



Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers

Submissions to Consultation 12/117

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1: Magnet

Magnet Networks welcomes this review of Market 1. Fixed voice access is the cornerstone on which all communications are built upon. However, the lines between tradition voice and VoIP have been blurred and people may now not even realise that they are using managed VoIP as opposed to POTS i.e. UPC, Magnet. Thus, as technically is moving so swiftly that VoIP should be considered within the period of this review.

Q. 1 Do you agree that the above identifies the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks agree with the preliminary conclusion outlined by ComReg that summarise the main developments in FVA since the previous market review in 2007. Magnet believes the two most prominent development has been the emergence of bundles and the growth in the use of VoIP whether managed or via Skype. As ComReg have noted Ireland still has a very high penetration of fixed voice access as well as a population that uses both their mobile and fixed lines in a complimentary fashion.

Q. 2 Do you agree with the scope of the review of the FVA market? Please substantiate your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

Magnet Networks agrees with the scope set out by ComReg in paragraph 4.13. In this paragraph ComReg looks at the totality of what now encompasses fixed voice access whether it be a bundle, a product for business or residential use, mobile and broadband substitution. All of these elements need to be examined in order for ComReg to reach a clear and educated conclusion about what FVA is in 2012 and how it looks or may look going forward 2-5 years.

Q. 3 Do you agree that FVA and fixed voice calls are in separate relevant markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Magnet is unsure as there are for and against having FVA and fixed voice calls in separate markets. Firstly, FVA is required to provide a broadband connection whilst at the same time you may not need to provide fixed voice calls i.e. place call barring on the line but via VoIP may still provide calls as only the narrowband element of the line is restricted. Likewise, FVA is required to provide voice calls. Thus, it would seem that they should be in the same market as they are not mutually exclusive as in you can't have fixed voice calls without having FVA but you can have FVA without having fixed voice calls. This leads to differing competitive constraints as different people see value in the 2 elements but more value is placed on the FVA on its own as the starting point to either acquire broadband or acquire fixed voice or both in a bundle.

Q. 4 Do you agree that standalone FVA is a separate market to a bundle of FVA with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

As per Magnet's answer above, you are unable to have broadband without FVA and similar you are unable to have fixed voice without FVA so thus, we do not agree with the supposition that FVA is in a separate market to bundles FVA. However, Magnet Networks does agree with the statement in paragraph 4.78 that customer like to purchase 2 products (reliant on the same access product) from one supplier rather than a voice and separate broadband supplier.

Q. 5 Do you agree that, in line with ComReg's previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

The starting point is FVA standalone however, it is necessary for ComReg to cast its review net wider and include the bundles of broadband and voice as potentially substitution products. ComReg at paragraph 4.80 identify that people will substitute fixed voice with broadband and VoIP.

Q. 6 Do you agree that there is a single FVA market for business and residential customers? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Overall, Magnet Network agrees with ComReg as the physical access infrastructure is the same as outlined in Paragraph 4.11, though pricing is potentially different an SME would take the same offer as residential with the only difference being their talk package. An SME would require more daytime calls whilst a resident would more than likely require more evening minutes. Thus, Magnet believe there is a single FVA market as it's the inputs that go over that access product that differentiate business from residential.

Q. 7 Do you agree that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Overall Magnet agrees with ComReg that due to the nature of activities carried out over HLVA as opposed to LLVA, that LLVA is a residential or small to medium businesses that have one or more phones but do not have a private PBX. Whereas HLVA potentially feed into private PBX's and have multiple channels.

Q. 8 Do you agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks believe that IP voice should be included. Alternatively if it is not included it should be at least monitored especially in light of hosted PBX's which does not require the purchase of a new PBX and in Magnet's belief will be established as a popular product within the lifetime of this review due to the speed and adoption of new technology and telecommunications products.

Q. 9 Do you agree that it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used to deliver managed VOIP services which may include cable, fibre, FWA and DSL? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

There are currently two broadband only products in the Irish market. Magnet Networks launched a 'Simply Broadband' product in May 2011. This product has been very popular with

our customer base. This product is not a fibre to the home product but is both LLU and bitstream. More recently Vodafone has launched a similar broadband only product. With the advent of NGA there will be numerous broadband only products upon which VoIP operators both managed and unmanaged will piggyback on. Thus, Magnet believe it is appropriate now to define FVA market in a much broader context to include copper and broadband connections including VoIP over cable, fibre and FWA.

Q. 10 Do you agree that retail fixed access and mobile access do not currently belong in the same relevant market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks agree to the most extent that fixed access and mobile access do not fall within the same market, however, with the falling fixed termination rates and mobile termination rates and higher broadband speeds across mobile networks, mobile phones will become more a substitute product as opposed to a complementary product.

Also, economic requirements are a factor, as social welfare provides phone rebate for either fixed or mobile, but not both. Thus, for some people a mobile on a low tariff is preferential to a landline.

For business customers there is more an emphasis on fixed voice access. However, as identified in paragraph 4.90, 80% of businesses in Ireland are small to medium enterprises. 70% of these SME's have less than 10 employees and thus mobile may be more important to them due to the nature of their work i.e. mechanic, salesman, solicitors, barristers are all mobile daily for work and a fixed line may not suit them and require the mobility flexibility of a mobile phone.

It must be noted that 2 to 3 telecommunications providers are offering converged services across mobile, fixed and broadband namely, O2, Vodafone and Eircom with Meteor. Though, Magnet agrees that fixed voice access and mobile access are separate, the line between them is blurring and should be monitored during the lifetime of this review.

Q. 11 Do you agree that the relevant geographic market for the relevant FVA markets identified is Ireland? Please explain the reasons for your answer, clearly indicating the relevant paragraph

numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Overall Magnet agrees that the relevant geographic market is Ireland as there is no regional price variance for access. Also, there is no other ubiquitous fixed voice access supplier.

Q. 12 Do you agree with ComReg's preliminary conclusions on the retail FVA market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Overall Magnet Networks agrees with ComReg's preliminary conclusions however; caveat the response with the above answers.

Q. 13 Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Magnet Networks agree with ComReg's preliminary conclusions as it clearly shows that Eircom has SMP and if the current OAO supplied SBWLR were included in this number then Eircom's percentage of market share would increase. It is clear that Eircom have SMP as they are the only fixed voice access provider with ubiquitous network. Though other operators may own their own network it is not as far reaching as Eircom's. Magnet Networks agrees with paragraph 5.42 that Eircom's market share of SB WLR when combined with OAO purchased service is over 80% and this share is not being constrained by VoIP over broadband. Magnet agrees that there are large barriers to entry to replicate Eircom's network and OSS systems. Magnet agrees with paragraph 5.87 that Eircom has economy of scope, scale and density that is not easily replicated. This is true for both the LLVA market and the HLVA market. As outlined in paragraph 5.104 Eircom has 62% of the HLVA market (Eircom and OAO purchase SBWLR). As outlined in the United Brands case a market share of over 50% is a good indication that a company holds a dominant position within the market. Though, some aspects of HLVA seem more competitive than others, Magnet still believes it is necessary to maintain retail controls as the competition features outlined are all still present in the HLVA market. As per ComReg's statement in paragraph 5.114 that competitive is still not effective in the HLVA market and thus, Magnet contends that retail remedies should be applied.

Q. 14 Do you agree with the types of competition problems identified by ComReg, as outlined above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Overall, Magnet Networks agrees with ComReg's preliminary conclusion. If regulation was absent Eircom would be incentivised not to offer SB WLR products to OAO's and it would further increase its market share and inevitably it would lead to an abuse of its dominant position. Eircom would more than likely impose higher prices on end users and squeeze competing operators out of the market.

Q. 15 Do you agree with ComReg's proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument appended to Decision D07/61? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Overall Magnet Networks agree with ComReg's proposed approach to the existing SBWLR obligations. It has been shown throughout this consultation that if such obligations were to be withdrawn Eircom would have an incentive to foreclose the market. Despite existing regulatory obligations Eircom has 60% of the FVA market with OAO resellers accounting for 20%. Thus, absent regulation such OAO resellers would not exist ensuring a foreclosure on the market and a return to a true monopoly.

Q. 16 Do you agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument Appended to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Magnet Networks agree that some form of retail regulatory obligations should be imposed as stated above Eircom retail account for 60% of the FVA market. As also stated in paragraph 6.48 LLU has made no discernible impact on the FVA, as a further 20% of the market is straight Eircom resellers. Also, Eircom retail has such a brand presence it can leverage this by bundling with other products within its company structure such as music hub, mobile, Setanta sports,

even cloud storage solutions. All of these can cross subsidise the FVA input and are non-replicable by an OAO.

Q. 17 Do you agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Magnet Networks do not agree with the removal of retail SMP obligations imposed on Eircom in the HLVA market and solely relying on wholesale remedies. The HLVA is a competitive marketplace and removing the retail obligations would unfetter Eircom retail and allow them cross-subsidise with other products especially mobile and cloud storage solutions. The business that utilises HLVA maybe too big to use LLVA products but too small to go for a more customised solution utilising leased lines or bespoke lines etc. This is the type of business that will be looking to cost save and reducing mobile costs and cloud storage may be a perfect companion when rolled in with their phone and broadband costs. The removal of such retail obligations may foreclose the market and would certainly allow Eircom retail bundle products to make them more attractive to the end user.

Q. 18 Do you agree with ComReg's view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Overall, yes Magnet agrees with ComReg's view to impose retail obligations on Eircom retail in the LLVA market. As outlined in Magnet's answer in question 16, Eircom would have opportunities to cross subsidise and bundle complementary products in order to attract retail customers. These bundles would not be replicable by OAO's and thus lead to increased market share and further foreclosure of the market.

Q. 19 Do you agree that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market? As regards the detailed implementation of that obligation, do you agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg)? Please

explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Magnet Networks agree that Eircom should be subject to a retail price cap as it still allows Eircom flexibility in pricing but does not allow excessive pricing. However, such price cap should be implemented in conjunction with an obligation not to margin squeeze as otherwise Eircom retail may price below cost and those foreclose the market whilst keeping in line with their regulatory price cap obligation. Also, unreasonably bundling items together should also be monitored to ensure that the sum of the standalone regulated products is accounted for and no cross subsidising takes place.

Q. 20 Do you agree that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

As outlined in Magnet's answer in question 19 it is imperative that the obligations outlined in the Draft Decision in Appendix 3 exist. These are required to ensure that Eircom retail do not foreclose the market to the preclusion of OAO's.

Q. 21 Do you agree that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Magnet Networks agree with the transparency obligation outlined in the Draft Decision, however, Magnet feel that such an obligation should be extended to HLVA not just LLVA. There may potentially be supply issues in HLVA which require the transparency requirement and as such should not be removed from HLVA.

Q. 22 Do you agree that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10? Are there other approaches that would address the identified competition

problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Overall, Magnet agrees that Eircom should be subject to an obligation to operate and maintain a cost accounting system. It is necessary for them to do this not only in the LLVA market but also in the HLVA market. Both markets can be subject to preferential treatment to customers in both markets whether this entails higher speeds, mobile discounts, free minutes or generally how products are bundled to the end users advanced. It is necessary that this should be monitored and ensure that at all times Eircom is complying with its obligations.

Q. 23 Do you agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position

It is imperative that such an obligation exists under which Eircom retail have an obligation due to the fact that they may discriminate one end user over another or leverage their relationship to their benefit over another OAO to the detriment of the market place.

Q. 24 Do you agree with ComReg's draft Decision Instrument at Appendix 3? Do you agree with ComReg's Definitions and Interpretations as set out in the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Overall, Magnet agree with ComReg's draft Decision Instrument outlined in Appendix 3, however, Magnet believes that the transparency obligation should be included for HLVA and not just LLVA.

Q. 25 Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Overall, Magnet Networks agree with the preliminary conclusions laid out in the Regulatory Impact Assessment. However, Magnet believes that transparency in the HLVA market should be explicitly stated in this decision.

Q. 26 Do you believe that ComReg's draft Decision Instrument set out above is, from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the matters proposed therein? Please explain the reasons for your answer, clearly indicating the relevant section numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Magnet believes that draft decision accurate from a legal, technical and practical perspective however, Magnet would like transparency in the HLVA market to be expressly stated in decision notice. Otherwise the decision is sufficiently detailed, clear and precise with regards to the matter proposed therein.

2: Eircom

eircom Ltd.

**Response on behalf of eircom Group to
ComReg Consultation 12/117:**

Market Review

**Retail Access to the Public Telephone Network at a
Fixed Location for Residential and Non Residential
Customers**

25 January 2013

This response was completed prior to the publication of ComReg 13/08, Addendum to Market review. It was not possible to incorporate the additional information in relation to the market research results into our response but we have added Annex 3 which provides some comment on this data.

DOCUMENT CONTROL

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PUBLISHED AS COMREG 13/08101**

1. EXECUTIVE SUMMARY

The Market 1 assessment set out in the Consultation Document, as it relates to Lower Level Voice Access (“LLVA”) services, is materially flawed at several levels. The market definition, which frames the competition assessment, does not reflect actual supply and demand characteristics in the Irish market place today. It is not, therefore, fit for purpose.

The ensuing competition assessment compounds the problems arising from the use of incorrect market definitions because it fails to give adequate weight to (or misinterprets the impact of) highly relevant changes in the market dynamics that have occurred over the past 5 years. It does not reflect the nature or intensity of competition at the retail level or the efficacy of regulation at the wholesale level. Likewise, it fails to take into account major developments that are expected to occur during the coming year which will further impact the relevant markets in the near term.

ComReg’s market analysis is supported by an external market survey that was carried out prior to the consultation (and published by ComReg as document 12/117a). This market research, while providing some useful indicators, does not give a comprehensive view of the market and is somewhat limited and distorted by its failure to identify some basic information in relation to the target sample. A review of this market research is attached as Annex 1 to this Response.

Relying on a flawed competition assessment and incomplete market research, ComReg has preliminarily concluded that eircom continues to have significant market power (“SMP”) in the LLVA and Higher Level Voice Access (“HLVA”) markets as it proposes to define them. On this basis, ComReg has essentially proposed no change in the retail and wholesale obligations that currently apply to eircom’s provision of LLVA services, effectively ignoring the major changes that have occurred in the market since the last market review more than five years ago.¹

The EU Regulatory Framework for electronic communications is intended to ensure that there is a competitive landscape for market players and reasonable retail offers

¹ Although the existing remedies applicable to Market 1 have been in place since August 2007 (D07/61) and certain elements have been subject to further specification from time to time (e.g., the retail price cap, the WLR retail-minus percentage, the net revenue test for bundles, etc.), many of the Market 1 measures in fact date back to 1999.

for consumers through application of the market review process, while yet ensuring a minimal level of intervention. The market assessment, which should be applied in a timely manner, should be based on a forward-looking analysis of evolving market conditions, including reduced barriers to entry and potential entry. The framework requires that national regulators adopt the least interventionist measures available and remove such measures when they are no longer necessary. This is demonstrated by the provisions of the Universal Service Directive that limit the application of *ex-ante* retail regulation to those cases where wholesale regulation has been demonstrated to be ineffective. Regulation at the retail level should, therefore, only be applied and maintained if it is clear that regulation at the wholesale level (if necessary) – combined with other measures that are in place, such as universal service obligations – are not adequate to protect competition at the retail level. At the same time, appropriate wholesale measures should be designed with the objective of promoting competition at the retail level.

Although the Consultation Document acknowledges these fundamental principles, which are enshrined in the EU Framework and Universal Service Directives and the Irish Regulations transposing them, the market assessment neither examines the impact of wholesale regulation (current and soon to be adopted) at the retail level, nor does it consider the impact of a number of other constraints that apply to eircom's provision of LLVA services at the retail level.

With respect to HLVA services, ComReg proposes to keep in place the obligations that currently apply to eircom at the wholesale level but to forbear from regulating these services at the retail level. In contrast to ComReg's apparent reluctance to acknowledge changes in the marketplace that materially impact on the competitive position of eircom's LLVA offerings, ComReg has based its decision to forbear from regulating HLVA services on the effectiveness of the applicable wholesale remedies and on "*increased competition from alternative infrastructure and/or, prospectively, from emerging products such as hosted PBX telephony and SIP trunks.*" (ConDoc Para. 6.55).

In the sections that follow, eircom provides an alternative, forward-looking assessment of competition in the provision of LLVA services. For the reasons set out in Sections 2 and 3 below and in eircom's responses to the consultation questions in Section 4, eircom strongly urges ComReg to define the "relevant" product and geographic markets in a way that is *relevant* to the Irish marketplace today. More

specifically, ComReg should define the relevant LLVA retail markets comprising Market 1 to include:

- Voice Only;² and
- Bundled Voice.³

The latter market should be further broken down into separate geographic markets defined to recognise the differing competitive constraints that exist within and outside of the Larger Exchange Areas (“LEAs”). In the LEAs, eircom faces strong competition for voice/broadband bundles from UPC and LLU operators and, in the very near future, eircom will also be competing with operators using its wholesale NGA inputs.

ComReg should take full account of the major changes in supply and demand in these markets that have occurred since the time of the last Market 1 review more than 5 years ago – a lifetime in this industry. ComReg should also evaluate the retail-level impact of the wholesale obligations that currently apply to Fixed Voice Access (“FVA”) services, as well as eircom’s separate obligations under the General Authorisation and the Universal Service Regulations as well as those that apply to it as the designated Universal Service Provider (“USP”) of fixed access and calls.

Given the weight of the evidence available to ComReg today and the likelihood that significant policy, regulatory, technical and commercial changes will further increase the competitive dynamics in the relevant FVA markets during the coming year, ComReg should:

- determine that the relevant product markets comprising Market 1, as set out above, no longer require SMP regulation at the retail level in light of the competitive constraints that exist and the efficacy of applicable wholesale remedies,⁴ and
- include the wholesale obligations now pertaining to Market 1 as access-related measures under Market 2 (which ComReg has effectively conceded makes sense by deferring its review of these measures until its upcoming review of Market 2).

² To be more specific, this market includes fixed Voice Access and Calls offered with complementary offerings of the standalone services by the same provider, whether bundled and sold at a single fixed price or not.

³ This market would include the provision of Broadband along with fixed Voice Access and Calls, as well as provision of the component parts on a stand-alone basis by the same provider.

⁴ These wholesale remedies include not only the CPS and SB-WLR obligations that are currently covered under Market 1 (which eircom proposes be shifted to Market 2), but also those applicable to Bundled Voice under Markets 4 and 5.

In proposing to remove Market 1 from *ex-ante* SMP regulation (or, alternatively, in requesting regulatory forbearance in the component markets), eircom recognises that it must continue to comply with the cost accounting rules in relation to FVA services as a result of its wholesale obligations under Markets 2, 4 and 5. Moreover, eircom will continue to be subject to any requirements of transparency and publication that ComReg adopts pursuant to Regulation 15 of the Universal Service Regulations, including currently, ComReg Decision D11/04. In addition, eircom is subject to specific obligations of publication and transparency under Regulation 8 of the Universal Service Regulations in relation to the services that it is required to provide under the Universal Service Obligation and is required to charge the same prices for FVA services nationwide, regardless of the underlying cost differentials, due to its USP designation.

The principal justification for the regulatory controls proposed by ComReg in terms of LLVA services is that they are necessary to avoid the exploitation by eircom of its SMP in relation to those consumers who value stand-alone LLVA. These concerns are however already addressed by way of existing generally applicable obligations and as a result of eircom's USO and the regulatory controls proposed by ComReg are accordingly unnecessary, and as such unjustified and disproportionate.

2. OVERVIEW OF EIRCOM'S POSITION

2.1 Changed and Changing Circumstances Justify the Removal of SMP Obligations from the Services Covered by Market 1

The EU Regulatory Framework is intended to ensure that there is a competitive landscape for market players and reasonable retail offers for consumers through the application of the market review process. The market assessment should be based on a forward-looking analysis of evolving market conditions, including reduced barriers to entry and potential entry.⁵ The framework requires that national regulators adopt the least interventionist measures available and remove such measures when they are no longer necessary. Regulation at the retail level should be applied only if it is clear that regulation at the wholesale level (if necessary) – combined with other measures that are in place, such as universal service obligations – are not adequate to protect competition at the retail level. At the same time, appropriate wholesale

⁵ See Para. 27 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

measures should be designed and implemented with the objective of promoting competition at the retail level.

In light of commercial and technological developments and changes in government policy, there are now substantial competitive constraints on eircom in the markets subsumed by Market 1, however defined. These competitive developments are discussed in Sections 2.1 through to 2.4 below.

Furthermore, as discussed in Section 2.5 below, the market assessment should take account of the impact of wholesale regulation as well as any additional regulatory constraints (both current and soon to be adopted) that apply to eircom. The Consultation Document fails to take adequate consideration of developments at the wholesale level, nor does it appropriately consider the impact of a number of other constraints that apply to eircom's provision of LLVA services at the retail level.

In this regard, the Consultation Document does recognise the importance of undertaking such a forward-looking analysis (ConDoc para. 1.4 & 5.10) and it is noticeable that ComReg's analysis, in places, acknowledges the prevailing trends over the next 3 to 5 years. Unfortunately, ComReg's assessment of market developments to date and those expected to occur over the coming year are focussed primarily on the rear-view mirror.

ComReg's previous SMP finding from 2007 was used as the starting point for the current analysis,⁶ in spite of the fact that there have been enormous changes over recent years in relation to the FVA markets. Circumstances that may have been relevant 5 or more years ago bear little or no resemblance to current competitive and market conditions pertaining to FVA services.⁷

One obvious example of the retrospective nature of the analysis is found in the lead-up to Question 4 of the Consultation Document, which deals with the issue of whether or not stand-alone FVA is a separate market distinct from FVA bundled with

⁶ ComReg 12/117 Para 4.79 – "... ComReg's view is that the stand-alone narrowband FVA product, which was the focus of ComReg's earlier market review in 2007, is considered the appropriate starting point for the current market review..."

⁷ The European Commission's Recommendation on relevant markets requires that the NRAs define relevant markets appropriate to national circumstance. It further states that, in order to identify those markets that are susceptible to *ex-ante* regulation, it is appropriate to apply the so-called three criteria test (the absence of any one of which means that regulation should be withdrawn from the market). When applied with respect to LLVA markets in Ireland, none of the three criteria set out in this test is satisfied. In particular, and with respect to criterion 1, any barriers to entry to this market have been removed by the implementation of appropriate upstream remedies such as CPS and SB-WLR obligations. The relevance of existing and prospective wholesale regulation in this regard is discussed in more detail below. Moreover, and in relation to criterion 2 of this test, eircom believes that the relevant LLVA markets are now trending towards effective competition over the period envisaged by ComReg for the purposes of this market review process. Moreover, there is no reason to believe that competition law and other applicable measures (including eircom's USP designation and the requirements of the Universal Service Regulations) are inadequate. For these reasons, it is legitimate to question whether Market 1 should be considered susceptible to *ex-ante* regulation going forward – an issue that is currently being considered by the European Commission in its consultation on the Recommendation on relevant markets.

other services. UPC's experience provides strong evidence of consumer demand for bundles of TV services and FVA services, and there is abundant evidence of the competitive dynamic that is driving eircom towards the development of similar offerings in line with telecommunications operators around Europe and globally. These types of service bundles will become increasingly important in the coming years. In spite of this, the issue of the presence of TV services in bundles receives only a cursory mention in the Consultation Document.

It is essential that ComReg's analysis recognises the competitive constraints that eircom faces in today's rapidly evolving marketplace. ComReg should tailor regulation so that it covers only those products and geographies in which the evidence shows that: (i) the constraints eircom faces from rivals are insufficient to ensure the appropriate outcomes for consumers; (ii) wholesale remedies and generally applicable consumer requirements are not sufficient; and (iii) any benefits from intervention outweigh the costs.

ComReg's analysis does not follow this approach. As a result, ComReg has reached a number of incorrect conclusions about the existence of market power and the need for *ex-ante* SMP regulation at the retail level. In eircom's view ComReg's assessment should take into account the following significant factors:

- Virtually all consumers today purchase voice access as part of wider packages of complementary products, usually in bundles. The suppliers of these products compete principally on selling bundles, not on individual elements of the bundles. In particular, fixed voice calls are almost always purchased from the same supplier as FVA, so it makes sense to consider calls and access together when defining markets. In addition, there are significant differences between the preferences of, and the demand-side substitutes available to, customers that purchase fixed VoiceOnly and those that purchase fixed voice as part of wider bundles including broadband. The clear distinction between the 2 implies that separate markets should be defined.
- In the market that includes fixed Voice Only products, mobile voice is now an effective alternative to fixed voice for all intents and purposes relevant to the assessment of Market 1. This is confirmed by ComReg's own market research, which shows that a very significant share of fixed voice customers would switch to mobile only if they faced an increase in the cost of making calls on their fixed lines. Also, the increase in the proportion of mobile only

households and a decrease in the proportion of fixed-only households provides strong evidence of this trend. This evidence is all the more powerful because the degree of substitutability of mobile has, to date, been masked by (i) the large proportion of Voice Only customers who have had the entirety, or the vast majority, of their bill paid by the Department for Social Protection's (DSP) Telephone Allowance scheme; and (ii) the fact that many consumers retain a fixed line in order to obtain a fixed broadband service. Mobile places a significant competitive constraint on eircom's ability to set the prices of fixed Voice Only products and therefore eircom does not have SMP in this market.

- eircom is now under intense competitive pressure in more densely populated urban areas. In these areas eircom faces infrastructure-based competition from rival fixed providers. This is particularly the case with regard to UPC, which provides bundles which include fixed voice. In addition, it is these areas that are most attractive to providers using LLU or, in the future, eircom's virtual unbundling products. The nature of competition in these areas, and the constraints this places on eircom, is different to competition in other areas. As the difference in the competitive conditions is largely driven by the existence of UPC's alternative competitive infrastructure, this is a natural initial boundary for defining the geographical market which is both unique and stable over time. This boundary can be updated over time, as eircom rolls out its NGA network, enabling its wholesale customers to provide competitive services based on its virtual unbundled products. It will remain unique, stable and well specified. Therefore, ComReg should define sub-national geographic markets for the retail of Bundled Voice. In the more densely populated urban areas the market should be found to be prospectively competitive, acknowledging that eircom does not have SMP.

Outside of the LEAs, eircom's provision of Bundled Voice calls and access with broadband will be constrained by the existence of wholesale regulation in Market 2 (including CPS and SB-WLR obligations, which eircom proposes be covered under Market 2 rather than Market 1) and in Market 5. In addition, eircom's USP designation requires that eircom charge geographically averaged rates nationwide. Bundles of voice and broadband provided outside LEAs will therefore be indirectly constrained by the competitive forces that apply within the LEAs. Additionally, eircom's obligations under the Universal Service Regulations would continue to apply. It would, therefore, be reasonable and proportionate for ComReg to withdraw SMP regulation from this market as well, or exercise regulatory forbearance.

These points are considered in greater detail in the sections that follow.

2.2 ComReg's Market Analysis Should Reflect the Fact that Consumers Buy Predominantly Product Bundles

2.2.1 Overview of assessment

ComReg's approach to market definition does not appropriately reflect that consumers buy complementary fixed telecommunications services (such as FVA calls and broadband) from the same provider, often in bundles – consumers do not buy FVA on a stand-alone basis. FVA may be a key part of the bundles,⁸ but that does not mean that it should be considered separately from the other products in the bundles. Such analysis would make sense only if there were significant differences in the competitive conditions for different elements of the bundles, or if consumers self-assembled bundles taking different elements from different suppliers.

As consumers usually purchase complementary fixed telecommunications services from the same provider, it is necessary to consider whether markets should be defined for each element of the bundle or for the bundle as a whole. Where competition takes place around product bundles, market definition and market power analysis should reflect this, to ensure that the competitive constraints that providers of bundles face are properly identified and assessed. This will ensure that any resulting remedies are targeted and proportionate to the market power problem that may be identified.

Instead of considering these incontrovertible developments at the market definition stage, ComReg has simply applied a mechanistic implementation of the European Commission's 2007 Recommendation on relevant markets susceptible to *ex-ante* regulation.⁹ Because the analysis ignores significant developments that have taken place in the way in which these markets have evolved in Ireland over the past several years, it risks leading to flawed conclusions about the existence or extent of market power and, therefore, to disproportionate or inappropriate remedies.

⁸ ComReg define "bundled" subscriptions as "subscriptions of a single operator who receive 2 or more services such as fixed and mobile telephony service, access to TV programmes and broadband internet access from that single operator, usually for a single price and as part of a single bill." (ComReg 12/117 footnote 90). In principle this could include pure bundles, mixed bundles, or tied products. In this document we use the term "bundle" to mean either pure bundles, mixed bundles or products provided as part of a single bill to consumers. Thus, the term bundle should be interpreted to include the provision of complementary products, such as access and calls, under a single bill whether or not there is a single price.

⁹ As discussed below in Section 3.3.2, the European Commission is in the process of conducting a consultation on this Recommendation and one highly probable outcome is the removal of Market 1, the only remaining retail market on the 2007 list.

The text below elaborates on the following points:

- suppliers of electronic communications services in Ireland compete by providing product bundles. There are 2 distinct categories of product bundles which include FVA as a key input; Voice Only services, where FVA and fixed voice calls are provided together, and Bundled Voice services, where FVA and fixed voice calls are provided together with other services, in particular broadband. The implication is that ComReg should define markets for each of these categories of product bundles;
- based on ComReg's own reasoning in its last market review, the structural changes in the market since that review imply that it should assess market power in the provision of bundles. While there may have been some justification for ComReg's approach to defining markets for the elements of the bundle at the time of its last review, such justifications no longer exist; and
- ComReg's assessment of market power in respect of one element of the different product bundles – namely stand-alone FVA – fails to give sufficient weight to clear evidence of the close substitutability between stand-alone FVA and mobile voice services.

2.2.2 Defining markets for FVA in the context of bundles

ComReg uses the criteria as set out in a report by BEREC (*"BEREC report on impact of bundled offers in retail and wholesale market definition"*)¹⁰ to determine whether the market for fixed access to a telephone network should be defined by bundles¹¹. The BEREC report provides *"guidance on how an NRA might define and analyse markets in instances where bundled products are prevalent at a wholesale and/or retail level"*¹². The BEREC report suggests using the following criteria for determining whether a market should be analysed with reference to bundled products:

- End user behaviour, for example:
 - where take up of bundles is high, i.e. a **"large proportion of consumers purchase bundles"**, it may suggest that consumers have a preference for consuming the bundle¹³ or

¹⁰BEREC BoR (10) 64.

¹¹ComReg 12/117 Para 4.20.

¹²BEREC BoR (10) 64 Para. 10.

¹³BEREC BoR (10) 64 Para. 85.

- where consumers do not unpick bundled products to switch to individual products it may be relevant to consider the bundled product as the relevant focal product for investigation.
- Where there are customer specific **economies of scope** or where there are **transaction costs savings** it may be appropriate to define the market as a bundle of products.

As discussed below, market conditions clearly demonstrate that markets should be defined by the product bundles.

2.2.2.1 End user behaviour

The European Commission has provided guidance (the “*Explanatory Note*¹⁴”) on how markets can be defined in the context of bundles. The Explanatory Note explains that if “*a sufficient number of customers would unpick the bundle and obtain the service elements of the bundle separately [given a price rise on the bundle then] then it can be concluded that the service elements constitute the relevant markets in their own right and not the bundle*”.¹⁵

The behaviour of consumers in Ireland clearly demonstrates that, when making their purchase decision, they consider the product bundle and not the individual elements. There appears to be a strong consumer preference for bundled offers which is reflected in the high take up of bundled services. Consumers’ preferences are also reflected in the retail offers available to them which almost exclusively consist of bundled offers. Therefore, when defining markets the natural starting point for ComReg should be bundles of services rather than around specific elements of the bundles.

Take up of bundled services is very high

The vast majority of consumers (99%) purchase FVA as part of a wider bundle of complementary products.¹⁶ According to ComReg only 1.3% of fixed access consumers take a CPS plan and, therefore, purchase their

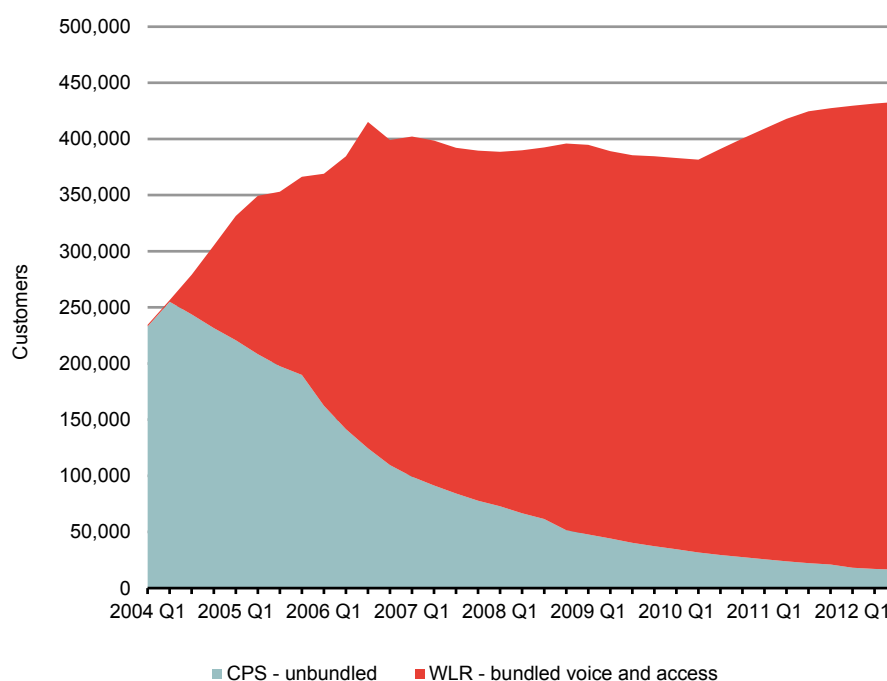
¹⁴ Explanatory Note - Accompanying document to the 2007 European Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications and services, SEC (2007) 1483 final.

¹⁵ Explanatory Note section 3.2.

¹⁶ ComReg 12/117 Para 4.46.

calls separately from their line rental.¹⁷ The high take up of bundles of FVA and calls services is contrasted with the state of competition at the time of ComReg’s last market review when it found that that “despite the increase in availability and take-up of bundled packages, calls and access are still often purchased separately”.¹⁸ The decline in popularity of unbundled products is in marked contrast to the growth in take up of bundled services in Ireland. As can be seen from Figure 1 below only 16,000 consumers now take an unbundled call service, down from over 250,000 in 2004.

Figure 1. Evolution of CPS compared to other types of fixed wholesale lines



The high take up of bundled services reflects **strong consumer preferences for bundles**. The information included in the 2012 Market Research¹⁹ evaluating the attitudes of retail customers towards fixed line services found that:

84% thought about calls and access together as a package (including 60% who thought about fixed telephone services as part of a wider bundle

¹⁷ComReg 12/117 Para 4.47.

¹⁸ComReg 06/39 Para 3.29.

¹⁹ComReg 12/117a.

of products).²⁰In view of this, ComReg “*acknowledges that there remains a strong link between a choice of FVA supplier and subsequent decisions on how to make a fixed voice call.*”

Most consumers with fixed line phones are concerned about the cost of the overall bundle/package (70% in the case of residential customers and 67% in the case of business premises), with only 15% of residential (23% of business) users claiming that they think about the cost of line rentals and calls separately.

Consistently, the top reason for the majority of the residential customers switching provider (in the last 3 years) is related to getting a better value in the bundle price and/or package offered (52% of respondents),²¹ instead of the specific conditions of individual services (only 11% of surveyed customers stated that they switched supplier due to the cost of the line rental).²²

Consistent with this, when asked about the price paid for the monthly line rental service, only 26% of the surveyed customers were able to even estimate the cost of the line rental.²³

Consistent with the market research on the preferences for bundles is evidence from switching surveys undertaken for eircom, which found that the main reason for switching from eircom appears to be availability of cheaper bundles from other providers. The data show that 38% of UPC churners stated that cheaper triple-play bundles to be the main reason for switching, followed by 30% and 30% of customers who switched because of the generally cheaper line rental and, respectively, calls offered by UPC. For 38% of Vodafone switchers, cheaper double-play bundles (voice and broadband) are the main reasons for switching, followed by 30% switching because of cheaper calls and 30% switching because of the cheaper line rental, see Figure 2 below.

²⁰ComReg 12/117 Para 4.48.

²¹2012 Market Research, page 42.

²² The pattern differs for business customers for whom the cost of making calls is the top reason (53%) followed by being offered a better bundled or package (19%).

²³ 17% did not know the answer, 45% considered the line rental service was part of a package with calls and 12% claimed they were not charged line rental. See the Annex to ComReg 12/117, page 28.

Figure 2. The main reasons to switch to UPC/Vodafone in Dublin area

✂

This appears to be broadly consistent with the product choice of surveyed switchers, see Figure 3 below. 80% of UPC switchers opted for some combination of broadband and voice services, with 30% choosing triple-play bundle including TV. At the same time, 80% of Vodafone switchers took up double-play bundles with voice. This evidence further highlights the importance of bundles among eircom's churners.

Figure 3. Product choice of UPC/Vodafone switchers

✂

Retail offers do not reflect consumers “unpicking” bundles

The preferences of consumers for bundled services are reflected in the retail offers available to them. Retailers generally no longer offer stand-alone call services to consumers. Instead retailers compete by offering product bundles which include access, calls and broadband.

According to ComReg, the largest fixed access suppliers in the market (eircom 63%, UPC 20%, Vodafone at home 13%), which make up a combined 97% of the residential FVA subscriptions, are not currently offering fixed voice calls independently of FVA. As such, fixed voice offers usually include the line rental service as part of the bundle. For illustration,

Annex 2 shows the retail phone offers that are currently available on eircom and Vodafone's web pages. In both cases, headline prices include the line rental service and do not give the option of acquiring call services without line rental. Similarly, UPC's web phone offers focus on call services, stating that no line rental needs to be paid (although there is a "monthly cost").²⁴

More generally, we understand that eircom is the only provider that offers a stand-alone line rental retail service, as it is required to by regulation. Instead, the focus of the commercial strategies of competitors to eircom is based on the provision of product bundles.

Technically it is possible to buy line rental from eircom and calls from another provider, but CPS is now hardly used. As shown in Figure 1 above, CPS has been progressively replaced by SB-WLR, which facilitates the provision of access and call services together. As such, while CPS represented 87% of the total wholesale lines in Q3 2004, this percentage dropped to just 4% in Q3 2012, with 82% of the lines corresponding to SB-WLR (with the remainder due to full or shared LLU). The current state of competition, wherein retailers choose to compete on product bundles, can be contrasted with the market in 2006, when ComReg found that, despite evidence that some operators offered bundled products "*each element of the bundle (whether access, calls, data or TV) can be, and often is, bought separately*".²⁵

2.2.2.2 *Economies of scope and transaction costs*

Where there are economies of scope in providing more than one product, or consumers bear transaction costs, operators may naturally seek to compete on bundles.

