Commission for
Communications Regulation

ComReg 12/63:

Supplementary Consultation to ComReg 11/72
Price regulation of bundled offers

Submissions to Consultation 12/63

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Content

1: ALTO

alto

alternative operators in the communications market

Response to Supplemental Consultation - Supplementary Consultation - Price Regulation of Bundled Offers Ref:12/63

Submission By ALTO

Date: August 29th 2012

ALTO is pleased to respond to the Supplementary Consultation - Price Regulation of Bundled Offers, Ref: 12/63.

Preliminary Comments

ALTO it necessary to make the following key comments on ComReg's Supplementary Consultation 12/63:

ALTO observes with some concern, 2that ComReg continues to propose to take the extremely unusual step of introducing geographic differentiation of regulatory obligations (relaxation of a key remedy on a sub-national basis) within a national market where Significant Market Power – SMP, has been found.

ALTO notes that ComReg intends to do this notwithstanding the existence of a market analysis decision (i.e., following the normal regulatory procedure requires a full market analysis to be undertaken before there can be any lifting or relaxing of regulatory remedies).

ALTO disagrees with the proposal in general, and notes that this highly unusual departure of introducing interim geographic differentiation of remedies is without precedent in any other EU member state on any relevant market.

ALTO notes that by way of general justification, ComReg makes reference to *"different structural conditions prospectively creating different consumer choices in certain areas in Ireland"* (para 40 and 47) and *"changing structural conditions are evident and fast evolving"* (para 42) – and makes further references to structural differences between geographic areas as triggers for relaxation of existing remedies.

ALTO observes that if ComReg believes that the market conditions on the market for Retail Fixed Narrowband Access have changed to such an extent (on a sub-national market basis), and ComReg argues that this is as a result of *"changing structural conditions"*, if this is indeed the case, ComReg should conduct a new full market analysis of the market for Retail Fixed Narrowband Access.

As ComReg will be aware, this process involves three key steps, including determining a market definition for the relevant market, secondly, undertaking an assessment of SMP, and finally if SMP is found to exist, impose the appropriate regulatory obligations.

Instead, Supplementary Consultation 12/63, ALTO strongly suggests that ComReg is keen to offer immediate regulatory relief to eircom quite possibly to enable the SMP operator to target a particular competitor, and make trading conditions almost impossible for exiting competitors, while also attempting to somewhat protect access takers on the incumbent's network. In doing so, ComReg is seemingly prepared to deviate from proper procedures enshrined in both EU and Irish law.

ALTO considers that this matter possibly should be brought to the attention of the European Commission, DG Digital Agenda as a matter of priority, although as this is a consultation, we expect ComReg to receive our comments in the positive fashion in which they are made.

Response to Consultation Questions:

Q. 1. Do you agree with the definition of the LEA (i.e. Category 1 exchanges) as set out in paragraph 58? Please provide a detailed response with supporting data where appropriate to support your view.

A. 1. ALTO makes the following comments:

Due Process

As a matter of regulatory process ALTO considers this consultation as in effect mandating sub-national markets without using the market review process (See above comments). The categories clearly define competition within a specific sub national areas and the proposal varies regulation depending on the geographic location. ALTO considers a change of this magnitude requires a full market review to change the market definitions.

Comments on the Definition of the Local Exchange Access – LEA

ALTO considers that eircom should be included in any definition of the LEA. Extract 1 has been provided for reference.

Without prejudice to ALTO's position on due process, the ComReg proposal for defining the LEA has too a low threshold. There is no proposal for the market shares of new entrant operators or the LLU/VUA provider at the retail level and this is critical to determining the level of competition. As ComReg state LLU has not grown as expected and its market share is still only 7% of the eircom XDSL according to figure 2 of the consultation.

ALTO considers that a substantial threshold much be achieved before an area is deemed an LEA. The presence of LLU must be for market five products and not terminating segments of leased lines.

ALTO considers that every exchange should be individually considered and don't agree that Islands should be included in the LEA definition by default. Our view is that Islands should stimulate their own investment otherwise eircom will be able to offer more competitive current generation services against existing resellers where the cable operator is not present or LLU is not established. We therefore consider this proposal is discriminatory against bitstream resellers and is thus unfair. This will entrench eircom market share in these areas making it harder for others to invest in those locations.

Our point on Islands above is supported in that the additional information provided by ComReg on Exchanges originally had Dublin as a single LEA with no consideration of the exchanges included.

Extract 1 – ComReg (Figure 6 of the consultation) definition of an LEA

LEA means Category 1 exchanges
Category 1 exchanges means:
1. Where UPC is providing telecommunications services at the retail level in that exchange area and at least one other operator is providing telecommunications services from that exchange at the retail level using LLU[1]/VUA (either directly or through the provision of a wholesale service from an LLU/VUA operator); or
2. Where an exchange is surrounded by exchange areas which meet criteria 1, 3 or 4; or
3. Where UPC is providing retail telecommunications services in that exchange area and there are more than 4,000 lines in that exchange and where the exchange area is directly beside exchange(s) which meet criterion 1; or
4. Where UPC is not providing telecommunications services at the retail level in that exchange area, but where at least two operators at the retail level are either using LLU/VUA, or purchasing LLU/VUA from an LLU/VUA operator in that exchange, in either case with a combined substantial retail presence[2],and where the exchange is directly beside exchange(s) which meet criterion 1.

1 For each of the four criteria, LLU includes either Line Share or GLUMP.
2 Indicatively for these purposes, this could be a combined share of at least 30-40% of the retail fixed telecommunications revenues in each such exchange, or group of exchanges.

Q. 2 With reference to Annex: 2, ComReg would be interested in interested parties' views.

A. 2. ALTO provide the following views:

ALTO remarks that Figure 1 of the consultation portrays the category 1 area as a small box, however in reality it is likely to be address over 80% of the population and Annex 2 of the consultation confirms this view as virtually all the major urban/cities are to be the subject of the proposed deregulation. Hence in reality Category 1 is practically most of the population.

Without prejudice to ALTO's position that due process has not been followed ALTO considers that the test for defining in category one need significant improvement, e.g., LLU and UPC coverage on a national basis is extremely modest when compared and contrasted with eircom, hence is this how is eircom being released from pricing regulation, and should this be permitted over such a wide area?

It is ALTO's view each specific location must be analysed to a strict set of criteria based on actual market shares and not simply on the presence of a type of provider, e.g., LLU is negligible in most locations and given UPC's national market share is only 35% of eircom's XDSL market share, eircom is clearly the dominant in almost all areas, so why are most areas included.

ALTO considers presence of UPC and or LLU based services in a location is not sufficient and market shares must also be factored into the test to define a category one location. If a test had to be conducted it should be related to the impact on the market and not a specific technology, hence we suggests this should be in the order of:

1. >20% for UPC;
2. >20% for eircom; and
3. >30% for LLU services.

With respect to the list of exchanges provided upon request, ALTO has serious questions and concerns as to the quality of the list as exchanges such as e.g., Ballymoneen and Curragheen Road which do not appear to exist, and ALTO queries whether many of the Dublin exchanges are actually in Dublin or County Dublin, etc.

ALTO members are also aware of other areas of low population close to the sea, with low populations are included for no viable reason. ALTO considers that the exchange list in its current form, is of poor quality and unusable to make an informed comment.

Q. 3 Do you agree with the inclusion of "island" exchanges in the definition of Category 1 exchanges to be appropriate? Please provide sufficient reasoning to justify your views.

A. 3. ALTO does not agree with the inclusion of "island" exchanges in the definition of Category 1 exchanges for the reasons highlighted in our answer to question 1, above.

Revision of the current net revenue test

Q. 4 Do you agree with the proposed use of a weighted average wholesale input in the net revenue test in Category 1 exchanges?

A. 4. ALTO agrees with the proposed use of a weighted average wholesale input in the net revenue test provided that:

1. The computed weighted average wholesale input must never be allowed to replace the actual wholesale price that eircom Retail or the price that eircom downstream services pays to eircom Wholesale or eircom upstream services.

2. We consider some aspects of the scenarios in clauses 74, 75, 76 and 77 are understated and should be amended.

Q. 5. Do you agree with the weighted average wholesale input calculation to take account of OAOs use of VUA as a wholesale service / product in Category 1 exchanges? Please provide adequate reasoning to support your views.

A. 5. ALTO agrees that the weighted average wholesale input calculation should take account of VUA. However, as VUA is actually bitstream plus local we do not understand why bitstream plus is not included in the test.

It is ALTO's view that bitstream plus must also be included otherwise the test is disproportionate against bitstream plus local, LLU, etc.

Q. 6. Do you agree with ComReg's proposal with respect to Category 1 exchanges — where changing market shares would normally require an increase in the bundles wholesale input? If you disagree, please provide sufficient detail to justify your views.

A. 6. It is ALTO's view that eircom should have equal exposure to market conditions and should be exposed to the risk of more regulation in the event of declining competition. This is an obvious and fundamental principle of regulation and should not be curtailed.

ALTO considers that ComReg should at least build a safety clause into the model to address the case where the computed weighted average wholesale cost rises, e.g., two to three consecutive rises should lead to corrective action.

Q. 7. What indicators in the retail market do you think should trigger a

reassessment of the revised net revenue test?

A. 7. It is ALTO's view that the retail market should be carefully regulated to insure that it remains vibrant, with at least three sizable players each having market shares somewhere in the 30 to 40%. Only at this point the revised net revenue test should be reviewed.

Q. 8. Do you agree with how the wholesale input usage of OAOs in Category 1 exchanges is calculated? If you disagree, please provide sufficient detail to justify your views and provide an alternative mechanism by which this could be calculated.

A. 8. ALTO makes no comment on this question. Please refer to preliminary remarks in order to assimilate our position in relation to this question.

Draft Directions

Q. 9 Do you believe the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and price with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A. 9. ALTO does not believe the market is at a stage where the proposed ComReg direction can be progressed in its current form, this is owing to the fact that due process has not been properly followed in order to create sub-national markets.

Without prejudice to the generality of this view, ALTO also considers that were such to be the case, a lot more work is required to define the relevant criteria, for example, by just saying that the mere presence of eircom, UPC and another LLU based service is far too simplistic, and any directions would have to subject to a thorough and rigorous set of tests based on actual and substantial market shares.

ALTO

29th August 2012

2: BT Communications Ireland Ltd

BT communications Ireland Limited ("BT") Response to ComReg's Supplementary Consultation

Price Regulation of Bundles Offers

Issue 1 - 29th August 2012

1.0 Introduction and Summary

General

1. This has proved to be a difficult consultation in an environment where indicative wholesale information about Eircom's Next Generation Access (NGA) pricing and its framework is currently being made available to industry. Whilst we welcome the indicative information we are receiving, it is difficult to understand the full implications and provide an informed view until the NGA pricing has been formally approved by ComReg.

2. The consultation appears to be based on a view that while Eircom Retail and Eircom Wholesale are competing effectively against bitstream and LLU operators, they are losing market share to the UPC triple play bundle in the geographies where it is available.

3. In summary our understanding is this consultation proposes increased pricing freedom to Eircom Retail in geographic locations where the cable operator UPC and operators providing retail services that use LLU are present. We understand the changes apply to both the current and next generation environments.

4. We understand the current market share for LLU based services is less than 60k lines, cable operator UPC has circa 275k lines, and Eircom bitstream DSL accounts for circa 726k lines. In our view this puts into perspective our concerns surrounding this initiative which we believe is solely aimed at benefiting Eircom Retail.

5. For the reader and for context we understand the Weighted Average Wholesale Input (WAWI) approach effectively influences the lowest price Eircom Retail can price their bundled retail solutions. The value of the WAWI is derived from the

volumes of Eircom Wholesale products other operators purchase and the prices they pay for these inputs. Our understanding is Eircom Retail is not required to buy the same inputs as other providers so can continue to purchase traditional WLR voice services.

6. For the reader and for context we believe this means that as other operators invest in VoIP and climb the ladder of investment the WAWI appears to pass the benefit gained to Eircom Retail in the form of lowering their retail bundles price floor. This appears to us to create an environment where Eircom Retail would not have to innovate or invest to gain the benefit of others investments. We consider this significantly undermines the incentive for others to invest in innovation and infrastructure in Ireland.

7. In summing up our response, we consider:

    a. The existing regulatory remedy provides the correct incentives i.e. it keeps wholesale equivalence and rewards innovation and investment. We believe this proposal undermines infrastructure investments including LLU, wireless, cable, SLU and VoIP.
    b. We believe that this ComReg proposal is flawed through insufficient analysis as discussed in 'Creating Sub National Markets' below and a full market review should have been conducted. There is insufficient evidence in the ComReg proposal that product features have been considered and thus we are concerned ComReg has proposed what is a pricing remedy for an issue that is not proven to be related to pricing. We strongly believe a full market review is required to address what appear to be supply issues. I.e. bundles with TV vs. other bundles without TV as such could lead to a different outcome.
    c. This ComReg proposal comes at a time when the industry is still being informed of the future pricing framework for NGA. We consider it would be fairer if all parties were to be aware of the final and approved NGA prices at this time. The extensions granted by ComReg for various good reasons have genuinely helped us become more informed; however until the final NGA pricing is available we cannot be cognisant of the full implications on this ComReg proposal.

In conclusion we consider the uncertainty around NGA pricing makes it difficult to provide an informed view concerning NGA bundles, and we are concerned the proposals appears to undermine the incentive for infrastructure competition in Ireland.

Creating Sub National Markets

8. We consider ComReg has not provided sufficient supporting information to demonstrate and support the establishment of sub-national markets which is what we believe this consultation is attempting to create. We believe that ComReg have provided little actual evidence of the competitiveness problems in certain geographic locations and no analysis as to whether the perceived

problems are result of pricing or product features. There is no analysis of whether this is a supply (investment in non-TV bundles vs. TV bundles) or a demand issue and such analysis could have led to different regulatory remedies. Indeed a new entrant to the market may provide the information sought.

9. ComReg's quarterly data demonstrates that Eircom Retail is competing effectively against other resellers of Eircom network services (i.e. DSL and WLR). The slight decline of LLU share is evidence of this.

10. In short, as proven here and in other European markets, consumers will pay a modest premium for higher speed broadband, but will opt for TV/BB/Voice bundles in far greater numbers than other triple-plays - mobile/bb/voice or electricity/bb/voice etc.

11. ✂

12. ✂

13. What all DSL retail providers need is a reduction in the wholesale input costs, which we believe are being kept artificially high by the retail-minus wholesale pricing regime. This point is clearly outside the scope of this bundling review, and BT proposes to address it independently.

14. There is no evidence that the price squeeze test is a sensible or effective response to the competitive threats faced by Eircom, rather there is a clear danger that it will simply give Eircom Retail a clear advantage when competing with customers of Eircom Wholesale.

Equivalence

15. We consider this proposal undermines the principle where all parties should be treated equivalently when purchasing Eircom Wholesale services and the sole beneficiary of the proposals in this consultation appears to be Eircom Retail. We consider the primary platform that will suffer is LLU which has barely had time to get off the ground following a difficult history in Ireland as seen by numerous ComReg Decisions. We would suggest ComReg should consider the situation in the UK, (arguably the most competitive telecoms market in Europe) where NGA, LLU and cable can all co-exist and compete to collectively grow the market.

