are in the same relevant product market as fixed domestic calls;
- Other non-geographic numbers such as premium rate and freephone calls are in the same relevant product market as fixed domestic calls;
- Fixed SMS calls are not in the same relevant market as fixed domestic calls;
- Local and national fixed calls are in the same relevant market;
- Fixed international calls are not in the same relevant market as fixed domestic calls;
- There are separate relevant markets for residential and non-residential customers; and
- Voice over Internet Protocol (VoIP) calls are in the same relevant market as fixed domestic calls for non-residential customers, but are not in the same relevant market for residential customers.

3.57 ComReg therefore is minded to define four markets for retail calls from a fixed location as,

- Retail residential domestic calls from a fixed location
- Retail residential international calls from a fixed location
- Retail non-residential domestic calls from a fixed location
- Retail non-residential international calls from a fixed location

- 3.58 The geographical scope of the retail calls markets is national.
- 3.59 ComReg has applied the definition of retail markets outlined in this section as the basis for an assessment of the three criteria, as discussed in Section 4 of this report. In its assessment ComReg considers that the retail call markets does not meet the first criterion (the retail call markets do not exhibit high and non-transitory barriers to entry) and therefore *ex ante* regulation is not warranted.
- 3.60 Therefore, ComReg concludes that while it considers the proposed definition to be appropriate for the purposes of an assessment of the three criteria, given that the retail call markets do not meet the first criterion, it is therefore unnecessary to draw final conclusions on market definition.

4 Retail Market Definition in the Presence of Wholesale Regulation - Assessment of the three criteria

Introduction

- 4.1 The European Commission's consultation³⁷ on *The Recommendation* set out its preliminary view that the retail calls markets should no longer be susceptible to *ex ante* regulation.
- 4.2 Under normal circumstances, an extensive review of the three criteria in the markets for retail calls would not be deemed necessary. However, in view of the initial findings from the European Commission's consultation on *The Recommendation*, on regulatory obligations mandated elsewhere as part of the market review process, and in light of current market conditions in Ireland, ComReg believes that it is appropriate to first assess whether the markets for fixed calls meets the three criteria and thus identify if *ex ante* regulation is considered to be warranted.
- 4.3 An examination of these criteria focuses on the general structure and characteristics of a market in order to identify market characteristics which require more detailed analysis. The three criteria are:

1. **Whether a market is subject to high and non-transitory entry barriers.** To meet this criterion, there must be evidence of high and non-transitory barriers to entry to the market;
2. **Whether a market has characteristics such that it will not tend over time towards effective competition.** To meet this criterion, it must be shown that the market does not tend towards effective competition; and
3. **The sufficiency of competition law by itself** (absent *ex ante* regulation). To meet this criterion, it must be shown that competition law can not adequately address any potential market failure.

- 4.4 The market must meet *all three* criteria to justify regulation.
- 4.5 In its analysis ComReg, in line with Commission thinking, has adopted a 'modified greenfield approach' in that (i) all regulations which are unrelated to SMP are assumed to be maintained³⁸, (ii) all SMP related regulations which are unrelated to the fixed calls value chain are assumed to be in place. ComReg has examined the four retail fixed calls markets as per the working definition discussed earlier in this document. Where appropriate, the specifics of the individual markets are reconsidered using updated market share information, particularly in the assessment of the dynamics of the market.

³⁷ such regulations include specific obligations, which are imposed on the universal service provider, such as a uniform tariff requirement
http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/recommendation_final.pdf

³⁸

First Criterion:

Barriers to entry and to the development of competition

Methodology – assessment in the presence of regulation

4.6 As noted by the European Commission³⁹, the first of the three criteria that must be identified by NRAs in order for a market to be susceptible to *ex ante* regulation is that the market is subject to high and non-transitory entry barriers.

4.7 In the ongoing consultation by the European Commission, it was stated that there was an important qualification in relation to this first criterion. That is, NRAs should examine:

“...whether high entry barriers are likely to be non-transitory in the context of a modified Greenfield approach (i.e. in the absence of regulation in the market concerned under this regulatory framework but including regulation which exists outside this framework).” (Emphasis added).

4.8 In the consultation paper, ComReg outlined its interpretation of this qualification as meaning that it should seek to determine whether or not high entry barriers existed and whether they were likely to persist over time (taking into account dynamic factors) but not taking into account the existence and effect of *ex ante* regulation specifically applying to the relevant retail calls markets. ComReg expressed the view that it was appropriate for it to adopt this qualification in its analysis because then it is at the same time attempting to address the ultimate and more fundamental question of whether SMP regulation may be appropriate in the relevant retail calls markets.

4.9 In other words, if entry barriers were deemed not to be high and not persistent in the absence of regulation, then regulation may not be justified. ComReg furthermore interpreted the European Commission’s qualification as meaning that ComReg could and should take into account the existence of *ex ante* regulation applying in other, generally wholesale electronic communications markets, which may have an effect on the relevant retail calls markets. ComReg believed that this approach was consistent with the approach recommended by the European Commission.

4.10 The wholesale regulation most relevant to fixed calls markets are that of CPS-only and SB-WLR (combined SB-WLR and CPS) obligations which are imposed as a result of the Retail Fixed Narrowband Access Market Review⁴⁰. In addition, ComReg has placed obligations on Eircom to provide origination and transit products on a cost orientated basis by virtue of its SMP in the relevant interconnection markets⁴¹. It also issued a notification to the EU of obligations for the provision of terminating services at cost-oriented products⁴². These products are available to all operators on a non-discriminatory basis.

4.11 Accordingly, ComReg proposed to examine the first criterion identified by the European Commission taking into account the presence of *ex ante* regulation in

³⁹ Page 9 of the Explanatory Memorandum to the Draft Recommendation.

⁴⁰ ComReg Document 07/61.

⁴¹ ComReg Document 07/80.

⁴² ComReg Document 07/83

related wholesale markets but not taking into account the presence of *ex ante* regulation specifically applying to the relevant retail calls markets.

Assessment of the First Criterion:

4.12 With respect to the first criterion, and according to the European Commission's Draft Recommendation on relevant markets⁴³, two types of barriers to entry and to the development of competition in the electronic communications sector appear to be relevant: (a) structural barriers; and (b) legal or regulatory barriers.⁴⁴

4.13 *The Recommendation* notes that legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other state measures that have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market⁴⁵. ComReg is not aware of any legal or regulatory barriers (such as the availability of spectrum or other non SMP obligations) which pose high barriers to entry into the retail fixed calls markets. In order to offer call services, an operator has to comply with the General Authorisation Regime, which imposes very few conditions on any entrant. Thus, ComReg believes that there are few or no legal or regulatory barriers to entry into the relevant calls markets.

4.14 A structural barrier to entry exists when, given the level of demand, the state of the technology and its associated cost structure are such that they create asymmetric conditions between incumbents and new entrants, impeding or preventing market entry of the latter. High structural barriers may be found to exist when the market is characterised by factors such as:

- Substantial economies of scale, scope and density; and
- High sunk costs.

4.15 ComReg conducted an analysis of structural barriers under the following headings:

- a) Level of sunk costs required for entry;
- b) Economies of scope and scale;
- c) Control of infrastructure not easily duplicated;
- d) Technological advantages or superiority;
- e) Barriers to switching for consumers; and
- f) Product/service diversification.

⁴³ Pages 9-10 of the Explanatory Memorandum to the Draft Recommendation.

⁴⁴ It is also possible that certain (strategic) barriers to entry may arise as a result of the actions and reactions of the incumbents to new entry. Where the incumbent engages in behaviour directly aimed at retaliating against and/or deterring new entry this may also need to be taken into account when examining the height of entry barriers. The scope for such strategic behaviour to arise and to negatively affect existing or potential competition is, however, taken into account in the discussion on the third criterion below.

⁴⁵ See page 10 of the Commission Recommendation in accordance with Directive 2002/21/EC.

4.16 In this respect ComReg examined whether the industry has experienced entry and whether entry has been or is likely in the future to be sufficiently immediate and persistent to limit any market power.

(a) Level of sunk costs⁴⁶ required for entry

4.17 ComReg analysed actual and potential barriers to entry in the fixed calls markets.

4.18 A number of wholesale products are available which, from a regulatory perspective, aim to provide new entrants the possibility to make their investments in a step-by-step manner. This approach, where two or more access products at different levels of the network hierarchy are simultaneously available to alternative operators such that they can make their investments incrementally has been called the ‘ladder of investment’⁴⁷.

4.19 The means by which an operator can enter the fixed calls markets are outlined in Figure 4.1 below.

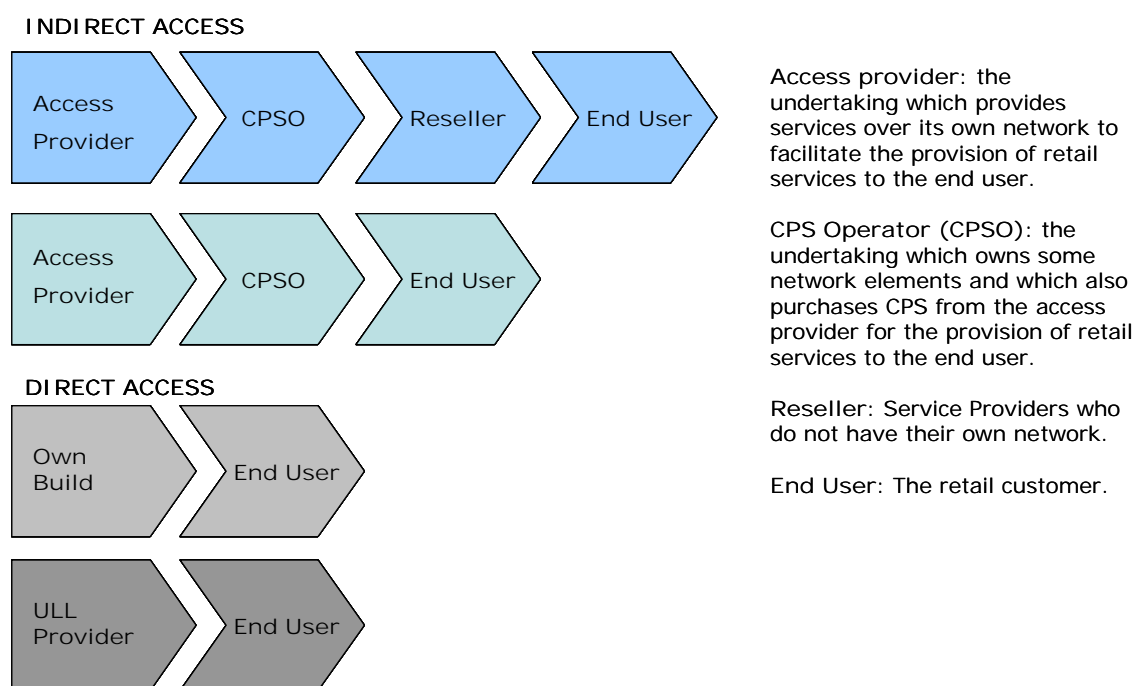


Figure 4.1: Means of entry into the Fixed Calls Markets

4.20 ComReg notes that in its consultation on the *Recommendation*⁴⁸, the EU Commission considers with respect to European markets,

“As regards the retail calls markets at a fixed location, the conclusion is different. Wholesale regulation, including Carrier Selection and Carrier Pre-Selection obligations, significantly reduce the barriers to enter these markets.”

