



Commission for
Communications Regulation

Response to Consultation on ComReg Document 12/37

(Draft Strategy Statement 2012 – 2014)

Response to Consultation

Reference: ComReg 12/68

Version: Final

Date: 29/06/2012

Legal Disclaimer

This consultation response document is not a binding legal document and it does not contain legal, commercial, financial, technical or other advice. The Commission for Communications Regulation is not bound by it, nor does it necessarily set out the Commission's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this document and the due exercise by it of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the Commission for Communications Regulation. Inappropriate reliance ought not therefore to be placed on the contents of this document.

Contents

Section	Page
1 Introduction.....	4
2 Strategic Context and Environment	6
2.1 ComReg’s Analysis	6
2.2 Respondents’ views	6
2.3 ComReg’s position	7
3 Additional Challenges during the next 2 years.....	10
3.1 Are there other challenges?	10
3.2 Respondents’ Views.....	10
3.3 ComReg’s Position.....	11
4 Is ComReg’s strategic focus broadly correct?.....	12
4.1 ComReg’s strategic focus	12
4.2 Respondents’ Views.....	12
4.3 ComReg’s Position.....	13
5 Do additional priority areas need attention over the next 2 years?.....	18
5.1 Other priorities?.....	18
5.2 Respondents’ Views.....	18
5.3 ComReg’s Position.....	19
6 Are views of interested parties taken adequately into account?	22
6.1 Recognising viewpoints of interested parties	22
6.2 Respondents’ Views.....	22
6.3 ComReg’s Position.....	23
7 Other issues raised	26
7.1 Respondents’ Views.....	26
7.2 ComReg’s Position.....	27
8 Conclusions.....	29

1 Introduction

- 1 After preliminary discussions with interested parties and workshops with internal staff, ComReg published its Draft Strategy Statement for the period 2012-2014 for consultation (see ComReg Document 12/37) (“Draft Strategy Statement”). ComReg sought written responses from interested parties on the document and it received feedback from eight respondents¹ that were both wide-ranging and stimulating . Within this document, ComReg has summarised the responses received and sets out its views on how the respective issues will be treated.

- 2 Broadly speaking, the strategic direction proposed in the Draft Strategy Statement was largely supported by interested parties. However, some issues of concern to some parties were highlighted. These issues have all been noted by ComReg, and some adjustments have been made to our final Strategy Statement, where relevant. The main strategic issues (not in any specific order) which were commented on include:
 - Relationship of ComReg’s strategy to national recovery objectives and addressing the so called “urban-rural divide”.
 - The need to protect existing wholesale services, as focus moves to NGN/NGA², versus the need to incentivise the transition to more advanced technologies.
 - Safeguards against discrimination from Incumbent operator(s).
 - Functional separation of Eircom.
 - Regulatory support for collaborative arrangements and facility sharing.
 - Providing certainty and timescales in relation to spectrum management.
 - Addressing harmful interference to broadcast channels and to mobile communications.
 - Timeliness in conducting market reviews.
 - Incumbency and the provision of universal service set against the reality of today’s market positionings.
 - Longer submission periods suggested for ComReg’s more complex consultations, with efforts also being made to minimise overlap or parallel running of consultations and/or concurrent information requests.

¹ A full list of respondents is contained in paragraph 4 on page 5.

² Next Generation Network / Next Generation Access

- More engagement with industry for complex consultations, with more preliminary consultation (possibly using more simplified processes), and the possibility of stakeholder briefings for the presentation of proposals.
- 3 In this document we develop our positions which address the points raised by interested parties. This discussion then informs our finalised Strategy Statement (ComReg Document 12/69) published in tandem with this document.

1.1 List of responses

- 4 Submissions were received from eight respondents, seven by the closing date of 25 May and one, from Eircom Ltd, on 6 June.

Respondents
Alternative Operators in the Communications markets (ALTO)
Broadcasting Authority of Ireland (BAI)
BT Communications Ireland Ltd
Eircom Ltd
Hutchison 3G Ireland Limited
RTÉ and RTÉNL
Telefonica - O2
Vodafone

- 5 A copy of all non-confidential responses received is available on ComReg's website as ComReg Document 12/68s and a high level discussion of general views is set out below. The views discussed below relate to the main issues of concern. They do not attempt to enumerate each point raised, but focus instead on the key issues addressed.

2 Strategic Context and Environment

- 6 In Section 3 of the Draft Strategy Statement, ComReg identified central trends for the communications sector and invited comments from interested parties on same.

2.1 ComReg's Analysis

- 7 Specifically, ComReg asked the following questions to determine whether it had correctly identified key issues and challenges for consumers and for the communications industry:

1. Do you agree with ComReg's analysis of the Strategic Context and Environment in Chapter 3? Are there other developments that ComReg needs to consider?
2. Are the concerns and challenges related to these trends in Chapter 3 the correct and most important ones?

2.2 Respondents' views

- 8 Respondents broadly endorsed the technological and economic trends identified by ComReg, both for the general economy and for its telecommunications sector.
- 9 One respondent (Eircom), while broadly agreeing with ComReg's analysis, nevertheless considered that ComReg has misrepresented the extent of the decline in demand in the sector. It also suggested that more recent figures than the quoted Central Statistics Office (CSO) statistics could have been used in the document.
- 10 Eircom also suggested that, given the need to encourage investment and increasing uptake of cable-based broadband in urban areas and the popularity of mobile broadband, it is imperative for ComReg to reconsider its market definition of the broadband market, the perceived value of incumbency, and its conclusions regarding market power, in its pursuit of fair and proportionate regulation.
- 11 An area which a number of respondents identified as being particularly challenging was that of investment during the present economic difficulties. Network Operators particularly noted that significant network investment will be required if the current trends in consumer usage (particularly for data) are to remain fully supported.
- 12 In its submission, ALTO stated that "*The concentration of the broadband market which is wireless is not a very positive trend, as it highlights a want or lack of investment in infrastructure in Ireland*".