It is clear that there are **economies of scope** in offering consumers fixed access and either a narrowband call service or a broadband call service. In particular, and in the context of the supply of fixed services, a significant economic cost is the provision and maintenance of the fixed access line to the customer's premises. The possibility of sharing this cost

²⁴ We note that most price comparisons, including EU benchmarks and ComReg's own surveys, look at the combined price of access and calls. In this regard, it is noteworthy that eircom's prices for the access lines and calls combined are overall below the EU average, which indicates that competition is effective. An example of this is Figure 2.4.1.1 - OECD Residential PSTN Basket – August 2012 in the quarterly report published by ComReg

²⁵ ComReg 06/39 Para 3.32.

between 2 service providers will lead to the realisation of significant economies of scope. In addition to the network costs, as ComReg notes, there are economies of scope due to “*shared billing systems, customer services, and various other administrative and business costs that can possibly be shared across various services.*”²⁶

Where such economies of scope exist, the prices for bundled services may be below the sum of the prices of the independent products. ComReg itself noted that “*FSPs typically offer discounted prices for the products when sold within a bundle, relative to prices available to end users when purchasing the services from separate providers. These discounts possibly reflect the cost benefits accrued by FSPs in terms of achieving economies of scale and scope.*”²⁷

For example, ComReg illustrated the potential economies of scope available to operators by noting that “*Vodafone at Home offers home phone only for €30 a month, broadband only for €30 a month, or a bundle of the two for €40 a month.*”²⁸

In addition to economies of scope ComReg found evidence that consumer **transaction costs** mean consumers had a clear preference for bundled services. For example, it stated that “*high demand for [...] voice plans by end users [...] suggests that end-users face some degree of transaction costs, and as a result demand-side transactional complementarities are present between these products.*”²⁹ It also noted that “*customers are migrating [from CPS] to SB-WLR primarily due to the convenience of “one stop shopping”.*”³⁰ In the context of voice and broadband bundles ComReg found that “[E]nd users are likely to face additional transaction costs when purchasing services from more than one supplier (such as, time spent reviewing bills or managing an additional account). As such, end users who value broadband access will often prefer to purchase FVA and fixed voice calls with broadband access from the same FSP”.³¹

²⁶ComReg 12/117 Para 4.25.

²⁷ComReg 12/117 Para 4.74.

²⁸ComReg 12/117 Para 4.74.

²⁹ComReg 12/117 Para 4.30.

³⁰ComReg 12/117 Para 4.27.

³¹ComReg 12/117 Para 4.74.

This is consistent with consumer research which shows that Irish, and more generally EU citizens, believe that the main advantage of packages is that it results in only one invoice (41% for EU and 32% for Ireland).³²

2.2.2.3 Bundled Voice should be assessed separately from Voice Only packages

When assessing the potential for market power ComReg should separately consider bundles of (i) FVA and fixed voice calls purchased as wider packages generally including broadband (“Bundled Voice”) and (ii) FVA and fixed voice calls (“Voice Only”). This is because the conditions of competition are very different for the 2 groups of customers as the preferences of the 2 groups of customers are different and the demand-side substitutes available to the customers are different.

The preferences of Bundled Voice customers are different to Voice Only customers

ComReg itself acknowledges that the preferences of Bundled Voice customers are different to the preferences of customers who buy a Voice Only package. Among the former it is clear that the choice of supplier is driven by the preferences for other elements of the bundles, in particular for broadband. For example, ComReg notes that “*some end users still retain a PSTN/ISDN connection to avail of the broadband service provided by that same supplier.*”³³ ComReg illustrates how some customers’ choices of FVA supplier reflects their value of broadband supplier by highlighting a Vodafone product that includes a FVA but “*appears to be targeted at mobile phone users who wish to purchase FVA as a fixed broadband platform, but primarily use their mobile phone to make calls*”,³⁴ as it does not include calls.

Clearly the main reason for not buying voice bundled with broadband is that consumers do not value access to the internet.³⁵ ComReg recognises the distinct demand for Voice Only packages compared with Bundled Voice products. For example, it notes that “*there remains separate end user demand for stand-alone FVA services that is not bundled with other*

³² E-Communications Household Survey, Special eurobarometer 362.

³³ ComReg 12/117 Para 4.34.

³⁴ ComReg 12/117, Para 4.34.

³⁵ ComReg 12/117a, page 14.

*communications services, such as, broadband.*³⁶ ComReg concludes that these consumers are not likely to switch to voice and broadband bundles.

In addition there are clear differences in the social and demographic characteristics of the different groups of customers. The information contained in the 2012 Market Research shows clear relationships between social grade and age and the presence of a fixed line voice telephony service with a higher prevalence of fixed line voice services among older people and higher socio-economic groups. Broadband penetration is, by contrast, lower among elderly people.³⁷

ComReg has taken the view that FVA, when sold on a stand-alone basis, should be considered in the same market as when it is sold as part of a bundle. The key rationale for this appears to be that there are some businesses that purchase FVA on a non-bundled basis, even though they consume both FVA and broadband, and there are also a significant proportion of businesses that purchase bundled FVA and broadband. Therefore, ComReg argues that “*potential substitution between a stand-alone FVA service and FVA bundled with other services might work in both directions*” [emphasis added]. However, ComReg provides no evidence of any such substitution. Furthermore, it should be noted that businesses form a minority of fixed voice lines. It is unclear why ComReg bases the market definition on potential substitution of a minority of lines. The conclusion is particularly unusual because ComReg notes that the large proportion of voice and broadband bundles suggests “*strong complementarities between these services for businesses*” which would appear to suggest that businesses have a strong preference to purchase these products from the same provider.

The demand-side substitutes of Bundled Voice customers are different to Voice Only customers

Furthermore, the demand-side substitutes available to Voice Only customers and ***Bundled Voice*** customers are very different.

For Voice Only customers (particularly low usage ones), mobile services are likely to represent the main alternative to fixed voice. This is

³⁶ComReg 12/117 Para 4.75.

³⁷ComReg 12/117a, page 11.

recognised by ComReg when noting that *“the incentive to FMS is likely to be most pronounced in relation to low usage customers.”*³⁸ ComReg’s finding is consistent with that of other regulators; for example, a former market review undertaken by the Spanish National Regulatory Authority (NRA) (CMT) considered that low usage fixed voice customers *“would bear the competitive pressure that the mobile operators exert, via their bundled offer for access and telephone traffic over mobile networks.”*³⁹

The situation is quite different for customers who also purchase fixed broadband services. The principal retail competitors to eircom’s broadband service are other fixed retail providers of bundles of access, broadband and calls such as alternative infrastructure cable operators, like UPC, or alternative operators using eircom’s wholesale services, either bitstream or LLU, such as Vodafone. These operators compete with eircom for customers who have a strong preference for fixed broadband and provide bundles including fixed voice and broadband.

Customers who purchase voice as part of wider bundles including fixed broadband are much less likely to consider mobile as an alternative. This is noted by ComReg when it states that *“in view of the increasing trend towards fixed bundles and that a significant number of users bundle voice with fixed broadband, customers will not regard generally a mobile connection as a substitute for a fixed connection.”*⁴⁰ However, that does not mean that mobile is not a suitable alternative for customers that do not wish to purchase fixed broadband.

The implications of ComReg’s approach on its market power assessment

Given the clear distinction between the characteristics and preferences of the different groups of customers and the demand-side substitutes available to them, there is a very strong case for assessing market power separately for each group. At the very least, ComReg should test whether its market power findings are sensitive to alternative plausible approaches to market definition.⁴¹ By assessing the scope for market power for the

³⁸ComReg 12/117 Para 4.182.

³⁹ CMT (2009) “Resolution regarding updating the methodology for the *ex-ante* analysis of Telefónica de España S.A.U’s commercial offers (AEM 2009/1106)” Section II.4.2.

⁴⁰ComReg 12/117 Para 189.

⁴¹ It is worth noting that ComReg considered whether its conclusions on market power were robust to alternative approaches to

different bundle products together ComReg's approach of assessing market power in the retail provision of the FVA element of the bundle implicitly assumes that competitive constraints on fixed access when provided with voice services and with broadband services are homogeneous. This leads ComReg to:

- underestimate the constraint that mobile services place on suppliers of Voice Only bundles; and
- mistakenly conclude that market conditions for retail **Bundled Voice** products are sufficiently geographically homogeneous to merit defining national markets.

2.2.3 Structural market changes since ComReg's last review require a change in approach to market definition

There have been clear and significant structural changes in the market since the time of ComReg's last review which merits a change in approach. In the period immediately preceding ComReg's last review of the FVA market a significant proportion of consumers bought either calls or narrowband services from a different provider to their FVA provider. Bundles of FVA, calls and broadband were much less significant. In particular:

- almost all voice services were provided by eircom's network, and cable services did not offer voice or broadband services to any degree;
- up to 9% of voice customers took the call services and fixed access from different suppliers;⁴² and
- narrowband internet access was a popular product which was offered by a number of providers as a metered or flat rate service. In 2006, prior to ComReg's last review 583,000 fixed customers took a narrowband internet service.⁴³

In the context of a sizeable proportion of consumers taking either calls or narrowband internet from a different supplier to their fixed line supplier, defining markets at that time by the elements of the bundle made sense in accordance with the principles set

market definition where it believed that the alternative approach would not affect its conclusions (i.e. the bundle of calls and FVA) (see ComReg12/117 Para 4.56). But it did not consider whether its conclusions were sensitive to taking bundled products as the focal product for investigation.

⁴²ComReg 07/26 Para 3.11.

⁴³ComReg 06/52 Section 2.5.

out by ERG. For example, in 2006 ComReg concluded that *“while the take up of single billing products has grown since their introduction, **enough customers still buy the products separately, and enough operators still offer them separately, to render calls and access in separate markets.** Even if the price of the access and calls elements sold separately were to increase by a small but significant amount, it is not clear that customers would switch in sufficient numbers to a bundled product offering such as to render it a close enough substitute”* [emphasis added].

However, as set out above, 99% of consumers now purchase FVA together with other services and retailers do not offer the independent products to a material degree. Furthermore, there are now only 12,000 narrowband internet subscribers.⁴⁴ Therefore, applying the logic that ComReg used in its last market review it is clear that markets should be defined around the product bundles that consumers take.

The approach taken by ComReg in the 2012 market review thus appears to reflect the nature of competition which was present in the early to mid-2000s, rather than the current nature of competition in the Irish telecommunications markets. Even though ComReg recognises that there have been significant changes in the very same market features that led it to conclude that access and call elements of the bundle should be defined separately in its 2006/07 review, it still considers that FVA and calls or broadband should be considered as separate elements for the purposes of market definition in this review.

There is precedent for considering access and calls together. In the Netherlands, OPTA found that they form part of the same product market since 98% of customers take these services from the same provider.⁴⁵ The take-up of access and calls from a single provider in Ireland is even higher than in the Netherlands.

2.2.4 ComReg’s reasoning for dismissing a bundled approach is flawed

ComReg’s reasoning for dismissing the strong evidential support for choosing to define markets by product bundles is flawed.

In its conclusions, ComReg notes that: (i) the “majority” (i.e. 99%) of customers in Ireland purchase their fixed voice services as a package of access and calls; (ii) the majority of customers think about their purchase decision over these products as a single decision; and (iii) there are likely economies of scale and scope relating to the provision of FVA and fixed voice calls. However, against this strong and clear

⁴⁴ ComReg 12/134 section 3.1

⁴⁵ See Commission decision concerning Case NL/2012/1306: Fixed Telephony Markets in the Netherlands.

evidence, it considers that 2 factors mitigate against it defining markets for product bundles, though it is difficult to see how ComReg's statements support its conclusion.

First, ComReg notes that consumers "*have more frequent opportunities to adjust their calling behaviour and may be willing to use their mobile phones or unmanaged VOIP services to make certain types of calls*".⁴⁶ This simply makes the uncontroversial observation that consumers, having chosen a particular product bundle, may have different per minute call charges depending on whether they use their FVA line or a mobile. However, this does not negate the evidence set out above regarding purchasing behaviour, retail offers, consumer preferences, and supply conditions (such as economies of scope or transaction costs) demonstrating that consumers choose between different product bundles and that the competition takes place around different product bundles.

ComReg is justified in highlighting the competitive interplay that exists between fixed and mobile services, such that consumers freely substitute between fixed and mobile services depending on the fixed and mobile tariffs chosen. However, as discussed further below, fixed Voice Only consumers are increasingly choosing to use mobile instead of fixed.

Second, ComReg observes "*the scope for competitive constraints to evolve differently for FVA and fixed voice calls respectively which implies that they potentially belong to separate markets*".⁴⁷ It is true that in markets competitive conditions may evolve. Markets have clearly undergone dramatic structural change since ComReg's last market review, even if ComReg's approach and conclusions remain largely unchanged. It is also correct to note that ComReg is obligated to make a forward looking assessment of market conditions when making an assessment for *ex-ante* remedies. However, ComReg's vague statement that competitive conditions in a market might change does not mean that it should mechanically apply the approach that it took in its 2006-07 market review. At the very least it should consider if its conclusions on market power are sensitive to alternative approaches to assessing market definition.

⁴⁶ComReg 12/117 Para 4.55.

⁴⁷ComReg 12/117 Para 4.56.

2.3 Mobile Provides a Strong Competitive Constraint on the Pricing of Voice Only Services

Contrary to ComReg's preliminary conclusion, eircom considers that mobile voice services impose a significant competitive constraint on providers of fixed Voice Only services and, hence, these should be included as part of the relevant market when considering FVA and voice services. This is because:

- the functionality of mobile is very similar to the functionality of fixed voice services, with the additional advantage of providing mobility. This is corroborated by customers' perceived quality of fixed and mobile services as included in the 2012 Market Research;
- the significant decrease experienced by eircom's FVA Voice Only customers combined with the significant increase in the proportion of mobile only households suggests that a high level of substitution from fixed voice services to mobile services may have occurred in Ireland. This observation is all the more powerful, given that many fixed voice users would not consider switching because they have been receiving the service at a significantly subsidised rate,⁴⁸ or because they take a fixed voice service to enable them to have a fixed broadband service. This is strong evidence that mobile is a significant competitive constraint on eircom's fixed Voice Only services;
- the differences between elements of the fixed and mobile tariffs do not imply that mobile services are not a strong constraint on FVA Voice Only providers. In this regard, ComReg's argument that fixed voice is cheaper than mobile is flawed: firstly, because it uses a wrong measure of prices (e.g. by comparing only call revenues from fixed and mobile operators); and secondly, because it does not provide any estimate of the potential saving for a given customer profile (ideally the profile of the "marginal customer") associated with the use of fixed services instead of mobile ones; and
- substitution towards mobile services will be even stronger with the expected reduction in the DSP subsidy of telephone lines paid to pensioners and the introduction of naked broadband services in Ireland. With these changes

⁴⁸ Many consumers receive FVA for free or pay very little, due to the Telephone Allowance from the DSP.

many more consumers are likely to consider mobile telephony as an alternative to the fixed voice service.⁴⁹

2.3.1 The functionality of mobile is very similar to that of fixed

Mobile voice services are technically similar to fixed voice services. This point is recognised by ComReg⁵⁰ when it states that *“Technically, mobile can substitute for fixed in relation to voice services because users can access the mobile network to make and receive calls just as they would do with a fixed voice connection. Voice quality is not a key driver of FMS at the calls level for both residential and business users. Consumers in general do not appear to perceive a marked difference between fixed and mobile in relation to quality of service for voice services at home.”* The 2012 Market Research shows that the perceived quality and reliability of the service is similar for both fixed (using a standard phone) and mobile services.

Indeed, according to the 2012 Market Research, 87% of Irish customers without a fixed line phone stated that they do not have a fixed line because they use their mobile phone instead.⁵¹ This clearly reflects the high degree of substitutability between fixed and mobile services.

The technical substitutability of fixed services by mobile ones is clearly shown by the fact that eircom sometimes uses fixed cellular solutions where there is no copper available and where the cost of building copper would be much greater or would take too long to be launched.

Further, it is possible to port a fixed number to a service delivered by mobile telephony.

Hence, even if there are some customers who value keeping their fixed numbers, there are mobile operators in Ireland that offer services which allow this possibility. An example is Vodafone’s One Net Express service,⁵² which was launched in 2012 for SMEs and provides a landline number to the mobile service. This is further supported by the current levels of number porting between the eircom and UPC

⁴⁹eircom is not alone in acknowledging the significant competitive constraints currently posed by mobile services to fixed markets. In its response to the recent European Commission consultation on the list of relevant markets for *ex-ante* regulation, BT stated that the revised Recommendation should make it clear that, even where mobile services are not considered to be within the same market as fixed services, the competitive constraints of mobile services must still be fully taken into consideration when assessing the level of SMP and the appropriate remedies on the relevant fixed markets. BT also argued that fixed to mobile substitution should be recognised for the purposes of market definition and analysis. See page 16 of BT’s response to the European Commission’s public consultation on the revision of the Recommendation on relevant markets (8 January 2013), available at: <http://ec.europa.eu/digital-agenda/en/news/results-public-consultation-revision-recommendation-relevant-markets>

⁵⁰ ComReg 12/117 Para 4.173

⁵¹2012 Market Research, page 50.

⁵²Mentioned by ComReg in paragraph 4.202.

networks which indicates that less than 3% of consumers sufficiently value their existing fixed telephone number to require the number to be ported when they migrate to UPC service.

Therefore, it is clear that, from a technical and functional viewpoint, mobile voice services are close substitutes of fixed voice services and are likely to provide a strong competitive constraint on suppliers of FVA.

2.3.2 Irish customers are substituting fixed services for mobile services

There is clear evidence that mobile is considered to be a close substitute for consumers that want a Voice Only service.

2.3.2.1 The change in usage strongly suggests mobile is a close substitute

eircom has experienced a significant reduction in FVA Voice Only customers over the last years, as shown in Figure 4 below. While around 3% of eircom's lines were for FVA and voice services only in July 2007, these represented less than 3% of the lines as of December 2012. Furthermore, the figures are distorted by the fact that a large proportion of Voice Only customers (3%) are elderly consumers and have been receiving fixed voice for free, or for a very low cost, under the DSP's free telephone scheme, in accordance with which the government has subsidised the majority of the price of the fixed telephony. These customers have had very limited or no incentive to drop their fixed line.

Figure 4. Evolution of eircom's consumer fixed Voice Only lines

3

The trend for consumers to discontinue their fixed lines in favour of mobile services is particularly strong in rural areas. In the period between December 2010 and September 2012 the number of fixed access lines in non-UPC areas fell by 3. In the same period the number of fixed broadband customers in non-UPC areas increased by 3. Therefore, despite a trend for consumers to take fixed access in order to take up

broadband services, Voice Only consumers are increasingly abandoning their fixed line to take up mobile voice services. The observed fixed to mobile substitution places a strong and increasing competitive constraint on eircom's Voice Only services.

At the same time, the proportion of users that rely exclusively on mobile services for voice communications has increased significantly since the last market review.

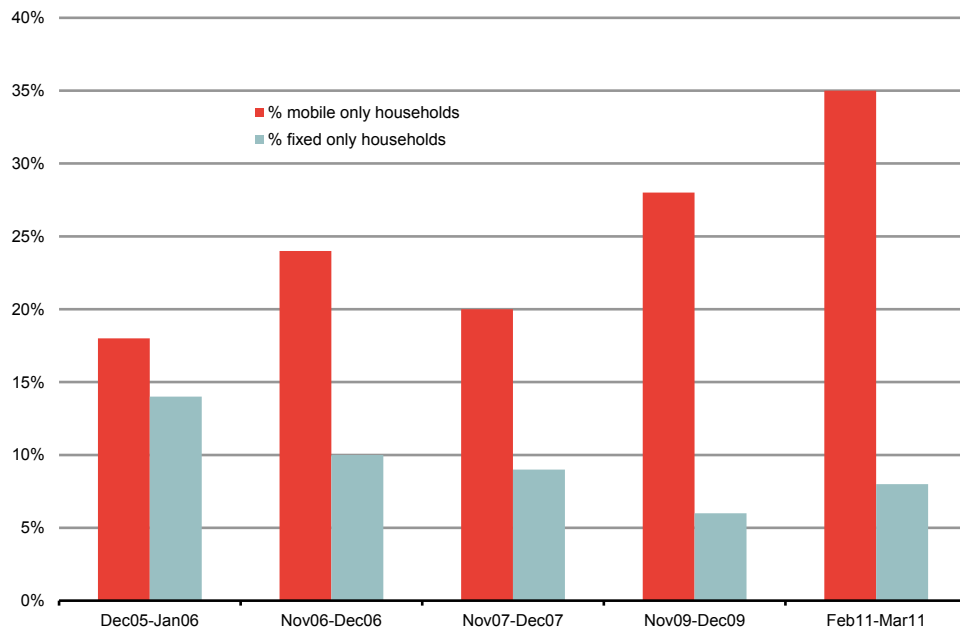
In 2006, ComReg recognised “*a trend towards ‘mobile only’ households (from 12% in 2003 to 15% in 2004), however, ComReg also [took] the view that this is not an indication of the market as a whole but rather substitution is taking place on the periphery, among certain consumer groups*”.⁵³

With 36% of households having mobile voice telephony only (vs. 5% having fixed line telephony only),⁵⁴ it is evident that mobile only households are no longer on the periphery and are clearly mainstream with over a third of households choosing to forgo a fixed service. This information is consistent with the statistics published by the European Commission on the penetration of fixed and mobile technologies as shown in the chart below. Since 2005 – a period when the number of domestic premises in Ireland increased by over 225,000 – the percentage of mobile only households has more than doubled.

⁵³ComReg 06/39 Para 3.46.

⁵⁴2012 Market Research, page 18.

Figure 5. Evolution of fixed only and mobile only households in Ireland



Source: E-communication household surveys, European Commission

The sharp reduction of FVA Voice Only customers combined with the significant increase of mobile only households suggests a strong degree of substitution of fixed and mobile services for FVA Voice Only customers.

Moreover, as discussed further below, with the significant decrease in the DSP subsidy and a consequent increase in the fixed voice charges that will need to be borne by subscribers, it is likely that there will be significant switching to mobile. When this is combined with the increasing take up of broadband, it is clear that the numbers of fixed Voice Only customers will decrease very significantly over the next few years.

2.3.2.2 ComReg's 2012 Market Research shows that subscribers consider mobile to be a substitute

The evidence in ComReg's 2012 Market Research points clearly towards mobile being a substitute for fixed voice.

Consumer survey evidence directly illustrates the fact that consumers are dropping their fixed service and switching to a mobile only service. For example, most of the households (87%) without a fixed line voice telephony service consider the availability of an

alternative –using a mobile phone – as the main reason for not having FVA.⁵⁵

Business customers also view mobile as a substitute for a fixed voice line. The fact that the percentage of customers that do not have fixed line access is much lower for businesses than for residential customers⁵⁶ does not necessarily imply that mobile is not a relevant substitute for business customers. As of 2011, 40% of enterprises in Ireland provided portable devices to some of their employees.⁵⁷ Further, when asked for the reasons for retaining a fixed line phone, more than 50% of the surveyed businesses considered in the 2012 Market Research⁵⁸ stated that this was needed for having an internet connection and that the phone connection was offered as part of a bundle.⁵⁹ Consistent with residential customers, the main reason identified by businesses for not having FVA is because mobile phones are used instead (considered by 73% of the businesses without FVA).⁶⁰

In terms of volume of calls, mobile originated traffic volumes surpassed calls originated in the fixed network in late 2007. Mobile traffic accounted for 63% of all voice minutes in 2012, which is explained by both the high degree of fixed-to-mobile line substitution, as well as the degree of call substitution by those that retain fixed lines.⁶¹

ComReg’s own evidence suggests a high cross price elasticity between fixed and mobile. While according to the 2012 Market Research customers express a particular preference for FVA to make certain types of calls, the switching analysis included in this research shows a significant level of substitution of FVA services by mobile services. Mobile telephony was the main alternative considered by households who consider either giving up their fixed line subscription with the current supplier or changing their behaviour after a hypothetical price increase of FVA services. As such:

⁵⁵2012 Market Research, page 50.

⁵⁶ComReg 12/117, Para 3.52.

⁵⁷http://scoreboard.lod2.eu/index.php?scenario=2&indicators%5B%5D=e_iacc3g+ENT_ALL_XFIN+%25_ent&countries%5B%5D=EU27&countries%5B%5D=IE

⁵⁸Among those holding bundles, i.e. almost half of the organisations.

⁵⁹2012 Market Research, page 85.

⁶⁰2012 Market Research, page 86.

⁶¹ See Figure 18 of ComReg 12/117.

- among the households that would cancel their current fixed line subscription after a hypothetical 10% price rise in the line rental (39% of the sample considered), 74% would use the mobile phone/and or mobile broadband instead;
- among the households that would cancel their current fixed line subscription after a 10% price increase of call charges (23% of the sample considered), almost 100% would use the mobile phone/and or mobile broadband instead;
- among the households that would cancel their current fixed line subscription after a 10% increase in the total bill (24% of the sample considered), 69% would use a mobile phone instead.

As we will show below, this high level of reported substitution towards mobile services is possible due to the converging pricing strategy adopted by fixed and mobile operators in Ireland.

Whilst eircom believes that the above information from ComReg's 2012 Market Research provides strong evidence, it should be noted that there are some serious issues with the research. These limitations suggest that it is not providing an accurate picture of the use of fixed and mobile telephony by businesses and households or appropriately determining the degree of substitutability between the services.

First, the estimation of the usage of fixed voice seems to be based on the number of households⁶² rather than on the number of domestic premises. As the number of households is significantly smaller than the latter, this will tend to overestimate the extent to which fixed voice services are available at fixed locations. While ComReg reports approximately 1.6 million households in Ireland,⁶³ the CER/ESB electricity metering⁶⁴ implies that there around 2 million domestic premises in Ireland (broadly consistent with the CSO 2011 census figure of 1.99m permanent

⁶² According to the CSO, in April 2011, there were 1,994,845 permanent dwellings or housing units in the State. Of these, 1,649,408 were occupied by persons usually resident in the State, while 10,703 were occupied by guests or visitors. There were 45,283 dwellings where all the occupants were temporarily absent on Census Night. A total of 59,395 housing units were classified as vacant holiday homes. The remaining 230,056 were vacant houses and apartments, of which 168,427 were vacant houses and 61,629 were vacant apartments. The overall vacancy rate in 2011, including holiday homes, was 14.5%. The figure of 1,994,845 permanent dwellings recorded in Census 2011 was an increase of 225,232 (12.7%) on the housing stock enumerated in 2006 (source: Profile 4: The Roof over our heads).

⁶³ ComReg 12/117, Para 3.33.

⁶⁴ CER: "Electricity & Gas Retail Markets Annual Report 2011", Information Paper CER/12/072.

dwellings). This difference is likely to be explained by the number of unoccupied premises, such as holiday homes or temporarily vacant homes, and permanently vacant premises, which are not included in the count of households. It appears that almost all of these premises – and over 200,000 other commercial or business premises – have an electricity connection. As there are probably less than 1.6m fixed telephony lines and many premises have several lines, a high proportion of these premises rely only on mobile technology for voice services. Even considering residential dwellings, 1.2m fixed lines serve 1.6m household or 2m premises. Using the higher number of premises, as would be appropriate given that ComReg finds that business and residential services are in the same market, would give a much lower usage of fixed voice services than considering households.

Second, the proportion of mobile only households is likely to include households with fixed broadband services (but not fixed voice services) and, similarly, the proportion of fixed only households may include households which have **Bundled Voice** services. As stand-alone broadband offers are not common, there may be some users who have a telephony and broadband service, but, as they rarely use telephony, they regard themselves as “broadband only” users. Therefore, the information in the survey is unclear.

Third, as the 2012 Market Research has not sought to investigate the degree of substitutability of mobile for those customers that take fixed Voice Only services then it is not fit for purpose for directly investigating the market definition that appears most consistent with the facts presented in the Consultation Document.

2.3.3 Prices of mobile services competitively constrain the prices of fixed Voice Only services

Contrary to ComReg’s view that fixed and mobile services are not yet sufficiently substitutable in terms of pricing, eircom considers that the prices for mobile services impose a competitive constraint on FVA services offered to Voice Only customers for the reasons detailed below.

2.3.3.1 Price structures of voice and mobile services do not imply separate markets

ComReg is wrong to suggest that differences in the price structures of mobile and fixed services imply that there are distinct markets. Regarding the alleged differences between tariff structures for FVA and pre-paid mobile services,⁶⁵ it is important to note that:

- **the observed differences are partly due to existing regulation on fixed providers.** As such, existing obligations⁶⁶ require access and calls to be sold separately on eircom's retail fixed network. Further, eircom has considered that it is unable to offer a pre-paid fixed package because it would not cover the cost of WLR for lower spending users and this would result in allegations that the proposed offer does not pass the net revenue test. Absent such regulation, eircom would be able to introduce new and innovative product offerings which could expand the number of users of fixed voice services to the clear benefit of consumers.
- despite the regulatory constraints on retail pricing of fixed services there is growing convergence in the structure of tariffs. Fixed operators have designed tariffs that can allow them to compete more successfully with mobile, e.g, by including a number of free calls with the line rental.⁶⁷ As such, Vodafone at Home Voice Onlyplans include a number of bundled minutes with the line rental. An example is Vodafone's free off-peak plan which includes free off-peak unlimited local and national calls as well as 200 minutes to Vodafone mobiles for a monthly payment of €30 (including the line rental).⁶⁸ Also, as in the case of mobile tariffs, fixed operators also offer add-ons to the basic service. For example, one of eircom's publicised add-ons gives 60 anytime minutes to Irish mobile operators by paying an extra monthly charge of €7.50. Thus, in effect, fixed operators are seeking to replicate the simplicity of fixed monthly charges that mobile operators are able to offer; and

⁶⁵ ComReg 12/117, Para 4.191.

⁶⁶ See ComReg 07/26, where ComReg requires eircom to offer all retail narrowband access services as stand-alone products.

⁶⁷ It should be noted that mobile bundles normally also include texts and data services.

⁶⁸ <http://www.vodafone.ie/df/homebroadband/LineAndSpeedCheck.shtml>

- the growing convergence between fixed and mobile tariffs is direct evidence of the competitive pressure imposed by mobile services over fixed providers.

2.3.3.2 *ComReg's assessment that mobile voice services are more expensive than fixed voice is misleading*

ComReg's assessment that mobile voice services are more expensive than fixed voice is misleading and does not support its conclusion on market definition. This is for the following reasons.

First, ComReg compares the average revenue per minute considering call revenues only on fixed and mobile networks.⁶⁹ This is highly misleading and the conclusion is wrong. According to ComReg, taking combined access and traffic charges, mobile is slightly cheaper since late 2010. As many mobile offers do not have separate access and traffic elements (and in fact often include the cost of expensive handsets which can cost over €500 over the course of the contract) they can only be compared with bundles of FVA and FVC when adjusted for subsidised handset and free SMS elements.

The change in relative prices of fixed and mobile services in Ireland is illustrated by the change in the "Mobile Voice Premium".⁷⁰ Contrary to ComReg's view that mobile services are more expensive than fixed services, Figure 6 below illustrates that the "premium" for mobile voice services has been negative in Ireland since 2008 in contrast to most other countries in the study. Despite the fact that measurement issues mean that comparisons can be difficult,⁷¹ it is clear that Ireland has one of the lowest Mobile Voice Premiums of the Western European countries in the study, second only to Austria (where the Austrian NRA found that mobile voice and fixed voice are in the same retail market). In contrast, most other European countries in the study have a positive mobile voice premium in the period between ComReg's last Market 1 review and its current review.

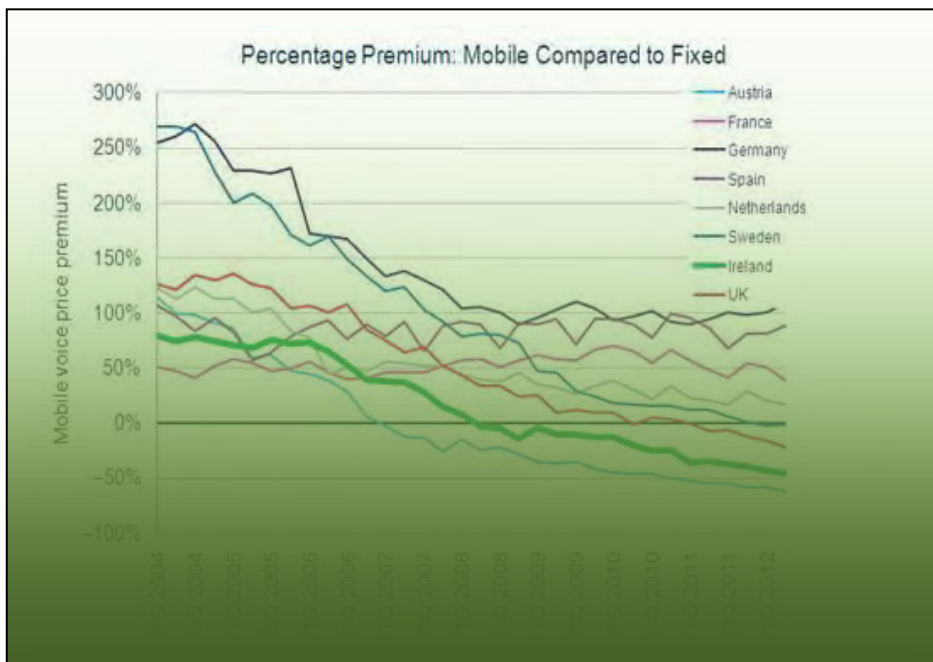
⁶⁹ComReg 12/117 Para 4.192.

⁷⁰ The Mobile Voice Premium is defined as "the average retail revenue per mobile minute less the average retail revenue per fixed minute divided by the average retail revenue per fixed minute."

⁷¹ For example typically call tariffs include bundles of services such as bundled "free minutes", data, or SMS which means that comparison of average prices "per minute" over time or across countries can be difficult.

The impact of the Mobile Voice Premium on households' propensity to substitute from fixed to mobile can be seen by comparing the data with the proportion of mobile only households in each country. According to data reported by ComReg, Ireland (with the second lowest Mobile Voice Premium) has the one of the highest proportion of mobile only households of the Western European countries studied, again, second only to Austria.⁷²

Figure 6. Mobile Voice Premium, EU countries



Source: Analysis Mason, Voice and messaging quarterly metrics

Second, for the purposes of market definition, the relevant comparison of fixed and mobile tariffs should be made with regards to the *marginal customers* who would be most likely to switch in response to a price rise, rather than comparing an average price or specific price components, such as out of package mobile charges. Given that the use of fixed voice service implies paying the monthly line rental, marginal customers are likely to be customers with a low level of usage.⁷³ eircom's calculations estimate a positive saving for a substantial and increasing proportion of Voice Only FVA customers by giving up its fixed line service and using a

⁷² See ComReg 12/117 Figure 15. The proportion of mobile only households in Austria is 47%, whereas the proportion of reported mobile only households in France (13%), Germany (12%), Spain (31%), the Netherlands (11%) and Sweden (2%) is lower than Ireland's reported figure of 35%.

⁷³ Consistently, the 2012 Market Research shows a lower prevalence of fixed line telephony for low income, young and rented households, which are likely to be low usage (particularly, the first 2 groups).

mobile service instead, assuming that the customer already has a mobile phone.⁷⁴

However, ComReg mistakenly defines the market by considering those customers less likely to switch, such as multi-person households or firms (see e.g. Para.s 4.193 and 4.195). By considering the preferences and substitutes for those customers *less likely to switch*, ComReg erroneously defines a narrow market for fixed voice services. When considering the competitive constraints, ComReg should consider the preferences of *marginal* consumers who, as ComReg itself points out, would be low users who would be likely to drop their fixed line in favour of a mobile only voice service.

2.3.3.3 ComReg is wrong to argue that mobile services are not a competitive constraint because some consumers prefer to make certain calls on a fixed line

ComReg further argues that fixed and mobile are in different markets because consumers prefer to make some calls on fixed (e.g. fixed-to-fixed) and other calls on mobile (e.g. mobile-to-mobile). However, this does not imply that fixed Voice Only and mobile are in different markets for the following reasons.

First, many of the consumers that responded to the survey will take voice and broadband service (77% of fixed voice customers claimed to also have broadband services).⁷⁵ As ComReg's analysis shows, many of these have FVA because they need to have it to get broadband. If the consumers have both fixed voice and mobile, then it is not surprising that they choose to use each one when they perceive the call price to be lower. The complementary use that customers with FVA and a broadband subscription make of fixed and mobile services should not lead to the wrong conclusion that mobile services do not constrain the price of fixed services for FVA Voice Only customers for which mobile services represent a substitute rather than a complement. For these customers who have to bear a significant monthly line rental charge to have a fixed line, the charges for making (marginal) calls is unlikely to be determinative about whether to keep a fixed line or not.

⁷⁴ This is a realistic assumption given a level of mobile penetration above 100% in Ireland.

⁷⁵ 2012 Market Research, page 11.

Second, some of the services for which customers show a preference for FVA are insignificant in terms of the monthly value generated. As such, (i) X% of eircom's residential lines make less than €3 worth of Directory Enquiry (DQ) and Premium Rate calls (PRS) per month; and, (ii) X% of eircom's residential lines make less than €1 worth of 1850, 1890, 0818calls per month. Overall, the residential revenues from non-geographic numbers⁷⁶ represent X% of total residential revenues and X% of residential call revenues. The levels of usage of these services is slightly higher for business lines but overall the percentage of overall business line usage is still insignificant.

ComReg's erroneous assessment that the prices for mobile voice services do not exert a sufficient constraint for FVA Voice Only services relies largely on its view that consumers buy FVA to buy fixed broadband. This is a consequence of a mis-specification of the market definition which considered FVA as a stand-alone service and which does not distinguish between the 2 distinct FVA users; namely, those who want Voice Only services and those who are mainly interested in a broadband bundle (with or without voice). This distinction is important as there are marked differences between the types of consumers as well as the source of the competitive restriction faced by eircom. As such, while for FVA Voice Only customers the main restriction comes from mobile operators, for customers acquiring FVA in combination with broadband and possibly voice the main constraint comes from the cable operator, UPC and other LLU based operators.

The expected introduction of naked broadband services, however, will increase the pressure that mobile voice services exert over fixed voice services for customers who also acquire fixed broadband services. This is because a proportion of customers that now acquire Bundled Voice services will consider the alternative of giving up FVA Voice Only services and instead acquire a fixed naked broadband product.

2.3.4 The substitutability of mobile will become even stronger with the reductions in the DSP subsidy

As discussed above, there is good evidence to show that mobile has been a suitable alternative for consumers that wish to purchase Voice Only services. However, the

⁷⁶ Including DQ, PRS, 1850, 1890 and 0818 calls

degree of substitutability of mobile will become even more apparent in the near future and this has significant implications for prospective market analysis. This is because elderly consumers have benefited from a very low cost, or in many cases free, fixed voice under the DSP's free telephone scheme under which the government has subsidised the majority of the price of the fixed telephony. However, as discussed in Section 5.7 below, the subsidy is about to be very significantly reduced. Changes in the retail prices for these consumers could lead to a significant switching to mobile.

Where consumers have been facing either no charge or very limited charge there has been very little or no incentive to substitute from fixed voice to mobile. Not surprisingly around 80% of Voice Onlylines are currently subsidised by the DSP scheme.

Further, the impact that the DSP subsidy has on the propensity to switch from fixed voice to mobile services can be seen if one looks at the disaggregated evolution of eircom's FVA lines distinguishing between DSP and non-DSP beneficiaries. Non-DSP lines have experienced a relatively significant reduction which is likely to be motivated by mobile substitution compared to DSP lines. As such, the volume of eircom's non-DSP Voice Only fixed lines fell by 80% in the period between July 2011 and November 2012, which contrasts with a 20% decrease (20%) of fixed lines that were receiving the DSP subsidy in the same period and a small increase in DSP fixed lines that took voice and broadband.

Figure 7. Evolution of eircom's residential customers with and without the DSP
80%

Once the subsidy for the retail price of fixed access is reduced, and customers pay the competitive price of fixed access, rather than a government subsidised price, it can be expected that a significant number of marginal fixed consumers will discontinue their fixed line in favour of a mobile only service. In these circumstances the constraint imposed by mobile services on the suppliers of fixed services will become even more apparent.

The significant reduction in the DSP subsidy will lead to further substitution towards mobile services by FVA fixed-only voice customers.