⁴⁶ A sunk cost is a cost, which is not recoverable.

⁴⁷ For further details see ERG Common Position on the approach to appropriate remedies in ECNs Regulatory Framework.

⁴⁸

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/recommendation_final.pdf

- 4.21 ComReg further notes the availability of a range of indirect access products mandated for provision to OAOs under the remedies for retail access market in Ireland.
- 4.22 The availability of mandated indirect access products such as CS, CPS-only and SB-WLR may provide an opportunity for entry into the retail calls market without significant upfront or sunk costs. There are currently eleven CPS operators providing retail services, six of whom also provide single-billing retail voice calls and access bundled together using SB-WLR inputs⁴⁹.
- 4.23 It is argued that the availability of such services may provide an operator with an opportunity to move up the “ladder of investment” as it expands its customer base, investing more in its network over time as illustrated in Figure 4.1.
- 4.24 Figure 4.2 outlines the growth in the number of CPS and SB-WLR lines used by market competitors for the delivery of retail services to customers. At the end of June 2007, SB-WLR lines accounted for 303,000 access lines, while the number of paths associated with CPS-only lines accounting for a further 103,000 indirect access lines.

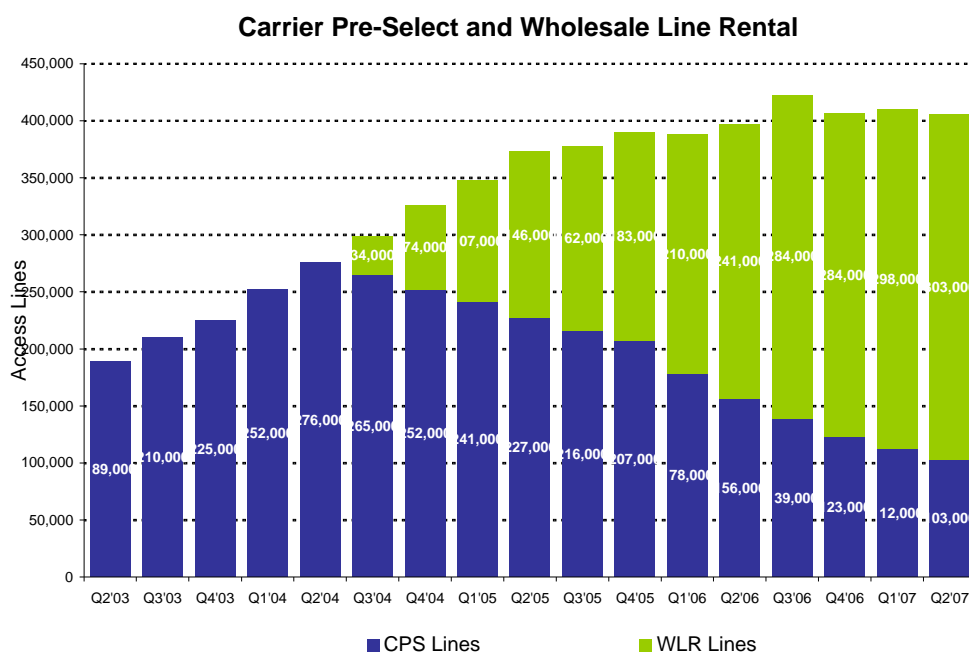


Figure 4.2: CPS and WLR lines Q2 2003-Q2 2007

- 4.25 Between Q2 2003 and Q2 2005, growth in total indirect access lines almost doubled. However, between Q2 2005 and Q2, 2007 there has been a slowing in the growth of indirect access lines; total growth in this two year period was 9%. It should be further noted that the total number of PSTN and ISDN narrowband access lines in the market between Q2 2005 and Q2, 2007 grew by less than 1%, indicating that the adoption of CPS and SB-WLR continued to grow, albeit at a slowing rate, despite negligible growth in the total number of access lines in the Irish market.
- 4.26 In addition to the availability of a range of wholesale access inputs, mandated under remedies for the retail access market⁵⁰, prices for wholesale interconnection are

⁴⁹ SB-WLR enables a market competitor to offer both calls and line rental on a single bill to retail customers

⁵⁰ ComReg Document 07/61

regulated on a cost basis, and are available to market entrants and competitors wishing to offer retail call services to the Irish market.

4.27 ComReg considers that the provision of regulated services in both retail access and wholesale interconnection markets potentially reduces the level of sunk costs required for market entry to the retail calls markets.

4.28 Further, the increased adoption of broadband both within the home and by business is likely to result in an increase in the use of VoB for calls in the future. VoB can be provided by operators using their own network build, or using LLU. Such an approach is likely to incur significant sunk costs in network and hardware costs for any new entrant. However, an alternative approach for market entrants is to offer VoB services over an existing broadband connection; under this scenario network investment costs are significantly reduced. A number of operators in Ireland currently offer VoB services in Ireland using existing broadband lines (e.g. Voice Ireland, Skytel, Blueface, Smart Telecom, Digiweb, Irish Broadband and Eircom⁵¹)

(b) Economies of scope and scale and density, (c) Control of infrastructure not easily duplicated, and (d) Technological advantages or superiority

4.29 According to the *Explanatory Memorandum* :

“...high structural barriers may be found to exist when the market is characterised by substantial economies of scale, scope and density and high sunk costs. Such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations”⁵²

4.30 The theoretical economics literature generally agrees that there are economies of scale, scope and density in the access network under monopoly – or close to monopoly - supply conditions⁵³. Discussing the economies of established national networks, it can be noted that for some network elements, in particular the local loop, the cost of duplicating an incumbent’s facility may be prohibitively high. Further, a new entrant must often cover a much higher long-run total service incremental cost, which has to be recovered from a smaller customer base. Another advantage arises from vertical integration, where the incumbent can achieve economies through its ownership of local, national and international networks, and from areas such as network planning, operations and maintenance.

4.31 In its analysis, ComReg suggested that the indirect access operator cannot achieve similar economies of scope as the incumbent as it is dependent on the incumbent and is effectively reselling the latter’s products. As such, ComReg considered that an OAO relying on indirect access cannot achieve similar scope efficiencies as an operator providing services directly over its own network through the production and development of a range of products.

4.32 However, while there are a large number of operators which offer calls only, the five largest competing calls providers all offer a similar range of services to Eircom at the

⁵¹ For a full list see <http://www.comreg.ie/erau/default.asp>

⁵² Commission Recommendation, 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 communication networks and services page 10.

⁵³ See for example, the World Bank’s “Telecommunications Regulation Handbook” ed by McCarthy Tetrault.

retail level. ComReg noted that unlike most operators, Eircom, the incumbent, was mandated to offer a wide range of wholesale products, which may reduce the extent to which economies of scope pose a barrier to entry to OAOs.

- 4.33 In relation to control and duplication of infrastructure, ComReg notes that it is not economically feasible for any other operator to replicate Eircom's access network. Indeed, the current level of call traffic currently carried over OAO direct build remains minimal and is unlikely to significantly increase over the period of the review. However, it could be argued that indirect access products significantly reduce the level of sunk network investment required by CPS operators. For the purposes of market entry, the presence of regulated wholesale indirect access products offers market entrants the most financially viable and attractive market entrance strategy, with low network build or sunk costs as discussed earlier in this document.
- 4.34 In the presence of effective wholesale inputs, ComReg outlined its view that it did not believe that any entity had a technological advantage over its rivals. The switched infrastructure used to provide call services is owned and operated by close to fifty operators (which includes resellers, CPSOs and direct access providers).

(e) Barriers to switching for consumers

- 4.35 In its consultation document⁵⁴, ComReg outlined evidence which suggested that switching barriers have fallen and may not be considered significant over the period of the review.
- 4.36 While this evidence suggested that there may not be significant barriers if a consumer proactively decides to switch, ComReg notes continued reluctance among some consumers to actually switch. As such, it is the incumbent operator, Eircom, who may have an advantage in this respect. ComReg highlighted that over 50% of non-residential users had *never* switched operator⁵⁵. Survey evidence suggested 84% of residential users had not switched in the preceding twelve months⁵⁶.
- 4.37 Survey evidence suggests that consumers, when asked about the factors which are important in choosing a fixed line provider, they are most likely to cite price, customer service and the reputation of the operator. In relation to the latter, while Eircom as the incumbent has an established brand other operators may have a global brand or have leveraged their brand from unrelated sectors e.g. BT Ireland, Verizon, Cable and Wireless, Irish Farmers Association (IFA) Telecom, UTV internet, Gaelic Telecom.
- 4.38 While price is suggested by residential consumers as a driver for choosing a fixed line provider, survey respondents cite different reasons when considering reasons why they might be reluctant to switch operator⁵⁷. In this instance, those reluctant to switch are most likely to cite "satisfaction with current supplier" (77%), and "too much hassle to switch" (13%). Only 6% of non-switchers consider that they do not believe they will make significant savings from switching supplier. If, as survey evidence suggests, a reluctance to switch operators is driven by a general satisfaction with current operator, this should, in every respect be possible for market entrants to replicate.
- 4.39 In its assessment of barriers to switching, ComReg questioned whether the cost difference between acquiring a new customer (for an OAO) as opposed to retaining

⁵⁴ ComReg Document 07/61

⁵⁵ Millward Brown IMS wave 2 2006.