- 13 Vodafone welcomed the clarity provided by ComReg on potential collaborative arrangements in its Spectrum Management Strategy Statement (ComReg Document 11/89³) and in its NGA Remedies consultation document (ComReg Document 12/27⁴). Vodafone and Eircom both submitted that properly designed, collaborative initiatives and/or “*scale plays and consolidation*” between operators (for example through network or spectrum sharing), should be supported by ComReg, so long as effective safeguards are put in place to ensure that “*the current robust and competitive dynamic between operators*” is sustained, or even extended.
- 14 Eircom commented that the “Ladder of Investment”, as used in ComReg’s Draft Strategy Statement, which may have been valid in the past, is no longer appropriate in today’s much more competitive environment.

2.3 ComReg’s position

- 15 ComReg acknowledges the real decline in consumer communications spend and usage that has taken place and shares industry’s concern about this, including the implications it has for ability to invest in innovation and new infrastructure. This decline should, however, be viewed in context, including that telecommunications revenue has suffered a less severe decline relative to other typical household expenditures (see figure 2 of the Draft Strategy Statement – ComReg Document 12/37).
- 16 Although the next two to three years will see continued (and perhaps exacerbated) pressure on operators to provide new network investment in order to meet consumer demand, ComReg is committed to facilitating such investment by providing as much regulatory certainty as possible. ComReg may also be disposed to support prudent cost-saving measures such as inter-operator collaboration, insofar as this can be achieved without raising competition concerns. In general, ComReg’s approach will be to promote efficient infrastructure competition wherever viable, as we consider this to be a particularly effective means by which to promote effective long-term competition. ComReg will be pleased to review any proposals received from operators on such concepts, as and when they arise. Since ComReg Document 11/89 was published, the possibility of collaborative arrangements (or spectrum sharing and pooling) have been discussed in a number of Spectrum Liberalisation consultation documents (i.e. Documents 12/25⁵, 12/50⁶ and 12/52⁷), with each concluding that the basic positions described in document 11/89 remain valid.

³ ComReg 11/89 – “Strategy for Managing the Radio Spectrum: 2011 – 2013”

⁴ ComReg 12/27 – “Next Generation Access (NGA) - Proposed Remedies for Next Generation Access Markets - Response to Consultation, Further Consultation and draft decision”

⁵ ComReg 12/25 / Decision D04/12 - “Multi-band Spectrum Release - Release of the 800 MHz, 900 MHz and 1800 MHz Radio Spectrum Bands - Response to Consultation and Decision”

⁶ ComReg 12/50 – “Multi-band Spectrum Release - Response to Consultation on the draft Information Memorandum”

⁷ ComReg 12/52 – “Multi-band Spectrum Release - Information Memorandum”

- 17 In response to Eircom’s submission to revisit the definition of the broadband market, ComReg points to its review of the wholesale broadband access (WBA) market that it completed in 2011 (see ComReg Document No 11/49⁸ and ComReg Decision D6/11) and also the ongoing review of the Retail Narrowband Access market, which will be published shortly. In Decision D6/11, ComReg stated that *“Given the emergence of more localised competitive pressures, we intend to continue to closely monitor any changes in the structure and dynamic of the market and in the commercial behaviour of operators, particularly in urban areas where there is a cable operator offering retail broadband and a WPNIA purchaser offering WBA”*. ComReg will, therefore, continue to monitor any changes and will take appropriate action, if required.
- 18 ComReg’s usage of CSO data was based on the consideration that it appears to be the most comprehensive data set currently available. It takes time to compile good, reliable information into meaningful interpretations of the situation on the ground and the 2009-2010 Household Budget Survey, which was published in March 2012, is considered to be the most recent and detailed information suitable for that purpose.
- 19 ComReg understands the concerns of ALTO, which considers that the relatively high reliance on wireless broadband in Ireland has a downside counterpart to the undoubted benefits that it brings i.e. it could be seen to imply under-investment in the (typically faster) fixed-line broadband service. However, against this, ComReg notes that the number of both residential and non-residential broadband subscribers that use a fixed wireless access service has declined between 2010 and 2012 (see table below), while the total number of DSL users and cable users has grown significantly. To the extent that user take-up can be considered indicative of operator investment, these figures show no lack of investment on the part of fixed wireline operators,

	Fixed Wireless Access Users	DSL Users	Cable Users
Q1, 2010 ⁹	101,617	724,268	163,455
Q1, 2012 ¹⁰	69,566	726,814	275,499

20

⁸ ComReg 11/49/ComReg Decision D6/11 – “Market Review: Wholesale Broadband Access (Market 5) - Response to Consultation and Decision”

⁹ ComReg Quarterly Report Q1 2010, doc. 10/43

¹⁰ ComReg Quarterly Report Q1 2012, doc. 12/62(R)

- 21 Eircom raised the point concerning its own market power and the perceived value of incumbency. The European Framework Directive¹¹ sets out the obligations of the Regulator concerning undertakings with significant market powers. ComReg considers that its market analysis process, which follows a structured approach, is suited to addressing such issues.
- 22 ComReg has taken note of Eircom's observations on the "Ladder of Investment". As well as EU level reviews on such principles and policies, we continuously review the appropriateness of the principles and policies underlying decisions relevant to regulated products or to prices that may play a role in incentivising appropriate investment in infrastructure, whether by the incumbent or by its competitors. Accordingly, it is not accurate to state this policy has not been reviewed in the past ten years.
- 23 ComReg considers that the rollout of NGA is critical to the delivery of high speed broadband services to Irish consumers. This investment is being made and will be made by a number of operators in the market. ComReg will continue to promote efficient infrastructure competition.