2.3.5 Conclusion regarding fixed Voice Only services

The analysis of the retail market for fixed Voice Only services shows a strong level of substitution from fixed to mobile voice services. Mobile services should be included within the same retail market as fixed Voice Only services. We reach this conclusion based on the following factors:

- the similar level of functionality that mobile services provide which mean that fixed and mobile voice services are regarded as interchangeable or substitutable by consumers, by reason of the products' characteristics, and their intended use;
- the high and growing proportion of mobile only households compared with fixed only households and the significant increase of mobile traffic at the expense of fixed traffic is direct evidence of switching. Mobile only households cannot now be dismissed as being on the periphery or fringes of competition. Consumers' strong and growing propensity to switch their Voice Only service from a fixed line to a mobile line acts as a strong competitive constraint on the pricing of fixed services;
- the price of mobile services places a strong constraint on the prices of fixed services. Contrary to ComReg's view that mobile services are more expensive than fixed ones, cross country comparisons of the Mobile Voice premium illustrate that the "premium" for mobile service is falling sharply and indeed is negative in Ireland since 2008. This evidence is consistent with ComReg's own analysis which found that taking combined access and traffic charges, mobile has been cheaper than fixed since late 2010. The evidence set out in Figure 6 suggests that Ireland's Mobile Voice Premium is one of the lowest in Western Europe (second only to Austria in the study cited above) which partly explains Ireland's relatively high proportion of mobile only households in the countries studied (second only to Austria in the study cited above). The degree of constraint from mobile will continue to grow as the Mobile Voice Premium declines (for example as the DSP subsidy reduces)⁷⁷ and consumers' propensity to substitute from fixed voice services to mobile voice services increases;

⁷⁷ The impact of the expected reduction in the DSP subsidy will lead to a further decline in the Mobile Voice Premium in Ireland.

- it is easy to show that for FVA Voice Only customers, particularly marginal customers with a low level of consumption (i.e. those most likely to switch in response to a price rise), mobile services represent a strong constraint,⁷⁸ and
- finally the expected reductions in the DSP subsidy will increase the substitution towards mobile services by fixed customers.

As the competitive conditions in the retail market for Voice Only services are largely the same across Ireland it may be reasonable to consider the market as national.

2.4 There is Strong Competition in Urban Areas for Bundled Voice/Broadband Customers

We set out above why we consider that there should be separate markets for Voice Only customers and customers that purchase voice (access and calls) as well as other products, in particular broadband, from the same provider.⁷⁹ Here we consider how to define the retail market for customers that purchase Bundled Voice.

In more densely populated urban areas eircom experiences very strong competition from fixed rivals who have their own infrastructure, in particular from UPC, for consumers that want Bundled Voice. In addition, there is competition from retail providers that rely on eircom's wholesale products based on its copper network (LLU, SB-WLR + bitstream or SB-WLR + line sharing). Outside the footprint of infrastructure-based rivals there is significant competition from providers that use eircom's wholesale products only (mostly SB-WLR + bitstream).

The question is whether there is sufficient difference in the competitive conditions in different parts of Ireland to mean that sub-national markets best represent the nature of the competitive constraints and whether eircom has significant market power in the resulting markets.

In eircom's experience the nature of competition in more densely populated urban areas is fundamentally different to competition outside these areas and this should, therefore, be reflected by defining separate geographic markets. eircom considers that the retail market for Bundled Voice in urban areas should be found to be prospectively competitive and that it does not have significant market power.

⁷⁸ The vast majority of Voice Only users could have lower bills using low cost mobile offers rather than any fixed service. Analysys-Mason report (in Voice and Messaging Quarterly Metrics) claim that the "premium for mobile service is negative for Ireland.

⁷⁹ We refer to the latter type of customers as those that purchase Bundled Voice, although we note that some customers may not purchase the 2 as part of a single bundle. However, the key point is that customers who wish to purchase fixed voice services and also broadband services typically choose to purchase both from the same provider.

The remainder of this section discusses:

- why the retail market for Bundled Voice should be considered to be sub-national; and
- why eircom should be found not to have significant market power in the retail market for Bundled Voice in the area of UPC's footprint.

2.4.1 ComReg should define sub-national retail markets for Bundled Voice customers

The market assessment also should take into account the fundamental differences in competitive conditions that exist in the areas where there is competing alternative infrastructure, when compared to areas where there is no such infrastructure. The focus should be on UPC because it is, by far, the largest of the vertically integrated rivals and, in urban areas, it imposes a strong competitive constraint on eircom.⁸⁰ However, important additional competition is provided by retail providers that rely on eircom's wholesale products and by other vertically integrated providers, such as smaller cable operators.

2.4.1.1 The development of customer shares is markedly different in more densely populated urban areas

In the retail market for Bundled Voice, eircom faces strong competition from a number of rivals. The strongest competition presently comes from fixed infrastructure-based rivals. In particular, UPC is a strong competitor as it is able to offer bundles of voice, superfast broadband and TV which eircom is not able to match. This makes it increasingly competitive.

The strength of competition can be seen when considering the change in UPC's share of Bundled Voice customers within its footprint area over the last 2 years. UPC has gone from X% of customers at June 2010 to X% at September 2012, X

⁸⁰eircom is not alone in highlighting the significant competitive constraints currently posed by cable operators on the retail market for fixed telephony access. In its response to the recent European Commission consultation on the list of relevant markets for *ex-ante* regulation, BT argued that there are now no grounds for excluding cable networks from market definitions of fixed network-based services, as retail services provided over cable directly compete with the same services provided over regulated fixed telephone networks. See pp. 23 & 25 of BT's response to the European Commission's public consultation on the revision of the Recommendation on relevant markets (8 January 2013), available at: <http://ec.europa.eu/digital-agenda/en/news/results-public-consultation-revision-recommendation-relevant-markets>

Figure 8. eircom estimate of Bundled Voice customers within UPC's footprint

✂

Even if one were to consider the shares of all voice customers, i.e. both those that purchase voice along with other products and those that purchase it on a stand-alone basis, the strength of competition from UPC is highly apparent. The share of UPC accesses in its footprint area has increased from ✂% in December 2010, to over✂% in December 2011, and is very likely to reach well over ✂% by December 2012 (at September 2012 it was ✂%). At the same time there has been a rapid fall in the number of eircom voice accesses; by the end of this year, the share of eircom retail voice accesses in the UPC footprint is very likely to have fallen below ✂.

UPC's share of voice customers is developing rapidly, in a similar way to its share of broadband customers. We note that it took about 2 years for UPC's share in its footprint areas to go from ✂% to ✂% at September 2012, making it the largest broadband provider in the areas where it is active with a greater share of connections than eircom retail and wholesale combined.

Figure 9. eircom estimate of total voice customers in UPC footprint

✂

There are additional constraints on eircom from retailers that use eircom's copper network to provide voice and broadband services. However, these operators are currently more limited in the level of constraint that they can impose on eircom compared to UPC. UPC is able to provide a higher quality superfast broadband product and a better range of bundles, in particular including TV. In contrast, eircom's copper network has reached

its technological limits based on the current infrastructure and is only able to deliver broadband speeds of up to 24Mbps. In addition, given the limitations of the network, neither eircom nor its wholesale customers currently provide any form of TV services. Thus these providers do not have the technical capacity to match the scope or the quality of UPC offerings.

The limitation of the constraint that these operators place on eircom, compared to UPC, is evident from the decline of their share of customers in urban areas in line with the decline in eircom's share. This is in marked contrast to the sharp rise in the number of UPC's customers. These share changes are consistent with the key competitive constraint on eircom in urban areas being due to UPC.

The strength of competition from retailers relying on eircom's wholesale products is expected to change due to eircom's NGA network rollout plans, which will enable eircom and others to provide superfast broadband services and IPTV services. A change is also expected as a result of the imminent entry of Sky into the broadband and voice market.⁸¹ Thus, it seems likely that, in the future, retailers using eircom's wholesale products will become a greater competitive force in urban areas as they will be able to provide high quality broadband and offer a greater range of products in bundles.⁸² However, a competing NGA infrastructure will remain and it is expected that this will continue to be a key driving force of competition – UPC will have to retain the ability to shape the characteristics and price of its retail products to compete with eircom and those providers that are reliant upon its wholesale products.

The difference in the development of shares outside UPC's footprint area is very markedly different. As shown in the Figure 10 below, eircom's share of Bundled Voice customers has \searrow gradually, but, in contrast to the situation in urban areas, the total number of eircom customers is \nearrow . Furthermore, the total number of Bundled Voice customers has increased at a much more modest rate outside UPC's footprint areas, reflecting the very significant difference in the nature of the market.

⁸¹ Sky has already announced that it will soon offer voice and broadband bundles in Ireland. See <http://www.sky.com/products/broadband-talk/index-roi.html>

⁸² eircom has already published its NGA wholesale offering including details of the products to be offered (including multicast) and the proposed quality of service. Thus other providers already have sufficient information to enable them to plan the products that they wish to launch on eircom's NGA platform.

Figure 10. eircom estimate of Bundled Voice customers outside UPC footprint



It should be noted that ComReg's assessment of the UPC shares (see Figure 23 of the Consultation Document), is clearly highly unreliable. UPC estimates that it provides voice services to 31.6% of the subscribers which are serviceable by it and, as we set out below, this is inconsistent with the evidence presented from ComReg's market research.⁸³

The EU household survey quoted by ComReg (Figure 15 of the Consultation Document) shows that 63% of households have a fixed telephone. If we assume that this figure can be applied to the UPC voice footprint, this would imply that UPC has **50%** of the voice subscribers in this area (31.6%/63%). Clearly, that share may be slightly lower if the take up of fixed telephony in the UPC areas is higher; however, it is not possible that the share is as low as ComReg's analysis shows.

The inaccuracy could be due to the small sample size or, alternatively and most likely, to the fact that, as ComReg notes, it is based on survey evidence which is categorised at the county level. As, in many cases, UPC's network passes only a proportion of the homes in each county, aggregating at the county level will necessarily give distorted results for UPC's share. Thus ComReg's survey appears to be fundamentally flawed for assessing the shares of UPC and should be disregarded.

2.4.1.2 eircom's competitive strategies are different in more densely populated urban areas

There are several ways in which eircom has adopted different strategies in areas where UPC and other infrastructure based rivals are active compared to its strategies outside these areas. In particular, and importantly, eircom has decided to roll out a NGA network, in large part to

⁸³ <http://www.lgi.com/oo-ireland.html> at Q3 2012

be able to compete with UPC and, has sought to lower wholesale FVA prices in NGA areas, so that the retail tariffs that eircom and its wholesale customers can offer allow them to compete with UPC.

eircom has chosen to roll out a NGA network which ComReg recognises *“is likely to coincide with the current cable footprint areas of UPC.”* Moreover, ComReg accepts that the nature of eircom’s NGA investment is *“defensive”*, i.e. that eircom has been forced into the investment because *“It is apparent that consumers are responding to UPC’s product offering, putting pressure on both eircom and its wholesale customers.”*⁸⁴ Alternatively, as ComReg’s advisors Oxera put it, eircom’s planned NGA investments *“are indeed a defensive response to UPC’s high-speed offerings.”*⁸⁵ Thus ComReg accepts that eircom’s competitive decisions in urban areas where it is competing with UPC are conditioned by the desire to be able to compete with UPC.

Outside the areas where operators have invested, or are likely to invest, in competing infrastructure, eircom accepts that it has had more limited incentive to invest in an expensive high-speed network. Therefore, there is clearly a key difference in the outcome of the competitive constraints on eircom. ComReg has also noted that eircom has proposed to change the SB-WLR and bitstream pricing for FVA sold as part of a bundle in the NGA enabled exchange. ComReg accepts that *“This discount appears targeted toward the sale of bundled broadband and voice, enabling eircom and the other FSPs to compete against the UPC bundled product.”*⁸⁶ However, ComReg curiously finds that this *“is indicative of some emergent pricing pressures driven predominantly by the alternative cable platform”* [emphasis added].⁸⁷ What is clear, given the very significant and rapidly increasing share of UPC’s voice customers in its footprint area, is that UPC has had a very strong influence on eircom’s competitive strategies, rather than *“some emergent”* pressures. Whilst ComReg emphasises that *“the precise scope and sustainability of such pressures over the lifetime of the current market review remain uncertain at this time”*, this effectively ignores the fact that UPC is highly likely to become the largest retail voice provider (bundled or otherwise) within its

⁸⁴ ComReg 12/27 Para 11.3, 11.46 and 14.121

⁸⁵ ComReg 12/27a page 29

⁸⁶ ComReg 12/127 Para 4.237

⁸⁷ ComReg 12/127 Para 4.238

footprint area within the next year, which will be before eircom has been able to roll out the NGA network that may enable it and its wholesale customers to compete with UPC.

Outside the more densely populated urban areas, the constraints on eircom are very different.

2.4.1.3 Churn data also shows the importance of UPC in more densely populated urban areas

eircom's churn data also emphasises the very strong competitive constraints that UPC, in particular, places on its actions in urban areas. For example, market research data shows that UPC is capturing around 28% of eircom's voice churn in Dublin area.⁸⁸ This is consistent with UPC's shares presented above, and the growing number of voice customers in UPC's customer base.

Figure 11. eircom's voice churn in Dublin area

✂

Clearly, there is necessarily a significantly different pattern in churn outside of UPC's footprint areas. As there is very limited competitive infrastructure, then the vast majority of churn is to providers that use eircom's wholesale inputs.

2.4.1.4 The difference in competitive conditions is unique and stable and has been recognised by ComReg

⁸⁸ Market research by Millward Brown Lansdowne covering eircom's switchers in Dublin area over the period October 2010 – September 2011

ComReg states that *“On balance, ComReg is of the preliminary view that it appears to be too early to determine that a separate geographic market can be clearly defined based solely on the bundled FVA services offered in particular regions. It is too early to determine whether the increasing competition with regard to the wider bundle of services (in particular voice and broadband) indicates that conditions in this area are sufficiently unique and stable to merit defining a separate sub-geographic market. eircom’s planned NGA investment and any NGA build-out by BT in other areas means that the current boundaries of the bundles market segment are furthermore unlikely to be stable over the next 2-3 year period”*.

However, UPC is likely already the largest provider to the *“bundles market segment”* in its footprint area, and will become the largest retail provider of voice services within the next year. Thus, whilst ComReg expresses concern about what may happen over the next 2-3 year period, eircom’s ability to compete with UPC is potentially significantly harmed now by ComReg’s inability to recognise how it competes with its rivals for customers that wish to purchase bundled products. In other words, what is very clear to eircom, and consistent with data provided above, is that the competitive pressures that it experiences within UPC’s footprint when setting the terms and conditions for Bundled Voice products are very different from outside that area.

As the difference in the competitive conditions is driven by the existence of UPC’s alternative competitive infrastructure, the area where it has upgraded its network in order to provide telecommunications services is a natural initial boundary for defining the geographical market. As it takes time and considerable investment to roll out further infrastructure, then this boundary is both unique and relatively stable over time.

However, as eircom rolls out its NGA network and wholesale products and as these become available to access seekers, these providers will become increasingly competitive. Thus, it is natural that the boundary of the sub-national market comprising the more densely populated urban areas should expand to include the areas covered by the NGA network.

The market boundary defined in this way would be unique and relatively stable over time and, most importantly, would reflect the nature of the

competitive conditions in the market. This market definition would be broadly consistent with ComReg's proposed definition of the larger exchange area (LEA).⁸⁹

Moreover, by introducing the concept of the LEA, ComReg has already recognised the differing nature of competitive conditions in different parts of Ireland. Thus, ComReg has accepted that the competitive constraints on eircom in the urban areas are stronger, and that this should be recognised by softening the regulatory constraints placed on eircom.

eircom notes that ComReg emphasises that "*the European Commission has underlined the importance of any proposed market boundaries being sufficiently stable over time.*"⁹⁰ However, it is not apparent to eircom why, if remedies can be defined that vary over time, this should not also apply to market definition. Market definition is simply a tool which is used to formalise the analysis of competitive constraints. In cases where competitive constraints are clearly very significantly different in different areas, it is natural that different geographic markets can be defined, even if the boundary of the markets may vary somewhat over time.

2.4.1.5 Conclusion regarding geographic market boundaries for bundles of voice and broadband services

It is clear from the analysis above that the conditions of competition are not homogeneous, and that there are clear and relatively stable boundaries which determine which areas have greater competition. Given this, it is clear that a national market does not make sense.

We note that whilst ComReg recognises significant geographic differences in competitive conditions for Bundled Voice as a result of strong competition from UPC, it defines a national market because Voice Only consumers are spread nationally.⁹¹ However, as set out above, a proper application of the market definition framework would find that Voice Only consumers were in a distinct economic retail market to consumers of Bundled Voice services. This should not, therefore, affect the assessment of the relevant geographic markets for Bundled Voice.⁹²

⁸⁹ See Notification by ComReg to European Commission under Article 7 of Directive 2002/21/EC, dated 26 October, 2012.

⁹⁰ 12/117 Para 4.240

⁹¹ See e.g. 12/117 Para 4.229

⁹² eircom also notes that there is a key question about proportionality. If ComReg is concerned about Voice Only customers,

2.4.2 eircom does not have SMP in UPC's footprint area

It is necessary for ComReg to take a forward-looking perspective and look at the market shares prospectively. Given the rapid change in UPC's share, it is inappropriate for ComReg to consider the market shares in a static sense. Even accepting ComReg's market definition (considering all voice accesses), which for the reasons set out above, eircom does not, eircom will become the second largest retail provider in the areas of UPC's footprint within one year. If ComReg instead looks, correctly, at Bundled Voice customers UPC's share is already higher than eircom's. In the future competition is only likely to increase further in more densely populated urban areas as access seekers are able to use eircom's NGA wholesale products, allowing them to be more competitive. Therefore, eircom considers that ComReg should find that in retail markets for Bundled Voice customers in more densely populated urban areas eircom does not have SMP.

Given UPC's very strong position within its footprint areas, eircom also notes that it does not understand how it can be appropriate for ComReg to find that eircom has significant market power without also making a similar finding for UPC. Rather, in eircom's view, if ComReg determines that eircom has SMP, then as a matter of regulatory fairness and technological neutrality, it should make the same finding as regards UPC.

2.5 Withdrawal of the Market 1 SMP Obligations in their Entirety is also Justified by the Efficacy of Wholesale Regulation (Both Existing and Forthcoming) and other Regulatory Requirements Applicable to eircom at the Retail Level, as well as Other Significant Developments that are in Progress

Retail regulation is seen by the European Commission and the NRAs as a last resort measure that is only appropriate where the imposition of upstream wholesale regulation alone is insufficient to achieve the required regulatory objectives.⁹³ The imposition of retail regulation should not, therefore, be seen as an end in itself, and its relevance will depend on the effectiveness of wholesale regulation. This principle is reinforced by the requirement set out under Article 13(1) of the Universal Service

applying regulation across all voice customers would appear to be clearly disproportionate.

⁹³ The 2007 Recommendation 2007/879/EC in recital 15 states: (15) Regulatory controls on retail services should only be imposed where NRAs consider that relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and the fulfilment of public interest objectives. By intervening at the wholesale level, including with remedies which may affect retail markets, Member States can ensure that as much of the value chain is open to normal competition processes as possible, thereby delivering the best outcomes for end-users. This Recommendation therefore mainly identifies wholesale markets, the appropriate regulation of which is intended to address a lack of effective competition that is manifest on end-user markets. Should an NRA demonstrate that wholesale interventions have been unsuccessful, the relevant retail market may be susceptible to *ex-ante* regulation provided that the 3 criteria set out above are met.

Regulation requiring national regulators to address competition issues at the retail level by imposing wholesale remedies in the first instance, and applying retail SMP obligations only if necessary.

Continued and effective wholesale regulation has, by and large, led to the withdrawal of regulation from all previously defined retail service markets included on the original 2003 Commission list of relevant market susceptible to *ex-ante* regulation, with the exception of the market for narrowband access. Notwithstanding, the same principle applies with respect to the latter market at the national level, and the efficacy of upstream regulation should firstly be assessed to determine whether, in combination with other competitive factors, the withdrawal of downstream regulation on the market for narrowband access is justified.⁹⁴

While the Consultation Document refers to the fundamental principles discussed above, the current market assessment neither examines the impact of wholesale regulation (current and soon to be adopted) at the retail level, nor does it consider the impact of a number of other constraints that apply to eircom's provision of LLVA services at the retail level.

eircom is currently subject to *ex-ante* regulation on all of the fixed wholesale markets listed in the European Commission's 2007 Recommendation, as well as wholesale regulation under Market 1 itself. Importantly, a number of developments affecting the range of wholesale regulations relevant to FVA markets in Ireland are either currently taking place or imminent.⁹⁵ While eircom's FVA services have been subject to regulation at the wholesale level for many years,⁹⁶ these new developments will have the effect of further strengthening retail based competition in fixed telephony in Ireland. In addition to these wholesale obligations, as the designated Universal Service Provider (USP) in Ireland, eircom is subject to a new specific Geographically Averaged Pricing obligation which has been implemented alongside a number of pre-existing measures. It is also subject to further regulation under the Universal Service

⁹⁴ Importantly, NRAs in both Finland (SG-Greffe (2010) D/16179) and the United Kingdom (SG-Greffe (2009) D/3172) have chosen to withdraw *ex-ante* regulation from Market 1. The European Commission did not make any comments on this decision in either case.

⁹⁵ eircom is not alone in asserting that effective wholesale regulation negates the need to continue regulating the retail market for fixed telephony access. In response to the recent European Commission consultation on the list of relevant markets for *ex-ante* regulation, Vodafone recommended removing the retail market for fixed telephony access from the list, expressly acknowledging that any competition related problems on this market may best be solved through the imposition of the appropriate wholesale obligations upstream. See page 1 and pages 6 – 7 of Vodafone Response to the relevant markets consultation (January 2013) available at: <http://ec.europa.eu/digital-agenda/en/news/results-public-consultation-revision-recommendation-relevant-markets>.

⁹⁶ Although the existing remedies applicable to Market 1 have been in place since August 2007 (D07/61) and certain elements have been subject to further specification from time to time (e.g., the retail price cap, the WLR retail-minus percentage, the net revenue test for bundles, etc.), many of the Market 1 measures in fact date back to 1999.

Regulations, and particularly Regulation 14. In addition, the competitive impact of significant policy changes that are taking place in Ireland (specifically, in relation to the DSP) should be taken into account. eircom therefore considers that, taken together, a combination of effective regulation at wholesale level (both existing and forthcoming) and several other material factors, ensure that eircom is subject to sufficient competitive and regulatory constraints so as to guarantee effective competition on the retail markets for FVA services. Continued imposition of regulatory obligations at the retail level is therefore unnecessary, disproportionate and unjustified. Overreaching regulation risks placing eircom at a significant competitive disadvantage vis-à-vis other market players whose share of the most commercially important markets going forward is increasing, and is at variance with the principle of technology neutrality with reference to both mobile voice and Bundled Voice Services offered by UPC and LLU-based (and future VUA-based) providers.

As discussed below, the relevant wholesale developments and other factors of which ComReg should take particular note when examining the continued need for the application of Market 1 remedies to LLVA services, include the following:

- the reduction in unbundled local metallic path (ULMP) prices under the Market 4 review;
- the reduction in fixed termination rates (FTRs) and mobile termination rates (MTRs);
- the forthcoming implementation of Bitstream floors and ceilings under the Market 5 review;
- the upcoming Market 2 review;
- the launch of stand-alone broadband;
- the concurrent application of regulatory requirements under the Universal Service framework and the Universal Service Regulations; and
- the expected significant retail disruption arising from DSP decision.

2.5.1 Reduction in unbundled local metallic path (ULMP) prices under the Market 4 review

eircom recently reduced the price of ULMP from €12.41 per month to €9.91 per month. The reduction of ULMP in this manner, and in the presence of the SB-WLR

price of €18.02 per month, significantly enhances the payback on a managed VoIP investment by the LLU access seeker. This is because the access seeker has, following such an investment, the option to move end users from SB-WLR to ULMP provision, and so to reduce cost-of-sale by €8.11 per line per month (€18.02-€9.91). This investment would allow the conversion of a higher proportion of the access seekers costs from variable costs to fixed and sunk costs – that is each customer added at prevailing market prices increases the contribution to fixed costs to a greater extent than is currently the case. It is well established that such a change in cost structure would be expected to lead to an increase in the intensity of competition from the access seekers – as lower end user prices driving higher volumes maximise profit at different level of demand than was the case in the SB-WLR (high cost-of-sale) model for delivering FVA. Such increased competition from access seekers would be additional to the intense competition from rivals with their own infrastructure, such as UPC.

A similar effect will be seen following the managed VoIP investment for access seekers currently using LS and SB-WLR to deliver multi-service bundles using eircom wholesale inputs. A further effect of the sunk cost of the managed VoIP investment, and of the reduced cost-of-sale from the ULMP reduction, is that more eircom exchange sites become economic for a sizeable access seeker looking at increasing its local loop unbundled (LLU) footprint. This, in turn, reduces the number of lines where the access seeker has no alternative to eircom's SB-WLR (for Voice Only end users) and SB-WLR plus Bitstream for Bundled Voice end users. Once again, the effect of the increased LLU and managed VoIP investment is to move the cost structure towards fixed and sunk costs and away from high levels of variable cost per end user.

We believe that the large price change referred to above will prompt migration from Line Share to ULMP, greatly increasing intra-platform competition using xDSL technology while also facilitating the entry into the market of large well-funded retail players (e.g. Sky). This, in addition to the launch of stand-alone Bitstream services in Q2 of 2013, will facilitate the growth of Managed VoIP solutions as an alternative to traditional narrowband voice offerings. As these developments will occur on the eircom platform, they are likely to be more extensive than the current offerings on alternative infrastructure. Many operators are also eagerly awaiting the launch of stand-alone Bitstream, in order to bring new bundles of voice, internet and TV services to the retail market. This launch in addition to the likely expansion of ULMP

will be a radical development in the market over the coming months (see Section 2.5.5 below).

2.5.2 Reduction in fixed termination rates (FTRs) and mobile termination rates (MTRs)

ComReg has recently directed that call termination charges on both fixed and mobile networks will fall to a level where they cover the pure LRIC of providing the service in question. This will lead to a reduction in interconnection prices of over 70% for mobile termination and 90% for fixed termination.⁹⁷ The effect of these changes will be to reduce those costs-of-sale that it is not possible for retail service providers to avoid given the nature of the bottleneck control wielded by the terminating network operators. This reduction in cost-of-sale will, in turn, allow the service provider to improve the competitiveness of the offer in any one of several ways. For Voice Only customers, lower call prices can be offered, lower calls and access bundle prices can be offered, or more calls can be added to existing bundles. For Bundled Voice customers, prices can also be reduced, more calls can be added at the same price, or the costs of additional broadband features can be recovered from the increased bundle contribution after the reduced cost-of-sale. The lower termination charges thus provide greater flexibility in setting prices, and would be expected to lead to more service differentiation and greater competition from fixed voice providers.

The decision to reduce termination rates in this manner is expected to have a profound impact on both wholesale and retail markets. Some operators may argue that there is little incentive to build infrastructure such as VoIP to originate calls where the whole cost of calls is shared between origination and termination on the incumbent's network. Any costs avoided by own-network origination simply get charged as termination costs. However, from 2013 onwards pure LRIC termination will drive incentives to build own-network origination capability.⁹⁸ We would, therefore, expect that retail offers in the Irish market will begin to reflect the new wholesale reality in the run-up to July 2013, and the customer response will begin to play out in the latter half of the year.

2.5.3 The forthcoming implementation of Bitstream floors and ceilings under the Market 5 review

⁹⁷ ComReg decision D12/12 Document 12/125; issued 21st November 2012.

⁹⁸ An operator using LLU does not pay for call origination service, but must pay for termination.

While the last Market 5 review was completed in 2011, several of the pricing measures are only now playing out. The consultation on WBA prices 10/108 led to the implementation of a WBA price floor in D06/12 in April 2012. This, in turn, resulted in the making of several price reductions by eircom in July 2012. Industry is now beginning to respond to these changes. The other remedy proposed in 10/108 – price ceilings for Bitstream products – is not yet complete. Notwithstanding, extensive work has been undertaken to build the relevant cost models, and a decision is expected in the near future. The impact of these developments, and their relevance to the Market 1 analysis, is set out below.

The implementation of Bitstream floors and ceilings has the effect of directly improving the intensity of competition only in that part of the FVA market that delivers service bundles that include broadband. ComReg's intention in publishing the price floor for eircom's Bitstream services was to demonstrate to LLU investors that their investment is safe from potential stranding by an eircom reduction of Bitstream prices to levels lower than those that would allow an LLU investor to achieve a reasonable return. The Bitstream ceiling proposal that ComReg has flagged will be designed to ensure that competitors in the national market for multi-service FVA bundles have a predictable cost of sale in all regions of the market – in particular in those areas where eircom Bitstream is the only option for fixed Broadband provision.

When combined with the effects of the reduced ULMP prices as described earlier, we believe that this initiative has the potential to further increase the levels of competition in the retail FVA market for multi-service bundles. Moreover and as also described above, ULMP will, once the LLU investment is in place, provide a profitable alternative to SB-WLR.

2.5.4 The upcoming Market 2 review

The logic of "pure LRIC" does not hold in the context of call origination, and there is an open question regarding recovery of common costs that were previously allocated to call termination. The upcoming review for call origination will reflect the view that ComReg set out in the recent consultation on call termination which states that at least some of the fixed and common costs that network operators consider to have been stranded by the move to pure LRIC for call termination may be recovered from call origination revenues.

However, unlike call termination where the FVA service provider cannot avoid the cost-of-sale, an alternative is available to service providers with respect to Market 2.

The LLU operator investing in a managed VoIP solution generates the option to use ULMP to deliver their own call origination service on all lines in unbundled exchanges. As described above, this option to replace cost-of-sale with sunk investments in their cost structure provides a strong incentive to the LLU operator to compete more vigorously in the downstream (in this case FVA) markets.

This suggests, therefore, that any Market 1 review should anticipate the real world impact of remedies arising from the Market 2 review fully into account.

2.5.5 The launch of stand-alone broadband

eircom has announced the launch of stand-alone Bitstream both at NGA deployment and across the balance of the Bitstream Managed Backhaul (BMB) footprint. When taken together with the first 4 developments above, this change is of particular importance in extending the benefits of increased retail competition to the widest geographic footprint.

When stand-alone Bitstream is combined with a managed VoIP service self-provided by the access seeker, FVA bundles can be delivered outside the LLU footprint without the use of eircom's SB-WLR. Given the role that is planned for stand-alone Broadband in extending market demand, and the retail-minus price ceiling for stand-alone Bitstream under the WBA price control, it is likely that such Bitstream access will provide a more economic wholesale LLVA solution than CPS with single billing for customers outside the LLU footprint.

2.5.6 The concurrent Application of Regulatory Requirements under the Universal Service Framework and the Universal Service Regulations

The Universal Service consultation 12/39 resulted in Decision D07/12, which designated eircom as the Universal Service Provider (USP) and imposed, alongside a number of pre-existing measures, a specific Geographically Averaged Pricing obligation.

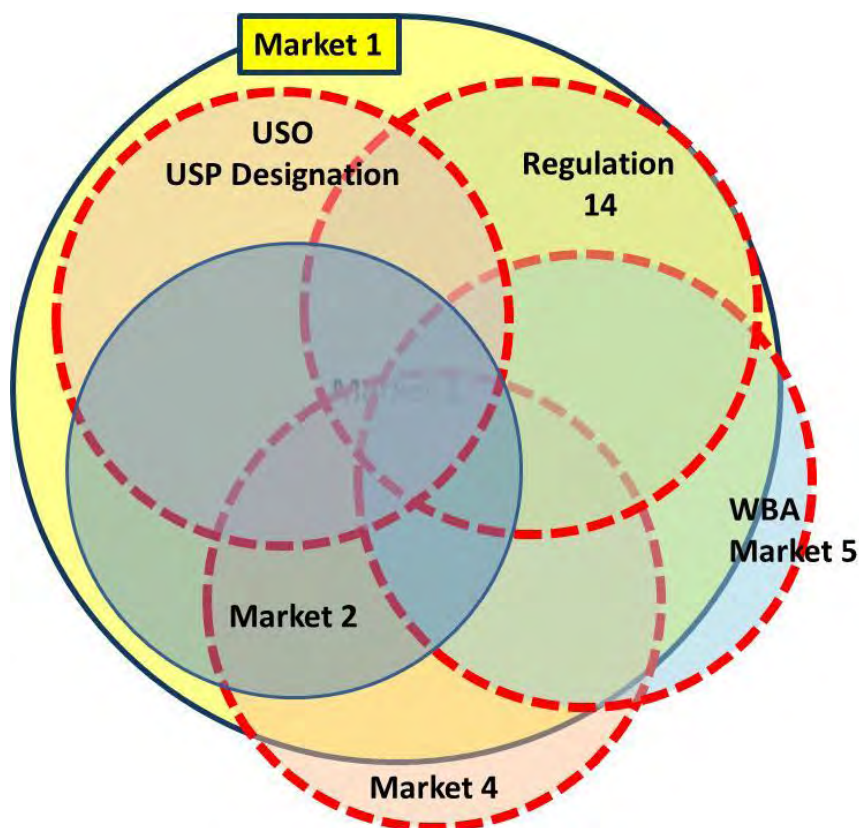
The Universal Service Regulations also impose obligations on all operators, including the USP. These include Regulation 14, which provides for a generally applicable transparency requirement, and which was the focus of a recent consultation process culminating in decision D13/12 (ComReg documents 12/128 and 12/129 refer).

Taken together, these obligations address many of the concerns regarding consumer protection and transparency raised by ComReg in 12/117. This leads to the conclusion that, in order to avoid duplicate regulation and its associated detrimental

effects, the existing obligations should not be replicated under the Market 1 analysis. ComReg should now have faith that these multiple measures will work, to the extent that the imposition of retail obligations based on Market 1 analysis is no longer required.

The diagram below is a simplified representation of the close relationship between *ex-ante* market analysis and regulation, the application of the universal service obligations and the application of Regulation 14 of the Universal Service Regulations. It represents a clear illustration as to why continuing *ex-ante* regulation with respect to Market 1 is not justified in this case.

Figure 12. Close relationship between ex-ante regulation and the obligations applicable under the Universal Service framework and Regulation 14



2.5.7 Significant retail disruption arising from DSP decision

The decision of the DSP to substantially reduce the Telephone Allowance paid to pensioners and other qualifying individuals may have a radical effect on the shape of the traditional fixed access market. Over 80% of consumer connections using eircom's fixed network are eligible for this allowance. In recent years, the DSP has negotiated additional "contributions" by eircom, so that the subsidy paid could decline to € 8, an amount less than the standard line rental, while still fully paying the fixed charge for a bundle that contains line rental, a call allowance, and subsidised customer premises equipment. This deficit was met through the application of a further eircom funded subsidy which fully offset the reductions in the DSP subsidy.

From January 2013 however, the DSP allowance will reduce to €7.72 excluding VAT and eircom will withdraw its corresponding subsidy in full. As the available subsidy cannot, at this level, cover the cost of a suitable bundle, eircom will offer users the option to put the allowance as a contribution to any available tariff. Some users

will, therefore, experience an increase of approximately €37 in their 2 monthly bill, from a starting position where they are paying close to zero for their service. This will clearly lead to many customers considering alternative services as a substitute for fixed line telephony access – in particular that mobile is a substitute for fixed Voice Only services.

eircom believes that the reduction in the Telephone Allowance will have a significant impact on the market for narrowband services in Ireland. In particular, this development will clearly indicate that many customers consider alternative services, and particularly mobile, are a substitute for fixed line telephony access.

Notwithstanding this, we note that, while the USP designation in June 2012 mentions the existence of the Social Benefit scheme, it does not consider the situation where it is substantially reduced or discontinued. We also note that Consultation 12/117 makes little or no reference to affordability or provisions for specific social groups, such as the elderly or those with special social needs, despite the fact that this cohort makes up over 30% of the eircom consumer line base, and over 30 consumers in total.

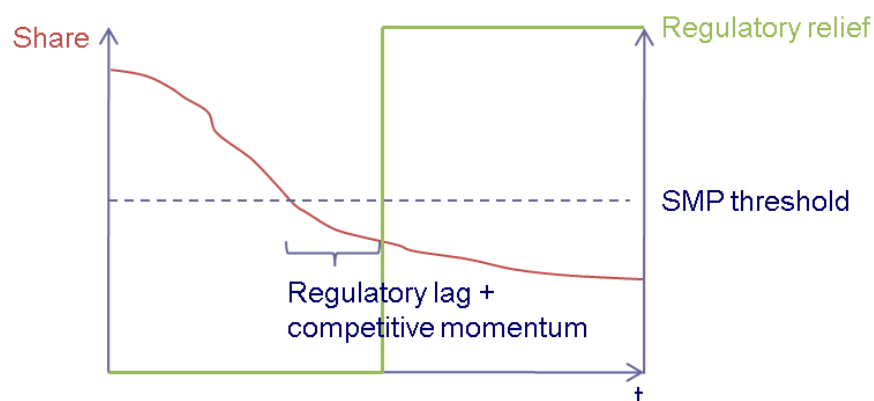
In eircom's opinion, any description of the market dynamics for narrowband services in Ireland that ignores the impact of the Telephone Allowance scheme is seriously deficient, and any such omission seriously undermines the credibility of the market analysis.

3. RELEVANT EXISTING AND IMPENDING DEVELOPMENTS THAT SHOULD BE TAKEN INTO ACCOUNT BY COMREG WHEN CONDUCTING THE MARKET 1 DEFINITION AND ANALYSIS PROCEDURE

3.1 Matching regulatory intensity with market developments

The EU Regulatory Framework is based on an on/off approach for regulation: the SMP test. Under this test, regulatory remedies are applied until SMP disappears. Importantly, however, regulatory „overshoot’ is likely due to regulatory lag: in this respect, the experience in Ireland has been that a lack of SMP is typically found after market power has long since disappeared, and the use of sunset provisions and/or competitive momentum mean the effect of past regulatory remedies typically extend well into the post-SMP phase. See Figure 13 below.

Figure 13.Regulatory lag impact on competitive momentum



The issue is somewhat ameliorated by the principle of proportionality that underpins the application of the 2002 EU Regulatory Framework: under the SMP framework, NRAs must apply the least burdensome remedy to address the identified market failure (the toolkit varies from simple transparency to burdensome cost-based access obligations or even functional separation). There is, however, also a degree of on/off in this system. This can be seen, for example, where price controls are removed in favour of simple price transparency. What we are arguing for is some proportionality in the implementation of a given tool in the toolkit. The objective is to match regulatory activity with actual market development, in order to minimise overshoot. The means to achieve this is to curtail the large regulatory discretion available in interpreting and implementing proportionality.

The model can be applied on a more granular basis, for example, if rural and urban markets are separated. In this case, both regulation and free market forces are optimised to deliver maximum consumer benefits.

In the light of the above, eircom considers that it would be premature for ComReg to take a decision involving the retention of retail obligations to LLVA services covered by Market 1 at this time.

3.2 Relevant Developments at EU Level

The European Commission has recently consulted on the list of recommended markets currently included in the 2007 Recommendation on relevant markets.⁹⁹ It is intended that this review will, for the purposes of the market analysis procedure, facilitate the taking into account of any major market and technological developments

⁹⁹ On 16th October 2012, with responses due by 8th January 2013

that have come to the fore since the last review was undertaken in 2007. Such developments include, for example, internet-based applications and services, the convergence between different types of networks and services and the development of Next Generation Access networks and services.

The overall aim of the EU 2002 Regulatory Framework is to reduce *ex-ante* sector-specific rules progressively as competition in the market develops. There is no doubt that the imposition of *ex-ante* regulation under the framework is regarded as a temporary measure only that is aimed at facilitating the transition to full competition that should follow liberalisation. As noted earlier, the European Commission has been explicit in this regard, emphasising the importance of rolling back *ex-ante* regulation as soon as the conditions for fair competition on a given market are sufficiently strong. The transitory nature of *ex-ante* regulation has been highlighted by the reduction in the number of markets identified for *ex-ante* regulation during the last round of review in 2007. This point is of particular relevance to the imposition of *ex-ante* regulation at the retail level owing to the fact that the 2007 round of review resulted in the removal of 6 such markets from the list.

In the light of the above, eircom strongly feels that any expected developments at EU level should be taken into consideration by ComReg in deciding whether to impose or to continue to impose any remedies with regard to Market 1. The expected removal by the European Commission of the Market 1 from the current list of recommended markets under the 2007 European Commission Recommendation, also allow ComReg the opportunity to appraise the effect of concurrent wholesale regulation (as referred to earlier in Section 2.5) on this market in Ireland. This would have the beneficial effect of placing ComReg in a better position to determine whether to adhere to any revised Recommendation in the case that any such revised Recommendation no longer included the current Market 1, or to continue to subject this market to *ex-ante* regulation.