⁵⁶ amárach, wave 4 2006 survey. ComReg Document 07/13

⁵⁷ ComReg Document 07/13; Amárach Residential Survey Research; Q4. 2006

existing customers (for the incumbent), created an asymmetry of costs such as to constitute a barrier to entry.

(f) Vertical integration and (g) Product/service diversification

- 4.40 An organisation which is dominant at the wholesale or upstream level of a market has the opportunity to leverage market power into downstream markets, thereby adversely affecting competition. In the case of the retail fixed calls markets, the relevant upstream market would be that associated with obtaining wholesale inputs, and in ensuring that wholesale inputs are available at competitive prices. This market is reviewed in the market reviews of the interconnection⁵⁸.
- 4.41 There are a number of operators that self supply wholesale call services in addition to those that provide access to third parties. Eircom is the largest vertically integrated operator, in that it is active at the wholesale and retail levels on a nationwide basis. The recent decision in the Call Origination and Transit, and Retail Fixed Narrowband Access Markets concludes that Eircom has SMP in the markets for call origination and transit, as well as in retail access. To overcome any potential competition problem at the retail level, ComReg proposed that wholesale inputs should be provided on a non-discriminatory and equivalent basis.
- 4.42 It could be argued that a potential lack of tariff flexibility for OAOs, who wish to offer a bundle of fixed telephony services comprising direct access and calls, might serve to deter some potential entrants or restrict the expansion of recent entrants. OAOs are to some extent constrained from diversifying their products as they are reselling the incumbents' services. On the other hand direct access providers can offer bundles of direct access with calls and other services such as broadband in such a way as to deliver a competitive advantage over indirect access providers in the relevant calls markets.
- 4.43 However ComReg notes that the sunk costs involved in establishing a direct access network, one which would enable competitors to offer a full diversified range of voice and data services, suggest it is very unlikely that a new entrant would choose this way of entering the calls markets. Entry is more likely to occur via indirect access offering bundles and different tariff options.

Consultation Question

Q.18 Do you consider that the retail fixed calls markets are not subject to high and non-transitory entry barriers (in the presence of regulatory measures in the related wholesale markets)? Please substantiate your response.

Views of Respondents

- 4.44 Of the four respondents responding to this question, three respondents broadly agree with ComReg's initial position that the retail calls market is not subject to high and non-transitory entry barriers. Two of these respondents consider the retail market not to be subject to high and non-transitory entry barriers given the availability of wholesale products such as carrier selection (CS), carrier pre-selection (CPS) and single billing through wholesale line rental (SB-WLR). They services are provisioned on a non-discriminatory basis as a result of obligations under the retail access

⁵⁸ Market Analysis - Interconnection Markets, Response to Consultation and Consultation on Draft Decisions – Document 07/51. Decision Notice - Market Analysis: Retail Fixed Narrowband Access Markets, ComReg Document Number (07/80).

markets⁵⁹, and have significantly lowered entry barriers to the calls market by lowering sunk costs for new entrants.

- 4.45 Two respondents make specific comment in relation to international markets, both noting that a number of alternative operators may enjoy competitive strengths in the provision of international calls as a result of affiliations with multiple international call carriers.
- 4.46 One respondent suggested that evidence for low entry barriers can be established given the number of CPS operators providing fixed retail calls in the market. They disagreed with ComReg's assertion that currently obligations with regard to overcoming barriers to entry in the fixed calls market may not be sufficiently effective. With regard to other forms of access for new entrants, one respondent disputed ComReg's contention that the availability of LLU (local loop unbundling) may not diminish entry into the fixed calls market as operators seeking access using LLU were unlikely to do so solely for the provision of fixed voice services. This respondent also sought clarification from ComReg on its contention that the unbundling of 1,100 exchanges was necessary to provide "competing fixed calls service equivalent" to the incumbent's services.
- 4.47 A fourth respondent disagrees with ComReg's contention that the retail calls market is not subject to high and non-transitory entry barriers. In particular the respondent questions whether the current regulatory measures in access markets provide sufficient margin to attract market entrants.
- 4.48 Three respondents made specific reference to barriers to switching as part of their response to this question. One respondent considered that survey and other evidence of switching suggested the existence of active market competition, and consequently that switching costs are not a material barrier in this market. The respondent further noted that it did not consider a perception of "too much effort to switch" in itself, to constitute a barrier to entry. Another respondent considered that while they were in general agreement with ComReg's view on a lack of high and non-transitory barriers, they noted their concern that a "transitory aspect" must be considered relating to actions taken by an incumbent operator to win-back migrant customers
- 4.49 In considering ComReg's approach to defining potential high and non-transitory entry barriers for the purposes of this analysis, one respondent considered that ComReg's analysis of barriers to entry fails to focus singularly on structural barriers to entry for the purposes of this review. This respondent considered an examination of additional barriers to entry as unwarranted and provided a misleading representation of the market.

Conclusion

- 4.50 ComReg notes that three out of the four respondents to this consultation question considered that the market for retail calls did not meet the criteria of high and non-transitory barriers to entry. Having further considered this issue taking into account respondents views, ComReg's view remain that expressed in Document 06/51, and therefore ComReg confirms its tentative view that current entry barriers shall not be considered as either sufficiently high or non-transitory to warrant *ex ante* regulation.
- 4.51 ComReg recognises that market entry to the calls markets for all competitors in the retail calls market is enabled using a range of indirect access products mandated for

⁵⁹ ComReg Document 07/61

provision under regulatory remedies for the retail access market. ComReg further notes the impact of the regulation of interconnection rates which are available to market entrants at a regulated wholesale rate, calculated on a cost-basis, which further enables market entry by competitors. Both regulatory solutions aim to lower barriers to entry by market competitors by lowering significant sunk costs.

- 4.52 ComReg considers that while continued active levels of switching within the fixed calls market remain relatively low, there is little evidence to suggest that current low switching rates are a result of barriers to switching. Indeed, survey evidence suggests that fixed line users most popularly cite satisfaction with their current fixed line provider as a reason for not switching, with the second most popular response cited being the “hassle factor” of changing operator⁶⁰. In the presence of wholesale inputs for competitors and low-cost switching between operators for consumers, ComReg considers that neither satisfaction with current operator, nor a reluctance to switch based on the perceived hassle associated with changing operators constitute undue barriers to switching in the calls market.
- 4.53 Increased adoption and use of broadband provides broadband users with alternative voice services using either managed or unmanaged VoB solutions. While the current working market definition applied by ComReg in its assessment of the three criteria considers VoB to be an element of the business market only, ComReg recognises that there is potential for VoB to deliver retail voice calls to residential fixed line users in the future. Such services, particularly those delivered over an existing broadband connection, are likely to enable delivery of retail voice call services by existing, or new market entrants without considerable sunk cost investment.
- 4.54 The European Commission’s own documentation suggests its preliminary consideration that in the presence of effective wholesale inputs, the retail calls markets are not subject to high and non-transitory barriers to entry. Combined with ComReg’s own analysis, and on the submissions of respondents to the consultation process, ComReg concludes that the fixed retail calls markets are not characterised by high and non-transitory entry barriers.

⁶⁰ ComReg Document 07/13

Second criterion:

Dynamic aspects – is there a tendency to effective competition

4.55 Given its conclusion that retail calls markets are not subject to high and non transitory barriers to entry, it is not necessary for ComReg to make a final determination in its analysis of the second criterion. However, in order to fully complete an assessment of all three criteria, it presents a summary of both its approach to analysis and consultation responses for the second and third criteria.

4.56 The assessing the second criterion, ComReg examined if the retail calls markets tended towards effective competition. This involved a consideration of the state of competition alongside the barriers to entry, and taking account of the fact that even when a market is characterised by high barriers to entry, other structural factors or market characteristics may mean that the market tends towards effective competition. It should be noted that in order to conclude that the market is tending towards effective competition does not necessarily demand that market conditions currently reflect effective competition.

4.57 ComReg assessed the second criterion under the following headings:

- a) Market share;
- b) Existing competition;
- c) Price developments; and
- d) Barriers to expansion.

4.58 A full analysis of each of these headings is discussed in detail in the consultation document⁶¹.

Consultation Question

Q.19. Do you consider that the fixed calls markets have characteristics such that they will tend over time towards effective competition? Please substantiate your response.

Views of Respondents

- 4.59 Of the four respondents who provided feedback on this question, three broadly agreed that over time the fixed calls market tended towards effective competition. One respondent however notes their belief that the definition of “effective competition” is subjective; while they note that Eircom’s market share has been declining, they query at what level this market share is likely to stabilise. Furthermore, this respondent also considers that Eircom remains in a strong position to exercise considerable influence on market competitors and this may lead to uncertainty with regard to perceived or real effective competition.
- 4.60 One respondent considers that the presence and number of competing operators, large price reductions over a three year period and low barriers to expansion arising from low switching costs indicate that this market is tending over time towards effective

⁶¹ ComReg Document 06/51

competition. Another respondent noted that while Eircom’s market shares remain at a level which may lead to a presumption of dominance under the competition rules, this does not indicate that the markets are not tending towards effective competition. This respondent noted that in the presence of dominance in a market where there were no high and non-transitory barriers to entry and where market conditions tended towards effective competition, any problems of abuse could be addressed under competition rules.

- 4.61 One respondent contended that there was no evidence to suggest that the fixed calls market will tend towards effective or sustainable competition overtime. In particular, they cited the low margins offered on wholesale indirect access services as being a key deterrent to the development of sustained competition in the fixed calls market.