¹¹ Framework Directive means Directive 2002/21/EC of the European Parliament and Council of 7 March 2002, as amended.

3 Additional Challenges during the next 2 years

3.1 Are there other challenges?

- 24 ComReg asked the following question to determine whether interested parties considered that additional challenges would or could arise, either for industry or for the regulator, beyond those mentioned in ComReg's analysis:

3. Are there additional challenges for the industry and for regulation over the next two years?

3.2 Respondents' Views

- 25 ALTO asserted that there are limitations to how much change ComReg could drive in respect of consumer protection, due to the levels of investment and intervention it can demand from market players. It also warned that *"over-focus on the Consumer strand of regulation may send the wrong signals to the market."* However, it also noted that *"that is not to say that ComReg should not fulfill its remit as it currently does"*.
- 26 Vodafone suggested that in a highly competitive communications market the market dynamic already acts to align the interests of service providers with those of its customers. It also considered it important that *"regulation in the interests of consumer protection [should be] proportionate and not unduly prescriptive. In particular the regulatory approach to consumer protection should seek to achieve its objectives in a way that maximises the scope for innovation and competitive differentiation"*.
- 27 The importance of ComReg setting out its position and its detailed understanding for operators on the implications of any new regulatory requirements prior to their coming into effect was highlighted by Vodafone. It said this would avoid lack of clarity and consequent non-compliance persisting for a significant period of time, with consumer detriment, before being identified and addressed.
- 28 Eircom considered that ComReg needs to focus more strongly on strategies to minimise the emergence of the so called "urban/rural divide".

3.3 ComReg's Position

- 29 ComReg acknowledges the significant commercial pressures on Irish operators in the present economic climate and is pleased that they continue to treat the protection of consumers responsibly. Hard-pressed, value-seeking consumers need a choice of innovative and good value products and services, backed up by excellent customer service.
- 30 ComReg also generally agrees with the proposition that regulation in respect of consumer protection should be:
- “*proportionate and not unduly prescriptive*”;
 - achieved “*in a way that maximises the scope for innovation and competitive differentiation*”, and
 - explained clearly to avoid doubts about ComReg's objectives.
- 31 Having said that, ComReg must always be guided by its mandate as set out in legislation. ComReg's work programme and organisation is therefore structured to address the various aspects of this mandate, which includes the encouragement of innovation and promotion of competition, in addition to protecting and informing consumers. Those tasks are not mutually exclusive (as indicated by respondents) and indeed the end-purpose of all telecommunications services – which is to benefit consumers - is furthered by the use of appropriate levels of support for innovation and competition.
- 32 In many instances, consumer related obligations set out in European legislation are directly applicable to undertakings and ComReg discretion is limited in that regard. ComReg's role is to ensure compliance by undertakings with those obligations. While it is incumbent on undertakings to be aware of their obligations, ComReg will provide clarifications where appropriate and necessary.
- 33 The relevant legislation also provides that in some cases ComReg may specify further requirements. Proposed interventions will be consulted upon in accordance with ComReg's consultation procedures and, where relevant, assessed in accordance with its Regulatory Impact Assessment (RIA) guidelines.
- 34 ComReg's regulatory approach already recognises the different economics that can exist between urban and rural areas. Nevertheless, ComReg agrees with Eircom that this is an important issue and ComReg will continue to take it into account where appropriate.

4 Is ComReg's strategic focus broadly correct?

4.1 ComReg's strategic focus

- 35 ComReg asked the following question to determine whether interested parties considered that it was focused on the correct issues, given current communications trends, market conditions and consumers' concerns and needs:

4. Given the trends, market conditions and consumer needs, is ComReg's strategic focus broadly on the correct priorities?

4.2 Respondents' Views

- 36 A number of common themes were raised by respondents regarding competition/wholesale related issues. The main issues raised were:
- a) Safeguards against discrimination from Incumbent operator(s);
 - b) The potential functional separation of Eircom;
 - c) Deregulation;
 - d) The intensity of market analysis;
 - e) Transparency regarding ComReg decisions.
- 37 In addition, H3GI submitted that it and other mobile network operators have advocated the introduction by ComReg of indefinite licences for mobile spectrum rights of use. H3GI said *"This would provide industry with greater certainty regarding this critical input, permit greater investment, create jobs and reduce the role for public expenditure to reduce any future Next Generation Broadband (NGB) Digital Divide. Whilst ComReg has rejected this proposal, H3GI submits that it has failed to demonstrate that it has properly examined this issue ..."*
- 38 H3GI also expressed its concern about the time being taken by ComReg to publish its Information Memorandum in respect of the upcoming 800, 900 and 1800 MHz spectrum award process.
- 39 Eircom perceived undesirable equivocation in ComReg's Draft Strategy Statement over its support for new fibre-based technologies versus the maintenance of *"out-of-date technology solutions including Local Loop Unbundling"*. It considered this could

be exacerbated if market review periods are not kept short (with an example being given of the fixed narrow-band market which has not been reviewed for 5 years and, under the EU regime, could conceivably not be reviewed for another 3 years).