4. RESPONSES TO CONSULTATION QUESTIONS

Q.1 Do you agree that the above identifies the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

The analysis set out in the consultation in Section 3 attempts to summarise the developments in the market, both at the wholesale and retail levels, over the 5 year period since the last review of this market. However, this analysis is entirely backward looking and completely fails to project how these changes will evolve over the period of the current review.

eircom would summarise the key market developments since ComReg's last market review as including:

- The product offerings of retailers have changed, and they increasingly provide multiple complementary services to consumers (in particular including FVA, fixed voice calls and broadband), commonly in bundles.
- UPC successfully introduced Bundled Voice services and, within its footprint area, has captured a significant share of consumers wishing to purchase these services.
- There is greater competition from retailers that use wholesale products based on eircom's copper network. Offerings of separate call services (via CPS) and narrowband internet are now negligible. Commonly retailers offer bundles of fixed voice (access and calls) and broadband services.
- An increasing proportion of households are now happy to rely just on a mobile connection for voice services, and this has led to a significant decrease in the number of fixed Voice Only customers.
- The above factors have led to a sharply declining retail share for eircom which faces significant competitive pressure from Voice Only customers switching to mobile and Bundled Voice services switching to UPC, and to a lesser extent Vodafone and other operators.

On a forward-looking basis there are a number of factors which will lead to greater competitive pressure on eircom:

- the significant reduction of the DSP subsidy for line rental, and the consequent increase in the charges to consumers, will likely lead to significant switching of Voice Only consumers to mobile. This will disproportionately affect eircom;
- the introduction of naked broadband services may also lead to households dropping their fixed voice lines; and
- Sky's imminent entry is expected to attract a significant number of Bundled Voicecustomers.

Significant entry has increased competition

While the main elements of change are captured in ComReg's review, the analysis fails to acknowledge one of the main developments that has taken place in the last 5 years which has been the huge increase in competition in urban areas resulting from the emergence of UPC as a major player in the market. There are now very clear differentials in the market dynamics between the highly competitive urban market where platforms offer competing retail offers using different infrastructure and the rural market where competition is still mainly dependent on the purchase of wholesale inputs on the eircom network.

In markets where UPC is present, eircom is playing catch up to the bundled services that UPC provides. This development has not been considered specifically in ComReg's analysis. Neither does the analysis adequately consider the extensive and continuing expansion of LLU in the urban market nor the possibility that this urban market should now be considered separately from the less competitive rural market.

eircom is also constrained by the emergence of retailers using eircom's infrastructure. Vodafone is a key competitor to eircom in this regard. This change in the market environment is also not given sufficient attention in ComReg's review. Like UPC, Vodafone can leverage its extremely strong brand and large customer base in adjoining markets which it can exploit with economies of scope and scale that are not available to eircom.

In addition to the emergence of UPC and Vodafone as major players in the market, there are other niche infrastructure operators such as Magnet, Digiweb and Imagine.

The imminent entry of Sky into the market brings another operator with a huge existing customer base in Ireland and strong operational experience from the UK market.

This consolidation of the consumer market means that the competitive nature of the market going forward will be dramatically different than was the case over the past 5 years when a large number of market entrants jostled to find market position.

These developments have not been considered appropriately in ComReg's analysis.

The consultation recognises that the eircom market share has declined significantly over the period since the last market review from 83% in 2007¹⁰⁰ to a market share of 58% in 2012,¹⁰¹ but yet ignores the fact that this dramatic market share reduction is much more pronounced in the highly competitive urban market.

The 3 charts below show the eircom view of the most likely trend for line numbers in the LLVA market up to Q3 2015. The factors that have been considered are the current trends in UPC and SB-WLR connections, the impact of the removal of the DSP subsidy, continuing mobile substitution of fixed voice and the introduction of stand-alone Broadband both in the NGA deployment and the NGB footprint.

The national market has been further divided into the urban and rural with the urban market taken to be those eircom exchanges where UPC network is present. The trends indicate that nationally, eircom retail, UPC, and LLVA suppliers using a combination of SB-WLR will have broadly similar retail shares by late 2015. Consequently, taking into account the current wholesale access remedies applied after an SMP finding in Market 2, the retail competition for LLVA will resemble that in the mobile voice access market with 3 MNOs of similar size.

In the urban LLVA market, UPC will have overtaken eircom retail and there is a strong likelihood that the combined size of the SB-WLR/LLU access seekers will also have a combined retail market share greater than eircom.

¹⁰⁰As stated in Para 3.14 of Consultation 12/117

¹⁰¹As stated in Para 2.13 of Consultation 12/117

Figure 14. Projected Bundled Voice market shares over the market review period



Figure 15. Projected Bundled Voice Urban market shares over the market review period



Figure 16. Projected Bundled Voice Rural market shares over the market review period



While the consultation references some of the changes which have occurred in the wholesale space over the period since the last market review, it does not acknowledge the renewed eircom commitment to the wholesale market resulting from its Wholesale Reform programme.

The trend towards bundled services

The trend towards bundled services is significant.¹⁰² The vast majority of consumers (99%) purchase FVA as part of wider packages of complementary products, usually in bundles.¹⁰³ According to ComReg, only 1.3% of fixed access consumers take a CPS plan, and therefore purchase their calls separately from their line rental.¹⁰⁴ The consultation acknowledges a dramatic decline in CPS only customers over the period since the last review. This decline is evident in Figure 1 on page 11 of this Response and is a clear indication that customers view both calls and access as being in a single market.

The preferences of consumers for bundled services are reflected in the retail offers available to them. Retailers generally no longer offer stand-alone call services to

¹⁰² In its response to the recent European Commission consultation on the list of relevant markets for *ex-ante* regulation, BT argued that the bundling of services, and notably broadband, voice and TV, is increasingly driving competition for consumers in the retail market. BT also argued that, at a minimum, and even where no bundled markets are defined, the competitive constraints arising from bundling need to be taken into account when assessing the market power in the relevant markets. See pp. 24 – 25 of BT's response to the European Commission's public consultation on the revision of the Recommendation on relevant markets (8 January 2013), available at: <http://ec.europa.eu/digital-agenda/en/news/results-public-consultation-revision-recommendation-relevant-markets>

¹⁰³ ComReg 12/117 Para 4.46.

¹⁰⁴ ComReg 12/117 Para 4.47.

consumers. Instead, retailers compete by offering product bundles which include access, calls and broadband. According to ComReg the largest fixed access suppliers in the market (eircom 63%, UPC 20%, Vodafone at home 13%), which make up a combined 97% of the residential FVA subscriptions, are not currently offering fixed voice calls independently of FVA.

Growing fixed to mobile substitution

Mobile voice services impose a significant competitive constraint on providers of fixed Voice Only services. The significant decrease experienced by eircom's FVA Voice Only customers, combined with the significant increase in the proportion of mobile only households, suggests a high level of substitution from fixed voice services to mobile services in Ireland.¹⁰⁵

The trend towards fixed to mobile substitution can be seen in a number of ways. ComReg clearly shows that the rate of fixed to mobile substitution is much greater in Ireland than elsewhere in the EU.¹⁰⁶ 62% of households in Europe have fixed and mobile telephone access, as against 57% in Ireland. 37% of Irish households are Mobile Only, as opposed to 27% across all of Europe.

The statistics above show that proportionally more people in Ireland are giving up their landlines (or are not purchasing fixed access in the first place), and are just using mobile access as a functional substitute for fixed access.

¹⁰⁵ In its response to the recent European Commission consultation on the list of relevant markets for *ex-ante* regulation, BT argued that fixed to mobile substitution should be recognised for the purposes of market definition and analysis. See pp. 23 – 25 of BT's response to the European Commission's public consultation on the revision of the Recommendation on relevant markets (8 January 2013), available at: <http://ec.europa.eu/digital-agenda/en/news/results-public-consultation-revision-recommendation-relevant-markets>

¹⁰⁶ For example Figure 16 on page 54 ComReg 12/117 represents effectively two pie charts – one representing the EU 27 and the other representing Ireland. These show clearly that there is much more substitution in Ireland between mobile and fixed than there is across the EU as a whole.

Q.2 Do you agree with the scope of the review of the FVA market? Please substantiate your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

eircom broadly agrees with the proposed scope of the review of the FVA market with the following qualifications.

First, the key issue in this review is that the market review does not reflect the fact that there are 2 distinct groups of customers who buy FVA with different demand side substitutes:

- fixed Voice Only customers; and
- Bundled Voice customers: those that purchase fixed voice as part of wider bundles including broadband.

ComReg's starting position is to assume that the supply of FVA to these different customer groups is a single market.

ComReg's starting position for its assessment of the potential for market power is the 2007 European Commission Recommendation and does not, therefore, reflect the realities of competition in the current Irish retail market. ComReg therefore examines the supply of FVA through the prism of competition which existed in 2007 when CPS and narrowband internet access were popular services which were bought independently of FVA.

eircom would argue that the retail market, as perceived by consumers, has developed considerably since the current market recommendations were put in place and that the review of these markets should be developed from current consumer perspectives rather than rigorously following the historic definitions from the EU which are in themselves currently under review.

The second qualification to the scope of the market review is that since ComReg published its preliminary conclusions, the Government announced changes to the DSP subsidy of telephone lines paid to pensioners and other qualifying individuals. This change will have a very significant impact on the provision of voice services and will disproportionately affect eircom, in particular in the Voice Only market. The withdrawal of the DSP subsidy will have a significant impact on eircom's ability to

maintain market share over the market review period. ComReg will, therefore, need to consider and consult on how this material change to the market for FVA will affect its conclusions on market power.

Q.3 Do you agree that FVA and fixed voice calls are in separate relevant markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom does not agree with the ComReg conclusion that FVA and fixed voice calls exist in separate relevant markets. The eircom view that these complementary products exist in a single market is supported by the 99% of consumers who meet their requirements for fixed voice and calls through a single transaction with a single supplier.

ComReg states at Para. 4.24 of the Consultation Document that FVA and Fixed Voice Calls are not substitutable products, but should, rather, be viewed as complementary products. eircom agrees with this assessment and believes that the almost entire elimination of the stand-alone CPS customer base is evidence that consumers share this view and in 99% of cases source their FVA and FVC service from the same supplier. The notable exception to this, are those consumers who purchase managed VoIP service, but, in this instance, the broadband access service is effectively a substitute for the FVA service.

ComReg, at Para.4.20 of the Consultation Document, sets out 4 criteria under which it proposes to assess whether FVA and fixed voice calls should be considered to determine whether they constitute a single market. These criteria were:

- economies of scale and scope;
- transaction costs faced by end users;
- differing competitive conditions; and
- end user behaviour (SSNIP test).

ComReg conducts a reasonable assessment under each of these criteria, all of which clearly points to a conclusion that calls and access should be considered as a

single market. However, ComReg concludes that they should be regarded as separate markets on the basis that *“it should not have a significant impact on the current competition assessment given that both products are currently jointly supplied in almost all cases.”*

The fact that fixed access calls are not part of the recommended market is ignored in this conclusion which seems to be influenced solely to align with the prescribed 2007 recommended market definition.

This response to this question is expanded upon in our response to question 5.

Q.4 Do you agree that stand-alone FVA is a separate market to a bundle of FVA with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

As set out in the analysis at Section 2 of this Response, eircom believe that there are separate markets for:

- Voice Only offerings of bundled fixed Voice Access and Calls; and
- Bundled Voice, including Broadband with fixed Voice Access and Calls.

These markets should be separately analysed to determine whether SMP is present and the current levels of competitive constraints which exist. Regulatory remedies should only be considered on the basis of such an appropriate analysis.

This response to this question is expanded upon in our response to question 5.

Q.5 Do you agree that, in line with ComReg’s previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a stand-alone basis and not a bundle entailing retail FVA sold with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom disagrees with ComReg's conclusion that FVA and fixed voice calls are in separate relevant markets. eircom believes that FVA and fixed voice calls, when purchased as part of a Voice Only service, should be considered separately from FVA and fixed voice calls when these are purchased as part of a wider package of complementary services, often as bundles.

eircom's responses to questions 3, 4 & 5 are set out fully above in Section 2 of this Response. However, in summary, eircom considers that ComReg's approach to market definition does not appropriately reflect that consumers buy complementary fixed telecommunications services (such as FVA calls and broadband) from the same provider, often in bundles – consumers do not buy FVA on a stand-alone basis. While FVA may be a key part of the bundles, that does not mean that it should be considered separately from the other products in the bundles. Such analysis would make sense only if there were significant differences in the competitive conditions for different elements of the bundles or if consumers self-assembled bundles taking different elements from different suppliers.

The current consumer trend is to purchase all telecommunications services from a single supplier. This is motivated by a number of demand side and supply side factors. Consumers achieve transaction costs savings from buying from one provider and suppliers are able to realise significant economies of scope, which are passed on to consumers as savings available from bundled purchasing. These savings result from the cost reductions available to operators in the customer handling elements of the service such as marketing, sales, billing and credit management as well as at the network level.

Therefore, the vast majority of consumers who require voice services prefer to purchase both FVA and fixed voice calls from the same provider. For those consumers who require voice as well as other services (that are commonly provided together with them), in particular broadband access, it is natural to purchase them from the same supplier.

As consumers usually purchase complementary fixed communications services from the same provider, it is necessary to consider whether markets should be defined for each element of the bundle¹⁰⁷ or for each bundle. Where competition takes place around product bundles, market definition and market power analysis should reflect

¹⁰⁷ We use the term "bundle" to mean either pure bundles, mixed bundles or products provided as part of a single bill to consumers. Thus, the term bundle should be interpreted to include the provision of complementary products, such as access and calls, under a single bill whether or not there is a single price.

this, in order to ensure that the competitive constraints that providers of bundles face are properly identified and assessed. This will guarantee that any resulting remedies are targeted and proportionate to the market power problem that may be identified.

ComReg's mechanistic application of the European Commission's 2007 Recommendation's list of markets, which ignores the significant developments in the way in which these markets have evolved in Ireland, risks leading to flawed conclusions about the existence or extent of market power and, therefore, to disproportionate or inappropriate remedies.

eircom therefore considers that:

- FVA and fixed voice calls should be considered together for the purposes of defining markets and assessing market power given that suppliers in Irish telecoms markets compete by providing product bundles; and
- given that the bundle of FVA and fixed voice calls is provided to 2 distinct customer groups ((i) Voice Only customers and (ii) Bundled Voice customers) it is necessary for ComReg to consider explicitly whether markets should be defined for these distinct product offerings.

In eircom's view it is clear that FVA supplied with calls is in a distinct market to FVA with calls and broadband, as consumers would be unable to self-assemble a bundle from separately sold elements and consumers would not switch from a Voice Only bundle to a Bundled Voice offering (or vice versa) if the price of their product bundle increased, i.e. consumers wish to either purchase Voice Only or a Bundled Voice offering.

Q.6 Do you agree that there is a single FVA market for business and residential customers? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees that, at this time, the market for LLVA should not be defined separately for residential and businesses. While there are some differences in the product characteristics, prices and customer demand for products aimed at businesses on the one hand, and consumers on the other, there is sufficient substitutability between the different products – businesses and consumers do switch between them.

The market for HLVA is characterised exclusively by business customers. It is, therefore, unnecessary to make a distinction between business and residential customers in this market.

Q.7 Do you agree that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

At a high level, eircom agrees that there are distinct markets, as proposed by ComReg in the consultation. As we have explained in detail in this Response document, we believe that fixed access and calls are part of the same market and that the relevant markets should be defined accordingly.

In addition, as also outlined in detail throughout this Response, we believe that the LLVA market should be sub-divided into:

- LLVA Voice Only market;
- LLVA urban “Bundled Voice” market (*i.e.*, fixed access + voice bundled with some other service, such as broadband and/or TV, extending over the LEA area); and
- LLVA rural “Bundled Voice” market.

Q.8 Do you agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom would not agree that the HLVA market should be narrowly defined.

Currently the access market is in a state of transition. As converging voice and data onto common infrastructure becomes increasingly important to customers, and as PRA and FRA access nears the end of its life-cycle, there is less demand for high level traditional voice access in the business base generally. The convergence of voice onto IP networks provides benefits to customers, which cannot be replicated on

traditional switched voice networks, and it is becoming a pre-requisite on the majority of the large corporate customer bids. While take-up to date has been slow, we have, within the past 12 months, experienced a significant increase in the demand for these services from Business customers. Forecasts for the coming financial years show that IP Voice services are expected to grow by close to 200% per annum. As a result, the impact of SIP trunking on HLVA over the next 2 years will be significant, with a continued levelling off and decline in demand for these traditional services.

- BT Ireland already launched SIP Trunking in November 2011 and most competitors (e.g. Vodafone, Imagine, UPC) now have a SIP trunking product in the market. Newer entrants, such as Planet 21, traditionally a PBX/CPE provider, are now also in the market with SIP Trunks.
- 38% of current Business tenders specifically refer to SIP trunking – increasing interest evident right across the base
- The worldwide market for SIP trunking grew by 128% in 2011. *“Though residential services continue to be the majority of VoIP service revenue, **business services have become the growth engine, particularly SIP trunking and hosted VoIP.** We expect continued strong worldwide growth in VoIP service revenue over the next 5 years, and it will reach \$86.3B in CY16.”*¹⁰⁸ (emphasis added)

For these reasons, eircom believes that in order to take a prospective view of the market, it is appropriate to include SIP Trunking in the HLVA market definition.

Q.9 Do you agree that it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used to deliver managed VOIP services which may include cable, fibre, FWA and DSL? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees that ComReg is correct to conclude that the market for FVA over PSTN or ISDN BRA should also include broadband connections used to deliver managed VOIP services which may include cable, fibre, FWA and DSL. From the

¹⁰⁸ VoIP and UC Services and Subscribers - Biannual Worldwide and Regional Market Share, Size, and Forecasts, Infonetics Research, 2012

consumers' perspective there would be no material difference between a voice service which is delivered via a managed VOIP service and a voice service delivered via a PSTN line.

However, as set out above, a proper assessment of the market shows that Voice Only bundles are in a distinct product market to Bundled Voiceofferings.

Therefore, to the extent that managed VOIP services tend to be part of wider bundles, this constraint will mainly operate on Bundled Voiceofferings - a consumer of Voice Only services would be unlikely to switch to a managed VOIP service, as such a service is generally only available in wider packages.

Q.10 Do you agree that retail fixed access and mobile access do not currently belong in the same relevant market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Contrary to ComReg's preliminary conclusion, eircom considers that mobile voice services impose a significant competitive constraint on providers of fixed Voice Only services and, hence, must be considered in the relevant market analysis of FVA and voice services. Our views are set out in full in Section 2.3 of this Response, but are summarised as follows:

- The functionality of mobile is very similar to the functionality of fixed voice services, with the additional advantage of providing mobility. This is corroborated by customers' perceived quality of fixed and mobile services as included in the 2012 Market Research.
- The significant decrease experienced by eircom's FVA Voice Only customers combined with the significant increase in the proportion of mobile only households, suggests a high level of substitution from fixed voice services to mobile services in Ireland. This observation is all the more powerful, given that many fixed voice users would not consider switching because they have been receiving the service at a significantly subsidised rate¹⁰⁹ or because they take-up a fixed voice service to enable them to have a fixed broadband

¹⁰⁹ Many consumers receive FVA for free or pay very little, due to the Telephone Rental Allowance from the DSP

service. This is strong evidence that mobile is a significant competitive constraint on eircom's fixed Voice Only services.

- The differences between elements of the fixed and mobile tariffs do not imply that mobile services are not a strong constraint on FVA Voice Only providers. In this regard, ComReg's argument that fixed voice is cheaper than mobile is flawed: first, because it uses a wrong measure of prices (e.g. by comparing only call revenues from fixed and mobile operators); and second, because it does not provide any estimate of the potential saving for a given customer profile associated to the use of fixed services instead of mobile ones.
- Further, substitution towards mobile services will be even stronger with the expected reduction in the DSP subsidy of telephone lines paid to pensioners and the introduction of naked broadband services in Ireland. With these changes many more consumers are likely to consider mobile telephony as a viable alternative to a fixed Voice Only service.

We note that the tariff structure for FVA is different to that for mobile,¹¹⁰ at least partly because of regulation. It is required that access and calls to be sold separately on the incumbent's retail fixed network and the reference interconnect offer makes call origination and call termination available at strictly cost-oriented interconnect rates. The fixed incumbent could not offer a pre-paid fixed offer because it would not cover the cost of WLR for lower spending users. Attempts to have lower rental coupled with higher call charges results in allegations that the proposed offer does not pass the net revenue test.

Much of the argument in the consultation as to why mobile is in a separate market relates to the quality of broadband access over mobile, yet ComReg had already concluded that broadband is in a separate market.¹¹¹ Moreover, this argument is not relevant for fixed Voice Only subscribers, for which mobile is very real and suitable alternative.

Q.11 Do you agree that the relevant geographic market for the relevant FVA markets identified is Ireland? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer,

¹¹⁰ See ComReg 12/117 paragraphs 4.191 - 4.192.

¹¹¹ ComReg 12/117 paragraphs 4.183 - 4.187

along with all relevant factual evidence supporting your views.

eircom considers that there are fundamental differences in competitive conditions in the areas where there is competing alternative infrastructure, compared to areas where there is no such infrastructure. The conditions of competition between these areas are not homogeneous and there are clear and relatively stable boundaries determining which areas have greater competition. Given this, it is clear that the definition of a national market does not make sense.

In particular, in the retail market for Bundled Voice, eircom faces strong competition from a number of rivals. The strongest competition presently comes from fixed infrastructure-based rivals. UPC is a strong competitor as it is able to offer bundles of voice, superfast broadband and TV, which eircom is unable to match. This makes it, increasingly, highly competitive.

UPC is, by far, the largest of the vertically integrated rivals and, therefore, imposes the strongest competitive constraint on eircom. However, there is important additional competition from retail providers that rely on eircom's wholesale products and from other vertically integrated providers, such as smaller cable operators.

The strength of competition can be seen when considering the change in UPC's share of Bundled Voice customers within its footprint area over the last 2 years. UPC has gone from 38% of customers at June 2010 to 48% at September 2012, 38

UPC's share of voice customers is developing rapidly, in a similar way to its share of broadband customers. We note that it took about 2 years for UPC's share in its footprint areas to go from 38% to 48% at September 2012, making it the largest broadband provider in the areas where it is active with a greater share of connections than eircom retail and wholesale combined.

ComReg's own research supports the very strong competitive impact of UPC. For example, ComReg finds that "*Over the 3 years preceding the 2012 Market Research, UPC attracted 37% of switchers with eircom attracting 25% by comparison.*"¹¹² This is despite the fact that eircom has well over twice the coverage as of UPC.

In addition, eircom's competitive strategies are different in more densely populated urban areas, where UPC and other infrastructure based rivals are active compared to its strategies outside these areas. In particular, eircom has decided to roll out a NGA

¹¹²ComReg 12/117 Para 4.226

network, in large part to be able to compete with UPC. It has also sought to lower wholesale FVA prices in NGA areas, so that the retail tariffs that eircom and its wholesale customers can offer allow them to compete with UPC.

eircom has chosen to roll out an NGA network which ComReg recognises “*is likely to coincide with the current cable footprint areas of UPC*”. Moreover, ComReg accepts that the nature of eircom’s NGA investment is “defensive” i.e. that eircom has been forced into the investment because “[*It is apparent that consumers are responding to UPC’s product offering, putting pressure on both eircom and its wholesale customers*”. In other words, as ComReg’s advisors Oxera put it, eircom’s planned NGA investments “*are indeed a defensive response to UPC’s high-speed offerings*.” Thus ComReg accepts that eircom’s competitive decisions in urban areas, where it is competing with UPC, are conditioned by the desire to be able to compete with UPC.

Outside the areas where operators have invested, or are likely to invest, in competing infrastructure, eircom accepts that it has had much more limited incentive to invest in an expensive high-speed network. Therefore, there is clearly a key difference in the outcome of the competitive constraints on eircom.

eircom’s churn data also emphasises the very strong competitive constraints that UPC, in particular, places on its actions in urban areas. For example, market research data shows that UPC is capturing around 30% of eircom’s voice churn in the Dublin area. This is consistent with UPC’s shares presented above and the growing number of voice customers in UPC’s customer base.

We note that whilst ComReg recognises significant geographic differences in competitive conditions for Bundled Voice as a result of strong competition from UPC, it defines a national market because Voice Only consumers are spread nationally. However, as set out above, a proper application of the market definition framework would find that Voice Only consumers were in a distinct economic retail market to consumers of Bundled Voice services. This should not, therefore, affect the assessment of the relevant geographic markets for Bundled Voice.

As the difference in the competitive conditions is driven by the existence of UPC’s alternative competitive infrastructure, the area where it has upgraded its network in order to provide telecommunications services is a natural initial boundary for defining

the geographical market. As it takes time and considerable investment to roll out further infrastructure, this boundary is both unique and relatively stable over time.

However, as eircom rolls out its NGA network and wholesale products based upon this become available to access seekers, these providers will become increasingly competitive. Thus, it is natural that the boundary of the sub-national market, comprising the more densely populated urban areas, should expand to include the areas covered by the NGA network.

A market boundary defined in this way would be unique and relatively stable over time and, most importantly, would reflect the nature of the competitive conditions in the market. This market definition would be broadly consistent with ComReg's proposed definition of the larger exchange area (LEA).

In addition, by introducing the concept of the LEA, ComReg has already recognised the differing nature of competitive conditions in different parts of Ireland. Thus ComReg has accepted that the competitive constraints on eircom in the urban areas are stronger and that this should be recognised by softening the regulatory constraints placed on eircom.

eircom notes that ComReg emphasises that "*the European Commission has underlined the important of any proposed market boundaries being sufficiently stable over time.*"¹¹³ However, it is not apparent to eircom why, if remedies can be defined that vary over time, this should not also apply to market definition. Market definition is simply a tool which is used to formalise the analysis of competitive constraints. Where competitive constraints are clearly very significantly different in different areas, it is natural that different geographic markets should be defined, even if the boundary of the markets may vary somewhat over time.¹¹⁴

We note that ComReg argues that the fact that FSPs price uniformly on a national basis suggests "*that competitive conditions for stand-alone FVA are homogenous nationwide*".¹¹⁵ We completely disagree with this contention.

First, ComReg recognises that eircom is required by the USO obligation to offer national retail prices, but fails to consider how this would affect the pricing incentives of other providers in the market.

¹¹³ 12/117 Para 4.240

¹¹⁴ See page 10 of the Explanatory Note

¹¹⁵ 12/117 Para 4.236

Second, ComReg does not consider that the cost for providers that use wholesale products based on eircom's network are the same nationally, as ComReg directly regulates the difference between eircom's wholesale and retail prices (SB-WLR is set on a retail minus basis).

Third, uniform pricing is, in any case, not determinative of a national geographic market if the demand-side substitution possibilities are local, as they clearly are in this case. When prices are set nationally in the presence of local markets, the national price level will simply represent an average of the profit maximising prices appropriate to each individual local market. In that case, the national price level depends on the average level of competition across each local market. Uniform pricing does not imply that competitive conditions are necessarily homogeneous across local markets.¹¹⁶

The view that national pricing does not imply national geographic markets has been reiterated recently by the OECD in relation to the telecommunications sector:

"It is sometimes argued that a national uniform price levied by the incumbent operator would imply a national market. However, although this might be correct in some cases, there may be other cases where, from a consumer perspective, significant differences exist between "competitive" and "non-competitive" areas despite a national uniform price charged by the incumbent operator".¹¹⁷

Q.12 Do you agree with ComReg's preliminary conclusions on the retail FVA market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

For the reasons set out earlier in this Response, eircom strongly disagrees with the LLVA market definitions set out in ComReg's consultation 12/117. When properly defined the market definitions are as follows:

- The market for FVA when supplied together with calls to Voice Only subscribers:

¹¹⁶ The issue of geographic market definition in the context of uniform pricing by national retailers was considered at length by the UK Competition Commission in its 2008 Groceries market investigation. In that case, Tesco argued that the prevalence of nationally set and uniform prices indicated a national geographic market. The Competition Commission disagreed: *"the fact that certain aspects of the retail offer are predominantly set uniformly on a national basis does not mean that the geographic market is national. Demand-side substitution by customers, which is the key to market definition in grocery retailing, can only take place within a local framework"*.

¹¹⁷ OECD (2010), "Geographically Segmented Regulation for Telecommunications", OECD Digital Economy Papers, No. 173, p. 22, available at <http://dx.doi.org/10.1787/5km4k7mgqw7f-en>.

- is significantly constrained by the supply of mobile only voice connections; and
- is national in scope.
- The market for FVA when supplied in wider bundles (Bundled Voice):
 - is sub-national in scope and should be delineated between more densely populated urban areas (broadly along the lines of the LEA that ComReg has defined) and less densely populated areas; and
 - excludes FVA when sold only with calls.

Q.13 Do you agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

In the market for Voice Only, eircom does not have market power given the strong and growing constraint that is provided by mobile. Providers of fixed Voice Only services are unable to increase prices as households already have mobile voice connections and can, and do, easily switch to a mobile only service.

The degree of substitution to mobile has been masked by the DSP subsidy of fixed line telephony. Reductions in the DSP subsidy mean that the bills of a large proportion of fixed Voice Only customers will substantially increase in the coming weeks, and is likely to lead to a significant increase in the substitution towards mobile services by fixed customers.

In the market for Bundled Voice services, eircom does not have SMP in UPC’s footprint area. As can be seen from the chart below eircom’s retail market share is \times . In the remaining non UPC footprint, eircom is subject to considerable competitive constraints from operators purchasing wholesale products on its network and there is no requirement for continuation of retail regulation in the presence of continued wholesale remedies currently in place.

Figure 17. eircom estimate of Bundled Voice customers within UPC's footprint

✂

It is necessary for ComReg to take a forward-looking perspective and look at the market shares prospectively. Given the rapid change in UPC's share, it is inappropriate for ComReg to consider the market shares in a static sense. Even accepting ComReg's market definition (considering all voice accesses), which for the reasons set out above eircom does not, eircom will become the second largest retail provider in the areas of UPC's footprint within a short period of time (perhaps a year). Moreover, and in the case that ComReg instead looks correctly at Bundled Voice customers, it will become evident that UPC's share is already higher than eircom's. In the future, competition is only likely to increase further in more densely populated urban areas as access seekers are able to use eircom's NGA wholesale products, allowing them to be more competitive. Therefore, eircom considers that ComReg should find that, in retail markets for Bundled Voice customers in more densely populated urban areas, eircom does not have SMP.

Given UPC's very strong position within its footprint areas, eircom also notes that it does not understand how it can be appropriate for ComReg to find that eircom has significant market power without also making a similar finding for UPC. Rather, in eircom's view, if ComReg determines that eircom has SMP it should also do so for UPC.

Q.14 Do you agree with the types of competition problems identified by ComReg, as outlined above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

eircom rejects the allegation that there is potential for eircom to engage in exploitative and exclusionary behaviour. Even if such potential existed, ComReg has not established why there would be an incentive to engage in such behaviour. Furthermore, the analysis repeatedly omits the continued existence of Universal Service Obligations and wholesale regulation (including the continuation of SB-WLR as a remedy in Market 2), which would prevent the behaviour described if there were potential or incentive to engage in it.

ComReg has not identified any significant exploitative practice in the market other than setting out hypothetical possibilities of how such practices could occur. Wholesale regulation can and does prevent this behaviour in the FVA markets. In addition, competition for urban consumers buying bundles, coupled with the USO obligation for nationally average line rental prices, prevent it even for consumers buying Voice Only FVA from eircom, as the setting by eircom of excessive prices for line rental would cause harm to eircom through reduced market share. As the volume of Voice Only FVA customers is small, and their revenue low, the extra profit from this excessive pricing would be insufficient to justify the practice. ComReg has not supplied any quantitative arguments grounded in fact to support its allegations. The competitive problems suggested in Section 6 of the Consultation Document do not arise because eircom does not have SMP.

The claim in Para. 6.14 of the Consultation Document that *“in particular, for customers who do not yet have internet access or who purchase and value the FVA service as stand-alone. These end-users have relatively less choice of access providers compared with end-users who have decided to purchase broadband and/or voice in a bundle or large volume business users”* is simply wrong. There are 14 operators currently re-selling the SB-WLR product into the market on a national basis. There are some 400,000 SB-WLR lines in place, of which almost 140,000 are Voice Only. In addition, there are multiple mobile operators and MVNOs that customers can choose for their voice services.

In Para.6.18of the Consultation Document, ComReg claims that eircom could *“push up the wholesale costs of its retail competitors (i.e. who are also its wholesale customers). Strategic benefits could be accrued through eircom charging an unjustified high price (and hence set at a higher level than if competition were effective) for network services or wholesale services for resale”*. This claim ignores the existence of SB-WLR – and the potential to continue the obligation to mandate the SB-WLR product through Market 2 and, through that remedy, appropriate regulation of wholesale prices. This obligation would also protect against the suggestion at Para. 6.21 that *“there is a risk of the actual retail price for FVA being masked when sold as part of a broader package including other services such as retail (fixed/mobile) calls, retail broadband, etc. This lack of clarity as to the effective retail price for bundled FVA might potentially facilitate the application of a margin squeeze vis-à-vis the wholesale inputs, thereby undermining the effectiveness of those upstream inputs and impeding the ability of access seekers to effectively*

replicate the entire retail bundle". Such a situation could not arise if the regulated SB-WLR product is utilised as the wholesale input of the FVA element of the bundle. This theme runs through the entire analysis of potential competition problems; therefore, this analysis should be re-considered in the context of the existing wholesale remedies remaining in place and applied through Market 2. ComReg identifies inefficiency or inertia as potential problems and alleges that eircom engages in costlier or less efficient production techniques than if competition was effective. This allegation seems unlikely to be true for a company that has had significant financial restructuring following a period of short-time working and emergency cost cutting. It is more likely in this situation that concerted efforts continue to be made to eliminate any excess costs or inefficient methods.

With regard to any potential competition problems at the wholesale level, these should be addressed by the relevant wholesale regulation and not through retail rules. eircom would strongly argue that appropriate wholesale regulation when combined with the current and growing constraints from retail competitors will ensure that the retail FVA market is effectively competitive without any necessity for regulation at the retail level.

Q.15 Do you agree with ComReg's proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations) imposed on eircom under Sections 5 and 6 of the Decision Instrument appended to Decision D07/61? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

eircom agrees that the CS/CPS/SB-WLR obligations, if still required, should be continued as a wholesale remedy arising from the analysis of the wholesale call origination market. If the continued existence of CS/CPS/SB-WLR as a remedy to eircom SMP in Market 2 is assumed, the Market 1 analysis would be much simpler and clearer. The Market 1 analysis should then only consider retail regulation where wholesale regulation is insufficient.

Q.16 Do you agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed

on eircom under Sections 5 and 6 of the Decision Instrument Appendixed to Decision D07/61, some form of SMP obligation(s) should be imposed on eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

We do not agree that any controls are required at the retail level. Under the Regulatory Framework, regulatory controls on a retail service may only be imposed as a measure of last resort, provided that it has been established that wholesale measures would not be sufficient. In arriving at this decision, regard must also be had, in accordance with the Modified Greenfield Approach, to other, generally applicable, measures including Universal Service Obligation and obligations applying to all operators under the General Authorisation and the Universal Service Regulations. In addition, in accordance with Article 17(5) of the Universal Service Directive and Regulation 13(8) of the Universal Service Regulations, ComReg shall not apply any retail control mechanisms to geographical or user markets where there is effective competition. eircom does not agree in this respect that ComReg has shown why regulatory controls, in the presence of existing wholesale obligations, continue to be required in relation to LLFVA. In particular, eircom does not believe that in light of Regulation 13(8) of the Universal Service Regulations, ComReg is entitled to impose any retail control obligations in relation to the geographic areas where there is intense competition, including in particular what is known as the LEAs.

In examining whether wholesale regulation is sufficient, ComReg finds that *“wholesale intervention is not sufficient of itself to adequately protect all consumers who face raising FVA prices”*. ComReg states in support of this that *“evidence demonstrates that eircom as the SMP operator in the markets identified in Decision D07/61 has had the ability and incentive to increase line rental charges and/or maintain them at a higher level than if competition were effective” (para 6.49)*. eircom does not understand the basis for this statement and does not see that there is any supporting evidence.

eircom has not increased prices for fixed voice access service since the last retail price cap measure (D03/07, document 07/76) was imposed, despite the alleged incentives to do so. In particular, a price increase of 5% would have been possible in

2008 and a further increase would be possible from October 2012. Competitive constraints are such that any such increase would be unprofitable.

In addition, the constraints imposed by the USO (national prices, and need to ensure affordability) would prevent any excessive pricing even if the competitive constraint did not do so. Contrary to the requirement under the Modified Greenfield Approach to take into account other applicable obligations and requirements, ComReg has not taken any meaningful account of the impact of a USO in relation to the provision of access at a fixed location.

No additional regulation is needed where there is no evidence that the LLVA fixed voice access business is generating excessive returns, well above the weighted average cost of capital. ComReg does not cite any evidence to the contrary. In fact, there is evidence that returns will be lower than required to fund the WACC as eircom shares decline in urban areas. This is the case for access at retail and wholesale level and is true irrespective of whether the costing approach is HCA or LRIC. For example, for the year ended 30th June 2012, the return on the Wholesale PSTN WLR rental service did show ✕.

ComReg also advances that in addition to maintaining excessive prices, eircom may “engage in an anti-competitive margin squeeze, possibly facilitated by bundling, which would serve to undermine the effectiveness of the relevant wholesale remedies”. ComReg however does not give any explanation why that should be the case. The presence of price controls on relevant wholesale inputs (including retail-minus based price regulation) and cost accounting and accounting separation obligations, together with the potential application of competition law, significantly constrain any possibility to engage in margin squeezes. eircom accordingly does not agree that ComReg should intervene at the retail level and urges ComReg to take due account of existing wholesale obligations, the impact of eircom’s USO as well as generally applicable measures specifically designed to protect consumers.

We, therefore, consider that, cognisant of the impact of USO and wholesale measures, ComReg does not need to intervene further in the retail market. All existing retail measures should be discontinued. This will lead to the substantial benefits that ComReg foresees in Para. 6.45 and Para. 6.47, with no danger of any of the downside.

Q.17 Do you agree with the proposed removal of the existing retail SMP obligations imposed on eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

eircom agrees that the removal of all retail remedies on HVLA is appropriate, as eircom does not have SMP in the HLVA market. We note the reference in Para. 6.56 of the Consultation Document to a price increase of 5% in 2007 and we again remind ComReg that there has been no price increase since the date of the Decision 07/61 on 28 August 2007, despite the fact that the retail price cap 07/76 would have allowed further price increases. We consider that the factors listed by ComReg in Para. 6.56 of the Consultation Document demonstrates that eircom cannot act independently of customers or competitors and so does not have SMP.

Q.18 Do you agree with ComReg's view that it is appropriate to impose retail SMP obligations on eircom in the LLVA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

For the reasons set out above (in particular our reply to Q16) eircom do not consider it appropriate to apply any retail remedy in the LLVA market. We note that ComReg has advanced no convincing reasons to support the regulation of the retail market, in the presence of wholesale regulation and the USO. The "*potentially anti-competitive cross market tactics*" referred to at Para 6.61 of the Consultation Document, to the extent that they arise, are adequately addressed by wholesale regulation, as indeed, the proposal to remove retail regulation in terms of HLVA demonstrates. At Para 6.62, ComReg seeks to justify retail regulation by the requirement to protect consumers "*who primarily value only the standalone FVA product*" and "*are likely to need continued protection against the risk of potential price rises*". eircom does not believe that this is a valid reason: not only, as explained above in response to Q16, is the evidence that eircom has not been able to increase its prices for FVA although this was permitted under the price cap, but also the USO framework provides adequate protection for such consumers. In addition it is difficult to see how this in

any way could justify the proposal to impose an extensive range of obligations.eircom's position is set out in further detail in respect of each of the proposed retail obligations.