16. As an operator that purchases services from Eircom Wholesale we provide an alternative source of products that can be used to compete against Eircom Retail and others. The current regulatory environment provides an incentive for the Eircom Group to reduce its wholesale and access prices where it is seeking to support its own Eircom Retail downstream business and these reductions are also offered to others using the Eircom network. However, this consultation proposes to break this relationship which puts other operators using Eircom's wholesale network at risk of a price/margin squeeze. We consider the existing regulation works as it creates the correct incentives for wholesale equivalence –

i.e. If Eircom Retail need lower wholesale input costs then Eircom Wholesale should lower its prices for all of its customers either by price reductions or by investing in cost efficient solutions (such as VoIP).

17. ✂

Weighted Average Wholesale Input (WAWI)

18. Without prejudice to our views on sub-national markets, a key aspect to this consultation is that the WAWI approach only impacts the competitiveness of operators using the Eircom network. Therefore it is imperative and proportionate that the presence of LLU services is given the most significant weighting in the test, otherwise we believe growing UPC activity will allow Eircom Retail the potential to squeeze LLU services out of existence. (LLU accounts for only 7% of Eircom DSL connections as highlighted in Fig 2 of the consultation).We note this percentage is currently decreasing and we believe the ComReg proposal acts as further disincentive for its use.

Transparency

19. Without prejudice to our views on sub-national markets, we consider a fundamental aspect of the WAWI is transparency. A decision by the Regulator to improve the competitiveness of any specific player in the market, and in particular one with the largest market share or a large market share, is a major decision and the market must be fully informed of the rationale with supporting evidence to justify such a decision for every location. We consider this consultation only addresses principles and not the detail as market share information (for locations) is not visible. We note ComReg publish national market share information in their quarterly reports hence the principle of publishing market information is established.

20. **New notifications -** As ComReg propose to bring about sub-national markets through this consultation, the above transparency must apply individually to each location. The notification for each new location should be consulted in its own right to understand whether there are other factors to be considered, and then the decision should be notified to the whole industry, well in advance, so that other competitors can consider and potentially alter their competitive position.

21. **On-going changes to the WAWI value -** On the basis of fairness, non-discrimination and proportionality, whatever benefit is notified to one player should also be notified to the rest of industry. Hence, any update of the WAWI value in an existing LEA area, for example a 5% lowering of the price floor should be notified to all with at least six month notice to allow time for the others to adjust the their propositions.

2.0 BT Response to ComReg's Detailed Questions

Analysis of Larger Exchange Areas

Q. 1 Do you agree with the definition of the LEA (i.e. Category 1 exchanges) as set out in paragraph 58? Please provide a detailed response with supporting data where appropriate to support your view.

A.1

22. We would like to make the following comments:

No Basis for Determining Sub-National Markets

23. Changing a market definition from a national market to a sub-national market is a significant regulatory step and such should follow the European Commission Market Review procedures[1]. We note ComReg's position that they are merely defining areas for a specific regulatory net revenue test, however the consequence of this change is tantamount to the establishment of sub-national markets and due process should thus be followed. Although figure 1 of the consultation implies the category 1 area is small (a small box is depicted), it fails to highlight these exchanges cover the majority of the population. Hence the proposed change is a significant market change.

24. Digital divide and Government policy – We believe that ComReg's proposal is detrimental for Irish rural communities, not only will they have slower broadband services, this proposal will creates the situation where it is highly likely rural communities will also pay higher prices relative to urban areas for the lessor service. ComReg has a policy objective to 'promote the interest of users within the Community[2]; however we believe that for the rural areas this proposal will not do that. We consider the Government should be consulted in this matter as it may impact their broadband plans.

25. We consider that rather than encourage Eircom to deploy NGA where it has already been deployed with private investment, we believe ComReg should encourage NGA in areas where NGA is not present such as non-UPC areas. This would be a better application of ComReg's policy objective to promote the interest of users within the community.

1 European Commission Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services

2 2002 Communications Act clause 12

Establishing Thresholds and a more robust test before determining an area as Category 1.

26. Without prejudice to our views that a full market review should be commenced to redefine the market, we consider the current ComReg proposal for classing an area as Category 1 as too simplistic. For example if an LLU based provider has 1% of the sub-national market and the cable operator 10%, with Eircom having a 50% plus market share, then it appears to us Eircom continue to have a level of dominance and should be regulated as such. We therefore consider a substantial threshold should be set before an area is defined as category one rather than trying to regulate via a confidential WAWI model. We consider each of the three parties in the ComReg proposal (UPC, Eircom and LLU sourced services providers) should each achieve at least 20% market share (in that location) before areas could be defined at category 1 to allow competition to reach critical mass. Otherwise we believe that the initiative risks allowing Eircom to entrench its dominance in current generation areas and potentially provides the ability for it to leverage its current generation dominance in into next generation services.

27. ComReg has demonstrated that it can collect regional data and we know ComReg has the expertise to gather market information; hence it is reasonable to expect ComReg should now conduct a thorough review of the market shares for each area before making any decision about whether or not an area should be defined category 1. As we have said earlier, we consider that if ComReg were to review the market in more depth it's likely to find that the impact of features offered is at least as important as pricing and a different remedy or no change may be more appropriate.

Next Generation Access - ✂

28. ✂

Conclusion

29. In conclusion, we consider a full market review should be conducted to establish the LEAs, however without prejudice to that view, we consider ComReg should set appropriate market share thresholds (20% each in that location) before triggering a specific LEA to both allow critical mass to be established and before the WAWI commences. Additionally, the term VUA is not appropriate to the test as this is merely another form of bitstream and we see SLU as the appropriate category to replace VUA in the proposal.

Q. 2 With reference to Annex: 2, ComReg would be interested in interested parties' views.

A.2

30. We would like to make the following comments:

31. Figure 1 of the consultation portrays the category 1 area as a small box, however in reality it is likely to be address over 80% of the population and Annex 2 of the consultation confirms this view as virtually all the major urban/cities are to be the subject of the proposed deregulation. Hence in reality the proposed Category 1 LEAs cover most of the population.

32. Without prejudice to our position that a full market review should be conducted we consider the test for defining category 1 needs improvement. It is our view each specific location must be analysed to a strict set of criteria based on actual market shares and not simply on the presence of a type of provider. For example LLU has a low market share in most locations and given UPCs national market share is modest Eircom is clearly strong in most areas. I.e. we don’t believe the majority of the exchanges should be included.

33. Therefore we consider the simple presence of UPC and or LLU based services in a location is not sufficient to define and LEA and market shares must also be factored into the test to define a category 1 LEA. If a test had to be conducted it should be related to the impact on the market hence we suggests this should be in the order of >20% for UPC and >20% for Eircom and >20% for LLU based services.

34. With respect to the list of exchanges provided on request we have a number of queries regarding the information provided as we cannot locate exchanges referenced as Ballymoneen and Curragheen Rd, while furthermore it is unclear whether references are to Dublin exchanges in Dublin or County Dublin. We consider the list is of poor quality and unusable to make an informed comment.

35. BT is does not trade in the retail consumer market hence we have limited intelligence of retail consumer activity and for BT to offer an informed view we consider the following is required:

   a. Number of people served by the exchange – is this an LEA.
   b. Number of operators present in the exchange area using Eircom bitstream services – including Eircom. – More accurate measure of benefit to Eircom.
   c. Is UPC present with a market share > 20%
   d. Is the %of LLU based lines >20% of the market?

Q. 3 Do you agree with the inclusion of “island” exchanges in the definition of Category 1 exchanges to be appropriate? Please provide sufficient reasoning to justify your views.

A.3

36. Our concern is that the approach to Island exchanges should be consistent and we are not totally clear at this time whether ✂ for NGA areas will apply to Island exchanges. Our view is that if the ✂ apply to Island exchanges then we will support the Island exchanges proposal. However, if the ✂ do not apply to Island

exchanges we consider the inconsistence between the current generation and next generation approach will be confusing to the customer, disruptive to the market and we oppose the proposal on these grounds.

Q. 4 Do you agree with the proposed use of a weighted average wholesale input in the net revenue test in Category 1 exchanges?

A.4.

37. We would like to make the following comments:

Problems with the Weighted Average Wholesale approach

38. As highlighted in the introduction our understanding of the Weighted Average approach is that the market shares of the other operators seen through the volumes of the products purchased effectively set the WAWI to Eircom Retail.

39. We note the computed WAWI is not the same as the actual wholesale input price that Eircom Retail will pay for their services.

40. Our understanding of the widely used ladder of investment model is that as operators climb the ladder of investment they purchase less of the incumbent's services, increasingly using their own platform to compete. We are therefore concerned ComReg appear to be proposing to pass the benefits gained by other operators climbing the ladder of investment directly to Eircom Retail through the use of the WAWI.

41. It therefore appears to us that for no investment by Eircom in new technologies or even a simple reduction of its Wholesale prices, the WAWI model allows Eircom Retail to reduce its price floors which could squeeze out any margin others gain by investing.

42. For example, a key reason for moving to full unbundled services is to deploy new and more efficient technologies such as VoIP and to establish a modest margin against Eircom's WLR/Bitstream solutions. We believe that the ComReg weighted average proposal could result in passing this benefit to Eircom Retail for no work or investment by Eircom. **We consider Eircom Retail should only get the benefit if they implement new technologies such as VoIP, or genuinely purchase the services on the merchant market, or Eircom Wholesale drops its prices to all.**

43. The WAWI proposal could undermine the investments made by other operators and removes the incentive to climb the ladder of investment using Eircom's Wholesale services.

44. We consider the WAWI proposal does not align with the policy objectives of ComReg and in particular clauses 12(2) (a) (ii) and (iii) highlighted below. We believe that the proposal removes the benefit of innovation and investment and

could distort competition of those operators purchasing Eircom wholesale services to support Retail solutions.

Extract Ref 2002 Communications Act clause 12 [Highlighting added by BT]
12.—(1) The objectives of the Commission in exercising its functions shall be as follows—
(*a*) in relation to the provision of electronic communications networks, electronic communications services and associated facilities—
(i) to promote competition,
(ii) to contribute to the development of the internal market,
And …

And then at Ref 2002 Communications Act clause 12(2)(a)(ii)and(iii)
...
(ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector,
(iii) encouraging efficient investment in infrastructure and promoting innovation, and ...

End of extract

45. We believe ComReg has missed a scenario and should additionally include SB-WLR and Line Share. Please see Annex A for our comments on the pricing scenarios.

Conclusion

46. We disagree with the Weighted Average Wholesale Input approach as we believe that it could pass the investment gains of other operators directly to Eircom Retail who appears to receive the same benefit for no innovation or investment. We consider this proposal contrary to the aims of the European Commission and ComReg's policy objectives as it undermines investment and innovation particularly using LLU for infrastructure competition.

Q. 5 Do you agree with the weighted average wholesale input calculation to take account of OAOs use of VUA as a wholesale service / product in Category 1 exchanges? Please provide adequate reasoning to support your views.

A.5.
47. ✂

48. ✂

49. ✂

50. ✂

Q. 6 Do you agree with ComReg's proposal with respect to Category 1 exchanges — where changing market shares would normally require an increase in the bundles wholesale input? If you disagree, please provide sufficient detail to

justify your views.

A.6.

51. The market is at a major evolution point with the introduction of NGA solutions and the prudent approach would be for ComReg to keep its options open to market conditions during this time of change. Taking a pragmatic approach we consider ComReg should at least build a safety clause into the model to address the case where the computed weighted average wholesale cost rises. For example two or three consecutive rises should lead to corrective action.

Q. 7 What indicators in the retail market do you think should trigger a reassessment of the revised net revenue test?

A.7

Our view is a full market review should be conducted now as the issues being addressed are complex and we consider the proposed solution will further damage the prospects for LLU. Our concern is that the consultation appears stacked against LLU as the moment its starts to develop a meaningful presence (currently 7% of Eircom DSL and reducing) the WAWI test will allow it to be squeezed. The test ComReg should be looking at is what is currently preventing the growth of LLU.

Q. 8 Do you agree with how the wholesale input usage of OAOs in Category 1 exchanges is calculated? If you disagree, please provide sufficient detail to justify your views and provide an alternative mechanism by which this could be calculated.

A.8.

52. ✂

Draft Directions

Q. 9 Do you believe the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and price with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A.9

53. We do not believe we are a stage where the proposed direction can be progressed for the following reasons:
    a. The consequences of the ComReg's proposed change to the Net Revenue Test is the establishment of Sub-National markets and this is such a significant change to the definition of the market that a market review should be conducted.
    b. Without prejudice to this view we consider the Weighted Average Approach is flawed as it appears to reward Eircom Retail for investment and innovation of other parties climbing the ladder of investment.

Comments to other 11/72 responses

54. ComReg state part of the aim of this consultation is to allow providers to cross review the responses of other operators. A couple of common themes emerge from the various parties other than Eircom as follows:

55. exPost Regulation – we note from our cross review of the Eircom submission to 11/72 their preference for exPost regulation and for ComReg to reduce its focus on detail. We agree with ComReg's approach in this situation to propose exAnte regulation as there appears to be both motive and the capability for a squeeze situation to occur. Previous history suggests the need for preventative action.

56. On the issue of detail, we welcome the current detailed approach on a product by product approach as simple maths can highlight the basket margin squeeze tests can be manipulated to provide a pass even when key individual products are non-compliant.

Annex A – Financial Scenarios

ComReg Pricing Scenario 1

SB-WLR and BMB
Input Blend
100% SB-WLR € 18.02
80% 8Mb BMB (€4.90+0.03*100kbps)= *€ 7.90* € 6.32
20% 24Mb BMB (€5.90+0.03*150kbps)= *€ 10.40* € 2.08
Connection and disconnection € 0.83
Total possible SB-WLR and BMB wholesale input € 27.25

ComReg Pricing Scenario 2

SB-WLR and LS+
Input Blend
SB-WLR - per Eircom RIO € 18.02
Fault Repair € 0.37
Line Share-per Eircom ARO € 0.77
Port cost per user (per minimum price floors model) *€ 4.55* € 4.55
Backhaul costs (per minimum price floors model)
Fixed cost per user *€ 1.33* € 1.33
Variable (cost per Mbps), say 100kbps usage *€ 8.14* € 0.81
Connection and disconnection € 0.83 **********The Eircom LS connection charge is twice that of SB-WLR and BMB hence this is too low.******
Total possible SB-WLR and LS+ wholesale input € 26.68

ComReg Pricing Scenario 3

LLU+
Input Blend
ULMP € 12.41
ULMP Fault Repair € 1.20
Line card included in DSLAM € -
ULMP connection and disconnection charges € 0.83
Port cost per user (per minimum price floors model) *€ 4.55* € 4.55
Backhaul costs (per minimum price floors model)
Fixed cost per user *€ 1.33* € 1.33
Variable (cost per Mbps), say 100kbps usage *€ 8.14* € 0.81
Total possible LLU+ wholesale input € 21.13

Applying the weightings and blending the mix.

LEA Category 1 areas
Input Blend
45% SB-WLR and BMB *€ 27.25* € 12.26
43% SB-WLR and LS+ *€ 26.68* € 11.47
12% LLU+ *€ 21.13* € 2.54
Wholesale input cost for Category 1 areas € 26.27

If you have enquires concerning this consultation please contact john.odwyer@bt.com.

