Commission for
Communications Regulation

ComReg 11/72:

Further specification of certain price control obligations in the markets of Retail Fixed Narrowband Access and Wholesale Physical Network Infrastructure Access

Submissions to Consultation 11/72

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alto

alternative operators in the communications market

Consultation and Draft Directions: Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, WPNIA & WBA - Ref: 11/72

Submission By ALTO

Date: December 16th 2011

ALTO is pleased to respond to the Consultation and Draft Directions: Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access – WPNIA, and Wholesale Broadband Access – WBA.

ALTO welcomes this opportunity to comment on this wide ranging and complex consultation and would like to make the following general comments before addressing the questions in detail.

The proposed changes in the draft Decision are small in number; however, we consider they potentially have a huge impact on the market as they relax the regulatory rules for eircom to potentially alter the price differentials between the retail and wholesale market primarily for eircom's benefit.

ALTO is also concerned the new processes could allow eircom to manipulate and capture ComReg to eircom's benefit.

The inclusion of the discussion to alter the underlining Local Loop Unbundled – LLU, access costs further destabilises market pricing and we consider further consultations will be required as discussed later to address the market information that will be required to propose such a change.

Preliminary Remarks

ALTO remarks below in four key specific areas that we would like ComReg to consider carefully.

Geographic deregulation

ALTO is surprised the proposals are seeking to relax the regulation on eircom in the absence of market data. We are aware that eircom maintains a sustained dominant market share in the national fixed voice and broadband market, however no market information is provided by ComReg either in the quarterly market publications or in this consultation to support the proposal to introduce local markets, indeed we are not aware of ComReg going through the market review process to determine local markets. In the absence of such information we cannot make a considered judgement in the issue of geographic de-regulation hence there is no grounds from this consultation to justify a change.

****ALTO considers geographic deregulation completely unsuitable to the Irish Communications market at this time. ****

ULMP as a price reference point

ALTO is concerned that ComReg assumes in its analysis that the LLU access seekers have migrated their customers to the Unbundled Local Metallic Path – ULMP, service. To date the majority of LLU lines are on the Line Share product and the price of migration (at 15 Euro per line) is a significant barrier to moving customers to ULMP.

As such, a high barrier exists for access seekers to benefit from ULMP services and its prices, it would be totally unreasonable to allow eircom to use the ULMP as a reference without eircom having to pay the total cost of migrating to ULMP (i.e., the migration fee, the management fees, etc.) as well as the considerable time to make such happen.

ALTO is strongly of the view that a level playing field must exist before ComReg could even consider allowing eircom to reference the ULMP prices – this has not happened.

Mobile Broadband

ALTO considers the inclusion mobile broadband in the market share analysis of what is the fixed broadband market to be unreasonable as the products are fundamentally different in service features and not truly substitutive.

The eircom Wholesale Reform Agenda

eircom Wholesale Reform – the consultation in clause 9.21 makes reference to the current eircom consultation for its wholesale reform and whilst we welcome the initiative for eircom to reform its practices and culture. ALTO considers that such reforms should only be judged after the improvements have been in experienced for at least two years.

It is common case that ALTO members, while engaging with the eircom Wholesale Reform agenda, deem it to be nothing more than a box ticking exercise, designed by senior management and external consultants to exhibit a form of consultation with industry. eircom Wholesale has lost some pretty key exponents from its team in recent months and while we must embrace change, change should not come at a price to existing legacy products.

ComReg should carry out proper and wholly independent consultation into any reforms, not by those who may propose reforms that effectually achieve nothing for Wholesale customers and new entrants.

ALTO does not consider the governance arrangements put to industry to be adequate given the state of the market and indeed the debt-laden state of eircom at this time. Any question of a telecoms adjudicator model is not something that ALTO believes is appropriate for the Irish market and to the Irish legal and regulatory frameworks, such as they are.

View of the two draft decisions

To provide focus to the executable part of the consultation the two regulatory changes proposed by ComReg are discussed in this section, with further detail discussed in our responses to the detailed ComReg questions.

Modified Net Revenue Test - Draft modification to Decision D07/61

ALTO is concerned about the changes to the Net Revenue Test by proposed by ComReg as we consider they solely benefit eircom at the risk to other operators using eircom's wholesale services, i.e., In our view the changes allow eircom the ability to reduce its retail bundles pricing whilst maintaining its wholesale pricing leading to a potential price squeeze on its wholesale customers. Given past experience we consider eircom a reluctant wholesaler that adds to the risk of this proposal.

ALTO can understand the drive for eircom Retail to lower its prices but such should not cause a price/margin squeezing to eircom wholesale customers. We observe eircom Wholesale has made no proposals or effort to voluntarily reduce its wholesale rental prices to assist this process that is a concern and suggests this all about benefiting eircom Retail.

In reviewing the market information supplied in the consultation, combined with the ComReg quarterly reports, we conclude eircom at the national level still hold a dominant position in the Voice and broadband market, i.e., at the National level there is no supporting market justification for the relaxation of the Net Revenue Test at this time.

The consultation does not include local market information or even urban market information hence it is not possible for us to evaluate the true impact the cable industry is having on eircom. Given the lack of local or urban marketing information, there is insufficient transparency and justification to make the proposed amendment to the Net Revenue Test at this time for local/urban areas.

ALTO would also like to make the following comments.

Whilst reserving our position above we consider the following comments may assist ComReg in its review.

- At the access/wholesale layer ComReg discusses reviewing whether an exchange should be based on a higher density of lines (larger exchange), however further discussion is required as to what triggers the decision to reclassify and re-price the access cost. We consider a specific consultation will be needed which develops the trigger mechanism for such a change. We are opposed to a sunset clause as the timing for migration is dependent on a number of inputs some of which are controlled by eircom, i.e., migration costs and time.

- With regards to the Net Revenue test we appreciate ComReg is trying to prevent the manipulation of the basket approach and we consider the two stage process helpful provided the ability for eircom to manipulate the 'basket' is prevented i.e. low volume high cost products should not subsidise for under priced high volume popular products.

- We have a concern that the Net Revenue Test appears to only apply pre- and just post product launch and not later. We consider that the test should be repeated twice a year every year at a specified times as input costs change over time, including price increases, and a scheduled test is necessary for on-going compliance. Hence we consider a new ongoing scheduled testing element needs to be added to the Net Revenue Test.

- Lastly, we are concerned (as mentioned above) that eircom could 'capture' ComReg's ability to issue stop notices as the proposal allows eircom to justify its position very late in the process, hence it would be relatively easy in our view for eircom to provide answers that drag the issue out whilst they continue to actively sell the offending product. We don't see why the justification of their behaviour

cannot be brought much earlier within the 10 week window. We don't agree to the window being extended as it just allows the problem to continue.
Our view is the change of Net Revenue Test is not fully justified and the test should not be eased at this time.

New Margin/Price Squeeze Test - Draft modification to Decision D05/10

Subject to the issue discussed in the second paragraph we agree with ComReg's proposal to add a new Margin Squeeze test through this consultation to D05/10 and agree with the proposal in clauses 4.1 and 4.2 of the Draft Decision within Annex A of the consultation. We consider these measures are required *ex ante* to prevent eircom from abusing its vertical integration and dominance in the various regulatory component products and also its ability to leverage its dominance into other products such as VoIP.

We agree the Reasonably Efficient Operator – REO, test is appropriate as other providers do not have the same economies of scale and scope as eircom in the key regulated input components and to move to the Equally Efficient Operator would positively discriminate towards eircom through its lower internal costs in these markets.

Our key concern about the proposal is the potential referencing of the ULMP price which we consider inappropriate as ULMP is not widely used by the industry due to the high migration costs (circa 15 Euro per line) charged by eircom.

In conclusion

ALTO supports ComReg's proposal for the new Margin Squeeze Test using the Reasonably Efficient Operator Model, but we don't agree with using the ULMP as the reference price whilst eircom maintain such a high barrier for industry to move to this product. In the event that the barrier is reduced, the exact same parameters, costs and delays should be built into any ‘WNI’ test of eircom’s input costs.

Response to Consultation Questions:

Q.1. Do you agree or disagree with the proposals / preliminary views expressed by ComReg in relation to possible revisions to the net revenue test? Do you have any views on the matters ComReg seeks further input on in the above? Please give a detailed response with supporting data where appropriate to support your view.

A. 1. ALTO generally agrees with the proposals / preliminary views expressed by ComReg in relation to possible revisions to the net revenue test but would like to make the following comments:

In relation to Clause 4.25 – ALTO’s concern with the removal of the product-by-product approach is that the test ultimately becomes a ‘basket’ test and such can be manipulated for a key product to create a squeeze whilst still passing the test. It is not fully clear that the 2-stage process avoids the ‘basket’ problem. We are of the view all products should pass the test otherwise the test can be gamed.

In relation to Clause 4.41 – ALTO accepts the principle that future price changes could be factored to the pricing model provided they are publicised openly at the same time. However, we don’t agree that eircom can use its own internal pricing knowledge until such a time as the price has been formally notified and fully approved by ComReg. Forward looking ‘forecast’ pricing – we remain concerned that eircom could take an over optimistic view of future revenues and consider that ComReg should continue to carry out stringent sensitivity checks as part of the Net Revenue Test – this will become more prevalent when Next Generation Access –

NGA, commences.[*]

Q. 2. In defining the Larger Exchange Area where a different wholesale input may be allowed, what area(s) of Figure 4 do you believe should be included in the Larger Exchange Area? Do you agree or disagree with the proposed use of a weighted average wholesale input in the net revenue test in the Larger Exchange Area? When / what area(s) of Figure 4 do you consider it would be appropriate for eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area? Please give a detailed response with supporting data where appropriate to support your view.

A. 2. **This question is addressed in three parts.**

Part 1 – Area to be included in the Larger Exchange Area

ComReg has already established the principle of a different cost base for the exchanges of the greater than 2,500 lines in a previous decision and the logic follows that the principle could be extended to larger exchanges using a cost based approach. We are concerned that we do not have any indication of new likely LLU price in area 1 of figure 4 of the consultation and whether the reduction would be equivalent to the price reductions further down the ladder of investment. We are of the view that a figure of €6 per month line rental would be more appropriate given repair is charged separately. If the differentials were to be reduced, then this would have the effect of squeezing both LLU providers and their downstream business and customers for the benefit of eircom contrary to ComReg's obligations pursuant the 2002 Act.

This consultation does not provide a view of the growth of competition in the urban areas associated with Exchange area one and we don't know whether the issue

[*] Despite much noise relating to NGA – Nothing has actually happened in the Irish Market, save for a pilot scheme which ultimately has servered as a laborotory for eircom to test solutions. We remain

ComReg is trying to address is limited to some areas or many. At national level we estimate that other competitors have a market share of less than 6% in the fixed voice and broadband market, hence it is surprising that eircom need such major regulatory relief (that may be granted to the detriment of current new entrant's businesses).

Prior to agreeing any adjustment ALTO would need to see the market shares in the various locations as it would not be proportionate to make such a wide ranging change based on only a small number of locations. This information has not yet been supplied.

Part 2 - Do you agree or disagree with the proposed use of a weighted average wholesale input in the net revenue test in the Larger Exchange Area?

ALTO broadly agrees with the sliding scale proposal for the areas where LLU exist, i.e., this price should only be averaged over LLU areas. Our main concern is that the industry has not yet moved to ULMP and we would thus expect the reference weighted average price to reflect the Line Share and WLR price rather than the ULMP price at this time. Hence the figure should be much closer to the €29.42 price in the table of Clause 5.20 that the €28.39 being proposed in Clause 5.23.

Migrations – we note that ComReg does not consider the cost of migrating from Line Share to ULMP and this should clearly be added to the costs of providing ULMP for LLU access seekers. As eircom do not experience this cost it would be unreasonable to force it on other operators whilst not doing the same for eircom.

ALTO fully appreciates that ComReg previously raised the possibility of incentivising through the industry to migrate from Line Share to ULMP through a sunset regulation, however to date there has been no migration. Given eircom's

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generally without feasible NGA in Ireland.

history, motive and ability to frustrate LLU operators, a sunset approach to move industry would be wholly inappropriate in Ireland.

Alternative migration strategy

Given the significant barrier to migrating from line share to ULMP, i.e., €15 per individual line, ALTO has sought to establish cheaper soft migration service from eircom. Initially eircom responded to this request in an unhelpful way where it appeared to us that we had to ask the precise question but failed to obtain what we considered a justified answer. Simple uses of the Internet searching for eircom switch vendors disclosed the strong possibility eircom's switches were able to meet our request hence the initial vague eircom answers were not believed.

Some six months later industry received a more mature answer from eircom detailing discussions with their switch vendors in sufficient detail to be believable. Ultimately it was considered uneconomic to proceed but a lot of time was wasted. We are now pursuing a new approach and eircom expect to deliver a solution in the summer of 2012 although we do not yet have pricing or a process.

Part 3 - When / what area(s) of Figure 4 do you consider it would be appropriate for eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area

It is ALTO's view that eircom should only be allowed to use figure 4 LLU+ on a strict equivalence basis as for the following reasons:

- LLU is the product the other operators are using and LLU+ should relate to the same product for equivalence and proportionality as to do otherwise discriminates towards eircom.

- According to the WPNIA decision eircom are supposed to consume LLU and so eircom should be subject to the same processes, delay's and additional costs, such as the cost of repair that LLU provider's experience. To use strict equivalence will incentivise eircom to cost correctly otherwise they unfairly benefit.

- The current eircom bitstream products uses the same network configuration as LLU line Share (its exactly the same) to the DSLAM and SB-WLR/PSTN line card, so it is appropriate to use the Line Share Model for the weighed average approach for eircom bitstream discussed early. To use ULMP for bitstream would be completely wrong, discriminator and disproportionate as bitstream is the same as line share.

- The possible introduction of a naked DSL service (eircom have postponed launching this until they complete a further review) would see eircom providing a broadband only solution over the copper service. Therefore, there would not be a voice service. The original pilot eircom Naked DSL proposal started with a solution supporting an active WLR card with the voice disabled but given eircom have postponed their launch we are now unclear what eircom are proposing to offer and how it is to be configured.

Q. 3. Do you agree or disagree with the proposed revised net revenue test? Please give a detailed response with supporting data where appropriate to support your view.

A. 3. We have the following concerns regarding the proposed revised net revenue test but have the following concerns:

- No market evidence has been provided by ComReg as to the level of competition and the materiality of the issues and the need for a change to the test – i.e., there is a lack of transparency as to the need for the change. We therefore consider there is unreasonable justification to make this change at this time.

- ALTO is concerned that the wider ‘basket’ test will allow eircom to ‘game’ the process through using higher value products to circumvent higher volume products.
- ALTO’s view is the current test was working well and we don’t see any need to change it.

Q. 4. Do you agree or disagree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access? Please explain your response and provide detailed information to support your view.

A. 4. ALTO agrees with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access. ALTO notes however that during the original dispute that brought about these rules it took some six months for ComReg to close down eircom’s activity, during which time, based on the evidence we had at the time, damage had been done to the market.

ALTO considers that eircom has the motive, the ability and in our view past behaviour that suggests pre-notification and pre-clearance is essential.

Q. 5. Do you agree or disagree that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that eircom should modify / withdraw such bundle within twelve weeks? Please explain your response and provide detailed information to support your view.

A. 5. ALTO agrees that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that eircom should modify / withdraw such bundle within twelve weeks provided the service is stopped until eircom fix the problem, rather than allowing eircom to tactically drag out ComReg’s decision to stop selling.

ALTO is very concerned that eircom could abuse the current and proposed system by offering a non-compliant product during a key sales period such as the run up to Christmas and stall ComReg stopping sales through tactical changes to the product effectively allowing the abuse to continue.

ALTO's view is that if ComReg says the activity should stop, it should stop until the issue is resolved rather than eircom stringing out a stop notice for tactical gain.

Q. 6. Do you agree or disagree with ComReg's proposed REO test to minimise the risk of a margin/price squeeze to ULMP? Please explain your response.

A. 6. While ALTO acknowledges the logic of ComReg's proposal there is a fundamental problem to be overcome before this can be considered and that is the majority of LLU lines don't use ULMP as a service today. If ComReg is to apply a test against a product not widely used will in our view seriously margin squeeze Line Share and potentially foreclose that market. The eircom price for migrating customers from Line Share at €30 is far too high. Unfortunately there are problems with bulk migrating customers from Line Share to ULMP due to the re-organisation of the customers wiring, hence circuits have to be managed individually.

Therefore ALTO certainly cannot agree to ULMP being used as a reference point for the Net Revenue test until such a time ULMP is widely used. In the foreseeable future, the or any test should be referenced to the Line Share/WLR pricing. We blame eircom for this situation through years of obfuscation, over two years trying to get migration products at all, LLU prices that were amongst the highest in Europe, etc. and now eircom should assist the industry through lower migration costs.

Use of the REO model

Notwithstanding our issue with the high price of migrating lines from Line Share to ULMP, we agree with the concept of using a reasonably efficient operator in the margin test, as we cannot achieve the scale of economies, scale, scope and the externalities of eircom in Ireland.

However, in saying that ALTO considers the test should not necessarily be against the ULMP product until such a time the LLU access seekers are widely using ULMP or another product with the same characteristics and prices as ULMP.

Conclusion

ALTO's view is that the margin test based on the REO model should be based on the actual products used by LLU access seekers and should include the cost of migration.

Q. 7. In your opinion, how should the cost of the network be calculated for setting the Wholesale Network Input ("WNI") for the purposes of the proposed WPNIA margin/price squeeze test to minimise the risk of a squeeze on ULMP? Please explain your response.

A. 7. We agree with ComReg on using a cost stack approach to evaluate the WNI for the proposed WPNIA margin/price squeeze to minimise the risk of a squeeze on the services used by the LLU access seekers. As above the migration to ULMP has not happened hence the current Wholesale Network Input ("WNI") should be used. Please also see our response question 6 above.

Q. 8. Do you believe that the existing obligation not to margin/price squeeze in WBA should be further specified to include passing a margin squeeze test for bundles that include WBA? Do you agree or disagree that such a margin squeeze test should be similar to the proposed revised net revenue test in the Retail Fixed

Narrowband Access markets? Please explain your response.

A. 8. ALTO believes that the existing obligation not to margin/price squeeze in WBA should be further specified to include passing a margin squeeze test for bundles that include WBA. ALTO agrees that such a margin squeeze test should be similar to the proposed revised net revenue test in the Retail Fixed Narrowband Access markets.

Q. 9. Do you believe that the D01/06 price control should be amended from SEO to EEO? Please support your view with relevant data and evidence. If you believe it should remain at SEO, when do you believe it might be appropriate to use EEO? Please support your view with relevant data and evidence.

A. 9. We agree that the existing price control should be continued and we believe that the D01/06 price control should not be amended from SEO to EEO. In our view figure 9 of the Consultation is misleading as mobile broadband is not the same product as fixed broadband (significant limitations in download speeds and consistent data throughput). Additionally, further work is required to understand what constitutes a mobile broadband subscription given broadband Sims can be acquired very cheaply and which can be disposed of with no cost after a short period of use – such as a holiday in Ireland. Removing mobile broadband highlights that the cable broadband share of the fixed access market is still relatively small at circa 22% of the broadband market and only 6% of the combined mobile/broadband market in Ireland. eircom's market share stands at 72% of the fixed voice/broadband market.

Clearly eircom's economy of scale, scope, externalities and ubiquitous network (eircom's network coverage is a lot larger than other operators) means it is not reasonable to apply an EEO test against other operators in the market for the foreseeable future.

Common sense and simple logic would suggest that operators would have equally efficient costs when they are of equal market share; hence our view is the test should change from SEO to EEO when the market shares are comparable and not before. To do otherwise hands eircom a discriminatory advantage that would be inappropriate for a regulator and for which an appeal would be warranted. eircom has sustained a persistently dominant retail market share in Ireland demonstrating that regulation has not fully worked and ComReg should not be handing eircom further advantages such as the EEO test at this time.

ALTO would also like to comment separately to the ComReg comment in clause 9.21 of the consultation. ComReg states:

"ComReg believes that eircom's recent wholesale reform announcements should ensure that OAOs are availing of wholesale products on a fully equivalent basis and without discrimination which should encourage OAOs to gain market share in 2012." (Italics added)

ALTO is justifiably highly sceptical of eircom's motives for its reform announcement and believe it has far more to do with potential investors in eircom than changing the systemic poor behaviour eircom has demonstrated towards its wholesale customers over many years. We simply don't believe eircom and we continue to observe poor behaviour such as during major bids, which gives us no confidence of any change, indeed some aspects are worse in our view. We therefore consider ComReg should wait at least two years to determine if eircom's actions demonstrate a change in behaviour before making any assumptions as to the benefit to industry.

Q. 10. Do you agree or disagree with ComReg's proposed floors for Naked WBA DSL to minimise the risk of a margin/price squeeze to WPNIA? Please explain your response.

A. 10. ALTO agrees that ComReg should regulate the price floor for Naked WBA

DSL to minimise the risk of a margin/price squeeze to WPNIA, however, as discussed in questions **2** and **6** we do not agree ULMP should form the base unless eircom are actually using essentially the same product. For example it will cost LLU access seekers €30 Euros to migrate each individual line to ULMP as co-ordination will be required with the customer to alter the internal wiring in the customer's premises. As eircom's bitstream product is configured exactly the same at the DSLAM we assume eircom will have to absorb the 30 Euro migration fee also to use ULMP. Additionally eircom should endure the same processes, delays, faults and significant management fees in migrating its base to Naked DSL. i.e., ULMP is only part of the real cost.

Soft migration

It is not yet clear to the industry as to how eircom will offer Naked DSL (if at all over copper) as they have postponed their launch subject to further review. One consideration that has already been explored is that eircom simply disable the WLR line card however we have already been informed this is uneconomic. The alterative is that the WLR card is left in situ semi-active however, eircom have not yet provided any indicative view of what leaving the line card semi-active means for pricing. Hence for eircom to achieve naked DSL they have only two options – i.e., either migrate from what is effectively line share at €15 per line or they have to have a very low/almost zero price for a semi-active WLR line card. If a new option exists at a low price the industry would welcome the information.

Conclusion

ALTO agrees to a price floor that fully recognises the costs, including the migration costs of moving to ULMP.

Q. 11. Are there any relevant issues that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate

A. 11. Per our earlier responses, we consider the following should be considered in ComReg analysis:

1. That the LLU access seekers have not yet migrated their lines to ULMP hence it is inappropriate to use ULMP as a reference price at this time;

2. The cost of migration should be built into the floor price for both existing services and naked DSL services. For Naked DSL services, the cost of Number Portability should also be factored into the cost.

Q. 12. Do you believe that the draft text of the proposed directions is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A. 12. We would like to offer the following comments and one question:

1. Is the change in the Regulatory Framework Directive covered?

Draft Direction in Relation to Decision D07/61

2. In relation to Clause 4.4 – ALTO is concerned that the draft direction text which will form the legal basis allows for a level of interpretation if the test fails and such will allow eircom to bring extreme pressure on ComReg that their view is better than that of ComReg. We consider the test should be black or white rather than the proposed 'grey' approach.

3. In relation to Clauses 4.10 and 4.11 – ALTO considers the approach proposed in the draft direction allows eircom to game ComReg. For example eircom could wait until the 11th week before presenting ComReg with a potential

solution. Our view is eircom should reasonably be aware of a solution much earlier and could thus game ComReg by waiting to the 11th week and then dragging the ComReg decision for a far longer period whilst a solution is discussed. The longer the process runs, the greater the potential damage to the market. We proposed eircom should be required to provide their prospective solution at six weeks and the whole process concluded by the 10th week. To support this view, ComReg only give the industry six weeks to answer hugely complex data requests, hence why can't eircom propose a solution more quickly.

Draft Direction in Relation to Decision D05/10

4. No comments

Q. 13. Do you have any views on this draft Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

A.13. ALTO believes, and as discussed in our responses above, that ComReg are making a significant assumption that the LLU operators are using ULMP, which is not the case. ALTO considers that the migrations process and or new modified Soft Migration product needs further detailed consideration.

ALTO

16th December 2011

2: BT Communications Ireland Ltd

BT Communications Ireland Ltd ("BT") response to the ComReg consultation:

Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access:

Issue 1.1 16th December 2011

1.0 Introduction

We welcome this opportunity to comment on this wide ranging and complex consultation and would like to make the following general comments before addressing the questions in detail.

The changes proposed in the draft decision may be small in number; however, we consider they potentially have a huge impact on the market as they relax the regulatory rules for Eircom to potentially alter the price differentials between the retail and wholesale market primarily for Eircom's benefit. We are also concerned the new processes could allow Eircom to 'game' the process for their benefit.

We are concerned the outcome of ComReg relaxing the regulatory rules for Eircom to compete with UPC could have the consequence of foreclosing the LLU market in Ireland prior to it reaching critical mass.

The inclusion of the discussion to alter the underlining LLU access costs is an important and significant issue in its own right and whilst it is helpful for ComReg to discuss in this consultation we consider further consultations will be required to discuss how such a change would be triggered.

We also note key issues arise in this consultation such as the ULMP price reference could have been resolved if Eircom were functionally separated and we consider that ComReg should consider such an initiative as part of this review.

2. Structure of our Response

Given the wide ranging issues of this consultation and for clarity we have structured the response so that our response to the two regulatory decisions is highlighted followed by supporting discussion in the detailed responses.

- Section 3 - General Comments
- Section 4 - View of the two draft decisions
- Section 5 - Detailed response to the questions

3. General Comments

3.1 Geographic de-regulation

We are surprised the proposals are seeking to relax the regulation on Eircom in the absence of market data. We are aware that Eircom maintains a sustained dominant market share in the national fixed market, however no market information is provided by ComReg either in the quarterly market publications or in this consultation to support the proposal to introduce local markets, indeed we are not aware of ComReg going through the market review process to determine local markets. In the absence of such information we cannot make a considered judgement in the issue of geographic de-regulation hence there is no grounds from this consultation to justify such a change.

3.2 ULMP as a price reference point

We are concerned the consultation appears to assume the LLU access seekers have migrated their customers to the Unbundled Local Metallic Path (ULMP) service. To date the majority of LLU lines use the Line Share product and the price of migration (15 Euro per line) is a significant barrier to moving customers to ULMP. Our view is that until the price of the migration is significantly reduced, Eircom should not be using a reference price the industry cannot reasonably achieve. If and when Eircom are allowed to use the ULMP price as a reference, the costs and delays experienced by the other providers migrating to ULMP should be factored into that reference point.

3.3 Soft Migration

Over the past twelve months the industry has discussed the ability of a 'soft' migration process from Line Share to ULMP with number porting to overcome the problem above. A solution was requested by industry where the WLR card was to be completely disabled (not even line power available) however Eircom presented feedback from their vendors that proved this to be uneconomic. We still require ULMP as defined in the ULMP specification and we continue to seek a way for the migration with the barriers removed, i.e. lower price and no delays. A concern in reviewing this consultation and checking the Eircom price list is there does not appear to be a product price for Line Share to Glump which is the migration product actually required given the need to move the phone number.

A possibility that has recently emerged to speed up the migration process and to reduce the costs is that Eircom could deliver ULMP (with Number Portability) through a two step process, firstly a 'soft' electronic migration to a partly disabled WLR line card which would be very fast, and then later a bulk migration (removing the jumper) to ULMP. The cost reduction would come from Eircom being able to co-ordinate a cheaper bulk migration to removing the physical jumpers.

3.4 Mobile Broadband

We consider the inclusion of mobile broadband in the market share analysis of what is the fixed broadband market unreasonable as the products are fundamentally different in service characteristics and not truly substitutive.

3.5 Eircom Wholesale Reform

The consultation in clause 9.21 makes reference to the current Eircom consultation for its wholesale reform and whilst we welcome the initiative for Eircom to reform its practices and culture, we consider such should be judged after the improvements have been experienced for at least two years.

4.0 View of the two draft decisions

To provide focus to the executable part of the consultation the two regulatory changes proposed by ComReg are discussed in this section, with further detail discussed in our responses to the detailed ComReg questions.

4.1 Modified Net Revenue Test - Draft modification to Decision D07/61

We are concerned about the changes to the Net Revenue Test proposed by ComReg as we consider they solely benefit Eircom at the risk to Eircom's wholesale customers. I.e. In our view the changes allow Eircom the ability to reduce its retail bundles pricing whilst maintaining its wholesale pricing leading to a potential price squeeze on its wholesale customers. Given past experience we consider Eircom a reluctant wholesaler which adds to the risk of this proposal.