- 40 Finally, ALTO commented that *“it is not ideal for ComReg to be subject to protracted commercial litigation or indeed statutory appeals These instances are obviously most acutely felt when a decision, with positive results for the industry, is either Judicially Reviewed or appealed for some reason, based on an error of judgment on ComReg’s part.”*

4.3 ComReg’s Position

- 41 In brief, ComReg’s positions on the four themes identified above are as follows:

- a) **Safeguards against discrimination:** ComReg agrees with ALTO on the importance of safeguards against discrimination by the Incumbent. ComReg considers that safeguards against discrimination are already recognised by the European Commission in its NGA Recommendation¹² as well as the recent consultation¹³ issued by the European Commission on the application of non-discrimination. ComReg will take utmost account of any final Recommendation that the European Commission may issue regarding non-discrimination. In any event, ComReg has imposed the obligation of non-discrimination in a number of Relevant Markets following the designation of SMP. More recently in the context of NGA, ComReg has proposed to mandate the obligation of non-discrimination on Eircom in ComReg Document No 12/27. ComReg also considers that its decision on key performance indicators (“KPIs”) in ComReg Document No 11/45¹⁴ (ComReg Decision D5/11) is also relevant in terms of safeguarding against discrimination on Regulated Markets.

¹² Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (Text with EEA relevance) (2010/572/EU)

¹³ Questionnaire for the public consultation on the application of a non-discrimination obligation under Article 10 of the Access Directive (including Functional Separation under 13A)

¹⁴ ComReg 11/45/ComReg Decision D5/11 – “

Response to Consultation and Decision on the Introduction of Key Performance Indicators for Regulated Markets”

- b) **Functional Separation:** ComReg is aware of the option of Functional Separation, as set out in Regulation 14 of the Access Regulations 2011 and has taken note of the points made by respondents. ComReg will continue to monitor market developments, keeping in mind this represents one option by which to address the substantive issues. ComReg will also monitor any changes that take place in respect of the process of wholesale reform that is undertaken on a voluntary basis by Eircom, and which it is hoped may lead to broader adoption of what is known as Equivalence of Input (EoI).

As already noted above, the European Commission has published a consultation on the application of non-discrimination that is relevant to this discussion, including views on the necessity and appropriateness of imposing functional separation. ComReg will, of course, take account of any Recommendation(s) published by the European Commission in this regard.

- c) **Deregulation:** ComReg considers that it is fulfilling its obligations regarding regulation and deregulation in a proportionate and fair manner and it believes that this is generally accepted. ComReg's current regulatory proposals are intended to provide certainty to all interested parties as to how regulation will unfold as the market evolves.

The level and extent of regulation is in any case predicated on, for example, our ongoing analysis of the various recommended Relevant Markets and, as ComReg monitors developments in the Relevant Markets, our regulatory stance will adapt as necessary to take into account such changes.

- d) **Market Analysis:** ComReg will continue to respect its obligations in relation to the market analysis process (e.g. under Action 6.5.2) as set out in Regulation 27 of the Framework Regulations.

We are also aware that the telecommunications landscape and market dynamics have become more complex in recent years. In addition, global competitors are now impacting on the returns of Irish operators. Such factors will be taken into account in our deliberations as appropriate.

The level and extent of ComReg regulation is, in any case, affected by our ongoing analysis of the various recommended Relevant Markets as described under b) above.

- e) **Transparency:** ComReg makes all its decisions in a transparent manner. For example, concerning the setting of wholesale prices (being one topic mentioned by a respondent), ComReg has cost models which can be made available to interested parties, subject to the confidentiality and commercial sensitivity of operator information.

A specific case that was raised was the question of transparency on the cost of leased lines. In that respect, ComReg considers that the publication of Eircom's prices for Leased Lines could distort competition by facilitating "price-following" by other operators. To date, no operator has requested access to a non-confidential version of the model for Leased Lines¹⁵. In addition, Eircom's 2011 Separated Accounts include an income statement for each of the Relevant Markets, including the market for wholesale terminating segments of leased lines.

ComReg disagrees with ALTO's assertion that it is not doing enough to ensure transparency regarding Eircom's cost orientation obligations and that it is not possible to use Eircom accounts to assess the cost orientation of Eircom's prices, "as freely admitted by ComReg". Eircom's Separated Accounts were subject to an extensive consultation process during 2010 (see ComReg Decision D08/10¹⁶ on the accounting separation and cost accounting review of Eircom Ltd.). It should be noted that the delay which occurred in the availability of 2011 Eircom Separated Accounts (but which are now published) was the result of Eircom's inability to complete its Statutory Accounts. This was unavoidable and a once-off occurrence.

42 Regarding the issue of indefinite licences for spectrum rights of use, both generally and in the context of the mobile bands, ComReg notes that:

- its current position on this issue generally is set out in ComReg's Spectrum Management Strategy (see section 3.4.2 of ComReg Document 11/88¹⁷ and section 4.3 of ComReg Document 11/89); and
- in the context of ComReg's spectrum liberalisation process, section 4.4.6.1 of ComReg Document 12/25 states:

"Para 4.98 For the reasons set out in Documents 11/88, 11/89 and above, ComReg considers that it has not, in its view, been presented with any further evidence to suggest that liberalised rights of use in the three spectrum bands should be awarded by way of licences of indefinite duration. ComReg has not seen any reason to depart from the specific licence duration set out in Document 11/60¹⁸, which results in all Time Slice 2 licences co-terminating in 2030."