3: Eircom Group

eircom Ltd.

Response on behalf of eircom Ltd to ComReg Consultation 12/63:

Price Regulation of Bundled Offers

29 August 2012

DOCUMENT CONTROL

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INTRODUCTION AND EXECUTIVE SUMMARY

This response to ComReg's supplementary consultation, Doc. No. 12/63, forms part of eircom's previous bundling submission responding to consultation Doc. No. 11/72, and should be read in conjunction with it. Many of the issues regarding the treatment of NGA services sold in bundles are common to all bundles, and so this document should also be read in conjunction with eircom's response to Doc. No. 12/27. We do not repeat in this document all of the relevant discussions contained in our previous submissions on this important subject.

eircom is disappointed in the proposal that has evolved over the course of these consultations, which supposedly offers more flexible price regulation for eircom's bundles in competitive areas. The proposal now appears to be so complex that it is likely to be unworkable, in terms of both the LEA definition and the price control formula (the modified "net revenue test") that would apply in the defined area. If implemented as proposed, this scheme would impose a substantial cost burden on both eircom and ComReg in terms of administration and compliance.

The complexity of the proposed regime will not benefit any of the relevant stakeholders, least of all eircom. As recently observed by the head of the Austrian regulator, RTR, and current Chair of BEREC: "[T]oday, regulation often seems to focus too much on details ("regulatory micro-management"), for example, on ensuring consistency between access products in the value chain, on how costs should be calculated, etc. This creates insecurity and high regulatory costs because of high complexity. Rather, regulatory policy should develop further sound fundamentals of intermodal competition..."[1]

ComReg does not appear to have considered the perverse incentives and arbitrage opportunities that are likely to be generated by its proposal. In particular, how will the LEA definition, coupled with the mechanics of the proposed net revenue test as applied in that area, affect eircom's and UPC's commercial decisions whether to invest in fibre outside the "Category 1" exchanges as defined by ComReg? How will it affect OAO commercial strategies in and outside the Category 1 exchanges? For example, given the proposed weighting formula for the price of wholesale inputs, the

[1] Georg Serentschy, "Regulation 2.0" (July 2012): http://www.rtr.at/en/komp/Regulation_2_0
.

OAOs' assessment may well be that it is more profitable to deter their customers from migrating to NGA-based services because of the impact VUA take-up would have on the regulatory outcome (i.e., greater pricing flexibility for eircom). How is that outcome compatible with the objectives of the EU Digital Economy targets or the New National Broadband Plan?

Another unintended consequence could be to freeze in place the initial borders of the "Larger Exchange Area" ("LEA") (defined by ComReg as being limited to the Category 1 areas) where ComReg proposes to allow eircom a greater level of pricing flexibility for retail bundled services. In defining this limited, narrow area, ComReg appears to have been guided by the approach followed by other NRAs, such as the Austrian and British regulators, when considering the appropriate remedies to impose in certain geographic submarkets. It should be clear, however, that what ComReg is proposing to do is not comparable to those decisions, which *removed wholesale price controls* in designated geographic submarkets.

In contrast, ComReg is *not* proposing to remove *ex ante* regulation of the pricing of eircom's bundles. It is merely proposing to relax some of the more draconian aspects of its preferred price control formula for bundles (an exceedingly strict approach that is unique to Ireland). This, ComReg proposed to do by acknowledging the likely wholesale costs faced by OAOs that use eircom's network so that the price floor for eircom's retail bundles (below which such bundles are not considered to be replicable) is not set too high, thus impeding eircom's ability to compete with other platforms providers. This is an important proposal but one that is nonetheless limited in its application to retail markets and leaves in place a significant price control mechanism.

ComReg should not set the LEA boundaries conservatively, as if it were proposing to remove the price control entirely in a geographic sub-market comprising the LEA. This clearly not the case here, and there is accordingly no reason for ComReg to define the LEA in an overly restrictive manner. Rather, ComReg should define the LEA in a manner that will ensure the highest level of retail competition in Ireland, for the benefit of consumers. This means enabling eircom to compete fairly with any other infrastructure-based competitor by defining the LEA boundaries to cover areas where there is competition from at least one such infrastructure or platform competitor – that is, UPC, another platform competitor or an LLU unbundler.

In the context of NGA, this means that the rules for the pricing of NGA-based bundles should enable eircom to compete with UPC and other infrastructure and platform competitors wherever they operate in Ireland and where OAOs have the ability to compete using VUA and associated backhaul facilities that have been deployed by eircom.

Additionally, so-called "island exchanges" incorporated within this area and a de minimis number of "affinity" exchange areas adjacent to the core LEA as defined below should be included if there are strong social linkages and commercial ties between these adjacent areas and the neighbouring LEA exchange(s).

In summary, in eircom's view, the LEA should comprise:

1. All exchange areas where UPC or any other cable/broadband operator is present;

2. Areas where UPC or any other cable/broadband operator is not present, but where there is at least one LLU unbundler and or FWA provider offering service to two or more retail service providers[2] (including their own downstream operations);

3. As NGA is deployed, any other exchange where VUA is commercially available and NGA-based retail services have been launched; and

4. Island exchanges within the areas covered by 1, 2 & 3.

<u>*ADDITIONALLY AND EXCEPTIONALLY*</u>: A limited number of areas that are adjacent to exchanges within the core LEA (1-4 above) which, on a case by case basis, are determined to have a social or trading affinity with a core LEA city or town based on recognised boundaries established by local authorities.

ComReg should apply a revised and more flexible net revenue test ("NRT") in a way that allows eircom to price its bundles competitively in all areas where there is significant actual <u>*or potential*</u> competition. This is fully consistent with ComReg's stated goal in defining the LEA concept: "A LEA was intended to reflect *those areas which prospectively* are more likely to permit a greater degree of competition." (11/72 Supplemental Doc., p. 6 (emphasis added)). In doing so, ComReg's key objective should be greater consumer welfare. The best way to achieve this is to give eircom (and its wholesale customers) the ability to decrease prices to respond to aggressive platform competition from UPC in the provision of bundles. If the pricing flexibility

[2] This is particularly important of the recent announcement of market entry by Sky utilising BT supplied wholesale services as discussed later in this response.

solution adopted by ComReg merely serves to undermine the ability of eircom to compete with UPC, the result will be anti-competitive, anti-consumer, and anti-investment in NGA.

Moreover, the combined effect of a restrictive LEA definition and the functioning of the triggers contained in the proposed NRT should be re-examined. ComReg's proposal should be revised to ensure that it minimises the opportunity to game the system in a way that would prevent eircom from competing fully and fairly in the provision of NGA-based bundles at the retail level, and to remove any inherent disincentives to invest in NGA outside a narrowly defined urban area.

In relation to the calculation of the WAWNI, eircom does not agree with the proposals set out in the consultation document. eircom believe that the WAWNI must promote the interests of fair competition and produce tangible consumer benefits. This can be achieved if ComReg sets a target wholesale mix that is based upon efficient usage of eircom's wholesale products, and defines a glide-path from the current mix of products to the target mix. This transition should be achieved over a reasonable period of 12 months from the first introduction of the WAWNI.

In summary, eircom is disappointed with the extent of ComReg's proposed revisions to the NRT. If adopted as proposed, the revised test will not achieve the intended objective of allowing for fair competition in more competitive areas. ComReg's proposed modifications to the NRT formula fall far short of enabling eircom to compete effectively in these areas, where it faces significant competition at both the wholesale and retail levels. Greater pricing flexibility for eircom is vital in this complex, competitive and dynamic market.

Responses to Consultation Questions

Q.1 **Do you agree with the definition of the LEA (i.e. Category 1 exchanges) as set out in paragraph 58? Please provide a detailed response with supporting data where appropriate to support your view**.

ComReg set out the following definition of the "Larger Exchange Area" ("LEA")[3] *as follows (Figure 6, p. 26):*

> **LEA** means Category 1 exchanges
>
> **Category 1 exchanges** means:
> 1. Where UPC is providing telecommunications services at the retail level in that exchange area and at least one other operator is providing telecommunications services from that exchange at the retail level using LLU[1]/VUA (either directly or through the provision of a wholesale service from an LLU/VUA operator); or
> 2. Where an exchange is surrounded by exchange areas which meet criteria 1, 3 or 4; or
> 3. Where UPC is providing retail telecommunications services in that exchange area and there are more than 4,000 lines in that exchange and where the exchange area is directly beside exchange(s) which meet criterion 1; or
> 4. Where UPC is not providing telecommunications services at the retail level in that exchange area, but where at least two operators at the retail level are either using LLU/VUA, or purchasing LLU/VUA from an LLU/VUA operator in that exchange, in either case with a combined substantial retail presence[2],and where the exchange is directly beside exchange(s) which meet criterion 1.
>
> 1 For each of the four criteria, LLU includes either Line Share or GLUMP.
> 2 Indicatively for these purposes, this could be a combined share of at least 30-40% of the retail fixed telecommunications revenues in each such exchange, or group of exchanges.

In this supplemental consultation, ComReg is proposing to limit the LEA to what it defines as "Category 1" exchanges. We consider that this proposed definition of the LEA is unjustifiably restrictive and fails to cover many exchange areas that "prospectively are more likely to permit a greater degree of competition"[4].

We welcome the fact that ComReg acknowledges that certain competitors, such as UPC, act as a substantial retail constraint on eircom, and that this is a central factor in ComReg's proposal to develop greater pricing flexibility for eircom in both Doc. No. 12/27 (the NGA Consultation) and 12/63. We believe, however, that the LEA

[3] eircom would recommend that a more suitable name be used to describe the area in which a more flexible price control will be applied. The focus should not be on an arbitrary exchange size but rather on areas where eircom faces actual or potential competition. A proposed alternative: Evolving Competition Areas.
[4] 11/72 Supplemental Doc., p. 6.

definition proposed by ComReg fails to take full account of the strength of the constraints imposed by UPC, BT and others competitors. We are also concerned that the proposed LEA definition will result in a scheme that is confusing to consumers as well as being difficult and costly to administer for both eircom and ComReg.

As a threshold matter, it is important to note that ComReg is merely proposing to amend some aspects of the NRT in the defined area – it is not proposing to remove the *ex ante* price regulation of bundles in any geographic areas. It is therefore not necessary or appropriate for ComReg to adopt a definition of the core LEA that is strictly circumscribed, as if the pricing proposal were to forebear from applying an *ex ante* NRT. The key features of eircom's proposed alternative LEA definition are discussed below.

Inclusion of areas where UPC or two LLU-based retailers compete with eircom

eircom strongly recommends that ComReg adopt a more reasonable and proportionate definition that does not insist on the presence of two platform and/or infrastructure competitors but, rather, recognises the strength of the pricing constraints that eircom faces from UPC, BT (and its wholesale customers) and other competitors, whether individually or collectively. The LEA should be defined to include areas where either UPC is operating *or* two or more LLU-based service providers are offering services to retail customers. In this context, it would be disproportionate to limit the LEA to those exchange areas where **both** an LLU wholesale provider and UPC are present, or where **two** LLU wholesale providers (as compared to two LLU-based retail providers, both of which may be using the same LLU provider) are offering service.[5]

We are very concerned that the proposed scheme will not be sufficiently supple to take into account, without a considerable lag, major changes in the competitive dynamics as they arise. A fresh example is the deal recently announced by Sky Ireland with BT Ireland. Sky plans to enter the Irish broadband market using BT's LLU platform. According to published reports, Sky intends to "unveil its phone and broadband service later this year" and plans to make the service available to 1.6

[5] One LLU operator could mean retail competition from numerous retail operators, e.g. BT might take LLU from eircom Wholesale, and then resell to BT Retail and Perlico/Sky/Vodafone.

million homes."[6] This means that in most areas where BT uses LLU, there will be at least two major service providers (Sky and Vodafone) offering retail broadband services and bundles using alternative network operator rather than eircom as their wholesale provider.

The Sky-BT transaction represents a seismic shift in the competitive landscape and calls for a fundamental rethink of ComReg's bundling proposal, including in terms of the assumptions. ComReg should consider the competitive impact of this development before finalising its bundling decision to ensure that the impact is fully reflected in defining the core LEA.[7] Because BT is the predominant provider of LLU-based wholesale services in Ireland, any exchange where it is present and there are at least two retail service providers offering LLU-based broadband services to retail customers should be included in the core LEA. ComReg also should consider how any subsequent, major transactions similar to Sky's agreement with BT will be factored into the competitive analysis, the LEA definition and the NRT following implementation of the proposed scheme.[8]

Inclusion of VUA-enabled areas in the LEA

As eircom's NGA network expands, the core LEA definition should encompass all VUA-enabled areas. In the NGA ecosystem, eircom's VUA service will be a more powerful, feature-rich and flexible equivalent of LLU equipped with the existing fit-for-purpose backhaul product. This new service will facilitate broadband competition at both the wholesale and retail levels in an even more cost effective manner than LLU. For example, VUA will offer OAOs greater flexibility than LLU due to reduced upfront costs and shorter OAO build out times. For this reason, where NGA and VUA are deployed at a given exchange, there will be the strong prospect of competitive OAO entry, which will act as a constraint on eircom's pricing in those areas. Confidence that the NGA footprint area was fully within the LEA definition would also allow eircom to be more imaginative and creative in its design of bundles including NGA, fostering NGA adoption and accelerating take-up. Accordingly, all exchanges where VUA is actively

[6] Irish Daily Mail, p. 56 (27 July 2012).
[7] As discussed in our responses to Questions 4 and 5, this development should also be considered in determining many of the proposed inputs to the NRT, such as the proposal to impose SEO costs in circumstances where another operator with superior economies of scale and scope has announced its intention to enter the market).
[8] As discussed below, eircom fully expects that the introduction of VUA, combined with the positive effects of eircom's Wholesale Reforms Programme, will create new opportunities for competition at the wholesale and retail levels, like the Sky-BT deal.

deployed should be included in the core LEA. eircom believes that where VUA is available, the number of lines in a particular exchange is irrelevant. If eircom is able to make the business case to invest in NGA, by definition the exchange will be sufficiently large for OAOs to make commercial use of VUA. The proposed VUA product enables a wholesale operator to purchase either Customer Sited interconnection at each exchange and thus avoid the requirement for co-location at the exchange or to purchase In Building interconnection to existing co-location space. Thus, it is relatively simple process to commence providing VUA services as NGA exchanges are commissioned. The availability of multiple VLANs as a standard feature on each exchange interconnection means that by establishing a single interconnection, an operator can support multiple retailers immediately.

There are important implications for the extent of NGA roll out of not including NGA-enabled exchange areas in the core LEA definition. If ComReg instead restricts the LEA definition as currently proposed, eircom would face the prospect of having to deal with an intermediate area that is not part of the LEA, but is part of the NGA footprint. Despite having the same NGA wholesale prices, this intermediate area would require eircom to market and charge different, higher retail prices than in the LEA. These prices may be higher than those for existing broadband services, making it more difficult to upsell users to NGA and removing the possibility of migration without extra monthly charges. Managing three or more marketing plans for the LEA, intermediate and other areas would be costly for eircom and confusing to customers.