We can understand the drive for Eircom Retail to lower its prices but such should not cause a price/margin squeezing to Eircom wholesale customers. We observe Eircom Wholesale has made no proposals or effort to voluntarily reduce its wholesale rental prices to assist this process which is a concern and suggests this all about benefiting Eircom Retail.

In reviewing the market information supplied in the consultation, combined with the ComReg quarterly reports, we conclude Eircom at the national level still hold a dominant position in the fixed market. I.e. at the National level there is no supporting market justification for the relaxation of the Net Revenue Test at this time.

The change proposed by ComReg has the potential for a significant impact on the market therefore the justification for the change should be proportionate to the impact. In our view the lack of local/urban market information provides insufficient transparency and justification to make the proposed amendment to the Net Revenue Test at this time for local/urban areas. We would also like to make the following comments.

Whilst reserving our position above we consider the following comments may assist ComReg in its review.

- At the access/wholesale layer ComReg discusses reviewing whether an llu exchange pricing classification should be based on a higher density of lines (larger exchange), however further discussion is required as to what triggers the decision to reclassify and re-price the access cost. We consider a specific consultation will be needed which develops the trigger mechanism for such a change. We are opposed to a 'sunset' clause providing a set time for migration as the transfer is dependent on a number of inputs some of which are controlled by Eircom, i.e. migration costs and time.
- With regards to the Net Revenue test we appreciate ComReg is trying to prevent the manipulation of the basket approach and we consider the two stage process helpful provided the ability for Eircom to manipulate the 'basket' is prevented i.e. low volume high cost products should not subsidise for under priced high volume popular products.
- We agree with the approach of using the weighted average approach between Line Share and ULMP input costs, however we would expect the average to be aligned with the Line Share price components at this time as such reflects the current reality.
- We have a concern the Net Revenue Test appears to only apply pre- and just post product launch and not later. We consider the test should be repeated twice a year every year at a specified times as input costs change over time, including price increases, and a scheduled test is necessary for on-going compliance. Hence we consider a new ongoing scheduled testing element needs to be added to the Net Revenue Test.
- Lastly, we are concerned that Eircom could 'game' ComReg's ability to issue stop notices as the proposal allows Eircom to justify its position very late in the process, hence it would be relatively easy in our view for Eircom to provide answers that drag the issue out whilst they continue to actively sell the offending product. We don't see why the justification of their behaviour cannot be brought much earlier within the 10 week window. We don't agree to the window being extended as it just allows the problem to continue.

Our view is the change of Net Revenue Test is not fully justified and the test should not be eased at this time.

4.2 New Margin/Price Squeeze Test - Draft modification to Decision D05/10

Subject to the issue discussed in the second paragraph we agree with ComReg's proposal to add a new Margin Squeeze test through this consultation to D05/10 and agree with the proposal in clauses 4.1 and 4.2 of the Draft Decision within Annex A of the consultation. We consider these measures are required exAnte to prevent Eircom from abusing its vertical integration and dominance in the various regulatory component products and also its ability to leverage its dominance into other products such as VoIP. We agree the Reasonably Efficient Operator (REO) test is appropriate as other providers do not have the same economies of scale and scope as Eircom in the key regulated input components and to move to the Equally Efficient Operator would discriminate in favour of Eircom through its lower internal costs in these markets.

Our key concern about the proposal is the potential referencing of the ULMP price which we consider inappropriate as ULMP is not widely used by the industry due to the high migration costs (circa 15 Euro per line) charged by Eircom.

In conclusion

We support the ComReg proposal for the new Margin Squeeze Test using the Reasonably Efficient Operator Model, but we don't agree with using the ULMP as the reference price whilst Eircom maintain such a high barrier for industry to move to this product. In the event that the barrier is reduced, the exact same parameters, costs and delays should be built into any 'WNI 'test of Eircom's input costs.

5.0 Response to the Detailed Questions

Q.1. Do you agree or disagree with the proposals / preliminary views expressed by ComReg in relation to possible revisions to the net revenue test? Do you have any views on the matters ComReg seeks further input on in the above? Please give a detailed response with supporting data where appropriate to support your view.

A.1. We would like to make the following comments:

- Market Data and Transparency – We consider the market data at the National Level does not support the case for changing the Net Revenue Test as UPC the cable operator still hold sub 10% of the national fixed market whilst Eircom maintain their dominant position at 58% of the fixed market. Although the consultation implies that UPCs market share is more focused towards certain local/urban areas no evidence is provided. Hence we don't know whether they have a strong position in one urban area or many, and how many, and what percentage market share is being achieved.

  As the proposal to modify the Net Revenue Test potentially has a significant impact on the Eircom wholesale prices and the industry, a strong justification is required to relax the rules. The lack of data undermines the justification and thus the case for relaxing the test. I.e. There a lack of transparency supporting this decision.

  Without prejudice to our above view:

- Ref clause 4.25 – Our concern with the removal of the product-by-product approach is that the test ultimately becomes a 'basket' test and such can be manipulated for a key product to create a squeeze whilst still passing the test. We appreciate the 2nd stage process should avoid the 'basket' problem but would like further safeguards to be adopted.
- Ref clause 4.41 – We accept the principle that future price changes could be factored to the pricing model provided they are publicised openly at the same time. However, we don't agree that Eircom can use its own internal pricing knowledge until such a time as the price has been formally notified and fully approved by ComReg.
- Forward looking 'forecast' pricing – we remain concerned that Eircom could take an over optimistic view of future revenues and consider that ComReg should continue to carry out

stringent sensitivity checks as part of the Net Revenue Test – this will become more prevalent when NGA commences.

- Scheduled testing – we note the testing appears to be pre-launch and for a few months after launch. We consider the tests should be repeated 6 monthly as product popularity changes over time and also input prices can go up as well as down, hence scheduled testing is required to ensure compliance is maintained on time.

Q. 2. In defining the Larger Exchange Area where a different wholesale input may be allowed, what area(s) of Figure 4 do you believe should be included in the Larger Exchange Area? Do you agree or disagree with the proposed use of a weighted average wholesale input in the net revenue test in the Larger Exchange Area? When / what area(s) of Figure 4 do you consider it would be appropriate for Eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area? Please give a detailed response with supporting data where appropriate to support your view.

A.2.

Part 1 – Area to be included in the Larger Exchange Area.
ComReg has already established the principle of a different cost base for the exchanges of greater than 2,500 lines in a previous decision and the logic follows that the principle could be extended to larger exchanges using a cost based approach although the trigger to make the change has not been established. We are concerned that we do not have any indication of new likely LLU price in area 1 of figure 4 of the consultation and whether the reduction would be equivalent to the price reductions further down the ladder of investment. We are of the view that a figure of €6 per month ULMP line rental would be more appropriate given repair is charged separately. If the retail to wholesale differentials are to be reduced such would squeeze both LLU providers and their downstream downstream customers for the benefit of Eircom contrary to ComReg's obligations pursuant the telecoms Act 2002.

The consultation does not provide a view of the growth of competition in the urban areas associated with Exchange area one and as discussed earlier we don't know whether the issue ComReg is trying to address is limited to some areas or many. At national level we estimate UPC have a market share of below 10% in the fixed market hence it is surprising that Eircom need such major regulatory relief.

Part 2 - Do you agree or disagree with the proposed use of a weighted average wholesale input in the net revenue test in the Larger Exchange Area?

We agree with the sliding scale proposal for the areas where LLU exist, (i.e. this price should only be averaged over LLU areas). Our main concern is that the industry has not yet moved to ULMP and we would thus expect the reference weighted average price to reflect the Line Share/WLR combined price rather than the ULMP price at this time. Hence the figure should be much closer to the €29.42 example of clause 5.20 than the €28.39 being proposed in clause 5.23.

Migrations – we note ComReg does not consider the cost of migrating from Line Share to ULMP and this should clearly be added to the costs of providing ULMP for LLU access seekers. As Eircom do not experience this cost it would be unreasonable to force it on other operators whilst not doing the same for Eircom. We also note that the current Access Reference Offer (ARO) price list does not have a migration charge for Line Share to Glump which is what the industry requires; hence we assume the migration pricing will include a further charge for Number Portability.

We appreciate ComReg previously raised the possibility of incentivising the industry to migrate from Line Share to ULMP through 'sunset' regulation – i.e. a regulatory clause setting a specific time to migrate, however to date there has been no migration from Line Share to ULMP. Given Eircom's history, motive and ability to frustrate LLU operators, a timed or 'sunset' approach to move industry would be wholly inappropriate in Ireland.

Alternative migration strategy
Given the significant barrier to migrating from line share to ULMP, i.e. €15 per individual line we have sought to establish cheaper 'soft' migration service from Eircom. Initially Eircom responded to this request in an unhelpful way however some six months later we received a more mature answer from Eircom detailing discussions with their switch vendors in sufficient detail to be believable. Ultimately it was considered uneconomic to proceed but a lot of time was wasted. We are now pursuing a new approach and Eircom expect to deliver a solution in the summer of 2012 although we do not yet have pricing or a process.

As discussed above in our General Comments, we are seeking a true ULMP solution and a two stage migration process maybe a better way forward as we are increasingly concerned Eircom will attempt to charge the industry for additional network components even though they were not requested or required.

Part 3 - When / what area(s) of Figure 4 do you consider it would be appropriate for Eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area

Eircom should only be allowed to use figure 4 LLU+ reference on a strict equivalence basis for the following reasons:

- According to the WPNIA decision Eircom are supposed to consume LLU and so Eircom should be subject to the same processes, delay's and additional costs, such as the cost of repair that LLU provider's experience. To use strict equivalence will incentivise Eircom to cost correctly otherwise they unfairly benefit.

- The current Eircom bitstream products uses the same network configuration as LLU line Share (it's the same configuration) to the DSLAM and the SB-WLR/PSTN line card, so it is appropriate to use the Line Share Model for the weighted average approach for Eircom bitstream. To use ULMP for bitstream would be completely wrong, discriminatory and disproportionate as bitstream is the same as line share. If Eircom are to use ULMP as the reference for naked DSL then they should be forced to migrate their physical service, at the same cost and delay, experienced by other operators to ULMP. Eircom should also be exposed to the out of tariff repair costs and the additional costs of test equipment required by the other operators.

- The possible introduction of a naked DSL service (Eircom have postponed launching this until they complete a further review) would see Eircom providing a broadband only solution over the copper service which may or may not include VoIP. I.e. there would not be a baseband voice service. The original pilot Eircom Naked DSL proposal started with a solution supporting an active WLR card with the voice aspects disabled but given Eircom have postponed their launch we are now unclear what Eircom are proposing to offer and how it is to be configured.

- We note that ComReg have said NGA is out of scope; however similar issues and the use of Sub-loop unbundling prices and procedures should apply for NGA.

Q. 3. Do you agree or disagree with the proposed revised net revenue test? Please give a detailed response with supporting data where appropriate to support your view.

A.3.
Please see our position in Section 4 clause 4.1 and also our response to question 1.

Q. 4. Do you agree or disagree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access? Please explain your response and provide detailed information to support your view. 64

A.4.
We agree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access. We note during the original dispute that brought about the application of the Net revenue Test it took some six months for ComReg to close down Eircom's activity, during which time, based on the evidence we collected at the time, the market was distorted. We consider Eircom has the motive, the ability and in our view past behaviour that suggests pre-notification and pre-clearance is essential.

Q. 5. Do you agree or disagree that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that Eircom should modify / withdraw such bundle within twelve weeks? Please explain your response and provide detailed information to support your view.

A.5.
We agree if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable Eircom should modify / withdraw such bundle within ten weeks provided the service is stopped until Eircom fix the problem, rather than allowing Eircom to tactically drag out ComReg's decision to stop selling.

We are concerned Eircom could abuse the current and proposed system by offering a non-compliant product during a key sales period such as the run up to Christmas and stall ComReg stopping sales through tactical changes to the product effectively allowing the abuse to continue.

We have two proposals; the first that Eircom should be required to respond very early within the specified period so the onus is on Eircom becoming compliant quickly rather than late where Eircom could drag the issue out for a longer period of time. We also consider that if ComReg says the activity should stop, it should stop until the issue is resolved rather than Eircom stringing out a stop notice for tactical gain.

Further we are of the view that the test should be repeated on a scheduled basis, say twice a year as the success of failure of a product can change with time, plus if Eircom is losing customers as this consultation appears to suggest, then we would expect their costs to be increasing (I.e. Volume over cost relationship changes). Scheduled testing would ensure ongoing compliance which is important to protect the industry from a Price/Margin Squeeze which is inadvertent or otherwise.

Q. 6. Do you agree or disagree with ComReg's proposed REO test to minimise the risk of a margin/price squeeze to ULMP? Please explain your response.

A.6.

We would like to respond to two issues that this question raises, the first of the margin squeeze to ULMP and secondly the use of the Reasonably Efficient Operator Model.

The ULMP Reference Point - Whilst we acknowledge the logic of ComReg's proposal for Eircom to use ULMP as a reference point, there is a fundamental problem to be overcome before this can be considered and that is the majority of LLU lines don't use ULMP as a service today and neither does Eircom use ULMP. Hence for ComReg to apply a test against a product not widely used will in our view have the impact of enabling a margin squeeze Line Share and potentially foreclose that market. The Eircom price for migrating customers from Line Share at €15 is too high.

Hence we cannot agree to ULMP being used as a reference point for the Net Revenue test until such a time ULMP is widely used and for the foreseeable future the test should be referenced to the Line Share/WLR pricing as Eircom bitstream uses the same inputs as Line Share today, namely SB-WLR line rental and Broadband Access. We blame Eircom for the current situation through years of delay as documented on the ComReg website, such as the industry spending over two years trying to achieve seamless migration to LLU and at least another year experiencing the Eircom arbitrary premium migration price before ComReg determined the premium should be removed.

As Eircom bitstream uses the same physical access network configuration as line share, all the additional costs of actually migrating, and the out of tariff repair charge should be factored into the reference point.

Use of the REO model - Notwithstanding our issue with the high price of migrating lines from Line Share to ULMP, we fully agree with the concept of using a reasonably efficient operator in the margin test as we cannot achieve the scale of economies, scale, scope and the externalities of Eircom in these markets in Ireland.

However we consider the test should not be referenced against the ULMP product until such a time the LLU access seekers are widely using ULMP and all the additional costs are factored into the test.

Conclusion

Our view is the margin test based on the REO model should be based on the actual products used by LLU access seekers and should include the cost of migration and out of tariff repair etc.

Q. 7. In your opinion, how should the cost of the network be calculated for setting the Wholesale Network Input ("WNI") for the purposes of the proposed WPNIA margin/price squeeze test to minimise the risk of a squeeze on ULMP? Please explain your response.

A.7

We agree with ComReg using a cost stack approach to evaluate the WNI for the proposed WPNIA margin/price squeeze to minimise the risk of a squeeze on the services used by the LLU access seekers. As above the migration to ULMP has not happened hence the current Wholesale Network Input ("WNI") should be used. I.e. Line Share with WLR. Please also see our response question 6 above.

Q. 8. Do you believe that the existing obligation not to margin/price squeeze in WBA should be further specified to include passing a margin squeeze test for bundles that include WBA? Do you agree or disagree that such a margin squeeze test should be similar to the proposed revised net revenue test in the Retail Fixed Narrowband Access markets? Please explain your response.

A.8.
We believe the existing obligation not to margin/price squeeze in WBA should be further specified to include passing a margin squeeze test for bundles that include WBA. We also agree that such a margin squeeze test should be similar to the existing net revenue test in the Retail Fixed Narrowband Access markets.

Our rationale for this position is we consider Eircom as a vertically integrated incumbent provider in the access, wholesale and retail markets is in a position where it has the motive and ability to create a margin squeeze against its wholesale customers and could potentially inadvertently create such a squeeze. Given the LLU access seekers are primarily using Line Share due to the high Eircom barriers for migrating to ULMP, such an action could foreclose the Line Share/WLR combined solution. For these reasons we consider the proposed exAnte regulation is required.

Q. 9. Do you believe that the D01/06 price control should be amended from SEO to EEO? Please support your view with relevant data and evidence. If you believe it should remain at SEO, when do you believe it might be appropriate to use EEO? Please support your view with relevant data and evidence.

A.9.
We agree that the existing price control should be continued and we believe that the D01/06 price control should <u>not</u> be amended from SEO to EEO.

Clearly Eircom's economy of scale, scope, externalities and ubiquitous network (Eircom's network coverage is a lot larger than UPCs) means it is not reasonable to apply an EEO test against UPC or other operators in the market for the foreseeable future.
Common sense and simple logic would suggest that operators will have equally efficient costs when they are of equal market share; hence our view is the test should change from SEO to EEO when the market shares are comparable and not before. To do otherwise hands Eircom a discriminatory advantage which would be inappropriate for a regulator and for which an appeal would be warranted. Eircom has sustained a persistently dominant retail market share in Ireland demonstrating that regulation has not fully succeeded and ComReg should not be handing Eircom further advantages such as the EEO test at this time.

Q. 10. Do you agree or disagree with ComReg's proposed floors for Naked WBA DSL to minimise the risk of a margin/price squeeze to WPNIA? Please explain your response.

A.10
We agree ComReg should regulate the price floor for Naked WBA DSL to minimise the risk of a margin/price squeeze to WPNIA, however, as discussed in our responses to earlier questions we do not agree ULMP should form the base unless Eircom are actually using essentially the same product and the industry has migrated to ULMP. For example it will cost LLU access seekers €15 Euros to migrate each individual line to ULMP and co-ordination will be required with the customer to alter

the internal wiring in the customer's premises. As Eircom's bitstream product is configured exactly the same at the DSLAM we assume Eircom will also have to absorb the 15 Euro migration fee also to use ULMP. Additionally Eircom should endure the same processes, delays, out of tariff fault charges and significant management fees in migrating its base to Naked DSL. I.e. ULMP is only part of the real cost.

Soft migration
It is not yet clear to the industry as to how Eircom will offer Naked DSL as they have postponed their launch subject to further review. One consideration that has already been explored is that Eircom simply disable the WLR line card however Eircom have informed us is uneconomic. The alterative is that the WLR card is left in situ semi-active however, Eircom have not yet provided any indicative view of the pricing implications of leaving the line card semi-active. Hence for Eircom to achieve naked DSL they have only two options – i.e. either migrate from what is effectively line share at €15 per line or they have to have a very low/almost zero price for a semi-active WLR line card. If a new option exists at a low price the industry would welcome the information.

Conclusion
We agree to a price floor that fully recognises the costs that an access has to experience, including the migration costs of moving to ULMP.

Q. 11. Are there any relevant issues that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate. 84

A.11.
As indicated in our response we consider the following should be considered in ComReg analysis.

1. That the LLU access seekers have not yet migrated their lines to ULMP hence it is inappropriate to use ULMP as a reference price at this time.
2. The cost of migration should be built into the floor price for both existing services and naked DSL services. For Naked DSL services, the cost of Number Portability and out of tariff repair should also be factored into the cost.

Q. 12. Do you believe that the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required. 89

A.12

We would like to offer the following comments:

1. Is the change in framework directive covered?

Draft Direction in Relation to Decision D07/61

Ref clause 4.4 – we are concerned that the draft direction text which will form the legal basis allows for a level of interpretation if the test fails and such will allow Eircom to bring extreme pressure on ComReg that their view is better than that of ComReg. We consider the test should be black or white rather than the proposed 'grey' approach.

4.10 And 4.11 – We consider the approach proposed in the draft direction allows Eircom to game ComReg. For example Eircom could wait until the 11th week before presenting ComReg with a potential solution. Our view is Eircom should reasonably be aware of a solution much earlier and could thus game ComReg by waiting to the 11th week and then dragging out the ComReg decision for a far longer period whilst a solution is discussed. The longer the process runs, the greater the potential damage to the market. We propose Eircom should be required to provide their prospective solution very early in the process and everything concluded by the 10th week. To support this view, ComReg only give the industry six weeks to answer hugely complex data requests, hence why can't Eircom propose a solution more quickly.

Draft Direction in Relation to Decision D05/10

2. No comments

Q. 13. Do you have any views on this draft Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

A.13.

As discussed in our responses above ComReg are making a significant assumption that the LLU operators are using ULMP which is not the case. We consider the migrations process and or a new modified Soft Migration product needs to be considered.

End

3: Eircom Group

eircom Ltd.

Response to ComReg Consultation and Draft Directions 11/72

"Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access:

Further specification of certain price control obligations in the markets of Retail Fixed Narrowband Access and Wholesale Physical Network Infrastructure Access"

16th December 2011

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EXECUTIVE SUMMARY

eircom welcomes the steps that ComReg has taken thus far to review the *ex ante* margin squeeze tests that currently apply to eircom. This consultation provides an opportunity to update and significantly improve the way in which these tests, which date back to 2008, are applied to eircom going forward. The current tests have tightly constrained eircom's pricing flexibility in ways that have become increasingly unsustainable and unreasonable in a dynamic marketplace of converged service offerings provided by an array of powerful platform- and service-based competitors.

Any *ex ante* margin squeeze test that is imposed on eircom should be designed to minimise the limits on eircom's ability to compete effectively in the provision of bundled services and packages, including those combining voice and broadband.

We therefore welcome ComReg's consultation and Draft Directions (Doc. 11/72) (the "Consultation Document") in a number of respects, including:

- On the approach to the Net Revenue Test ("NRT"):
  - to move to forward looking costs rather than using out of date historic costs,
  - to consider a portfolio approach, rather than a pure product by product approach,
  - to limit the number of portfolios to two, rather than have multiple portfolios,
  - to use Long Run Incremental Costs ("LRIC") for the retail costs for calls,
  - to maintain the position that all relevant revenue is included in the NRT,
  - to allow known changes to wholesale cost to be taken into account in the NRT,
  - to apply LRIC and, on a case-by-case basis, an Average Avoidable Costs ("AAC") approach for unregulated products, and
  - to maintain the current approach to customer lifetimes;
- On revising the appropriate Wholesale Network Input ("WNI") cost:
  - to consider the competitive context of a given bundle before determining whether it is in breach of the relevant regulations, and
  - to clarify the obligation regarding margin squeeze between WPNIA, WBA and SB-WLR.

However, ComReg's proposals will continue to impose retail pricing constraints on eircom that are unreasonable and disproportionate in the current competitive environment. We therefore urge ComReg to reconsider its position on several key issues, including the timing of the reforms. In particular:

- Product by product assessments, if warranted at all, should use avoidable costs for *all* inputs (lines, broadband and unregulated elements) -- not just the retail element of calls.
- The actual avoidable costs of an Equally Efficient Operator ("EEO") should be used for line rental, rather than effectively imposing the full retail price of line rental as the cost.
- There should be an immediate move to EEO avoidable cost for broadband in the product test, and to the Average Total Costs ("ATC") of an EEO in the portfolio tests.

- Realistic assumptions over the customer lifetime should be accepted: *e.g*. if several other EU NRAs have already imposed glidepaths for moving to a maximum 1c per minute mobile termination rate ("MTR") during 2012/3, then the test in Ireland could reasonably assume that ComReg will set similar levels. Forcing eircom to assume that the MTR will never reduce below 4c per minute over the lifetime of a bundle launched in 2012 is simply unreasonable.
- Tests applied after launch should not apply the same ATC as before launch as sunk costs should be disregarded.
- Although eircom accepts that the post-launch test will be applied on a month by month basis, allowances should be made for unexpected circumstances that are not expected to continue, and modest variances should be considered on an average basis over a six-month period or longer.
- ComReg should clarify how reasonably efficient operator ("REO") / similarly efficient operator ("SEO") costs are to be reconciled with eircom's regulatory accounts.
- ComReg should clarify that it is not proposing to regulate eMobile's retail prices when offered as part of a bundle under the revised NRT test.
- A full and fair competitive assessment should be undertaken by ComReg before a bundle is found to be in breach of the relevant obligations.
- LRIC, AAC or the stand-alone price for unregulated products should be applied when testing individual bundles, and LRIC+ should be considered only at the product group level (not at the portfolio level).
- ComReg should recognise that voicemail can be provided by other operators at a lower unit cost than eircom's wholesale service, and in light of the issues raised by the 14% retail-minus margin minimum imposed on line rental, eircom should be permitted to price bundled voicemail in regulated bundles at the actual cost to eircom.
- ComReg should accept logical arguments in support of the existence of retail efficiencies and allow for reasonable estimates to be factored into the test, even if the cost savings cannot be proved or quantified with scientific certainty.
- ComReg should relax the NRT test and procedures and apply a competitive assessment that takes into account all of the relevant facts and circumstances in cases where eircom needs to respond to a discounted OAO bundled offering.
- ComReg should reconsider the logic of ignoring past positive margin while taking any negative margin into account, and should note the inherent conflict with the idea that a promotion is reasonable if recovered over the customer's lifetime.
- The actual take-up of opt-in or discretionary promotions should be taken into account.
- ComReg should move to a self-certification regime, subject to inspection (rather than advance notification), with launch delayed for a maximum of 5 days after approval.
- A reasonable time should be allowed for the modification or withdrawal of non-compliant bundles.
- ComReg should clarify that Naked WBA cannot reasonably be considered to cause a margin squeeze in relation to SB-WLR.

These issues are discussed in greater detail in eircom's responses to ComReg's questions and proposals in the following sections.

GENERAL COMMENTS

1. Proportionality of an *ex ante* Margin Squeeze Test

The Consultation Document sets out an array of measures that could be implemented to provide eircom with a greater degree of pricing flexibility under a revised net revenue test. Some positive steps have been proposed for immediate implementation, which is a welcome development.

eircom is disappointed, however, that many of the improvements have been deferred, in some cases indefinitely. Moreover, in many cases the triggers proposed for the implementation of the proposed changes are either unspecified or are based on developments that are beyond eircom's control. Reform is needed as soon as possible and should not be unnecessarily delayed. Deferred implementation may be justifiable in some cases to allow for an orderly transition, but any such deferrals should be subject to reasonable triggers that are objectively verifiable and within eircom's control to deliver.

eircom is also disappointed that ComReg did not consider the costs and benefits of relying on its *ex post* competition law powers (an approach followed by regulators in other Member States) in the Consultation Document. The current and proposed *ex ante* tests entail a high degree of regulatory intervention and micromanagement, which is a cause for concern. The contemplated *ex ante* regulatory scheme is complex, which is a by-product of the need for the test to take account of the intense platform competition that eircom faces in the provision of retail broadband bundles in many areas of the country, as well as the rapidly declining demand for fixed voice lines (the putative basis for retail regulation of the bundles). In our view, the complexity of the proposed tests is a strong indication that imposing prescriptive *ex ante* formulae for the regulation of bundles is a suboptimal solution.

The proposed tests, even with the near-term adjustments that are contemplated by the Consultation Document, remain fairly inflexible and will continue to involve ComReg in the micromanagement of pricing decisions. This is particularly worrying at a time of increasing challenges in forecasting due to deteriorating economic conditions, uncertain customer demand, and the introduction of Next Generation Access ("NGA")-based bundles enabling new types of converged bundles (for example, involving IPTV).

eircom is particularly concerned that the rules developed for assessing bundles involving legacy services will be extended to cover NGA services (although the latter are expressly not covered by this consultation), without adequate consideration being given to the impact during and following the transition from legacy services. A holistic approach, giving full consideration to the impact on the pricing of bundles involving NGA services in the parallel consultations on NGA regulation, should be followed to ensure that a reasonable and proportionate margin squeeze test – *i.e.,* one that regulates no more than is necessary – is adopted.

A reasonable test affording eircom sufficient pricing flexibility as convergence accelerates will be critical to the viability of the business case underlying eircom's NGA deployment plan. eircom is already competing head-to-head with powerful platform competitors -- including a well financed and completely unregulated cable TV operator -- in providing voice and broadband packages using legacy access. As NGA is rolled out, eircom must have a fair chance to compete against bundled offerings provided by both platform-based and service-based competitors.

This is more than a refined debate about competing economic theories of regulation. A consequence of ComReg's persistence in using an array of detailed and intrusive controls is that eircom is inhibited both in the degree to which it can offer the keenest possible prices to its customers and in the innovation and flexibility it can bring to the structure and level of its charges. Pricing by competitors is rational and profit maximising. If the market leader's prices are inflated by regulation they offer a false price umbrella under which competitors can win share without being spurred as sharply as they might have been to innovate and price competitively. It is the consumer, and the economy, which bears the cost of this regulatory drag on the efficiency of the market.

eircom urges ComReg to start with first principles and consider whether complex and intrusive *ex ante* regulation in the form of the proposed NRT is reasonable, necessary and proportionate in today's marketplace and over the next two years, with the introduction of NGA and ultrafast broadband packages in the offing. If ComReg remains convinced that such a test is justified, it should consider whether the test requires further recalibration to reflect the fact that OAOs in Ireland can generally match eircom's retail scale and scope efficiencies (due to their ability to spread retail costs across adjacent product lines and multiple geographies), and therefore are in a position to replicate eircom's bundles.