43 Furthermore, section 2.2.2 of ComReg Document 12/50 states:

¹⁵ This information could be made available to interested parties, upon request to ComReg.

¹⁶ ComReg Document No. 10/67 entitled "Response to Consultation Document and Final Direction and Decision, Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited" dated 31 August 2010

¹⁷ ComReg 11/88 – "Review of the Period 2008 – 2010 & Proposed Strategy for Managing the Radio Spectrum: 2011 – 2013"

¹⁸ ComReg 11/60 – "Multi-Band Spectrum Release - Release of the 800 MHz, 900 MHz and 1800 MHz radio spectrum bands - Response to Consultation and Draft Decision".

“Para 2.27 With the exception of Telefónica’s comment regarding the investment gap that could emerge at the end of a licence term and its suggestion that the final Regulations include a provision which would require the spectrum re-assignment process to be completed at least five years before the end of the licence term, ComReg notes that all of the respondent’s views on this issue were considered in Document 12/25.”

- 44 ComReg’s position in both contexts was arrived at after very careful consideration of, amongst other things, the views of interested parties, including H3GI.
- 45 ComReg therefore considers, in the absence of any new information or evidence from H3GI to support its claims regarding indefinite licences that this issue has already been comprehensively addressed.
- 46 Whilst ComReg regrets any inconvenience caused to interested parties concerning the time taken to publish its Information Memorandum on its Multi-Band Spectrum Award Process, it should be remembered that this has been a highly detailed, complex and time consuming process in which, amongst other things, a very large amount of material has been provided by interested parties which has required careful and pains-taking consideration by ComReg. Nevertheless, ComReg is pleased to state that the Information Memorandum was published on 25 May (see ComReg Document 12/52).
- 47 The transition from the currently predominant technologies to new fibre products should be accomplished as efficiently as possible but without leaving stakeholders, whether consumer or industry, with stranded assets. As set out elsewhere in this document and also in ComReg Document 12/27 on NGA, we are obliged to give appropriate consideration to the importance of the current legacy product sets during the transition to NGA. In doing so, we acknowledge that a failure to provide certainty about the future of copper based access services would be very likely to hamper investment by entrants.
- 48 As already set out in ComReg’s Draft Strategy Statement and also in ComReg Document No 12/27 on NGA, ComReg will facilitate and promote the rollout of NGA networks while also supporting those market players that continue to unbundle exchanges for current generation services, including for example, local loop unbundling (LLU) services. Our consultation on NGA (ComReg Document No 12/27), was published in April 2012 and a response is due from interested parties by 13 July 2012. The proposed remedies in the context of NGA, in particular in relation to the obligations placed on Eircom, are set out in that document. ComReg will consider all relevant issues raised by respondents in that context before taking our final decisions on NGA.

- 49 The market review for Retail Narrowband Access and for the Broadcasting Transmission market are already in progress and the relevant consultation documents will be published shortly.
- 50 Regarding ALTO's comment on ComReg misjudgements leading to judicial appeals, ComReg is conscious that operators may have a number of motivations for bringing forward appeals to regulatory decisions but notes that there has been no judicial opinion in recent times where it has been upheld that an error of judgement by ComReg has occurred.

5 Do additional priority areas need attention over the next 2 years?

5.1 Other priorities?

- 51 ComReg asked the following question to provide an opportunity for interested parties to identify any other key priority areas that should be addressed, in addition to those mentioned in ComReg's analysis:

5. Are there additional priority areas that need attention over the period of this Strategy Statement?

5.2 Respondents' Views

- 52 Respondents, including Hutchison 3G Ireland, RTÉ, Eircom and the BAI, raised the following important issues:

- a) ComReg should devote more resources to curbing illegal and harmful interference.
- b) The Strategy Statement should make specific reference to increased co-ordination between ComReg and the BAI in relation to the roll out of commercial DTT.
- c) ComReg should be more ambitious in terms of achieving a “breakthrough outcome”, by grounding its strategy in Ireland’s challenging operating environment so that the key national objectives of economic expansion, job creation and, specifically, investment in critical infrastructure, are fully addressed. It was asserted that ComReg has an advocacy role in supporting the Government and service providers in ensuring broadband is rolled out effectively and the inclusion of such an advocacy item under section 5.6 of the Strategy Statement was recommended.
- d) ComReg's strategy should avoid placing disproportionate weight on short-term consumer benefits which may not be sustainable in the long term if key national infrastructure investment is not delivered.
- e) Given stagnant telecommunications revenues and ongoing economic difficulties, ComReg should commit to reducing its spend over the course of its Strategy Statement in line with a similar commitment made by Ofcom in the UK.

- f) Regulatory Impact Assessments should form a central component of the regulatory process from the outset so as to avoid being viewed as an “*incidental add-on*”.
- g) Finally, attention was drawn to a number of issues relating to the importance to the market of ComReg’s international work with BEREC on issues such as “net neutrality” over the next two years.

ComReg’s position on these issues is set out in turn below.