If – as is likely – this fringe of users in these intermediate NGA areas is small, it may be impossible to make a profitable business case work. The net result would be to deter eircom from retailing any NGA services in such areas. This would likely be exacerbated, if all UPC areas are not included in the qualifying areas as eircom's ability to compete with UPC would likely be significantly harmed – further undermining the business case for NGA roll out. This, in in turn, would damage the business case for wholesale services in these areas and artificially limit the NGA wholesale footprint to the highly restrictive "Category 1" area, which could become frozen in time. We see this as a very real danger.

Conversely, if the core LEA definition is expanded to be contiguous with the whole of eircom's NGA footprint and active deployment of VUA, eircom would have a powerful incentive to extend the NGA Footprint as rapidly as possible, which would have clear benefits for consumers and for OAOs.

In summary, the costs to both eircom and ComReg of applying different regulatory rules in a sub-set of the NGA area would far outweigh any benefits to OAOs and end-consumers. Such a scheme would be confusing and extremely burdensome to administer and subject to regulatory manipulation and arbitrage.

eircom's proposed alternative LEA definition

We welcome ComReg's proposal to base the LEA concept on eircom's actual network structure. However, for the reasons discussed above, we believe that the LEA (or Category 1) should be defined by reference to the presence of effective actual or potential competition. In our view, this means that the LEA (or Category 1) should cover the following exchanges:

1. All exchange areas where UPC or any other cable/broadband provider is present;
2. Areas where UPC or any other cable/broadband provider is not present, but where there is at least one LLU unbundler or FWA provider offering service to two or more retail service providers (including their own downstream operations);
3. As NGA is deployed, any other exchange where VUA is commercially available and NGA-based retail services have been launched; and
4. Island exchanges within the areas covered by 1, 2 & 3.

    ADDITIONALLY AND EXCEPTIONALLY: A limited number of areas that are adjacent to exchanges within the core LEA (1-4 above) which, on a case by case basis, are determined to have a social or trading affinity with a core LEA city or town based on recognised boundaries established by local authorities ("Adjacent Affinity Areas").

Adjacent Affinity Areas under eircom's proposal

eircom's proposal to extend pricing flexibility for bundles offered in the Adjacent Affinity Areas is based primarily on marketing and customer relations concerns, and these areas are not expected to cover more than 5 percent of exchange lines in the total area proposed for greater pricing flexibility for bundles. There is, moreover, strong evidence that in areas adjacent or close to where UPC's broadband services are available, a form of "across-the-fence" competition exists. In those adjacent areas, consumers are aware of UPC's offerings and this affects their willingness to spend on telecommunications services. For example, a recent study concluded that ten percent of customers in non-UPC areas of Ireland are aware of UPC's services and prices and regard them as the first choice supplier.[9]

The effectiveness of the UPC (or LLU) pricing constraint on eircom will depend on overall consumer awareness of its prices and offerings, and the attractiveness of these offerings. This constraint will be equally potent in the Adjacent Affinity Areas as it is in the core LEA. Though the number of lines involved is expected to be small, we recognise that the extension of pricing flexibility to these Adjacent Affinity Areas could have some impact on the Wholesale Network Inputs used in the NRT, which eircom believes can be addressed through appropriate adjustments to the relevant inputs.

If these Adjacent Affinity Areas are clearly part of a defined geographic location, then it is quite likely that the price offered by UPC (or an LLU-based operator) will act as a constraint on eircom's pricing in these areas. Conversely, the exclusion of these areas would lead to marketing black-spots and consumer confusion. Examples of where this is likely to happen are suburban areas outside cities and large towns, such as Rush and Skerries in north Dublin. The exclusion of these locations in circumstances where Balbriggan and Swords were included would create severe consumer confusion. This is discussed further in our response to Question 3.

In summary, eircom believes that the alternative proposal outlined above reflects a more reasonable approach to the definition of LEA, given the purpose for defining the area (relaxation, not elimination of price controls). It will also be simpler to administer and raises far fewer issues than ComReg's more complex and inflexible proposal.

Concerns raised by ComReg's proposed LEA definition criteria

We now turn to an examination of the components of ComReg's proposed "Category 1" definition. The four criteria are repeated below for ease of reference, and we note that our comments focus on these criteria – they do not presuppose the adoption of eircom's alternative proposal, outlined above:

1. *Where UPC is providing telecommunications services at the retail level in that exchange area and at least one other operator is providing telecommunications services from that exchange at the retail level using LLU*[10]*/VUA (either directly or through the provision of a wholesale service from an LLU/VUA operator*); *or*
2. *Where an exchange is surrounded by exchange areas which meet criteria 1,3 or 4; or*
3. *Where UPC is providing retail telecommunications services in that exchange area and there are more than 4,000 lines in that exchange and where the exchange area is directly beside exchange(s) which meet criterion 1; or*
4. *Where UPC is not providing telecommunications services at the retail level in that exchange area, but where at least two operators at the retail level are either using LLU/VUA, or purchasing LLU/VUA from an LLU/VUA operator in that exchange, in either case with a combined substantial retail presence*[11]*, and where the exchange is directly beside exchange(s) which meet criterion 1.*

Criterion 1: presence of UPC and one LLU/VUA Operator

We note that UPC is a strong and growing competitor, having gained significant market share in fixed broadband within its footprint.[12] This constraint exists irrespective of whether there are LLU operators present in the same exchange area. We experience no less competition from UPC in those exchange areas (representing a relatively small number of exchanges where BT or other potential

[10]For each of the four criteria, LLU includes either Line Share or GLUMP.
[11]Indicatively for these purposes, this could be a combined share of at least 30-40% of the retail fixed telecommunications revenues in each such exchange, or group of exchanges.
[12] We note that UPC's most recent quarterly report for the period ending 30 June 2012, which has just been published, confirms continued growth in broadband and telephony services, with a year on year increase in UPC broadband subscribers of 26.1%. See also the competitive assessment of UPC prepared by Frontier Economics, annexed to eircom's response to ComReg's NGA consultation dated

wholesale customers have not yet availed of LLU. There are currently 40 exchanges being considered for inclusion in the NGA footprint where UPC is providing services but there is no LLU presence in the exchange. These exchanges represent less than 55k working lines but only one has more than 4k working lines. The attached confidential Annex 1 provides detail of the level of competitive activity present in these exchanges.

Most of the UPC coverage area falls within the scope of criteria set out above. However, there are, or may be in the future, areas where UPC or other cable operators are active and do not meet this criteria as there is no LLU/VUA operator present. Nevertheless, the cable operator's presence will have a significant impact on competition in the retail broadband market in these areas. Moreover, there may be other (non-LLU) infrastructure providers operating in these areas, which ComReg's proposal would not take into account.

We note that, despite considerable consolidation, there are still other cable operators providing broadband and telephony services in addition to their TV offerings. These include Casey Cablevision, Magnet and Smart. In some cases, their coverage area is a significant proportion of the relevant MDF area. These MDFs should also be considered part of the "Category 1" area or LEA. eircom notes in this regard that the competitive pressures exercised by alternative platform operators on eircom is clear from the use of comparative advertising between a local competitor's offerings and eircom's as a common marketing tool.

eircom proposes that all exchange areas where there is alternative access infrastructure should be included in the core LEA. This should include all areas where UPC or any other cable/broadband provider is present. If ComReg does not adopt the core LEA definition proposed by eircom, above, then ComReg should at least modify its proposed definition so that it does not arbitrarily exclude areas where UPC is present. Instead, as discussed below in connection with Criterion 3, ComReg should take a close look at each area that is adjacent to the areas defined by the criteria above, regardless of the number of exchange lines, and undertake a competitive assessment. After all, the 4000 exchange line benchmark is merely an estimation of the density required to make the economics of competitive entry work, and it should not be a hard and fast rule.[13]

Criterion 2: where an LEA exchange area is surrounded

As discussed above, we agree that the effects of competition can spill over to adjacent or enclosed areas, and we welcome ComReg's recognition that it would be both politically and commercially very difficult to exclude such surrounded or "pocket" areas from the retail offers made within the LEA. eircom therefore welcomes criterion 2.[14] Our proposal for defining Adjacent Affinity Areas is predicated on the core LEA definition that we have outlined above. In the event ComReg does not accept eircom's proposed alternative definition, ComReg should at a minimum establish a process for considering the competitive conditions in any adjacent areas that would justify a greater degree of pricing flexibility for eircom's bundles on a case by case basis.

eircom agrees that exchange areas which are surrounded by exchange areas qualifying for inclusion in the LEA should also be included in the LEA but would argue that the proposed definition is too narrow a definition. eircom believes that adjacent exchange areas should also be included where such adjacent areas are clearly within a defined geographic location. These are discussed above in eircom's alternative proposal as "Adjacent Affinity Areas."

Criterion 3: UPC is present, there are more than 4,000 lines in that exchange and where the exchange area is directly beside exchange(s) which meet criterion 1

For the reasons discussed above, we consider criterion 3 to be overly restrictive, in that it requires the following conditions to be fulfilled:

(a) UPC present;

[13] Additional concerns raised by the proposed 4000-line threshold are discussed below.
[14] We note further that it would be impractical to produce detailed coverage maps with isolated islands where higher prices apply. It is also very difficult to explain to the public why certain customers at the edge of large urban conurbations are excluded from the LEA, because their MDF was split for capacity reasons during the housing boom.

(b) more than 4,000 lines, and

(c) directly beside criterion 1 site.

We have already pointed out that other cable operators besides UPC can place a similar retail constraint on eircom, and ComReg should not arbitrarily exclude this possibility. If ComReg does not accept eircom's alternative proposal, ComReg should at a minimum examine the actual competitive dynamics of those exchange areas where there are more than 4000 lines that are adjacent to a criterion 1 site, even if UPC is not present, to assess both actual and potential competition.

For similar reasons, ComReg also should examine the competitive dynamics in those areas where UPC or another platform competitor is present *and* there are fewer than 4000 exchange lines. eircom notes in this regard that the condition of a minimum of 4,000 lines (which we understand to mean the number of premises potentially served by an exchange) does not reflect retail competition conditions. Therefore, eircom believe that a minimum threshold should not be applied and each exchange area should be considered individually.

By automatically excluding these exchange areas from the LEA, the proposed scheme will force eircom's retail prices to remain higher in such areas and will therefore put eircom at a distinct price disadvantage vis a vis UPC. However, since eircom must geographically average its wholesale prices, eircom will have no incentive to decrease the prices of retail bundles in these "marginal" areas, since the loss in wholesale revenues nationwide would not be offset by any potential retail revenues to be gained by a reduction. The outcome would leave eircom unable to compete effectively with UPC in such areas due to a set of regulatory factors – including the geographic averaging of wholesale rates outside the LEA – that create perverse incentives in areas such as these.

Consider the following example:

Exchange A serves 10,000 premises. 1,500 of these are dwelling units cabled to the MDF, but never occupied. Of the remaining 8,500 premises, 1,000 are business premises with ISDN BRA or PRA services. Of the 7,500 dwelling units occupied, 30% (2,250) are mobile only households. Of the 5,250 households with fixed services, 50% (2625) have service with a cable operator, and 2625 with

DSL, of which 900 are with operators using eircom wholesale services. eircom retail has only 1725 active lines.

This simplified[15] construct suggests that it is inappropriate to set any limit on the number of lines in criterion 3. We therefore strongly urge ComReg to clarify that if criterion 3 is adopted, the 4000 line threshold will be used as a guideline but not a strict cut-off, and that ComReg will consider the inclusion of exchanges falling outside the requirements of this criterion on a case by case basis, subject to a competitive assessment. A potential consequence of the proposed ComReg criterion is that as the market share of other platforms increase, exchanges may fall below the defined threshold and therefore drop out of the LEA footprint. The result of this would be that as competition increases, eircom's ability to respond to the competition would be reduced. This cannot be considered reasonable.

If ComReg does not adopt eircom's proposal, it should at least allow for a case by case assessment to determine whether to include in the LEA certain exchange areas where either UPC or an alternative access operator are present which are *not* adjacent to an exchange area meeting another LEA criteria. Dungarvan is a typical example. It is a large town with more than 5,000 homes where the cableTV operator Casey CableVision provides its Cablesurf broadband services[16]. The existence of their service exerts a potent constraint on eircom retail pricing throughout the Dungarvan exchange area and therefore it should be included within the LEA. There are several other examples of towns where UPC is present, outside the defined area, where eircom is subject to an effective competitive constraint.

Criterion 4: UPC is not providing services but where at least two operators at the retail level using LLU/VUA, or purchasing LLU/VUA from an LLU/VUA operator in that exchange, in either case with a combined substantial retail

[15] In fact, there will be a more complex mix of voice only lines, premises with multiple lines, businesses with dual-operator strategies, etc.
[16] Typically 30Mb to 120Mb DOCSIS 3.0

presence[17], and where the exchange is directly beside exchange(s) which meet criterion 1.

Criterion 4 is unreasonably restrictive. It imposes at least three conditions:

(a) not just the availability of LLU or VUA, but a minimum of two ***retail*** operators using same;

(b) a substantial combined retail market share (ComReg suggest a combined 30%-40% of "retail fixed telecommunications revenues"); and

(c) adjacent to areas falling within criterion 1.

Requirement for two retail operators.

The first condition might be easily met where a wholesale operator such as BT sells retail services itself, and facilitates retail provision by Sky, Vodafone or other retailers. Based on the fact that BT is the recognised wholesale supplier to both Vodafone and Sky as well as possibly other retailers, it should always be assumed that two retailers are in place where BT purchases LLU/VUA. The exchange areas where BT is in the process of unbundling should also be included as soon as agreed plans are in place. This argument is justified on the basis that the availability of automated seamless migration at cost effective transaction charges enable BT to migrate existing customer bases for these retailers without delay.

If these exchange areas were excluded from the LEA definition until such time as the migration was complete, this would create an un-necessary lag in providing eircom retail with the ability to compete with the intense competition from other retailers in the market. Those retailers will be fully aware of the impending migration to LLU/VUA based service and will have immediately adjusted their marketing and sales activity to reflect this revised input once the LLU/VUA plans are in place. Based on the evidence from exchanges which have been unbundled to date, approximately 50 – 60% of Bitstream lines will immediately migrate to LLU based service when these planned exchanges are commissioned.

eircom believes that this criterion unreasonably excludes situations where a single LLU or VUA operator has a de-facto monopoly on retail services. For example, an

[17] Indicatively for these purposes, this could be a combined share of at least 30-40% of the retail fixed telecommunications revenues in each such exchange, or group of exchanges.

operator might have an "exclusive" deal with a developer to provide broadband and TV over LLU or VUA, and so has 100% of the lines in an area, but it is the only retailer other than eircom (which can compete where services are provided under USO). Currently such situations constitute a small part of certain exchange areas, but as MDF areas fragment and VUA becomes available, it is possible that there will be more such areas.

Minimum share threshold using revenues

The minimum market share threshold proposed is unreasonably high and in this context should be measured on the basis of premises served rather than revenue. Indeed, it is extremely difficult to apply such a threshold at an exchange area level, so the presence of retailers who have a combined market share of 25% within the proposed category 1 exchanges should be sufficient for inclusion in the LEA.

eircom also objects to the use of revenue data in this context instead of the number of lines. The calculation of fixed telecommunications revenues is never an easy matter, but it will be even more difficult to ensure the uniform interpretation, vetting and application of revenues by exchange area. This is in part because the OAO revenues to be included in the calculation will be difficult to define, identify and audit.