2. The "Reasonably Efficient Operator" versus the "Equally Efficient Operator" Test

Many of the proposals contained in the Draft Directions rely on a cost standard that artificially inflates eircom's actual retail costs on the basis that eircom's competitors cannot match eircom's retail scale or scope efficiencies when providing similar services. If such an assumption was ever justified, it is no longer defensible today.

When evaluating actual or potential exclusion, a threshold issue is whether the test should be based on the costs of an EEO or a REO.[1] The REO test is based on the downstream costs of an efficient firm that is operating on a smaller scale than the incumbent, whereas the EEO test considers the incumbent's own downstream costs.

ComReg also uses an alternative to the REO test: the SEO test, which relates to the costs incurred by a firm that has the same cost curve as the incumbent, but operates at a lower scale. Conceptually it is similar to the REO test, except that it replaces "efficient costs" with the cost curve of the incumbent, which in theory could be efficient or inefficient.

The only time that the application of an EEO vs. REO/SEO standard matters is when a dominant or SMP firm's pricing passes an EEO test but fails a REO/SEO test. If the pricing passes on both approaches, or fails on both approaches, then there is no issue. However, if the pricing behaviour of the dominant firm fails a REO/SEO test but does not fail an EEO test, it means that the dominant firm's costs are lower than those of the competitor firm. Applying the REO/SEO standard would then require the dominant firm to change its price in order to accommodate a firm that is less efficient. This will lead to productive inefficiency and likely also higher prices to consumers. For this reason, the EEO test is generally preferred in competition law analysis. For the same reasons, the REO/SEO test should be used only exceptionally when applying *ex ante* regulatory remedies.

For example, there may be occasions where the static welfare loss associated with the REO/SEO standard (i.e. productive inefficiency and likely higher prices) is outweighed by expected dynamic efficiency gains. This would generally occur when a sector is newly opened to competition and the competitor firm is currently not cost efficient but, if given competitive headroom, would become efficient in the medium term. The increase

[1] The discussion that follows is based on the expert statement of Dr. Mike Walker of Charles River Associates, which was prepared for and submitted in the parallel consultation on NGA Regulation. Many of the issues addressed by Dr. Walker are equally relevant to legacy services. For convenience, Dr. Walker's statement is reproduced in its entirety in Annex 1.

in competition that this would engender may outweigh the short-run economic harm. Clearly, after more than a decade of competition from multiple, well financed multinational competitors participating in the marketplace, the continued application of an REO/EEO standard must be re-examined.

The above analysis implies that there are two necessary conditions that need to hold before the REO/SEO standard should be applied:

(1) There are competitor firms that are not currently as cost efficient as the incumbent but will become equally or more cost efficient as the incumbent if they are able to survive in the short run and achieve efficient scale in the medium term; and

(2) The increase in the number of efficient firms must have a positive effect on the competitive outcome for consumers in the medium and long term that outweighs the short run costs from higher prices to consumers.

The first condition gives rise to an empirical requirement for applying the REO/SEO test: there must be competitors who are not currently at scale but who will likely achieve scale if they are given competitive headroom. If competitors are already at scale, then they do not need to be supported via the REO/SEO standard. If they are not at scale and are not likely to achieve scale, then they should not be supported by the regulatory regime as this would lead to productive inefficiency. This condition does not imply that any sub-scale operator should be protected even if it could reach scale. If there are already enough other firms operating at scale, then it is not necessary and, indeed, productively inefficient, to offer regulatory protection to sub-scale firms.

The second condition also gives rise to an empirical requirement: protecting competitors *in the short run* so that they can become efficient in the medium term must have a positive impact on competitive outcomes. The consultation document fails to provide a reasonable justification for continuing to apply REO and SEO standards under the circumstances. In particular, ComReg has not shown that either of the necessary conditions for justifying a SEO (or REO) standard apply in the present circumstances. In particular, it has not been shown that the likely users of wholesale access are sub-scale insofar as their retail operations are concerned, since they will inevitably share resources (billing systems, CRM systems, etc.) with adjacent lines of business (mobile) and geographies (*e.g.,* the UK). ComReg also has failed to analyse whether any smaller competitors that may still be subscale have the potential to become scale operators in the near to medium term.

ComReg should consider the actual comparative scale of the likely access seekers at the retail level. The standard situation when considering issues relating to access to an incumbent's network is that the firm requiring access is smaller than the incumbent. That is not the situation in Ireland. The most likely NGA seekers are Vodafone, 02, BT and Sky. All of these companies are part of multinational corporations with extensive, centralised retail operations that are far larger than eircom's.

For example, Vodafone's Annual Report 2011 records revenues of £45.9bn and an adjusted operating profit of £11.8bn. It employed 83,900 people and operated in 26 countries. BT's Annual Report 2011 reported revenues of £20.1bn and an EBITDA of £5.9bn. BT employed 92,600 FTEs and operated in 170 countries. Telefonica (O2) had revenues of nearly €61bn and EBITDA of nearly €26bn in 2010. It employed 133,000 people, had nearly 288 million customers and was present in 25 countries. Sky had adjusted revenues in the 12 months to June 2011 of £6.597bn and an EBITDA of £1.405bn. It employed 16,500 people and had more than 10 million customers. In comparison, in the twelve months to June 2010, eircom revenues were €1.8bn, its adjusted EBITDA was €669m and it employs just over 7,000. One implication of this is that eircom's competitors can take advantage of economies of scope and scale at the retail level between their operations in Ireland and other countries in which they operate.

In summary, the REO and SEO tests should apply only during the early stages of market liberalisation as a protective measure enabling (truly) *new* entrants to gain scale and scope sufficient to compete with the incumbent. There is no justification for the continued application of these protectionist measures after more than a decade of full competition by multiple industry players that enjoy important strategic, financial and economic advantages over eircom. This includes substantial positions in the Irish mobile market and the subscription television market, which provide them with a substantial base from which to compete in the provision of converged bundles.

Failure to move to an EEO standard rewards inefficient entry, and protects inefficient entrants. This harms consumers and confers an unfair advantage on alternative platform providers (which do not rely on the incumbent's wholesale platform). eircom therefore urges ComReg immediately to apply the EEO across all NRT components (and the margin squeeze test for downstream regulated wholesale services) or, at the very latest, by the end of 2012.

3. Replicability

The principle behind the Net Revenue Test is that operators buying eircom's services should be able to replicate eircom's retail prices. This does not mean that every potential entrant, no matter how small, or no matter what market sub-segment they target, must be able to match eircom's retail prices. ComReg has invoked the "ladder of investment" and the objective of encouraging operators to build their own infrastructure. The ultimate aim is that end-users would have a choice of differentiated offerings, rather than identical offerings at marginally different prices. Over time, several[2] operators have invested in their own platforms in Ireland, each independent of eircom's network.

At section 3.20.1 of the Consultation Document, ComReg has listed as the first among several objectives the need for a properly considered decision to allow eircom to compete with "emergent" infrastructure competition to the benefit of end users. eircom agrees that this is a key consideration, but disagrees that infrastructure competition can reasonably be characterised as "emergent" in Ireland. Broadband competition from the cable television provider is intense and is growing. Local Loop Unbundling ("LLU") has been available at regulated prices to competitors in all "Larger Exchange Areas" for several years, even though take-up has not matched that in some other Member States. However, that is largely due to Ireland's challenging demographics and topology. These key factors appear to have been overlooked or given insufficient consideration in the Consultation Document's discussion of the various options.

Perhaps balance of the various considerations meant that a form of *ex ante* NRT was appropriate when other operators were new to the Irish marketplace a decade ago. At some point, however, ComReg will need to consider whether it is in the interests of consumers to protect existing resellers and encourage inefficient entry by applying a protectionist form of the NRT, or whether it is instead time to unleash market forces and allow real infrastructure and platform competition to develop.

4. Geographically Differentiated Remedies

ComReg has recognised in the WBA market, and in the relevant price control proposals, that price control requirements may differ by geographical area. In some areas, there are many competing platforms, and in others there is no alternative to eircom. In the former, a low price floor is required to ensure eircom does not exclude

[2] Digiweb, Imagine, TelefonicaO2, UPC and Vodafone all have Broadband and/or voice network infrastructure independent of eircom's DSL/PSTN network

more efficient operators or technologies. In the latter, a price ceiling (based on the relevant costs in the particular area) may be needed to ensure prices (at retail and wholesale levels) are not excessive. ComReg should not confuse these very different requirements.

5. Stand-Alone Broadband

ComReg should welcome the introduction of retail stand-alone broadband ("SAB") and the underlying wholesale Naked WBA. Artificial regulatory constraints to protect those operators who insist end-users must buy fixed voice services are not warranted and will severely distort the market.

6. Use of Outdated Cost Forecasts

eircom notes that many of the cost details in 11/72 are based on the 2011 forecast figures in cost models prepared in 2010, to inform the draft direction 10/108. These figures are not appropriate for 2012 and later years. As a consequence, the savings – and the incentive to make them – as operators "climb the ladder of investment" are far larger than indicated in Figure 3 of the Consultation Document. Nevertheless, many operators have determined that Ireland's geography and demographics (and low population density, with high dispersion) makes that alternative independent platforms (typically wireless) more efficient than reselling eircom's copper network.

7. Geographic Price De-Averaging

The fact that costs in areas 4 and 5 are almost treble that in area 1 creates significant pressure on eircom to de-average its prices. ComReg should allow eircom to de-average its retail and wholesale broadband services by specifying two areas for differential treatment: areas 1, 2 and 3 would constitute the Larger Exchange Areas, and areas 4 and 5 would constitute the Smaller Exchange Areas.

8. Implications for NGA

Consideration of the competitive conditions in areas 1 to 5, as set forth in section 3.13 of the Consultation Document, is similar (and related) to the consideration of the constraints on the prices of NGA-based products. ComReg has briefly acknowledged this important linkage in section 3.17 of the Consultation Document. However, much further thought will need to be given to the impact of NGA deployment on the core concepts being proposed in this Consultation Document, including the triggers for some of the proposed changes to the existing NRT. For example, many of the "flexibility measures" under consideration by ComReg would be triggered by LLU take-up; however, when NGA is deployed, it is entirely possible that most OAOs will choose higher-speed Virtual Unbundled Access ("VUA") over NGA instead of legacy LLU. Provision will need to be made for that eventuality by allowing VUA prices to be factored into the equation.

We urge ComReg to consider issues relating to both legacy and NGA bundles in a cohesive fashion, even if they are being addressed in separate consultations. ComReg should take a forward-looking view over a period of not less than three years, and one that is properly informed by recent developments relating to eircom's planned NGA deployment.

Responses to Consultation Questions

Obligation not to "unreasonably bundle" in the Retail Fixed Narrowband Access markets: proposed further specification of the net revenue test

ComReg document 11/72 is lengthy and complex, with multiple proposals included under many of the headline questions. To facilitate cross-references to the Consultation Document, we have replicated and paraphrased salient aspects of ComReg's proposals, and we have numbered the specific proposals under each question for ease of reference.

Q. 1. Do you agree or disagree with the proposals / preliminary views expressed by ComReg in relation to possible revisions to the net revenue test? Do you have any views on the matters ComReg seeks further input on in the above? Please give a detailed response with supporting data where appropriate to support your view.

STEP ONE: PORTFOLIO / PRODUCT BY PRODUCT ASSESSMENT APPROACH

Proposal 1.1 (CD, p. 27): *To revise the net revenue test to a two-part test: Part 1) Portfolio aggregate bundle assessment based on ATC and Part 2) Individual bundle assessment with lower cost standard required for retail costs associated with calls.*

eircom considers that only an overall assessment at the portfolio level is reasonable and proportionate. However, ComReg's shift away from a highly disaggregated individual bundle assessment on a product by product basis (using ATC for every product) is welcomed, although it is very limited. ComReg's proposal is in reality a framework for future change rather than a meaningful modification of the existing test at this time. A proportionate two-stage test would use incremental or avoidable costs at the product level, and ATC at the portfolio level.

As currently proposed, the two tests are virtually the same at each stage. The costs for all network inputs (telephone line, broadband, calls, and ancillary services) are identical. The outpayments to other operators are identical. The retail costs for the telephone line, broadband, ancillary services and unregulated services are identical. The only difference between the individual product test and the portfolio test is the treatment of the retail cost of calls.

The retail cost of calls is a small component in the overall cost stack, and the change proposed will make very little difference except for those bundles with very large call volumes.

The additional overhead cost of preparing the portfolio test is not insignificant and is difficult to justify if the approach proposed in the Consultation Document is adopted. A portfolio-level test provides a sound basis for a competitive assessment because it is at the portfolio level that firms actually compete, not the individual bundle level. If the portfolio has adequate margins, ComReg should not be concerned about a small negative margin on an individual product. ComReg advocates use of the ATC standard for the margin squeeze test at the portfolio level, and for almost all elements of cost (except the retail cost of calls) at the individual product level. This is not the correct cost standard to use from an economic perspective or based on application of the proportionality principle. The appropriate cost standard should be the incremental or avoidable cost. ATC less common costs and fixed indirect costs is effectively the same as incremental cost, so this is a reasonable and proportionate standard. This standard could be readily adopted as ComReg, and eircom have carried out a substantial amount of work to determine the relevant elements, both for costing of bundles and for evaluating the avoidable cost in the context of universal service obligation ("USO") funding. ATC less common and indirect fixed would overstate avoidable cost only to the extent that there were incremental costs that were sunk.

If the concern is primarily with encouraging (truly) new entry, then it might be reasonable to include sunk costs in the cost standard. However, more than ten years after market opening, a regulatory focus on promoting "entry" is misplaced. Given the actual circumstances prevailing in Ireland today, the concern ought to be primarily focused on ensuring a level playing field for existing competition from cable TV and from mobile. Viewed against the realities of the Irish marketplace, sunk costs that have already been incurred should not be included.

Proposal 1.2 (CD, p. 29): *There will be two portfolios for assessing bundles under Part 1 of the net revenue test. The two portfolios are: Portfolio (1) comprising all Bundles (including voice only bundles) sold within the Larger Exchange Area; and Portfolio (2) comprising all Bundles sold outside the Larger Exchange Area.*

Eircom considers that only a single portfolio test is required, as a majority of competitors providing bundles do so on a national basis (although with less coverage than eircom). However, given the fact that eircom offers a different set of retail bundles in more urban areas than in more rural areas, two portfolios could be tested.

Some eircom offerings (e.g. the Social benefit scheme) are regarded by ComReg as bundles of calls and lines, but are sold at the same price nationwide. For the purpose of the portfolio test, eircom will need to calculate the revenues and costs in the larger area, and in the smaller area.

Correct level of aggregation

When thinking about the correct level of aggregation at which a margin squeeze test should be carried out, it is important to focus on what the purpose is of a margin squeeze test. The purpose is to understand whether the pricing behaviour of a dominant firm is likely to exclude an efficient competitor, or at least restrict their ability to compete effectively. If the pricing behaviour is not likely to lead to either of these effects, then it will not adversely affect competition and so should not be considered abusive.

The implication of this is that a margin squeeze test should be applied at the level at which exclusion might take place. If a dominant firm offers a number of different products (e.g. different bundles) and competitors do not need to be able to compete for each of the products, then the margin squeeze test should not be carried out at the level of individual products. In summary, a margin squeeze test should be applied at the level at which exclusion might take place.

ComReg does not seem to have carried out this kind of analysis. Instead, they have simply presented the notion that both individual tests and portfolio tests are required, and for the portfolio test discussed several candidate "markets" as examples (business or residential; voice only versus broadband; bundles with a non-NGB broadband component compared to bundles with a NGB broadband component, and combinations of these approaches.). ComReg does not attempt to demonstrate that these portfolios represent either distinct areas in which competition takes place or areas where the potential for exclusion exists to different degree.

For the reasons discussed below, the appropriate groupings should be based on eircom‟s NGB and non-NGB areas, and a margin squeeze test should be applied separately to (1) bundles based on eircom‟s NGB-based products and (2) all other eircom bundles. The test should be applied at the level of the portfolio of bundles within each grouping, and the cost of the wholesale inputs used in each case should reflect the availability of LLU or other network inputs in the given areas.

STEP TWO: PROPOSALS IN RELATION TO THE COMPONENTS WITHIN THE NET REVENUE TEST

Proposal 2.1 (CD, p. 30): *The calculation of revenue in the net revenue test to remain unchanged. This applies to both the individual bundle and portfolio assessment.*

eircom generally agrees with the approach proposed in the Consultation Document. Many eircom customers are billed every two months. Therefore, to calculate monthly revenue, eircom will collect data for a rolling two month period where every customer has been billed at least once, and divide by two to calculate average monthly revenue. This is the protocol that has been developed and agreed with ComReg over the years under the existing NRT. The average will therefore be the average of customers on a given bundle, over the previous two month period. The Draft Directive should clarify that the "monthly revenue" calculation will continue to be interpreted reasonably and proportionately.

Proposal 2.2 (CD, p. 31): *Narrowband retail costs in the net revenue test will remain calculated by reference to the retail-minus price control for SB-WLR where the SB-WLR remains at the maximum price allowed i.e. 14% of retail price for retail line rental. This applies to the individual bundle and portfolio assessment.*

The retail-minus approach that has been used for SB-WLR is not strictly either an REO/SEO approach, or an EEO approach, and is not consistent with other concepts used in the NRT (such as forward looking costs). The problem is that the 14% margin was set several years ago as an average across all SB-WLR products. Regardless of the source of the problem, it should not be compounded by applying the 14% margin requirement as part of the revised NRT if the actual costs are known.

For example, if eircom could reduce billing costs by introducing a bundle which is only available in conjunction with direct debit, and provides only online bills with email notification. Suppose this halved the retail cost per line from €2.93 (14% of the retail line price of €20.96) to €1.46. A competitor could replicate the cost of €1.46, but the NRT will still apply a cost of €2.93.

Similarly, suppose 14% were an average retail cost across products A, B and C, priced at 20, 50 and 100. 14% suggests a cost of €2.80, €7 and €14. But suppose the actual costs are €3, €5 and €20. A sensible competitor will only sell bundles with product B, but the NRT will incorrectly assign a cost of €7.

By continuing to apply an outdated 14% retail-minus delta, ComReg is applying an unjustified price control that is incompatible with the progressive measures it has considered, including incremental or avoidable cost, forward looking costs, and REO/SEO versus EEO.

Proposal 2.3 (CD, p. 31): *Broadband retail costs will for the time being remain calculated by reference to the SEO under D01/06. In 2012, D01/06 may potentially be amended to EEO or replaced by a cost-based price control, at which point the SEO test may no longer apply (subject to separate consultation) or may be replaced by an EEO test. This applies to the individual bundle and portfolio assessment.*

In essence, ComReg's proposal is to regard a six-year-old retail minus price control (D01/06) as the actual measure of retail costs. This is similar to the proposed use of the 14% margin minimum for retail line rental, as discussed above.

It is important to note that D01/06 specifies a discounted cash flow ("DCF") model should be used to calculate the retail costs of a sufficiently efficient operator which sells only broadband services. The SEO operator in the D01/06 model does not sell telephony. D01/06 sets prices for wholesale broadband access (bitstream) on the basis that a new entrant could come into the market and compete for a share of the broadband market – without having to enter any other markets.

eircom has typically set the WBA price below the level of the ceiling set by D01/06. Therefore, the sum of the WBA price and the minimum retail margin is often less than the full retail price for the appropriate broadband product. This sum is used in the NRT.

eircom considers that the correct retail cost to use is significantly lower. The historic EEO cost (i.e. eircom's historic cost) is much lower than the figures derived from D01/06 for two reasons: (i) because eircom may be more efficient than the SEO/REO, and (ii) because eircom predominantly sells broadband in bundles. It is quite possible that even an REO/SEO selling bundles would have costs much closer to eircom's than to the stand-alone ISP hypothesised for purposes of D01/06. This is especially true where the REO/SEO is a large multinational with significant scale and scope economies, such as UPC, Vodafone or Sky.

As discussed in the expert statement of Dr. Walker (Annex 1), the EEO standard should be applied as a matter of sound economics, unless there are new entrants who are currently not cost efficient but will likely become so if they have an incentive to enter the market and achieve scale. Maintaining an REO/SEO indefinitely, after more than a decade following market opening, suggests that even competitors that have no prospect of achieving scale should be encouraged to enter. This is not a reasonable proposition as a matter of regulatory or economic policy: competitors who are not likely to achieve scale should not be artificially supported by the regulatory regime. Any proposal to apply the REO/SEO standard should be accompanied by strong evidence that entrants are likely to achieve scale and so over time it will be possible to move to an EEO standard. Otherwise there is a risk of permanently supporting inefficient entry while at the same time propping up retail prices and dampening competition to the detriment of consumers, without any prospect of gain in the longer term.

What this means in practice in Ireland is that the EEO standard should always be used. When applying the margin squeeze test we are concerned with the downstream costs of competitors, which are largely retail costs. We believe it is significant, and a somewhat unusual feature of the Irish market, that the majority of eircom's existing competitors in the marketplace are already able to avail themselves of economies of scale at the retail level that are at least as great as eircom's. Vodafone and Telefónica/O2 are multinational mobile firms with operations in far more countries than eircom's market in Ireland, and so are able to take advantage of economies of scale and scope that are not open to eircom. They are also able to achieve significant efficiencies by leveraging their mobile retail operations to support their fixed broadband services. UPC and BT are also multinational firms that operate in multiple countries across Europe and globally, and BT is the incumbent operator in Northern Ireland. Within its cable areas in Ireland, UPC has a substantial 40%+ share of the fixed broadband base. This share is rapidly growing as UPC gross additions are over 50% of the market and so UPC has unquestionably been able to achieve efficient scale in its downstream operations by comparison with eircom.[3]

A corollary to this is that a margin squeeze test should be based on the assumption that entrants will make efficient investment decisions. For instance, if it is more efficient to enter using unbundled lines, then the regulatory regime should not require that there is enough "headroom" for an entrant with no unbundled lines to survive using, for instance, 100% SB-WLR plus bitstream. We will return to this point later. Supporting inefficient modes of operation will not provide entrants with the correct investment incentives or consumers with the benefits of real competition.

eircom is of the view that it would be preferable to apply the EEO standard to both stand-alone WBA as well as bundles. eircom understands that ComReg is considering moving, at some point, to price WLR on the basis of cost-orientation rather than on a retail-minus basis. With regard to WBA, eircom believes that ComReg should utilise EEO standard in setting any retail-minus amount. These adjustments will eliminate any inconsistencies between cost standards used for stand-alone services and the margin squeeze test for bundles.

In the interim, if the NRT for bundles uses EEO and the D01/06 control continues to use REO, it is unlikely that there will be any significant impact on competition as a result of this relatively insignificant discrepancy, since very few customers are buying stand-alone voice or broadband services today. During the period from June 2010 – June 2011, 90% of customers who ordered new eircom services purchased bundles.

The market in Ireland has shifted to the provision primarily of bundles of products, not standalone products. Thus, an efficient competitor would not focus solely (or likely even predominantly) on standalone products. Such an approach is unlikely to be efficient given the economies of scope that are available to firms that supply bundles. This implies that a margin squeeze test should not be applied at the level of standalone products. Even if it were the case that some niche competitors were not able to survive, this does not imply that their exclusion would harm consumers and therefore that it should be the driving force behind the NRT levers. ComReg should be concerned with ensuring that efficient firms are able to compete. Conversely, ComReg should not have a policy that has the effect of maintaining prices at an artificially high level, to the detriment of consumers, if there is no demonstrable long term benefit to them.

Proposal 2.4 (Preliminary view) (CD, p. 32): Subject to robust and appropriate information, the net revenue test may be adjusted to reflect known future changes in wholesale and / or retail cost over the average customer lifetime. This will be monitored retrospectively. This applies to the individual bundle and portfolio assessment.

eircom agrees that forward looking costs should be used in the NRT, as eircom has proposed. Forward looking costs should take current and future changes into account.

[3] As stated on Vodafone's website: "Vodafone is one of the world's largest mobile communications companies by revenue with approximately 382 million customers in its controlled and jointly controlled markets as at 30 June 2011. Vodafone currently has equity interests in over 30 countries across 5 continents and more than 40 partner networks worldwide." (http://www.vodafone.com/content/index/press/news/vodafone_555blue.html) There are numerous examples of Vodafone cloning its foreign-developed products in Ireland. For example, Vodafone introduced a product from Vodafone Italy called 'Vodafone in a Box', which is a device that combines Fixed and Mobile Broadband in 2010.

Similarly, UPC, a subsidiary of Liberty Global, has been reported as "blazing trails" by "consolidat[ing] the number of suppliers Liberty Global uses for various equipment in order to get better pricing and service." *Multichannel News, Vol 31, No.46, 13 December 2010, pg 3.*

It is also important to note that there can be a very large discrepancy between "historic" costs and current or forward looking costs. Many costs have become quite volatile in recent years, due to market developments, and company initiatives. Advertising costs have dropped dramatically. Eircom itself has cut staff, and changed pay rates. Suppose the net effect of this action is that from July 2010, eircom has reduced a certain aspect of cost by 50%. A competitor, whether REO or EEO, could do the same. If the NRT uses only historic costs reconciled to published Regulatory accounts, then this saving will not appear in the NRT until the 2010/11 Regulatory Accounts are audited, published, and reviewed by ComReg. So, a saving in July 2010 available to all competitors from that date would not appear in the NRT until at least January 2012: over 18 months later. In this instance, robust evidence of savings will be available.

eircom agrees that reasonable forecasts of unit costs are relevant. However, we have some concerns about eircom's ability to replicate valid price strategies which might be adopted by its competitors. It is essential that eircom be allowed to make reasonable assumptions about future trends in certain key unit costs, and in some instances, robust evidence may not be available.

Consider the case of MTRs. There is a current glide path from 4.5c in July 2011, tracking the EU average to about 3c by end of 2012. After that, a "pure LRIC" rate will apply. Based on recent decisions by other NRAs, an operator might expect MTR to decline to 1.0c by January 2014 at the latest. So, if expecting a 42 month lifetime, a new product launch in January 2012 might assume an MTR cost of 3c for 2012, 2c for 2013 and 1c for the remaining 18 months: say 1.85c on average assuming constant monthly minute volumes. This would be a reasonable forward looking assumption. This issue may become even more relevant as time moves on, and the "unknown" end point gains increasing weight in the calculation.

Currently, ComReg would insist that a new bundle to be launched on 1st November must assume the MTR will remain constant at 1/11/11 rates for the customer lifetime, and the expected reductions on 31/12/11 and 30/6/12 cannot be taken into account. ComReg is proposing to change this approach, so that eircom could take account of the changes expected under the current glidepath, which ends in December 2012. This does not go far enough, as other operators can make reasonable assumptions about customer lifetimes and trends in costs over the relevant time period.

Proposal 2.5 (CD p. 36): *ATC is the cost standard for the assessment of eircom's bundles at the portfolio level to ensure they are and remain profitable*.

As discussed in many previous submissions to ComReg, eircom remains of the view that the appropriate cost standard to use for the purpose of assessing bundles including unregulated elements at the portfolio level is AAC, not ATC.[4] Alternatively, ATC less common costs and fixed indirect costs would be a reasonable proxy for AAC and would be a reasonable standard to apply. It would overstate avoidable cost only to the extent that there were incremental costs that were sunk.

eircom recognises that ATC may be appropriate as a test during the early stages of market opening, when new entrants are attempting to secure a toehold in the marketplace. In that situation, it might be reasonable to include sunk costs in the applicable cost standard.

However, more than ten years after market opening, a regulatory focus on promoting new entry is misplaced. Given the actual circumstances prevailing today in Ireland, the regulatory concern should take into account the actual situations of the existing competitors faced by eircom which have strong positions in cable TV and mobile as

[4] Note that avoidable cost is not just a short run measure. ComReg seems to suggest in its NGA consultation that avoidable cost is of necessity a short run measure (see paragraph 5.122 of the NGA consultation), but conceptually avoidable costs can be measured over any time period.

well as fixed lines. In these circumstances, sunk costs that have already been incurred should not be included in the NRT assessment at the portfolio level.

Nonetheless, the Oxera paper commissioned by ComReg advocates an ATC standard for the margin squeeze test at the portfolio level, and ComReg proposes to adopt this standard. This is not a proportionate cost standard to use for purposes of a Net Revenue Test for bundles in the Irish context.