5.3 ComReg’s Position

- 53 ComReg’s Spectrum Compliance team is responsible for maintaining the integrity of radio spectrum and investigating instances of harmful interference. This is already a high priority workstream for ComReg and that will continue under Action 4.2.2 of ComReg’s Strategy Statement. All resources available to the Spectrum Compliance team are dedicated to resolving instances of interference in addition to proactively removing potential sources of interference. To this end, ComReg currently investigates approximately 200 cases of interference per annum and conducts regular market surveillance in conjunction with other European NRAs to ensure that electrical, electronic and radio equipment available on the market is compliant with all relevant standards.
- 54 ComReg believes that engagement with all interested parties is an essential part of effective regulation and it strives to engage with them on a regular and mutually beneficial basis. This, of course, includes the BAI, with whom ComReg already collaborates closely, as envisaged by the relevant legislation and will continue to do so. ComReg notes that in its submission, the BAI “*recognise the common points of interest*” between ComReg’s strategic objectives and its own. The BAI also states that it will continue to work with ComReg on those areas of commonality. ComReg notes and appreciates the broad support of the BAI for our strategy and particularly in respect of those areas that are of relevance to the role and objectives of the BAI.
- 55 ComReg notes Eircom’s identification of various national objectives that should be taken into account by ComReg in fulfilling its role. Whilst such national objectives are clearly important, ComReg observes that its regulatory functions, objectives and duties are clearly prescribed in legislation. Nevertheless, within this regulatory framework, ComReg recognises that its regulatory function should be exercised in a way that promotes the best possible outcome for the Irish end-user and, in this context, ComReg supports, amongst other things, the objective of early and extensive roll-out of fast broadband which would be a step forward in the interests of all stakeholders. Accordingly, ComReg strongly encourages operators to move forward on this as quickly as possible, to benefit their customers and to future-proof their own offerings.

- 56 ComReg recognises the interplay between promoting consumer benefit and infrastructure investment. In considering any policy that would involve forbearance of short-term consumer benefit in the interests of infrastructure investment, the regulator would need to assure itself that such an approach would result in the appropriate level of infrastructure investment and long-term end consumer benefits. ComReg, in common with other economic regulators, routinely takes such matters into account when implementing its strategies.
- 57 In general, the cost of communications regulation in Ireland benchmarks very well against other European countries. Nevertheless, ComReg is very conscious of the very difficult conditions currently facing all of its stakeholders and its budget will continue to be tightly controlled to ensure that the regulatory cost burden is minimised. ComReg continues to manage costs through outsourcing of various functions, and ensuring effective procurement policies are in place. In addition, ComReg has been subject to pay reductions and levies imposed by Government in recent times as well as being subject to an employment control framework which has resulted in a reduction in staff numbers and available resources to meet our regulatory obligations. We are acutely conscious of the need for economising and restraint given the current economic and fiscal environment and we have cut back where possible on discretionary expenditure. We continue to carefully monitor all expenditure.
- 58 ComReg accepts the importance of RIAs as being central to the regulatory decision-making process and their appropriate use will continue to inform ComReg decisions.
- 59 BEREC consults on and publishes a work programme for the upcoming year in the final quarter of each year. It operates in a transparent manner and regularly seeks the views of its stakeholders, such as through public consultations and workshops¹⁹. ComReg provides input to this work programme over the course of its development and supports its execution through active participation in the work streams closely aligned with Irish priorities.
- 60 In the more general context of internal BEREC work, ComReg takes care to monitor issues of concern to Ireland and strongly asserts the Irish viewpoint at those preliminary stages. Once BEREC positions have moved beyond discussion between regulators, then opportunities are afforded to all interested parties to provide their inputs and responses directly to BEREC – typically within the context of BEREC consultations. It is at this point that industry has the ideal opportunity to make its views known and ComReg is ready to provide appropriate assistance in that regard. At earlier internal stages, it may be that in some cases ComReg needs to request support from industry and it welcomes the offer made by one respondent to provide expertise and assistance when required.

¹⁹ Details of consultations and other BEREC publications are available on its website at - www.erg.eu.int

61 In respect of the specific work streams currently being undertaken by BEREC, ComReg notes that BEREC has a number of important position papers currently under consultation and ComReg has actively participated in their development to date. The approach taken by ComReg to “net neutrality” would, in principle, follow the lines proposed by BEREC and, where relevant, the European Commission (EC). In general, both BEREC and the EC acknowledge that traffic management per se is not a violation of net neutrality but discriminatory or unjustified differentiated treatment of traffic may well be so.

6 Are views of interested parties taken adequately into account?

6.1 Recognising viewpoints of interested parties

- 62 ComReg asked the following questions to determine whether interested parties considered that ComReg takes due cognisance of their views – and if not, to receive input on how any perceived weaknesses could be addressed.

6A. Do you consider that ComReg provides sufficient opportunities for all stakeholders to express their views and provide relevant information to inform the decision-making process?

6B. If not, then how could we improve?

6.2 Respondents' Views

- 63 Respondents were generally satisfied that ComReg properly fulfils its obligation to consult with interested parties and respondents believed that improvements have taken place in recent years. Eircom pointed at the “industry fora” approach that it said is working well in the context of new investment challenges such as NGA. This general support was accompanied by some suggestions for additional improvement such as the holding of bilateral discussions, workshops, presentations or preliminary consultations, in advance of full consultations. It was suggested that such engagement should take place in a planned and results-oriented manner, as effective time management and resource allocation is critical to the delivery of results and robust outputs.
- 64 One example from ALTO was that consultation “*might have better informed the industry and wider stakeholders*” in respect of the use of new powers addressing Fraud Management pursuant to Article 23(2) of the Universal Services Regulations (USRs).
- 65 ALTO and Vodafone expressed concerns about multiple concurrent ComReg consultations, highlighting the impact that this has on industry resources – especially when set against the background of short submission timeframes. Vodafone noted that simultaneous data requests by ComReg sometimes add to this burden. Eircom agreed that timescales allotted for consultation processes can sometimes be too short, thereby affecting the achievement of robust future-proof regulatory outcomes.