For example, fixed revenues should include revenue from leased lines and other services which are not bundled with narrowband access, since it is the viability of the competitor's fixed line business and its potential to offer competitive bundles that is important. Limiting the amount to "retail revenue" also leaves open the question whether retail revenue from incoming calls – rather than simply settlements or termination payments arising because an operator has a retail customer – should be included. For instance, if revenue were to be the measure, would the TV revenues of Sky or the mobile revenues of Vodafone be included in the calculations?

While these calculations are difficult and complex for eircom, it is highly unlikely that other operators will be in a position to accurately assign revenues to eircom's exchange areas in a manner likely to satisfy an appropriate audit opinion. At the same time, they will have a strong incentive to interpret the reporting requirement so as to under-report their actual fixed line telecommunications revenues and thereby prevent eircom from adopting a more flexible pricing approach in these areas.

Clearly national revenues cannot be the suggested measure because the very concept under discussion is designed to identify an operator with a small national scale and large local impact acting as a retail constraint on eircom. Larger players can quickly enter into a new area and rapidly build share, so their actual market share in a given area at any particular point in time is not a key factor. Their *potential* to enter these adjacent markets rapidly acts as a significant constraint on eircom.

For all of these reasons, the use of revenue as a measure is inappropriate and unworkable in this context, especially when coupled with a high threshold. Using a revenue threshold can paint a distorted picture of the competitive dynamics because of the different per unit pricing levels and structures adopted by each service provider.

Using a minimum number of lines as the threshold would be more appropriate because:

(a) number of lines is a simple metric that is much harder to game;

(b) it is much easier to obtain the information (and on a more timely basis); and

(c) it is possible to obtain/verify the information from eircom wholesale.

We therefore recommend that if retained for purposes of the LEA definition, criterion 4 should be revised to make it more reasonable and proportionate in the given context by requiring, in exchange areas where UPC (or another cable/broadband operator) is not present:

(a) the presence of an LLU operator serving a minimum of two ***retail*** service providers, and

(b) a significant share of retail broadband lines provided utilising the eircom network (approximately 20 - 25 percent) within the LEA provided by the retail competitors.

We consider that if these conditions are met, the area should be considered competitive and eircom should have greater pricing flexibility, even if the area is not adjacent to those where criterion 1 applies. Letterkenny and Drogheda are good examples of large towns where a significant share of services is delivered over LLU and where eircom retail would be denied the ability to compete effectively in what is clearly a highly competitive market if this restriction were to remain in the proposed definitions. The confidential Annex 1 provides further details on the levels of market share held by LLU based operators

It should be remembered that the LEA is being proposed as a mechanism to determine where the retail price floor to which eircom is subject could be lowered thereby allowing eircom some additional retail pricing flexibility by applying in the LEA a net revenue test based on a mix of wholesale inputs reflective of those used by eircom's competitors in the area. However, ComReg's proposal would effectively penalise eircom by preventing it from selling a range of services to consumers in these areas at competitive prices, despite the fact that consumers value bundles of services. We strongly urge ComReg to reconsider the overly restrictive approach proposed in the supplemental consultation.

Q.2 **With reference to Annex: 2, ComReg would be interested in parties' views.**

Annex 2 purports to list counties and towns where exchange areas which are candidates for the LEA are located.

However, the list in Annex 2 is unclear and may be somewhat misleading. The heading is "Urban centres /Cities" but in fact it lists 15 counties. The first five are unqualified, whereas the remaining ten have a named town or towns or the word "city" in brackets. A footnote makes clear that not every exchange in a given county – particularly in Dublin - or every named town or city - may be part of the LEA.

The lists of eircom exchanges provided by ComReg to operators during the consultation process attempted to bring some clarity to the proposed LEA area. However, eircom believes that these lists are incomplete and will require to be modified once the final definition of the LEA is determined. This final list should clearly identify the geographic areas included in the LEA but not by reference solely to eircom exchanges. For instance, Cork city should be included on the list rather than a list of eircom local exchanges in that city. This format will allow for new local exchanges and local network re-arrangements to be implemented without the necessity for revision to the list.

Q.3 **Do you agree with the inclusion of "island" exchanges in the definition of Category 1 exchanges to be appropriate? Please provide sufficient reasoning to justify your views.**

eircom agrees that islands or pockets of otherwise non-qualifying exchange areas should be included in the LEA where they form part of what is a clearly defined geographic location. The proposed criteria for defining the LEA will create "islands" or "adjacent" exchanges (i.e., the "Adjacent Affinity Areas" described in eircom's proposal, as outlined above) that do not meet the criteria but are surrounded by or adjacent to exchanges and neighbouring communities that do. It is critical that all of these locations are included in the LEA to enable cost effective marketing/sales activity and to avoid consumer confusion.

eircom considers that any other approach would be inconsistent with normal commercial dynamic outcomes of competitive markets where the same bundle/offering would not be available on equal terms in neighbouring exchanges within such defined geographic locations. While there may not be a simple definition of these geographic areas, the control footprint of local authorities, or the county boundary in the case of Dublin, could provide one possible basis to assist in determining whether an exchange can be defined as "adjacent" or not. eircom therefore considers that it is appropriate to include such exchanges within the LEA. The inclusion of these "island" and "adjacent" exchanges should not materially increase the overall footprint of the LEA and would represent an insignificant minority of lines in all defined geographic locations.

These "islands" or "pockets" of exchanges may arise in inner city or suburban areas due to the evolving network architecture. For example, exchange areas were originally – prior to the 1980s – determined to meet the needs of simple telephony users based on their locations. In the 1990s, some areas were subdivided so that new services, or a changed mix of telephony traffic, could be accommodated. For example, a business park might be built on an infill site in or near a residential area where the exchange was almost full. Rather than trying to upgrade the old residential exchange, this might result in a part carved out and a new exchange located in or near the business park, to serve business users with a higher calling rate, and a requirement for high capacity ISDN lines.

In more recent years, very small “container” or “cabinet” exchanges were often installed mid-way between older sites or in new expanding suburbs of provincial towns and cities. This is, in many instances, because the dwellings or businesses at these locations were too far from existing sites to support good quality broadband. These infill sites were constructed for the very reason that the market expected such areas to have the same services, and the same prices, as the surrounding urban exchanges. eircom therefore considers that it would be inconsistent to have a “pocket” of customers where certain attractive bundle offerings / prices may not be available.

From a practical commercial perspective (to avoid marketing black-spots) and to avoid the social exclusion of consumers it would be appropriate to include those exchanges that are surrounded by or adjacent to Qualifying Exchanges. The benefits of a contiguous footprint are of critical importance in conducting marketing and sales activity. ✂**.** It is critical that the target areas are contiguous to enable eircom to clearly communicate a price message without causing customer confusion and dissatisfaction. This is why it is critical that all of Dublin is included in the LEA. While the example above is specific to Dublin, the point is equally relevant for the cities of for Cork, Limerick, Galway and Waterford.

Similarly, the sales strategies covering the LEA will include core elements such as ✂**.** If the areas are not logical and have pockets or black spots, this may result in human error and a bad customer experience. ✂ The logical route here is that the local store can advertise the local pricing. This will not be possible if there are “pocket” or Adjacent Affinity Areas in the defined geographic area that are excluded from the LEA. The consumer expects to see the rates they will pay clearly displayed in a retail store, and eircom needs to be in a position to provide this.

eircom also notes that these commercial imperatives are consistent with, and in fact follow, the competitive pressures experienced by eircom in these areas in the same manner as in the LEA proper, in the manner defined by ComReg.

Q.4 **Do you agree with the proposed use of a weighted average wholesale input in the net revenue test in Category 1 exchanges?**

It is disappointing that ComReg has not taken the opportunity to propose an approach that will promote the interests of fair competition and produce tangible consumer benefits.

eircom considers that the weighted average wholesale input should be set to allow eircom to compete with alternative infrastructure providers and with highly competitive OAOs using LLU or VUA as inputs. eircom is concerned that the proposed weightings, based as they are on the mix of inputs used by OAOs, will not provide eircom with sufficient flexibility to compete fairly and effectively, and will have the additional drawback of keeping consumer prices higher than they need to be.

We note that some operators may be more efficient than others, or their optimum mix of inputs may vary. For example, an operator could serve large businesses using its own fibre, and use DSL only for residential users. Thus, there may be some operators that use SB-WLR and WBA nationally to target certain customers – even where these are not the lowest price wholesale input products available in all areas. The prices of WLR and WBA are geographically averaged, and are (and will be) available across many more areas than will be part of the LEA. This means that these products effectively have relatively higher prices in the LEA than actual alternative wholesale inputs that are available only in geographically more limited areas (such as LLU and VUA). Including these products to define the weighted average input cost in the LEA will have the effect of increasing the relative input cost and, thus, stopping eircom from decreasing retail prices in response to competition.[18] This will clearly harm

[18] Clearly eircom **must** sell LLU, WLR+LS and bitstream services outside the LEA. Eircom does not have the freedom to adjust prices so that they might be lower in the LEA, and higher elsewhere, therefore overall complying with its national obligations. There will be suggestions by other operators that eircom could achieve lower cost inputs simply by pricing all wholesale services at the “floor”. This would allow lower retail prices in the LEA, but it would also reduce eircom’s revenues outside the LEA to such an extent that it would not be able to sufficiently recover costs. This would imply that the maintenance of existing USO and widespread DSL

consumers and dilute competition. It will also enable alternative infrastructure providers to win customers, not because they are providing better or more efficient services than eircom, but because the NRT is structured to prevent eircom from meeting the competition. By forcing eircom to keep its retail prices artificially high, the weighted average approach proposed by ComReg will help protect inefficient providers and disincentivise NGA expansion.

In addition, the WAWNI proposed by ComReg will give OAOs an unfair advantage over eircom because they will be able to set their retail prices with reference to the optimal mix of wholesale inputs that they plan to use in the future. They have visibility of these factors. In contrast, eircom will not have visibility of the future effective cost of the averaged wholesale input when determining the retail prices it can set. Reductions in the eircom cost stack will only become apparent over time as OAOs switch to alternative wholesale inputs. This lack of visibility will preclude eircom from being able to meet the competition even if it is the most efficient competitor.

Furthermore, using the wholesale inputs utilised by other operators encourages them to game the system. For example, if they do not want eircom to be able to compete as hard, they may vary their choice of inputs to ensure that the WAWNI used for eircom remains higher. Or, alternatively, the OAOs may want to time the introduction of any shifts in their usage of different wholesale inputs so that they are only included in the measure of the WAWNI with a considerable lag (for example by one quarter). This can enable OAOs to have an unfair advantage over eircom.

eircom believes that ComReg should define a wholesale input cost that (i) gives eircom the ability to compete, (ii) protects only efficient competitors, and (iii) creates the right incentives for OAOs to migrate to the most efficient wholesale inputs without trying to game an artificial regulatory structure.

These objectives can be achieved if ComReg sets a target wholesale mix that is based upon efficient usage of eircom's wholesale products, and defines a glidepath from the current mix of products to the target mix. If ComReg sets a target wholesale mix, OAOs would not be able to game the system because eircom and OAOs would have an equal degree of visibility of the (effective) costs of their wholesale inputs. Efficient competitors would be protected because, by applying the NRT, ComReg would allow sufficient margin for them. Moreover, if OAOs know that their actions will

services would be in peril. Thus it is unrealistic to consider that eircom would reduce these geographically averaged prices simply to improve its ability to compete in urban areas.

not affect the assumed WAWNI, they will have a stronger incentive to migrate to LLU (or VUA).[19] In addition, eircom will not be held back in its ability to compete because some OAOs elect to remain on less efficient wholesale inputs in order to game the system.

It is important to consider carefully how the weighting factors in the target WAWNI should be defined. eircom considers that within the LEA, it should be assumed that all OAOs migrate all legacy lines to LLU.[20] The simplicity of using a 100% weighting for LLU is more likely to lead to sensible outcomes for eircom, for eircom's wholesale customers, and most importantly for end-users of all operators. And, in eircom's view, a period of 12 months should be more than sufficient for operators to adjust their business strategy appropriately.[21] We also note that ComReg seems to consider only the weighted average input of the use of the eircom network, by those operators who choose to use this network. However, if the aim is at least in part to allow eircom's retail end users to benefit from lower prices that compete with those offered by UPC, then a construct that prevents eircom from competing if its wholesale customers choose not to do so would be counterproductive. eircom considers that the best way to remedy this problem is to include the UPC lines in the LEA areas as part of the weighting factors in the WAWNI. Moreover, because UPC is effectively providing an NGA service to all its retail customers, then ComReg should assume that for all UPC lines the equivalent input is the VUA product. The alternative is to use LLU as the appropriate input with a glide-path to VUA over the 12 month period.

In summary, eircom proposes that the WNI should be initially established based on the actual usage of wholesale inputs utilised by other operators, including those utilising alternative infrastructure, and should then follow a glide-path over a 12 month period to the final situation in which the WNI would be based exclusively on LLU/VUA. However, we consider that there is a need to adjust the historic actual utilisation of operators to avoid a potential lag between the time at which the utilisation is measured and the time that the WNI can reasonably be utilised by eircom. eircom would propose an implementation regime based on the process steps set out below.

The proposed steps are:

[19] This is because the incentive to migrate to more efficient wholesale inputs may be softened if the OAOs know that they will enable eircom to be more competitive when they migrate.
[20] Clearly there is a significant issue about the proportion of VUA and we consider this issue in question 5 below.
[21] eircom notes that ComReg was initially considering a period of about this length in the 11/72 consultation document (see paragraph 5.29 (4) therein).

1. eircom wholesale provides ComReg with a report which includes the usage of the individual wholesale products for the most recent month available together with the trend in movement in volumes for these products over the previous 12 months and details of any known migration plans being implemented by operators over the coming months;

2. ComReg combines the information received from eircom with their own quarterly report information on the volumes of services provided by alternative infrastructure providers from the most recently published report, following adjustment for the growth trends and known migration plans, derive the appropriate weightings for each product in the revised WNI

3. ComReg calculates the revised WNI and provides it to eircom within one month, thereby allowing eircom to utilise that input in pricing submissions from then onwards.

On a somewhat separate issue, eircom notes that there is some inconsistency and double counting in the worked examples set out in the consultation document. The bitstream example has a mix of customers with 100kbps or 150kbps products, whereas the LS+ and LLU+ cost stacks have a lower average throughput. Furthermore, the €4.55 cost floor from the WBA floor model used to set the control in 12/32 includes the Line Share rental and the Line Share fault costs: they should not be counted twice in the LS+ stack, and should be removed from the LLU+ stack and replaced with the relevant LLU costs.