It is clear that OAOs competing with eircom in the provision of bundles that include unregulated elements such as mobile calls and/or TV do not price their bundles by reference to the ATC of unregulated elements. There can thus be no valid reason for imposing on eircom, in relation to the pricing of converged bundles that include unregulated elements, a higher cost standard than those faced by its competitors. Indeed, to do so would have harmful effects for consumers and economic efficiency by forcing eircom's retail prices above the competitive level, thereby removing an important source of competition, while raising the overall level of prices.

In this context, eircom submits that the appropriate cost standard to use is one which reflects the fact that eircom in relation to bundles with unregulated elements is facing competition from alternative operators, including mobile operators and television service providers (both satellite and cable TV operators). Wholesale regulation in place (in particular LLU, WBA and SB-WLR) provides any "entry assistance" that these operators may need and that can be considered reasonable and proportionate.

Insofar as bundles are concerned, eircom submits that these competitors need no entry assistance. Rather, as eircom is meeting competition, it appears essential to protect competition in the marketplace by ensuring that eircom has the ability and incentives to innovate and offer competing and competitive converged offers. AAC is the threshold used under the competition rules to determine whether a pricing practice is capable of foreclosing equally efficient competitors. Prices below AAC are generally considered to be anti-competitive. Where the effective price is between AAC and Long Run Average Incremental Costs ("LRAIC"), the European Commission, as explained in its Guidance on Article 102 TFEU, reviews whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is likely to be adversely affected. In this context, the Commission will investigate whether and to what extent competitors have realistic and effective counter strategies at their disposal, for instance their capacity to also use a "non contestable" portion of their buyers' demand as leverage to decrease the price for the relevant range.

The Consultation Document fails to justify the use of ATC, except to speculate (at p. 33) that a "new entrant" would not enter the market unless it believed that fixed and common costs could be recovered. What ComReg's assessment fails to take into account is that virtually all of eircom's competitors are offering broadband bundles as an incremental service using cable television or their extensive mobile platforms as the base (particularly in regard to retail activities like billing, customer care, etc.).

eircom proposes to use both AAC and LRAIC for the purpose of applying the NRT to bundles involving unregulated elements, assuming the following test:

- Taking a family of "regulated" bundled products (e.g., line rental, fixed calls and broadband), the NRT should be considered as failed where not all products within the portfolio/family are above or equal to AAC. Where each of the products within a portfolio/family is equal or above AAC, the NRT is considered to be passed when the revenue at the level of the family is equal to or above "pure" LRAIC (as opposed to LRAIC plus mark-ups). In other words, there would be two conditions to be met for the NRT to be passed: first, that the revenue for each product within a family/portfolio is equal or above AAC; and second, that the revenue for the family/portfolio is equal or above "pure" LRAIC.

- Adding now an unregulated element (e.g., TV) to each of the products within the family, eircom proposes to apply the test by measuring the variation in costs and revenues brought in by the unregulated element against the relevant cost standard, so that: the revenue for each product within a family/portfolio, including the unregulated element, is required to be equal to or above AAC, with the AAC calculated to include those associated with the unregulated element; and the revenue for the family/portfolio including the additional revenues brought in by the new products including the unregulated elements is equal to or above the LRAIC of the family/portfolio including the additional costs incurred on an LRAIC basis in offering the unregulated element.

This test would be supported by a simplified forward looking model of both AAC and LRAIC (for an EEO) in relation to any unregulated service included in bundles. This is not unlike the approach adopted by ComReg in other situations such as the DCF model for the D01/06 WBA control, Ethernet or PPC prices. Such models can be constructed by eircom or ComReg, with key inputs verified by expert industry knowledge. Consideration should be given to any required approval process, whether on an *ex ante* or *ex post* basis, so that in any event eircom is capable of introducing new bundles within a timescale that is compatible with the functioning of the retail market(s) concerned.

In terms of the model to be used for calculating the AAC and LRAIC of unregulated services (as explained above), two contrasting approaches are possible:

In the case of a new service which is offered only to bundled customers and never sold on a stand-alone basis (e.g. IPTV over broadband) then AAC and LRAIC might be the same, and both would include the full cost of the platform.

In the case of an existing, profitable service (e.g. Mobile telephony), then the inclusion in the bundle might require only modest upgrades to the existing platform (e.g. the mobile network) and only these incremental requirements would be included in the LRAIC, rather than the full platform cost. The AAC might not include any contribution to the network at all, if there is sufficient spare capacity in the short run. The example of eMobile makes this very clear. Meteor runs a mobile service, which does not appeal to users of fixed lines and broadband. The business is run to make an acceptable rate of return over the long term. If a new service (eMobile) is launched, designed specifically to appeal to the customers who buy fixed bundles, then the costs and revenues of Meteor are not impacted. The increment in the LRAIC is simply the eMobile base, given the pre-existence of the Meteor network with its existing customer base and spare capacity.

The use of a forward-looking model in the context of the "bundle against bundle" test using AAC at the product level also allows one to deal with the following issues: in the presence of economies of scale for multiple products, ATC is misleading, especially for retail costs, because many of the retail costs will not change where a provider sells three products instead of two: these costs will just be reallocated. For example, it might cost €1.00 to send a bill for two products: €0.50 each. Adding a third product costs only €0.02. So three products cost €1.02 or €0.34 each. Allocating the modelled ATC of €0.34 to the third product is misleading if one does not adjust the cost for the first two products. Where allocations are not equal, they may depend on historical accidents. In the past, eircom allocated most fixed retail cost to line rental, because one must have line rental to buy calls or broadband. However, if eircom sold stand-alone (“naked”) broadband, with optional voice, most of the fixed retail cost would go to broadband, and little to voice over internet protocol (“VoIP”). Equally efficient operators may have the same costs as eircom, but might allocate them very differently because they converge towards four-play from TV, Mobile or Broadband, rather than from narrow-band voice.

Proposal 2.6 (CD, p. 36): *ATC is based on and reconciled to Eircom's regulated accounting information based on its audited separated accounts. ComReg seeks views as to whether ATC should be / can be disaggregated between Larger Exchange Area and outside the Larger Exchange Area.*

We have already described above how ATC based on regulatory accounts can lag current costs by over 18 months. Adjustment to the accounting information is needed to ensure current and forward looking information is correctly taken account of.

ComReg asks whether ATC can be, or should be, disaggregated between the Larger Exchange area and the rest of Ireland. It is certainly possible to obtain different network elements for each area. It is not clear whether it is sensible to try to do so for retail costs – as many elements are in fact indirect allocations (*e.g.* sunk cost of IT or billing systems) and others are direct costs (such as cash collection, postage, or modem costs) which do not vary by location.

Proposal 2.7 (CD, p. 37): *LRIC (estimated in this instance from Eircom's regulatory accounting information as ATC less common costs and fixed indirect costs) to be the cost standard for retail costs for retail calls in the assessment of Eircom's bundles at the individual bundle level. Retail costs associated with broadband and retail line rental remain set by reference to their respective retail-minus price controls.*

eircom considers that LRIC should apply to *all* retail costs.

Proposal 2.8 (CD, p. 40): *Unregulated products and services when bundled with Retail Fixed Narrowband Access must pass their own LRIC. On a case-by-case basis and subject to no medium to long term competitive harm, AAC might be used instead of LRIC. In addition for unregulated retail mobile services, aggregate total revenues must exceed their LRAIC+ (including common cost) each year. These proposals apply to both the individual bundle and portfolio assessment.*

GENERAL COMMENTS

The test for whether a bundle that includes unregulated products is anti-competitive or not should be whether incremental revenues are above incremental costs. Another formulation of the test is whether the incremental price of an unregulated product is greater than the incremental cost of supplying that product. In many situations this is a reasonable test. If a firm sets the incremental price below the incremental cost, then this means that it is reducing the unit margin on the bundle, and so it may be unprofitable unless there are significant volume effects. Thus the test should presume that an incremental price which exceeds the incremental cost will not pose a competition problem. Where the incremental price is less than the incremental cost, the bundle should still be permitted if the total revenue exceeds the relevant costs (i.e. the relevant costs of the regulated elements, plus the incremental costs of the unregulated elements).

Since the issue is about the addition of an extra product to a bundle, the correct standard (at least before launch) is incremental cost, not avoidable cost (*i.e*. any already sunk costs incurred before providing the additional product should not be covered). The actual incremental costs that the firm incurs should be used. That is, they should be the costs of an equally efficient operator and not, the REO/SEO costs of an efficient entrant. Incremental revenues should be measured over the expected lifetime of the customer.

Consider the case of a mobile network that has 1 million customers. Its competitors, with similar networks, have 2 million customers – so adding another million users won't change the network cost. Suppose it can gain 300k new users with a second brand, with no cannibalisation of existing users because the second brand does not appeal to its original base. The only incremental cost is the retail cost, and handset subsidy. The network cost does not change. It is certainly not appropriate to spread the network cost evenly over customers, or minutes. Even if the second brand users have higher usage, they don't need to pay for the network if there was spare capacity. What if the network was inefficient? Suppose the original users had cheap, single-band handsets, requiring extra network build, and additional spectrum. Suppose the second brand emphasises tri-band smartphones – and so could survive with less network, and less spectrum. Its LRAIC would be much less than the LRAIC of the original users, but in the short run – perhaps twice the average contract duration – its incremental network costs might be zero.

Section 8 of the Oxera Report deals with the issue of unregulated products, and it is not clear to what extent ComReg is basing its direction on the Oxera analysis. There are several aspects of the Oxera analysis with which eircom takes issue.

First, Oxera seems to suggest that entry should be encouraged for its own sake, even if it is not cost efficient. In Section 8.3 Oxera states

> *"Where eircom services hold a strong position in the market, the objective to promote entry warrants applying a cost standard that enables entrants to recover their fixed and common costs. The economic reasoning underpinning the use of such a cost standard in markets where entrants have cost disadvantages relative to eircom stems from the notion that entrants, with significantly lower economies of scale and density, could not replicate eircom's services at the same level of unit costs and hence a cost standard that incorporates all common and fixed costs could be warranted."*

It is not clear who Oxera considers to be "entrants" in this discussion. In unregulated markets such as TV or Mobile, eircom itself is frequently the new entrant, and the incumbents with the strong market position are UPC and Vodafone. They can certainly replicate eircom's new services at the same or a much lower level of unit costs.

Consistent with the analysis above, headroom should be allowed for competitors who are currently sub-scale only if there is a likely prospect that they can achieve scale within a reasonable period of time. If not, and they are never likely to be cost efficient, then their entry should not be encouraged. There are a number of other places in the paper where Oxera makes similar arguments or attributes the argument to ComReg, but fails to note the inherent flaw: in section 2.1.1 it is stated that "While the multi-national mobile operators (Vodafone and Telefónica) or UPC may be in a relatively sound position to compete with eircom, ComReg's regulatory objectives may not be limited to ensuring sufficient entry conditions for these rivals."

Oxera raises a concern over undermining the prospects for "small-scale entrants targeting niche customer bases". Oxera suggests that the EEO standard would be "a tough regulatory stance" even if it is not applied until entrants reach "efficient scale". The EEO standard is not a "tough regulatory stance" if competitors are at efficient scale; it is the correct regulatory stance. A REO/SEO standard in these circumstances would be unjustified and would act as an incentive for inefficient entry. It would also be to the detriment of consumers by artificially inflating the price for eircom's bundles.

Oxera seems to believe that it is necessary for ***all*** existing and potential competitors to be able to replicate any bundle that eircom offers. From a competition economics standpoint, replicability only by a *sufficient* number of competitors to provide effective competition to eircoms' bundles is required. If eircom has SMP at the upstream level, then ComReg should ensure that there is some form of access regulation in place. And if eircom does not have SMP at the upstream level (e.g. in unregulated markets where eircom is not yet present, or has a small scale), then this implies that it is not essential that competitors have access to the upstream input.

Oxera seems to be focused heavily on the ability of OAOs to replicate eircom's fixed/mobile bundles. Apart from the fact that there are already players who can do this (i.e. Vodafone, Telefónica or the MVNOs), it is unclear why Oxera is not also concerned about the ability of players to replicate UPC's fixed/TV bundles (including programming content).

At various points Oxera discusses the possibility of using the standalone price of the additional product as the cost standard when the product is added to the bundle. This does not seem to make sense. The whole point of adding a standalone product to a bundle is that the incremental price of the product in the bundle is less than the standalone price. So a test using the standalone price as the proxy for cost will always be failed. It is a test that conveys no information of interest. ComReg has correctly rejected this concept at section 4.76.

We note that ComReg can request Additional Financial Statements ("AFS") for unregulated products, and that such statements are produced for Meteor and for eMobile. However, eircom considers the proposal for unregulated mobile services to mean that the revenue for the two mobile brands must be sufficient to cover the aggregate cost of the mobile platform – as suggested in 4.77 to 4.79 on page 40 of the Consultation Document. At this point ComReg suggests that E-Mobile and Meteor should cover their own LRIC, and that mobile voice as a whole covers its LRAIC+. eircom considers this language to be unhelpfully imprecise. Many elements of network and retail costs are common to mobile voice and data, and the advent of smartphones further blurs the distinction. eircom considers that mobile service revenues and costs – not just mobile voice – are relevant.

The suggestion on page 73 of the Consultation Document that "the aggregate revenue of E-Mobile voice services must cover its own LRAIC+" is not properly founded in law or economics and should be reconsidered. eircom proposes that the NRT should be applied to unregulated elements on a "bundle against bundle" basis so that the additional revenues brought in by eircom's bundles which include an unregulated element are required to be equal to or above which would be passed when revenues equal or exceed the additional costs incurred for the purpose of adding the unregulated element in the bundle. This means that there would be no requirement that the incremental revenue brought by the unregulated component exceeds its incremental costs. Rather, the issue would be whether, once the unregulated element is added to existing bundles, the bundle's revenue covers the bundle's cost. In terms of the cost standard to be used, eircom is of the view that AAC is the appropriate standard to be used. Consideration could be given to complement the use of AAC at the level of the product with an additional requirement that LRAIC/ATC be met at the level of the family or portfolio of products. We note that innovation can ultimately make certain technology approaches obsolete, such that the relevant ATC is the LRIC of the Modern Equivalent Asset ("MEA"), rather than the sunk costs of the technical solution actually used.

This test recognises the difficulties that exist in terms of identifying the costs, in particular the sources of cost inputs in relation to unregulated elements. It also strikes the right balance in advancing competition in a context of converged products while keeping regulation, in particular, pricing regulation to those markets where SMP has been found.

Issues regarding the source of cost inputs, the choice of the cost standards and the working of the proposed test are considered further below.

SOURCES OF COST INPUTS

For the purpose of applying the NRT to a bundle, its revenues will be relatively readily available, in the form of planned estimates pre-launch and actual revenues post-launch. The various costs for line rental, broadband, fixed calls, and certain WLR ancillary services (*e.g*. voicemail, CPE) are also readily available through the regulation of wholesale components. These are all elements that eircom is required to sell to its competitors, so the “market price” for the item can be calculated. However, this is not the case for the costs to be associated with “unregulated” items, that is, services which eircom is not required to sell at either retail or wholesale level: *e.g.* mobile call service, mobile broadband, or TV.

Regulated Accounts

It is true that some “unregulated” elements might be products which eircom has been selling for some time, such as mobile voice minutes. There may be cost information about these services in eircoms’ accounts. However, this cost information is nowhere as granular as that available for traditional fixed products. There might be debate about whether outgoing mobile minutes should fund handset subsidy, coverage, or overheads. This would in turn depend in part on the future treatment of other regulated products, such as mobile termination (e.g. whether LRAIC+ or pure LRIC). Suffice it to say that the current accounts may simply reflect aggregate costs of “mobile”, and will not allow detailed calculation of the costs of outgoing calls for segments such as pre-pay and post-pay. They certainly do not allow accurate cost allocation by tariff package, and even if they did, the tariffs currently on offer will typically differ from those offered during the period of the latest published regulatory accounts.

Other services may be more recently introduced, such as mobile broadband. These services might not appear in accounts for several months after launch. For example, a mobile broadband service launched in September 2010 would first appear in the Regulatory Accounts for 2010/11, which might be published in November 2011 (15 months later). New services are often accounted for oddly in their first year (e.g. they may be allocated a full year of depreciation, even though the service was not sold for the full year). As the service is typically of a small scale at this point, this is not material for the overall company position: but it makes calculation of unit costs very dubious. It would be over 27 months before there was regulatory accounting information available for a full year of the service.

Regulatory Accounts will of course have no data at all about services yet to be launched.

Standalone price

ComReg and Oxera have previously suggested to use the standalone retail price of unregulated products in the cost stack, adjusted to account of a zero or low (<10%) margin, justified on the basis that the products concerned are sold on competitive markets. eircom does not believe that this approach is tenable, for several reasons:

First, the use of a stand-alone retail price as the cost input would significantly undermine the possibility for eircom to market an offering based on the message “Bundle and Save” and offer value to users in accordance with their expectations that the price of two services A and B bought together will be cheaper than when bought separately. This in effect means that eircom would be prevented from offering multi-product rebates where one of the products concerned is narrowband access, although eircom is simply subject to an obligation not to unreasonably bundle.

Second, the fact that the products concerned are not regulated does not mean that they are offered on competitive markets at zero or low margins. It is not obvious that there are low or zero margins in the market for TV, mobile calls or mobile broadband. Establishing margins by reference to statutory accounts would be quite difficult, as the margins may not be visible by product, or by region. So TV operators may have higher margins on some packages than others (analogous to the day and evening price gradient for calls). Mobile operators may have higher margins in Ireland than in other countries, but only publish Irish profit margins as part of "Europe other" rather than a specific Irish margin by customer type or package. Margins may also be volatile over time, especially during technology upgrade cycles (e.g. migration from 2G to 3G, or to HDTV).

Third, there may be no directly comparable eircom retail product. eircom might not sell a stand-alone TV service, but could add a TV service into a voice and broadband bundle (indeed, as any TV service provided by eircom would require broadband, it is difficult to imagine that eircom would provide a standalone TV service). In addition, even if eircom were to sell an exactly comparable stand-alone offering, the price could simply be manipulated to suit the bundle. For example, if eircom wished to include unlimited eMobile service in a bundle at €50, it could make the standalone price €50, so that the cost stack would include a cost of €50.

It is also likely that competitor retail unregulated products will not be directly comparable, due to a variety of factors, including the fact that such offerings will be provided over alternative infrastructure. For example, eircom's TV offering may include content not available on the UPC or Sky offering, or exclude certain content exclusive to UPC or to Sky – adjustments would be required and this in turn would require to identify the costs of various content elements. Similarly, eircom's offering might not have the same type of set-top box (recording capability or capacity, HD etc.) as Sky or UPC. In addition, offers will include initial one-off charges, rebates, free or discounted set-top boxes, satellite dish installation charges or purchase discounts for telephone handsets, which might not be mirrored exactly by the eircom offering. For mobile broadband, competitor offerings might have different speeds, coverage, quality of dongle, or other differences. Adjusting for all these issues is not simple.

Moreover, the unregulated component of the bundle concerned may not in fact be the subject of competitors' standalone offerings. In particular, competitor products may in fact be bundles of transport and content services. For example, Sky and UPC each charge €23 for an entry level package. This does not mean that €23 is the "stand-alone retail price" for the purpose of the NRT. UPC has a stand-alone 12Mb broadband product at €25, but this cannot be bundled with TV. In particular, a review of UPC's offers show that UPC offers TV at an incremental price of €18 to its existing customer availing of broadband and phone. This may be because the "stand-alone" TV product is in fact a bundle of the access network, and TV content. When the access network cost is already covered by the broadband and telephone service, adding TV service simply adds some TV distribution costs, and content costs.

Forward-Looking Model

For these reasons, eircom does not believe that it is possible to rely on either "market prices" or published accounts for the purpose of determining costs associated with unregulated products within a bundle. In light of this, eircom proposes that costs for unregulated elements included in bundles be identified on the basis of the differences in costs as compared with equivalent bundles that do not include the unregulated elements concerned. In addition, eircom proposes that a forward looking cost model be used for this purpose. eircom notes that eircom and ComReg together have substantial experience in constructing such cost models, so the basic approach is well understood. A model can have reasonable estimates of costs and volumes, and be tested for sensitivity to various inputs.

CONCLUSION ON UNREGULATED PRODUCTS

Where unregulated products are added to an eircom bundle which contains regulated elements, the primary test is whether the total bundle revenues are sufficient to cover the bundle costs. On a product basis, the relevant costs are the average avoidable costs of an equally efficient operator. In addition, the portfolio revenues must be sufficient to cover the relevant cost of the regulated inputs, and the LRAIC (excluding any joint or common cost) of the unregulated elements. Costs would be calculated using a forward looking MEA model, as retail prices of stand-alone products, or historical accounts, even where available, are unlikely to get a reliable guide to future costs.

Proposal 2.9 (CD, p. 40): *No change proposed to treatment of mailbox costs (where included). This applies to both the individual bundle and portfolio assessment.*

eircom considers that the mailbox facility could be provided by other operators using their own platform. For the reasons cited above, the use of the 14% retail-minus margin is not the correct level of retail cost.

We agree that if, say, 70% of customers (of an individual product or of a portfolio) take the voicemail facility, then the average cost in the NRT should be 70% of the unit price.

STEP THREE: CASE-BY-CASE ASSESSMENT OF A BUNDLE'S REASONABLENESS

Proposal 3.1 (CD, p. 41): *ComReg proposes no change (regarding retail efficiency) from the current net revenue test. Retail efficiencies, once supported by robust evidence can be considered in determining whether a bundle, which fails the net revenue test, is nonetheless compliant with the obligation not to unreasonably bundle services.*

We note that ComReg has set a very high if not impossible standard for "robust evidence" and has rejected valid claims in the past. This matter would be much reduced in importance if an EEO approach to retail costs were adopted, especially for broadband, as the EEO sells mainly by way of bundles. In any event, ComReg should allow for reasonable estimates of efficiencies that are obviously associated with bundles but which cannot be quantified precisely.

Proposal 3.2 (CD, p, 42): *ComReg proposes no change (regarding customer lifetime) from current net revenue test. Increased customer lifetimes once supported by robust evidence can be considered in determining whether a bundle, which fails the net revenue test, is nonetheless compliant with the obligation not to unreasonably bundle services.*

eircom's retail arm can provide evidence of lifetimes for eircom retail users on bundles and, separately, eircom Wholesale can supply information on wholesale contract lifetimes. However, we note that wholesale lifetimes may often be less than the appropriate lifetime for retail costs. Consider a customer acquired by BT in 2006. The customer was automatically moved to Vodafone in 2009, and continues to the end of 2011 on the same service, same tariff, same modem etc. eircom Wholesale may see this user as a BT bitstream customer from 2006 to 2008, a Vodafone bitstream user for 2009-2010 and a BT Line Share user for 2011. However, the retail acquisition cost was only incurred once, in 2006.

Proposal 3.3 (CD, p. 43): *ComReg proposes no change (regarding competitive assessment) from current net revenue test. A competitive assessment is undertaken* *before a bundle is found to be in breach of the obligation not to unreasonably bundle services.*

One aspect of the competitive assessment is whether the numbers of customers and size of revenue is significant in market terms. However, migration across platforms can be a significant cause of failing the NRT. For example, if customers migrate to a new billing system, there may be a transition period where the costs of both billing systems are incurred. Similarly, a migration to NGB, or to NGA, could lead to a failure of the net revenue test for several reasons. Costs may be inflated, and spread over low customer numbers. Volatility can be even more important, especially where heavy users, or users in a given location, move first.

The competitive assessment could be considerably enhanced if alternative views of cost (such as AAC for individual products) are eligible for consideration in connection with any competitive assessment that ComReg undertakes in situations where actual experience with a bundle appears likely to fail the NRT post launch. Simple what-if scenarios can also be of use: what would the margin be after the migration is finished, and all the planned users are on the new platform/product.

Proposal 3.4 (CD, p. 44): *ComReg proposes no change to the (competitor response aspect of the) current net revenue test. The net revenue test does not change when a bundle is claimed to be a response to a competitor's bundle. However, as is currently the case, the complementary competitive assessment will investigate the competitive context of the bundle.*

The Consultation Document has not correctly assessed situations in which eircom is responding to a competitor's pricing. ComReg focuses on new entry, by entrants who cannot match eircom's scale or scope, which we have earlier suggested is inappropriate at this point in Ireland's market development and given the profiles of eircom's competitors. There are several competitors with sunk costs, and potential entrants can frequently buy existing competitors more cheaply than building their own infrastructure. Potential entrants can also avail of various forms of resale (*e.g.* white label) to limit their fixed costs at launch.

However, we welcome the complementary competitive assessment of competitive responses. If eircom were to respond aggressively to a new entrant with 100 consumer customers worldwide, some of ComReg's concerns might be valid. However, when responding to a well-established competitor, 10 to 30 times eircom's size, the situation is rather different. Sometimes the CEO of such a competitor states publicly that the new offer is not a promotion, but a real, sustainable long-term price, and it will be profitable. In such a case, if application of the NRT prohibits eircom from responding, the effect of the test would clearly be unreasonable and disproportionate, and an exception should be made by ComReg following a competitive assessment.

Proposal 3.5 (CD, p. 44): *ComReg proposes no change to the (post launch) current net revenue test. There is no different test for bundles after launch.*

This proposal fails to take account of the fact that circumstances may change unexpectedly, and that forecasts can be wrong.

We have explained at some length that a firm which invests in a fixed asset believing there is a positive business case sometimes makes mistakes. Once costs are sunk, circumstances change. Before launch, the firm will only proceed to launch if it expects it can recover the full cost, including the fixed cost. If it becomes apparent after launch that this is not the case, the firm will not withdraw the product unless the incremental revenues are less than the incremental costs going forward.

This proposal is particularly harsh when applied to bundles that have been in operation for some time. Suppose a bundle passes the NRT for two years, and then begins to fail regularly. Either the correct NRT is providing a false picture, or circumstances have developed that make it impossible for *any* provider to compete profitably for the legacy users. In such cases, it might be proportionate to prevent eircom from offering the bundle to new users, but existing users should at least be allowed to complete their contract period. The investing firm is of course unlikely to reinvest, by upgrading or replacing the underperforming asset. However, the asset may have an 8 or 20 year life, while the average customer contract is only 12-18 months. A rational firm may elect not to cease services to contracted users, and may continue to sell the services if incremental revenue exceeds incremental costs.

We understand that this concept is not likely to be opposed by competitors who are simply resellers and have not invested in fixed costs (and so regard all costs as incremental). Firms that invest in infrastructure, however, will naturally follow this principle.

If eircom's proposed test using incremental cost and revenue were to apply in all cases, it would eliminate the need to specify a different test for post-launch bundles. Fixed investments would simply cease to be incremental after they are made.

The Oxera paper discusses the situation in which the NRT is passed *ex ante* before launch, but fails after launch. It is not entirely clear what Oxera's proposed solution is in that case. The Oxera paper discusses alternative remedies and considers how the test might be modified. In short, we do not fully understand Oxera's proposal for retrospective assessment as set forth in figure 4.1 of the Oxera paper.

Oxera seems to suggest that the monthly *ex post* test should be updated with new cost and revenue data. We certainly agree with this where an external payment such as MTR is involved. Oxera's reference to incentive regulation suggests that the test should be adjusted to include a lower cost input where eircom can demonstrate that costs are actually lower than originally expected. We note that using REO or SEO would undermine this incentive. No matter how efficient eircom becomes, its improved efficiency will not affect the output of a model based on REO.

It is not clear what Oxera is proposing in cases where the actual costs turn out to be above expected costs (for reasons that could not have been foreseen by eircom). In cases where an offering has passed the test for say, two years, and then fails because of declining volumes of other products causing an increased cost allocation, ComReg's competitive assessment should take account of the underlying circumstances and allow eircom to continue to offer the product for as long as the legacy network remains operational[5]. By contrast, if the unexpected costs become manifest during the first few months following launch and are likely to remain at the same level over the life of the bundle, a proportionate response would be for ComReg to allow eircom to continue serving existing customers in the absence of clear evidence that actual competitive harm will result.

Another interpretation of Oxera's comments is that if the NRT is passed, any excess margin can be stored up for future use. So, for example, an offering with a margin of €5 for the first 12 months could be allowed to remain in the market even if it fails the test later, until the cumulative margin approaches zero. If this is indeed the proposal, it needs to be described more formally so it can be captured in the reporting models. This formal proposal should also be accompanied by an explanation as to why this approach is better than the conceptually simpler one of just requiring that when a customer is acquired, the revenues that are expected to be earned from that customer must be greater than the expected costs of supplying that customer.