Updated Market Position

(a) Market Share

- 4.62 ComReg has reviewed the market shares in the domestic and international fixed calls for residential and non-residential customers based on updated market share information for the end of June 2007. It is important to consider the change in market shares over time, as this will indicate trends in the market and will contribute to an assessment of whether or not the market may tend towards competition in the lifetime of this review. Accordingly ComReg analysed market share data from the time of the initial review to the present, and the view of market developments is therefore based on a period of over two and a half years.

Market for residential domestic calls

- 4.63 Figures 4.2. below shows market share trends updated from the initial analysis and presents data for the period Quarter 1, 2004 until Quarter 2, 2007.

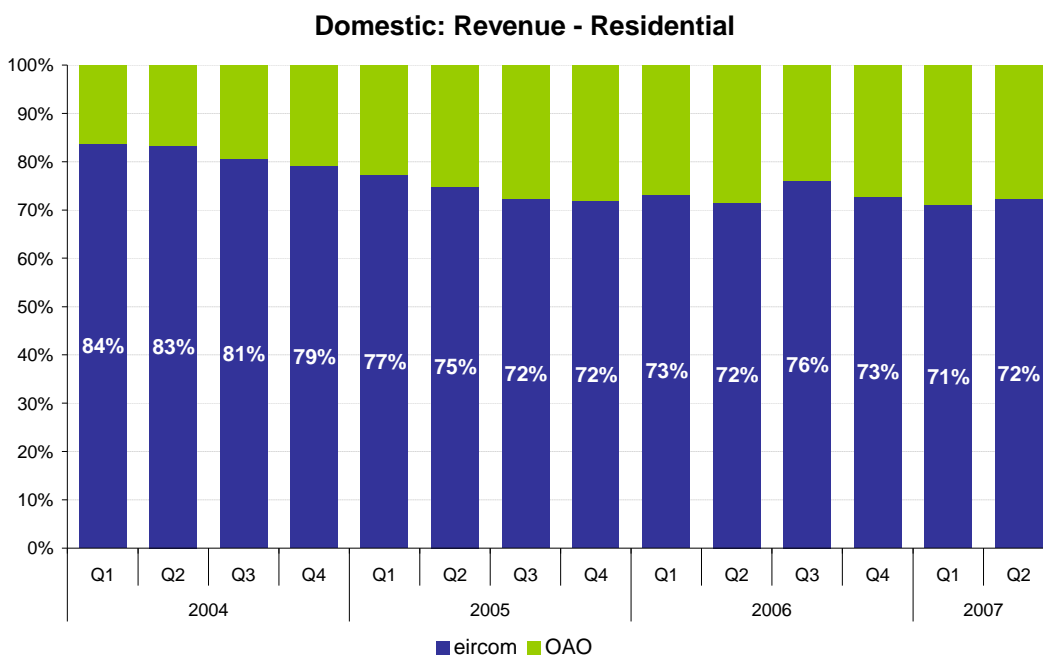


Figure 4.2: Market Share: Domestic: Residential: Revenues

- 4.64 Figure 4.2 illustrates the long term trend of a slow drop in Eircom’s market share in the residential domestic calls market since the beginning of 2004. In total Eircom’s

market share fell by 12 percentage points in the period between Quarter 1, 2004 and Quarter 2, 2007. However, it should be noted that since in the two year period between Q2, 2005 and Q2, 2007 falls in market share within the residential call market have generally stagnated, with Eircom market share appearing consistently between 72-76%. In Q2 2007, no OAO had reached over 10% of total market share.

Market for non-residential domestic calls

4.65 In March 2004, Eircom’s share of the non-residential domestic market was around 83% by revenue. Figure 4.3 shows the market share data from Q1 2004 to Q2 2007, covering a period of two and a half years of quarterly analysis.

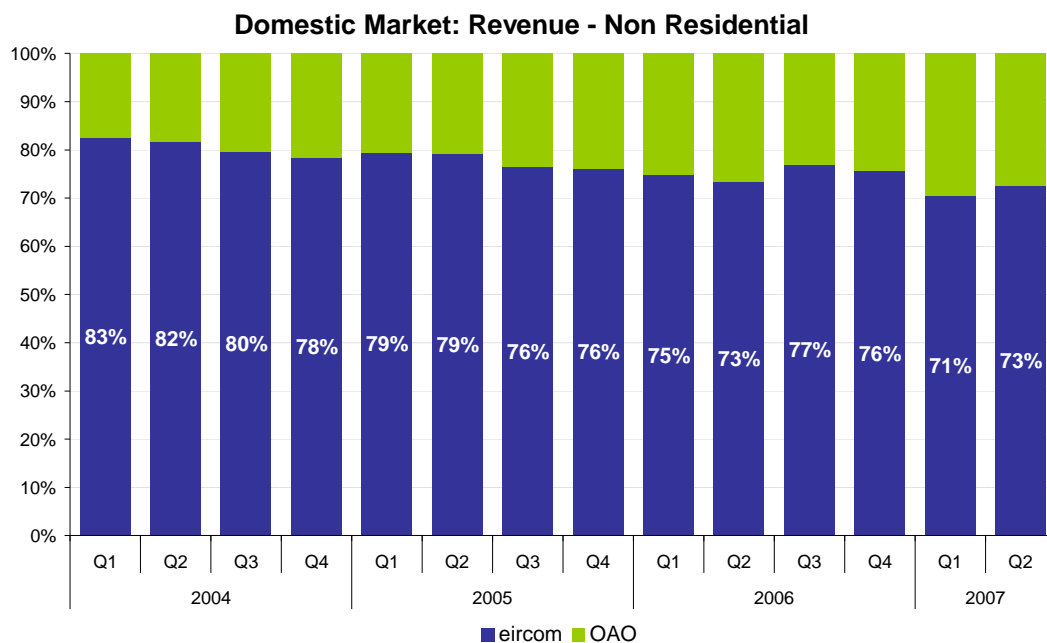


Figure 4.3: Market Share: Domestic: Non-residential: Revenues

4.66 Since Quarter 1, 2004, Eircom’s market share in the non-residential domestic calls market has fallen from 83% to 73%. As in the residential market, Figure 4.3 appears to indicate a slow-moving and continued trend of falling Eircom market share.

Market for international residential calls

4.67 In the residential market for international calls, Eircom’s market share for international calls was 69% at the beginning of 2004, and has fluctuated between 69-75% in the intervening period; Eircom retained 71% of residential international calling revenues in Q2 2007. Eircom’s market share in this segment has not fallen below 70% in any quarter since the first quarter of 2004.

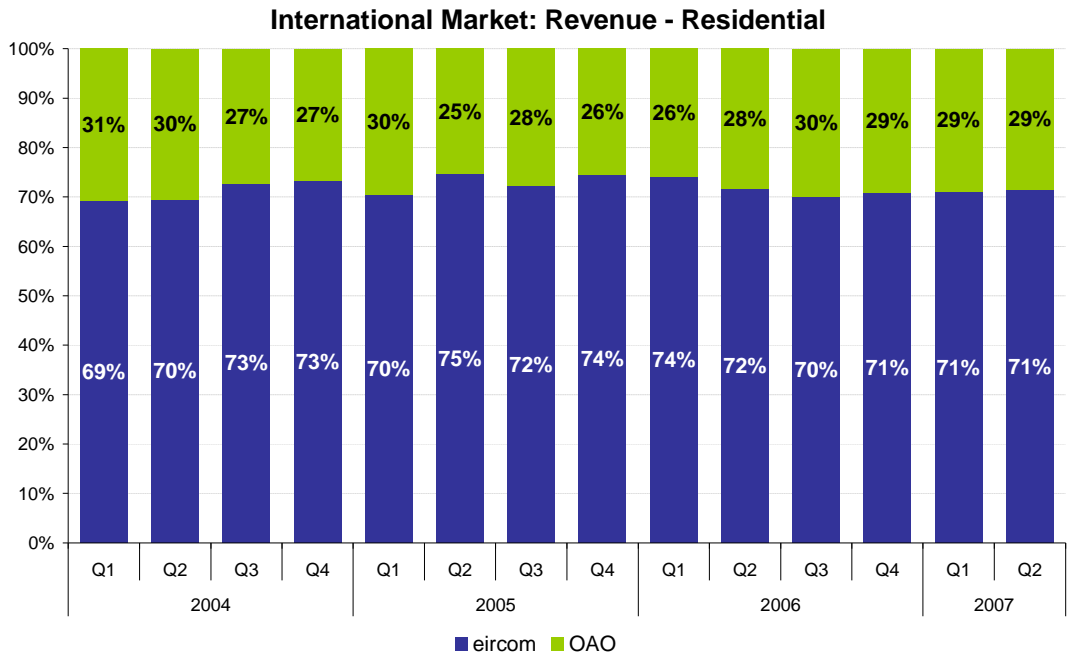


Figure 4.4: Market Share: International: Residential: Revenues

Market for international non-residential calls

4.68 In March 2004, Eircom’s share of the international non-residential market was 54%. Figure 4.5 illustrates a long term trend of continued falling market share for the incumbent within the non-residential international calls markets. At the end of June 2007, Eircom’s market share was 42% of international calling revenues; there were two operators with market shares each in excess of 10% of the market.