Q.5 **Do you agree with the weighted average wholesale input calculation to take account of OAOs' use of VUA as a wholesale service / product in Category 1 exchanges? Please provide adequate reasoning to support your views.**

Similar to our response to Q4 above, eircom considers that the best way to include VUA in the WAWNI is to include a proportion of VUA in the target wholesale mix (with the proportion of legacy lines assumed to be LLU as discussed above). Clearly, this will need to take into account information about eircom's roll out of VUA and the optimal mix of retail customers taking NGA and legacy broadband products. eircom believes that its own projections of the relative consumer take up of NGA and legacy products is reflective of the optimal mix. This is because eircom has the incentive to compete as strongly with UPC as possible (in the NGA consultation 12/27 ComReg accepted that the rationale for eircom to roll out its NGA network is to be competitive with UPC) and bearing this in mind will decide on the optimal retail prices of NGA and legacy products to achieve this. This means that eircom's projections should be aligned with the optimal mix of consumers taking legacy and NGA products.

eircom believes that all NGA lines should be treated as if the wholesale input was VUA even if other wholesale products (such as Bitstream Plus) are used. This is because the larger and more efficient OAOs are all expected to use the VUA service.

To have a WAWNI defined over time, it will be necessary to define the weighting factors in the target WAWNI and the glide-paths to achieve that. As discussed above, eircom believes that the weighting factors in the target WAWNI should be defined to be 12 months from the initial WAWNI determination and should assume that all legacy services are provided using LLU as the wholesale input. It will also be necessary to define the proportion of VUA in the WAWNI. After this time the only factor that will need to vary in the WAWNI is the assumed proportion of VUA. eircom believes that the assumed/target proportion of VUA should be set thereafter each time for a 1 year period ahead, and updated based on the best information about NGA take up at that time.

eircom understands the proposal to calculate the WAWNI will include NGA products where relevant. A single WAWNI will apply throughout the LEA. This will be used as the network input for both legacy and NGA retail services. Three legacy services – WLR+Bitstream, WLR+LS and LLU are considered. Two NGA services are considered: Standalone VUA, and POTS-based VUA. It is not clear why legacy VUA service would not be part of the weighting. There is a clear Statement of Requirements (SoR) from the industry requesting a virtually unbundled version of the proposed QoS enabled Bitstream Plus service offered on the legacy network: in other words a layer 2 DSLAM port at 8Mb or 24Mb, with the backhaul self-provided or sold separately. There is also an industry request for standalone legacy QoS enabled broadband service (and the associated migration transactions) which could be utilised to support customer voice propositions. In principle, all of these options should be in the Weighted Average Network input.

There may also be some interest in sub-loop unbundling by certain operators outside the eircom planned NGA footprint, particularly if there was to be relevant state aid. If this were to happen, it should also be part of the weighting (including the effect of any state aid). We note that the weighting is essentially that of the LEA, but we consider that any location where these options are utilised should automatically form part of the LEA.

Q.6 **Do you agree with ComReg's proposal with respect to Category 1 exchanges — where changing market shares would normally require an increase in the bundles wholesale input? If you disagree, please provide sufficient detail to justify your views.**

ComReg proposes that the WAWNI will have a ratchet mechanism so that the WAWNI will remain constant or reduce at each subsequent review. This is because ComReg expects that there will be migration from WLR+Bitstream, to WLR+LS initially, and ultimately, to LLU. Two exceptions are proposed:

(a) if, in the absence of NGA, the WAWNI calculation shows a weighted average greater than the applicable figure for three consecutive periods, ComReg may revise it; and

(b) as NGA rolls out, where the higher result arises from the NGA rollout the WAWNI will increase. If OAOs migrate from WLR+LS to SA-NGA, any increase would be minimal. However, the gradual roll out of NGA is likely to mean an increasing percentage of NGA input, rising towards 100% in the LEA.

What does all this mean? It seems to eircom that availing of any interim lower levels of cost input would be dangerous, as a changing mix would require rising retail prices and/or further wholesale reductions in the future. It is for this reason that eircom argue in the response to previous questions that while the WAWNI can commence based on the utilisation of wholesale inputs by other operators, it should then ratchet to a target utilisation over a given period. This would avoid the potential problems referred to in the consultation.

How does the ComReg proposed ratchet, and the NGA adjustment, impact on OAO incentives to invest in LLU, or to migrate to NGA? Can OAOs play games by ordering LLU, then ordering POTS-based NGA, all while planning SA-NGA?

We consider that the need to impose a ratchet mechanism simply shows that ComReg's proposal is not robust. If it is already obvious that such a mechanism is required, it is likely that there may be other unintended outcomes – for example, as discussed above, the incentives of OAOs to migrate customers could be affected by the effect that this will have on the regulation. Instead, ComReg should form a view on what is an optimal mix of inputs (as set out in our response to Q4 above).

ComReg set out criteria by which increases in the WNI could be considered. One of these is linked to the introduction of NGA products. eircom has clearly stated its intent to price NGA wholesale products at levels which will enable operators to migrate their customers from the legacy network onto the NGA network without incurring increased wholesale costs. Assuming that this is the case, then it is extremely unlikely that the introduction of NGA products will impact adversely on the WNI. Therefore, eircom would argue that there is no need to set specific conditions in relation to NGA as suggested in paragraph 86 but rather the introduction of NGA products should be dealt with within the regime proposed in paragraph 85 whereby ComReg would initiate a review if the WNI increase for three consecutive quarters.

Q.7 **What indicators in the retail market do you think should trigger a re-assessment of the revised net revenue test?**

ComReg seems to be proposing that eircom's market share will be monitored, and if the changes proposed in 12/63 cause eircom's share to "improve", pricing flexibility may be withdrawn:

> *Eircom's retail market share will be monitored by ComReg and should that indicate that OAOs are being squeezed (for example if their retail market share on Eircom's platform is declining or has reached an excessively low level) then ComReg will review the appropriateness of the further specification of the pricing control. ComReg considers that it is appropriate to calculate this retail broadband share based by reference to respective DSL lines. ComReg is cognisant that this parameter may need to be updated in future depending on technology developments and usage.*

This proposal is unclear. It seems to suggest that eircom retail will not be allowed to increase its percentage of DSL lines within the LEA without regulatory reprisal. This is not a reasonable approach. If both eircom and OAOs lose customers to UPC, but eircom loses at a slower rate, a review would be triggered. If eircom and OAOs both win back users but eircom does a little better, ComReg proposes this too would be evidence of a squeeze.

ComReg is setting up tensions which will incentivise OAOs to migrate to LLU, or directly to NGA. However, if eircom's bundles become more attractive as a result of the measures in both 11/72 and 12/63, the outcome may well be that the decline in eircom's share relative to OAOs, and to UPC especially, would be halted. The measures allowed may help the DSL platform (including NGA, VDSL and LLU) to retain users, and indeed OAOs potential profits should increase as a result of both migration and wholesale price reductions.

It is also possible that the OAO absolute numbers could increase but their share of DSL reduce. It is equally possible that consumers may prefer higher speed NGA or UPC services to LLU based services, or that OAOs may simply be ineffective in competing for customers. Thus it is important to ensure that market outcomes due to consumers' technology preferences are not merely attributed in whole or in part to the regulatory treatment of wholesale network inputs.

The various elements of the control as proposed are designed to ensure there is no margin squeeze, so we do not accept a requirement for an additional test to undo or reconsider the proposed changes based on movements in market share or absolute customer volumes. In any event, it would be unreasonable and disproportionate to impose a mechanical link between market share trends and pricing flexibility once the new rules are implemented. An increase in market share for eircom's retail operations may simply reflect that a large OAO has had a poor marketing campaign or a poor retail offering over a particular period.

Instead, if a sustained trend emerges that ComReg believes may reflect an inherent flaw in the system, it should assess the full range of competitive factors to inform itself about what is actually happening in the market. And it should take steps to remove or reduce eircom's pricing flexibility only if there is clear and compelling evidence of anticompetitive margin squeeze, despite the rigours of the proposed NRT.

Q.8 **Do you agree with how the wholesale input usage of OAOs in Category 1 exchanges is calculated? If you disagree, please provide sufficient detail to justify your views and provide an alternative mechanism by which this could be calculated.**

ComReg has proposed that the appropriate weighted average wholesale network input would be calculated by eircom wholesale, and forwarded to ComReg with any bundle submissions. This may not be a workable approach.

For simplicity, consider a new bundle proposal for eircom's consumer and small business ("CSB") segment. When preparing the proposal, CSB may want to set the price as low as possible consistent with the price flexibility requirements. The key issue for the CSB marketing team will be "what will the regulation allow?". The main issue in that analysis will be the value of the wholesale network inputs. To make the price proposal, CSB will therefore need to know the WNI.

Certainly, CSB must not have direct access to actual use, or future migration plans, of wholesale customers. eircom has systems and procedures in place to ensure that this information is not accessible by eircom's retail operations. However, CSB, like any other retail provider, will need to know what the operative WNI will be in order to make marketing decisions.

We would propose an alternative approach, as follows.

1. eircom wholesale provides ComReg with a report which includes the usage of the individual wholesale products for the most recent month available together with the trend in movement in volumes for these products over the previous 12

months and details of any known migration plans being implemented by operators over the coming months;

2. ComReg combines the information received from eircom with their own quarterly report information on the volumes of services provided by alternative infrastructure providers from the most recently published report, following adjustment for the growth trends and known migration plans, derive the appropriate weightings for each product in the revised WNI;

3. ComReg calculates the revised WNI and provides it to eircom within one month thereby allowing eircom to utilise that input in pricing submissions from then onwards.

A question then arises as to transparency issues surrounding the WNI: should it be shared with all market players? Is it appropriate for UPC to have this information? Is it appropriate for resellers buying a white label service from an LLU operator to have this figure?

On balance, eircom believes it may be preferable for eircom Wholesale to provide the WNI data directly to ComReg, and for ComReg to furnish the target efficient WNI to OAOs subject to an NDA (but not to UPC). It may well be reasonable for ComReg to provide the targets for a three-year period and to review the figures quarterly, but only update the targets where material differences emerge.

Q.9 **Do you believe the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and precise[22] with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.**

This question refers solely to the revised definitions in 12/63, amending the draft direction in 11/72. We consider that the definitions are incomplete. In particular, the definition of “portfolio” should use some mechanism to distinguish between the two portfolios, such as “LEA Portfolio” and “Residual Portfolio”. The definition of “Larger Exchange Area” and “Category 1 exchanges” needs to be resolved in line with our comments above, and there should be reference to a confidential schedule available

[22] We consider this is the noun intended

to interested parties in the decision instrument or an associated annex. The text should also deal with the WNI transparency issues discussed in our response to Q8.

4: UPC

UPC Ireland response to ComReg 12/63

Supplementary Consultation to ComReg 11/72 Price Regulation of Bundled Offers

1 UPC's key comments on ComReg 12/63

UPC Communications Ireland Limited ("UPC") is pleased to provide its response to ComReg on its Supplementary Consultation to ComReg 11/72. This consultation concerns price regulation relating to bundled offers and specifically proposed amendments to the Net Revenue Test which relates to eircom bundles that include Retail Fixed Narrowband Access.

This UPC response should be read in conjunction with UPC's response to the original ComReg consultation, in which UPC highlighted the very considerable impact of the proposals, and in which UPC also expressed serious concerns, among others, about the absence of detailed justification for the proposed amendment of the Net Revenue Test, and the timing of the ComReg proposals.

UPC reiterates and further emphasises its serious concerns in light of ComReg Supplementary Consultation 12/36, given that: (i) the SMP position of eircom throughout the territory of the Republic for Retail Fixed Narrowband Access remains a fact (which ComReg acknowledges), (ii) the evidence and arguments put forward by ComReg in favour of amending the Net Revenue Test remain spurious, (iii) the criteria put forward to define the "Larger Exchange Area" are flawed and (iv) serious concerns exist that ComReg's proposals would enable targeted cross-subsidies by the SMP operator.

UPC considers it necessary to make the following key comments on ComReg's Supplementary Consultation 12/63:

a) UPC observes that ComReg continues to propose (as it did in ComReg 11/72) to take the extremely unusual step of introducing geographic differentiation of regulatory obligations (relaxation of a key remedy on a sub-national basis) within a national market where SMP has been found. Further it intends to do this notwithstanding the existence of a market analysis decision (i.e. normal regulatory procedure requires a full market analysis to be undertaken before there can be any lifting or relaxing of regulatory remedies).

   UPC disagrees with the proposal and would note that this highly unusual departure of introducing interim geographic differentiation of remedies is without precedent in any other EU member state on any relevant market. By way of justification, ComReg makes reference to *"different structural conditions prospectively creating different consumer choices in certain areas in Ireland"* (para 40 and 47) and *"changing structural conditions are evident and fast evolving"* (para 42) and makes further references to structural differences between geographic areas as triggers for relaxation of existing remedies.

UPC would observe that if ComReg believes that the market conditions on the market for Retail Fixed Narrowband Access have changed to such an extent (on a subnational market basis), and ComReg argues that this is as a result of *"changing structural conditions"*, if this is indeed the case, ComReg should conduct a new full market analysis of the market for Retail Fixed Narrowband Access. As ComReg will be aware, this process involves three key steps, including determining a market definition for the relevant market, secondly, undertaking an assessment of SMP, and finally if SMP is found to exist, impose the appropriate regulatory obligations.

Instead, Supplementary Consultation 12/63 strongly suggests that ComReg is keen to offer immediate regulatory relief to eircom quite possibly to enable the SMP operator to target a particular competitor (e.g. UPC) while also attempting to somewhat protect access takers on the incumbent's network. In doing so, ComReg is seemingly prepared to deviate from proper procedures enshrined in both EU and Irish law.

b) ComReg puts forward a series of scenarios for inclusion of geographic areas in the "Larger Exchange Area" in which sub-national relaxation of regulatory obligations on eircom would be granted. These scenarios can usefully be summarised for clarity as:

- Main scenario: *UPC + 1 LLU/LineShare or NGA VUA operator* (para 49);
- Sub-scenarios: *UPC + 0 by aggregation of areas* (para 51 and 54);
- The no cable sub-scenario: *1 LLU/LineShare or NGA VUA only (no cable) where a LLU / NGA VUA operator sells wholesale services to another operator* (para 57).

UPC notes that the scenarios proposed by ComReg to identify sub-national geographic areas in which *remedies* on eircom would be relaxed on an interim basis are without precedent in EU regulatory practice. No other EU member state has introduced such a measure on an interim basis. Further, these scenarios are patently inconsistent with the regulatory practice of the European Commission. This is particularly true in relation to the approach taken by the EU with respect to proposed sub-national geographic *market definition* in other EU Member States (e.g. UK, Spain, Portugal, Finland).[1]

UPC would argue the scenarios put forward by ComReg are quite simplistic in that these merely count the number of existing or potential operators in a given geographic area. In this regard they fail to assess in detail the actual conditions of competition on the supply

[1] The European Commission has set a standard of assessment as follows (the citation is extracted from the EC comments letter dated 1 June 2010 on Ofcom's second notification of Market 5 – Case UK/2010/1064-1065):

[…]The Commission's view remains valid, i.e. that a geographic delineation which is based primarily on the number of operators present in a local exchange is not, in itself, sufficiently detailed or robust to identify real differences in competitive conditions for the purposes of the market definition. In assessing whether conditions of competition within a geographic area are similar or sufficiently homogeneous, additional structural and behavioural evidence is necessary.