[5] It should be noted that this effect (i.e. costs rising because of reduced sales of another product) only arises because of the use of ATC and the resultant necessity to allocate common costs. Under an avoidable cost standard, this issue does not arise.

eircom notes that the proportionality of the available remedies in a situation where a bundle fails the NRT post-launch will also depend to some extent on the position of competing OAOs. The NRT is designed to establish that an equally efficient OAO could replicate the offering. *Ex ante*, an equally efficient OAO would not launch the product unless expected revenues covered total costs. *Ex post*, the OAO would only withdraw the offering if revenues were less than avoidable costs. So, whether competitors can compete against eircom going forward would depend on whether the competitors had already sunk costs in the product or not. And whether eircom was excluding competitors would depend to some extent on whether those competitors were existing competitors or hypothetical entrants. The criteria applied when considering how to deal with post-launch NRT failures should reflect these factors. The avoidable cost of new customers ("ACN") will always be above the avoidable cost of existing customers ("ACE"). So, if revenue is above ACN, the OAO will continue to acquire new customers and keep the existing users. If revenue is below ACN but above ACE, the OAO will keep the existing users but cease to acquire new ones, and if revenue is below ACE, the OAO will withdraw the product. We can be certain the OAO would not withdraw the product if the revenue expected is still above ACE or ACN. In a retrospective test, therefore, provided that eircom's revenues remain above ACN, there should be no justification for requiring eircom to stop selling the product. And only if eircom's revenues fall below ACN would there be any basis for mandating withdrawal of the product from the market entirely.

This form of analysis would formalise the required remedy. Oxera proposes that ComReg should have the discretion to allow an offering to continue to be sold, to be maintained for existing users, or to be modified or withdrawn. Oxera suggests this discretion should be exercised "to protect consumers". eircom considers that there are different levels of cost/revenue deviations that can help establish which of the various remedies are appropriate in each case, as indicated above.

We understand that ComReg's proposed competitive assessment may in fact allow for a more customer friendly approach. We welcome this development but remain concerned that the proposed test, as a whole, remains unfit for purpose and requires more fundamental adjustments to provide eircom with a more reasonable degree of flexibility in a rapidly evolving environment.

Proposal 3.6 (CD, p. 45): *ComReg proposes no change to the current net revenue test. Past margins cannot be banked / carried forward.*

This proposal seems to contradict proposal 3.7, which we believe to be the correct and only proportionate correct approach. Suppose a bundle has a margin of €10 per month, and an expected customer lifetime of 42 months. Total margin expected is €420. A rebate of €180 (perhaps in the form of €30 discount for each of the first 6 months), could be allowed.

Why then, can a rebate of €30 per month not be allowed to an existing user, who has already provided €420 margin over the last 42 months?

The proposed treatment would unfairly discriminate against eircom's retail operations. If eircom Wholesale were to offer a rebate of €100 for new wholesale users, an OAO could "bank" such rebates for the first 1,000 users, and use the pool of cash to offer, say, a €240 rebate for the next 400 users. There is no reason why eircom should not be allowed to do the same in the absence of proof of actual anticompetitive harm or the strong probability of same.

We welcome the proposed competitive assessment, which in eircom's view should take these factors into account in order to allow for proportionate outcomes when applying a complex and fairly inflexible test in a period of increasing uncertainty and unpredictability in terms of forecasting.

Proposal 3.7 (CD., p. 45): *No changed position - a bundle must be reasonable at all times and a promotional discount is considered reasonable if the cost of the promotional discount is covered over the average customer lifetime.*

eircom welcomes ComReg's clarification that an initial promotion will be considered reasonable if the cost of the promotion is covered over the average customer lifetime.[6] Oxera report incorrectly in section 8.4 of 11/72a: ComReg has indicated that it now allows promotional discounts to be recovered over a minimum contract term of 12 months. In fact, as per 4.103 ComReg allows such discounts to be recovered over the customer lifetime.

This is consistent with normal commercial practice, especially in the fixed telecommunications sector. In the mobile sector, it may be the norm for customers to be very aware of contract periods, and their ability to switch without penalty for a new subsidised handset, so the average lifetime may be close to the contract period. The fixed sector however tends to see lifetimes much longer than the minimum contract period.

If the NRT is designed to test whether an OAO could replicate an eircom offer, it is not reasonable to assume that the OAO would always seek to recover the investment in promotions within the contract period. OAOs will assess their promotions over average customer life, not the contract period. Therefore, the proportionate approach, consistent with the replicability principle, is for promotions to be recovered over the average lifetime of the customer.

Proposal 3.8 (CD, p. 46): *ComReg proposes no change to the current net revenue test. Discretionary promotions / opt-ins are assumed to have 100% take-up.*

ComReg currently applies a highly restrictive approach to discretionary promotions. eircom (and other operators) sometimes allow a discretionary or "opt-in" element in bundles. Consumers value these promotions and they have become a feature of the competitive landscape. For example, there may be an offer of 100 minutes of free calls to Meteor. Suppose the MTR is 5c per minute, so this offer has a "cost" of €5. ComReg currently insists this offer may only be allowed in conjunction with a product with margin greater than €5 (i.e. eircom must assume 100% take-up or opt-in).

However, because eircom does not automatically assign the offer described in the previous paragraph to every user, only 20% of customers take it up. So, if there are 100 users with a margin of €5, 20 opt-in and have their margin reduced to zero, but 80 do not and maintain their margin at €5: so the average margin over the 100 users becomes €4.

eircom considers that promotions should be considered in terms of their overall impact or expected impact on revenues and costs, subject to rigorous review. If an element is opt-in, and only a percentage of users avail of it, then its impact on the NRT should be diluted, and a competitive assessment should take this into account.

ComReg seems concerned that if eircom has 10,000 users on a bundle, it could effectively reduce the price of that bundle with a "discretionary" discount applied to every new customer. However, the situation as described is one where there is in effect a new lower price for all new customers: in practice it is a new bundle and would need to be assessed as such under the NRT.

[6] The discussion that follows is based on the expert statement of Dr. Mike Walker of Charles River Associates, which was prepared for and submitted in the parallel consultation on NGA Regulation. Many of the issues addressed by Dr. Walker are equally relevant to legacy services. For convenience, Dr. Walker's statement is reproduced in its entirety in Annex 1.

An alternative situation is where eircom proposes to offer a new bundle, with no customers. Most customers pay the full price of €100 but some ask for a discount. Suppose eircom's research has indicated that an extra 10% of customers would buy with a €10 discount. So, on this new bundle, eircom might attract 100 users at €100 each, and 10 users at €90, with average revenue of €99. ComReg proposes that the NRT should assume that the revenue for all users is €90. We do not see how this outcome could be considered reasonable, proportionate or in the interest of consumers.

The two situations described above are very different, and warrant different treatments under the proposed NRT.

Appropriate wholesale input cost for use in the net revenue test

Q. 2. In defining the Larger Exchange Area where a different wholesale input may be allowed, what area(s) of Figure 4 do you believe should be included in the Larger Exchange Area? Do you agree or disagree with the proposed use of a weighted average wholesale input in the net revenue test in the Larger Exchange Area? When / what area(s) of Figure 4 do you consider it would be appropriate for Eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area? Please give a detailed response with supporting data where appropriate to support your view.

Proposal 5.1 (CD, p. 50): *ComReg will define an appropriate area ("Larger Exchange Area") corresponding to those areas where uptake of unbundled services, whether LLU and/or virtual unbundling in NGA, is likely to be viable. Subject to respondents' views and other relevant evidence, the Larger Exchange Area could be either Areas 1-2 of Figure 4 OR Areas 1-3 of Figure 4*

In the past, ComReg has taken the position that because eircom prices its bitstream offerings on a uniform basis nationally, this implies that the relevant geographic market is national in scope. In fact, however, eircom's retail and wholesale broadband products are naturally evolving into different subsets (speeds, features, etc.) in the NGB versus the non-NGB areas. In this regard, the comments of the European Regulators Group ("ERG") are noteworthy. While acknowledging that it might be correct in some cases that an incumbent's national uniform price implies a national market, the ERG concluded that "*there may be cases where, from a consumer perspective, significant differences exist between "competitive" and "non-competitive" areas despite a national uniform price of the incumbent operator*"[7]. eircom is of the view that this is the case in Ireland.[8]

The ERG further noted that "the national uniform price is (ceteris paribus) not a useful indicator for a national market if it is imposed as the result of an SMP finding". The fact that eircom's retail broadband competitors have not differentiated their own prices[9] on the basis of geography cannot be conclusive where, in fact, these operators are not present in the entirety of the Irish territory but are concentrated in urban areas[10] - *i.e*. one of the two sub-markets in which eircom provides its services.

As discussed above, ComReg should consider the proposed area definition on the basis of eircom's geographic product offerings, taking into account the planned roll-out of NGA.

The NRT and the portfolios defined apply only to eircom. If the area definition is such that the prices of eircom's products are constrained by the geographic availability of competing products, the tests may become unworkable. eircom would have to set prices to meet the most onerous test, or would have to set different prices in different locations for the same product. If instead the tests vary by eircom product, then each product has a price, and it applies everywhere that product is available, which is much clearer for users and competitors. Reporting and analysis of the NRT is also much simpler under such a structure, reducing the burden on eircom and ComReg.

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[7] ERG Common Position on Geographic Aspects of Market Analysis (definition and remedies), October 2008, p.14.

[8] The argument is somewhat circular: Regulation requires national prices for narrowband access, and a national margin squeeze applies against a national cost floor: so the scope for regional differences is very limited. A more lenient NRT may well lead to different regional prices.

[9] In essence, UPC has a low price in urban areas and an infinitely high price in rural areas.

[10] In passing, we note that eircom has previously provided ComReg with evidence demonstrating those areas where eircom faces competition from the cable network operators and those areas which are highly likely to be unbundled in the next two to three years, for purposes of identifying those areas where the conditions for competition are not the same.

ComReg also should consider the incentives that the proposed rules would give to operators competing with eircom. Would the proposed area definition encourage or deter operators from extending their reach?

The definition of area 3 is critical. It represents eircom's NGB footprint, excluding the LLU (area 2) and cable (area 1) areas. Thus, the combination of areas 1, 2 and 3 is eircom's NGB footprint. If this is designated as the "Larger Exchange" area, then eircom has a single price control applying to NGB.

If the "Larger" area comprises only area 1 and 2, then potentially eircom can charge a lower price for NGB in areas 1 and 2, but a higher price elsewhere. To take advantage of this, eircom would probably need to specify two different products, and designate the areas where they can be sold. This would be quite disruptive in the market at the same time as NGA is being rolled out. So, rather than have a new cheaper NGB-like product in areas 1 and 2, eircom might opt for a new product replacing NGB in area 3. NGB prices could then be reduced, in anticipation of NGA.

A critical issue is the scale of area 3, and whether it is capable of being addressed in a coherent way by eircom (and other operators). In area 3, OAOs can buy legacy bitstream or Bitstream Managed Backhaul ("BMB").[11] In area 4 they can buy only legacy bitstream.

So, the number of customers, the scale of revenue, and whether area 3 is an addressable market (contiguous and relatively homogenous) or not will be very important factors. If area 3 is essentially an overspill around areas 1 and 2, then it is best treated as similar to 1 and 2. If it is a distinct area with very different competitive conditions, there may be a case for treating it separately.

What are the implications for OAOs of the two options? If the larger area includes area 3, the weighted average network input will be more expensive. So, competing in areas 1 and 2 using LLU or cable will be more profitable.

If the larger area excludes area 3, the weighted average cost will be less, so eircom could have lower costs and cheaper bundles. This would be the case if ComReg moved to a situation where 100% LLU input was assumed in all of area 1 and 2 (recognising that it is unlikely ComReg could assume this in area 3 if LLU is not viable there).

So, OAOs would face aggressive low LLU-based prices in areas 1 and 2, NGB competition based on BMB in area 3, and legacy broadband competition based on legacy WBA in area 4. There would be significant added complexity for eircom, ComReg and OAOs, but consumers in areas 1 and 2 might benefit.

Proposal 5.2 (CD, pp. 54, 56): *For bundles sold within the Larger Exchange Area, the net revenue test will reflect the weighted average cost of Eircom's wholesale inputs sold to OAOs based on actual usage by OAOs of each applicable wholesale input in the Larger Exchange Area at the end of the previous quarter. This weighted average wholesale network input cost would remain in place until (subject to further consultation) replaced by a LLU+ network wholesale input cost. ComReg seeks views as to whether it might be appropriate to move to an input of a LLU+ / network input cost only in the net revenue test for any Area(s) of Figure 4 at this time. If not, ComReg seeks respondent's views as to the appropriate trigger for when the LLU+ input might be used. ComReg also seeks views as to within what Area(s) of Figure 4 this could be done.*

[11] BMB is the wholesale offer underlying Next Generation Broadband.

As a preliminary matter, it is unclear whether the current Consultation Document is in fact the "further consultation" about an eventual move to LLU+ rather than a weighted average of LLU, WLR+LS, and WLR+BS. eircom believes that both options should be fully considered at this time rather than to wait for another round of consultations on the same issue. If ComReg decides to defer one or more of the proposed changes in the existing NRT, it should specify the triggers that will cause the change to be implemented. These triggers should be specific and objectively verifiable, and their achievement should not be beyond eircom's control.

We understand that the figures utilised for purposes of the discussion in 11/72 are only indicative, but we are concerned that they are typically based only on the 2011 cost figures as per the cost model prepared for the 10/108 draft direction on WBA price controls.

If one assumes the WLR and bitstream prices will not change, the WLR+BS cost is indeed €28.47.

The WLR+LS cost should reflect a port charge of €4.70 (including LS charge, faults and connection/disconnection) plus €2.18 for transport – giving a total of €24.90. This is a saving of €3.57 per line per month and explains why some OAOs are migrating to WLR+LS. In fact, if an OAO did not build out to all sites in the relevant models, its cost might even be lower. ComReg's indicative numbers would suggest there was no saving.

The LLU+ cost should be calculated in a similar way. However, if LLU faults and connection/disconnection are included care must be taken to strip out the LS rental, LS faults and LS connection/disconnection from the port floor of €4.70. The corrected figure would be about €19.80.

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eircom considers that the floor input should be based on the opportunities open to other operators, rather than the choices they actually make. This is entirely consistent with the concept of using FL-LRIC of an efficient operator when setting cost oriented eircom wholesale prices. eircom's historic cost, or the actual technology used, is irrelevant. The price is set based on the modern equivalent asset available to eircom if it were to replace the required assets today. Similarly, when ComReg applies the NRT to determine whether eircom's offers could be replicated, it should consider the least cost option open to those trying to replicate eircom's offerings today: their actual behaviour or past costs – whether this gives lower or higher price floors – is simply not relevant.

On this basis, eircom considers that ComReg should apply the full LLU input immediately, if the Larger Exchange Area covers areas 1 and 2.

If the Larger Exchange Area covers area 3, and ComReg considers that LLU will never be viable in that area, then a weighted average of LLU in areas 1 and 2, and WLR+BS in 3, could be used. The alternative suggested by ComReg, of modifying the LLU price to reflect the higher cost of copper across area 3, does not reflect the mix of WNI options available to an operator trying to replicate eircom's bundles. As such, the proposal is neither reasonable nor proportionate.

eircom considers that there is no impediment to OAOs using the full LLU input immediately, and eircom is not aware of any evidence of any barriers. However, if ComReg elects to use a weighted average approach on an interim basis, it should document and articulate the impediments that must be removed before a move to an LLU measure will be triggered, and the change should occur when those impediments are removed. In other words, eircom should not be held hostage to build/buy decisions made by OAOs for reasons that have nothing to do with eircom's wholesale offering. In this regard, the arbitrary delay of 12 months that has been proposed would be seriously damaging to eircom and indeed all DSL operators. ComReg should reconsider this proposed timetable.

Application of the proposed revised net revenue test under Decision D07/61

Q. 3. Do you agree or disagree with the proposed revised net revenue test? Please give a detailed response with supporting data where appropriate to support your view.

eircom continues to question the need for and the proportionality of an *ex ante* margin squeeze test for bundles. If such a test can be justified in the current environment, then a far more flexible approach is needed to accommodate the current dynamic and uncertain environment. eircom has provided a response on each element of the revised NRT proposals in the sections above. While eircom welcomes the proposed improvements, eircom is concerned that they do not go far enough, and many of the proposed improvements that have been proposed would be deferred for extended or indefinite periods of time under the scheme set out in the Consultation Document. eircom urges ComReg to reconsider those elements of its proposal over which eircom has raised concerns in the previous sections.

Notification, pre-clearance, modification / withdrawal of retail bundles that include Retail Fixed Narrowband Access

Q. 4. Do you agree or disagree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access? Please explain your response and provide detailed information to support your view.

ComReg's Preliminary view (CD, p. 63): *Eircom must notify and obtain approval for bundles that include retail fixed narrowband access at least five working days before launch*.

ComReg's preliminary view as summarised at p. 63 of the Consultation Document is unclear. It could mean that eircom must notify at least 5 days before the planned launch date, or it could mean that eircom may not launch a bundle for at least 5 days after ComReg's approval is granted. On the basis of the discussions in section 7.5 of the Consultation Document and in the Draft Direction (4.6 and 4.7), eircom understands that in fact ComReg proposes that eircom cannot launch bundles without having obtained ComReg's prior approval and that ComReg will make a decision as to whether or not to approve a bundle within 5 days of notification. Where approval is granted, eircom will be able to launch immediately or at its election.

eircom strongly objects to the pre-notification and pre-clearance requirements proposed by ComReg. eircom would point out that Decision D07/61 may not be used as the legal basis for imposing such an obligation. The market review that led to D07/61 contained the clear finding that an obligation to pre-notify bundles was not appropriate and any specification of the obligations set out in D07/61 must be consistent with these findings. For ComReg to impose such an obligation on eircom, ComReg must conduct a new market review. Only if such an obligation was justified on the basis of the outcome of this review could it be imposed.

Even if these procedures were permissible on the basis of Decision D07/61 (which they are not), requiring eircom to pre-notify and pre-clear bundles with ComReg is an unfair and disproportionate remedy which is not suited to existing market conditions. It is unreasonable to single out eircom as the only operator (fixed, mobile or cable) to be required to obtain permission to compete in the market, with pricing heavily managed in advance by the regulator. Under ComReg's proposals, eircom would be required to continue the process of compiling extensive information and modelling scenarios. This places an enormous burden on eircom's resources and impedes innovation, to the detriment of competition and ultimately end-users.

The comments below are without prejudice to eircom's fundamental objection to the pre-notification and pre-approval requirements proposed by ComReg.

In terms of the information that eircom would have to produce in the context of **pre-notification**, eircom is of the view that it is unduly burdensome and impractical. eircom has no reason to believe that the practice followed in the context of the Settlement Agreement was not adequate and accordingly sees no reason to depart from it. In this context, while eircom does not disagree that the notification should make "*full and true disclosure of all material facts*", this should be deemed to be the case where the following information is provided:

(a) A description of the proposed bundle and the method of calculating the margin;

(b) Where appropriate, a 'Statement of Compliance with ComReg D01/06' when broadband is included in the bundle (in Word or equivalent format);

(c) Margin forecasts for the proposed bundle, including explanations of the customer data used, the scenarios for customer behaviour and summary of models using each scenario (in Word or equivalent format); this includes explanations regarding assumptions made in terms of retail efficiencies and changes to customer lifetimes and

(d) Detailed workings using customer data, tariff data and modelling of scenarios (in Excel or equivalent format).

Whether full disclosure of all material facts has been made should be determined taking into account the information that is reasonably available to eircom, whether the bundle implements a new concept or not and the actual relevance of the information. eircom in particular notes the following:

- If the submission concerns a new concept in bundles, ComReg should recognise that it may be difficult for eircom to collect evidence for retail efficiencies and/or increased customer lifetimes in advance of the bundle being launched and the robustness of any evidence provided should be assessed in this context and not dismissed simply because it is based on assumptions that eircom has not been able to verify.

- Sensitivity testing for "Net revenue test" scenarios should be based on a range of high probability parameters.

- ComReg must recognise that projections are, by nature, susceptible to unanticipated developments and, therefore, actual performance can sometimes differ.

In terms of the **approval** process, it is essential that the right that ComReg reserves for itself to seek further information from eircom is only exercised in exceptional circumstances and not as a matter of course. In particular, ComReg should not challenge eircom's cost justification unless there is a patent error or flaw in the analysis.

Where ComReg does require further information, it should send its request to eircom as soon as possible so that the 5-day period is not unduly jeopardised. A Decision on the proposed bundle should be made as soon as possible and in any event within a *maximum* of 5 days of receipt of further information from eircom. Any refusal should be made in writing and detailed explanations provided to eircom, so that eircom is in a position to amend its submission and resubmit it or challenge ComReg's refusal.

Q. 5. Do you agree or disagree that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that Eircom should modify / withdraw such bundle within twelve weeks? Please explain your response and provide detailed information to support your view.

Preliminary view (p. 64): *Eircom must withdraw / modify any unreasonable bundle that includes retail fixed narrowband access within twelve weeks – this is an increase from the ten week proposal of Consultation Document No. 10/01. Within that twelve-week period, Eircom must not add any customers to the relevant bundle until and unless such bundle is modified to ComReg's satisfaction.*

eircom strongly objects to ComReg's proposals.

At a fundamental level, eircom does not accept that ComReg has the powers to enforce compliance on an operator in the manner proposed in the Draft Direction. The process proposed by ComReg circumvents the provisions of Regulation 31 of the Universal Service Regulations. It deprives eircom of its right to make representations under Regulation 31(2) and seeks to allow ComReg to make an enforcement decision in place of the High Court. As such, the process proposed by ComReg is clearly *ultra vires* its powers and unenforceable.

In this regard, it is eircom's view that the only obligations that could be imposed on eircom in the context of compliance enforcement are an obligation to monitor that launched bundles continue to meet the Net Revenue Test and an obligation on the part of eircom to notify ComReg that a bundle has not met the Net Revenue Test when a bundle fails the test in relation to two consecutive data sets.

While eircom could be required to do this as soon as possible, as ComReg is aware, eircom does not produce net margin calculations on a calendar monthly basis but rather for periods of four weeks. The data for each four-weekly report that eircom produces becomes available some time after the end of the four-week period. Two to three days are then required to validate the data. Therefore it will be a minimum of ten days after the end of the four-week period before a report can be produced.

On receipt of this information, it would be open to ComReg to require further information from eircom or proceed to issue a Notification of Non-Compliance in accordance to Regulation 31 of the Universal Service Regulations. eircom would then have the right to make representations why the bundles should not be considered to amount to unreasonably bundling and/or offer to remedy the non-compliance through appropriate actions, including for example, ceasing to offer the bundle, amending the bundle or withdrawing the bundles from existing customers within an appropriate time period.

In the current Draft Direction, draft section 4.8 is couched so as to require eircom to notify ComReg immediately if it believes that a bundle may not be compliant with eircom's obligation not to unreasonably bundle. It appears to eircom that this gives eircom the latitude to undertake the compliance assessment referred to at Draft

Section 4.4. While eircom is not opposed to this as such, another approach would be to require eircom to notify ComReg anytime that a bundle does not pass the Net Revenue Test in two consequent datasets. It would be open to eircom to make submissions as to the reasons why this does not amount to unreasonable bundling.

The Draft Direction is silent on how ComReg will assess the "unreasonableness" of a suite of bundles (or an individual bundle) after launch. Key issues include:

- The period of time over which such an assessment should be conducted. eircom's view is that a minimum of 6 months is required. This is because the assessment of a bundle must be made over a time period that is sufficient to provide a true reflection of customer behaviour, including customer familiarisation with and reaction to the bundle features. Furthermore there may be seasonal factors that influence the actual margin calculations when compared to the predicted margins. There may also be external factors, such as an aggressive response by a competitor or adverse economic circumstances that influence the behaviour of the bundles.

- The basis for the assessment. eircom is of the view that the assessment should be based on average margins over the 6-month period, provided that the bundles are margin positive in each of the last three months.

As noted, there may be unusual or unpredictable circumstances that affect bundles which could not have been foreseen prior to launch and which should be considered when assessing the reasonableness of bundles after launch. eircom launches bundles to meet customer demand and needs. These are based on customer research and data analysis, and are clearly designed to respond to observed customer behaviour and lifestyle choices. This is an integral part of any compliance assessment.

In terms of remedying non-compliance, separate from the process proposed by ComReg, eircom considers that while the revision from 10 weeks to 12 weeks is an improvement, it still does not allow sufficient time to eircom having regard to eircom's pre-notification obligation to ComReg and OAOs under Decision D07/61 and D01/06 and to its retail customers under Regulation 14 of the Universal Service Regulations. The following table lists the notifications that are required with respect to the scenarios outlined by ComReg.

Table illustrating the bundle modification scenarios and associated notification timelines

Scenarios	Notification to ComReg per Regulations	Notification to OAOs	Regulation 14) Notification to Retail Customers	Notification Time Required
(i) Reduce the stand-alone price of retail line rental and its associated wholesale price, single bill wholesale line rental ("SB-WLR");	Two Months (per ComReg D07/61)	Seven weeks (per ComReg D07/61)		Two Months
(ii) Increase the headline package price of the bundle	15 working days (per ComReg D01/06)		One Month	15 Working Days plus One Month
(iii) Increase the prices of calls outside the bundle allowance	15 working days (per ComReg D01/06)		One Month	15 Working Days plus One Month
(iv) Modify the "free" allowance within the bundle	15 working days (per ComReg D01/06)		One Month	15 Working Days plus One Month
(v) Reduce the price of the Bitstream	Bit-Stream price change: 15 working days (per ComReg D01/06)	Bit-Stream price change: 15 working days (per ComReg D01/06)		15 Working Days

- D07/61 applies for change to line rental prices
- D01/06 applies for changes to bit-stream prices

In the first scenario, eircom would be left with no more than two weeks to propose a modification to a bundle and to obtain ComReg approval.

In the cases of scenarios (ii), (iii) and (iv) in the above table there are various practical difficulties. In some circumstances one month's advance notification must be given to end users under Regulation 14. If time is limited, in order to comply with obligations, this would have to be sent to customers before ComReg is formally given the 15 working day notification by way of a compliance statement under D01/06. This is not practical.

In addition to the scenarios proposed in the consultation it may be open to eircom to modify elements of the bundles. For example a free Voicemail Box or other unregulated services could be withdrawn to move the margin to being positive.

It should be noted that ComReg uses different measures of time that may give rise to confusion, these are:

- Working Days (*e.g.* 15 working days' notification to ComReg per ComReg D01/06)
- Weeks (*e.g.* Seven weeks' notification to OAOs per ComReg D07/61 and Twelve Weeks in this consultation)
- Months (*e.g.* Two Months' notification to ComReg per ComReg D07/61)

eircom is of the firm view that (again separate from the process proposed by ComReg), it is not possible to set beforehand a specific time period by which non-compliant bundles must be withdrawn. Any such measure, consistent with the provisions of Regulation 31, would have to be assessed in the overall context and taking into account all relevant circumstances. eircom does not accept that withdrawal of a bundle from existing customers availing of that bundle will necessarily be an appropriate and proportionate measure to take. To withdraw bundles that are designed to meet specific customer needs is harmful to eircom's reputation and commercially damaging, and amounts to a very significant interference with eircom's commercial freedom that cannot be provided for automatically, and indeed can be imposed only by agreement or by way of a High Court order.

In circumstances where it would be appropriate to withdraw a bundle from existing customers or to amend it, eircom welcomes ComReg's acceptance that it would not be appropriate for it to interfere with eircom's communications with its own customers, including by way of requiring eircom to indicate to their customers that they can move to another operator. This is not a requirement of Regulation 14. The marketplace will ensure that customers are well aware of their options, and it would be entirely unwarranted and disproportionate for ComReg to require eircom to provide free advertising to other operators.

WPNIA – further specification of obligation not to margin/price squeeze

Q. 6. Do you agree or disagree with ComReg's proposed REO test to minimise the risk of a margin/price squeeze to ULMP? Please explain your response.

ComReg proposes that a REO test should be specified to ensure that SB-WLR and Naked Wholesale Broadband Access ("NWBA") offerings cannot cause a margin squeeze against the ULMP price. In summary, eircom does not agree that an REO test is appropriate. eircom also considers that ComReg has not clearly specified why a margin test or cost floor is required for SB-WLR, and has not clearly identified what this floor would be. We agree that the approach to setting a cost floor for NWBA is broadly correct, but ComReg should use EEO costs. All of the figures shown in the 11/72 document are misleading, and in some cases costs have been double counted.