Q.19 Do you agree that it is appropriate that eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market? As regards the detailed implementation of that obligation, do you agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

eircomconsiders that a retail price cap is no longer required.

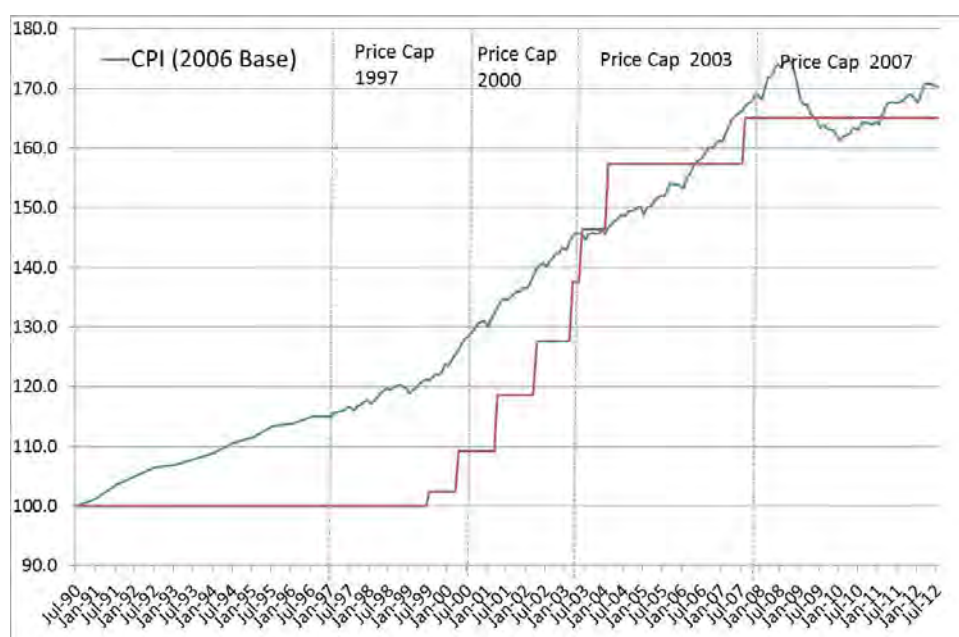
The claim that prices are higher than would apply in a competitive market is cited several times as a reason for continuing price controls. There is a single reference to line rental prices being higher than other EU countries. However, ComReg has not considered that eircom's combined price of line rental and calls is close to the average for all EU for consumers, and among the cheapest in the EU for business users¹¹⁸. The prices in Ireland are governed by complex models for LLU and interconnect, and margin squeeze tests which are designed to deter eircom from "selling below cost". However, comparisons with other EU countries suggest that, despite higher structural costs, eircom's prices in the combined call and line market are overall below the EU average. This is not consistent with a view that competition is ineffective, or that continuing retail price controls are needed.

We reject, therefore, the claim that prices for connection and rental are higher than would apply in a competitive market. ComReg has offered no quantitative justification for this other than asserting that stable prices are consistent with a lack of competition. Yet despite this stability, ComReg seems to have concerns that

¹¹⁸ComReg 12/134 Quarterly Report Q3 2012

customers, especially consumers who simply require FVA without other services such as calls or broadband, face rising prices. ComReg should clearly spell out what opportunity existed for eircom to increase prices and whether such price increases were applied – and if not, explain why they were not. eircom’s position is that competitive forces (constraints from mobile, from consumer resistance) and the USO prevented any increases, thus making the RPC redundant. Figure 18 below plots the changes to line rental over the period since the introduction of the Price Cap and clearly indicates that the cap allowed for a price increase in recent years but existing competitive constraints meant that such an increase was not feasible.

Figure 18 Line rental pricing compared with CPI



ComReg has not properly explained the web of constraints working to maintain prices at current levels including, in particular, extensive price control mechanisms based on margin squeeze tests in respect of Market 4 and Market 5 products.

In 11/72, in Para. 5.11, ComReg explored the cost floors that might apply to WLR and/or Stand-alone Broadband wholesale products (called Naked Wholesale Broadband Access, or NWBA). Each of these products would have as an input a copper pair between the local MDF and the customer premises. ComReg argued that the cost to eircom of these copper pairs might be higher than the LLU price (which at that time was €12.41). ComReg set out an argument that the national average cost of a copper pair was higher than the LLU price of €12.41, because the latter was based on the probability of LLU take-up in larger exchanges, which have shorter loops and hence a lower average cost. In Para.8.6 of that document, ComReg set

out an assurance to LLU Operators (LLUOs) that neither SB-WLR nor NWBA could be priced at such an excessively low level that would lead to the foreclosure of LLUOs. The conclusion in 11/72 was that a floor for a wholesale service: in the LLU footprint: would be set at € 3 plus line card costs, and a floor for wholesale NWBA would be set at € 3. Outside the LLU footprint, a higher floor might apply. 3

In particular, no conclusion can be properly drawn from the lack of price reduction for retail line rental without taking into account the regulatory constraints applicable to eircom in relation to line rental, including SB-WLR price changes in the context of ComReg's approach to margin squeeze test in relation to Market 4 in particular. ComReg's discussion of retail markets cites the lack of price reduction as evidence that the market for retail line rental is not competitive. This argument should bear in mind how difficult it would have been for eircom to reduce the WLR price in the wholesale regime described above. This inability to reduce WLR taken together with the need to maintain a 14% margin between retail price and WLR, translates into a regulatory constraint preventing retail price reductions. The fact that prices for WLR were maintained at a stable level, by means of regulation, perhaps to encourage the adoption of LLU, cannot be cited as evidence that the retail market is uncompetitive, or requires a price cap.

We note that eircom undertook several initiatives to reduce connection fees on a promotional basis. ComReg does not mention this fact in its analysis although it clearly demonstrates that eircom is behaving as an operator that is acting in a competitive market; not one that can act independently of its customers and competitors. All of the retail promotions were supported by wholesale initiatives and, in some cases, competing retail operators were more successful than eircom's own retail arm.

We note ComReg's view that bundles in urban areas are more competitive than pure FVA in rural areas. Yet UPC was able, in this more competitive market, to apply new charges such as the non-direct debit charge of €3.75 and to eliminate its discount for direct debit. UPC was also able to increase prices. Thus, if margins were low, a true competitive market might actually have experienced price increases during the period August 2008 to date.

We note that ComReg proposes to exclude FVA provided by means of VOIP. However, no detailed analysis is contained in the Consultation Document to support

this conclusion. eircom is of the view that this is a matter that should be kept under close review.

We agree that ISDN PRA and FRA should be removed from any price cap immediately, even if ComReg continues to apply a price cap for other FVA services.

Q.20 Do you agree that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

eircom note ComReg's acknowledgment that Decision D07/61 simply required eircom to offer narrowband access services on a stand-alone basis, thereby prohibiting "pure bundling". ✕eircom however does not believe that the obligation not to unreasonably bundle that is mentioned in Regulation 13 can be interpreted as entitling ComReg to require eircom to meet a Net Revenue Test in relation to any bundle which include FVA where FVA is in fact available independently. This is apparent from Recital 26 of the Universal Service Directive, which refers to "*compulsory bundling of retail services*". Any other interpretation of this obligation which would go further than a prohibition on pure bundling is tantamount to allowing effectively the regulation of other products and services where the conditions for ex ante regulation simply are not met, contrary to the legal requirements of the regulatory framework.

Without prejudice to this position, and in any event, we do not see a requirement for an obligation not to unreasonably bundle FVA, whether it is interpreted to prohibit pure bundling and/or other forms of bundling. Where FVA is bought as a bundle with FVC, or with broadband, mobile or TV, there are adequate competitive pressures to ensure prices will not be excessive. Similarly, competitive pressures and USP designation will ensure that FVA cannot be tied. Indeed it is not clear how eircom could engage in tying while complying with the USO and with obligations to offer CS/CPS and SB-WLR. ComReg's concern at Para. 6.85 seems to be unfounded. It is not necessary to apply an additional retail obligation to ensure that eircom complies with the USO.

Q.21 Do you agree that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

eircom do not agree that an obligation of transparency is appropriate or justified. In this regard, we note that contrary to what ComReg suggests at para 6.89, an obligation of transparency is not among the obligations listed in Regulation 13 of the Universal Service Regulations which the Regulator may impose by way of control on retail markets, where and if justified.

At paragraphs 6.91 and 6.92, ComReg sets out the measures which apply to all retail providers of electronic communication services and refers in particular to Regulation 15 of the Universal Service Regulations and Decision D11/04 re: ComReg's Code of Practice for Tariff Presentation. eircom notes in this respect that to date, ComReg has refrained from imposing publication requirements on all operators but has taken other measures to achieve transparency in retail communications services markets, including, for example, through its website "callcosts.ie". Other requirements, including, in particular, under Regulation 14 of the Universal Service Regulations (which requires that prices and terms and conditions are specified in contracts in a clear, comprehensible and easily accessible form, and that customers be advised one month in advance of any changes), ensure that end-users have access to adequate and accurate information. In this context, it is not clear why there should be a specific SMP obligation imposed on eircom.

eircom notes further that, in any event, eircom is subject, as the USP, to an obligation under Regulation 8(4) of the Universal Service Regulations to publish the conditions of any scheme to provide special tariff options, and common tariffs, including geographical averaging. As such, eircom's terms and conditions for line rental are published in its website and no further obligation can be justified in this respect. This also means that ComReg's proposed obligation to supply services only at the relevant published price is entirely redundant having regard to Regulation 8(4).

eircom also disagrees that it is necessary to maintain an obligation to notify ComReg five days in advance of changes to LLVA services. eircom particularly does not see that this can be justified by reference to “SMP margin squeeze obligations” because the terms of relevant price obligations would, in any event, trigger such an obligation.

It is thus the case that in the event of a reduction in FVA prices, eircom would have to seek ComReg’s approval for corresponding changes to SB-WLR and satisfy ComReg that the WLR price did not squeeze LLU or NWBA alternatives. The mechanism used under Decision D01/06 shows that a retail minus/margin squeeze price control does not require retail obligations to operate.

An increase in FVA prices is unlikely due to the competitive constraints. However, an increase in SB-WLR would require ComReg’s approval, while an increase in retail prices without a corresponding SB-WLR increase would create arbitrage opportunities for other operators (whose incremental retailing cost might be below the current 14% margin already), especially given the requirements of D13/12.

Finally, ComReg has wide ranging powers to seek information from eircom, so it is misleading to suggest (as in Para. 6.94) that a transparency obligation is needed to monitor evolution of prices in order to ensure compliance with the USO. If advance notice is required to ensure compliance with obligations of affordability or otherwise, this should be provided for by amending the USO designation.

In this context, and for the avoidance of doubt, noting ComReg’s reference to bundles at para. 6.96, the regulatory controls that ComReg may impose at the retail level are of course limited to the regulated product, in this case LLVA, and could not be lawfully applied to any other products on the pretext that they are sold in a bundle including the regulated product. Any other interpretation would be fundamentally at odds with the regulatory scheme as set out in Regulation 13 of the Universal Service Regulations which only allows for regulation in restrictive circumstances. We also note that the European Commission has emphasised in its Article 7 letters the requirement of proportionality of any measures that are imposed. It cannot be considered that the application of an extensive set of regulatory controls not only to the regulated products – LLFVA – but also, effectively, to any other products when sold with it, can be considered to be a proportionate measure. Regulation 13 allows for the imposition of an obligation not to unreasonably bundle: eircom is of the firm view that this is the only extent to which bundles may fall within the scope of regulatory controls at the retail level.

The requirement at Para. 7.1 to “publish in its public offices” is obsolete. Eircom does not have public office and does not have printed material with this information. If publication is required, it should be sufficient to publish on the website and to make material available to customers on request.

Q.22 Do you agree that, insofar as the LLVA market is concerned, eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

eircom agrees generally that compliance with the general accounting separation obligation arising from D08/10 requires that eircom collect the required accounting cost and revenue data, such that an obligation of cost accounting for retail FVA is not an onerous one. Conversely, eircom considers that the cost accounting obligation for wholesale markets (including for CS/CPS/SB-WLR arising from the call origination market) and reconciliation to overall costs and revenues makes any additional obligation on retail FVA redundant. In other words, eircom is of the view that it is not necessary to impose a specific obligation of cost-accounting in relation to the retail markets because effectively the imposition of such an obligation would have no material impact on what eircom is already required to do under Decision D08/10 in terms of compliance with its obligations of cost accounting and accounting separation in a range of wholesale markets.

Q.23 Do you agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

eircom does not believe that an obligation not to show undue preference to specific end-users of LLVA is required. There are a number of issues arising.

First, eircom does not agree that the obligation not to show undue preference to specific end-users means what ComReg suggests it means at para. 6.110. It appears, in particular, that ComReg understands an obligation not to show undue preference to specific end-users to be the same as the obligation of non-discrimination that it may impose at the wholesale level. However this is not correct and there are significant differences between the two. In accordance with the terms of Regulation 10 of the Access Regulations, an obligation of non-discrimination requires the SMP operator to treat his own downstream activity in the same way as he treats competing downstream operators; and to treat all competing operators in the same circumstances in the same way. Non-discrimination means no discrimination and it also means that dissimilar conditions may not be applied to equivalent transactions.

A requirement not to show undue preference to specific end-users is a radically different idea. To require that differences in treatment be objectively justified is in fact equivalent to ban showing preference to any specific end-user. The normal meaning of preference is "*the act, fact, or principle of giving advantages to some over others*"¹¹⁹. The dictionary definition of undue suggests that it is something bad and is greater or more extreme than you might think appropriate. The words "specific end-users" also cannot be interpreted to include a requirement that all end-users within a category be treated the same. Therefore, preventing undue preference to specific end-users does not mean that there can be no preference shown to a specific customers, that is, no preferential or different treatment; just that any preference must be, not objectively justified, but simply no more extreme than might be

¹¹⁹Merriam-Webster, <http://www.merriam-webster.com/dictionary/preference>.

appropriate.eircom believes, in this context, that to the extent that the incremental costs of delivering a product (including the price of the relevant wholesale input) is recovered in the price offered to a specific end-user, there can be no suggestion that the preference shown in the offering of tariffs that are different from tariffs offered to other customers is “undue”. This is consistent with the judgment of the Court of Justice of the European Union in the Post Danmark case.

Second, and in any event, eircom does not believe that an obligation not to show undue preference to specific end-users can be justified in the presence of eircom’s USO. eircom’s USO provides that eircom charges the same price for FVA in all cases, thereby providing entirely adequate protection to those “*consumers which continue to primarily value only the standalone FVA product*” and there is no justification for a further similar obligation under SMP regulation. Our comments in response to Q21 concerning the scope of application of regulatory controls at retail level being limited to the regulated product are also relevant in this context.

Without prejudice to eircom’s position that this obligation cannot be properly justified and is unnecessary, were ComReg to unnecessarily duplicate the USO and require eircom not to show undue preference to specific end-users, then eircom believes that further clarity is required in terms of the process which ComReg proposes to use to ensure compliance with any such requirement. It is eircom’s view in particular that an “assessment on a case by case basis”, short of specifying the specific test that would be used to assess compliance, if it is not to be arbitrary, can only take place on an ex post basis so that it can indeed be reasonably shown that the discount or rebate may have the effect of restricting or distorting competition.

Q.24 Do you agree with ComReg’s draft Decision Instrument at Appendix 3? Do you agree with ComReg’s Definitions and Interpretations as set out in the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

eircom agrees that no retail controls should apply to HLVA. We reject the remainder of the draft Decision. However, eircom accepts that all of the wholesale obligations should remain in force pending consideration of the call origination market.

In the event that ComReg were to impose SMP and remedies, we consider several elements of the decision notice as flawed, redundant or unclear.

- Section 6 seems to be redundant, or at best a recital.
- The new obligation at 8.1 “Eircom shall not charge excessive prices” is poorly defined, as it is not clear what might be meant by the term “excessive”. This is not justified in the analysis that leads to the Decision Notice.
- The new requirement in 8.2 to comply with Annex 1 of ComReg Decision 03/07 is unclear: does it require a new decision to make eircom comply with an existing decision? This seems to be identical to the requirement in 8.3 which is somewhat better worded
- 10.2 seems to require any individual service included in a bundle which contains LLVA must be available on a stand-alone basis, and purports to set tariffs for each element in any such bundle. The provisions of the decision notice can only apply services which clearly fall within the LLVA market.
- 10.3 is strangely worded: Is there a double jeopardy in requiring eircom to “avoid a margin squeeze” AND “comply with a net revenue test” . Is the net revenue test not just the means to demonstrate that a margin squeeze was avoided?
- 10.4 seems to maintain an obligation that has not yet been imposed.

Q.25 Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

As we have explained in detail above, eircom fundamentally disagrees with the substance of the market analysis being carried out by ComReg here. Consequently, we cannot accept the Regulatory Impact Assessment (RIA) in principle. However, we also have significant specific issues with the purported RIA, which, in effect, means that the RIA is not fit for purpose.

We are disappointed by the approach adopted by ComReg, which is little more than a qualitative discussion. No attempt has been made to quantifiably assess the efficiency or cost of ComReg’s proposals.

In addition, the RIA is far too limited and does not consider all of the available options. We have earlier made it clear that as some recent developments become established, these will undoubtedly have significant impacts on the markets in scope in this review, and it is incumbent upon ComReg to take a prospective view when analysing the markets. Yet, ComReg does not consider these developments as part of its RIA.

Indeed, in Para. 7.56 of the Consultation Document, ComReg makes the point that “*regulatory forbearance is unwarranted*”. However, this is based on the assumption that SMP has already been found to exist in particular markets, indicating clearly that ComReg is starting from the wrong premise when conducting this RIA.

In this context, when listing in Para. 7.58 the options it intends to consider, ComReg’s RIA focuses exclusively on remedies and obligations, apparently treating the definition and analysis of the markets as effectively “*faits accompli*”. Alternative market definitions, such as the inclusion of calls and access in the same market, are simply ignored in the RIA.

As far as the actual analysis carried out by ComReg is concerned, many of the alternatives are reasonably well laid out and explained, although the analysis is quite repetitive and simplistic. In summary, the limitations outlined above mean that the overall RIA is seriously defective and cannot reasonably be considered to be fit for purpose.

Q.26 Do you believe that ComReg’s draft Decision Instrument set out above is, from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the matters proposed therein? Please explain the reasons for your answer, clearly indicating the relevant section numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

No. The decision instrument is not clear or precise. Please see our response to Q24 above.

ANNEX 1

CRITIQUE OF COMREG'S MARKET SURVEY (12/117A)

Background

ComReg is currently consulting on the market for retail Fixed Voice Access (FVA) and, as part of this process, they have published the results of a survey of some 1,000 residential and 500 business users. This was initially published as a PowerPoint presentation of a selection of the results. Later, at eircom's request, the full questionnaire was published. eircom has a number of serious concerns around the survey and this short paper lays out our initial findings.

General concerns

In the first instance it is important to say that eircom welcomes the use by ComReg of substantial market research to inform their market analysis. A scientific survey of customer awareness, intentions, and behaviour is an essential input into a sound market definition. All the comments below are on the basis that improvements to the design, implementation, and data analysis could lead to a fit-for-purpose tool for market analysis.

We also note that, in correspondence prior to Christmas, eircom requested additional data from ComReg around the survey and, at ComReg's request, we set out in detail the reasons why this additional information was needed in order to allow us to fully respond to the consultation. Although ComReg indicated that they would respond favourably to this request, they have refused to respond, either positively or negatively. This has impacted adversely on our ability to do a full critique of the survey, and the analysis below should be read in this context.

Our general concerns can be grouped into four areas:

- Some information important to the purpose of market analysis was not collected, despite being available from respondents, because of the use of inappropriate, incomplete, or missing survey questions.
- The drafting of some survey questions is ambiguous or incomplete, and likely to lead to two respondents with the same characteristic giving different answers (or vice versa) – or to different interpretations by the survey administrators.

- A very limited analysis of the survey data has been presented to the participants in the consultation; the degree of analysis is well below that required to fully inform market analysis based on the data collected.
- While the overall number of respondents may be sufficient to produce a statistically valid assessment of single issues across the whole country, when correlations between subsets of respondents are required some of the key categories include very few respondents.

Missing information

Geographic information - a key requirement for any data to be used in market analysis is that it can be used to establish the presence or absence of geographic differences between levels of competition. The only geographic information gathered here is the county and fixed line area code of the respondent. These are insufficient to establish whether the customer lives in an urban or a rural area – or whether there is competing infrastructure (LLU, Cable or Wireless). ComReg’s actual approach is inconsistent with the general EU market approach to a crucial question. It is even inconsistent with the approach of the ComReg 12/67 consultation (fixed and mobile call termination,) informed by the same market survey, where the “network coverage” approach (effective access to networks) has been preferred relative to “served geographical area” approach. This is the background reason for several cases of insufficient information, e.g. as was indicated in 4.227 of 12/117 document where ComReg have “identified a single market for residential and business access” even though the supply side conditions are clearly different for residential customers in urban areas where UPC voice access is available.

The DSP allowance – this subsidy for telephony access is a key factor in the choices that residential customers make and the size of the bills they pay. There is no direct question that asks the residential respondent whether they are in receipt of such allowance for their fixed or mobile telephony access. Question 1500 contains the only reference to this allowance as the 10th in a list of 11 factors to be rated 1 to 5 in terms of importance on the decision on “keeping a fixed line”. A direct question is essential here for many reasons – among them the fact that a knowledgeable recipient would be aware that they can take a cash alternative to the allowance towards a mobile telephony service and so give the allowance a low rating even where they actually avail of it.

The presence of competing infrastructure has the most significant single impact on competition for FVA. UPC has almost completed the upgrading of their cable network for

voice and broadband services. To be fit for purpose, this survey must include a direct question on the presence of competing infrastructure passing the premises.

Ambiguous and incomplete questions

Key question 4030 on the reasons for giving up a fixed line makes no reference to the DSP allowance – recipient consumers realising that they can claim the same allowance for a prepaid mobile they have anyway, have a positive incentive to cease their fixed line.

The questionnaire appears to have no response option for consumers with bills between €51 and €60. This is probably apparent in a feature of the analysis page 29 where the distribution shows an anomaly at the entries for monthly bills between €50 and €60. The fact that there are any entries at all in this range is then probably due to two monthly bills in the range €100 to €120, and quarterly billed customers with bills in the range €201 to €240.

Limited Analysis

Even despite the fact that limited information has been gathered in the survey, there are valuable additional learnings to be derived from the survey by cross referencing the response data in ways that have not been reported in the Annex to the consultation. Some examples are:

Cross price elasticity – Questions 12xxx to 16xxx poll consumers about their potential behaviours in the presence of a 10% price increase. Where the response includes the option to move their calls to a mobile service the data provides that capability to calculate the cross price elasticity between fixed voice service and mobile voice service. The level of such elasticity is a strong indication as to whether the two services are likely to be in the same market. Given that the survey is supposed to support market definition it is bizarre that this opportunity was ignored.

There are very few cases in the analysis where the responses from multiple questions are combined to develop a more granular view of the market(s). For example, the limited location data seems to have been used solely to check that the survey sample was representative in the sense that respondents were distributed around the country broadly in line with the distribution of households. There has been no attempt to test for geographic variation in the responses to the questions that test the level of competition in the FVA markets. This is a serious omission as ComReg are required to examine their data for evidence of sub-national markets by the EU regulatory framework for *ex-ante* telecommunications regulation.

The behaviour in the presence of a 10% bill increase depends critically on the size of the bill in the first case (and whether the bill is subsidised by the DSP). There has been no attempt to correlate price sensitivity to bill size or DSP allowance.

Of equal concern to eircom, as the limited extent of the analysis actually carried out for ComReg, is the fact that, as indicated above, when eircom asked for a small number of additional presentations of the data collected during the survey, ComReg have been unable to source the analysis before the deadline for submissions. This indicates a level of inflexibility in the use of the research data to test hypotheses around market definition. This is unfortunate considering the effort and cost expended in collecting the information and the potential in the data for some deep insights into the real operations of the markets being tested.

Sample Size

While 1,000 consumers is sufficient to establish simple behaviours, such as voting intentions in an election, to a confidence interval of about 3%, it may not be large enough when respondents select from a series of options. Declining subsets are then tested successively. An example of this is on page 66 of the analysis where 16 respondents have to select between 7 options. The validity of the findings with this number of respondents is highly questionable. Given the total response from across the country this sample size is hardly likely to be able to detect geographic differences in the behaviour being tested.

A way to address this at the design phase is to test the survey on a smaller sample and modify the structure and sample size to help ensure that all key responses have statistically valid volumes of data.

ANNEX 2

EXAMPLES OF RETAIL OFFERS




This annex sets out examples of retail bundled offers from eircom, Vodafone and UPC. The retail offers show that FVA is bundled with other services such as calls and broadband.

Figure 1. Example of eircom's phone plans

eircom Talk Weekend Features

- *Unlimited weekend local & national calls
- Out-of-package local & national calls charged at 6c per minute
- Calls to Meteor/eMobile charged at 10c per minute
- Calls to other Irish mobile operators charged at 25c per minute
- **Package includes monthly line rental**
- All prices inclusive of VAT

*Weekend is defined as midnight Friday to midnight Sunday. Unlimited local & national calls are subject to a combined maximum of 6000 minutes in any one billing cycle (or a maximum of 12,000 minutes where the customer is availing of bi-monthly billing). If 60 minutes is exceeded on any one call, out-of-package rates will be applied to the minutes in excess of 60 mins.

eircom Talk Weekend	eircom Talk Off Peak	eircom Talk Anytime
Unlimited Weekend Local & National calls	Unlimited Off-Peak Local & National calls 30 mobile minutes	Unlimited Anytime Local & National calls 30 mobile minutes
Line Rental Included 	Line Rental Included 	Line Rental Included 
more details	more details	more details
€25.00 per month Buy Now	€30.00 per month Buy Now	€40.00 per month Buy Now

Source: eircom's web page as of 26 December 2012

Figure 2. Example of Vodafone at home's offers

€30 per month	free offpeak unlimited local & national calls	200 offpeak mins to Vodafone mobiles	line rental included
€37 per month	free anytime unlimited local & national calls	200 anytime mins to three Vodafone mobiles	line rental included
€39 per month	free offpeak unlimited local & national calls	200 offpeak mins to Vodafone mobiles	100 offpeak mins to international landlines & Irish mobiles
€49 per month	free anytime unlimited local & national calls	200 anytime mins to three Vodafone mobiles	100 anytime mins to international landlines & Irish mobiles

Source: Vodafone's web page as of 26 December 2012


Figure 3. Example of Vodafone at home broadband offers

€31.99 per month	Simply Broadband - the fastest cheapest broadband there is * up to 24MB download speed * generous 15GB usage allowance * line rental included in the price * €29.99 for existing Vodafone customers		Full details Select
€40.66 per month	40GB usage allowance	up to 8Mb download speed	No line rental It's included in the price Full details Select
€48 per month	300GB usage allowance	up to 8Mb download speed	No line rental It's included in the price Full details Select
€55 per month	350GB usage allowance	up to 24Mb download speed	No line rental It's included in the price Full details Select

Source: Vodafone's web page as of 27 December 2012

#Figure 14. Example of UPC's phone offers

Home Phone






€6.50
a month

- ✓ Cheaper calls than eircom to landlines and mobiles
- ✓ **No line rental**
- ✓ All the usual Phone features- voicemail, call waiting, call forwarding etc.
- ✓ DSP allowance included (if eligible)

Home Phone price shown applies when added to an existing Television or Fibre Power broadband connection.

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	Home Phone	Home Phone & Anywhere 100	Home Phone & Anywhere 200
Monthly Home Phone price	 <p>€6.50 a month</p>	 <p>€14 a month</p>	 <p>€19 a month</p>
Call Packs	None	<p>Anywhere 100</p> <p>100 FREE minutes ANYTIME to Irish mobiles, landlines and selected fixed line international destinations</p> <p>International call destinations</p>	<p>Anywhere 200</p> <p>200 FREE minutes ANYTIME to Irish mobiles, landlines and selected fixed line international destinations</p> <p>International call destinations</p>
	> more info	> more info	> more info
	ADD TO BASKET >	ADD TO BASKET >	ADD TO BASKET >

Source: UPC's web page as of 26 December 2012

ANNEX 3 COMMENTS ON THE ADDITIONAL ANALYSIS FROM THE COMREG SURVEY PUBLISHED AS COMREG 13/08

Background

ComReg is currently consulting on the market for retail Fixed Voice Access (FVA) and as part of this process they have published the results of a survey of some 1,000 residential and 500 business users. This was initially published as a PowerPoint presentation of a selection of the results; later the full questionnaire was published, and finally some additional analysis was published as ten additional PowerPoint slides. This note is limited to the eircom findings from ComReg 13/08

General Concerns

In the first instance it is important to say that eircom welcomes the use by ComReg of substantial market research to inform their market analysis, and that we welcome the publication of the additional analysis. However the results of that analysis merely reinforce the eircom finding that the survey has serious flaws of design, administration, and reporting.

New problems identified

1. The DSP allowance

A key question in the survey is Q1500 that asks the 633 residential respondents “that still have a fixed line phone” to rate 11 reasons for keeping the fixed line phone. Tenth of the eleven reasons rated is “Because I receive a social welfare allowance for my fixed line”. This refers to an allowance from the Department of Social Protection (DSP) that was paid at €22 per month at the time of the survey. The allowance can either appear on the customers fixed line bill or can be paid directly in cash and is primarily targeted at people over 70 years – or at people over 65 years living on their own. There are a limited number of cases where residents with long term disabilities or their carers can qualify for the allowance when less than 65 years of age but a very substantial majority of the recipients are over 65. For this reason the additional analysis published on slide 3 (page 12 of ComReg 13/08) provides a check as to the validity of the responses to 1500. Unfortunately this analysis indicates that a substantial number of respondents claiming to be influenced by the social welfare allowance do not actually receive it. Conversely, as the total proportion of respondents influenced by the DSP allowance is broadly in line with the proportion of residents receiving it, there are a substantial number of respondents in receipt of the allowance claiming not to be influenced

by it. This finding merely underlines the necessity of the direct question “Are you in receipt of an allowance from the DSP towards the cost of your fixed line?” A supplementary question is also appropriate as the allowance can appear either on the fixed line bill or be paid in cash (e.g. from the DSP into the resident’s bank account). The two methods of payment clearly have different impacts on the customer’s bill, and potentially have quite different impacts on the sensitivity to price changes.

2. Bill Size

The additional analysis published in ComReg 13/08 on slide 4 (page 13) exposes some problems with the data gathered in the survey and/or the analysis of that data. In the table on slide 4 There is no row showing bill sizes between €21 and €30 although we must presume that customers did give answers in this range as the questionnaire text to the right of that slide does include the option to have a bill of this size. Of the 633 respondents 31 are shown as giving “No answer” which we presume must mean that their answer actually fell in the missing range.

The questionnaire text to the right of the slide appears to be for Q540 and does not include the option to respond for a bill in the range €61 to €70. Despite this the table on slide includes a row with responses in this range. Indeed with 164 respondents with bills in this range it is the most popular range for bill size even exceeding the number of respondents with bills of greater than €80, despite this range having no upper limit.

These discrepancies may be explained simply by presentation issues rather than serious gaps in the data or in the survey questionnaire but the mere fact that they have made their way into materials that are presented to inform an important consultation response is matter of deep concern.

3. Switching History by Area Code

The additional analysis of switching history on slide 6 is an attempt (given the very limited geographic information gathered) to establish the likelihood of a significant difference in switching patterns as between urban and non-urban areas of the LLVA markets. The codes 01, 021, 051, 061, and 091 include the Dublin, Cork, Waterford, Limerick, and Galway city areas. However many of the fixed customers using these area codes live in provincial areas beyond the reach of cable TV networks and so do not benefit from the more intense competition in the urban LLVA markets. On the other hand those responses from outside these codes will be almost exclusively from respondents in provincial settings.

The simple finding of the additional analysis is that 51% of respondents with the five area codes that include urban and provincial customer have never switched, whereas 63% of respondents with area codes that do not include the significant urban centres have never switched fixed line provider. It is clear that using Electoral District rather than Area Code to distinguish between urban and non-urban would move many provincial customers from the “higher switching propensity“, to the “lower switching propensity” portion of the sample, and illustrate the split with greater definition. The point at issue here is that ComReg have the information to test whether the tendency indicated by the additional analysis is significant but blandly state the “no additional insights (were) identified from this breakdown”.

General Conclusion

The survey questionnaire, the results presented, and inferences that can be drawn for the operations of the LLVA markets for urban and rural, residential and business, customers indicate that the study has the status of a productive pilot. Lessons learnt in data sought, question text and structure, and data analysis indicate that there are considerable insights available to ComReg and all stakeholders when a full survey is implemented using the learnings from this pilot. eircom finds that ComReg should now proceed to implement a comprehensive survey with corrections to the sample size, question text, the location information analysed, and the addition of direct questions to discover key factors that influence customers for LLVA service in their purchasing decisions. The data resulting from a more comprehensive and robust survey will then be amenable to statistical analysis to generate reliable insights and to support, or refute, hypotheses put forward in the empirical market analysis carried out by participants in the consultation.

3: UPC



**UPC Ireland Response to: Market Review, Retail
Access to the Public Telephone Network at a fixed
location for Residential and Non Residential
Customers, ComReg 12/117**



Introduction

UPC Communications Ireland Limited (“UPC”) welcomes the opportunity to provide its response to ComReg on its Consultation and Draft Decision (“the consultation”) on Retail Access to the Public Telephone Network at a fixed location for Residential and Non Residential Customers (ComReg Document 12/117).

UPC recognises and acknowledges the considerable effort on ComReg’s behalf in producing such a comprehensive consultation and draft decision on what is undoubtedly a key regulatory issue. UPC also acknowledges that in general the proposals contained within this draft decision are proportionate and appropriate to the level of prospective competition within this market in Ireland over the coming years.

Because of UPC’s particular position in the market, as an operator which relies primarily on its own alternative managed VOIP service and as such is not reliant on securing access to Eircom’s public telephone network, many of the detailed specifics of this consultation are not directly relevant to UPC. It is for this reason that UPC has not provided detailed replies to each of the questions set out in ComReg’s consultation document. Instead, this response is, by necessity, of a more restricted nature and, as such, sets out some specific concerns of UPC in relation to this consultation, reiterates some concerns of UPC which overlap this and previous consultations and generally stress the importance of clarity and certainty for all industry players in any measures proposed by ComReg.

Market Definition

UPC generally agrees with and supports ComReg’s continued sub-division of the Fixed Voice Access (FVA) market in to a national market for lower level retail narrowband access (LLVA) and a national market for higher level retail narrowband access (HLVA) given the limited demand and supply side substitution between the two. More specifically we agree that the geographic market for both sub-markets is national in scope. We believe that this national scope of the market is supported by much of the analysis presented by ComReg in this consultation, in particular the fact that:

- *“Eircom supplies FVA nationwide over its PSTN network and, as set out in Chapter 3, Eircom is by far the supplier with largest nationwide market share. FSPs can buy wholesale inputs from Eircom on a national scale, enabling any FSP to also supply a nationwide service. Therefore, it can be assumed that resellers have the ability to enter any geographic area sufficiently quickly and provide FVA using resale products, in response to a 5-10% price increase. This is indicative that the market for standalone FVA is national [...]”*



- *“The emergent localised competition observed to date and anticipated on a forward-looking basis (based on UPC’s growth trends to date and Eircom’s planned NGA investment) is targeted at the sale of bundles that include a voice component [...].The sizable minority of end users (44%) who have demonstrated a desire for stand-alone FVA products are spread across all areas of the country and are not exclusively concentrated in areas outside of the cable/NGA/LLU footprint. In view of the fact that one-third of Irish households still do not have a broadband connection, there is likely to be a continuing segment of customers over the period of this market review which will not avail of bundles offered over alternative networks.”*

As ComReg supports the view that the geographic market is national in scope, we believe that it is important to reiterate UPC’s concerns as stated in response to ComReg 12/63 (Supplementary Consultation on Price Regulation of Bundled Offers) regarding the extremely unusual step of ComReg proposing to introduce geographic differentiation of regulatory obligations (relaxation of a key remedy on a sub-national basis) within a national market during the period of validity of a market analysis decision. As stated in that response the proposal strongly suggested that ComReg was 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. UPC believes that this proposal in 12/63 is equivalent in practical effect to the establishment of a sub-national geographic market given that the outcome will be differential pricing which we do not consider justified based on current facts or on a forward-looking basis. Therefore we call upon ComReg to abandon the proposal in 12/63 and to proceed on the basis of the conclusions of the full Market 1 review as contained in 12/117.

In addition, UPC disagrees with the way in which ComReg continues to overstate the potential impact of UPC’s *network reach* on competition for telecommunications services in this and other related consultations. Pointing out that UPC’s cable and managed voice service is the primary alternative access technology, ComReg continually states the fact that UPC’s cable network has an approximate current reach of 728,300 households, 46% of the approximately 1.6 million households in Ireland when scaling UPC’s impact. However we would remind ComReg that this network reach has not translated to massive consumer uptake of UPC telephony services, specifically:

- PSTN / ISDN lines still account for 1.43 million lines in 2012. The 300,000 line decrease since 2007 has a number of contributing factors including poor economic conditions and increased mobile only households.
- As stated by ComReg, UPC has approximately 205,800 voice customers in Q2 2012. While this number is not insignificant, it is still only 29% approx. of the telephony capable household reach of UPC and only 13% of all fixed telephony subscriptions in Ireland.



Remedies

UPC generally agrees with and supports ComReg's overall approach to remedies in both the LLVA and HLVA markets, with the proviso that we disagree with introducing geographic differentiation of remedies in Market 1 (which ComReg is considering effecting through a measure standing separate from the full re-analysis of Market 1). We believe that the balance between wholesale and retail remedies is appropriate and proportionate to the levels of prospective competition in this market in Ireland.

However, UPC believes that ComReg's current proposal not to extend the obligation to "not unreasonably bundle" FVA provided by Eircom via managed VOIP is wrong, inconsistent, opens opportunities for regulatory gaming by the SMP operator, and doesn't provide the industry with the level of clarity and certainty expected in a comprehensive forward looking review.

In paragraph 6.84 ComReg states (emphasis added):

*"ComReg considers it appropriate to impose a general obligation on Eircom not to unreasonably bundle services, insofar as the LLVA market is concerned. Such an obligation would effectively mean that **Eircom is not entitled to unreasonably bundle FVA services (falling within the scope of the LLVA market) with other retail services.**"*

As stated above ComReg proposes to include managed VOIP services in the LLVA market definition yet goes on to state in paragraph 6.86 that:

"Finally, for the reasons outlined above, a further key element of the obligation that ComReg proposes to impose is that Eircom must ensure that bundles containing FVA provided via PSTN or ISDN BRA (when bundled with other services) avoid a margin squeeze and comply with a net revenue test."

However, ComReg goes on to explain in footnote 288 that:

"It should be noted that ComReg does not propose, at present, to extend this obligation to FVA provided via VOIP, notwithstanding the fact that VOIP-based FVA forms part of the proposed LLVA market. This is because Eircom does not currently offer VOIP-based FVA at the retail level on a mass market basis. ComReg intends to keep the scope of this proposed obligation under review in light of market developments."

UPC believes that ComReg's unwillingness to contemplate on a forward looking basis that eircom might launch a mass market managed VOIP service is entirely inconsistent with its approach to many other issues within this and other consultation documents where ComReg readily speculates about future market developments, including NGA roll-out by Eircom, to justify its position. In addition, ComReg's unwillingness to assess the likely competition issues that could arise should a launch of managed VOIP service take place and its consequent lack of discussion on appropriate remedies to those competition issues is short sighted, increases uncertainty for market players and is potentially damaging to competition in the market. In general, UPC believes that ComReg should strive on a proactive basis to provide maximum clarity on current and prospective remedies that may apply during the life time of a particular market analysis.