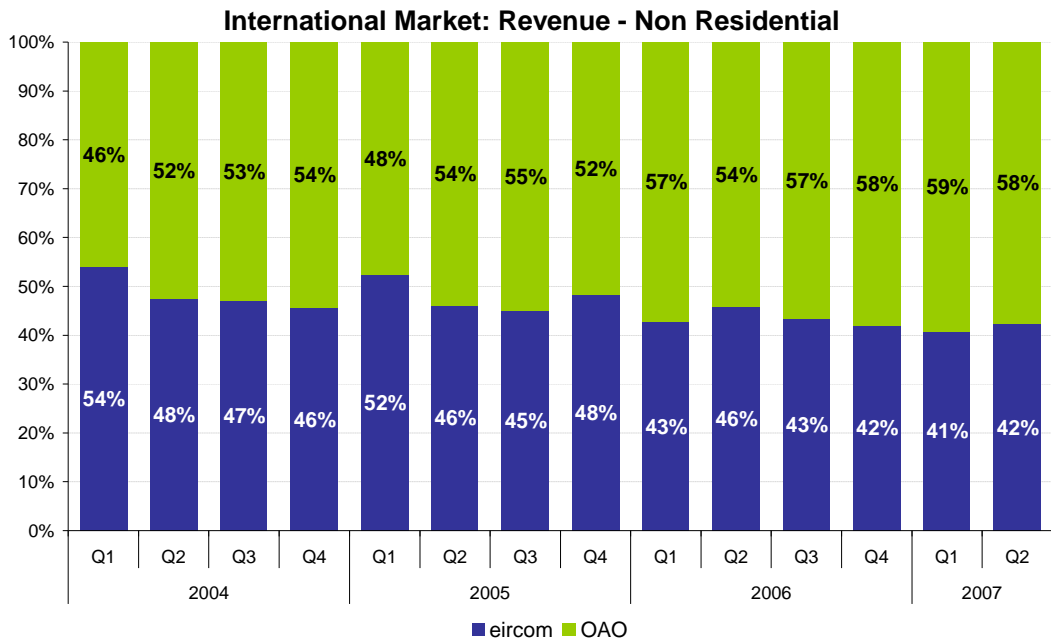


Figure 4.5: Market Share: International: Non-residential: Revenues

(b) Existing Competition

4.69 There are a range of indirect access wholesale products which enable market entrants to offer services to consumers. In particular, a key change in the structure of the

markets has been the introduction of SB-WLR. This allows an alternative operator to offer customers a calls and access bundle with a single bill. Many – but not all – CPS operators now offer SB-WLR.

(c) Price developments

- 4.70 ComReg considered price developments for fixed calls services since 2003. Pricing is presented in terms of both the national average for Ireland and European average. This does not include the fixed access charge.
- 4.71 ComReg noted that all such data should be considered in light of the impact of the existing regulatory pricing constraints. Eircom’s prices are currently regulated and any proposed price change must be notified to ComReg.
- 4.72 Also, it should be pointed out that in terms of domestic markets it is somewhat difficult to compare prices nationally as charges in each country are balanced - i.e. higher usage charges will usually be off-set by lower rental charges and vice versa.

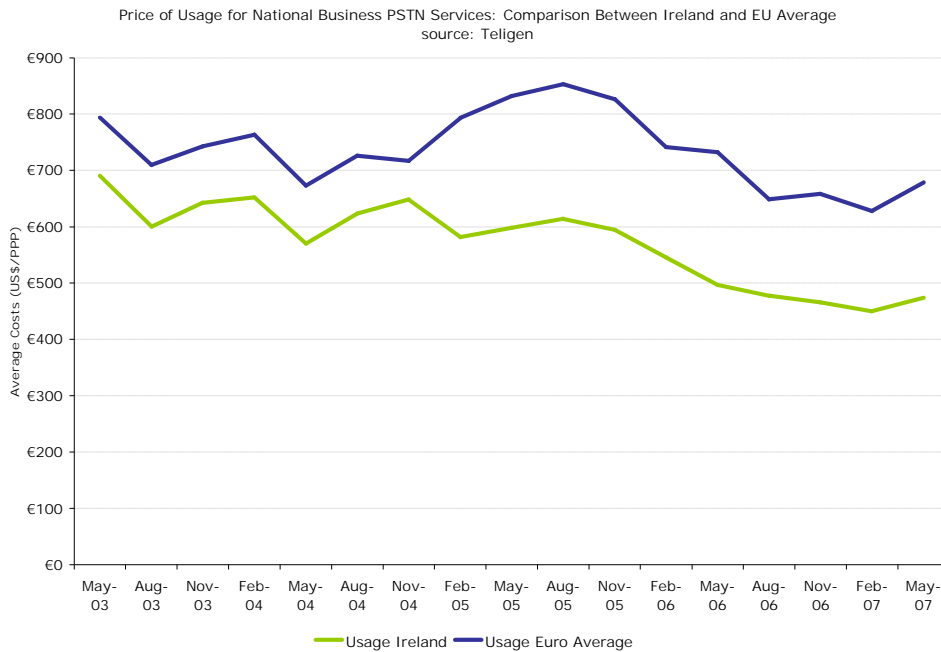


Figure 4.6: Price Developments: Domestic Residential

Retail Fixed Calls Market Review- Response to Consultation

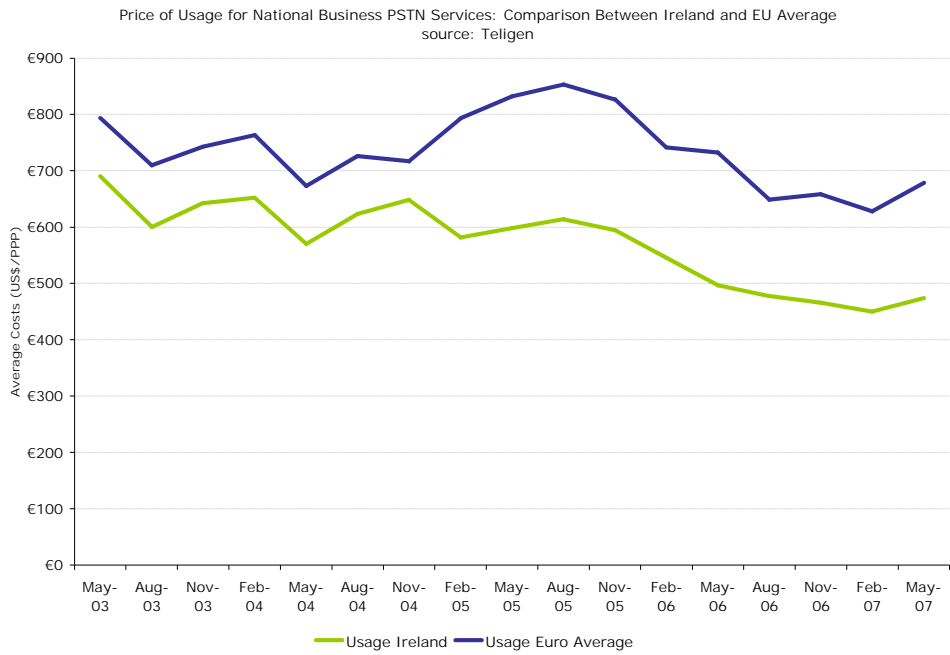


Figure 4.7: Price Developments: Domestic Non-Residential

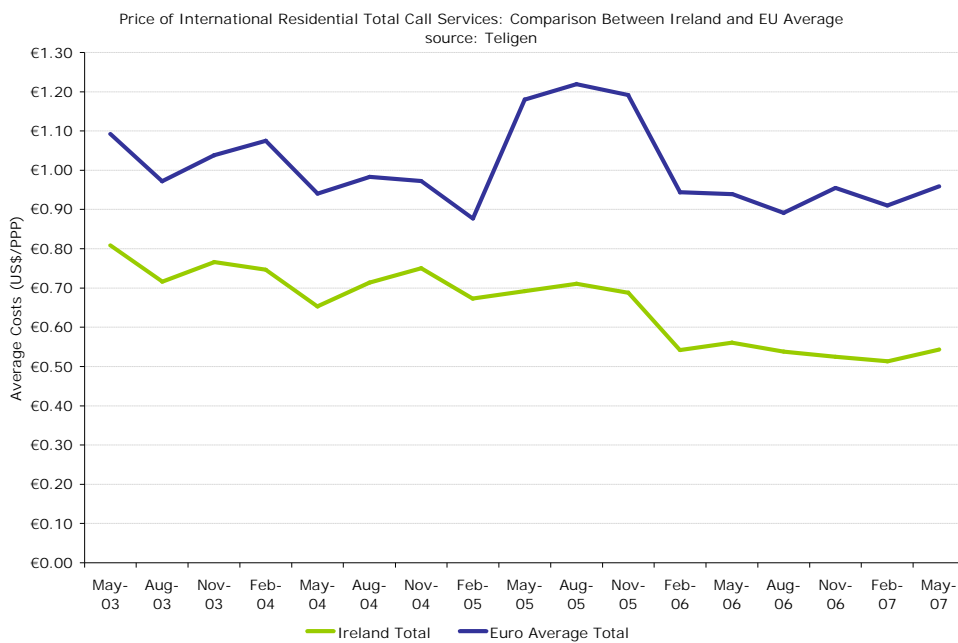


Figure 4.8: Price Developments: International Residential

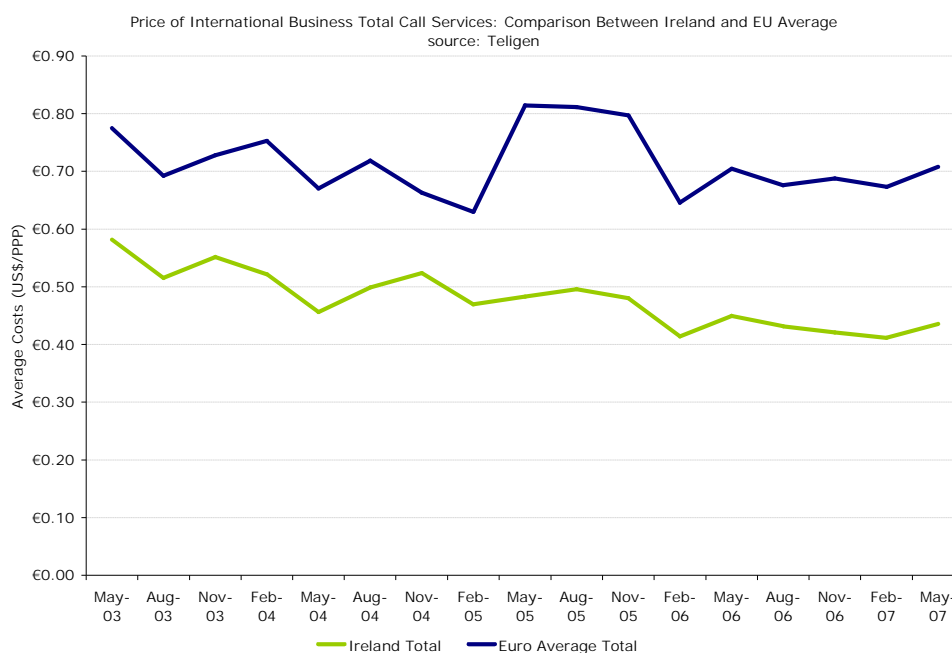


Figure 4.9: Price Developments: International Non-residential

4.73 Pricing developments indicate some adjustments by the incumbent to respond to competitors in the various calls markets over the period 2003-2006. As such, it would appear that a certain amount of pressure has been exerted on fixed call prices. Furthermore, prices in all markets are lower than the equivalent European average, although this may be accounted for by a divergence in costs across the 25 Member States.