- 66 ComReg was also encouraged by Eircom to make greater efforts to inform and educate its wider stakeholders of its proposals – including Government, consumer groups and other interested parties.
- 67 H3GI, on the other hand, was not convinced that ComReg is prepared to review its positions following consultations. It insisted that ComReg needs to be more transparent and clearly demonstrate why regulation is required. It also claimed that while ComReg is adequately resourced to perform its duties it devotes too much time to easily achieved and unnecessary projects, thus giving an impression of progress. In this regard, a voluntary consumer protection measure was cited.
- 68 Telefónica expressed a concern about requests by ComReg for data in cases where the results are not subsequently seen to be used as part of regulatory decisions.

6.3 ComReg's Position

- 69 In general, ComReg believes that engagement with our stakeholders is at the very core of effective and appropriate regulation. We believe it is imperative for ComReg to interact and engage with interested parties so that we are on a sound footing to respond appropriately to marketplace evolution.
- 70 This engagement with interested parties and other regulatory bodies, both at home and abroad, and our participation in fora, is wide-reaching. We aim thereby to inform and shape the development of regulatory policy. ComReg is a member of groups such as the Economic Regulators Network (ERN), the Body of European Regulators for Electronic Communications (BEREC), the Radio Spectrum Policy Group (RSPG) and the International Audiotext Regulators Network (IARN), among others, and we aim to always follow best practice in those groups. ComReg also meets with and briefs Irish government representatives (including DCENR) whenever appropriate, during the course of our work.
- 71 In order to assist interested parties to plan and manage their regulatory obligations, ComReg publishes a number of documents to indicate the future work in which we will engage, our published Annual Action Plan being an example of this. ComReg also publishes an Annual Output Statement that describes the work completed by ComReg during the course of the year. Finally, ComReg hosts regular workshops and presentations on specific matters and - resources permitting - we will continue to operate such fora whenever possible.

- 72 Nevertheless, ComReg appreciates the importance of the various points made in the above submissions about engagement and the spirit in which they are made. There is always room for improvement in respect of engagement and information provision where regulation is concerned. We note in particular the suggestions of preliminary consultations to help develop thinking at the early stages of the regulatory process and stakeholder briefings to accompany the publication of complex consultation documents. We shall endeavour to follow these suggestions wherever useful and appropriate, and to develop new ways to engage with interested parties. We shall also remain open to useful suggestions about practical and/or innovative new ways to encompass interested party engagement.
- 73 ComReg specifically notes the key issues raised by respondents in this regard (e.g. spectrum strategy related matters), and will bear them in mind during the course of this next strategy period. It is not possible to perfectly balance the need for early decisions (and the related early provision of regulatory certainty) with extended discussions and/or repeated consultations and inevitably some interested parties will be dissatisfied with whichever outcome is chosen. ComReg will therefore endeavour to combine speed with certainty insofar as this is possible, without prejudice to its need to retain discretion over what it deems to be the most appropriate consultation process.
- 74 ComReg's formal consultation procedures²⁰ and its range of other interactions with interested parties (as described more fully in section 6.3), are designed to ensure all have a fair opportunity to input into and influence its decisions. Those processes meet ComReg's statutory obligation to describe and explain clearly the reasons for those decisions and no significant decisions are taken in the absence of such consultation. ComReg will keep in mind comments received on the time needed to give meaningful consultation feedback and the need to manage consultation response times where consultations are overlapping.
- 75 ComReg considers it understandable that information requests that seem to not be directly linked to subsequent regulatory decisions may be considered superfluous and/or wasted effort by those directly affected. However, in reality all information requested by ComReg from interested parties is used to inform and guide the work that we do, including the priority and scheduling of that work. It should be understood that information provided by interested parties in this way, even when no immediate result is observed, can often indirectly assist those affected by establishing that regulatory intervention is unnecessary or can be postponed.

²⁰ ComReg Document 11/34 – Information Notice on ComReg Consultation Procedures

- 76 ComReg's Annual Action Plan, on which it continues to deliver, is comprised of four primary objectives, including protecting and informing consumers. The actions contained therein include both minor and major steps but all are of major importance to those concerned. Accordingly, ComReg does not accept that actions specifically supporting the interests of consumers are necessarily of less importance than other measures. Projects of a consumer-support nature, referred to by one respondent as "*giving an impression of progress*", are aimed at assisting operators to improve aspects of their telecommunications offering to consumers.
- 77 Regarding fraud management pursuant to Article 23(2) of the USRs, ComReg consulted interested parties as part of its workshop on 22 May 2012. More generally, it is ComReg policy to consult on all of our decisions under the European Framework.

7 Other issues raised

78 Apart from their submissions on the specific questions raised by ComReg and discussed in earlier chapters, respondents commented on some additional matters of concern to them. These have been noted by ComReg and, where relevant, they are listed below along with ComReg's position.

7.1 Respondents' Views

79 ALTO requested that ComReg publish an online full organisation chart "*in order that the industry can reference the precise organisation and structure of ComReg subject matter experts, all in one place*".

80 BT suggested that ComReg should review the objectives set out in its previous Strategy Statement, in order to learn from interventions that have taken place over the last two-year period.

81 Telefónica supported the ongoing benchmarking of ComReg and suggested that along with the publication of its annual action plan and its Strategy Statement, ComReg should take the opportunity to also publish the benchmark information referred to in section 7.4 of the Draft Strategy Statement (i.e. benchmarking against international standards).