Relevant evidence would include information on the distribution of market shares and the evolution of shares over time. In addition, evidence of differentiated retail or wholesale pricing which might apply could help indicate different regional or local competitive pressures. It is also considered appropriate to look at the pricing of both the incumbent and alternative operators and at its evolution over time in the relevant areas.

side and the demand side, including distribution of market shares and differentiated retail or wholesale pricing.

Further, ComReg seems to be explicitly aiming for regulatory relief on eircom in circumstances where UPC and/or access takers on the eircom network have achieved >30% market share for Retail Fixed Narrowband Access in the relevant geographic area, with the remainder of retail market share accruing to eircom. This fails to assess eircom's actual market share for Retail Fixed Narrowband Access, which is still most likely to represent prima facie dominance in many or most instances within the geographic areas considered by ComReg.

UPC objects to the repeated references throughout ComReg documents 11/72 and 12/63 whereby the Regulator attempts to justify the shortcutting of normal EU regulatory procedure on grounds of 'infrastructure competition' by UPC. While UPC may have infrastructure within its own physical footprint, the fact remains that is that only +/- 40% of UPC's customers (on a total footprint basis) choose to purchase a retail phone subscription from UPC. Therefore, UPC's physical footprint should not be used as an indicator of competition for Retail Fixed Narrowband Access or as an indicator for UPC's market share for Retail Fixed Narrowband Access. Rather than focusing on UPC, and simply counting the number of existing or future operators, it is incumbent upon ComReg to analyse the SMP operator's market share in real terms and using actual market statistics.

c) UPC has grave concerns about the scenarios put forward by ComReg for inclusion of geographic areas in the "Larger Exchange Area", but UPC is even more surprised about the sub-scenarios described above as *UPC + 0 by aggregation of areas.* This, more so than any of the other scenarios, seems to be an attempt by ComReg to enable eircom to specifically target UPC, including potentially by means of targeted cross-subsidies from non-NGA areas to NGA areas. It is important to note that in this regard UPC understands the proposed relaxation of the remedy in ComReg 12/63 is in relation to the Retail Fixed Narrowband Access only (this despite the repeated references throughout to the offer of broadband services, which as ComReg will be aware is Market 5 and therefore has no bearing on Market 1). In this context, UPC would wish it to be noted that, if ComReg chooses to make repeated reference to UPC's infrastructure, ComReg should also recognise that UPC was the first, and to date the only operator that has made any significant investment in NGA which has resulted in UPC being the catalyst that has spurred other telecoms investors, including eircom, to invest in NGA[2]. In this regard, UPC should not be punished for having made investments which resulted in it attracting customers for bundles led by TV and NGA internet access services.

On the basis of points a), b) and c) above, UPC considers that there must be serious doubts as to whether ComReg's approach in seeking to relax regulatory obligations on eircom on a sub-national basis and attempting to do this between market analysis cycles, is justifiable. Finally, it is questionable as to whether ComReg's approach is sustainable given that there is no precedent for this within an EU regulatory context. UPC notes in this regard that amendments to regulatory obligations on SMP operators is subject to notification by ComReg to the European Commission in accordance with Article 7a1 of Directive 2002/21/EC as amended by Directive 2009/140/EC.

[2] UPC has invested 500m euro in its Irish networks up to end 2011.

2 UPC's response to questions included in ComReg 12/36

Q.1 Do you agree with the definition of the LEA (i.e. Category 1 exchanges) as set out in paragraph 58? Please provide a detailed response with supporting data where appropriate to support your view.

UPC disagrees substantially with ComReg's proposed definition of the "Larger Exchange Area" (LEA) (Category 1 exchanges). UPC considers that ComReg's proposed additional sub-scenarios deviate from the concept of "Larger Exchange Area".

The summary at para 58 of ComReg 12/63 is indicative of ComReg's apparent desire to offer rapid regulatory relief to eircom, without credible basis or justification, and perhaps specifically to enable the SMP operator (eircom) to target a particular competitor such as UPC.

The scenarios suggested by ComReg in para 58 (summarising previous paragraphs, in particular para 49, 51, 54, 57) putting forward *geographic differentiation of remedies* are unheard of in the EU, and in addition are patently inconsistent with the historic regulatory practice of the European Commission with regard to proposed *sub-national geographic market definition* in other EU Member States (e.g. Spain, Finland, UK and Portugal – where only cases put forward by the latter two countries were accepted by the European Commission).

Please also refer to UPC's comments in Section 1 above including the footnote reference to the EC's decisional practice on a key case in the UK.

On the basis of the response provided above and in also Section 1, UPC would challenge ComReg's proposed approach, which amounts to merely counting the number of existing or potential operators within a given geographic area. UPC does not consider this to be in line with the requirement to assess in detail the actual market conditions of competition on the supply side and demand sides nor does it include any formal analysis of distribution of market shares and differentiated retail or wholesale pricing.

Q.2 With reference to Annex: 2, ComReg would be interested in interested parties' views.

Q.3 Do you agree with the inclusion of "island" exchanges in the definition of Category 1 exchanges to be appropriate? Please provide sufficient reasoning to justify your views.

Based on our response to Q.1, and our key remarks in Section 1 above, UPC considers the list of areas in Q.2 ("*Urban Centres / Cities which prospectively contain individual exchanges, to be included in the LEA*") and the inclusion of "island exchanges" (Q.3) to be substantially flawed. Please refer to Section 1, point b) above, in which we challenge the lack of justification and the incompatibility with EU precedent for the:

- Main scenario: *UPC + 1 LLU/LineShare or NGA VUA operator* (para 49);
- Sub-scenarios: *UPC + 0 by aggregation of areas* (para 51 and 54);
- The no cable sub-scenario: *1 LLU/LineShare or NGA VUA only (no cable) where a LLU / NGA VUA operator sells wholesale services to another operator* (para 57).

Q.4 Do you agree with the proposed use of a weighted average wholesale input in the net revenue test in Category 1 exchanges?

Q.5 Do you agree with the weighted average wholesale input calculation to take account of OAOs use of VUA as a wholesale service / product in Category 1 exchanges? Please provide adequate reasoning to support your views.

UPC considers that there must be serious doubts as to whether ComReg's approach to relaxing regulatory obligations on eircom on a sub-national basis and in between market analysis cycles is justifiable and sustainable.

Given this, UPC considers it both inappropriate and pre-mature for it to enter into detailed considerations on the proposed amendments to Net Revenue Test, weighting of average wholesale calculations, etc. UPC reserves its position in this regard.

Q.6 Do you agree with ComReg's proposal with respect to Category 1 exchanges — where changing market shares would normally require an increase in the bundles wholesale input? If you disagree, please provide sufficient detail to justify your views.

Q.7 What indicators in the retail market do you think should trigger a re-assessment of the revised net revenue test?

UPC considers it both inappropriate and pre-mature for it to enter into detailed considerations on the proposed amendments to Net Revenue Test, weighting of average wholesale calculations, etc. UPC reserves its position in this regard.

Q. 8 Do you agree with how the wholesale input usage of OAOs in Category 1 exchanges is calculated? If you disagree, please provide sufficient detail to justify your views and provide an alternative mechanism by which this could be calculated.

UPC considers it both inappropriate and pre-mature for it to enter into detailed considerations on the proposed amendments to Net Revenue Test, weighting of wholesale input usage of OAOs, etc. UPC reserves its position in this regard.

Q. 9 Do you believe the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and price with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

From legal/regulatory perspective, UPC considers that there must be serious doubts as to whether ComReg's approach to relaxing regulatory obligations on eircom on a sub-national basis and in between market analysis cycles is justifiable and sustainable, in the light of the EU and Irish legal and regulatory framework for electronic communications, and the decisional practice of the European Commission regarding sub-national market definition and geographic differentiation of remedies.

UPC underlines that the scenarios proposed by ComReg to identify sub-national geographic areas in which *remedies* on eircom would be relaxed on an interim basis are without precedence in EU regulatory practice. In addition, these scenarios are inconsistent with the decisional practice of the European Commission with regard to proposed sub-national geographic *market definition* in other EU Member States, as we have highlighted in Section 1 above. Indeed, the scenarios put forward by ComReg for defining the “Larger Exchange Area” merely counting the number of existing or potential operators in a given geographic area and fail to assess in detail the actual conditions of competition on the supply side and demand sides, including distribution of market shares and differentiated retail or wholesale pricing.

From a technical and practical perspective, UPC finds it surprising that ComReg is putting so much effort, and is causing industry to engage in arcane calculations, in an exercise which is flawed on legal, regulatory and procedural grounds.

Should you require any clarifications or further information on the positions set out in this response, please contact:

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5: Vodafone Ireland Ltd

Vodafone Response to ComReg Document 12/63

Supplementary Consultation to ComReg 11/72

Price regulation of bundled offers

Introduction

Vodafone welcomes the opportunity to respond to this important supplementary consultation on the issue of price regulation of bundled offers.

Vodafone would like to frame its response by quoting from the Consultation paragraph 3 where ComReg sets out that "*The controls are intended to ensure that where Eircom (the SMP operator) bundles regulated inputs,2 that it is not priced in such a way as to force Other Authorised Operators ("OAOs") which use Eircom's network to sell their retail bundles at a loss.*"

It is clear therefore that the only criteria appropriate to be used when assessing the need to change the current control or whether any proposed change is appropriate is a consideration of eircom's position as against the position of OAOs who buy regulated wholesale inputs from eircom to compete with it at the retail level. For the purposes of assessing this control it is immaterial whether or not there is an alternative infrastructure provider also competing with eircom provided the position between eircom and its wholesale customers is correct.

Vodafone fundamentally disagrees with ComReg's conclusions that there is any need to modify the existing control to allow eircom additional flexibility in optimising the pricing of its retail propositions as against the retail propositions of its wholesale customers.

ComReg's quarterly report shows that the mix of eircom's self supply and wholesale based OAO activity for both the retail narrowband market and the Bitstream market is reasonably stable with only a gradual erosion of eircom retail's proportion of the telecoms market that is based on eircom's network. These wholesale products have been in the market for a number of years. If the mandated wholesale products and their associated pricing allowed effective retail competition then one would have expected eircom retail's proportion of the market to be far lower and its rate of decline to be faster. This ComReg published data shows that OAOs using eircom's network have at best a weak competitive position as against eircom retail. This is direct empirical evidence that eircom retail is in no way disadvantaged by the current control and that OAOs continue to require the protection of the current regime to allow them operate in the retail market on an equal footing with eircom.

The regulated wholesale products which are encompassed by the control are subject to "retail minus" as opposed to "cost plus". This allows eircom, as a vertically integrated SMP supplier, to set the prices of these wholesale inputs in a way which shelters an eircom determined proportion of the overall margin from a retail sale in wholesale products where it faces no competitive constraint. Any additional flexibility afforded a vertically integrated supplier to further finesse its overall pricing, costs and margin distribution can only serve to undermine the intent and operation of the remedies previously imposed in those markets where it has been designated as having SMP.

The proposed change would allow eircom retail to optimise its price structure as against retail competitors who are obliged to buy wholesale inputs from it in markets where it has SMP. It may be a by-product of the change in the control now proposed that would allow eircom retail to also change its retail pricing as against alternative infrastructure providers. However the proposed change does nothing to allow wholesale customers of eircom to similarly react to alternative infrastructure providers as their cost input remain unchanged and eircom continues shelter margin in its wholesale pricing. As such Vodafone believes that the proposed changes are discriminatory and distortive in the market.

Eircom has set out in presentations to industry that where it wishes to attain a target retail price for NGA services it is prepared and able to reduce pricing of WLR to support this. This provides evidence of a number of items. The first is that eircom earns margin well above its WACC on the SB-WLR product. The next is that where eircom is under actual or prospective retail competitive pressure from alternative infrastructure providers it can if it wishes amend its retail pricing to respond without any variation in the current bundles price control. Finally, given the highly selective criteria eircom has set out for making these wholesale price reductions, where eircom is given pricing flexibility it exercises this in a way which is optimised for its own benefit.

Comments on Consultation Document

ComReg sets out that eircom may be subject to increasing retail competition in Area 1. However ComReg has not explored whether this competition is based on price, service performance, service functionality or some combination of these.

If the retail competition is based on service performance and/or service functionality then eircom's NGA deployment will level the playing field ensure that while the retail service mix within the NGA areas is different to the non-NGA areas the only structural imbalance that might occur within those areas is between NGA type services (including cable based services) and non-NGA type services.

Vodafone believes that any difference in retail competition in Area 1 is primarily due to the release of pent up demand for NGA services, triple play services including TV and for service bundles which do not include a narrowband access/fixed voice element.

ComReg's analysis omits entirely any consideration of substitutability dynamics between these retail bundle types. The rapid growth of UPC's based using these service bundle types and the low level of win-back from UPC by operators not offering these service types mean that these retail product features are entirely different to current generation services including those based on LLU. Any geographic variation of the retail bundles remedy should not be delimited by the availability of the NGA type/TV retail services. These services are in a separate grouping and have no effect on the competitive dynamic between eircom retail and eircom's wholesale customers for its current generation services. Similarly the pent up demand moving to service bundles which include these elements are uncontestable by current generation service sets and their retail pricing has no intersection with the pricing of current generation bundles.

This view is entirely supported by eircom's pricing proposals for NGA services where it only proposes wholesale pricing adjustments for Market 1 products in areas where it actually launches NGA. If eircom believed that it was possible to contend with cable based NGA service/TV on price then it would make similar adjustments in current generation areas.

Because of eircom's ability to shelter margin in its wholesale pricing Vodafone believes that it is only appropriate to consider activating the proposed revised control in circumstances where eircom has reduced its regulated wholesale prices to the levels of the relevant price floors. This pre-condition meets the objectives of bullet points 3 and 4 of Paragraph 41 of the consultation documents and minimises any distortive effects of the revised control.

Responses to Consultation Questions

Q. 1 Do you agree with the definition of the LEA (i.e. Category 1 exchanges) as set out in paragraph 58? Please provide a detailed response with supporting data where appropriate to support your view.

Vodafone notes that ComReg's proposals make no distinction between POTS based services (current and next generation) and standalone services. Further the proposals make no distinction between NGA and current generation services. Given that eircom itself is proposing competition wholesale price discounts based precisely on these distinctions it is clear that ComReg's proposals for homogeneous treatment of bundles with a given geographic area are not based on a correct assessment of the competitive dynamic within these areas.

Q. 2 With reference to Annex: 2, ComReg would be interested in interested parties' views.

Q. 3 Do you agree with the inclusion of "island" exchanges in the definition of Category 1 exchanges to be appropriate? Please provide sufficient reasoning to justify your views.

Vodafone notes that eircom's proposals for NGA pricing would involve the application of WLR discounts to lines supporting current generation broadband services only in NGA areas. This approach will give rise to the exactly the dynamic set out at paragraph 51 of the consultation where it raises concerns in circumstances "*where the same bundle*

/offering would not be available on equal terms in neighbouring exchanges". If eircom itself is proposing wholesale pricing adjustments which are partial and do not extend to contiguous exchanges areas then a price control which gives it benefits to eircom on the basis of wide area applicability do not appear to be proportionate reasonable or justified.