(d) Barriers to expansion

4.74 As outlined above, evidence would suggest that barriers to switching have lowered and may not be significant over the period of the review. However, it could be argued that OAOs, are to some extent constrained from expanding significantly as a result of continued dependency on Eircom's network, e.g. by not being able to offer differentiated bundles. However, it may also be argued that fit for purpose wholesale inputs, delivered on the basis of equivalence by the incumbent, may be sufficiently effective to enable operators to enter the markets and compete in the longer term.

Conclusion

4.75 ComReg notes that a determination on whether the markets for retail calls tend towards effective competition is not necessary in this instance, given that it has already concluded that there are no high and non-transitory barriers to entry marketing the retail calls markets. Therefore, the relevant markets do not meet the first criterion.

4.76 ComReg considers that market share data for the non-residential international calls market suggests that this market is tending towards effective competition.

4.77 ComReg believes that, based on its analysis of the other three markets (domestic residential, domestic non-residential and international residential calls) that it is unclear whether these markets tend towards effective competition, but that no final determination is necessary at this point.

4.78 In these remaining three markets, Eircom retains in excess of 70% revenue market share. Further, there is no evidence than any single market competitor has developed

its share in these calls markets to in excess of 10% market share. In spite of a long-run trend of falling market share in two of the markets over the period of analysis, Eircom's market share position in all three of these calls markets appears consistent with a finding of SMP.

- 4.79 ComReg is of the view that currently prices for fixed calls in Ireland are subject to competitive pressures. Fixed line call charges which constitute an element of the Consumer Price Index (CPI) basket for private telecoms services in Ireland, have declined by 20% since market liberalisation in 1997, in comparison to an overall price inflation which has increased in the order of 45% over the same period⁶².
- 4.80 In conclusion, ComReg considers that a determination that the fixed calls markets are tending towards effective competition remains unclear in all but one of the retail calls markets (international business calls). ComReg recognises that Eircom's market position in relation to market share based on retail revenues within the three remaining markets remains consistent with a finding of SMP. ComReg proposes to continue to monitor market share, competitive activity and other indicators within this market to identify any possible abuse of market power by the incumbent in the three remaining calls markets in the future.
- 4.81 ComReg, however, notes that for the purposes of this review, a final determination on this criterion is unnecessary in light of the previous finding that there exist no high and non-transitory barriers to entry in retail calls markets.

Third Criterion:

Relative efficiency of competition law and complementary ex ante regulation

- 4.82 In its assessment of the three criteria set out above, ComReg also performed an analysis to determine whether *ex ante* regulation is appropriate in the case of the retail calls markets. This determination depended on an assessment of the sufficiency of competition law by itself (absent *ex ante* regulation) in reducing or removing potential competition problems/market failures and/or in restoring effective competition.
- 4.83 The European Commission has noted that potential restrictions of competition may still arise in the fixed calls markets, for example through price squeeze strategies of incumbent operators that remain dominant on related upstream markets. Where such strategies constitute an abuse of dominance, the European Commission suggests that competition law potentially provides the appropriate instruments to deal with such market failures.
- 4.84 Predatory prices may be foreseen as a potential problem in the fixed calls markets. The firm with upstream dominance may, for example, be in a position to sustain a strategy of predatory pricing in related markets by way of cross-subsidisation. However, it can be argued that even if a strategy of predation were pursued in the fixed calls markets, it is not clear, in the presence of wholesale regulation, that Eircom would be in a position to foreclose competition and increase its prices significantly in the future given the potential for future new entry based on CPS or SB-WLR. If, however, it were to establish a reputation for responding aggressively to new entry in

⁶² Price inflation stated refers to the CPI index of prices (Base, 100= Dec 1996) of all items in the market, and an element of Basket 8- Private Telephone services. Source: CSO. Price index indicative of all telecommunications services including fixed line, narrowband internet and mobile services.

the fixed calls markets by way of predatory pricing this might have the effect of creating strategic barriers to entry into that market and act as a disincentive to new entry. In any event, the competition case law and practice on predatory pricing is well-established⁶³. Furthermore, there is no general rule that dominant entities should not be able to compete on price and as there is an extremely fine line between low prices that are of benefit to consumers and low prices that are expressly aimed at eliminating competition for the purposes of raising prices in the future, the question arises as to whether *ex ante* regulation is appropriate or necessary to deal with this potential problem. As such, ComReg suggests that the application of competition law may be well-placed to adequately address any market failures concerned.

- 4.85 Absent wholesale regulation, a dominant firm could also have the incentive to raise wholesale prices to competitors, as there would be no competitive pressure to prevent this. A firm which was dominant in an upstream market could use its market power to leverage into a downstream market. A firm which was dominant in one market could attempt to leverage power horizontally into a related market. Currently remedies in place at the wholesale level help prevent Eircom raising the price of its wholesale inputs to downstream competitors. Furthermore, it should be noted that it is an established principle in competition case law and practice that it is not necessary for the dominance, the abuse and the effects of the abuse all to be in the same market for the prohibition under Section 5 of the Competition Act, 2002 or Article 82 of the EU Treaty to apply. Thus competition law is equipped to deal with potential restrictions of competition arising in one market as a result of a dominant position held in one or more associated markets.⁶⁴
- 4.86 An example of competition problems associated with a firm with upstream dominance leveraging its position vertically by price means is a margin squeeze. As a margin squeeze arises from the pricing of wholesale inputs and/or downstream outputs the question arises as to whether wholesale regulation is sufficient to deal with this potential problem. A margin squeeze may occur in the following circumstances:
- There is a vertically integrated firm with SMP in the upstream market, so that competitors have some reliance on the firm's upstream input;
 - The margin between the retail price and the price charged for the wholesale element is insufficient to cover the vertically integrated firm's downstream costs (by implication therefore an efficient downstream firm would not be profitable);
 - The aggregation of upstream and downstream business may mean that the vertically integrated firm does not incur a loss overall.
- 4.87 As for the predatory pricing section above it might be argued that it is not clear that in the presence of well-functioning wholesale regulation, a strategy of margin squeeze would be successful in foreclosing competition and increasing prices in the fixed calls markets given the potential for future new entry based on CPS or SB-WLR. It is recognised, however, that were the incumbent to establish a reputation for responding to new entry aggressively by way of a margin squeeze this could create a strategic barrier to entry in the fixed calls markets. Notwithstanding this, ComReg expresses the view that for the same reasons outlined in the predatory pricing section above

⁶³ AKZO Chemie BV v Commission; Compagnie Maritime Belge Transports v Commission; and Deutsche Post AG.

⁶⁴ Commercial Solvents v Commission or Tetra Pak II.

competition law may be well-placed to deal with any potential competition problems in that regard.

- 4.88 On the other hand it can be argued that where there is a risk of persistent market failures and frequent and/or timely intervention is necessary and/or where creating legal certainty is of paramount concern, then *ex ante* regulation may be justified.

Consultation Question

Q.20 Do you believe that Competition law is sufficient of itself (absent ex ante regulation) to address any observed market failure in the fixed calls markets? Please substantiate your response.

Views of Respondents

- 4.89 Four respondents provided responses to this question posed in the consultation document. One respondent considered that competition law was sufficient to ensure effective competition, and that it could adequately address issues of price squeeze and predatory pricing.
- 4.90 One respondent noted that they did not consider competition law to be sufficient in itself to address market failure in the fixed calls market. This respondent suggested that any such move towards the use of competition law should only be considered if ComReg is at some point in the future, given and proves willing to use co-competition powers. Another respondent, in stating their general agreement with the use of competition law within this market however noted that the use of competition law in addressing market failure could be a lengthy and ineffective process where an incumbent operator was attempting to frustrate the market.
- 4.91 A fourth respondent to this question considered that competition law may be sufficient in addressing market failure, however it considered that since it believed that since the other criteria required to justify an *ex ante* approach to regulation were not met, the examination of this criterion was not strictly necessary.

Conclusion

- 4.92 ComReg notes that the EU Commission has recently successfully used competition powers in a case against Telefonica for abuse of its dominant market position in relation to a margin squeeze in the Spanish broadband market. Similar cases, on the related issue of predatory pricing, have also been successfully taken against Deutsche Telecom and Wanadoo in the past, and indicate an ability at Commission level to use competition powers where appropriate to address market failure.
- 4.93 ComReg notes that three of the four respondents to this consultation question stated broad agreement that the use of competition powers may be sufficient in addressing any potential market failure.
- 4.94 ComReg further notes that since May 2007, ComReg has been given co-competition powers enabling it to take action in cases of abuse of dominance and market failure such as predatory pricing or margin squeeze cases.
- 4.95 ComReg concludes that it is likely that competition law may be sufficient, in the absence of *ex ante* regulation, to address potential market failure. ComReg considers therefore that it may be argued that the retail calls market is not likely to meet the third criterion. However, ComReg considers that in light of its determination that the retail

calls markets did not meet the first criterion, a final conclusion on the third criterion is unnecessary.