In section 8 of 11/72, ComReg proposes a further specification of the obligation not to margin/price squeeze in connection with the WPNIA market. ComReg considers the appropriate margin between the ULMP product and eircom's SB-WLR product, and its "Naked WBA" product, when the latter is made available.

There are a number of complex ideas presented in this section. We note that ComReg proposes a number of new concepts, including:

- the idea that there should be economic space between ULMP and SB-WLR
- the idea that eircom's costs differ in various areas of the country
- the concept of NWBA and the associated concept of retail Broadband sold on a line which does not have a telephony service.

We have already dealt with the fact that a reasonably efficient operator test is inappropriate except where there is a real prospect that entrants will enter and will achieve scale. eircom does not consider that this is the case with SB-WLR. LLU has been available for many years, and there is no evidence that it has been used to provide a stand-alone WLR service. Indeed, although eircom suggested that this might be economic, other operators responding to 09/62 and related consultations disagreed. In decision D01/10 (document 10/10) ComReg in effect excluded (or weighted to a very low extent) any lines which could not support broadband speeds greater than 1Mbps. Therefore, any floor for SB-WLR should be set on an EEO basis.

We note that the ComReg calculation for a floor for SB-WLR includes the LLU price, fault repair (actual fault report charge multiplied by the percentage fault rate used in the ULMP price control model), line card costs, and ULMP connection and disconnection charges. However, ComReg does not actually specify a price floor for SB-WLR, but instead shows only a "possible minimum price floor for the ULMP component in SB-WLR excluding the line card (if appropriate)". ComReg calculates this as €14.12. ComReg then adds DSLAM costs and transport costs to this number to calculate a "total minimum price floor for the ULMP component in Naked WBA DSL." This is very confusing, because the ULMP component seems to include both the DSLAM and the transport costs.

ComReg's central idea that eircom's costs somehow differ from the ULMP price is a very dangerous and confusing one. In D01/10, section 4.178, ComReg is quite clear that the ULMP charge is a national one, which applies everywhere in the state. ComReg is quite vague about the costs that might apply in areas 3 and 4. According to the model underlying the €12.41 price, there were a range of costs for different areas. The €12.41 figure arises from a weighted average of numbers for several different years and for a national average.

Area	Year 1: 2010	Year 2: 2011	Year 3: 2012	3 year average
Area 1 & 2	A	B	C	X
Area 3 & 4	Q	R	P	Y

In simple terms (ignoring long lines) one can think of the ULMP price as 95% X plus 5% Y. However, it is not clear whether ComReg is proposing that the price floor for SB-WLR is to be Y, or P, or some weighted average of C and P. In almost all cases, these figures would exceed €18.02.

In summary, we cannot express agreement or disagreement with ComReg's proposal for an REO test for a margin squeeze between ULMP and SB-WLR because the proposal is very unclear.

Regarding the margin squeeze test for a NWBA product, we consider the general approach to be correct, but there are a number of errors.

As the €12.41 price applies nationally, it is the correct input in all areas: 1, 2, 3 and 4.

It is correct to add the fault cost, but it is not correct to multiply the fault charge by a notional fault rate in the model used to derive the price. If the control were to use EEO cost, then eircom's actual fault costs and actual fault rate should be used.

If ComReg were to persist with an EEO approach, then the fault cost should be the charge paid by the REO multiplied by the fault rate actually experienced by the REO. If the REO only unbundles large urban areas with low fault rates, it would be inappropriate to mix some national or notional fault rate which might be experienced by a larger operator of a different scale and scope, with other costs calculated on an REO basis.

ULMP connection and disconnection charges should be included. 42 months is the appropriate lifetime.

The DSLAM costs should be included. ComReg has built models of DSLAM costs for ADSL2+ service launched from MDFs. These models include all survey, build and collocation costs (including floor space rental, power etc.). These models include entrant's costs and eircom's costs. ComReg is aware that the €7.65 price suggested in consultation 10/108 applied only to 2011, and was never appropriate even for an REO model for a price control commencing in 2012. eircom estimates that a 3 year average for 2012, 2013 and 2014 for the REO port cost would be less than €4.70. This charge however includes not just €0.77 for line share, but also a contribution for fault repair on the Line Share portion of the line. When both elements are deducted, the REO cost would be about €3.45. The EEO national cost would be similar, but the EEO cost for areas 1 and 2 would be much less.

Similarly, the transport cost cited in 11/72 of €50/Mbps is purely at the 2011 figure, and 10/108 suggests this cost would fall by more than half over subsequent years. A more correctly cost-oriented treatment of transport cost would suggest that the transport cost floor for an REO over 2012-4 would be about €1.28 per customer, plus €9.01 per Mbps peak throughput. At the current average throughput of 100kbps, this suggests a transport charge of less than €2.18.

Therefore, eircom estimates that an REO floor for NWBA would be €12.41, plus €3.45 plus €2.18, or a total of €18.04: not €24.75. If the costs were calculated on a national basis using EEO costs, the result would be similar, while an EEO cost for area 1 and 2 would be significantly less.

Q. 7. In your opinion, how should the cost of the network be calculated for setting the Wholesale Network Input ("WNI") for the purposes of the proposed WPNIA margin/price squeeze test to minimise the risk of a squeeze on ULMP? Please explain your response.

eircom proposes that the correct and proportionate WNI in a margin test between ULMP and downstream wholesale products such as NWBA is the national ULMP price.

WBA – possible further specification of obligation not to margin/price squeeze

ComReg seeks views as to whether the existing obligation not to margin/price squeeze in respect of WBA, as set forth in D01/06, should be further specified to impose a margin squeeze test for bundles that include WBA. The posited margin squeeze test would be similar to the proposed revised NRT used in the Retail Fixed Narrowband Access market, complemented by an assessment of the competitive context. In particular, the posited test for WBA would deal with bundles including the wholesale equivalent of SAB/Naked DSL to ensure that OAOs availing of NWBA (Bitstream) DSL are not being squeezed at the retail level.

Q. 8. Do you believe that the existing obligation not to margin/price squeeze in WBA should be further specified to include passing a margin squeeze test for bundles that include WBA? Do you agree or disagree that such a margin squeeze test should be similar to the proposed revised net revenue test in the Retail Fixed Narrowband Access markets? Please explain your response.

BUNDLES THAT DO NOT RELY ON NARROWBAND ACCESS - NAKED DSL

The basis for applying the NRT is the Narrowband Access Market SMP obligations, and in particular the obligation not to unreasonably bundle. If a bundle does not include narrowband access, the NRT does not apply.

For example, if eircom offers a bundle of line rental, calls and broadband at €74.99, the NRT applies. But if eircom offers line rental at €25, and a bundle of calls and broadband for €49.99 then the NRT does not apply.

It is essential to bear in mind that eircom's obligation not to unreasonably bundle has been imposed having regard to eircom's SMP on the *retail* market for narrowband access. An obligation not to unreasonably bundle can be imposed under the Universal Service Regulations in relation to a retail market where SMP has been found.

Oxera expresses concern that eircom could "bypass" the no unreasonable bundling rule by offering a Voice over Broadband ("VOB") solution over naked DSL. It is difficult to see how such "bypassing" could arise where the provision of retail *narrowband access* is the trigger to the obligation not to unreasonably bundle, and eircom's SMP in *retail narrowband access* its justification. A finding of SMP at the retail level is a pre-requisite to the imposition of an obligation not to unreasonably bundle. No equivalent test to an "unreasonably bundling test" can lawfully be devised in relation to broadband access, including where it is provided in the form of Naked DSL, because the retail market for broadband access is not regulated. In particular, it is not possible for ComReg lawfully to rely on the obligation not to margin squeeze to regulate markets which are properly unregulated. This means that before considering whether to adjust the existing rules in order to catch new and innovative services that are freely offered by eircom's competitors, a full market review would be required.

eircom notes that ComReg has not proposed to regulate retail broadband access or voice calls. If ComReg were minded to include VOB and PSTN voice calls in the same market, it is likely that eircom's share of the combined market would be rather low and that SMP would no longer be indicated. The same is true if ComReg were minded to combine DSL(including Naked DSL) and Narrowband access.

In any event, eircom does not believe there is any justification for applying an *ex ante* margin squeeze test to bundles using a VOB solution, provided that a reasonable wholesale naked DSL offering is available to OAOs. WBA products have their price subject to a cost orientation obligation and this, combined with the *ex post* application of the competition rules is sufficient to monitor prices in the absence of eircom having SMP in the retail broadband access market.

Without prejudice to the above position, eircom also notes the following:

If NWBA were only offered in areas 1 and 2, then eircom considers that competitive conditions for broadband bundles are such that eircom has no market power, and so no test is required. UPC is currently winning over 50% of orders in these areas, and eircom's retail share is 35% and falling.

However, if eircom is to be regulated because of SMP in the market for WBA nationally, then, for the reasons laid out in the sections above, an EEO test is the correct and proportionate one.

The basic price control for WBA relies on a retail minus control using an SEO/REO approach. ComReg has suggested one reason for this new control is that the controls in D01/06 on WBA sold standalone or offered in bundles "may be removed in the near future". So, this new control is designed to replace the existing controls. It would be unfortunate if multiple conflicting controls were to apply, so we should consider the proposal as if the exiting D01/06 rules no longer applied.

We note that in the table on page 72 of the Consultation Document, ComReg proposes that cost C2 is "the monthly operating costs as derived from the WBA regulated retail minus price control". We take this to mean the retail cost in the "DCF model" of the REO/SEO entrant that sells only standalone broadband. This is certainly not appropriate in the context of an REO/SEO selling bundles, but for the reasons above, eircom considers the appropriate test is an EEO test.

We find the definitions of C3 and C4 (total bundle cost, and total monthly adjusted Bundles Cost) to be identical. This seems to arise because on page 59, there is a distinction between cost lines C7 and C8. C7 includes the total cost of calls and C8 includes the total LRIC of calls. We also note that the definitions of "Total Monthly Adjusted bundle Cost" on page 92 is not consistent with the definition on page 73.

eircom has been consistently clear to reject the concept that unregulated products in bundles must cover common costs (especially sunk costs), or should be costed at the stand alone retail price.

eircom reiterates that the correct and proportionate test is that each individual bundle should be assessed on the basis of avoidable cost, or forward looking incremental costs ("pure LRIC"), and that common costs should only be considered at the portfolio level.

A competitive assessment of any additional services offered by eircom is welcomed provided it is predicated on a realistic view of market conditions and considers the benefits to consumers of eircom's entry. eircom currently has a minimal share of post-pay mobile market, and a zero share of the TV market. eircom's entry to such markets should be welcomed, rather than discouraged.

For any tests of bundles that do not include line rental, only two portfolios – NGB area and non-NGB areas -- should be considered.

Q. 9. Do you believe that the D01/06 price control should be amended from SEO to EEO? Please support your view with relevant data and evidence. If you believe it should remain at SEO, when do you believe it might be appropriate to use EEO? Please support your view with relevant data and evidence.

ComReg has proposed in other consultations to review the price control for WBA and move to cost-based pricing. Given the proximity of that expected change, eircom views the imposition of a further margin squeeze test in the presence of a cost-orientation obligation ad being entirely unnecessary and disproportionate, in particular in the absence of SMP at the retail level. Because eircom does not have SMP in the downstream retail broadband market, *ex post* review under the competition rules is the proportionate approach.

Without prejudice to this, eircom notes as follows:

The discussion at sections 9 .13 to 9.19 of the Consultation Document suggests that ComReg has accepted that the cost standard in a future margin squeeze test between retail broadband and WBA, and for bundles using WBA or its underlying components, should move from SEO to EEO when competitive conditions warrant this. However, ComReg has indicated that such an amendment may not be warranted at this time. eircom welcomes ComReg's proposed move to EEO but is very concerned about the deferral of this important change. The current REO/SEO approach does not make simply a small adjustment for scale and scope: it assumes that the appropriate costs are those of an entrant starting from zero, and selling only broadband. eircom considers that the only proportionate test under the circumstances presented in today's marketplace is an EEO test. If "entrants" have not been able to achieve sufficient scale and scope after many years of protection under the restrictive REO standard (a fact that ComReg has not even attempted to establish), there is no justification to continue this approach indefinitely. ComReg should consider the balance of consumer benefits from allowing eircom to charge market prices against the benefits of protecting "entrants" who are either ineffective, or simply optimising their profits in a sector that has long been fuelled by regulatory arbitrage.

As discussed in previous sections, it is possible that the "entrants" – most of whom are multinational global operators of vast scale and scope compared to eircom – are simply extending their portfolio from Mobile or TV markets into fixed broadband to the optimum extent. It would not be surprising to find that they are choosing the optimum mix of geographical coverage, or the optimum mix of mobile broadband, mobile voice, and fixed broadband and voice – to maximise their profits.

ComReg has presented selective data relying on DSL market analysis (to the exclusion of other retail broadband markets), and suggests that further take-up of LLU or WBA inputs will be needed before an EEO approach can apply to margin squeeze tests. The net effect of this is that eircom's retail prices – which must exceed the sum of cost-based network prices and fictional SEO/REO costs – are set too high compared to other platforms, and as a result DSL is losing significant market share of the total broadband market.

While eircom would prefer a consistent use of EEO in all situations, we welcome the proposal that it is appropriate to use EEO broadband retail costs for consumer and mass market business bundles – where the key competitors are large, well established foreign operators selling similar bundles. We urge ComReg to provide for an expeditious transition to the use of EEO for setting the ceiling of the stand-alone broadband price.

Naked WBA (Bitstream) DSL – obligation not to margin/price squeeze WBA and WPNIA

Q. 10. Do you agree or disagree with ComReg's proposed floors for Naked WBA DSL to minimise the risk of a margin/price squeeze to WPNIA? Please explain your response.

eircom does not accept that ComReg's approach to retail price floors for NWBA is correct or proportionate and questions whether ComReg has the authority to extend regulation to apply to a retail market that is highly competitive for the purpose of preventing margin squeeze in an upstream wholesale market. In eircom's view, *ex post* regulation under the competition rules is more than adequate to address any concerns in this area.

Notwithstanding the foregoing, the following considerations would need to be taken into account in any *ex ante* test that might be applied if one could be justified:

As indicated above, a correct and proportionate *ex ante* test should be based on the ULMP price, (rental charges and connection/disconnection amortised over the customer lifetime), the EEO DSLAM costs, the appropriate transport costs, and the relevant fault costs.

There is no basis for concluding that NWBA can cause a squeeze against WLR. ComReg itself has failed to articulate what form of squeeze it believes might arise. WLR is not conceptually an input to NWBA. In fact, even if eircom were to offer an NWBA service by utilising a WLR line with incoming and outgoing calls disabled, it would be inappropriate for the cost stack to include the cost of elements that are not needed for the service supplied. There is no evidence to suggest that WLR and NWBA could conceivably be classified as falling within the same relevant market. Indeed, ComReg's proposal would appear to be an attempt to create an elaborate strait-jacket spanning a range of unrelated wholesale and retail offerings in order to protect legacy services against innovative NGA-based offerings. This not only would undermine achievement of the ultrafast broadband targets set by the European Commission; it also would violate the principle of technology neutrality.

ComReg appears to have concerns that SB-WLR might be undermined by some combination of NWBA and voice over broadband (VoB). VoB might take the form of third party over the top applications (e.g. Skype, Blue face) or a carrier grade VoIP service. The VoIP service might be provided by an operator which has existing VoIP platforms (e.g. Magnet, UPC or Smart runs such platforms in Ireland, or Vodafone, TelefonicaO2 or BT all have VoIP operations in various countries which could be extended to Ireland, especially if QoS features were part of the standard bitstream offering). Such offerings are possible already in many areas using eircom's ULMP service, and many alternative platforms. We do not see how the imposition of a high floor price for NWBA could enhance competition in the provision of these services.

ComReg appears to have paid little attention to market reality when attempting to set the floor for NWBA. What retail prices apply for standalone broadband offerings today[12], and does the proposed floor allow OAOs using eircom's DSL network to compete?

The entry level UPC product is offered at €25 for 20Mb broadband, plus €7.75 surcharge where the customer does not take a TV or phone package. So, the total SAB retail price, including VAT, is €32.75. The price excluding VAT is €27.06. An NWBA price floor of €28.65 makes no sense in this context, whereas eircom's proposed floor of €18.04 would allow the EEO to compete.

On a national basis, Digiweb offers an entry level SAB product at €34.95 including VAT, and Imagine offers a range of products from €25. Mobile operators typically offer SAB in the form of mobile broadband, with typical prices less than €20 per month.

eircom's own market research suggests that there would be significant interest in SAB over DSL at prices in the range €30-€35, but almost no interest if the retail price were to exceed €40.

If ComReg were to set a NWBA floor such that eircom and/or others operators using NWBA were unable to achieve retail prices of €35 or less, then ComReg would in effect be preventing most DSL operators from competing against UPC in the market for SAB. There is no legal, economic or policy basis for this proposal. It should not be pursued.

[12] The prices in this section were taken from the Digiweb.ie, UPC.ie and Vodafone.ie web pages on 6th December 2011.

Conclusion

Q. 11. Are there any relevant issues that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

There are a number of other important developments that overlap with many of the issues raised in the consultation. These include new price controls on WBA and the launch of NGA. ComReg should ensure that any draft direction is, or can be made, consistent with these decisions. eircom would, in particular, caution ComReg to fully and fairly assess the impact of the Draft Directions on NGA-based bundles.

As noted above, eircom believes that ComReg has given insufficient consideration to the competitive dynamics of the marketplace today and the foreseeable acceleration in the provision of converged bundles over the next two to three years. ComReg's first-level assessment should be whether a light-touch regulatory approach can safely be tested in light of the clear parameters and severe penalties that would apply if eircom were found, *ex post*, to have engaged in margin squeeze under the competition laws.

ComReg has not to the best of eircom's knowledge exercised its competition law powers to date. A far more reasonable and proportionate approach, and one that would be far less interventionist and burdensome, would be for ComReg to issue guidance identifying the factors it would apply in making an *ex post* assessment of margin squeeze involving bundles (particularly those involving new services like naked DSL). ComReg also should consider developing procedures that would allow for the expeditious handling of any colourable claims of margin squeeze that might arise. This would have the advantage of providing a strong deterrent against anticompetitive behaviour while at the same time allowing innovation to flourish.

Draft Directions

Q. 12. Do you believe that the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

For the reasons discussed above, eircom urges ComReg to revise the Draft Directions to reflect eircom's proposals and concerns as discussed in the preceding sections. eircom would be pleased to provide ComReg with proposed text for the affected sections of the Draft Directions.

One important change that should be incorporated into the final Directions is a specification of the triggers that will be applied to any deferred changes in the existing Net Revenue Test. These trigger provisions should be objectively verifiable. Moreover, the triggers should not include any measures that are beyond eircom's control to achieve.

eircom would, in particular, caution ComReg to fully and fairly assess the impact of the Draft Directions on NGA-based bundles. See also our response to Question 11.

DRAFT Regulatory Impact Assessment

Q. 13. Do you have any views on this draft Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

eircom believes that the draft RIA ignores the very high costs to eircom and to consumers of continuing the highly interventionist approach that applies to the pricing of retail bundles, even if the proposals do contain welcome relief from some of the constraints that apply under the current NRT, and the possibility of greater flexibility in the coming years. In light of the significant changes that are occurring in the marketplace as a result of the continued deterioration of economic conditions, unpredictable customer demand, and the imminent introduction of NGA services, the costs and risks associated with applying a highly complex *ex ante* NRT have actually increased dramatically.

ComReg should carefully reassess the need for such an *ex ante* test going forward by comparison with expeditious application of the competition rules to any issues that may arise in relation to the pricing of bundles or the wholesale price stack.

Annexes

Annex 1: Expert statement of Dr. Walker

CONFIDENTIAL/COMMERCIALLY SENSITIVE

Annex 2:

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CONFIDENTIAL/COMMERCIALLY SENSITIVE

Annex 3:

4: UPC

UPC Ireland submission to the ComReg Consultation and Draft Directions Document 11/72 - Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access: Further specification of certain price control obligations in the markets of Retail Fixed Narrowband Access and Wholesale Physical Network Infrastructure Access

UPC Response

1. UPC Ireland (UPC) welcomes the opportunity to comment on ComReg's consultation document 11/72. While the proposed changes in the draft Decision are small in number; UPC considers they potentially have a very significant impact on the market as they reduce the regulatory remedies place on eircom and will enable the company alter the price differentials between the retail and wholesale markets primarily to eircom's benefit. UPC therefore does not agree with the proposed changes and in particular do not believe the timing is right, nor the market analysis is sufficiently robust. Further, UPC does not believe the individual Net Revenue Test (NRT) proposals are sufficiently detailed to arrive at the conclusions as presented by ComReg.
2. ComReg provide no analysis of market failure where a portfolio of products being offered together (hereafter referred to as "bundles"). The recent ComReg commissioned survey on ICT usage, among residential and business users, indicates that bundles are both popular and easily accessible. This study indicated 58% SMEs take a bundled package[1] and a third of businesses have already switched bundle supplier in last twelve months[2]. Similar findings are borne out in the residential market where bundles are very popular (with six in ten consumers taking a bundled portfolio).[3] UPC struggles to understand what objective ComReg is seeking to achieve and what market failure the proposed changes to the NRT attempts to rectify. It should be noted that all communications providers in the market offer bundles, for example UPC, eircom, Vodafone, 02, Imagine, Magnet, Digiweb and Three.
3. UPC sees no evidence that the market share of the other operators, including that of UPC, have made an impact on eircom's market power in the Retail Fixed Narrowband Access (Market 1), WBA (Market 5) and WPNIA (Market 4) markets. There is no evidence that ComReg calculations of market share whether from a product or geographic standpoint, are significantly different for bundles compared to the markets assessed individually. Further UPC asserts that ComReg has not justified in any satisfactory manner, why it believes an amendment to the NRT is required. In the absence of any detailed justification, UPC cannot provide detailed observations on the proposed Decision and in particular, with respect to the issue of geographic de-regulation and would note the absence of any attempt by ComReg to define local markets which would support such a move. It is for these reasons UPC would assert there appear to be no justifiable grounds in this consultation that would justify the proposed change to the NRT.

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[1] Slide 8, SME ICT Usage, ComReg 11/96b http://www.comreg.ie/_fileupload/publications/ComReg1196b.pdf
[2] Slide 12, Whether switched supplier in the last 12 months, ComReg 11/96b http://www.comreg.ie/_fileupload/publications/ComReg1196b.pdf
[3] Slide 52, Conclusions 2, ComReg 11/96a http://www.comreg.ie/_fileupload/publications/ComReg1196a.pdf

4. While the paper does not address the regulation of services provided over Next Generation Access (“NGA”) networks, ComReg has clearly indicated that Naked DSL is a component product that falls in scope for the purposes of this consultation. It is very clear from the NGA and Bitstream roadmaps presented by eircom in the ComReg industry Bitstream Forum that Naked DSL will not be offered on the current ADSL network until such time as stand alone broadband products are first launched from the NGA network. As ComReg will be aware, the timeframe for naked ADSL has not yet been confirmed. The other primary NGA product VUA (Virtual Unbundling Access) also has the potential to impact the market; specifically the economic space between ULMP, VUA, Naked DSL and POTS based DSL which will have and an impact on a bundle with or without derived voice. UPC strongly believes the timing of assessing the current network (including Naked DSL) is therefore premature and would argue be better assessed in the context of ComReg’s separate review on the regulatory framework for NGA networks which ComReg has advised will be the subject of another consultation which will issue before a final decision on this particular issue will be taken.[4]

5. UPC has concerns that the potential compression of the economic space between ULMP, VUA, Naked DSL and POTS based DSL may negatively impact the ladder of investment objectives set out by ComReg. UPC is a strong advocate of platform competition. It is the best way to guarantee real consumer choice and the availability of innovative, differentiated products and services, including advanced broadband services, at the most competitive rates. Any changes to the NRT must be made with consideration to NGA and current generation product bundles.

6. As outlined in the consultation document, UPC’s cable footprint matches approximately one hundred of the eircom's exchanges that are most likely to be unbundled.[5] In turn, these one hundred exchanges, match ComReg’s potential definition of a “Larger Exchange Area”. As acknowledged by ComReg, UPC has invested substantially in upgrading its network to a NGA network and is the only operator to have to have done so in any meaningful manner to date.

7. Further to an intensive five year investment programme, the company recently launched the commercial offer of very high-speed broadband services (i.e. up to 100 Mbps) to residential customers. ✂ ✂ This underscores UPC’s belief that the NGA market in Ireland is only at the very early stages of development at this point in time and it will take many years before there is any real payback for operators that invest in NGA networks. UPC therefore firmly believes that it is premature to change NRT for bundles for this subset of products and for any products where investment in LLU or alternative networks has been made or has potential to be made.

8. UPC would therefore reject ComReg’s assertion that it is legitimate and appropriate to apply the NRT as a two-part approach given the absence of a definitive definition of the “Larger Exchange Area” (LEA). The suggestion that Average Total Cost (ATC) should be or could be disaggregated between LEA and outside the LEA is premature in the absence of ComReg defining what it means by this particular term of reference. Given this, UPC has serious concerns that any disaggregation of costs could lead to the incumbent subsidising bundles in these larger areas with revenues earned by their large base outside these areas. The necessary analysis that enables ComReg to take such these decisions is simply absent.

[4] Para 1.3, Pg.3, Introduction, ComReg 11/72 http://www.comreg.ie/_fileupload/publications/ComReg1172.pdf
[5] Footnote 14, Pg. 16, ComrReg 11/72, http://www.comreg.ie/_fileupload/publications/ComReg1172.pdf

9. In light of eircom's virtual unbundling (VUA) and the planned product offering of stand alone Bitstream (Naked DSL) over its NGA network, UPC believes ComReg is premature in attempting to define the relevant market triggers that would identify alternative network input costs akin to existing 'LLU+' costs. While ComReg has outlined a number of potential triggers to change the input costs from "explicit number of unbundle lines" to a simple "time based approach", it has not provided a clear definition of the "trigger" nor a clear methodology of measurement.
10. Given all of the above, UPC would insist that ComReg conduct a full market analysis and review because the UPC analysis indicates that no market failure exists. When ComReg conduct this review UPC would encourage ComReg to re-consider its approach and in particular, set out its objectives; define the market failure it wishes to correct and produce the required analysis to substantiate such a proposal. Finally, UPC would call on ComReg to address all matters relating to the future regulatory framework for NGA in one single consultation.

December 16, 2011

5: Vodafone Ireland Ltd

Vodafone Response to ComReg Document 11/72

Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access

Further specification of certain price control obligations in the markets of Retail Fixed Narrowband Access and Wholesale Physical Network Infrastructure Access

Introduction

Vodafone is pleased to have the opportunity to respond to this ComReg consultation. ComReg has covered a significant number of issues in the consultation, including suggesting changes to controls that are still out to consultation. Vodafone has sought to respond constructively to the consultation questions and to provide market analysis and evidence to inform ComReg's thinking. At a high level, ComReg is consulting on:

- A number of changes to the net revenue test
- The introduction of a net revenue test for WBA bundles
- Moving the WBA margin squeeze from SEO to EEO
- Introducing REO price floors for WLR and NWBA

Below we set out Vodafone's high level views on each before setting out our detailed responses to each of the consultation questions.

We note that the proposals individually, and in aggregate, appear to be aimed at significantly increasing eircom's pricing and commercial flexibility without requiring eircom to change the wholesale prices it charges to OAOs. Thus the bulk of the proposals would have the effect of improving further eircom's competitiveness with respect to OAOs. Vodafone believes that this approach is at odds with the long-term development of competition in the market, does not help to deliver ComReg's statutory objectives, will dis-incentivise investment and, most importantly, will be detrimental for customers in the longer term.

Vodafone also notes that, amidst all the proposals, there is almost no reference to looking again at whether LLU prices are set correctly. If ComReg is concerned about the slow take up of LLU and about the ability of Eircom/OAOs to compete effectively with cable, then it is essential that it reviews the current pricing of LLU.

There is clear evidence that LLU prices are too high:

- take up of LLU in Ireland is significantly less than it was assumed to be when LLU prices were being determined
- the full monthly LLU price in Ireland is 44% higher than the EU average and twice that in the UK.

Moreover, as has been demonstrated with Line Share, there is clear evidence that OAOs will respond and invest when prices are set appropriately.

While eircom has the ability to reduce LLU pricing (as the regulatory price is a price maximum), we note that they have signalled that they do not intend to do so. In addition eircom has explicitly stated at an Industry workshop on NGA pricing attended by ComReg that its has no plans to reduce WLR pricing Consequently, if ComReg were to reduce the maximum LLU price it would encourage further investment by OAOs, while maintaining the critical regulatory safeguards that are in place and that fostered competition, entry and investment in the market to the benefit of all Irish consumers.