ComReg Questions

Q. 1 Do you agree that the above identifies the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

While UPC agrees with much of ComReg's description of key market developments, we disagree with the way in which ComReg continues to overstate the potential impact of UPC's *network reach* on competition for telecommunications *services* in this and other related consultations. Pointing out that UPC's cable and managed voice service is the primary alternative access technology, ComReg continually states the fact that UPC's cable network has an approximate current reach of 728,300 households, 46% of the approximately 1.6 million households in Ireland when scaling UPC's impact. However we would remind ComReg that this network reach has not translated to massive consumer uptake of UPC telephony services, specifically:

- PSTN / ISDN lines still account for 1.43 million lines in 2012. The 300,000 line decrease since 2007 has a number of contributing factors including poor economic conditions and increased mobile only households.
- As stated by ComReg, UPC has approximately 205,800 voice customers in Q2 2012. While this number is not insignificant, it is still only 29% approx. of the telephony capable household reach of UPC and only 13% of all fixed telephony subscriptions in Ireland.

Q. 2 Do you agree with the scope of the review of the FVA market? Please substantiate your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

Q. 3 Do you agree that FVA and fixed voice calls are in separate relevant markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 4 Do you agree that standalone FVA is a separate market to a bundle of FVA with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.



Q. 5 Do you agree that, in line with ComReg's previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 6 Do you agree that there is a single FVA market for business and residential customers? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 7 Do you agree that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

UPC generally agrees with and supports ComReg's continued sub-division of the Fixed Voice Access (FVA) market in to a national market for lower level retail narrowband access (LLVA) and a national market for higher level retail narrowband access (HLVA) given the limited demand and supply side substitution between the two.

Q. 8 Do you agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 9 Do you agree that it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used to deliver managed VOIP services which may include cable, fibre, FWA and DSL? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 10 Do you agree that retail fixed access and mobile access do not currently belong in the same relevant market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 11 Do you agree that the relevant geographic market for the relevant FVA markets identified is Ireland? Please explain the reasons for your answer, clearly indicating the



relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

UPC agrees that the geographic market for both sub-markets is national in scope. We believe that this national scope of the market is supported by much of the analysis presented by ComReg in this consultation, in particular the fact that:

- *“Eircom supplies FVA nationwide over its PSTN network and, as set out in Chapter 3, Eircom is by far the supplier with largest nationwide market share. FSPs can buy wholesale inputs from Eircom on a national scale, enabling any FSP to also supply a nationwide service. Therefore, it can be assumed that resellers have the ability to enter any geographic area sufficiently quickly and provide FVA using resale products, in response to a 5-10% price increase. This is indicative that the market for standalone FVA is national [...]”*
- *“The emergent localised competition observed to date and anticipated on a forward-looking basis (based on UPC’s growth trends to date and Eircom’s planned NGA investment) is targeted at the sale of bundles that include a voice component [...].The sizable minority of end users (44%) who have demonstrated a desire for stand-alone FVA products are spread across all areas of the country and are not exclusively concentrated in areas outside of the cable/NGA/LLU footprint. In view of the fact that one-third of Irish households still do not have a broadband connection, there is likely to be a continuing segment of customers over the period of this market review which will not avail of bundles offered over alternative networks.”*

As ComReg supports the view that the geographic market is national in scope, we believe that it is important to reiterate UPC’s concerns as stated in response to ComReg 12/63 (Supplementary Consultation on Price Regulation of Bundled Offers) regarding the extremely unusual step of ComReg proposing to introduce geographic differentiation of regulatory obligations (relaxation of a key remedy on a sub-national basis) within a national market during the period of validity of a market analysis decision. As stated in that response the proposal strongly suggested that ComReg was 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. UPC believes that this proposal in 12/63 is equivalent in practical effect to the establishment of a sub-national geographic market given that the outcome will be differential pricing which we do not consider justified based on current facts or on a forward-looking basis. Therefore we call upon ComReg to abandon the proposal in 12/63 and to proceed on the basis of the conclusions of the full Market 1 review as contained in 12/117.



Q. 12 Do you agree with ComReg's preliminary conclusions on the retail FVA market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Q. 13 Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Q. 14 Do you agree with the types of competition problems identified by ComReg, as outlined above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Q. 15 Do you agree with ComReg's proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument appended to Decision D07/61? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Q. 16 Do you agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument Appended to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Q. 17 Do you agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Q. 18 Do you agree with ComReg's view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.



Q. 19 Do you agree that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market? As regards the detailed implementation of that obligation, do you agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Q. 20 Do you agree that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

We believe that the balance between wholesale and retail remedies is appropriate and proportionate to the levels of prospective competition in this market in Ireland.

However, UPC believes that ComReg's current proposal not to extend the obligation to "not unreasonably bundle" FVA provided by Eircom via managed VOIP is wrong, inconsistent, opens opportunities for regulatory gaming by the SMP operator, and doesn't provide the industry with the level of clarity and certainty expected in a comprehensive forward looking review.

In paragraph 6.84 ComReg states (emphasis added):

*"ComReg considers it appropriate to impose a general obligation on Eircom not to unreasonably bundle services, insofar as the LLVA market is concerned. Such an obligation would effectively mean that **Eircom is not entitled to unreasonably bundle FVA services (falling within the scope of the LLVA market) with other retail services.**"*

As stated above ComReg proposes to include managed VOIP services in the LLVA market definition yet goes on to state in paragraph 6.86 that:

"Finally, for the reasons outlined above, a further key element of the obligation that ComReg proposes to impose is that Eircom must ensure that bundles containing FVA provided via PSTN or ISDN BRA (when bundled with other services) avoid a margin squeeze and comply with a net revenue test."

However, ComReg goes on to explain in footnote 288 that:

"It should be noted that ComReg does not propose, at present, to extend this obligation to FVA provided via VOIP, notwithstanding the fact that VOIP-based FVA forms part of the proposed LLVA market. This is because Eircom does not currently offer VOIP-based FVA at the retail level on a mass market basis. ComReg intends to keep the scope of this proposed obligation under review in light of market developments."



UPC believes that ComReg's unwillingness to contemplate on a forward looking basis that Eircom might launch a mass market managed VOIP service is entirely inconsistent with its approach to many other issues within this and other consultation documents where ComReg readily speculates about future market developments, including NGA roll-out by Eircom, to justify its position. In addition, ComReg's unwillingness to assess the likely competition issues that could arise should a launch of managed VOIP service take place and its consequent lack of discussion on appropriate remedies to those competition issues is short sighted, increases uncertainty for market players and is potentially damaging to competition in the market. In general, UPC believes that ComReg should strive on a proactive basis to provide maximum clarity on current and prospective remedies that may apply during the life time of a particular market analysis.

Q. 21 Do you agree that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Q. 22 Do you agree that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Q. 23 Do you agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Q. 24 Do you agree with ComReg's draft Decision Instrument at Appendix 3? Do you agree with ComReg's Definitions and Interpretations as set out in the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

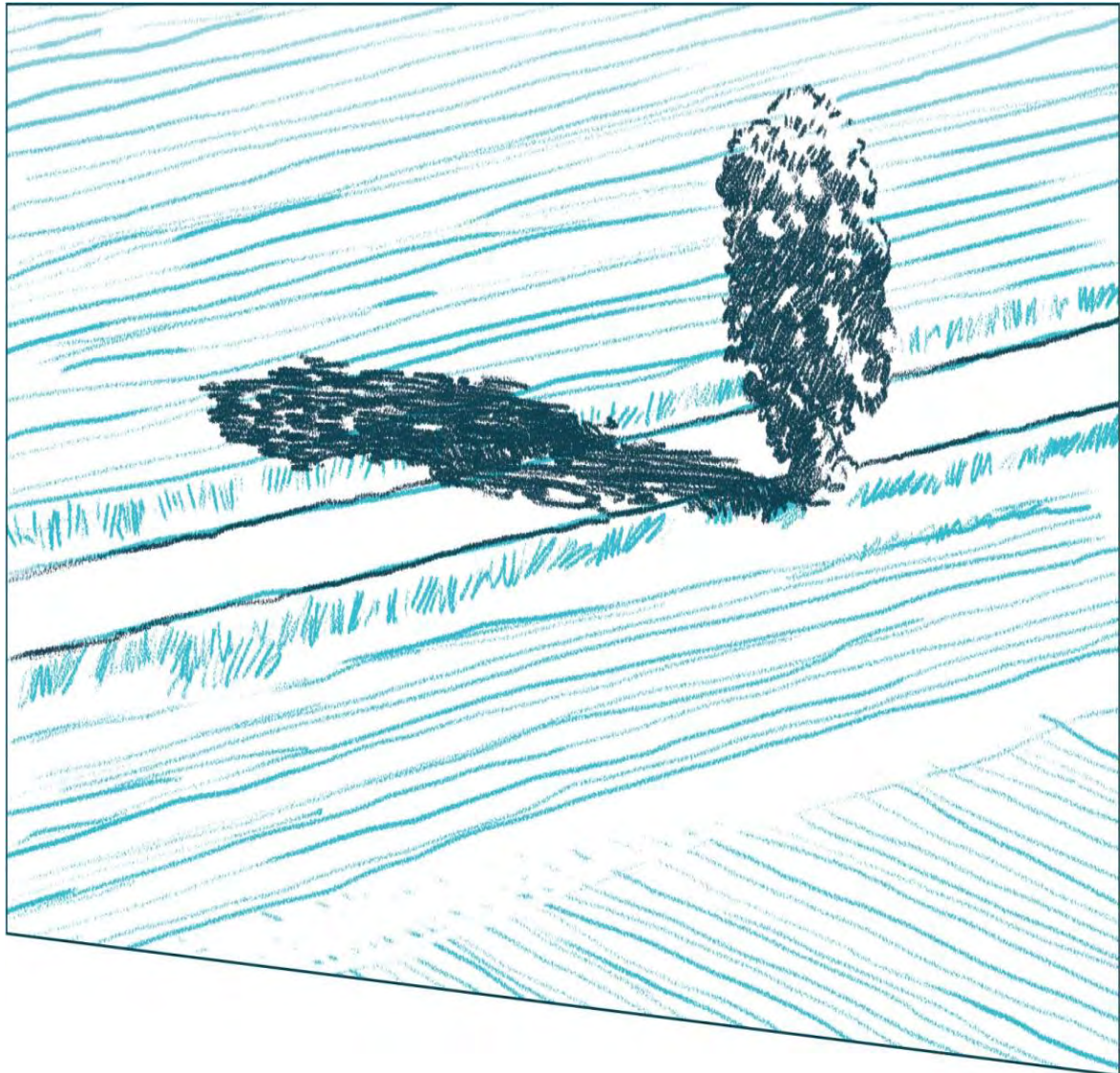
Q. 25 Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.



Q. 26 Do you believe that ComReg's draft Decision Instrument set out above is, from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the matters proposed therein? Please explain the reasons for your answer, clearly indicating the relevant section numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.



4: Telefonica Ireland Limited



**Response to Consultation on retail access to the
public telephone network at a fixed location for
residential and non-residential customers**

Comments on Document 12/117

Telefonica

Introduction

Telefonica welcomes ComReg's consultation on the retail access market review.

Telefonica would initially raise a number of general concerns. The retail remedies proposed in this consultation are assumed to be appropriate in the context of pre-existing wholesale remedies. It has long been argued by the European commission that regulators should in the first instance address wholesale market regulation and set out the appropriate wholesale remedies to address the identified competition problems. Only having defined the wholesale competition problem should the regulator examine 'top-up' retail remedies where dominance is found in a retail market. ComReg's approach to this market review is to conduct the retail review before the wholesale review. For these reasons Telefonica's views on the appropriateness of the retail remedies proposed has to assume the continuance of the wholesale remedies for the period of review.

Secondly, Telefonica agrees with ComReg's conclusion and re-statement that the fixed voice access market is national despite signs of competitive activity in certain limited locations. However, ComReg have an obligation to analyse whether competitive conditions differ to such an extent that a separate geographic market definition exists and an appropriate set of remedies are argued if SMP is found. This approach is taken at the product level in the market review but it appears to Telefonica that ComReg have not given sufficient focus to defining a separate market. Telefonica would note the following comment from the EU Commission on this matter:

The [EU] Commission, therefore, stresses that the differentiation of remedies for the LEA should be based on a sound analysis of the competitive conditions in the LEA and asks ComReg to set out clearly in the final measure the different competitive constraints compared to the other areas. In this regard, the Commission invites ComReg to strengthen its analysis of all relevant structural and behavioural factors (before the final adoption of the revised remedies) to justify that existing variations of competitive conditions that have lead ComReg to proposing differentiated remedies are not strong and stable enough to justify the definition of sub-national markets.¹

¹ Letter dated 26.11.12 IE 2012-1381/2

The analysis presented of localised competition is at a high conceptual level and there is noticeably sparse analysis of what is happening within geographic areas. Therefore, Telefonica believes that ComReg have not taken utmost account of the EU Commission's comments on sub national markets.

There is a risk with the ComReg approach that differential remedies will be defined for geographic areas that are not defined as sub national markets. The consultations recently on bundling and the concept differential remedies proposed for Local Exchange Areas appears to allow for this approach by ComReg. In Telefonica's view if ComReg followed this approach there would be a clear risk that eircom's bundles, in some parts of the market would be unregulated with the risk of margin squeeze activity by the incumbent going unchecked.

Finally, Telefonica is concerned around the removal of regulation on ISDN Primary Rate and Fractional Rate Services. Telefonica are relying on ComReg to ensure effective wholesale regulation of eircom to protect retail players against unreasonable bundling and margin squeeze. Telefonica will await the wholesale call origination market review and seek to ensure ComReg will protect the retail market through strong wholesale regulation. Telefonica also notes that ComReg appear to be concluding that eircom have SMP in the HLVA market but are not imposing remedies. Telefonica would remind ComReg that following a finding of SMP they are obliged to impose at least one remedy.

Response to Consultation Questions:

Q. 1. Do you agree that the above identifies the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees that ComReg has identified the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007.

Q. 2. Do you agree with the scope of the review of the FVA market? Please substantiate your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

Telefonica agrees with the scope of the review of the FVA market.

Q. 3. Do you agree that FVA and fixed voice calls are in separate relevant markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Telefonica agrees FVA and fixed voice calls are in separate relevant markets.

Q. 4. Do you agree that standalone FVA is a separate market to a bundle of FVA with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees that standalone FVA is a separate market.

Q. 5 Do you agree that, in line with ComReg's previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg.

Q. 6. Do you agree that there is a single FVA market for business and residential customers? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg

Q. 7. Do you agree that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg

Q. 8. Do you agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg

Q. 9. Do you agree that it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used to deliver managed VOIP services which may include cable, fibre, FWA and DSL? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agree it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used to deliver managed VOIP services that may include cable, fibre, FWA and DSL. We agree that customers would consider managed VoIP in a bundle the same as traditional FWA in a bundle and thus it should be included in the market definition.

Q. 10. Do you agree that retail fixed access and mobile access do not currently belong in the same relevant market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg

Q. 11. Do you agree that the relevant geographic market for the relevant FVA markets identified is Ireland? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Please see comments above in relation to sub national markets. Telefonica is concerned that ComReg have not carried out the analysis required to define sub national markets but is taking the easier route, without sufficient evidence, to support differentiated remedies.

Telefonica is particularly concerned with ComReg's statement:

'This conclusion does not preclude the application of geographically distinct remedies, as appropriate and as contemplated in ComReg's consultation on bundles (see ComReg Documents 11/72 and 12/63).'

Given the importance of the issues and regulatory uncertainty created Telefonica consider ComReg should carry out the appropriate market review analysis to prove it one way or other.

Q. 12 Do you agree with ComReg’s preliminary conclusions on the retail FVA market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg’s preliminary conclusions on the retail FVA market definition assessment and that the market is national however, we are concerned that there does not appear to be an adequate level of market review rigour (such as market shares) in deciding when a location is showing signs of competitive activity. We note ComReg are not declaring these as separate market, however ComReg are proposing modified remedies for parts of the national market which is sub national market definition by the back door.

Q. 13. Do you agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP however we note that this assessments is based on the assumption that wholesale remedies are effective and remain in place for the period of the retail market review.

Q. 14. Do you agree with the types of competition problems identified by ComReg, as outlined above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agrees with ComReg’s analysis

Q. 15. Do you agree with ComReg’s proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument appendixes to Decision D07/61? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agrees with ComReg’s proposed approach to the existing Indirect Access products e.g., Carrier Selection/Carrier Pre-Selection/SB-WLR obligations (and various related supporting obligations). It is clear that competition in the FVA market would not be sustainable at this time without the availability of the remedies such as CS/CPS and SB-WLR.

As discussed above however Telefonica is concerned that the analysis in this market review is predicated on the forthcoming wholesale market analysis and the conclusion in para 6.42 reinforces the uncertainty created by ComReg’s approach.

Telefonica have to take the view that ComReg will continue with these wholesale remedies and would urge ComReg to complete the wholesale call origination market review as soon as possible.

Q. 16. Do you agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument Appendixes to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agrees that in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets.

Telefonica would specifically highlight the obligation not to unreasonably bundle as required to prevent activities that could easily circumvent wholesale regulation, such as mixing subsidised non-regulated components with regulated components.

Q. 17. Do you agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market with the exception of the obligation not to unreasonably bundle which should be retained. Telefonica believe the reliance on wholesale remedies alone as a means of addressing the competition problems in that market is sufficient if retail competition can be protected against unreasonable bundling. We note that ComReg have imposed SMP on the HLVA market but are not imposing remedies. The Framework regulations require ComReg to impose at least one remedy if there is a finding of SMP.

Q. 18. Do you agree with ComReg's view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agrees with ComReg

Q. 19. Do you agree that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market? As regards the detailed implementation of that obligation, do you agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agrees with ComReg that RPC is an appropriate remedy

Q. 20. Do you agree that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Telefonica agrees that the obligation not to unreasonably bundle should be imposed on Eircom however the issues of LEA, discussed earlier and discussed as part of the bundling consultations are not addressed within this review. It is noted by Telefonica that ComReg are clearly saying the obligation will apply to eircom in this market, as defined a national market. ComReg had an opportunity to clearly set out the obligations on eircom and Telefonica believe it would be inappropriate for ComReg to change significantly a remedy agreed in this process through a second notification to the EU Commission without first defining a sub national market. We consider this a major oversight, as transparency around local market share information per location remains lacking to support what is a major change in direction.

Q. 21. Do you agree that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Telefonica agrees with the imposition of the transparency obligation as outlined.

Q. 22. Do you agree that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Telefonica agrees with ComReg

Q. 23 Do you agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Telefonica agrees with ComReg

Q. 24. Do you agree with ComReg’s draft Decision Instrument at Appendix 3? Do you agree with ComReg’s Definitions and Interpretations as set out in the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Telefonica agrees that ComReg’s draft Decision Instrument effectively represents the positions ComReg has outlined in its response to consultation.

Q. 25 Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Telefonica agrees with ComReg

Q. 26 Do you believe that ComReg’s draft Decision Instrument set out above is, from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the matters proposed therein? Please explain the reasons for your answer, clearly indicating the relevant section numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Telefonica agrees with ComReg

5: Sky



MARKET REVIEW: RETAIL ACCESS TO THE PUBLIC TELEPHONE NETWORK AT A FIXED LOCATION FOR RESIDENTIAL AND NON RESIDENTIAL CUSTOMERS – CONSULTATION AND DRAFT DECISION (COMREG DOCUMENT NO. 12/117)¹

RESPONSE BY SKY IRELAND

SECTION 1: INTRODUCTION

1. As an imminent entrant to the Irish broadband and telephony markets, Sky Ireland welcomes the opportunity to comment on this Consultation and draft Decision. The final decision that the Commission for Communications Regulation (“ComReg”) publishes, could have a profound impact on how the Irish market develops in the coming years, not only in the Fixed Voice Access (“FVA”) market by itself, but also in adjacent markets where FVA is bundled with other services.
2. While ComReg is obliged to undertake market reviews of specific markets it is generally understood that a market and the proposed significant market power (“SMP”) remedies for it, are inextricably linked to the SMP remedies being proposed for separate, but related markets. This is something that ComReg acknowledges, through its cross-references to reviews of other markets in its draft decision instrument. Thus, in addressing the issues and proposed remedies in this market review, Sky Ireland’s response focuses not only on the SMP remedies for this market, but those on related markets, especially given that the SMP wholesale remedy for this market (wholesale line rental or “WLR”) is the linchpin that inextricably links it with other markets and industry developments.
3. The remedies imposed on eircom, the operator with SMP, could significantly determine the success or otherwise of the launch of Next Generation Access (“NGA”) services in Ireland. This is especially the case, given that eircom is proposing to launch NGA broadband as a “POTS”-based service.² In this respect, Sky Ireland considers that ComReg should impose an effective SMP non-discrimination obligation, in the form of an equivalence of input (“EoI”) obligation for the entire suite of a bundle of NGA services, including WLR and not an equivalence of output (“EoO”) obligation.
4. As Sky Ireland to date has not been active in the FVA market in Ireland, our comments focus primarily on the proposed remedies to address the market failures that have been identified in ComReg’s market analysis and its preliminary conclusions in this respect.
5. In general, Sky Ireland agrees with the remedies being proposed by ComReg to regulate this market. However, Sky Ireland considers that in order to increase the prospect of the proposed

¹ Published on 26 October 2012.

² There are two options for providing voice services with the NGA solution, these are: (a) very high bit rate digital subscriber line (“VDSL”) stand-alone broadband services with voice over internet protocol (“VoIP”) which option does not involve wholesale line rental; or (b) VDSL delivered alongside wholesale line rental with POTS (Plain Old Telephony Service) voice switching. POTS is the basic form of residential and small business service connection to the public telephone network.

SMP obligations achieving their stated objectives, further specificity may be required in two important respects.

6. First, there is evidence that there are areas where current regulation is failing to deliver on expected and desired outcomes and Sky Ireland considers that this needs to be addressed. Second, insofar as it is possible, Sky Ireland considers that there needs to be greater clarity as to how these SMP obligations will work in the context of new market developments, notably the advent of the launch of NGA in Ireland.
7. Against this background, the key topics addressed in this submission are as follows:
 1. ComReg should strengthen eircom's incentives to comply with its quality of service targets for its universal service obligations ("**USO**") through larger financial penalties and the removal of any scope for eircom to benefit financially from its non-compliance.
 2. ComReg should give greater specificity to its net revenue test ("**NRT**") such that it assumes a more realistic customer migration path to NGA and a defined period with regard to eircom's WLR discount.
 3. ComReg should require that where WLR is bundled with NGA, it is subject to an EoI obligation, not an EoO obligation.

SECTION 2: COMREG SHOULD STRENGTHEN EIRCOM'S INCENTIVES TO COMPLY WITH ITS QUALITY OF SERVICE TARGETS AT THE RETAIL AND WHOLESALE LEVELS

8. In order to address eircom's on-going failure to comply with its quality of service targets, Sky Ireland considers that eircom's USO obligations at the retail level and its SMP non-discrimination obligations at the wholesale level both need to be:
 - strengthened, including providing incentives to eircom to meet its obligations; and
 - aligned with each other.

eircom's USO obligations

9. As the universal service provider ("**USP**") eircom's continued failure to meet its long-standing, legally mandated service provision targets in relation to its USO, coupled with strong evidence of breaches of its non-discrimination obligation, can only be addressed by strengthening eircom's incentives to comply with these obligations. Sky Ireland considers that this would result in a better customer experience for all FVA customers; be they eircom's customers, or the customers of other alternative operators ("**OAOs**").
10. eircom has been required to meet repair time targets since June 2009, yet as recently as the January-March 2012 period, its performance (69.7%) was substantially in breach of its legal obligation. For the review period of 1 July 2011 – 30 June 2012, eircom achieved a performance of just 74.3% (compared to its legal obligation to achieve 80%).³ As a result of this under-performance in fault repair timelines (as outlined in ComReg Document No. 12/106) eircom was fined just €525,000. It is apparent that eircom sees the financial consequences (as they currently are) of its failure to meet its legal obligations as preferable to actually complying with those obligations. As a consequence, ComReg should address the fact that the financial penalties that have been levied are an insufficient incentive or deterrent to address eircom's

³ See in this regard: Information Notice - Provision of Universal Service by eircom Performance Data – Q2 2012 (1 April 2012 to 30 June 2012) and Annual (1 July 2011 to 30 June 2012) (ComReg Document No. 12/106, 28 September 2012).

shortcomings, especially when it is clear that competitive forces will not do so – something that ComReg has concluded is the case in the FVA market and, by extension, the WLR market.

11. In addition, eircom has been fully compensated in anticipation of it achieving its legally mandated targets.⁴ ComReg Decision No. 02/08 has many references to the fact that fault repair targets were determined on the basis that eircom had been “*fully compensated*” upfront, for the target level of performance, through both the retail price cap and local loop price reviews.⁵ In other words, eircom has already been paid for something which it has not delivered. This is an outcome that runs entirely contrary to economic efficiency principles that are enshrined in Irish electronic communications legislation and the EU Directives upon which that legislation is based. Furthermore, eircom’s consistent failure to achieve these targets results in lost revenue (direct and indirect) and damage to the brand and reputation of purchasers of its WLR product.
12. Sky Ireland can understand ComReg’s previous willingness to provide some scope to eircom to take a stepped approach to improving its performance through the Performance Implementation Plans (“**PIPs**”) but when incremental improvements as seen from the Quarter 1 (January-March, 2012) to Quarter 2 (April-June, 2012) figures are followed by the alarming decline we can anticipate⁶ in the Quarter 3 figures,⁷ then Sky Ireland must conclude that this regulatory forbearance is not delivering. Furthermore, eircom’s recent announcement of a proposed 35% reduction in its workforce by mid-2014 should add to ComReg’s and indeed the industry’s alarm in that regard.

13. In ComReg Decision No. 02/08 ComReg correctly stated as follows:

“...it is desirable that the USO performance targets are set as minimum acceptable performance targets and that any wholesale performance targets are at least equal to or possibly better than the USO performance targets.”⁸

14. Based on recent developments with respect to non-compliance with its non-discrimination obligation and the on-going USO service performance breaches by eircom, coupled with ComReg’s view that eircom continues to have SMP in the provision of FVA, then the outcome posited in ComReg Decision No. 02/08 ought not to be merely “desirable” rather, it should now be mandated through appropriate regulation. In fact, the opposite of what ComReg deemed to be “desirable” more than 4 years ago, is what we now have, as borne out by the data. Accordingly, remedial action by ComReg is now needed to address this “undesirable.”

eircom’s non-discrimination obligations

15. Despite eircom’s long-standing SMP non-discrimination obligation in the FVA market, ComReg was compelled to issue a notification to eircom of non-compliance with that obligation on 21 December 2012.⁹ That notification of non-compliance concerns discriminatory behaviour by

⁴In all probability, that financial benefit far outweighs the penalties imposed by ComReg Document No. 12/106 and in particular, when a discounted cash flow analysis is conducted.

⁵ See for example pages 6, 41, 47, and 81 of ComReg Decision No 02/08.

⁶ Eircom has not yet published USO quality of service information for Quarter 3, 2012.

⁷ As evidenced from July-September 2012 wholesale KPIs in Table 1.

⁸ See page 54.

⁹ Information Notice - Notification of non-compliance issued to Eircom Ltd for Fault Repair timescales for SB-WLR (ComReg Document No. 12/140) 21 December 2012.

eircom in relation to WLR fault repair timelines for OAOs, by comparison to fault repair timelines that eircom achieves for itself.

16. Whether it is deliberate, or because of an inherent bias in its repair appointing systems the fact that eircom has been in breach of its SMP non-discrimination obligation is beyond doubt. The extent to which speedier fault repair timelines are achieved for eircom retail customers by comparison to WLR customers, is well beyond the explanation of “statistical noise” e.g. in April, August, and September 2012, eircom retail enjoyed the benefit of 9%, 6.7%, and 5.9% higher delivery rates for the 2 working day fault repair statistics. As with its USO targets, unless there are sufficient incentives/deterrents, there is no reason to believe that eircom will comply with its targets and its non-discrimination obligations in the provision of WLR.

The evidence of breaches by eircom

17. eircom is currently required to publish quality of service information in relation to its USO. The most recent data reported on eircom’s website¹⁰ includes statistics on eircom’s “Direct Access PSTN Repair” times and eircom is legally obliged to meet targets, pursuant to ComReg Decision No. 02/08.¹¹ This overlaps with eircom’s requirement to publish wholesale key performance indicators (“KPIs”) for “Narrowband Access” in accordance with ComReg Decision No. 05/11.¹² The key fault repair data from these reports and ComReg Decision No. 02/08 is represented in **Table 1 in the Appendix.**

18. There are a number of striking observations to be made about Table 1:

- i. eircom has consistently and significantly failed to meet its legal obligations on performance quality for its USO;
- ii. eircom has consistently and often significantly failed to meet its service level agreement (“SLA”) targets for WLR, in particular its crucial 2 working days commitment;
- iii. eircom has consistently and often significantly performed better at repairing faults for its own retail arm than for its WLR customers; and
- iv. the persistent and widespread failure to meet its obligations, clearly suggests that eircom’s incentives to comply with its USO performance targets are insufficient and ineffective.

19. In light of the evidence, it is no longer appropriate for ComReg to take the view that the setting of SLA targets is best left to wholesale commercial negotiations between eircom and OAOs because:

- i. The market power in these negotiations sits entirely with eircom;
- ii. As ComReg has many times observed, eircom has been “fully compensated” for a performance level that the SLA falls well short of;

¹⁰ April 2012 to June 2012.

¹¹ Response to Consultation and Decision Notice: Eircom’s Universal Service Obligation - Quality of Service Performance Targets (ComReg Document No. 08/37) 28, May 2008.

¹² Response to Consultation and Decision: Response to Consultation and Decision on the Introduction of Key Performance Indicators for Regulated Markets (ComReg Document No. 11/45) 29 June 2011.

- iii. The financial penalty for not achieving the USO targets has proved insufficient to incentivise eircom to comply with its legal obligations or to act as a deterrent against it not doing so. If eircom also faces “*Service Credits for not Meeting Performance Metric Target*”¹³ that are based on the USO targets, the financial exposure associated with non-compliance will begin to approach a level that would substantially increase eircom’s incentives to comply;
- iv. OAO customers, whose service has been provisioned through WLR, are no less entitled to the level of service that eircom retail customers enjoy. In not aligning fault repair SLAs with USO performance targets, eircom’s obligation not to show undue preference is unnecessarily exposed; and
- v. Under the current regime, and in the worst case scenario, eircom could comply with its non-discrimination obligation by being ‘*equally bad*’ for all OAOs, while taking a view that the current financial penalties for failing to meet the USO targets are more than offset by the cost savings associated with such a strategy.¹⁴ Indeed, eircom’s announcement in 2012 of staff reductions must increase the probability of this worst case scenario becoming a reality.

Sky Ireland’s proposed remedies

20. Accordingly, in respect of its USO obligations, the financial penalties payable by eircom need to be increased, by either or a combination of both:
 - a re-design, so that a failure to comply with any of the obligations, can in each case attract the maximum permitted financial penalty that the High Court may impose under secondary legislation (€500,000); or
 - a substantial increase in the amounts payable by eircom under the current cash deposit arrangement with ComReg.
21. If it is important to ComReg that eircom’s retail customers generally are protected through USO performance targets, then it is equally important that customers who are service provisioned through eircom’s SB-WLR product have the same duty of care extended to them.
22. The logical approach to ensuring that the desired service level¹⁵ for all customers is achieved, is to align the USO targets with the targets in eircom’s SLA for single billing wholesale line rental (“**SB-WLR**”). This would also ensure that eircom does not comply with its non-discrimination obligation, by simply striving to be ‘*equally bad*’ in terms of performance for eircom retail and WLR customers alike. Currently, eircom’s SB-WLR SLA for fault repair timelines are as outlined in Table 1 (2 day – 73%, 5 day – 92%, 10 day – 100%). The level of disparity with the 2 working day repair USO target in particular, is quite significant (73% v 80%) and illogical, because there is no difference in what is being measured in each case i.e. both involve appointments that require visits to the customer’s premises.

¹³ This is the term used for penalties in eircom’s SLA.

¹⁴ ComReg has already determined that competitive pressures are not sufficient to ensure such a strategy would not be pursued.

¹⁵Which ComReg has deemed appropriate in ComReg Decision No. 02/08 and for which eircom has already been “fully compensated.”

23. To align SLA targets with the USO retail targets, ComReg should both increase the SLA targets metrics to a level corresponding with the USO retail targets and increase the payments/service credits payable to OAOs by eircom when eircom fails to meet its SLA targets. Aligning SB-WLR fault repair SLAs to the USO service performance targets will ensure that eircom has the dual incentive to ensure it achieves its USO targets, while also complying with its SMP non-discrimination obligation.¹⁶
24. ComReg has the legal powers to adopt both measures.¹⁷ Furthermore, given that these regulatory obligations (and ComReg's legal powers) ultimately derive from EU law, the principle of EU law that enforcement measures (including financial sanctions) be effective, proportionate, and dissuasive, should be recognised and observed in practice. This would not only deter eircom from failing to adhere to its regulatory obligations, but would strengthen those obligations—with potentially transformative effects on the Irish broadband and telephony markets.

SECTION 3: COMREG NEEDS TO GIVE GREATER SPECIFICITY TO ITS PROPOSED NRT

25. ComReg needs to give greater specificity to the proposed NRT, if it is to achieve its objective in the context of the obligation to not unreasonably bundle FVA with other services and to be fit for purpose. In particular, eircom will have an incentive and a means to sidestep the intent of the EU NGA Recommendation¹⁸ if the NRT for bundled products, as currently proposed, is not further and better specified.
26. Sky Ireland agrees with ComReg's general observations that: "*bundling of services can be, and usually is welfare enhancing...and is not anticompetitive per se.*" However, based on the outcome of ComReg's market analysis and its review of the FVA markets, Sky Ireland considers that the obligation on eircom "*not to unreasonably bundle services*" should be maintained at this time. Sky Ireland also considers that greater specificity about how this obligation will be applied in practice may be required.
27. In this regard, Sky Ireland notes ComReg's intention to continue to require eircom to pass a NRT and to avoid a margin squeeze in instances where FVA is bundled with other services. ComReg has also indicated that pursuant to its recent notifications to the EU Commission and its 'Bundles Consultation'¹⁹ it may modify the NRT and margin squeeze tests to give greater flexibility to eircom in its pricing of FVA bundles containing a Next Generation Broadband service²⁰ ("**NGA Bundles**").
28. In affording this greater flexibility to eircom for NGA Bundles a number of factors should be carefully considered by ComReg. If the NRT and margin squeeze tests are to remain relevant as a regulatory control in determining the reasonableness of NGA Bundles (and that would appear

¹⁶ This remedy could not be deemed disproportionate by default, because (as ComReg has previously acknowledged) eircom has already been "fully compensated" to deliver the service on this basis.

¹⁷ Under the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011.

¹⁸ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA). One of the intentions of the EU NGA Recommendation is to enable competition and the benefits that flow from it. This is supported by for example, Article 32, which provides that: "*NRAs should oblige the SMP operator to make new wholesale broadband access products available in principle at least 6 months before the SMP operator or its retail subsidiary markets its own corresponding NGA retail services, unless there are other effective safeguards to guarantee non-discrimination.*"

¹⁹ ComReg has used this term to refer to its consultation documents in relation to this; these are: ComReg Document No. 11/72 and ComReg Document No. 12/63.

²⁰ NGA Wholesale Broadband services included NGA Bitstream and Virtual Unbundled Access (VUA).

to be their purpose) then it is important that forward-looking assumptions underpinning the *ex-ante* NRT and margin squeeze tests reflect outcomes that can reasonably be expected to occur in the market. While Sky Ireland recognises that accurate forecasting of actual market developments in this regard can be difficult, it is a much more straightforward exercise to discount wholly unrealistic outcomes at the *ex-ante* stage.

29. By way of example, given that service delivery of NGA Bundles can only be achieved by visiting customers' premises through an appointing process, then an assumption of mass customer migration from Current Generation Access ("**CGA**") to NGA, for example, on day one²¹ of NGA becoming available in an exchange area is wholly unrealistic. If such an assumption were applied in the NRT, the test itself would be redundant in terms of trying to capture what is actually happening from an operational perspective and by extension could result in an unrealistic accelerated cost recovery schedule.
30. Furthermore, in order to ensure ComReg can adjudicate effectively on appropriate underlying assumptions that inform the NRT, uncertainty should be removed from the forecasting process in all instances where this is possible. A key example of this pertains to the €4 monthly WLR discount in NGA exchange areas being proposed by eircom running, potentially, until December 2014. It is apparent that this discount has been proposed in order that eircom can avail itself of the greater pricing flexibility that has been proposed for Large Exchange Areas ("**LEAs**")²² in the 'Bundles Consultation'.
31. While Sky Ireland welcomes discounted WLR pricing generally (and in particular, given the relative cost of WLR in Ireland by comparison to other European countries) greater certainty as to the application and timelines of the discount can and should be provided at an early stage if transparency and non-discrimination concerns are to be addressed. In this regard, eircom has outlined timelines for the deployment of its NGA network by exchange and has indicated that as these exchanges '*go live*' the WLR discount will apply in those exchange areas. This information, coupled with a realistic customer migration path that is cognisant of the operational constraints of installing NGA at a customer's premises, provides ComReg with a solid basis on which to base the NRT in the context of eircom's NGA roll-out.
32. If eircom is to satisfy the requirements of an *ex-ante* NRT in which the WLR discount is applied, the dates of application of those discounts and their duration will already have been embedded in the test. There is no reason or justification not to also bed down these dates and durations in reality as well. This is vitally important from a business planning perspective and in particular, with respect to NGA deployment—where providing such certainty to non-SMP operators is at the heart of the EU NGA Recommendation.
33. The WLR discount has been inextricably and deliberately linked to NGA by eircom. It is only available as part of a CGA/NGA broadband bundle at NGA enabled exchanges and, crucially, it does not apply to the stand-alone purchase of WLR, even within these NGA exchange areas. Consequently, the WLR discount *de facto* forms part of eircom's NGA product price list.²³ This means that it must be transparent and non-discriminatory in accordance with the timelines outlined in the EU NGA Recommendation. In this regard, Sky Ireland welcomes the fact that ComReg has notified²⁴ the EU Commission that it proposes to adopt the timelines outlined in

²¹ A migration path of even 50% could take months or even years.

²² Based on ComReg's market analysis, competitive forces are not sufficient to act as a pricing constraint on eircom's WLR price and therefore, it is apparent this discount is being proposed purely to avail of greater pricing flexibility in these areas.

²³ This is compounded by the fact that the WLR discount is **only** applicable as part of a bundle. eircom has specifically stated that stand-alone WLR in these exchanges will not attract the WLR discount.

²⁴ ComReg notifications to the EU Commission of 26 October and 16 November 2012.

the EU NGA Recommendation and, accordingly, this should ensure that this (and any similar discount or pricing strategies) are treated effectively in the context of NGA.

34. Furthermore, in accordance with ComReg's own transparency obligations, there is no reason why the migration assumption at the wholesale level (which feeds into the wholesale network input²⁵ in the NRT) is not clearly communicated (and justified) to industry at the *ex-ante* stage of the NRT, as this will be an industry aggregate, rather than a confidential input from eircom retail as to its NGA roll-out plans/expectations. This is the level of transparency and certainty that industry requires for ensuring that the launch of NGA in Ireland is accomplished on a fair and non-discriminatory basis. If the obligation to not unreasonably bundle FVA (and in effect WLR) with other services as a SMP remedy to address a market failure is to meet its objective of alleviating that market failure, then the types of issues raised by Sky Ireland above, if adopted, will help achieve that objective.