Overall preliminary conclusion

- 4.96 In its review of the three criteria, ComReg presented its preliminary assessment as to whether the retail fixed calls markets are susceptible to *ex ante* regulation.
- 4.97 ComReg considered that the four retail markets may not be subject to high and non-transitory barriers. This decision was based on the availability of regulated wholesale inputs for the retail access markets, and regulated cost-oriented rates of interconnection which facilitated market entry to competitors with relatively low levels of sunk costs. Its analysis noted that there are now close to fifty market operators operating in the retail calls market at present.
- 4.98 In relation to the second criterion, whether the retail call markets tend towards effective competition, ComReg examined Eircom's market share in the respective markets; retail call prices, and the impact of VoB among non residential users⁶⁵. At this point, evidence indicated that the international non-residential calls market is tending towards effective competition. The competitive conditions were considered less clear for the remaining three markets; all three exhibit market shares that, by reference to established case-law, would still be consistent with a finding of SMP. While Eircom's market share has fallen, and may well continue to fall, it may not yet have done so at a sufficient rate as to clearly indicate a tendency towards effective competition.
- 4.99 ComReg identified that some potential restrictions of competition may still exist, for example, through excessive pricing, predatory pricing and price squeeze strategies of Eircom (which remains dominant in the interconnection markets) but where such strategies constitute an abuse of dominance there may be scope to apply competition powers to meet such abuses.
- 4.100 In the event that the retail fixed calls markets were found *not* to be subject to *ex ante* regulation on the basis that wholesale obligations are sufficient, ComReg invited input from interested parties on whether existing wholesale obligations were sufficient in themselves or whether there was a need to strengthen or indeed reduce any such intervention.

Consultation Questions

Q.21 Do you believe that the retail fixed calls markets meet all the three criteria? Is it your view that one/some of the criteria are not met? Please substantiate your response.

Q.22 Do you believe that there are sufficient differences between the individual retail fixed calls markets to justify adopting different conclusions in respect to the assessment of the three criteria? Please substantiate in detail what those differences are; and how they justify different approaches. Please substantiate your response.

Q.23 Do you believe that existing wholesale regulation is sufficient to preclude the need for specific ex ante regulation, if so, respondents are asked to substantiate their

⁶⁵ Voice over Broadband is a managed type of Voice over Internet service (VoIP) and is one of a sub-group of VoIP services.

responses. If respondents believe that wholesale regulation should be reduced, again they are asked to provide detailed justification and reasoning.

Views of Respondents

- 4.101 All but one respondent considered that the three criteria were not met for *ex ante* regulation. The latter based its consideration on its view that wholesale services available to market entrants were not offered on the basis of an equivalent customer experience, and that current wholesale margins were among the lowest in Europe and did not, in its opinion, enable sustainable competition to develop.
- 4.102 Three respondents responded directly to Q.22. One noted that it believed competitive conditions to be stronger in the international retail calls market than in national markets, however it noted its consideration that the market was subject to low barriers to entry; it further suggested that it considered market characteristics were such that all call markets tended towards effective competition. Another respondent in concurring with these conclusions however, maintained that should ComReg perform a prospective market analysis it would witness effective competition in all four call markets in the period of the two-year review. A third respondent disagreed with this position, stating that it believed that the development of competition in Ireland was at too early a stage to justify differences between individual retail call markets.
- 4.103 In their consideration of the sufficiency of current *ex ante* regulation one respondent considers that current levels of wholesale regulation are adequate to preclude the need for regulatory remedies in the relevant retail markets. Another respondent concurs with this stance, however further states their belief that there is no need for additional wholesale regulation. Their response questions whether effective competition is best enabled by maintaining all of the existing wholesale remedies, and considers that these remedies may have a negative impact on the structure of the markets, particularly with regard to investment.
- 4.104 Another respondent proposes that existing wholesale regulation falls short of that required to preclude the need for *ex ante* regulation in the fixed calls market

Conclusions

- 4.105 In light of the European Commission's consultation on *The Recommendation on Relevant Markets (The Recommendation)*, and its preliminary view that retail calls markets were no longer susceptible to *ex ante* regulation, ComReg conducted an analysis and consultation to assess whether the markets for fixed retail calls meet the three criteria, and thus decide whether *ex ante* regulation is warranted.
- 4.106 ComReg notes that all three criteria must be met in order to justify regulation.
- 4.107 In light of its analysis and the responses to consultation, ComReg considers that the retail markets for calls under the working definition described in this document do not meet the first assessment criterion, that of high and non-transitory barriers to entry. ComReg has based its conclusion on the basis of,
- (a) The EU Commission's consultation on the *The Recommendation*⁶⁶ considers that wholesale regulation, including the carrier pre-select

⁶⁶

http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/recommendation_final.pdf

obligations has “significantly reduce[d] barriers to entry” in the retail calls markets

- (b) There were no legal or regulatory barriers to entry identified by ComReg which would constitute a high or non-transitory barrier to entry to the retail calls markets.
- (c) The availability of wholesale indirect access inputs, mandated for provision to market competitors in the regulation of retail access markets which facilitate market entry to retail calls markets with relatively low associated sunk costs
- (d) The availability of wholesale interconnection inputs, mandated for provision under the Wholesale Call Origination and Termination Market Review⁶⁷, provided on a cost-basis to market competitors which further enable market entry.
- (e) The future growth of broadband was likely to create additional opportunities for market entry by VoB operators either using LLU or their own network, or more likely for market entrants, the provision of VoB call services over an existing broadband connection.

4.108 ComReg therefore concludes that, as the retail calls markets analysed do not meet the first criterion, the retail calls markets, as defined in the working definition used for the purposes of this assess, does not pass the three criteria test.

5 Proposed Removal of Retail Regulations

- 5.1 As part of ComReg’s review of the retail access and calls⁶⁸ markets (markets 1-6 of the *Relevant Markets Recommendation*),⁶⁹ ComReg previously considered the markets for retail calls. On 01 September 2004 ComReg published a national consultation on the markets for Retail Fixed Calls (ComReg Doc 04/95), and on the 22 March 2005 ComReg notified to the European Commission and published the response to consultation (ComReg Doc 05/26). The notified measures were accepted by the Commission.⁷⁰
- 5.2 Following this ComReg issued a further consultation - Fixed Retail Calls Market Review – Call for Input on an Assessment of the Three Criteria. As noted above, ComReg has on foot of the last consultation identified that the retail calls markets are not subject to high and non-transitory barriers to entry, and as a result does not meet the first criterion. As markets must meet all three criteria to justify *ex ante* regulation, ComReg considers that this finding would indicate that the current remedies imposed on this market are subject to withdrawal, following an appropriate notice period.
- 5.3 Current remedies applying to the retail calls markets include,
- (a). Cost Orientation
 - (b). Undue Preference
 - (c). Transparency
 - (d). Not to unreasonably bundle⁷¹
 - (e). CAS and AS
- 5.4 Where a market is found not to satisfy the “three criteria” which make that market susceptible to regulation) any existing remedies should be removed. Article 16(3) of the Framework Directive⁷² states
- “In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.” (*emphasis added*).
- 5.5 ComReg is mindful of the need for clarity in the timeliness and processes for any orderly removal of regulatory remedies for the retail calls market. In order that such removal maintains commercial confidence in the retail calls markets and allows operators to make suitable alterations to contractual arrangements, it is ComReg view that the removal of retail obligations shall be subject to an appropriate period of notice. Such a period of notice should, in ComReg’s view, take into consideration an

⁶⁸ ComReg Document No. 04/95.

⁶⁹ Retail Access Market Review– National Consultation (04/94) and Notification (05/25) & Retail Calls Market Review - National Consultation (04/95) and Notification (05/26).

⁷⁰ Comments pursuant to Article 7(3) of Directive 2001/21/EC. Brussels, 25-04-2005.

⁷¹ It should be noted that the obligation not to unreasonably bundle still applies to obligations relevant to the retail access market.

⁷² The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003

appropriate period for all market operators to make necessary adjustments in order to avoid any negative disturbance or impact on the calls market or associated markets. ComReg is keen to consult will all interest parties and in particular market participants on an appropriate notice period and timeframe for the removal of obligations. ComReg also seeks the opinion of parties on the likely impact of the removal of these regulations.

- 5.6 ComReg seeks the view of respondents in respect to its proposal for the removal of obligations from the retail calls markets. In particular, ComReg is interested to receive input on an appropriate timeframe for the removal of regulatory obligations and input relating concerns or additional factors to be considered as a result of the removal of obligations from this market.
- 5.7 The draft text of the proposed decision instrument is presented in Appendix C. Views on the proposals set out are sought by 5:30pm on 22nd November, 2007.

Q. 1. Do respondents agree that the proposed decision instrument set out in Annex C adequately reflects ComReg's proposed findings on the Fixed Retail Calls Market review?

Q. 2. Do respondents believe that the draft text of the proposed decision instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the specifics proposed? Please elaborate on your response.

Q. 3. Do you agree with ComReg's approach to the removal of regulatory obligations from all retail calls markets?

Q. 4. What is your opinion on the length of a suitable timeframe for the removal of obligations from the retail calls markets?

Q. 5. What factors do you consider to be relevant in determining a suitable period for the withdrawal of regulations and what other factors do you believe ComReg should consider in the removal of regulatory obligations from the retail calls markets?

Annex A: Consultation Questions

Q. 1. Do respondents agree that the proposed decision instrument set out in Annex C adequately reflects ComReg's proposed findings on the Fixed Retail Calls Market review?

Q. 2. Do respondents believe that the draft text of the proposed decision instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the specifics proposed? Please elaborate on your response.

Q. 3. Do you agree with ComReg's approach for a suitable period of notice to be applied in the removal of regulatory obligations from all retail calls markets?

Q. 4. What is your opinion on the length of a suitable timeframe for the removal of obligations from the retail calls markets?

Q. 5. What factors do you consider to be relevant in determining a suitable period for the withdrawal of regulations and what other factors do you believe ComReg should consider in the removal of regulatory obligations from the retail calls markets?