Vodafone does not agree with the proposed changes to the net revenue test

The current test is working well and provides an important safeguard in the market. Moreover, the two-part nature of the test provides ComReg with the flexibility to allow bundles that fail the net revenue test in circumstances where ComReg is of the view that the bundle will not harm competition.

Under the new proposals some bundles that would have failed the current test will pass the revised test. This <u>only</u> provides additional flexibility to eircom if ComReg would previously have blocked those bundles. ComReg would only have blocked those bundles if they believed they would be harmful to competition. In consequence, the proposed changes only increase eircom's pricing flexibility in so far as they result in harmful bundles being allowed whereas previously they would not have been allowed.

Vodafone is of the strong belief that the proposed changes will therefore lead to outcomes that are harmful to competition. ComReg has previously considered and rejected all of the proposals it is setting out in this document, and ComReg has provided little or no evidence of changing market conditions to support their proposed changes. ComReg has failed to undertake the type of market analysis that would be required to support such significant changes, and had ComReg undertaken such analysis, it would clearly have demonstrated that the proposed changes are unnecessary and harmful to competition. Vodafone strongly believes that proceeding in the manner set out in the consultation document will undermine regulatory certainty, damage investor confidence and reduce the prospects for future investment in the Irish telecommunications sector.

Vodafone supports the introduction of a net revenue test for WBA bundles based on the current net revenue test

Vodafone is of the view that the adoption of a margin squeeze model for WBA/Naked WBA bundles is appropriate.

However, Vodafone does not believe that the test set out in the consultation document is appropriate. Rather, we believe that the test should be based on the existing net revenue test, which requires bundles to pass on a bundle-by-bundle basis and includes unregulated products on a no-margin basis.

In particular, given ComReg's very recent findings with respect to the state of competition in the WBA market (ComReg 11/49 published in July of this year) we find it surprising that ComReg is contemplating geographically differentiated remedies.

Vodafone does not support a move from SEO to EEO for the D01/06 price control

Vodafone does not believe that the test should be amended from SEO to EEO.

Vodafone agrees with ComReg's assessment in the consultation document that:

> *"Looking at the current market conditions, ComReg believes such an amendment may not be warranted at this time - as Eircom continues to hold a significant market share of DSL broadband lines as the latest Quarterly Report shows and, as noted in the recent WBA market review, Eircom is still a major provider of retail broadband. The D01/06 price control assumed the SEO would have a 25% market share."*

ComReg have recently reviewed the market and have found that there is a national market in which eircom has SMP. eircom have a share of 65.9% of DSL lines, and even when the market is widened out to the full fixed retail broadband market, eircom have a market share of 45.2% whereas Vodafone the next largest DSL operator have a share of 16.6%. While Vodafone has grown its market share over time, we would highlight that its share, at just under 17%, is still substantially less than the assumed SEO share of 25% as set out in D01/06.

Competition in the market is developing to the benefit of customers, and the current regulatory framework is supporting the development of that competition. Moving too quickly to change that framework will damage competition to the detriment of consumers, and undermine confidence in the regulatory framework which is absolutely essential if OAOs are to make long-term investments and commitments to the Irish market.

With respect to 'where' ComReg might move from an SEO to an EEO standard, Vodafone assumes ComReg is alluding to geographically differentiated remedies. In this regard, Vodafone believes that ComReg's own market analysis clearly demonstrates that markets are national in their geographic scope and that there is at best limited evidence of locally varying competitive conditions. Vodafone is of the firm view that allowing eircom varying pricing flexibility to respond to postulated differences in local competitive conditions is not in the interests of consumers, as it will harm entrants and undermine the prospects of effective competition developing in the medium term.

Vodafone agrees in principle with the introduction of appropriate additional safeguards for NWBA

Vodafone agrees in principle that it is important to ensure that there are appropriate controls in place to safeguard and incentivise investment in LLU. Vodafone also believes that, in the case of NWBA, there is also a need to ensure that there is no margin squeeze to its other wholesale products SB-WLR and WBA.

However, Vodafone believes that it is inappropriate to consider a standalone price floor for SB-WLR to protect against a price squeeze of full LLU. This is because it is extremely unlikely that an operator that has invested in LLU would seek to offer only narrowband services. Clearly, an operator investing in LLU will be offering both narrowband and broadband services. In consequence, the key issue is to ensure that the combined price of SB-WLR and WBA are not so low as to squeeze LLU investment.

Vodafone also believes that it is inappropriate to consider a price floor to protect LLU investment from an NWBA price squeeze. Vodafone believes that the more pressing concern is that NWBA could squeeze OAOs who are currently using SB-WLR and Bitstream. As ComReg itself notes in this consultation, and elsewhere, WLR and WBA have been key enablers of competition. Indeed, in those areas of the country where LLU is economically infeasible and cable is not present, WLR and WBA represent the only credible form of competition.

Vodafone is of the view, therefore, that ComReg needs to consider whether the price floor for NWBA is appropriate not just with respect to LLU, but also with respect to the combination of WLR and WBA. ComReg should re-consider the scope of the proposed price floors, and re-consult on appropriate price floors after the WBA process is complete and when it has provided market participants with greater clarity regarding NGA.

Response to Consultation Questions

Q. 1. Do you agree or disagree with the proposals / preliminary views expressed by ComReg in relation to possible revisions to the net revenue test? Do you have any views on the matters ComReg seeks further input on in the above? Please give a detailed response with supporting data where appropriate to support your view.

Vodafone does not agree with the proposed revisions of the net revenue test as set out by ComReg in ComReg Document 11/72. Vodafone is of the strong belief that the proposed changes will lead to outcomes that are harmful to competition. ComReg has previously considered and rejected all of the proposals it is setting out in this document, and ComReg has provided no evidence of changing market conditions to support their proposed changes. ComReg has failed to undertake the type of market analysis that would be required to support such significant changes, and had ComReg undertaken such analysis, it would clearly have demonstrated that the proposed changes are unnecessary and harmful to competition. Vodafone strongly believes that proceeding in the manner set out in the consultation document will undermine regulatory certainty, damage investor confidence and reduce the prospects for future investment in the Irish telecommunications sector.

As requested in the consultation question, we expand on our response below. In particular, we:

- Provide a summary of the proposed changes
- Set out why, conceptually, the proposed revisions can only result in outcomes that are harmful to competition;
- Review ComReg's own views on the elements of the net revenue test it is now consulting on, and a summary of ComReg's own views on how competitive conditions have evolved in the intervening period, drawn from recent consultation papers.
- Assess the current state of competition based on data set out in ComReg's quarterly key data report on the telecommunications market.
- Consider any other issues with respect to the proposals.

Summary of proposed changes

ComReg's consultation document contains the following proposals for changes regarding the net revenue test:

- To revise the net revenue test to a two-part test: Part 1) Portfolio aggregate bundle assessment based on ATC and Part 2) Individual bundle assessment with lower cost standard required for retail costs associated with calls.
- There will be two portfolios for assessing bundles under Part 1 of the net revenue test. The two portfolios are: Portfolio (1) comprising all Bundles (including voice only bundles) sold within the Larger Exchange Area; and Portfolio (2) comprising all Bundles sold outside the Larger Exchange Area.
- Broadband retail costs will for the time being remain calculated by reference to the SEO under D01/06. In 2012, D01/06 may potentially be amended to EEO or replaced by a cost-based price control, at which point the SEO test may no longer apply (subject to separate consultation) or may be replaced by an EEO test. This applies to the individual bundle and portfolio assessment.

- Subject to robust and appropriate information, the net revenue test may be adjusted to reflect known future changes in wholesale and / or retail cost over the average customer lifetime. This will be monitored retrospectively. This applies to the individual bundle and portfolio assessment.
- ATC is the cost standard for the assessment of eircom's bundles at the portfolio level to ensure they are and remain profitable.
- ATC is based on and reconciled to eircom's regulated accounting information based on its audited separated accounts. ComReg seeks views as to whether ATC should be / can be disaggregated between Larger Exchange Area and outside the Larger Exchange Area.
- LRIC (estimated in this instance from eircom's regulatory accounting information as ATC less common costs and fixed indirect costs) to be the cost standard for retail costs for retail calls in the assessment of eircom's bundles at the individual bundle level. Retail costs associated with broadband and retail line rental remain set by reference to their respective retail-minus price controls.
- Unregulated products and services when bundled with Retail Fixed Narrowband Access must pass their own LRIC. On a case-by-case basis and subject to no medium to long term competitive harm, AAC might be used instead of LRIC. In addition for unregulated retail mobile services, aggregate total revenues must exceed their LRAIC+ (including common cost) each year. These proposals apply to both the individual bundle and portfolio assessment.

The proposed changes can only be harmful to competition

The current test provides all the flexibility eircom needs to respond to commercial pressures. However, the net revenue test as currently constituted provides an important safeguard as it ensures that ComReg must be satisfied that any test that fails the net revenue test will not harm competition.

Under the new proposals some bundles that would have failed the current test will pass the revised test. This <u>only</u> provides additional flexibility to eircom if ComReg would previously have blocked those bundles. ComReg would only have blocked those bundles if they believed they would be harmful to competition. In consequence, the proposed changes only increase eircom's pricing flexibility in so far as they result in harmful bundles being allowed whereas previously they would not have been allowed.

Vodafone believes that the safeguard provided by ComReg assessing, individually, bundles that pass a net revenue test more than compensates for the potential administrative burdens associated with ComReg carrying out additional competition assessments. In any event, the number of new bundles launched in any given year is relatively low.

Moreover, if ComReg's key concern is around platform competition, and that cable has a significant cost advantage over copper, it is not obvious that changes to the net revenue test will make any difference. While it may increase eircom's flexibility, it would not allow eircom to overcome any genuine technological cost differences between platforms. Rather, it will squeeze OAOs who are reliant on eircom's wholesale inputs to the detriment of competition.

Encouraging take up of LLU

ComReg have also suggested that the proposed changes will encourage uptake of LLU. However, this is unlikely to be the case. Currently, ComReg have put in place a series of price controls that are attempting to provide incentives for OAOs to climb the ladder of investment. As a result, there is an economic space between the floor price for WBA and the LLU cost oriented price. The objective of that space is to encourage profit maximising OAOs to engage in infrastructure investment.

It is clear that OAOs do respond to such price signals. For example, where the price of LLU was reduced to a more appropriate level, OAOs responded by increasing the uptake of LLU. In reality, however, the cost orientated price of LLU remains too high to allow OAOs to profitably investment in LLU infrastructure. The proposed changes set out in this consultation do not improve incentives for an efficient profit-maximising OAO to invest in infrastructure – if anything the proposals reduce such incentives as an OAO will find it more difficult to compete with Eircom under the proposals than under the current regime.

For the current proposals to increase incentives to invest in LLU, ComReg must believe that OAOs are not profit-maximising, and Comreg has provided no evidence to support this position. The reality is that LLU at the current regulated prices is simply not profitable. Moreover, the uncertainty regarding the roll out of NGA based services and viability of the copper network makes it less likely that a rational profit maximising operator will sink significant investment costs in unbundling.

Rather than increase LLU take up, the proposals will simply squeeze efficient WBA operators, forcing exits from the market to the detriment of competition and consumers. If ComReg wishes to see a significant uptake in LLU investment, it needs to revisit the current LLU maximum prices. Doing so would also provide OAOs with greater flexibility to compete with cable.

ComReg has previously considered and rejected the proposals

It is only 18 months since ComReg last consulted on the price controls for the retail fixed narrowband access market. In consultation document 10/01 (January 2010) ComReg considered and rejected a number of the proposals it is now putting forward. These include:

- The use of portfolios rather than bundles;
- The use of LLU prices as an input;
- The use of a cost standard other than ATC; and
- The appropriate approach to unregulated products.

Since the publication of that consultation (10/01), ComReg has also published a number of other documents (for example, 10/10, 10/39/, 10/108 and 11/49) which have provided relevant assessments of the development of competition. These assessments related in particular to ComReg's findings that the emergence of competition from cable operators and LLU had not resulted in the development of sub-national markets.

We believe that the grounds on which ComReg rejected each of these elements remains valid, and we further believe that ComReg has provided no evidence or analysis that would justify a change in its previous position.

ComReg has found that sub-national markets do not exist

In the current consultation document ComReg is proposing that the net revenue test will differ for different parts of the country. ComReg is suggesting that a distinction be drawn between:

- The Larger Exchange Area (comprising either just the assumed potential LLU exchanges or the potential LLU exchanges and the NGB exchanges).

- All other exchanges.

The justification for this distinction appears to be the following:

> *"The Irish telecommunications sector is changing and both Eircom and the OAOs are facing an increasing potential for localised competitive pressures to emerge at retail level. One of the most fundamental structural changes to the fixed broadband market that has taken place over the past eighteen months has been the upgrade of cable networks in urban areas. ComReg's recent review of the WBA market review has found evidence of structural change arising in certain overlapping geographic areas. This was identified as being relatively recent and not yet sufficiently stable to conclude sub-national geographic markets. However, should such structural change facilitate behavioural change in the future, consumers should ultimately reap the benefits of higher broadband speeds at more competitive prices. With this structural change comes the challenge of ensuring that the long term competitive dynamics of the market are not distorted and all operators relying on Eircom's network, including Eircom itself, are not unduly hindered in their efforts either by Eircom's dominant position, or in Eircom's case, by regulation."*

It is important to note that the finding that sub-national markets do not exist, referred to in the passage above, was arrived at by ComReg in July this year (it is contained in the WBA market review (11/49), published on July 8th). Vodafone further notes that ComReg has provided no evidence of further changes in market conditions between July and October of this year to justify a revision in its thinking on sub-national markets.

Vodafone also believe it is important to consider in detail the findings from the WBA market review, as we believe that in reality ComReg found very little evidence to support a sub-national market.

At a high level, ComReg found that:

> *"The geographic dimensions of the retail broadband market are considered to be national in scope. This finding is based on an assessment of entry conditions and evolution of operators; market shares; retail pricing patterns; and a consideration of geographic differences in product characteristics, as is consistent with the approach recommended by the EC."*

In its more substantive assessment ComReg considered the case for sub-national geographic markets on the basis of:

- Entry conditions, distribution and evolution of market shares of alternative networks;
- Retail pricing patterns of incumbent and alternative operators; and
- Geographic differences in retail product characteristics.

With regard to entry conditions, ComReg concluded that:

> *"When considering geographic variation in the structure of the market, we can see that over the last one to two years, alternative operators providing retail broadband based on cable and on purchased WPNIA inputs, have increased their market shares in urban areas. These operators have a very limited presence outside major urban centres. Their increase in market share has been at the expense of FWA-based retail broadband and of DSL broadband, provided directly by Eircom and by suppliers using WBA inputs."*

With respect to retail pricing patterns, ComReg found that:

> *"Our analysis of all the available retail broadband products and associated marketing campaigns continues to show that national pricing strategies are still being pursued by both the incumbent and alternative operators in the provision of retail broadband services in Ireland."*

Finally, ComReg assessed whether eircom's NGB service was a direct response to localised demand and supply conditions and in particular, competitive pressure from UPC. They found that:

> *"Our view remains that this strategy is driven primarily by technical considerations and therefore cannot explicitly be linked to a response to competitive conditions in specific geographic areas."*

In coming to a view on whether sub-national markets were in existence, ComReg found that:

> *"Operators providing retail broadband over cable and purchased WPNIA inputs, have been increasing their market shares in urban areas at the expense of both FWA and Eircom DSL. This structural development is noted but the boundary around any such area cannot be considered as established or stable over the lifetime of this review."*
>
> *"Our assessment of behavioural indicators suggests that any structural change has not yet had an impact on the commercial behaviour of operators which would indicate sub-geographic markets. This means that for a retail customer in an urban area compared with a rural customer, there is often a greater choice of platform when purchasing retail broadband, but the pricing and product characteristics are similar in urban and rural areas. We would therefore infer that though there are some structural developments in urban areas this has not influenced product and pricing behavioural patterns, such as to identify unique and stable boundaries around a sub-geographic area that are, absent wholesale regulation, either stable or self-sustaining."*

Vodafone agrees with the above analysis. Vodafone is also of the view that there have been no market changes since July of this year that would allow ComReg to come to a different view. On this basis, Vodafone believes that there is no rational justification for ComReg's proposal to delineate the market on the basis set out in the consultation document. Moreover, given that there is no evidence of commercial behaviour differing in different parts of the country there is no obvious justification for providing differing levels of price flexibility to eircom.

ComReg has previously found that a portfolio approach would harm competition

In Consultation 10/01, ComReg addressed explicitly the concerns that a net revenue test based on a portfolio approach rather than a bundle by bundle approach would harm competition:

> *"ComReg believes that applying the obligation only to bundles as a whole would give Eircom a large discretion in selectively discounting individual bundles according to the degree of competition in the various segments, that is, it would allow Eircom to selectively reduce the prices of those bundles where competition is more intense. ComReg believes that this could negatively impact on those competitors, whose scope of retail products and bundles is smaller and which would not be able to reduce the price of their bundles without jeopardising the viability of their business case.*
>
> *ComReg believes that applying the obligation only to bundles as a whole would make Eircom's own range of bundles, and its pricing across bundles, a reference point, from which it would be difficult for competitors to deviate. ComReg believes that application of the obligation on*

individual bundles in an ex-ante context allows the promotion of competition by OAOs which currently have a smaller range of retail services and bundles than Eircom.

ComReg believes that it is perfectly legitimate and appropriate to ensure that efficient retail competitors are not excluded, marginalised, or deterred from entry or expansion via a net revenue test applied to individual bundles. ***This is justified under the prevailing competitive conditions on Ireland. This may be subject to reassessment in a future market review if the competitive dynamics change. Without such action in the present situation, rivals would face enormous difficulties in entering the market, becoming as efficient as Eircom and/or competing effectively with Eircom, to the detriment of competition and consumers in Ireland.****[emphasis added]"*

Vodafone does not believe that the competitive dynamics have changed materially since ComReg came to this position. Nor does Vodafone believe that ComReg has carried out the type of market review that would be necessary in order to come to a reasonable judgement that the market dynamics had so changed.

Vodafone believes that ComReg's initial assessment was right and that a move to portfolios (even with the requirement to price at LRIC on a bundle by bundle basis) would indeed significantly impede both market entry and the ability of established entrants to compete effectively with eircom.

ComReg has previously found that ATC is the appropriate cost standard

In arriving at the existing net revenue test ComReg considered in detail the rationale for a cost standard other than ATC to be included in the net revenue test. It found that:

"ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ComReg is of the preliminary view that this is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets."

ComReg also noted that, under the current model:

"the current framework allows the pricing below ATC on a case by case basis if supported by robust evidence of retail efficiencies as a result of bundling and that the below cost selling of retail fixed narrowband access is not having a negative impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term."

Vodafone strongly agrees with ComReg's previous assessment. We believe that the current test provides an important safeguard for competition whilst allowing eircom the necessary flexibility to price below the net revenue test if it can demonstrate that its actions are not harmful to competition.

ComReg has also sought views on whether ATC should be / can be disaggregated between Larger Exchange Area and outside the Larger Exchange Area. Vodafone does not believe that such an approach would be appropriate:

- For the reasons set out above, we do not believe there is any basis for differentiating between different geographies.

- Disaggregating ATC would of necessity entail a number of arbitrary judgements about cost allocation to be made, potentially affording eircom the ability to use the cost allocation process to increase even further its advantages with respect to OAOs
- It would further dilute the safeguard which the net revenue test provides, and which was the basis of OAO's business and investment plans.

Treatment of unregulated products

In Consultation document 10/01 ComReg set out the following treatment and rationale for unregulated products:

> *"ComReg believes that for unregulated products that are not accounted for in sufficient granularity in the separated accounts it may be difficult to estimate the wholesale cost and retail cost of these products. ComReg believes that if the market for the unregulated product is considered to be effectively competitive (excluding calls), this implies that the economic margin should be close to zero (i.e. profits are restricted to the cost of capital). Therefore, ComReg is of the preliminary view that using the SMP operator's retail prices for such standalone products in the net revenue test is the most practical method to assess if retail fixed narrowband access is being sold below cost within the bundle. Furthermore, ComReg recognises that new unregulated products may be sold as loss leaders say, for example, to gain or maintain market share and this further supports the taking of the standalone price (in effect a zero margin).*
>
> *However, ComReg recognises that the approach may not be proportionate and justified in all circumstances. Therefore, ComReg proposes a two-stage process:*
> *1 If the net revenue test is passed with a zero margin assumption, that is, using the standalone price of the unregulated product, then no further investigation would be required.*
> *2 If it is failed with that assumption, then it would be necessary to consider what margin would make the difference between passing and failing. In that situation, ComReg will require actual information to be provided by the SMP operator to justify the adoption of margin of greater than zero in the net revenue (ex-ante imputation) test. This actual margin information provided by Eircom should be robust and fully supported. Therefore, if Eircom believe that there are a number of unregulated products that will be always added to bundles (e.g. mobile broadband); there may be merit in Eircom including cost details on such products in a confidential Additional Financial Information submission to ComReg each year with its separated accounts submission."*

ComReg, in the current consultation, is proposing to move away from this approach on the basis that:

> "ComReg does not believe it is practical for ComReg to continue to apply the standalone retail price for unregulated products and services in the net revenue test. The standalone price may continue to form part of the assessment; however, it is unlikely that consumers will see the addition of products at standalone prices to be attractive. Evidence in the market place suggests that it is common to offer discounts when sold in bundled offers."

In consequence, ComReg is now proposing the following approach to unregulated products:

> *"Unregulated products and services when bundled with Retail Fixed Narrowband Access must pass their own LRIC. On a case-by-case basis and subject to no medium to long term competitive harm, AAC might be used instead of LRIC. In addition for unregulated retail mobile services, aggregate total revenues must exceed their LRAIC+ (including common cost) each year. These proposals apply to both the individual bundle and portfolio assessment."*

ComReg also suggests that:

> *"for the avoidance of doubt, in all cases, the onus would be on Eircom to ensure that it is compliant with the required cost standard based on information available to it. Currently, ComReg does not have any cost models for these unregulated products and services. However, ComReg would be able to request Additional Financial Statements ("AFS") where required to cover unregulated products and services and currently receives separated accounts for Meteor and E-Mobile respectively."*

Vodafone does not believe that ComReg have provided any evidence to support the proposed change to the way unregulated products are treated. Vodafone believes that the current approach provides an important safeguard to ensure that eircom is not in a position to leverage its SMP in the fixed narrowband access market.

Moreover, and as noted by ComReg above, it is not clear how ComReg would be in a position to assess whether eircom is compliant with the new proposal, given the lack of visibility of costs on a number of the potential products that might be included in a bundle. If ComReg is determined to make this change to the net revenue test, Vodafone believes it will be essential for ComReg to consult on the LRIC costs and models for unregulated products that will underpin the test.

Finally, we note ComReg's reference to e-mobile as potentially being a new entrant to the mobile market. Vodafone strongly disagrees with this assertion. First, we understand that the e-mobile brand has been in existence as a business customer brand that eircom is now simply extending to residential customers. Second, we understand that in terms of the cost base, e-mobile and meteor are essentially run from a single cost base, and so e-mobile already benefits from the advantages of scale and scope that meteor avails of. In consequence, we find it hard for ComReg to credibly be of the view that e-mobile is similar in characteristic to a new entrant.

Assessing the current state of competition

While ComReg have not carried out any detailed market analysis, their proposals to significantly weaken the current net revenue test appear to be built on concerns regarding two 'developments' over the past 18 months:

- The increase in competition from cable in certain urban areas: ComReg appear to have a concern that the current net revenue test is unduly hampering eircom's ability to compete with UPC; and
- The increase in LLU: ComReg appear to have a concern that the increase in LLU over the past 18 months has the potential to place eircom at a disadvantage with respect to OAOs.

Before considering the market evidence in detail, it is worth considering the type of impacts one might expect to observe were eircom coming under significant pressure from UPC and/or OAOs.

With respect to competition from UPC, one might expect to see the following impacts:

- Significant switching from DSL to cable
- eircom responding to competition from UPC with a targeted offering aimed at those areas where UPC is present
- eircom seeking to upgrade and roll out its NGB product in a footprint that matches UPC's

- Evidence of eircom seeking to adjust its pricing policies to allow it to better compete with UPC. Given that eircom's retail price is constrained by its wholesale pricing policy, one might therefore expect to see evidence of eircom seeking to lower its wholesale prices in order to better compete with UPC. For example, this could manifest itself in terms of eircom pushing wholesale prices to their floors (where floor and ceiling price controls apply) or seeking to reduce wholesale prices below the maximum prices allowed by the regulator.

With respect to competition from LLU operators, if the current controls were providing LLU operators with a significant advantage over eircom, then one would expect to see:

- Significant uptake of LLU by LLU operators;
- Significant erosion of eircom market share within the DSL segment
- Geographically differentiated products and prices being provided by both the LLU operators and eircom

Below we consider the extent to which we observe evidence of such impacts in the market.

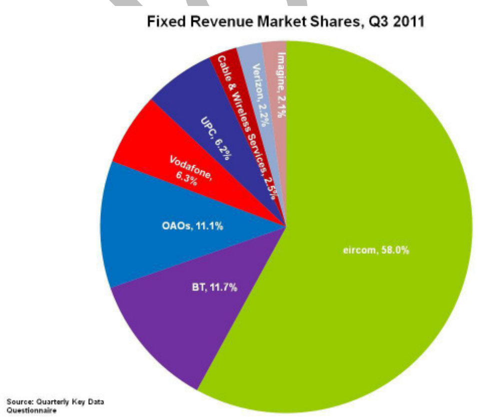
Competition from UPC

Vodafone accepts that competition from cable has increased somewhat over the last 18 months. However, eircom remains the dominant provider in the market, and there is little or no evidence that it is unable to compete effectively:

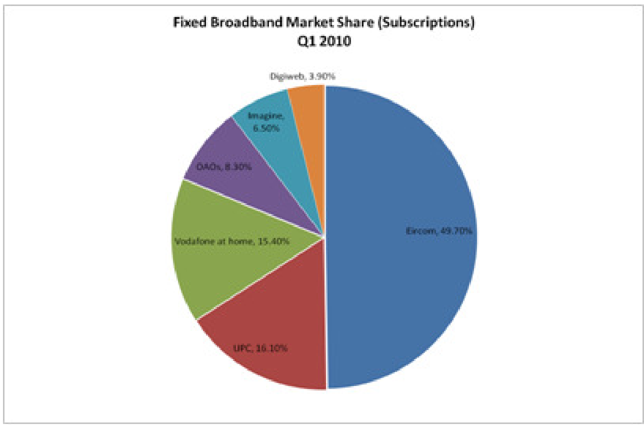
- eircom remains by far the largest operator and has experienced only moderate diminution of its market share
- DSL customer numbers have remained essentially constant – there is limited evidence of customers switching to cable, rather cable has had the impact of expanding the market
- There is no evidence of a geographically differentiated response from eircom
- There is no evidence that eircom has sought to alter its wholesale pricing policy to increase its flexibility with respect to UPC

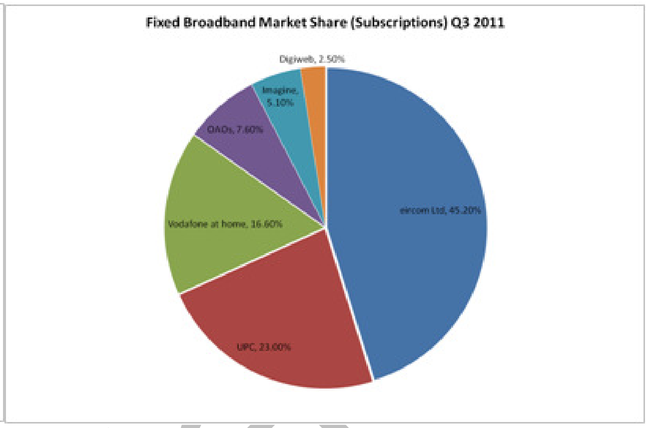
Eircom remains the largest operator and has seen limited market share erosion

Figure 1 below shows total Fixed revenue market shares for Q3 2011. This shows that eircom has a market share of 58%, compared to UPC's share of 6.2%. The five largest operators after eircom have a combined market share of 29%, half of eircom's market share.



In telephony, UPC has 143,000 subscribers, and a penetration rate of just over 20%. This compares to eircom's c.1.3 million subscribers. In broadband, the Figure below shows fixed broadband market shares for Q1 2010 and Q3 2011. This shows that UPC's market share has grown by just less than 7% over the period, while eircom's share has dropped by just 4.5%. Eircom remains by far the largest provider of fixed broadband services, with a share of over 45%.