SECTION 4: COMREG SHOULD REQUIRE THAT WHERE WLR IS BUNDLED WITH NGA, IT IS SUBJECT TO AN EOI – NOT AN EOO – OBLIGATION

35. The obligation not to unreasonably bundle FVA with other services should include a provision which ensures that FVA has an Eoi non-discrimination obligation, where FVA is bundled with other services, one or more of which already has an Eoi non-discrimination requirement. This is to ensure that the existing Eoi obligation is not *de facto* diluted to EoO. There is a very real risk that this will occur, because eircom is planning to launch NGA in Ireland as a "POTS"-based service. Thus, eircom will be using WLR to provide the voice telephony service element of the bundle, yet WLR stand-alone is subject only to an EoO obligation, not an Eoi one.
36. ComReg has already indicated, in accordance with the EU NGA Recommendation, that SMP operators will have a non-discrimination obligation of Eoi, in respect of the provision of NGA services. As noted by Vice President Neelie Kroes in the EU Commission's Policy Statement of July 12, 2012²⁶ "*...equivalence of inputs is the best guarantee of non-discrimination, to ensure equivalence of access.*" Sky Ireland agrees with this observation and welcomes the Eoi position being taken by ComReg on NGA services.
37. Nevertheless, while ComReg has posited that Eoi can coexist with EoO obligations²⁷ provided "*sufficient transparency can be provided and outputs are equivalent*" (as has already been clearly outlined above) breaches by eircom of its non-discrimination obligation where WLR is concerned is an on-going problem. It is a problem that may well have its genesis in the *ex post* nature of the monitoring process inherent in an EoO regime. Furthermore, as already discussed in this response, it appears to be the case that even when discrimination is detected through transparency reporting requirements (like the KPI reports mandated in ComReg Decision No. 05/11), eircom is not sufficiently incentivised to ensure that such breaches of its SMP non-discrimination obligation do not occur.
38. A serious concern therefore arises that where services subject to EoO obligations (such as WLR) are bundled with services subject to Eoi obligations,²⁸ the benefit of Eoi identified by Vice President Neelie Kroes has the potential to be completely diluted.

²⁵ Wholesale network input cost calculated in the NRT – which we expect will also be impacted by the proposed WLR discount.

²⁶ "*Enhancing the broadband investment environment*": Policy statement by Vice President Neelie Kroes, 12 July 2012.

²⁷ See paragraph 4.102 of Notification by ComReg to the EU Commission under Article 7 of Directive 2002/21/EC, 16 November 2012.

²⁸ ComReg is proposing that NGA Bitstream and VUA be subject to Eoi.

39. Consequently, Sky Ireland considers that ComReg's notification to the EU Commission, to the effect that it plans to impose an EoI obligation only on the market 5 (WBA) element of NGA Bundles that include WLR, should be reconsidered. eircom has offered to migrate the eircom retail arm through the "Unified Gateway" for provision, repair, and maintenance of NGA Bitstream. Sky Ireland considers that this migration should also occur for all CGA services, but in particular for WLR, as this service is an integral part of eircom's NGA product suite. In fact, it is reasonable to assume that the majority of retail NGA customers will also purchase FVA and accordingly, the "*best guarantee*" of non-discrimination and ensuring that NGA is launched in Ireland on a fair and equitable basis, is to require that the entire NGA Bundle meets the EoI obligation and delivers the outcome envisaged by the EU NGA Recommendation.

CONCLUSION

40. Given the fundamental importance of this key market to Sky Ireland and OAOs, Sky Ireland would encourage ComReg to carefully consider Sky Ireland's proposals as outlined in this response, with a view to adopting them in its final decision.
41. Finally, Sky Ireland reserves its right to make further submissions to ComReg on these matters.

SKY IRELAND

25 JANUARY 2013

Appendix

Table 1:

Universal Service Obligation Quality of Service v. Wholesale Narrowband Key Performance Indicators

USO - ComReg Decision No. D02/08				Wholesale Narrowband KPIs - ComReg Decision No. D05/11							
Target	Oct-Dec 2011	Jan-Mar 2012	Apr-Jun 2012	SLA Target 2012	Apr	May	Jun	Jul	Aug	Sep	
80% in 2 Working Days	68.80	69.70	81.50	73%	Retail	79.14	83.21	75.69	73	70.3	74.90
					WLR	72.61	81.05	70.62	71.40	65.90	70.80
95% in 5 Working Days	89.60	88.60	94.80	92%	Retail	96.24	96.84	96.05	94.00	93.30	93.40
					WLR	95.19	96.93	95.45	93.50	92.00	91.10
100% in 10 Working Days	98.90	98.30	99.40	100%	Retail	99.21	99.08	99.30	98.60	98.50	98.30
					WLR	99.37	99.25	99.04	98.40	98.50	98.20

6: Vodafone Ireland Limited

Non-Confidential



Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers

Introduction

Vodafone welcomes the opportunity to respond to this market review. The market under consideration is perhaps the baseline fixed telecommunications market. Notwithstanding the growth in broadband penetration and the more limited decline in fixed telephony access, connection to the public telephone network is the most common fixed telecommunications service purchased at the retail level. Its importance to wider society is reflected in its treatment as a “universal service”.

In this context the importance of a properly functioning market for this service cannot be understated. It is clear that eircom does not have a monopoly in this market. It is also clear that there is not perfect competition; the state of the market lies somewhere in the continuum between these two end points. Along this continuum there is no single point where it is possible to say that on one side Significant Market Power (SMP) is exercised and on the other side it is not. There will be a range of market conditions where SMP exists. In Vodafone’s view it is open to ComReg to make a finding of fact that SMP exists anywhere within this range of conditions. The design of remedies to ameliorate the exercise of this SMP is where account should be taken of the strength of the market power that has been detected.

In this light at a high level Vodafone agrees with the preliminary conclusions reached by ComReg that eircom exercises SMP on the Lower Level Voice Access (LLVA) market and on the Higher Level Voice Access (HLVA) market. In addition Vodafone agrees with the overall thrust of the remedies proposed to deal with this situation.

Vodafone’s detailed views are set out below but in general we would view that ComReg, in making its market assessment, has given eircom the benefit of the doubt in weighing the constraints upon it and therefore ComReg’s high level conclusions are robust.

Response to Consultation Questions

Q. 1 Do you agree that the above identifies the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone broadly agrees with the market developments outlined by ComReg. However in the respect of VOIP, and in particular unmanaged VOIP access it is not clear whether ComReg has sufficiently distinguished between calls made between closed user groups within the unmanaged VOIP service and calls made to or from the Public Telephone Network (Para 3.39). By definition it is only for this second type of call that you need access to the Public Telephone Network and therefore only this pool of customer demand that is relevant to the market analysis being carried out. This lack of distinction between these pools of demand means that ComReg has potentially overstated the impact of unmanaged VOIP on the market under consideration.

Q. 2 Do you agree with the scope of the review of the FVA market? Please substantiate your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

Vodafone agrees with the scope of the review of the FVA market as proposed by ComReg and believes that the initial group of services considered represents a superset of the services likely to ultimately fall within the market under consideration with no obvious or material omissions and is therefore a robust basis to carry out the analysis.

NON-CONFIDENTIAL

Q. 3 Do you agree that FVA and fixed voice calls are in separate relevant markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone agrees that retail FVA and fixed retail voice calls are in separate relevant markets and is broadly in agreement with the analysis carried out by ComReg that underpins this conclusion.

Vodafone notes that technically there is a one way dependency between calls and access. You cannot make or receive calls unless you have access but you can have access without actually making or receiving calls. There are therefore potentially choices available to end customers as regards their provider for calls which are quite distinct from their choices as regards their provider for FVA. This is reflected in the fact that CPS historically allowed retail calls to be offered distinct from the provision of retail FVA.

That the incidence of standalone voice offerings have declined the face of reduced total telecoms spend driven largely on the back of lower in-bundle pricing is a clear indication that there is a price sensitivity which causes changes in end-user purchasing decisions from purchasing disaggregated services to bundled services. There is nothing to indicate that a similar sensitivity would not operate in the opposite direction. Consider a SSNIP test carried out whereby the overall price of a bundle increased based on a notional increase in the price of FVA with all other elements held constant. This sensitivity means that there would be the possibility of demand and supply side substitution of the individual elements should bundle pricing rise. This is a strong indication that the individual elements comprise separate markets and are not so intrinsically linked as to justify the definition of a market consisting of a composite retail calls and FVA service.

Q. 4 Do you agree that standalone FVA is a separate market to a bundle of FVA with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

The last sentence of the conclusion which this question encompasses summarises the analysis carried out by ComReg as indicating that “*the fixed voice connection component, irrespective of whether it is sold standalone or as part of a bundle, constitutes a relevant market in its own right*”. Vodafone agrees with this **conclusion** and the analysis upon which it is based. However Vodafone believes that the phrasing of the question posed is inconsistent with the preliminary conclusion which it is meant to represent.

This conclusion is not the same as the question posed. It is Vodafone’s view that the correct phrasing would be: “Do you agree that the relevant market for FVA is FVA sold either on a standalone basis or as part of a bundle?”

Question 4 as posed by ComReg is at odds with the preliminary conclusion ComReg itself has reached. The conclusion that ComReg has set out in the body of the analysis is not that Standalone FVA is a separate market but rather that FVA is in the same relevant market whether sold on a standalone basis or in a bundle.

For this reason Vodafone does not agree with the **question** as posed

Vodafone urges ComReg to rectify this miscasting of the question so as to accord with the structure of the analysis carried out.

In terms of the **conclusion** reached Vodafone believes that it is also instructive to look backwards. Historically the elements that comprised wider bundles were sold separately. i.e. there is actual evidence of substitutability in one direction and there is no technical impediment to substitutability in the other direction. The sole driver would be the price-point at which separate purchase of the discrete components (even from the same supplier) becomes attractive to end-users.

A Hypothetical Monopolist selling bundles faces the real prospect that, in the face of a SSNIP, customers would have it open to them to self-assemble a composite service made up of standalone purchases of the various bundle elements. ComReg itself recognises this at paragraph 4.77.

This demonstrates that, in the face of a SSNIP, the FVA service elements within a bundle are substitutable on the demand and supply side by the standalone variant of the bundle elements (including FVA) and therefore FVA sold as part of a bundle would fall into the same relevant market as the standalone service.

Q. 5 Do you agree that, in line with ComReg’s previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone agrees that the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services and is broadly in agreement with the analysis carried out by ComReg that underpins this conclusion.

Vodafone notes that in the traditional fixed PSTN environment the physical access layer was physically connected to the PSTN exchange to provide FVA. i.e. FVA was the direct downstream service from the WPNIA input. The vast majority of FVA connections are still based on this model and are provided by eircom (directly or indirectly).

Eircom has structured its retail and wholesale portfolio so that PSTN connection is a precondition of broadband connection. It is possible to purchase standalone FVA but is not possible to purchase standalone broadband. Broadband is always an “add-on” to FVA. This is also an indication that the correct starting point for the analysis is standalone FVA.

Q. 6 Do you agree that there is a single FVA market for business and residential customers? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Vodafone agrees that there is a single FVA market for business and residential customers and is broadly in agreement with the analysis carried out by ComReg that underpins this conclusion.

Vodafone notes that on the demand side the interface between residential demand profile and the business demand profile has a significant overlap with packages targeted at higher end residential customers overlapping with lower end business offerings. The differentiation arises not from the FVA element but from the calls and Value Added features. In general the value added features are “nice to haves” not “have to haves”. These offerings are standard publicly advertised offerings and if an operator supplying both increased the notional price contribution of FVA element of a business offering, resulting in an overall bundle price rise, this would offset any bundle pricing advantages attaching to the calls element of the business bundle meaning that there would be switching to the residential bundle. The reverse is also true. In this context the scope for both demand and supply substitutability would strongly indicate that at least for Lower Level Voice Access these two pools of end-user demand are in the same retail market.

As an aside it is not clear whether the prices quoted in Table 3 reflect that fact that a number of service providers offer discounted rates for the initial period of a minimum contract term meaning that the average monthly charge across the minimum term and beyond is in fact higher than the advertised headline price.

Q. 7 Do you agree that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Vodafone agrees that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA and is broadly in agreement with the analysis carried out by ComReg that underpins this conclusion.

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Q. 8 Do you agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Vodafone agrees that the relevant market for HLVA is narrow including ISDN FRA and PRA only and is broadly in agreement with the analysis carried out by ComReg that underpins this conclusion

Vodafone notes that even if ComReg's made a finding that the scope of the market were wider then the same analysis as set out by ComReg could then be applied to conditions within the market itself and would lead to the conclusion that alternative fixed access technologies within the HLVA would not exert a sufficient constraint to curb and SMP within the period of the review.

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Q. 9 Do you agree that it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used to deliver managed VOIP services which may include cable, fibre, FWA and DSL? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

In this case a wide market definition is the one which favours a prospective SMP operator in any assessment of whether it enjoys this position. This is because the wider definition potentially allows for the consideration of a wider range of constraining services and competitors. Where ultimately a market analysis based on a wider definition finds SMP then the materiality of the decision on the width of the market is less significant. In this regard Vodafone notes that having conducted its analysis on the basis of the wider definition ComReg has reached a preliminary conclusion that eircom exercises SMP. Therefore Vodafone believes there is no need to be unduly prescriptive as to the precision of a wider market boundary.

Vodafone notes that the question as posed is silent as to whether the broadband connection contemplated for inclusion constitutes part of a retail bundle comprising Broadband and FVA or standalone FVA delivered over a broadband access layer. In either event, from a technical point of view, it is clear that FVA is capable of being delivered over broadband.

To the extent that the question relates to whether FVA delivered over broadband, irrespective of whether it is a bundled with a retail broadband service, should be included in the market assessment then Vodafone agrees that an assessment of a wider market including FVA delivered over broadband is not irrational.

It is also entirely proper to consider whether FVA sold within a bundle on alternative infrastructures exercises a constraint on a potential SMP supplier of FVA to the extent that this curbs SMP.

ComReg followed a similar methodology in the analysis of the WBA market where it found that WBA over cable was not in the market but still assessed whether the impact of this non-market supply in the downstream retail space curtailed prospective SMP.

Vodafone also notes that the consideration of FVA via broadband over DSL needs to be qualified as to being FVA via broadband over **Naked** DSL. In all other cases the DSL is supplied with WLR/PSTN as a precondition of supply. (Para 4.163)

As pointed out previously ComReg's consideration of unmanaged VOIP may seriously overestimate its impact as the majority of the unmanaged VOIP appears to be within closed user groups rather than for connection to the PSTN. (Para 4.145 of the paper which analyses this aspect does not distinguish whether the 10% using unmanaged voice on a daily basis use it for access to the PSTN).

Q. 10 Do you agree that retail fixed access and mobile access do not currently belong in the same relevant market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

ComReg's analysis seems to conflate the question of whether retail mobile propositions are in the same market and consideration of whether the mobile air interface can be used as an alternative access layer to support competitive FVA. The analysis put forward by ComReg in support of this question covers both considerations.

A distinction must be drawn between access which uses the mobile air interface as a technical solution to provide fixed access and retail mobile voice access.

Vodafone agrees that retail fixed access and mobile access do not currently belong in the same relevant market.

Given the high retail mobile penetration in Ireland Vodafone believes that the dynamic at play in the wider retail market is not a substitution of mobile retail voice access services for retail fixed voice access but rather an independent assessment by end users of whether the incremental utility that they derive from having FVA in addition to their mobile voice access justifies the additional cost. For a portion of the market are not choosing between fixed and mobile on the basis of substitution but rather this market segment increasingly views mobile service as the baseline and FVA as incremental and discretionary and are calibrating this discretionary spend.

The question of whether the mobile access layer can be used as an effective technology substitute for the physical fixed layer in the FVA this is not an issue for market definition but rather a matter for the market analysis.

In the context of USO Vodafone believes that there is functional similarity between the PSTN access obtainable via a demand assigned mobile air interface and the PSTN access obtainable via a fixed infrastructure solution (copper or FWA). However USO is concerned with connections that cannot be otherwise commercially provided. From the point of view of this market analysis the functional similarity is not the same as economic substitutability.

Eircom itself uses the mobile air interface as an access layer to support delivery of a retail FVA service. Some WLR lines are provided using a "Fixed Cellular Service" variant. However FCS appears only to be deployed by eircom where traditional copper based access is uneconomic and also only in a small percentage of cases. If FVA using the mobile air interface was a credible alternative commercial access solution one would have expected eircom to have deployed it in far larger volumes.

In terms of the Vodafone One Net Express proposition outlined at paragraph 4.202 Vodafone views this as a Fixed Mobile Convergence solution rather than a Fixed Mobile Substitution solution. ✂

Q. 11 Do you agree that the relevant geographic market for the relevant FVA markets identified is Ireland? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Vodafone agrees that there is a single national market for FVA. Whether the appropriate market is for FVA sold on a standalone basis or as part of a bundle the question arises as to whether there are sufficiently differentiated conditions of demand and supply to justify the identification of sub-national markets.

Perhaps most straightforwardly there appears to be some level of nationally ubiquitous demand for standalone FVA not bundled with broadband, even in areas where broadband is available. The same technology (twisted copper pair and direct connection to a Line Card in a local exchange) is the predominant and ubiquitous delivery mechanism. This is not differentiated between areas where broadband is available and where it is not.

In terms of areas where there is broadband availability there is a demand profile for FVA within bundles. As the boundary of broadband availability has increased there does not seem to be any difference in the demand profile for bundled FVA in areas which formerly did not have broadband and those which historically did. If there is a geographic boundary then it has not been exposed by the expansion of broadband availability to date and lies beyond the current broadband footprint. There is no identifiable reason why there should be any boundary and it seems reasonable to consider that the demand profile for bundled FVA will be substantially homogeneous wherever there is broadband availability.

There are some areas where cable is not available but other broadband access mechanisms are and in those areas the technical solution employed to meet FVA demand is predominately the same as the previously outlined i.e. over twisted copper pairs. Even where cable is available the majority of FVA connections are still by way of twisted copper pair connections. Logical connection over managed IP voice on the cable network is the main alternative. The boundaries of these technical solutions are not determined by some objective geographic limitation but rather are determined by the internal business decisions of the relevant infrastructure operators as to the extent of their network deployment.

It should be noted that eircom, having announced the deployment of FTTH to up to 10% of its projected NGA base, has decided not to deploy this technology beyond a limited number of trial areas already installed.

Looking forward there is the prospect of additional supply of Naked DSL (either NGA based or current generation based) allowing wider deployment of logical IP based FVA access. However the geographic boundaries of this deployment are not determined by any discernible geographically stable criteria but rather by the scope of eircom's broadband network deployment. This continues to evolve.

In terms of the wholesale input price eircom currently operates a single price point for SB-WLR irrespective of location and irrespective of whether the service is bought in conjunction with broadband. While eircom has proposed geographically differentiated discounts for SB-WLR these were explicitly related to its NGA broadband deployment and are not indicative of any objective geographic delineation in the market conditions for FVA. This is demonstrated by the

fact that eircom has declined to make equivalent discounts available prior to the deployment of NGA in specific geographic areas. The only difference in competitive conditions occurring which appears to have prompted the introduction of the discount is the deployment of eircom's NGA broadband service not any FVA related dynamic. Eircom has recently modified this initial proposal to make the discount available in a set of ComReg defined "Large Exchange Areas" however the definition of these and of the discount scheme means that the discount is linked in the longer term to the extent of eircom's NGA deployment rather than any FVA demand. It should be noted that this is a discount with a defined duration. Even if the discount pricing were to be indicative of some localised effects these must be considered transitory given that eircom has effectively reserved the right to unilaterally reverse them out of the market within the period of the review.

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Q. 12 Do you agree with ComReg’s preliminary conclusions on the retail FVA market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

Subject to the issues raised in our response to Question 9 regarding the market definition, Vodafone agrees with ComReg’s preliminary conclusions.

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Q. 13 Do you agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position

Vodafone agrees with ComReg’s preliminary conclusions on the status of SMP in the LLVA and HLVA.

Addressing ComReg’s analysis in detail the first area is ComReg’s assessment of existing market shares.

Vodafone strongly endorses the modified greenfield approach adopted by Comreg in considering eircom’s market share. The nature of the price control and the lack of functional differentiation between WLR and eircom’s retail FVA product means that any retail market share attributable to OAOs using WLR (sold as bundles or otherwise) is a close proxy for eircom directly providing the service at a retail level. The reseller of WLR is in effect a sub-brand for eircom’s retail FVA service. This means that the use of the modified greenfield approach is no mere theoretical exercise but is an accurate model of actual market conditions. Given the price structure of SB-WLR there is little or no scope for a prospective competitor to eircom at the retail FVA level to undercut eircom for standalone FVA services

ComReg’s analysis at paragraph 5.32 overstates the impact of LLU. There is limited uptake of LLU in any event and such uptake as there is predominantly in the form of Line Share. LLU Line Share has no influence on the FVA market as it is a precondition for the wholesale purchase of LLU Line Share that there be an eircom supplied FVA either as eircom retail PSTN or as SB-WLR.

The analysis that LLU is the enabler for BT to act as a reseller of SB-WLR is flawed. The key enabler was the provision of a white label voice service by BT. This allowed prospective resellers of FVA via BT to enter the market without the set-up costs associated with voice switching capability. The LLU purchased by BT is predominantly Line Share and as set out above has no bearing on the FVA market.

In terms of the market share of cable there has been an evident slowing in the growth rate of cable based FVA (figure 24). Vodafone believes that this is due to the fact that the initial faster growth rate was due to the expanding nature of cable coverage and the initial switching of pent up demand. In this context Vodafone believes that the switching was primarily driven by broadband considerations and not FVA considerations. Looking forward the prospective impact of cable based FVA over the period of the review cannot be directly inferred from past growth rates as it would appear that UPC’s coverage expansion has slowed very considerably.

By way of context it is worth recapping the current state of the market. Eircom has previously been designated as exercising SMP on the equivalent market in the previous round of analysis. It is subject to a number of obligations in the market including one to provide wholesale access in the form of SB-WLR and a wholesale price controls in the form of a retail minus control. Eircom has not introduced naked DSL but rather has maintained the purchase, directly or indirectly, of retail narrowband access as a precondition for the supply of its own retail broadband, WBA and LLU Line Share. The net effect of the retail minus price control and the necessity to buy FVA in order to sell broadband means that OAOs are effectively branded sales channels for eircom’s PSTN service whether on a standalone basis or part of a bundle. The WLR price is effectively determined by eircom’s retail price and so in the absence of Naked DLS eircom can in practice control the pricing of all FVA supplied over its network. This includes the OAO cost of FVA supplied as part of

retail bundles. Consideration of eircom's WLR pricing activity is therefore a direct proxy for eircom's retail pricing activity in respect of FVA.

In the context of eircom's NGA broadband launch it has proposed a WLR discount scheme. This discount has been stated by eircom as designed to allow retail bundles containing NGA to reach a target retail price point without breaching various bundles margin squeeze tests. In order to achieve the desired WLR price level and to avoid a margin squeeze in the vertical supply chain eircom had to reduce the cost oriented price of its underlying LLU service. The size of the LLU price reduction was €2.50 while the size of the WLR discount is €4. This implies that the undiscounted WLR price was some €1.50 higher than the cost of delivering the service including the WACC (it should be noted that the LLU pricing contains provision for eircom to recover its WACC). This is a clear indication that eircom was free to price WLR (and by inference retail FVA) above the competitive level for a protracted period of time.

A number of other points flow from the form of this proposed discount scheme.

The first is that it is a discount scheme with a defined end point and not a price reduction. Eircom retains the unilateral flexibility to increase its WLR price. This facility is only relevant if it believes that it will be in a position to maintain or increase its retail price for FVA going forward.

The next is that the discount has been explicitly linked to the launch of a new broadband product. While it will apply to lines supporting existing broadband products it was originally proposed to only be available in areas where the new broadband product has launched. The discount is specifically designed to support the launch of a bundled broadband product it is not a competitive response to the provision of FVA over cable. Eircom refused OAO requests to make the discount available in other areas prior to the NGA launch even where cable based FVA and broadband is available in those areas. The clear inference is that eircom does suffer a competitive pricing constraint from cable in terms of FVA. If it did then the FVA discount would be made available on eircom current bundles. Whatever constraint eircom faces is on the broadband side.

Further even within the discount footprint the discount does not apply to standalone WLR connections. This is a clear demonstration that eircom perceives that standalone FVA does not face any constraint for FVA within bundles and eircom can price it as it will.

Eircom has within recent days revised this discount scheme. It has reduced the discount and in effect has brought forward the extent of its geographic availability. These changes do not substantially affect the analysis above and there is some question as to whether the changes were in fact in part prompted by industry concerns that the original scheme was discriminatory.

Apart from the price aspects of a service, non-price aspects are also an important component. In terms of service assurance, eircom has repeatedly failed to meet its mandated repair performance for PSTN, in fact it has also failed to meet a less onerous performance improvement plan which it itself has proposed. If eircom was subject to effective competition from FVA provided over alternative infrastructures one would expect that it would seek to improve the product performance so as to be a competitive differentiator.

There is nothing to indicate that eircom's historical ability to act independently of the market in terms of FVA as evidenced above will be circumscribed on a prospective basis over the period of the review.

In terms of barriers to entry Vodafone agrees substantially with ComReg's analysis and with its conclusions.

In terms of the consideration of economies of scale, scope and density Vodafone is in general agreement with ComReg's analysis and the conclusions it draws.

When considering the issue of vertical integration it is instructive to consider eircom's approach to self-supplied wholesale inputs. There have been a number of developments in the various retail and wholesale markets over the past number of years. These include the introduction by eircom of BMB, white label voice, ongoing developments in the UG interface and most recently process developments related to NGA. A number of these have required eircom retail to interface to the UG to place transfer orders. In addition NGA has also necessitated eircom retail developing interfaces into the UG for service assurance as well as provisioning. Eircom's wholesale white label voice product requires eircom to produce wholesale CDR feeds suitable for use in retail billing systems.

Taken together these would have allowed eircom over time to migrate off its legacy retail systems onto newer systems interfacing into the new functionality it had developed for these new wholesale inputs on an incremental basis as it added customers to new propositions.

Eircom did not do this, rather it appears to have developed a separate set of internal interfaces for these new wholesale inputs and associated functionality.

In making this decision eircom will presumably have chosen the option that minimises the overall cost and maximises the operational benefits. Faced with a choice of developing a second set of interfaces associated with an EoO approach by a vertically integrated operator or migrating over time to using the newly developed external interfaces associated with an EoI approach, eircom chose the former. This is strong empirical evidence that eircom itself views that there are financial and operational benefits from its vertical integration.

The fact that such a large proportion of FVA is based on wholesale SB-WLR provided by eircom provides an opportunity (whether realised or not) for eircom to leverage the advantage it gains from vertical integration as eircom continues to use a different self-supplied input, which based on eircom's decisions as to its continued use, must confer benefits on eircom.

Overall Vodafone agrees with the finding that eircom currently exercises SMP in the LLVA and is likely to maintain this position over the period of the review.

In terms of the HVLA market Vodafone agrees with ComReg's analysis and conclusion that the eircom exercises SMP on this market but that the presence of appropriate wholesale remedies could potentially obviate the need for retail controls. However it is Vodafone's view that this approach is only justified where the wholesale remedy is based on an EoI approach.

Q. 14 Do you agree with the types of competition problems identified by ComReg, as outlined above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position

Vodafone agrees that ComReg has identified the type of competition problems that might flow from a finding of SMP in the FVA market. Notwithstanding the fact that it is not necessary to show that such problems have crystallised before proceeding to consider the imposition of specific remedies to address such problems Vodafone notes that ComReg's conclusions are supported by empirical evidence of past activity by eircom which falls into the categories of possible competition problems identified. In particular ComReg has previously found that eircom has acted in a discriminatory manner in respect of repair in the existing market for Retail Fixed Narrowband Access and has engaged in pricing of bundles which was also inappropriate.

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Q. 15 Do you agree with ComReg’s proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument appended to Decision D07/61? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position

Vodafone agrees with ComReg’s analysis that the absence of wholesale obligations relating to SB-WLR would result in a significant diminution of competition in the retail FVA market. Further Vodafone notes that because of the lack of an effective and ubiquitous “Naked DSL” product, absent a WLR product, it would be impossible for OAOs to purchase a Market 5 wholesale Bitstream service unless Eircom had already provided a retail PSTN connection. Because of this the removal of the SB-WLR obligation would mean that competition in the retail broadband market would actually entrench Eircom’s position in the FVA market. Therefore until Eircom’s portfolio in Market 5 is sufficiently decoupled from dependence on a SB-WLR input, the SB-WLR product could also be considered an associated facility within Market 5.

Vodafone disagrees with the concept that having fully justified the imposition of remedies within this market ComReg should couch their imposition as being interim and in some way subject to the outcome of an analysis in a separate market. If the separate analysis also finds that it is necessary to impose the same remedy then that does not lessen or impinge on the construction of remedies in the FVA market. To give regulatory certainty, remedies in the FVA market should be imposed on their own merits without caveat or conditional dependency on some economic market which by definition does not curb Eircom’s SMP in FVA.

From a practical point of view Vodafone has serious concerns that ComReg is proposing to impose these remedies by reference to some other document. These concerns are set out in detail in our response to Question 24.

Q. 16 Do you agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument Appendixed to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position

Vodafone agrees with ComReg's assessment of the efficacy of the proposed wholesale remedies and in particular the analysis set out in paragraphs 6.48 and 6.49 and the conclusion in paragraph 6.50 which recognises that the wholesale remedies as proposed do not in themselves offer sufficient protect against the competition problems identified.

ComReg is therefore faced with a choice; it can try to construct a much more intrusive and robust set of wholesale remedies OR it can use a more nuanced and tailored combination of wholesale and retail remedies to address the issues.

Given that the market under consideration is a retail market and the degree of market power that exists it is not clear that an intervention based solely on a set of wholesale remedies could be guaranteed to adequately address the retail level concerns. On this basis it appears to be a proportionate approach to use a combination of wholesale and retail remedies.

Q. 17 Do you agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position

Vodafone notes ComReg's analysis of the strength of competition at the retail level in the HVLA market and agrees that there are sufficiently different conditions between it and the LLVA market to justify consideration of a differentiated regulatory response. While the HVLA issues may not require intervention in the retail market to directly protect end-uses (e.g. in the form of retail price controls) the nature of the proposed wholesale remedies and in particular the fact that HVLA is likely to be sold to enterprise customers a part of a composite telecommunication service supply that some form of intervention is required at the retail level to prevent eircom leveraging its retail SMP into the wholesale market inputs particularly through margin squeeze. Vodafone believes therefore that the total removal of retail controls is not justified and does not conform to ComReg's statutory objectives to safeguard competition. Therefore Vodafone believes that it is necessary that a retail price control be maintained which prohibits the unfair bundling of eircom's HVLA products.

The removal of retail controls means that it is almost impossible to monitor or detect discriminatory activities in the upstream wholesale supply. Vodafone believes therefore that the removal of retail remedies should only be contemplated in the context of a move to an EoI approach as regards wholesale supply of HLVA products.

Q. 18 Do you agree with ComReg’s view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Vodafone has considered ComReg’s analysis of the LLVA market and agrees broadly with its conclusions as regards the fact that eircom exercises SMP on the LLVA market and as regards the strength of that power. Vodafone agrees that because of the strength of eircom’s market power, the nature of the potential competition problems already identified and the fact that eircom has incentives and opportunities to leverage such power (as evidenced by eircom’s previous breaches of obligation in this market) it is proportionate, reasonable and justified to impose retail obligations in the LLVA market.

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Q. 19 Do you agree that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market? As regards the detailed implementation of that obligation, do you agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Vodafone agrees that given eircom's relative market strength in the LLVA market and the fact that the retail minus nature of the price control for SB-WLR means that eircom can still leverage this market strength to price retail FVA above the competitive level.

Vodafone notes that the majority of costs of operating the FVA service can be broken into two elements: firstly capital costs, the majority of which Vodafone believes attach to the copper access network and which are sunk and stable. Further the retail price of FVA is above the BU-LRAIC price of the copper access (the LLU price) which was modelled by ComReg. The modelled LLU price includes provision for return on investment. This means that the retail price of FVA is above the competitive level required to recover the capital input costs. The second element is operational costs, which Vodafone believes are significantly related to the repair and maintenance of the service. While unit labour costs are rising over time, Vodafone notes that over a protracted period eircom has been reducing its operational costs primarily through headcount reduction and efficiency gains. It seems reasonable therefore to limit the extent to which eircom can exercise its SMP by keeping all of these operational gains as windfall profits.

A price cap of the form of RPI minus would ensure that eircom cannot exert its SMP directly on end users in the retail market where it has SMP through either the over recovery of costs or the garnishing of additional margin arising from operational efficiency gains.

Q. 20 Do you agree that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Vodafone broadly agrees with the analysis set out by ComReg in respect of the potential competition issues associated with bundles. In principle the re-imposition of the measure as proposed acts to protect wholesale customers of eircom from the exercise of SMP (Vodafone has separate concerns as regards how to implement the measure which have been set out in our response to ComReg's separate consultation on Price Regulation of Bundled Offers).

In the case of FVA these issues are potentially more acute than for other elements of bundles. The reasons for this include the fact that the SMP is directly in the retail market where, as part of the market analysis, ComReg has identified that eircom is not constrained by normal market forces as regards retail price setting.

Secondly the current structure of the eircom product portfolio means that the vast majority of retail bundles which are based on eircom supplied inputs (whether sold directly by eircom Retail or by OAOs using wholesale inputs purchased from eircom) contain an FVA component. This means that the potential scope of market harm from the unreasonable bundling of FVA services is very wide.

Thirdly, based on the level of operator engagement on product development at the Industry NGA forum, demand for the nascent NGA service portfolio appears to be based around POTS based NGA services. That is the NGA retail bundles will almost certainly contain an FVA component. This means that if eircom were to leverage its FVA market position into the NGA retail market space through unreasonable bundling the effect on retail competition and end-user choice could potentially be more severe than for Current Generation Access services where competitors to eircom already have established market positions. In this regard Vodafone notes that the recently published price controls for NGA services (ComReg Document D03/13) are based on a series of margin squeeze tests and it is not clear to Vodafone how these could operate correctly if it was open to eircom to effectively manipulate cost and cost recovery allocation within bundles. This freedom would potentially exist would be the case in the absence of this proposed measure.

ComReg has recently published a Decision on Price Regulation of Bundled Offers (ComReg Document D04/13). The detail of this Decision has been used by eircom itself to construct pricing arrangements related to the launch of NGA services (in particular tying discounts to the LEA as defined by the Decision). This is strongly indicative of the nature of the pricing, cost and cost recovery interrelationship between FVA and other eircom supplied bundle inputs and is indicative of the scope for eircom to act in the absence of the measure proposed here.

Q. 21 Do you agree that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Vodafone broadly agrees with ComReg's analysis of the issues relating to this topic. Dealing with each of the proposed measures in turn

- (i) pre-notification of changes in conditions of supply – Given the nature of the proposed price controls this measure is proportionate reasonable and justified to allow adequate supervision by ComReg of the other measures proposed to be imposed in this market. The lack of adequate supervision undermines the effectiveness of the other proposed measures.
- (ii) Publication of changes in conditions of supply – There are two distinct strands to this measure. The first relates directly to consumer welfare in the retail market where eircom has SMP. Transparent and prompt publication of information relating to terms and conditions of the supply of retail services allows end-users to make informed purchase decisions and prevents eircom, as SMP operator, obfuscating the nature of its supply of SMP services to the detriment of end-users. Secondly the prompt publication of retail terms and conditions allows potential competitors to eircom to formulate competitive responses to changes in services in circumstances where the SMP operator is not constrained by the market in making such changes. Also the publication also exposes the changes to review by a wider pool of industry stakeholders and adds a further level of supervision of the other remedies imposed.

Vodafone notes that eircom is not required to give additional advance notice to the wider market of changes in its retail offerings over and above what would apply if this measure was not in place and so eircom is not placed at any competitive disadvantage by the imposition of this requirement.

- (iii) Supply in conformance with the published terms – This measure is important as it ensures that retail competitors to the SMP operator are not faced with competing against a “secret” product supplied on an off-book basis by the SMP operator. Further this ensures the effectiveness of retail minus type pricing remedies as it prevents cherry-picking by the SMP operator whereby it blends high margin from inert customers in the FVA market against lower margins in those market segments where it faces prospective competition to the detriment of competitors and ultimately end-user choice.
- (iv) Application of Regulation 15 of the Universal Service Regulations – This clarification has no additional regulatory burden on eircom but does give regulatory certainty to eircom and the wider market.

Vodafone notes that proposed measure is couched in terms of “changes” to terms and conditions of supply. A question then arises as to whether these requirements also apply to the introduction of new services by eircom which fall within the LLVA market (for example consumer IP based FVA in the context of NGA). To give regulatory certainty and avoid

foreseeable disputes Vodafone suggests therefore that ComReg should either make explicit that the measure excludes the introduction of new services or that it clarifies that it comprehends the introduction of new services.

NON-CONFIDENTIAL

Q. 22 Do you agree that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

Vodafone broadly agrees with ComReg's analysis of this issue. Vodafone notes that movement in the wider retail market to bundled offerings and the implementation of price controls in other regulated markets based on margin squeeze (including NGA pricing, WBA price floors etc.) means that to conduct proper supervision of these remedies ComReg requires information regarding eircom's costs and cost recovery. Because eircom is entirely vertically integrated without functional or structural separation at this time the required information is best obtained by way of separated accounts as specified under ComReg Decision D08/10.

In respect of the position set out by ComReg at paragraph 6.106 Vodafone must once again strongly restate its view that if, based on the analysis conducted in this market, there is a self-sufficient requirement and justification for the imposition of a remedy then it should be imposed on that basis and not on some interim or conditional basis pending the outcome of analysis activity in some separate market.

Q. 23 Do you agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position

Vodafone broadly agrees with ComReg's analysis of this issue and the conclusions drawn. Vodafone also notes that for the reasons set out at its response to point (iii) of question 21 this proposed remedy complements the measure proposed under clause 7.3 of the proposed decision instrument.

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Q. 24 Do you agree with ComReg’s draft Decision Instrument at Appendix 3? Do you agree with ComReg’s Definitions and Interpretations as set out in the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Vodafone does not agree with the Section 12 of the draft Decision Instrument. The simple reference to Sections 5 and 6 of Decision D07/61 means that these sections must be read in conjunction with the definitions in that previous decision instrument and not this proposed decision instrument. The definition of the market in D07/61 is different to the definition here. In particular the D07/61 definition is limited to a subset of the LLVA market as it refers to “Lower Level Narrowband Access”.

eircom could decide to self-supply a Managed VOIP input falling within the FVA market with a lower cost base and/or additional functionality when compared to traditional PSTN based FVA. Under the under the proposed decision instrument, and based on the provision of section 5 and 6 of D07/61, it appears that eircom would not have any obligation to provide a wholesale variant of this FVA service as it does not fall within the scope of the obligation of D07/61. This means that eircom as an SMP operator could move its retail supply to the new lower cost input while only being required to supply prospective retail competitors with a higher cost/lower functionality wholesale input.

In its RIA ComReg has titled the table setting out its preferred option (Option 5) as “*Maintain the existing wholesale remedies on **all** [emphasis added] FVA markets...*”. It would appear therefore that the partial application of the wholesale remedies this is not the intent of the draft Decision. If this is the case then the wording of section 12 must be reworked to rectify this gap.

In the alternative, if it was the intent of the wholesale remedy to only have partial application to the market then the lack of meaningful consultation on this approach would render the process underpinning its imposition invalid.

The remainder of the draft decision reflects the matters canvassed in the consultation and Vodafone’s position on these issues is set out in its responses the specific questions.

Q. 25 Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position

Vodafone broadly agrees with ComReg’s analysis and the conclusions reached.

At a high level what is at issue is the prospect that the strength of eircom’s market power has dissipated. The point at which it could act appreciably independently of the market is not a precise point at which it goes from exercising complete SMP to facing perfect competition. Rather it is a range. The question for ComReg is whether to lift the controls that were previously imposed to protect competitors and end-users. If ComReg errs and lifts some measure of regulation before eircom’s market power has sufficiently dissipated then there are likely to be direct and tangible effects on competition and consumers that will be difficult to unwind. If on the other hand the error is to impose a level of regulation slightly higher than that actually required by the market conditions then the impact is on eircom rather than competition or consumers.