Vodafone agrees that there are good reasons for the inclusion of "island" exchanges but this can only be justified where eircom is utilising matching criteria for the application of wholesale pricing discounts i.e. the revised control would be conditional on the application of common wholesale discounts across the entirety of the LEA.

Q. 4 Do you agree with the proposed use of a weighted average wholesale input in the net revenue test in Category 1 exchanges?

For the reasons set out elsewhere in this response and Vodafone does not agree with the use of a single "portfolio" of bundles which simply consists of all bundled services sold in a geographic area without any consideration of whether there are any substitutability dynamics between the service bundles in question. To the extent that appropriate portfolios of bundles are defined then it would be appropriate to use a weighted wholesale input.

However Vodafone disagrees with the inclusion of separate calculations for LLU based services. ComReg has already modelled price floors for WBA below which there would be a margin squeeze on such LLU based services. If eircom is pricing its WBA above such floors then in Vodafone's view the revised control should not apply. Even if ComReg takes a contrary view then it is Vodafone's view that eircom actual price for WBA should be used as the input for every LLU based line. This approach means that eircom has a positive incentive to reduce its WBA pricing to the price floor hence exposing its SMP protected wholesale margin to competition to the maximum extent. If it fails to reduce its WBA pricing this is an exercise of a commercial decision in a market where it has no competitive constraint and it should not seek or be allowed a regulatory offset on this is a market where it is subject to a competitive constraint

Vodafone notes that the ComReg proposal does not include provision for differentiated WLR pricing. Given that eircom is proposing to introduce such differentiated pricing this aspect needs to be considered.

Vodafone further notes that ComReg's proposals do not input provision for the WLR inputs from standalone voice bundles. While Vodafone disagrees with their inclusion in the bundles portfolio for internal consistency if ComReg is to persist in this course then they should be reflected in the weighted input OR alternatively if they are to be omitted from the weighted input they should be excluded from the bundles portfolio.

Q. 5 Do you agree with the weighted average wholesale input calculation to take account of OAOs use of VUA as a wholesale service / product in Category 1 exchanges? Please provide adequate reasoning to support your views.

As set out previously Vodafone believes that NGA services are sufficiently distinct that a separate portfolio of bundles should apply for Voice only bundles, current generation bundles and Next Generation bundles. To that extent it is appropriate to use a weighted wholesale input for NGA based inputs.

Vodafone has set out its views in answer to Question 4 that where the pricing for WBA is set above the ComReg determined price floor for WBA the revised control should not apply. Even if ComReg takes a contrary view then similarly it is Vodafone's view that eircom actual price for WBA should be used as the input for every VUA based line. This approach means that eircom has a positive incentive to reduce its WBA pricing to the price floor hence exposing its SMP protected wholesale margin to competition to the maximum extent. If it fails to reduce its WBA pricing this is an exercise of a commercial decision in a market where it has no competitive constraint and it should not seek or be allowed a regulatory offset on this is a market where it is subject to a competitive constraint

Q. 6 Do you agree with ComReg's proposal with respect to Category 1 exchanges – where changing market shares would normally require an increase in the bundles wholesale input? If you disagree, please provide sufficient detail to justify your views.

Vodafone does not agree with ComReg's proposal with respect to Category 1 exchanges. In practical terms what ComReg is trying to address is a situation where OAOs are using more and more higher cost wholesale inputs. As ComReg points out at paragraph 44 OAOs "…*have fewer customers and a less differentiated customer base than Eircom*". The issue of average wholesale price increases would not be a problem where the portfolios of bundles being tested represent coherent substitutable groups. In this situation the increase in average wholesale costs would be reflective of retail demand for higher value services in a retail upselling situation. If eircom retail where active in this segment of the market one would expect the prices of its own portfolio of retail bundles to be rising in line with the general retail market activity. If it were not active in that market segment then the test for its retail bundles would be unaffected by the cost input rise in a separate portfolio.

At a more basic level what is proposed is to give eircom a one-way regulatory bet. When the mix of wholesale inputs suits, it can choose to reduce pricing. When the mix would otherwise show that it is squeezing wholesale customers it would suffer no detriment. Given that eircom also wishes to reserve to itself the ability to keep wholesale margin shielded from competition this does not seem equitable.

Q. 7 What indicators in the retail market do you think should trigger a reassessment of the revised net revenue test?

The only indicators in the retail market that should trigger a review is evidence that the control is operating in such a way as to give OAOs, who use eircom regulated wholesale inputs to compete with it at a retail level, a competitive advantage greater than would be expected from the operation of the wholesale remedies by themselves. This goes back to the intent of the control as set out by ComReg and repeated at the start of this submission.

Q. 8 Do you agree with how the wholesale input usage of OAOs in Category 1 exchanges is calculated? If you disagree, please provide sufficient detail to justify your views and provide an alternative mechanism by which this could be calculated.

Vodafone agrees that the use of eircom provided information represents a useful means to calculate the wholesale input usage of OAOs in Category 1 exchanges.

Q. 9 Do you believe the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and price with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Vodafone believes that the proposed definitions are deficient in a number of respects

"Bundle" Vodafone continues to believe that this definition is too narrow and is amenable to regulatory gaming on the part of eircom. In addition its limitation to offers which contain retail narrowband access means that the retail bundles control would not apply to retail services offered by eircom which were based on standalone inputs. There is also an inconsistency that OAO standalone wholesale inputs would be factored into the control calculation but eircom's own bundles which were of similar construction would not face control.

"Portfolio" As set out in its response Vodafone believes that this definition is too broad, gives rise to distortive effects and gives rise to some of the perceived problems with the operation of this control.

6: Magnet Networks Limited

Magnet Networks welcomes this consultation especially in light of all the Industry debate that is occurring around NGA pricing. However, there are 3 main elements to this consultation, first is the definition of an LEA area, the second is the exchanges and lastly is the net revenue test. Magnet has no issue with the latter, however, the former two are the most contentious. Magnet has no issue with lighter regulation in exchanges that are competitive currently, once a strict margin squeeze test is adhered to and that a sufficient economic space is kept between LLU and other Eircom wholesale prices namely, SB WLR. Magnet does not agree to lighter regulation in areas that may, at an unknown date or time in the future potentially become competitive. What is a competitive area must be strictly defined.

Q. 1 Do you agree with the definition of the LEA (i.e. Category 1 exchanges) as set out in paragraph 58? Please provide a detailed response with supporting data where appropriate to support your view.

Magnet Networks welcomes the review of the Large Exchange Area (LEA) as Magnet believed the original LEA definition was flawed and thus contributed to a higher than necessary full LLU price. . Magnet seeks clarity than when UPC is referenced in this consultation it is the locations where UPC can provide phone and broadband, it does not include locations where UPC provides MMDS or cable TV services.

In relation to ComReg's proposed LEA Magnet have the following comments:-

1. Magnet does not agree with proposal 1 as including UPC is disingenuous. UPC may not overlap an exchange footprint and thus, including UPC may cause a market distortion for example, Greystones exchange. The Greystones exchange is on Kimblerly Road, anyone within 3-4 km of this exchange is unable to receive UPC's phone and broadband service as UPC has not upgraded their cable in this location. However, some 4km away from the exchange in a new development UPC has laid new cable and does provide its full suite of service. Thus, people in close proximity of the Greystones exchange can avail of Eircom or Vodafone (lineshare) however, not UPC phone and broadband. Thus, this is an example of the incorrect inclusion of an exchange. Magnet feels that ComReg should further investigate UPC upgraded cable map and overlay it onto the location of unbundled exchanges and come up with a more appropriate exchange list. (See geomap attached)
2. Magnet does not agree with the 'infill' proposal and the infill exchanges just may not be economically viable evey to be unbundled and giving these exchanges a false sense of hope of being unbundled and a price difference to residents in those exchange areas which may not be justified. It allows Eircom foreclose an exchange region.
3. Magnet Networks does not agree with proposal 3 of ComReg's proposal as per our answer above, this exchange, though may have 4,000 lines it may not be attractive to unbundle.
4. Magnet agree to a limited extent to proposal 4 and adding in criterion 1 further reduces the number of exchanges which come within this proposal which is to Magnet's satisfaction.

It is Magnet's view that each specific location must be analysed to a strict set of criteria based on actual market shares and not simply on the presence of a type of provider, e.g., LLU is negligible in most locations and given UPC's national market share is only 35% of eircom's XDSL market share, eircom is clearly the dominant in almost all areas, so why are most areas included.

Magnet believes the presence of UPC and or LLU based services in a location is not sufficient and market shares must also be factored into the test to define a category one location. If a test had to be conducted it should be related to the impact on the market and not a specific technology, and thus each provider or provider type i.e. cable/fibre/LLU should be given a percentage above which the exchange comes within category 1.

Q. 2 With reference to Annex: 2, ComReg would be interested in interested parties' views.

Magnet would like to understand how Eircom arrived at the list of non-confidential exchanges provided to Magnet. Are these exchanges those which NGA will be rolled out in, that Eircom believe will be unbundled by other operators or where UPC intend to put its phone and broadband services (not just its TV service). Alternatively, are these exchanges, exchanges where backhaul is or maybe available via Eircom or a third party provider. Magnet believes that unless there is an existing competitive services available no exchange should be included. Any speculation about where another entity may or may not provide service is just that, speculation and should not be relied upon when making decisions in an industry that very price sensitive.

As outlined above Magnet does not believe that Greystones exchange should be included in this list, as UPC does not truly overlap with the Greystones exchange area. The same can be said for Bray which does not seem to have been upgraded at the date of this consultation.
As outlined in the map provided, which was obtained from UPC's own website the following areas should not be included in Annex 2 exchange list

1. Cork – as after a quick search and comments on boards and forum websites not all locations within Cork can obtain broadband and phone services.
2. Dublin – Dublin 1, 2, 4, 6, and 7 do not have UPC at all and these locations are not even on UPC's rollout map.
3. Like Cork, Galway has UPC in limited areas.
4. Kildare should not be on the list as UPC is in limited areas of Kildare, to newer estates in the areas outlined in the UPC coverage map. There are lots of areas of Kildare county not covered by UPC.
5. Roslevin and Mullingar should not be included in Westmeath towns, as these do not even feature of UPC's own services map.
6. Again, not all of Bray have been upgraded to all for the provision of phone and broadband services.
7. Greystones should not be included. In UPC's own coverage map they highlight Charlesland not Greystones as having home phone and broadband service. Charlesland is some 4km from Greystones. (A geomap will be provided to show same).

As stated above Magnet does not object to lighter regulation but only in competitive areas, but Magnet does not believe that the areas outlined in the LEA are appropriate except potentially condition 1 all other conditions are irrelevant and distorting the marketplace and these other areas are not competitive and may never be competitive.

In relation to the extension list of exchanges provided by ComReg further comments will be provided once Magnet has had time to consider same.

Q. 3 Do you agree with the inclusion of "island" exchanges in the definition of Category 1 exchanges to be appropriate? Please provide sufficient reasoning to justify your views.

Overall, no, Magnet does not agree with the 'island' or 'infill' exchanges. This is potentially placing several exchanges in a category that may never come to pass i.e. becoming unbundled. Areas unbundled currently are more than likely the only areas ever to be unbundled. There is no incentive to unbundle these exchanges or analysis has been done by LLU providers and have decided that it is not economical to unbundle these island exchanges due to multiple reasons, backhaul costs, number of lines, type of demographic is the location etc. Including these 'island' exchanges will distort the true LEA market. As the LEA is being amended it is now imperative that the pricing of LLU is also amended to reflect the LEA. As the number of exchanges being included should reduce the per line price of LLU. Magnet looks forward to the publication of this LLU pricing consultation.

Q. 4 Do you agree with the proposed use of a weighted average wholesale input in the net revenue test in Category 1 exchanges?

We would encourage ComReg to review their figures in light of the usage that other OAO's have. .

Thus, Magnet is agreeable to the split but not with the usage and feels the usage should be increased. Usage should be increased to 200kbps rather than the 100kbps, this doubles the usage charge.

Magnet do not agree with the percentage breakdown in SB, to LS to LLU and believe that SBWLR will be greater than outlined by ComReg and LS and LLU to be smaller. Magnet would like to know where ComReg obtained their percentages. Thus, along with usage, Magnet would like if ComReg will review the percentage of an exchange in Category 1 breakdown. However, Magnet is not adverse to a weighted average cost approach to Category1 exchanges once it is justifiable. It is in a LLU's providers' interest to move a BMB customer to full unbundled but currently there is little incentive to do this.

Q. 5 Do you agree with the weighted average wholesale input calculation to take account of OAOs use of VUA as a wholesale service / product in Category 1 exchanges? Please provide adequate reasoning to support your views.

Magnet Networks agree with the use of VUA as a wholesale service in Category 1 only if there is a cross over between the exchanges in Category1 and the NGA exchanges. Magnet believes each exchange in Category 1 should be dealt with on a case by case basis in relation to VUA. Maybe in the short term utilising VUA as a wholesale service is presumptive especially as eircoms' NGA roll out has been delayed until 2013. VUA as part of this consultation should only be included when the product is launched. As Magnet has already stated the only exchanges to be included should be those where competition currently take place and that condition 1 is passed. All other conditions are irrelevant.

Q. 6 Do you agree with ComReg's proposal with respect to Category 1 exchanges — where changing market shares would normally require an increase in the bundles wholesale input? If you disagree, please provide sufficient detail to justify your views.

Magnet is concerned that utilising the proposal outlined by ComReg that a margin squeeze would occur. Thus, Magnet feel that the market should be left fluctuate as it should and as these Category1 exchanges will introduce a geographic nature to pricing ComReg should let the market led the pricing within the regulatory confines already laid out. If ComReg feel the need to geographically separate certain exchanges to allow Eircom benefit, preventing a detriment to Eircom should also be within its remit, that Eircom always benefits is not within the powers under Section 12 of the Communications Act, 2002.

Q. 7 What indicators in the retail market do you think should trigger a reassessment of the revised net revenue test?

Magnet believe only a potential market squeeze should trigger a reassessment of the revised network revenue test or alternatively, where three providers obtain each have sizeable shares between 30% to 40% each.

Q. 8 Do you agree with how the wholesale input usage of OAOs in Category 1 exchanges is calculated? If you disagree, please provide sufficient detail to justify your views and provide an alternative mechanism by which this could be calculated.

Magnet agree with the quarterly updates. Though Magnet agrees with ComReg that using the ComReg quarterly data collected is nearly 3 months out of date when published and utilising eircom's more real time figures i.e. usage costs per provider for BMB etc. can be on a monthly basis and is up to date.

Also, ComReg maybe request information from LLU providers on their usage in exchanges. As has been seen over the last few quarters the number of lines unbundled is staying static thus, the numbers of new provides will not fluctuate greatly in the future, it will be usage by these customers that will be of more interest.

Q. 9 Do you believe the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and price with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Magnet believe that the draft text is clear and sufficiently detailed from a legal, technical and practical perspective. However, Magnet does not believe the market is at a stage where the proposed ComReg direction can be progressed in its current form, this is owing to the fact that due process has not been properly followed in order to create sub-national markets.

Magnet considers that a lot more work is required to define the relevant criteria, for example, by just saying that the mere presence of eircom, UPC and another LLU based service is far too simplistic, and any directions would have to subject to a thorough and rigorous set of tests based on actual and substantial market shares.