82 RTÉ was supportive of ComReg's strategy of promoting innovation and investment and proposed revised wording to improve the description of Action 6.2.4.

83 Several mobile operators stated that the release of "Digital Dividend" 800 MHz spectrum to enable advanced wide coverage mobile broadband services, and the review of the future allocation of spectrum in the 2.6 GHz and 2.3 GHz bands, should be achieved as early as possible "*so that regulatory certainty is maximised.*"

84 ALTO pointed to what it described as low uptake and bottlenecks in fixed market services (e.g. LLU, WBA, and Ethernet services), failures that it ascribed to aggressive block and hold behaviour by the incumbent over at least the past two to three years. It considered that NGN Ethernet could "*form the next battleground*". Both BT and ALTO had concerns that Eircom's drive towards NGA might be delivered at the expense of existing services, such as LLU. The former referred to "*extremely poor performance*" on WLR repairs, which it claimed was due to Eircom's recent lack of capital investment in the copper access network. BT commented that extensive reported redundancies within Eircom, coupled with its stated intention to accelerate NGA investment, would result in issues for its own customers, unless adequate penalties for non-performance are put in place and enforced by ComReg.

85 Eircom suggested that ComReg could be “more muscular” in its response to the EC, given outcomes that are considered here to be fair and reasonable but which are not accepted by the EC. Eircom added that in the particular circumstances of the Irish market and when applying regulatory remedies, “harmonisation” should not automatically equate to “uniformity”.

7.2 ComReg’s Position

86 ComReg already publishes information describing its organisational structure and the responsibilities within each division of the organisation but it will consider whether that information can be improved.

87 ComReg published output statements during this last strategy period and those documents detail the work completed by ComReg over that time. We recognise the importance of benchmarking as a metric by which to guide us towards greater effectiveness and efficiency in our regulatory role. Benchmarking against other NRAs is of special relevance in that regard. Such benchmarking is carried out independently by both the OECD and the European Commission (as part of the Digital Agenda Scorecard metrics) and the relevant documents are publicly available from both of these organisations. In addition, BEREC processes involve considerable benchmarking of the various regulatory practices in the EU area; the results are typically published in documents that are available on the BEREC website.

88 ComReg appreciates RTÉ’s welcome for its Draft Strategy Statement as well as its support for our ongoing work of optimising spectrum management for Ireland. It notes the suggestion from RTÉ in relation to Action 6.2.4 and proposes to emphasise the contribution of other interested parties as follows:

“6.2.4 Explore the long term future use of the UHF spectrum in the light of the WRC-12 Decision in cooperation with relevant stakeholders”

89 ComReg also appreciates respondents’ support for our position on spectrum sharing and pooling and we take note of views expressed on that issue. Section 4.4 of ComReg’s Spectrum Management Strategy (ComReg Document 11/89) sets out our position on collaborative arrangements in relation to spectrum issues. We acknowledge the positive support received for our policies on Digital Dividend spectrum and the future allocation of 2.6 GHz and 2.3 GHz bands spectrum and we recognise the importance attached by interested parties to the timescales set down for this.

- 90 We also note the remarks of ALTO and BT regarding incumbent behaviour. We recognise that the take-up of local loop unbundling (LLU) has been disappointing to date. In light of our powers set out in Regulation 14 of the Access Regulations²¹ regarding functional separation, we will continue to monitor Eircom's behaviour and market developments and be ready to take action, as appropriate. Issues relating to NGN Ethernet should be raised and discussed by way of the Industry Forum or by complaint to ComReg. Concerning Eircom's performance (including where that impacts on the quality of the universal service), document ComReg 11/79²² reports that the introduction of legally binding performance targets by ComReg resulted in a marked improvement in performance in respect of connections, fault repairs and fault occurrence. Nevertheless, ComReg understands the concerns of competing operators and we remain fully committed to ensuring that the quality of universal service is maintained. We are confident that the measures already taken will continue to benefit large numbers of consumers in the State. Furthermore, ComReg has no proposals in place to withdraw current access products.
- 91 ComReg takes note of Eircom's suggestion regarding EC recommendations. It should be remembered, however, that ComReg is obliged to take utmost account of any recommendations issued by the EC and will continue to do so. If it appears that divergence is objectively justified on the basis of national circumstances, then ComReg will, of course, consider such matters carefully, as appropriate.

²¹ S.I. No 334 of 2011: European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011

²² ComReg 11/79 – Provision of Universal Service by Eircom - Information Notice

8 Conclusions

- 92 In this strategy, ComReg has set out its strategic priorities for the next two years. We have carefully considered all inputs by individuals and organisations that have responded to the consultation on its Draft Strategy Statement. ComReg appreciates the breadth and depth of these contributions and the careful thought that has gone into them. These have been very helpful in validating our overall approach and refining our goals, leading to more finely honed strategic and operational plans.
- 93 ComReg has also considered whether there is more that we can do in all areas highlighted by respondents and whether our priority actions should be revised having regard to these inputs.
- 94 ComReg's Strategy Statement for 2012-2014, published in parallel with this document, is therefore the product of revisions to the original draft document based on these inputs and on our own subsequent analysis of the views provided.
- 95 The approach set out in the Strategy Statement for 2012-2014 will be implemented through our published Annual Work Programme and it will also be integrated into the performance objectives of ComReg's internal divisions, as well as the individual performance objectives set down for ComReg staff, as appropriate.