When one considers the regulatory approach in the round and the strength of the market power identified ComReg appear to have acted in a proportionate and reasonable manner in weighing these two opposing risks.

Q. 26 Do you believe that ComReg’s draft Decision Instrument set out above is, from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the matters proposed therein? Please explain the reasons for your answer, clearly indicating the relevant section numbers to which your comments refer, along with all relevant factual or other evidence supporting your position

Vodafone believes that decision instruments should be self-contained and that the Decision Instrument should explicitly set out the detail of any obligations imposed. In this regard Vodafone believes that the continuation of wholesale obligations under Section 12 should not be done by reference to a six year old document which imposed obligations under a different legislative basis.

In the interests of clarity, precision and practicality Vodafone believes that this section should set out in detail the obligations being imposed.

As set out in its response to Question 21 Vodafone believes that in the interests of clarity and certainty the wording of Section 7 should be modified to ensure that it is unambiguous that these obligations also apply to new services within the market and not solely to changes to existing services.

NON-CONFIDENTIAL

7: BT



BT Communications Ireland (“BT”) Response to:

ComReg’s Market Review:

Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers

Issue 1 25th January 2013
Status – Issued

1. Introduction

This consultation is about regulating the wholesale voice access market which at this time also forms the foundation for Eircom’s proposed NGA pricing. This is an important juncture in the evolution of the industry and it’s critical that ComReg achieves the right balance in both facilitating NGA whilst continuing to support existing investments. Our view is this balance is not yet achieved which we believe will have an adverse effect on competition, and must be addressed as a matter of urgency to ensure regulatory certainty and create an associated investment environment. In this introduction we bring the relevant issues together which we will then further address with our key issues and detailed comments.

Functional Separation and lack of Wholesale Competition

We remain disappointed that functional separation has not occurred in Ireland and consider this a major hurdle to competition both in traditional and next generation services as such would open up competition (as has occurred in the UK). An example of this is the low growth of LLU and the opportunities this would have brought to developing competitive data and retail fixed voice propositions in the market. Today, with a couple of exceptions the industry still largely depends on Eircom’s regulated wholesale fixed voice services to offer retail voice solutions.

Continuing Voice Access Regulation

We welcome the preliminary position of ComReg to maintain regulation on Eircom Retail Fixed Voice Access products and believe the small scale of alternative wholesale or self provided products supports ComReg’s view.

Voice Access Price Regulation

We welcome the evolution of services such as the introduction of NGA and note in Ireland that Eircom, the incumbent, is largely depending on discounting the price of its Wholesale Fixed Voice Access pricing to establish its retail NGA Fixed Voice Access and Broadband bundle price. In our view the restrictive and temporary nature of Eircom's wholesale discounts combined with low price migrations is creating an outcome that is detrimental to competitors purchasing Eircom wholesale products and to services such as LLU. We consider this unacceptable.

Retail Bundles

The light touch regulation of WLR access pricing is exacerbated when combined in a broadband voice bundle and we are disappointed with the approach ComReg has taken towards Eircom PSTN/NGA bundles pricing. ComReg in this consultation propose the voice access market to be national in nature, and then in the associated consultation (in document 12/63) propose sub-national pricing. We believe sub-national pricing effectively sub-divides the national market to the detriment of LLU providers and rural communities, and in our view, ComReg has failed to demonstrate to an appropriate and transparent standard the evidence for such a significant decision. We note the wholesale price of rural voice services will be 4 Euro per month higher than for urban wholesale voice services for exactly the same voice service and unfortunately significant differences of this nature are lost in the detail. We welcome the comments of the European Commission requiring ComReg to strengthen its analysis and we expect this to be completed, published and offered for review.

Promotions

We consider the promotions process is now discredited as some Eircom promotions last over a year and now Eircom are planning an 18 month promotional discount for PSTN pricing in NGA areas. We consider promotions should be short term initiatives lasting a maximum of six month duration without continuous repetitions. Longer durations are arguably price changes and should be established as such.

ISDN

We agree with ComReg to continue the regulation of lower layer ISDN products such as basic rate services, but disagree with ComReg's preliminary conclusion to de-regulate higher layer retail ISDN services such as fractional and primary rate ISDN services as Eircom still maintain significant market share and, as ComReg highlight, would have considerably higher market shares absent regulation – hence there is no basis for removal of the regulation.

Out of Date Regulatory Remedies

Whilst we welcome the titles of the proposed remedies, we are concerned ComReg's preliminary conclusion in this market review is to simply roll over the regulatory remedies of 2007 presumably with a view to moving them to a future wholesale origination and transit review. However, the existing remedies do not capture the lessons learned by operators and ComReg over recent years and in our view the remedies should be

updated at this time to deal with the issues of today, particularly around using more modern text and the requirements for improved transparency. We propose ComReg align the voice access remedies with those it has recently mandated for wholesale physical access services, wholesale broadband access and those in the NGA consultation of 2012.

2. Key Issues

2.1 NGA Pricing - Nature of the market – national vs. sub-national markets

2.1.1 NGA Pricing – Sub National Markets

In our view the sub-national market debate is being complicated as there are currently two initiatives within the fixed voice market to create sub-geographic markets for fixed voice access services. The first is Eircom's approach to discount the voice component within both NGA and Current Generation Access (CGA) bundles at the wholesale layer (and we assume this will pass through to the Retail layer) using the current regulatory environment; the second initiative is ComReg's intention to create pseudo sub-geographic markets through the creation of what ComReg term Large Exchange Areas in consultation reference 12/63.

2.1.2 NGA Pricing - Why is the issue of sub-national markets so important?

The creation of sub-national markets allows Eircom to target aggressive price reductions towards specific locations and our concern is such focus has the potential to foreclose products such as LLU as discussed below.

1. Eircom has announced a significant promotional discount on the voice component of the NGA bundle for a period of 18 months where NGA is rolled out.
2. Eircom's proposal (unique in the pricing of its wholesale products) to load the cost of migrating customers to NGA into wholesale rentals effectively means there will be no or a very small direct charge to the customer to migrate to NGA.

We believe a combination of these two pricing approaches provides a platform for Eircom to 'flip' its retail customer base to NGA with a detrimental outcome to competition. We provide two potential examples.

✂

2.1.3 Product vs. pricing competition

An argument that is used for the pricing changes is Eircom need to compete with UPC and we would like to make the following two points.

- We consider the main competitive issue is more about UPC's triple play voice, broadband and mature television programming vs. Eircom's double play voice and broadband service than it is about pricing.
- Our view is the pricing as proposed by Eircom is more damaging to existing operators using the Eircom platform and to the LLU community than beneficial for Eircom Retail in trying to compete with UPC.

In summary, it is our strong belief that low pricing for NGA will deliver limited competitive advantage to Eircom Retail against UPC, but will have substantial detrimental impact on Retail operators using Bitstream or LLU based products. Thus, the result of low NGA pricing will be foreclosure of LLU and a market duopoly between Eircom and UPC.

We note that ComReg took a simple pricing approach in the Retail Bundles consultation (ComReg doc. 12/63) and we consider this incorrect. A deeper product functionality review is needed which we believe will highlight the unreasonable damage that the voice pricing component of the NGA pricing will cause to operators using Eircom's network and LLU operators.

2.1.4 NGA Pricing - Remedies

We would like to offer the following proposals to correct these issues.

- Bundles Consultation – We seek a deeper review and evidential transparency from ComReg on the rationale for its decisions on sub-national markets. Our view is this review should consider both product competition and price competition as the product sets are now very different.
- Fixed Voice Access Discounts – The simple remedy to this would be for Eircom to apply the discount across the whole of the wholesale fixed voice access base thereby:
 - a. Removing the discriminatory wholesale fixed voice access pricing between rural and urban areas. I.e. As it stands Wholesale Voice Access in rural access will be 4 Euros more expensive than urban areas for the same wholesale voice access service.
 - b. Removing potential discrimination issues for current generation services.
 - c. Making it practical for the current generation providers to pass on the discounts.
- Migrations – To establish a simple and straight forward cost based wholesale migration price to provide confidence that it is not over or under priced. To offer the same pricing approaches for current generation services.
- LEA Test - A competition threshold should be set rather than simply counting the number of operators to create an LEA – i.e. reaching a critical mass threshold would enable the competitor to sustain the competitive pressure that Eircom is likely to apply. We believe the failure to allow competition to reach such a threshold will make it virtually impossible for LLU operators to survive in an LEA.

2.2 De-regulation of certain ISDN Services

We note ComReg's observation that absent regulation Eircom's Market share would rise significantly in the consumer (Lower Level Market) voice access market to 80% and business (Higher Level Market) voice access market to 62%. Given Eircom's high market share in the high level voice access market we consider it premature at this time to remove the regulation around ISDN Primary Rate and Fractional Rate Services. We acknowledge SIP trunking type services are beginning to enter the market however the significant cost for customers to change their PBXs and existing infrastructure means the market will change slower than ComReg imply. For this reason we consider ComReg should maintain full regulation on Eircom's high level voice access services.

2.3 Regulatory Remedies in the Draft Decision

Whilst we agree with the aim and the titles of the remedies proposed by ComReg, we consider the text of the remedies to be dated and out line with recent decisions of ComReg where robustness has been added through lessons learned over recent years. This view also applies to the continuation notice to maintain the regulation of large parts of Decision 07/61 which is regulatory text of 2007 and now dated in terms of effectiveness.

2. Response to the detailed questions

Q. 1 Do you agree that the above identifies the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 57)

A.1 We agree ComReg has identified the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007.

Q. 2 Do you agree with the scope of the review of the FVA market? Please substantiate your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views. (Page 62)

A.2 We generally agree with the scope of the review of the FVA market as the proposal reflects the trends in the market and identified by ComReg, however we consider the review should additionally:

- a. Consider the regulation of voice services within a bundle and,

- b. Provided further evidential information to support the pricing proposals in the Retail Bundles Consultation 12/63.

Q. 3 Do you agree that FVA and fixed voice calls are in separate relevant markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 72)

A.3 We agree that FVA and fixed voice calls are in separate relevant markets as highlighted by ComReg in clause 4.51. We agree customers make choices as to what FVA to use for certain types of call (international vs. national etc.) and thus FVA and voice calls markets to develop at difference paces.

Q. 4 Do you agree that standalone FVA is a separate market to a bundle of FVA with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 79)

A.4 We agree that standalone FVA is a separate market to a bundle of FVA with other services as indicated by ComReg in clauses 4.75, 4.77 and 4.78. Significantly 40% of the households surveyed and 54% of business surveyed still purchase standalone FVA.

Q. 5 Do you agree that, in line with ComReg's previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 80)

A.5 We agree that, in line with ComReg's previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services. Given we consider FVA is a separate market to bundles as in our response to question 4 we agree FVA sold on a standalone basis is the correct place to start.

Q. 6 Do you agree that there is a single FVA market for business and residential customers? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 92)

A.6 We agree that there is a single FVA market for business and residential customers as the same underlying network is physically used to deliver the products, and although there are some differences in the packages offered, there is an ability for business and residential customers to substitute between business and residential products.

Q. 7 Do you agree that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 98)

A.7 We agree that there are distinct sub markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA as the LLVA products primarily address singleton or small groups of end users whereas HLVA can support larger numbers of end users, with additional features (e.g. DDI services) on larger PABX platforms.

Q. 8 Do you agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 100)

A.8 We agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only. However we consider it is important to ensure that future platforms can support replacement SIP trunking type services to high quality levels. There are currently no industry agreements in place or industry discussions on interconnecting SIP or even carrying SIP across other operator platforms.

Q. 10 Do you agree that retail fixed access and mobile access do not currently belong in the same relevant market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 129)

A.10. We agree that retail fixed access and mobile access do not currently belong in the same relevant market given:

1. The views of the European Commission that there is insufficient evidence to prove they were in the same market and
2. The different demand and supply characteristics analysed by ComReg are compelling. For example as highlighted in clause 4.201 if fixed mobile integration had occurred why would Mobile operators support both fixed voice access and mobile access.

Q. 11 Do you agree that the relevant geographic market for the relevant FVA markets identified is Ireland? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 142)

A.11 We agree the relevant geographic market for the relevant FVA markets identified is Ireland as regional changes are not clear and it's too early to define Sub-Geographic markets. However we have the following concerns about ComReg's statement:

'This conclusion does not preclude the application of geographically distinct remedies, as appropriate and as contemplated in ComReg's consultation on bundles (see ComReg Documents 11/72 and 12/63).' [Italics added.]

1. We believe the proposal in 12/63 is tantamount to establishing a sub-geographic market given the outcome will be differential pricing. Given this is such a significant decision we believe ComReg should carry out the appropriate market review analysis to prove it one way or other.
2. We note the Comments of the European Commission for ComReg to strengthen its analysis.

Q. 12 Do you agree with ComReg's preliminary conclusions on the retail FVA market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views. (Page 144)

A.12 We agree with ComReg's preliminary conclusions on the retail FVA market definition assessment and that the market is national. However, we are concerned that there does not appear to be an adequate level of market review rigour (such as market shares) in deciding when a location is showing signs of competitive activity. We note ComReg are not declaring these as a separate market; however modification of the price control is tantamount to a declaration that the market is sub-national.

Q. 13 Do you agree with ComReg's preliminary conclusions on the competition analysis and assessment of SMP? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. (Page 189)

A.13. We generally agree with ComReg's preliminary view that wholesale regulation is still required for Eircom's wholesale offering of higher level voice access ISDN solutions, however we also consider the same should apply for Eircom's retail offering of the same. We note ComReg's remark that absent regulation Eircom's market share would potentially rise to 62% is a dominant market share. We are also aware from our own market intelligence that Eircom is strong in these markets and consider it too early to remove either the wholesale or retail obligations.

Q. 14 Do you agree with the types of competition problems identified by ComReg, as outlined above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. (Page 198)

A.14. We would like to provide the following comments:

- a. Pricing - We are aware that the focus is often on the abuse of pricing and note the bundled pricing issue that ComReg successfully addressed through the courts in 2009. This case clearly highlights the benefit of exANTE regulation as it took nearly a year for the case to be concluded.

- b. Service/Product discrimination – We note the recent finding by ComReg (21st December 2012) that Eircom had discriminated on service assurance and note other non-compliances such as the sync checker issue ✕. Hence we know discrimination has been taking place. We welcome the publication of KPIs and consider these should continue, but additionally we consider the onus be placed on Eircom to publish the differences between internally and externally traded products and services. Moreover, this would make it a breach not to publish and creates the right incentives. After all, if there is nothing to hide why would Eircom not publish? Such would then allow the industry to decide whether it should order the same product as Eircom provides itself.

We note that even in a regulated environment it proves difficult to detect and resolve such matters and absent regulation we believe we would have never have known that different levels of service were being provided.

Q. 15 Do you agree with ComReg’s proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument appendixes to Decision D07/61? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. (Page 202)

A.15 We generally agree with ComReg’s proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument appendixes to Decision D07/61 but would like to offer the following comments:

- a. Given the high barriers to building an access network it is clear that competition in the FVA market would not be sustainable at this time without the availability of the remedies such as CS/CPS and SB-WLR.
- b. We are concerned that the text about the continuation on an interim basis (Clause 6.42) is sending mixed messages that the outcome might be different in a new market review. As this is a full market review we have difficulty understanding how a different view could emerge in the space of only a couple of months.
- c. We can understand ComReg’s desire to move what is a wholesale remedy to the wholesale market reviews; however this should not be reason to undermine the conclusions of this review that will only be a few months old.

Q. 16 Do you agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument Appendixes to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to

which your comments refer, along with all relevant factual evidence supporting your position. (Page 205)

A.16 We agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument Appendixes to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets. We would like to offer the following supporting comments.

- a. LLU - has not reached critical mass in Ireland to facilitate a competitive challenge to Eircom Retail's dominance in the fixed voice access market and we believe within the period of the review LLU based services are unlikely to impact Eircom's supply of lower layer or higher layer fixed voice access.
- b. Alternative supply of fixed voice access - We note that alternative operator Retail Fixed Voice Access in Ireland has largely continued to depend on Eircom's supply of wholesale SB-WLR and CPS services. Other than UPC whose voice access numbers are still relatively small, no other player has made in-roads into this market in Ireland. We acknowledge there is a number of Internet type voice access solutions of varying degrees of quality however most of these do not display the characteristics of PTSN Fixed access service such as using phone numbers etc. We therefore believe that given the current slow evolution of the Irish Retail Fixed Voice Access Market Eircom should continue to be regulated to supply the various wholesale regulatory remedies including SB-WLR and CPS.
- c. Switching - There is a need to maintain retail regulation on Eircom to ensure end customers do not experience discomfort when attempting to switch provider. For example their retail termination clauses must be transparent and operate in a predictable way.
- d. Price/Margin Squeeze - We believe that there is both motive and opportunity for the creation of price/margin squeeze activity and the retail regulations should prevent such. Given past experience in Ireland with bundles pricing and ComReg having to resolve through the courts exANTE regulation is clearly required.
- e. Price controls – Large parts of the industry in Ireland depend on the Retail Minus price control established by ComReg and we consider it should be maintained alongside the retail bundles regulation that is proposed. Given the complexity of the retail bundles proposal in 12/63 proposal we ask that ComReg keep it under review for unexpected outcomes.

Q. 17 Do you agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. (Page 207)

A.17 We do not agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market. We note ComReg's remarks that Eircom have not altered their prices for some years, although a price change has been initiated whilst this consultation is in progress. We also note that services such as SIP trunking are only now being introduced into the market however given the high cost to customers of replacing PABXs it will be a very considerable time

before ISDN PRA and FRAs are removed. We therefore consider the HLVA should remain at this time and ComReg should monitor the market for change.

Q. 18 Do you agree with ComReg's view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. (Page 209)

A.18 We fully agree with ComReg's view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market. We agree with the concerns identified by ComReg and support the proposals made. A key issue for operators using Eircom wholesale products is that there is sufficient economic space between the retail price and the wholesale price and that this is not eroded through bundling practices or other initiatives.

We also have concerns about the switching process and request as part of this review for ComReg to ensure there are not inappropriate barriers for users to switch provider. For example we are aware that some providers are finding the service termination practices of other providers unpredictable which can leave customers without service or their telephone number going into quarantine, potentially giving the customer a poor perception of its new provider.

Q. 19 Do you agree that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market? As regards the detailed implementation of that obligation, do you agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. (Page 213)

A.19a We agree that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market to protect the interests of end users as this will prevent over pricing.

A.19b We agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg). This process has worked to date and should be continued.

Q. 20 Do you agree that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position. (Page 217)

A.20 We generally agree that the obligations outlined (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom. However we are concerned that the distinct sub-geographic location aspects (definition of Large Exchange Areas) within the bundling consultation 12/63 and that this full market review are not appropriately evidenced. We consider this a major oversight as transparency around local market share information per location should be made available to support what is a major decision. Our view is there is product as well as price issues at play and we don't have the market information available to review whether ComReg's proposals are correct.

Q. 21 Do you agree that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position. (Page 220)

A.21a We agree that the transparency obligations considered from clauses 6.89 to 6.98 inclusive (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom. We also consider these conditions should also apply to the higher layer retail products including primary and fractional rate ISDN, given Eircom's potential additional market share absent regulation.

A21b Other approaches to address the identified competition issues. Given the risk that this type of regulation will only be applied to standalone products, and that such can be undermined through bundles this decision notice needs to link to the retail bundles proposals. Failure to do this simply circumvents the obligation on standalone products.

Q. 22 Do you agree that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position. (Page 224)

A.22a We agree that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10. We note that in an earlier consultation ComReg raised concerns about incomplete cost information hindering its ability to make decisions hence this is essential.

A22.b We consider Eircom should provide Current Cost Accounts as well as Historic Cost Accounts given the important of accounting accuracy and CCA provides a present day valuation.

Q. 23 Do you agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position. (Page 226)

A.23 We agree that an obligation not to show undue preference to specific end users as described (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom. However we would add that this will be almost ineffective without very strong transparency regulation such as recently consulted by ComReg in the NGA remedies consultation 2012. We would urge ComReg to adopt the NGA transparency proposals into this consultation.

Q. 24 Do you agree with ComReg's draft Decision Instrument at Appendix 3? Do you agree with ComReg's Definitions and Interpretations as set out in the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer. (Page 227)

A.24a We would like to offer the following comments to ComReg's draft Decision Instrument at Appendix 3 and would like to offer the following comments.

- a. We agree with aim of the remedies ComReg is proposing but there are problems with the effectiveness. I.e. we consider the text of the draft remedies proposed in the draft decision of 12/117 is dated and do not align with more modern and robust remedies recently issued by ComReg in its recent decisions such as WBA, WPNIA and recently consulted on for NGA. For example non-discrimination is virtually impossible to detect without associated strong transparency remedies, hence the non-discrimination text in 07/61 is ineffective when considering the light transparency regulation proposed in clause 7 of the draft decision. We propose that ComReg should review its recent NGA text for a far more effective and robust remedy.
- b. We note the continuation notice at 12.1 of the draft decision triggers remedy text that is now five years old and out of date. As highlighted in the bullet above we consider ComReg should update the remedies in line its current remedy text to make the remedy effective in the modern world.
- c. We note the continuation notice at 12.1 of the decision does not address the update in retail minus pricing. I.e. the retail minus margin has changed from 10% to 14%.
- d. To create new obligations around switching such that end customers can switch smoothly between providers – i.e. Customers should not be left without service whilst trying to switch.

A.24b We agree with ComReg's Definitions and Interpretations as set out in the draft Decision Instrument.

Q. 25 Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. (Page 253)

A.25 We agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment however we consider that ComReg's approach to the pricing regulation of Eircom Voice Access Services needs to be stronger and to consider within the remedies how to prevent effects that cause harm to competition.

Q. 26 Do you believe that ComReg's draft Decision Instrument set out above is, from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the matters proposed therein? Please explain the reasons for your answer, clearly indicating the relevant section numbers to which your comments refer, along with all relevant factual or other evidence supporting your position. (Page 264)

A.26 We believe that ComReg's should update its draft decision notice as below:

- To consider our comments throughout this response and in particular our responses to questions 24 and 25.

Documentation Control

Documentation Status: Issue 1
Issue Date: 25th January 2013
Confidentiality Status: Non Confidential Version

For enquiries about this response please contact: john.odwyer@bt.com

8: Alto

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alternative operators in the communications market

Response to Consultation - Market Analysis: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers Ref:12/117

Submission By ALTO

Date: January 25th 2013

ALTO is pleased to respond to the Market Analysis Consultation - Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, Ref: 12/117.

Preliminary Comments

ALTO welcomes this Market Review the aim of which is to determine the appropriate levels of regulation necessary for the coming years in the fixed voice access market.

ALTO considers this a critical consultation given that it triggers regulatory remedies which mandate Eircom to supply wholesale voice services such as Wholesale Line Rental – WLR, without which, consumers would experience little or no choice for fixed telephony services.

ALTO agrees with the majority of competition issues identified by ComReg in the Consultation paper, and its preliminary conclusions. ALTO considers key areas where the proposals should be stronger. We outline these proposals below:

The nature of the market – National versus Sub-National

ALTO agrees with ComReg's conclusion and re-statement that the fixed voice access market is national in nature. ALTO acknowledges that there are signs of competitive activity in certain limited locations. ALTO notes that while ComReg's analysis of the geographic market that commences at clause 4.209, and addresses localised competition at a high conceptual level, there is noticeably sparse analysis of what is happening within local locations and the characteristics in terms of market shares. This is an obvious concern for ALTO members.

ALTO believes that the lack of detailed market information for the local areas is not proportionate with the comprehensive remedies proposed by ComReg in their

Bundles Consultation Ref: 12/63 and ALTO is disappointed this particular Market Review appears to have missed the opportunity to provide the necessary detail and transparency to justify such a detailed remedy, as the one proposed.

ALTO believes this issue is of critical import to the market, as the Bundles Consultation and proposal creates an environment wherein differential pricing based on location and predicated on the presence of alternative operators is the main factor, and not the overall market shares of those alternative operators, i.e., the simple action of defining an area as part of the Larger Exchange Area – LEA, enables the incumbent – Eircom, to apply differential prices, which could act to foreclose the early signs of competition. This would be irrespective of ComReg’s proposed weighted average test. ALTO believes that the incumbent – Eircom, has ample margin within its WLR pricing model to differentiate pricing without the risk of hitting, or nearing the price floor calculated through the weighted average test. Further, the incumbent – Eircom, has wide scope to apply differential pricing without restriction.

In conclusion ALTO considers the mere fact that an area has been defined as part of the LEA allows Eircom to apply different prices irrespective of whether or not any other party has any market share and ALTO considers this to be *prima facie* inappropriate and disproportionate.

Eircom have notified an in-bundle WLR discount of €4, where they roll out an NGA exchange, so ALTO members in-fact realise that our concerns are not simply theoretical in nature.

ALTO members are not opposed to the concept of what ComReg is trying to achieve but a ‘critical mass’ approach to market share, would be more appropriate in ALTO’s opinion, to trigger the designation of an area as part of the LEA, and not just the presence of a given operator. This extremely simple modification to the criteria used to determine the LEA, will have the effect of improving the quality of

the decision to declare an LEA, and hence nascent competition will not be prematurely foreclosed.

Deregulation of certain ISDN Services

ALTO notes ComReg's observations that absent regulation, Eircom's Market share could rise significantly in the consumer (low level) voice access market to 80% and business (high level) voice access market to 62%.

Given this high market share in the high-level voice access market, ALTO considers it premature to remove regulation around ISDN Primary Rate and Fractional Rate Services. ALTO acknowledges that Session Initiation Protocol – SIP, trunking services are beginning to appear in the market, however the significant cost for customers to change existing infrastructure and their telephone systems, means the market will not change at the pace that ComReg implies it will. ALTO considers that for the above reasons, ComReg should maintain full regulation on Eircom's high-level voice access services.

Relevant Operational Matters

As a result of ComReg's publication entitled: Addendum – Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, Ref: 13/08, the following submissions arise:

- Wholesale Line Rental – WLR, fault repair Service Level Agreements – SLAs, need to be aligned with legally mandated USO targets (as part of ComReg's applied non-discrimination remedy).
- USO target penalties need to be increased, the financial incentive to comply is clearly not sufficient for Eircom (to ensure non-discrimination remedy is not achieved by just being equally bad for everyone).

- Aligning WLR SLAs to USO should be mandated to reduce scope for the potential for discriminatory behaviour.
- Leaving SLAs to commercial negotiation is not sensible, considering that ComReg have already concluded all the market power is with Eircom.
- Achieving SLAs = USO mandated targets is proportionate and justifiable, given that ComReg have consistently stated that Eircom have been “*fully compensated*” to achieve the sort of performance reflected in the USO targets – consequently, that must apply to WLR SLAs as well.

Response to Consultation Questions:

Q. 1. Do you agree that the above identifies the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 1. ALTO agrees that ComReg has identified the main relevant developments in the provision of FVA since ComReg's previous review of this market in 2007.

Q. 2. Do you agree with the scope of the review of the FVA market? Please substantiate your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

A. 2. ALTO agrees with the scope of the review of the FVA market as the proposal reflects the trends in the market and identified by ComReg. ALTO considers that we consider the review should additionally:

- a. Consider the regulation of voice services within a bundle and,
- b. Provided further evidence in support of pricing proposals in the Retail Bundles Consultation 12/63.

Q. 3. Do you agree that FVA and fixed voice calls are in separate relevant markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views

A. 3. ALTO agrees that FVA and fixed voice calls are in separate relevant markets as highlighted by ComReg in clause 4.51. Further, ALTO agrees that customers chose what FVA to use for certain types of call (international versus national, etc.) and thus FVA and voice calls markets to develop at difference paces.

Q. 4. Do you agree that standalone FVA is a separate market to a bundle of FVA with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 4. ALTO agrees that standalone FVA is a separate market to a bundle of FVA with other services as indicated by ComReg in clauses 4.75, 4.77 and 4.78. Significantly 40% of the households surveyed and 54% of business surveyed still purchase standalone FVA.

Q. 5 Do you agree that, in line with ComReg's previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 5. ALTO agrees that, in line with ComReg's previous market review, the appropriate starting point for carrying out the subsequent market definition assessment is narrowband FVA sold on a standalone basis and not a bundle entailing retail FVA sold with other services. Given we consider FVA is a separate market to bundles as in our response to question 4 we agree FVA sold on a standalone basis is the correct place to start.

Q. 6. Do you agree that there is a single FVA market for business and residential customers? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 6. ALTO agrees that there is a single FVA market for business and residential

customers as the same underlying network is physically used to deliver the products, and although there are some differences in the packages offered, there is an ability for business and residential customers to substitute between the business and residential products.

Q. 7. Do you agree that there are distinct markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 7. ALTO agrees that there are distinct sub markets for LLVA over PSTN, ISDN BRA and FWA and for HLVA over ISDN FRA and PRA as the LLVA products primarily address singleton or small groups of end users whereas HLVA can support larger numbers of end users, with additional features (e.g. DDI services) on larger PABX platforms.

Q. 8. Do you agree that the relevant market for HLVA is narrow including ISDN FRA and PRA only? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 8. ALTO agrees that the relevant market for HLVA is narrow including ISDN FRA and PRA only. However we have a concern that ComReg should mandate the NGA product should support SIP trunking both through the bitstream plus service and the VUA access. Given that Equivalence of Input – EOI, does not exist between the two solutions it is important both support SIP trunking in the same way.

Q. 9. Do you agree that it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used

to deliver managed VOIP services which may include cable, fibre, FWA and DSL? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 9. We agree it is appropriate to define a broader FVA market to include PSTN and ISDN BRA over copper and broadband connections used to deliver managed VOIP services that may include cable, fibre, FVA and DSL. We agree that customers would consider managed VoIP in a bundle the same as traditional FWA in a bundle and thus it should be included in the market definition.

ALTO is also concerned that if such were not to exist in the same market and be regulated, the incumbent would be highly incentivised to introduce managed VoIP at significantly lower prices to undermine competition that has been created through the existing access remedies such as CPS and WLR.

Q. 10. Do you agree that retail fixed access and mobile access do not currently belong in the same relevant market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 10. ALTO agrees that retail fixed access and mobile access do not currently belong in the same relevant market given:

1. The different demand and supply characteristics analysed by ComReg are compelling, e.g., as highlighted in clause 4.201 if fixed mobile integration had occurred why would Mobile operators support both fixed voice access and mobile access.

2. The views of the European Commission that there is insufficient evidence to prove they were in the same market

Q. 11. Do you agree that the relevant geographic market for the relevant FVA markets identified is Ireland? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 11. ALTO agrees that the relevant geographic market for the relevant FVA markets identified is Ireland as regional differences are not clear and it's too early to define sub-geographic markets. However ALTO has the following concern about ComReg's statement:

'This conclusion does not preclude the application of geographically distinct remedies, as appropriate and as contemplated in ComReg's consultation on bundles (see ComReg Documents 11/72 and 12/63).'

ALTO believes that this proposal in 12/63 is equivalent in practical effect to the establishment of a sub-national geographic market given that the outcome will be differential pricing which we do not consider justified based on current facts or on a forward-looking basis.

Therefore we call upon ComReg to abandon the proposal in 12/63 and to proceed on the basis of the conclusions of the full Market 1 review as contained in 12/117.

Q. 12 Do you agree with ComReg's preliminary conclusions on the retail FVA market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 12. ALTO agrees with ComReg's preliminary conclusions on the retail FVA market definition assessment and that the market is national. However, we are concerned that there does not appear to be an adequate level of market review rigour (such as market shares) in deciding when a location is showing signs of competitive activity. We note ComReg are not declaring these as separate market, however modification of the price control through the proposal contained in 12/63 is tantamount to a declaration that the market is sub-national.

Q. 13. Do you agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 13. We generally agree with ComReg’s preliminary conclusions on the competition analysis and assessment of SMP however we are concerned about ComReg’s views to reduce PRA and FRA HLVA regulation.

Q. 14. Do you agree with the types of competition problems identified by ComReg, as outlined above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 14. ALTO agrees with the types of competition problems identified by ComReg, as outlined above. We are aware that the focus is often on the abuse of pricing such as the problems of 2009 that were ultimately addressed by ComReg in the high court, however equally important in our view are problems connected with product discrimination and the resultant product squeeze issues.

ALTO strongly supports ComReg’s initiative to publish KPIs and these have proved effective in their short existence, demonstrating different outcomes between the service assurance services received by Eircom Retail to that received by Wholesale customers of Eircom. We note that even in a regulated environment it proves difficult to detect and resolve such matters and absent regulation we believe that we would have never have known that different levels of service were being provided.

Q. 15. Do you agree with ComReg’s proposed approach to the existing CS/CPS/SB-WLR obligations (and various related supporting obligations)

imposed on Eircom under Sections 5 and 6 of the Decision Instrument appendixes to Decision D07/61? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 15. We generally agree with ComReg's proposed approach to the existing Indirect Access products e.g., Carrier Selection/Carrier Pre-Selection/SB-WLR obligations (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument appendixes to Decision D07/61 but would like to offer the following comments.

Given the high barrier of building access networks, it is clear that competition in the FVA market would not be sustainable at this time without the availability of the remedies such as CS/CPS and SB-WLR.

ALTO is concerned that the text contained at Clause 6.42, relating to the continuation on an interim basis is sending mixed messages that the outcome might be different in that market. As this is a full market review we have difficulty understanding how a different view could emerge in the space of only a couple of months.

ALTO understands ComReg's desire to move what is a wholesale remedy to the wholesale market reviews; however this should not be a reason to undermine the conclusions relevant to this review that will only be a few months old.

Q. 16. Do you agree that, in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument Appendixes to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets? Please explain the reasons for your answer, clearly indicating

the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 16. ALTO agree that in addition to maintaining the existing wholesale obligations of CS/CPS and SB-WLR (and various related supporting obligations) imposed on Eircom under Sections 5 and 6 of the Decision Instrument – Appendixes to Decision D07/61, some form of SMP obligation(s) should be imposed on Eircom at the retail level in order to protect consumers by promoting and ensuring effective competition in the relevant FVA markets.

ALTO offers the following supporting comments:

1. The introduction of LLU in Ireland has been painfully slow in Ireland given the various hurdles it has had to face over the years as seen by the regulatory decisions on the ComReg web site, for example it took several years of regulatory activity from the regulator to force seamless and cost efficient migrations from other services to LLU.
2. ALTO considers the obligation not to unreasonably bundle service is required to prevent activities that could easily circumvent wholesale regulation, such as mixing subsidised non-regulated components with regulated components.
3. Promotions – ALTO considers Eircom are now potentially misusing promotions in two ways:
 - a. A promotion should be a short duration offer, however we find Eircom often rolling over promotions again and again. In our view this is tantamount to a permanent price change and Eircom should be mandated to make a price change if a promotion lasts for more than six months.
 - b. Recently Eircom have informed the industry it intends to reduce the price of WLR for 18 months as a promotion. The rationale behind this was it was too difficult to reduce the price due to systems issues. Our view is this is not a promotion but a price and such should not be allowed.

Q. 17. Do you agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 17. ALTO does not agree with the proposed removal of the existing retail SMP obligations imposed on Eircom in the HLVA market and reliance on wholesale remedies alone as a means of addressing the competition problems in that market. We note ComReg's remarks that Eircom have not altered their prices for some years, although a price change has been initiated whilst this consultation is in progress [maybe Eircom saw ComReg's proposals]. We also note that services such as SIP trunking are only now being introduced into the market. Given the high cost to customers of replacing PABXs it will be a very considerable time before ISDN PRA and FRAs are removed. We therefore consider the HLVA remedies should remain at this time and ComReg should monitor the market for change.

Q. 18. Do you agree with ComReg's view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position. 209

A. 18. ALTO fully supports the ComReg view that it is appropriate to impose retail SMP obligations on Eircom in the LLVA market. We agree with the concerns identified by ComReg and support the proposals made. A key issue for operators using the Eircom wholesale products is that there is a sufficient economic space between the retail price and the wholesale price and that this is not eroded through bundling practices.

ALTO has further concerns about the switching process and request as part of this review for ComReg to ensure there are not inappropriate barriers for users to switch provider.

Q. 19. Do you agree that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market? As regards the detailed implementation of that obligation, do you agree that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 19. Two Part Answer:

Part 1. ALTO agrees that it is appropriate that Eircom should be subject to a price control obligation in the form of a retail price cap measure in the LLVA market to protect the interests of end-users, as this will prevent over pricing.

Part 2. ALTO agrees that it is appropriate that the existing RPC, as set out in Decision 03/07, should continue to apply to Eircom insofar as FVA provided via either PSTN or ISDN BRA is concerned (pending a further review of the RPC by ComReg) as this is a known process and has worked to date.

Q. 20. Do you agree that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting

your position.

A. 20. ALTO generally agrees that the obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) in respect of bundling should be imposed on Eircom however we are very concerned that the distinct location aspects (definition of Larger Exchange Areas) within bundling consultations are not fully addressed within this review. We consider this a major oversight, as transparency around local market share information per location remains lacking to support what is a major change in direction. Our view is there are product as well as price issues at play and we don't have the market information available to review whether ComReg's proposals are correct.

Q. 21. Do you agree that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

A. 21. Two-part question:

Part 1. ALTO agrees that the transparency obligations outlined above (and set out in the Draft Decision Instrument at Appendix 4) should be imposed on Eircom.

Part 2. ALTO makes no remark in this regard.

Q. 22. Do you agree that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all

relevant factual or other evidence supporting your position.

A. 22. – Two-part Answer:

Part 1. ALTO agrees that, insofar as the LLVA market is concerned, Eircom should be subject to an obligation to operate and maintain a cost accounting system and that it should operate and maintain such cost accounting system in the manner and format specified under ComReg Decision D08/10.

Part 2. ALTO considers that Eircom should provide Current Cost Accounts as well as Historic Cost Accounts given the important of accounting accuracy and CCA provides a present day valuation.

Q. 23 Do you agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

A. 23. We agree that an obligation not to show undue preference to specific end users as described above (and in the Draft Decision Instrument in Appendix 3) should be imposed on Eircom. However we would add that this would be ineffective without very strong transparency regulation such as recently consulted by ComReg in the NGA remedies consultation 2012. We would urge ComReg to transpose the NGA transparency proposal into this consultation.

Q. 24. Do you agree with ComReg's draft Decision Instrument at Appendix 3? Do you agree with ComReg's Definitions and Interpretations as set out in the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments

refer.

A. 24. ALTO agrees with ComReg's Draft Decision Instrument at Appendix 3.

ALTO agrees with aims of the remedies proposed, but there are problems with the effectiveness of the proposed remedies. ALTO considers the text of the draft remedies proposed in the Draft Decision of 12/117, to be dated and not aligning with more modern and robust remedies issued by ComReg in its recent decisions such as WBA, WPNIA and recently consulted on for NGA.

ALTO submits that compliance with non-discrimination conditions is virtually impossible to detect without associated strong transparency remedies, hence the non-discrimination text in 07/61 is ineffective when considering the light transparency regulation proposed in clause 7 of the draft decision.

ALTO proposes that ComReg should review its recent NGA text for a far more effective and robust remedy.

We note the continuation notice at 12.1 of the Draft Decision triggers remedy text that is now five years old and out of date. As highlighted in the bullet above we consider ComReg should update the remedies in line its current remedy text to make the remedy effective in the modern world.

ALTO notes that the continuation notice at 12.1 of the Draft Decision does not address the update in retail minus pricing, i.e., the retail minus margin has changed from 10% to 14%.

Q. 25 Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

A. 25. ALTO agrees with ComReg's preliminary conclusions set out in the Regulatory Impact Assessment.

Q. 26 Do you believe that ComReg's draft Decision Instrument set out above is, from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regard to the matters proposed therein? Please explain the reasons for your answer, clearly indicating the relevant section numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

A. 26. ALTO believes that ComReg's Draft Decision Instrument is sufficiently detailed from a legal, technical and practical perspective. Further, ALTO remarks that it is clear and precise with regard to the matters proposed therein.

ALTO

25th January 2013