Annex B: Glossary of Terms

Access Line	A circuit that connects a subscriber to a switching centre.
Analogue	The direct representation of a waveform, as opposed to digital which is a coded representation. An analogue signal is one that varies continuously (e.g. Sound waves). Analog signals vary along two parameters, amplitude (strength) and frequency (tone). The unit of measurement is the Hertz, or cycle per second.
Bandwidth	The physical characteristic of a telecommunications system that indicates the speed at which information can be transferred. In analogue systems, it is measured in cycles per second (Hertz) and in digital systems in binary bits per second. (Bit/s).
Bits per second	Basic unit of measurement for serial data transmission capacity; abbreviated as K bps, or kilobit/s for thousands of bits per second; M bps or megabit/s for millions of bits per second; G bps, or gigabit/s for billions of bits per second; T bps or terabit/s or trillions of bits per second.
Broadband	A service or connection allowing a considerable amount of information to be conveyed, such as television pictures. Generally defined as a bandwidth > 2Mbit/s Broadband Integrated Services Digital Network (B-ISDN). The capability to integrate any type of communications signals (voice, data, image or multimedia) and carry them over a single broadband channel of 150-mbps and above, 4k (B-ISDN) regardless of their content.
Cable Modem	A cable modem is a device that enables a PC to be linked to a local cable TV line for internet/data services.
Carrier Pre-selection (CPS)	The facility offered to customers which allows them to opt for certain defined classes of call to be carried by an operator selected in advance (and having a contract with the customer), without having to dial a routing prefix or follow any other different procedure to invoke such routing.
Dial-up	Connections made to a data network using the switched network to provide a voice band or data bearer.
Digital	The coded representation of a waveform by, for example, binary digits in the form of pulses of light, as opposed to analogue which is the direct representation of a waveform.
Digital Subscriber Line (DSL)	A family of technologies generically referred to as DSL or xDSL, which are capable of transforming a normal telephone line into a high-speed digital line. These include ADSL (Asymmetric DSL), SDSL (Symmetric DSL), HDSL (High data rate DSL) and VDSL (Very high data rate DSL). DSL enabled lines are capable of supporting services such as fast Internet access and video or TV on-demand.
Direct Access	The situation where a customer is directly connected to a telecommunications operator by a wire, fibre-optic or radio link to connect that customer to the public telecommunication network. This includes access via LLU.
Directory Enquiry Service (DQ)	Directory information service which is operator assisted and involves the operator looking up entries on a database.
Fibre Optic Cable	A transmission medium that uses glass or plastic fibres rather than copper wire to transport data or voice signals. The signal is imposed on the fibres via pulses (modulation) of light from a laser or a light-emitting diode (LED). Because of its high bandwidth and lack of susceptibility of interference, fibre-optic cable is used in long-haul or

Retail Fixed Calls Market Review- Response to Consultation

	noisy applications.
Fixed telephone Services	Means the provision to end-users at fixed locations of a service for the originating and receiving of national and international calls, including voice telephony services and may include, in addition, access to emergency 112 services, the provision of operator assistance, directory services, provision of public pay telephones, provision of service under special terms or provision of special facilities for customers with disabilities or with special social needs but does not include value added services provided over the public telephone system.
Flat Rate Internet Access (FRIACO)	The provision of a Flat Rate Internet Access Call Origination via a wholesale un-metered Internet access product.
Fixed Wireless Access (FWA)	A system that connects subscribers to the public switched telephone network (PSTN) using radio signals as a substitute for copper wires for all or apart of the connection between the subscriber and the switch.
Indirect Access	Where a customer's call is routed and billed through operator A's network even though the call originated from the network of operator B. It is the generic term for both easy access and equal access.
Integrated Services Digital Network (ISDN)	A network based on the existing digital PSTN which provides digital links to customers and end to end digital connectivity between them. ISDN2 provides a maximum bandwidth of 128kbit/s.
Interconnection services	Services provided by one telecommunications organisation to another for the purpose of the conveyance of messages and information between the two systems and including any ancillary services necessary for the provision and maintenance of such services.
Internet protocol (IP)	Packet data protocol used for routing and carriage of messages across the internet.
Internet telephony	A specific type of VoIP service that uses the public Internet to carry the IP traffic (also referred to as Voice over the Internet).
ISP	Internet Service Provider
Leased line	A leased line is a telephone line that has been leased for private use. In some contexts, it's called a dedicated line. A leased line is usually contrasted with a switched line or dial-up line.
Local Loop	The access network connection between a customer's premises and the local exchange. This usually takes the form of a pair of copper wires.
Local Loop unbundling (LLU)	LLU was mandated by the EU in December 2000. It requires those operators designated as having significant market power) to make their local networks (i.e. the link between the end-user and the remote concentrator) available to other telecommunications companies.
Mediated service	Service where a service provider acts as a mediator to manage the communications capability between end-points by providing call set-up, connection, termination and party identification features, often generating or modifying dialling, signalling, switching, addressing or routing functions for the end-user.
Modem	A device which converts digital signals from a data-transmitting terminal into modulated analogue signals which can be carried by a public telephone network.
Narrowband	A service or connection allowing only a limited amount of information to be conveyed, such as for telephony. This compares with broadband which allows a considerable amount of information to be conveyed.

Retail Fixed Calls Market Review- Response to Consultation

Originating network	The network to which a caller who makes a call is directly connected.
Other Authorised Operators (OAOs)	Companies, other than Eircom, which operate telecommunications systems.
Premium rate services (PRS)	Services, including recorded information and live conversation, run by independent service providers. All calls to these companies are charged at a higher rate than ordinary calls to cover the companies' costs in providing the content of the call and the operator's cost for the special network facilities needed.
Private circuits	Point-to-point circuits for customers exclusive use covering speech, data or image communications.
Public switched telephone network (PSTN)	The telecommunications networks of the major operators, on which calls can be made to all customers of all PSTNs.
Public telecommunications network	A telecommunications network used, in whole or in part, for the provision of publicly available telecommunications services.
Resellers	Service Providers who do not have their own network.
Switch	Relates to a telecommunications network comprising at least one exchange and capable of routing signals and messages from one line to all other lines comprised in the network.
Telecommunications	Conveyance of speech, music and other sounds, visual images or signals by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical means.
Third generation mobile systems (3G)	A European 3G mobile communications system provides an enhanced range of multimedia services (e.g. high speed Internet access).
Transit	A transit service is a conveyance service provided by a network between two points of interconnection. It is, therefore, a service that links two networks that are not in themselves interconnected.
Voice over Internet protocol (VoIP)	The generic name for the transport of voice traffic using Internet Protocol (IP) technology. The VoIP traffic can be carried on a private managed network or the public Internet (see Internet telephony) or a combination of both. Some organisations use the term 'IP telephony' interchangeably with 'VoIP'.
Voice telephony service	A service available to the public for the commercial provision of direct transport of real-time speech via the public switched network or networks such that any user can use equipment connected to a network termination point at a fixed location to communicate with another user of equipment connected to another termination point.
Virtual private network (VPN)	These are used by a company or private group to make inter-site connections either for telephone speech or data as if there were dedicated leased lines between these sites. The equipment used is located within the public telecommunications operators' premises and forms an integral part of the public network but is software-partitioned to allow for a genuinely private network
Wireless Local Area Networks (WLAN)	Also known as 'hotspot' services. A WLAN access point provides Internet connection and virtual private network (VPN) access from a given location e.g. public places, such as airports, hotels, and coffee shops. Access is facilitated via the user's own portable computer.

Annex C: Draft Decision Instrument

PLEASE NOTE: The Draft Decision Instrument below is set out for information purposes only and is subject to consideration of any views expressed during consultation by interested parties.

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument relates to markets numbers 3-6 identified in the EU Commission's Recommendation⁷³ ("the Markets"). The Markets, so identified are:

- i. Publicly available local and/or national telephone services provided at a fixed location for residential customers;
- ii. Publicly available international telephone services provided at a fixed location for residential customers;
- iii. Publicly available local and/or national telephone services provided at a fixed location for non-residential customers; and
- iv. Publicly available international telephone services provided at a fixed location for non-residential customers.

1.2 This Decision Instrument is made by the Commission for Communications Regulation ("ComReg"):

- i. Having had regard to sections 10 and 12 of the Act of 2002⁷⁴;
- ii. Having taken account of and assessed the proportionality of the obligations herein, relative to the objectives of ComReg set out in section 12 of the Act of 2002;
- iii. Having (where appropriate) complied with the Policy Directions made by the Minister⁷⁵;
- iv. Having taken the utmost account of the EU Commission's Recommendation⁷⁶, the Explanatory Memorandum⁷⁷;

⁷³ EU Commission Recommendation of 11 February, 2003 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁷⁴ The Communications Regulations Act, 2002.

⁷⁵ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

⁷⁶ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

- v. Having regard to the EU Commission's Consultation on a draft Recommendation⁷⁸;
- vi. Having taken account of the submissions received in relation to ComReg Document No. 06/51;
- vii. Having regard to the reasoning and analysis set out in ComReg Document No. [*this decision*]; and
- viii. Pursuant to Regulations 8 and 9 of the Access Regulations⁷⁹.

2 DECISION

- 2.1 It is hereby decided that the Markets are not susceptible to *ex ante* regulation. This decision is made by reason of the fact that the first criterion referred to in the Explanatory Memorandum is not fulfilled because the Markets are not subject to high and non-transitory entry barriers.

3 WITHDRAWAL OF SMP OBLIGATIONS

- 3.1 All obligations on Eircom Ltd ("Eircom") in force immediately prior to the effective date of this Decision Instrument, to which Eircom was subject by virtue of its having had significant market power ("SMP") on the Markets are hereby withdrawn with effect from []

4 EFFECTIVE DATE

- 4.1 This Decision Instrument is effective from the • day of • 2007/8 until further notice by ComReg.

Mike Byrne
Chairperson
The Commission for Communications Regulation
Dated the • day of • 2007/8

⁷⁷ Explanatory Memorandum to EU Commission Recommendation of 11 February, 2003 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 the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁷⁸ Commission Staff Working Document - Public Consultation on a Draft Recommendation: 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 communication networks and services (Second edition) dated 28 June, 2006.

⁷⁹ The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.