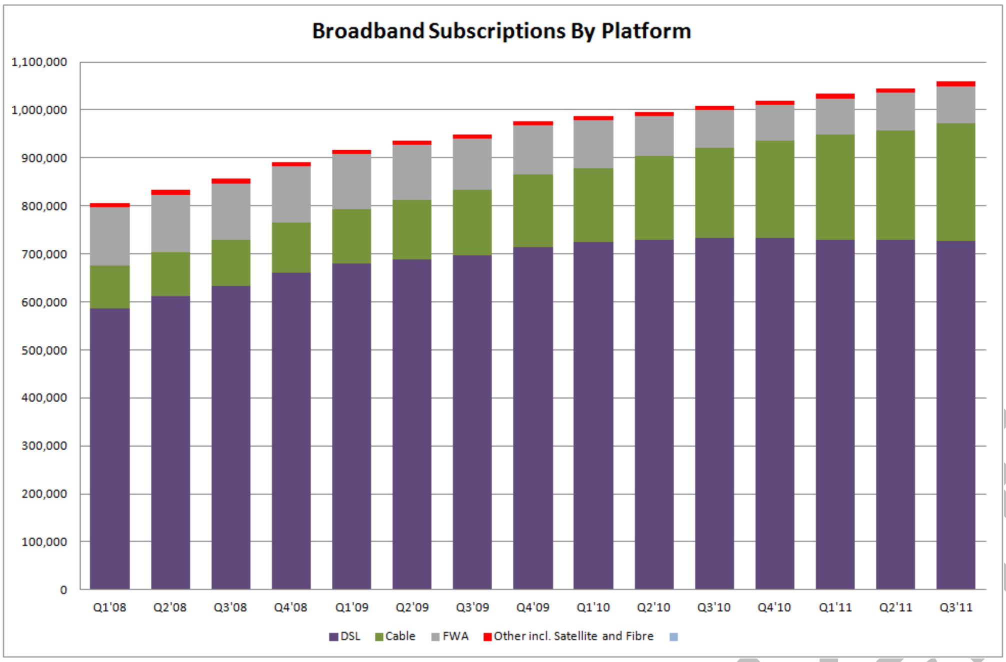




In terms of UPC's performance over the period, it is important to note that their penetration rate has increased only from 27% to 34%, and consequently a significant number of new subscribers have been from network expansion. It is therefore likely that with UPC's footprint now largely established, its share growth will decline.

DSL customer numbers have not been eroded

In terms of competition between platforms, while cable customer numbers have increased over the period, DSL customer numbers have remained stable. Therefore, there is limited evidence of cable's growth in customer numbers coming at the expense of DSL. As can be seen from the figure below, the DSL total customer numbers have remained stable over the last two years.



There is no evidence of ComReg responding to competitive pressure from UPC

As noted above, ComReg in Document 11/49 published in July of this year considered in detail whether UPC's growing market presence was resulting in sub-national competitive responses from eircom or OAOs. They found that:

- Pricing strategies were still national;
- Product availability was national, except due to technical constraints
- eircom's NGB investment did not appear to reflect a commercial response to UPC and the footprint is considerably beyond the UPC footprint

There have been no changes in the last five months that would lead ComReg to revise this finding.

There is no evidence of eircom adjusting its wholesale pricing

eircom's retail pricing is circumscribed by a number of wholesale price controls to which it is subject. These wholesale price controls allow eircom considerable flexibility in its wholesale pricing (e.g. the WBA control is based on floors and ceilings). If eircom were under significant pricing pressure at the retail level, one might therefore expect this to lead eircom to reduce its wholesale prices in order to provide it with greater flexibility in the retail market. Vodafone notes that this would have a pro-competitive effect as it would also lower the costs facing OAOs which would further increase competition and lead to lower prices for consumers.

Vodafone notes that eircom has not revised any of its wholesale prices over the last 18 months (except where it has been obliged to do so as a direct result of a change in the regulatory controls). In particular, we note that:

- Where the regulator has set maximum prices, eircom is pricing its wholesale products at the maximum price level

- Where the regulator has set wholesale price floors, in all cases eircom's prices are above the price floor.

We note in particular that eircom has not revisited its LLU price, despite the low take up of LLU (below the assumed take up level in the model) allowing it to earn a return in excess of that anticipated by the regulator.

Vodafone believes that, were eircom genuinely facing significantly increased competitive pressures from UPC, there are a number of actions it could take to increase its competitiveness.

Competition from LLU operators

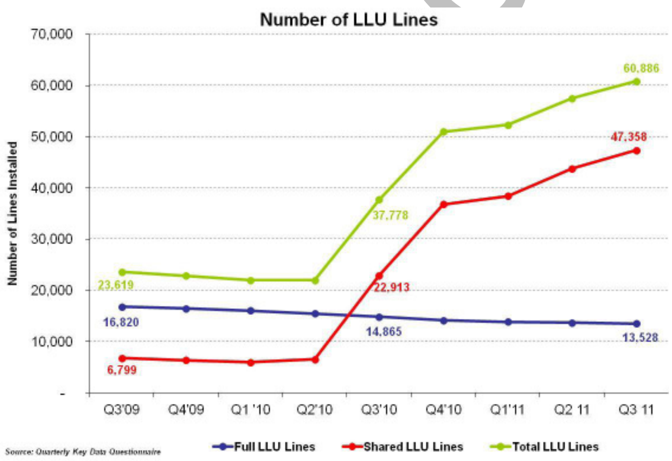
ComReg's second rationale is that competition from LLU operators may be increasing, and that the current net revenue test is placing eircom at commercial disadvantage. As noted above, if the current controls were providing LLU operators with a significant advantage over Eircom, then one would expect to see:

- Significant uptake of LLU by LLU operators;
- Significant erosion of Eircom market share within the DSL segment
- Geographically differentiated products and prices being provided by both the LLU operators and eircom

It is not clear that there has been such a significant change in market conditions over the past 18 months to warrant such a significant shift in ComReg's approach.

LLU uptake has increased but is still relatively limited

The figure below shows the evolution of LLU over time. This shows that LLU has increased over the past 18 months. However, it is important to bear in mind that the bulk of the increase has been in line share, and came about as a result of a 90% drop in the price of line share. Given the scale of the price fall the actual increase in LLU has been modest.

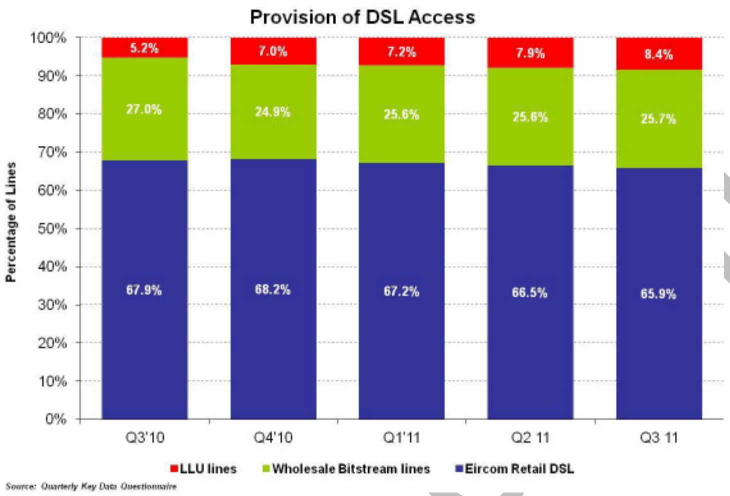


In absolute terms, the level of LLU remains low at just 8.4% of total DSL lines. It is also important to note that the take up of LLU is significantly below the assumptions made in the LLU model. As recently as July this year, ComReg found that:

> *"LLU take up in Ireland is still at relatively low levels. In Ireland just 7.2% of total DSL lines were provided to subscribers by OAOs using LLU. Furthermore, this is equivalent to approximately 25% of OAO DSL lines, which is significantly below the EU average of 76%."*

LLU operators have not significantly eroded eircom's market share

In terms of the impact that the increase on LLU has had on eircom's position, the figure below shows that eircom has a share of retail DSL of 65.9%. Its share of retail DSL has declined by just 2 percentage points over the last year. Vodafone, the next largest operator, has a share of 16.6% of the fixed broadband segment. While this has grown from 15.4% a year earlier, it is not growing at a pace consistent with a significant competitive advantage over eircom. Indeed, we note that in the last quarter, Vodafone's share has dropped from 17.8%. A price comparison of Vodafone and Eircom bundles shows that on average its bundle prices are approximately 10% lower than eircom's.



There is no evidence of geographic segmentation

As noted above, with respect to competition from UPC, there is no evidence that either eircom or OAOs have deviated from national pricing or product policies.

Other issues concerning the net revenue test

As is clear from the analysis above, at an aggregate level Vodafone strongly disagrees with making any changes to the net revenue test. They are not justified on the basis of market evidence, they go against ComReg's previous findings, and they can only result in outcomes that are harmful to competition.
For completeness, there are two additional elements of the test which are not captured in our assessment above, and we comment on them specifically below.

Reflecting future price changes in the net revenue test

ComReg is proposing that:

> *"Subject to robust and appropriate information, the net revenue test may be adjusted to reflect known future changes in wholesale and / or retail cost over the average customer lifetime. This will be monitored retrospectively. This applies to the individual bundle and portfolio assessment."*

Vodafone strongly believes that there is no economic justification to include potential future cost reductions in current revenue appraisals. If the market is competitive, and eircom puts through price cuts before they are realised they will not be able to recoup them.

Consider a margin squeeze test applied over 12 months with each month contributing positively or negatively on a cumulative basis to the aggregated margin over the 12 months. Consider also a situation where the test is just being passed absent recognition of any future MTR reduction. If in month 1 eircom recognise a cost saving that won't materialise until month 12 and reduces its retail pricing accordingly, then on a standalone basis months 1 to 11 will give a negative contribution to the overall test. The only way that it can meet the overall test is if it can use the cost reduction in month 12 to generate excess margin in this month to cover these previous losses. However, if there is sufficient competition at the retail level, other service providers will be in a position to reduce their retail pricing in month 12 and so eircom cannot be assured of recovering its months 1-11 losses as customers will move to lower priced competitors.

The only way that eircom can be assured of not coming under such competitive pressure is if its customers are not contestable i.e. they are still in minimum term contracts. Therefore any recognition of future cost reductions could at most be as far out as the **minimum contract term** on the relevant retail bundle, rather than the average customer lifetime.

Even with this safeguard, Vodafone would have significant concerns about the proposal:

- What level of certainty is required before a price cut can be included? Will ComReg provide guidance on the evidence necessary for a price cut to be included in the test? When new bundles are in the market will ComReg make it known that the bundles has only passed with an assumption of reduced future costs?
- ComReg note that the proposal would be monitored retrospectively. However, what redress will there be if an anticipated price reduction fails to materialise? As noted in the example above, it is possible that Eircom could have a non-compliant bundle in the market for 11 months on the basis of an anticipated price reduction. If that price reduction fails to materialise, the harm to competition will already have occurred.

Related to this is the *"average customer lifetime"*. Based on ComReg's own market research (ComReg document 11/96a) 29% of consumers with bundles switched supplier in the past 12 months – for consumers with Internet this figure is 21%. ✂ . Even assuming a lower figure of 20% (i.e. full base replacement over 5 years) implies that the average customer lifetime is somewhere in the region of 30 months. Vodafone believes that this is shorter than the figure currently used by ComReg in the Net Revenue Test. In addition Vodafone notes from the ComReg Quarterly report the decline in the volumes of fixed originated call minutes. This leads Vodafone to believe that there has been a corresponding decline in the volumes of high margin out of bundle call minutes. When both of these factors are taken into account Vodafone believes that there is a requirement to recalculate the test for the current set of bundles to ensure that there is a compliant baseline before ComReg considers any change to the test.

Scope of portfolios

As noted above, Vodafone does not believe it is appropriate to move from a bundle-by-bundle assessment to a portfolio assessment. Vodafone believes that this will reduce the likelihood of entry, and harm OAO's ability to compete with eircom. If ComReg were to introduce such a change, Vodafone believes that the portfolios as proposed by ComReg would further exacerbate competition concerns.

ComReg is proposing the following portfolios:

> *"There will be two portfolios for assessing bundles under Part 1 of the net revenue test. The two portfolios are: Portfolio (1) comprising all Bundles (including voice only bundles) sold within the Larger Exchange Area; and Portfolio (2) comprising all Bundles sold outside the Larger Exchange Area."*

Vodafone believes that, in the event ComReg moved to a portfolio based test, the proposed portfolios are significantly too wide, and provide will provide eircom with the flexibility to undermine efficient niche competitors (a concern ComReg explicitly acknowledged in its last review).

We note that ComReg's advisors, Oxera, in the accompanying expert report set out the approach one should take to defining bundles.

> *Conceptually, defining which products are included in the relevant portfolios is analogous to a market definition exercise. More specifically, the definition of portfolios should recognise the demand and supply conditions of individual bundles, and the grouping should be conducted by identifying those bundles that are considered substitutable. However, there are practical challenges in undertaking a detailed market definition exercise for every bundle launched (requiring consumer survey information, for example).*
>
> *As a consequence, more practical approaches could be considered, while recognising that the following attributes would be informative.*
>
> *– Consumers consider bundles included in the portfolio to be relatively close substitutes (or there is a realistic prospect of a chain of substitution). Historical evidence on the demand of bundles, or the relevant stand-alone components, could inform ComReg's decision in this respect.*
>
> *– Bundles included in the portfolio are such that the operators can switch to provide any of the bundles within the portfolio without incurring significant costs (eg, the bundles would not rely on different infrastructure and/or wholesale inputs).*

Unfortunately, ComReg has not carried out the type of analysis recommended by Oxera above. Moreover, we note that the choice of portfolio proposed by ComReg differs from that proposed by Oxera, who recommended differentiating portfolios by product type and technology type.

Vodafone has not carried out the analysis necessary to identify appropriate portfolios of products (and as noted above, Vodafone does not believe that a move to portfolios is appropriate). Vodafone has not carried out the analysis necessary to identify appropriate portfolios of products (and as noted above, Vodafone does not believe that a move to portfolios is appropriate). Notwithstanding the fact that we have not carried out this wider analysis, we have specific concerns that the proposal to include "voice" bundles in the relevant portfolio is dysfunctional and distortive. The starting point for ComReg's proposal is the assumed increase in competitive pressure from UPC. By the very nature of the technology used by UPC voice only propositions will form only a small proportion of its activity in the market. As of 30 September

2011 UPC's published data shows some 241,000 internet customers but only 143,000 voice customers. Similarly Vodafone's customer base is primarily Internet bundles based with less than ✂ of sales being of voice only packages. Based on this eircom faces no significant competitive pressure on voice only bundles.

ComReg's latest Quarterly report shows that eircom retail still has over 73% of retail narrowband access paths. This figure is reasonably stable (although falling slowly). The proposal to incorporate voice bundles into the portfolio allows eircom to blend these largely inert customers, which aren't contested by other operators into the margin squeeze test. From a volume point of view these have the potential to skew the overall portfolio pricing so that it is these uncontested customers who ensure that the portfolio passes the ATC test, meaning that the lower standard test would always apply on a bundle by bundle basis for other bundle configurations.

In light of this we strongly urge that, in the event of the test being portfolio based, ComReg takes on board the advice of its advisors and carries out an appropriate economic analysis of bundles to identify an appropriate set of portfolios. Vodafone believes that such an analysis should consider product and technology type but should also consider customer type (e.g. business vs residential).

Other Considerations

At a high level a margin squeeze test models the costs of an operator other than eircom and measures whether the operator can match eircom's retail's pricing while recovering these costs. If it can, then according to the test eircom's retail pricing is acceptable. The margin squeeze test does not have any provision for the operator to make a margin. The embedded assumption in the test is that other operators are prepared to be active in a market where they make zero margin. In fact the wholesale inputs that these operators must purchase from eircom to make zero margin for themselves have embedded in there derivation an explicit margin for eircom. in the shape of its WACC. In addition the prices that eircom charges other operators are in some instances far higher than the cost to eircom of providing these services. This is particularly true where the wholesale input is based on a retail-minus basis. For example Vodafone estimates the capital cost of providing an individual voice mailbox to be of the order of ✂ The wholesale price that is charged to operators is over €1 per month. In order for the Margin Squeeze test to yield a proper result ComReg must revisit the retail minus price controls on ancillary services which do not have upstream substitutes.

In the scenario where eircom's retail pricing barely passed the Net Revenue Test (and assuming that the test correctly modelled other operator costs) then competitors to eircom would make zero margin. However eircom would make real margin on the wholesale inputs it sold to these competitors and eircom retail would make real margin on its own sales because eircom's internal costs are lower than the external wholesale process it charges.

It is difficult to envisage any investor continuing to be engaged in a market where regulation sets an environment in which a dominant wholesale provider and its downstream retail arm can engage in price setting which ensure that they make a margin and where in order to compete with the downstream retail arm the investor must price at zero margin.

Even if it were the case that the current price controls allow for some form of "excess" over costs for other operators, this "excess" would in practice allow for operators to obtain the margin which is necessary to garner continued investment. ComReg has carried out **no** assessment of the impact on market diversity if it introduces the proposed changes.

The entire premise for this proposed intervention in the market is to facilitate reductions in retail prices by eircom. Clearly a price reduction without matching cost reduction leads to a reduction in margin. There are two components to the overall margin that eircom obtains. One is from its retail activities and the other from the wholesale inputs which underlie them. What is proposed here allows eircom to preserve the wholesale margin component on products, where by definition it faces no market constraint on pricing and to fully allocate the necessary margin reduction to the retail market where it does not face competition. Eircom as vertically integrated provider obtains both margin components while other operators who cannot access the wholesale margin face much higher proportionate margin reduction. In fact if ComReg has constructed the cost elements of the test properly they face their margin going to zero. The proposed changes can only benefit eircom retail at the expense of other operators.

ComReg itself recognises that eircom has scope to achieve the desired reductions in retail pricing within the existing regulatory framework by reducing the price of its wholesale products. ComReg should not countenance any change to the current retail price controls. This approach has the benefit of transferring the retail competitive pricing pressure into uncompetitive regulated wholesale markets, simulating a wholesale competitive dynamic.

Summary

Vodafone does not agree with the proposed changes to the net revenue test. The current test provides a critical safeguard for competition, and is an essential element of the suite of measures that has encouraged OAOs to enter and invest in the market to the benefit of Irish consumers.

Vodafone believes that the proposed changes do not in reality increase eircom's flexibility to increase pro-competitive bundles, they only increase eircom's ability to introduce bundles that will be harmful to competition. This is based on the following:

- ComReg have previously considered and rejected all of the proposals. ComReg has provided no credible evidence to support its revised view of the proposals.
- ComReg has provided no substantial market analysis to support their proposed changes – despite stating clearly in previous consultations that such an analysis would be required in order to change the elements of the test
- A review of market evidence suggests that there has been no significant weakening in eircom's ability to compete over the last 18 months
- The impact of the proposed changes will be to damage the ability of OAOs to compete and to deter any future entry
- The proposals will not encourage further uptake of LLU and may indeed result in squeezing efficient operators out of the market.

Q. 2. In defining the Larger Exchange Area where a different wholesale input may be allowed, what area(s) of Figure 4 do you believe should be included in the Larger Exchange Area? Do you agree or disagree with the proposed use of a weighted average wholesale input in the net revenue test in the Larger Exchange Area? When / what area(s) of Figure 4 do you consider it would be appropriate for Eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area? Please give a detailed response with supporting data where appropriate to support your view.

With respect to the issues set out in this question, Vodafone believes that:

- Geographic market segmentation of any form is not appropriate at this time. ComReg have not carried out the necessary analysis to conclude that a geographic segmentation is appropriate. Moreover, the evidence that ComReg has considered in very recent consultation documents further supports Vodafone's view that geographic segmentation is not appropriate at this time.
- While there is no case for geographic segmentation at this time, it considers that, even in the future when such segmentation might become appropriate, it is unlikely that exchanges beyond those covered in areas 1&2 should be included in the large exchange area.
- The use of any LLU price in the net revenue test is not appropriate at this time. Moreover, ComReg has considered this issue previously and found that the use of LLU in the net revenue calculation would be harmful to competition.
- Even if, in the future ComReg were to use LLU prices in the net revenue test, it would be important that the use of LLU reflected actual unbundling, and was related to an appropriate market review process. It would also be important that ComReg not develop a new LLU+ network input cost to be included in the net revenue test – the WBA price floor provides an appropriate benchmark for LLU+ network input costs.

We expand on each of these points below.

Geographic segmentation is not appropriate

In the current consultation document ComReg is proposing that the net revenue test will differ for different parts of the country. ComReg is suggesting that a distinction be drawn between:

- The Larger Exchange Area (comprising either just the assumed potential LLU exchanges or the potential LLU exchanges and the NGB exchanges).
- All other exchanges.

The justification for this distinction appears to be the following:

> *"The Irish telecommunications sector is changing and both Eircom and the OAOs are facing an increasing potential for localised competitive pressures to emerge at retail level. One of the most fundamental structural changes to the fixed broadband market that has taken place over the past eighteen months has been the upgrade of cable networks in urban areas. ComReg's recent review of the WBA market review has found evidence of structural change arising in certain overlapping geographic areas. This was identified as being relatively recent and not yet sufficiently stable to conclude sub-national geographic markets. However, should such structural change facilitate behavioural change in the future, consumers should ultimately reap the benefits of higher broadband speeds at more competitive prices. With this structural change comes the challenge of ensuring that the long term competitive dynamics of the market are not distorted and all operators relying on Eircom's network, including Eircom itself, are not unduly hindered in their efforts either by Eircom's dominant position, or in Eircom's case, by regulation."*

It is important to note that the finding that sub-national markets do not exist, referred to in the passage above, was arrived at by ComReg in July this year (it is contained in the WBA market review (11/49), published on July 8th). Vodafone further notes that ComReg has provided no evidence of further changes in market conditions between July and October of this year to justify a revision in its thinking on sub-national markets.

Vodafone also believe it is important to consider in detail the findings from the WBA market review, as we believe that in reality ComReg found very little evidence to support a sub-national market.

At a high level, ComReg found that:

> *"The geographic dimensions of the retail broadband market are considered to be national in scope. This finding is based on an assessment of entry conditions and evolution of operators; market shares; retail pricing patterns; and a consideration of geographic differences in product characteristics, as is consistent with the approach recommended by the EC."*

In its more substantive assessment ComReg considered the case for sub-national geographic markets on the basis of:

- Entry conditions, distribution and evolution of market shares of alternative networks;
- Retail pricing patterns of incumbent and alternative operators; and
- Geographic differences in retail product characteristics.

With regard to entry conditions, ComReg concluded that:

> *"When considering geographic variation in the structure of the market, we can see that over the last one to two years, alternative operators providing retail broadband based on cable and on purchased WPNIA inputs, have increased their market shares in urban areas. These operators have a very limited presence outside major urban centres. Their increase in market share has been at the expense of FWA-based retail broadband and of DSL broadband, provided directly by Eircom and by suppliers using WBA inputs."*

With respect to retail pricing patterns, ComReg found that:

> *"Our analysis of all the available retail broadband products and associated marketing campaigns continues to show that national pricing strategies are still being pursued by both the incumbent and alternative operators in the provision of retail broadband services in Ireland."*

Finally, ComReg assessed whether eircom's NGB service was a direct response to localised demand and supply conditions and in particular, competitive pressure from UPC. They found that:

> *"Our view remains that this strategy is driven primarily by technical considerations and therefore cannot explicitly be linked to a response to competitive conditions in specific geographic areas."*

In coming to a view on whether sub-national markets were in existence, ComReg found that:

> *"Operators providing retail broadband over cable and purchased WPNIA inputs, have been increasing their market shares in urban areas at the expense of both FWA and Eircom DSL. This structural development is noted but the boundary around any such area cannot be considered as established or stable over the lifetime of this review."*
>
> *"Our assessment of behavioural indicators suggests that any structural change has not yet had an impact on the commercial behaviour of operators which would indicate sub-geographic markets. This means that for a retail customer in an urban area compared with a rural customer, there is often a greater choice of platform when purchasing retail broadband, but the pricing and product characteristics are similar in urban and rural areas. We would therefore infer that though there are some structural developments in urban areas this has not influenced product and pricing*

behavioural patterns, such as to identify unique and stable boundaries around a sub-geographic area that are, absent wholesale regulation, either stable or self-sustaining."

Vodafone agrees with the above analysis. Vodafone is also of the view that there have been no market changes since July of this year that would allow ComReg to come to a different view. On this basis, Vodafone believes that there is no rational justification for ComReg's proposal to delineate the market on the basis set out in the consultation document. Moreover, given that there is no evidence of commercial behaviour differing in different parts of the country there is no obvious justification for providing differing levels of price flexibility to eircom.

What areas should be included in the Larger Exchange Area?

ComReg has asked for views on which areas should be included in the larger exchange area. Vodafone as set out above does not believe such a market segmentation is appropriate, and so is not in a position to comment on the areas that should be included. However, it is possible that such a segmentation may be appropriate in the future depending on how competition develops in the market.

Given the potential impact that segmenting the country in this way could have on regulation and market outcomes, it would be essential for ComReg to carry out a thorough geographic market definition exercise, which sought to identify whether geographically distinct markets exist. The type of analysis contained on pages 15-18 of the consultation paper is simply not an appropriate evidence base on which such an important decision could be based.

Notwithstanding the above, Vodafone considers it highly unlikely that such an analysis, if conducted in the near future, would find that the 'area 3' exchanges should be included in the same geographic segment as the area 1 and 2 exchanges. ComReg's rationale for including them, that they represent the NGB footprint, is not in any way appropriate. In the absence of an NGB roll out taking place, an appropriate regulatory framework being put in place for NGB and clear evidence that the roll out and regulatory framework have resulted in a material change in competitive outcomes there is no rationale for their inclusion.

Including LLU in the net revenue test

ComReg has asked for views on whether using a weighted average wholesale input in the net revenue test would be appropriate. Essentially, this would result in using a combination of WBA and LLU prices in the net revenue test.

Vodafone does not believe that such a change is warranted at this time. Including LLU pricing would:

- Make further entry to the market extremely difficult as any new entrant would have to immediately invest in LLU (i.e. jump to the top rung of the ladder) or be placed at a competitive disadvantage vis-à-vis eircom. This is entirely at odds with ComReg's regulatory approach which is based around ensuring that the ladder of investment principle allows efficient entrants to build up a sufficient presence in the market to make LLU profitable.
- Disadvantage any OAO whose level of LLU is less than the weighted average included in the cost calculation. Again, this would place the OAOs at a competitive disadvantage compared to eircom and would be harmful to competition.

We note that in ComReg Document 10/01 (January 2010) ComReg considered whether there was merit in moving towards the use of LLU as an input price in the net revenue test. It came to the view that:

> *"ComReg also recognises that if LLU competition increases it would also need to consider through a market analysis process whether eircom remains the SMP operator in retail narrowband access. However, currently the progress of these alternative platforms is at an early and vulnerable stage of development. Therefore, ComReg is of the preliminary view that to consider utilising LLU wholesale inputs in the net revenue (ex-ante imputation) test, the penetration levels of LLU operators would need to be significantly higher than they currently are in Ireland. Furthermore, ComReg considers that the competitive impact of such a move, possibly considered separately for certain urban centres and nationally, would need to be measured through the market analysis process."*

ComReg is now proposing to introduce such a change without any recourse to a market analysis process. Moreover, it is important to note that while LLU has increased somewhat in the intervening period, just over 8% of DSL lines are unbundled, and the level of increase since Q1 2010 is just five percentage points.

It is also important to note that as recently as July of this year, ComReg found that:

> *"LLU take up in Ireland is still at relatively low levels. In Ireland just 7.2% of total DSL lines were provided to subscribers by OAOs using LLU. Furthermore, this is equivalent to approximately 25% of OAO DSL lines, which is significantly below the EU average of 76%."*

Including LLU inputs, even in the form of a weighted average price, is not appropriate at this time. Moreover, ComReg's proposal is not as a result of having undertaken the type of market analysis process discussed in its own consultation paper, and it is highly unreasonable for ComReg to contemplate such a change in the absence of such a detailed market analysis being undertaken.

When / what area(s) of Figure 4 do you consider it would be appropriate for Eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area?

Vodafone believe that the approach being suggested by ComReg with respect to a move to full LLU prices beings reflected in the net revenue test is deeply flawed.

In the consultation paper, ComReg is seeking views as to whether:

> *"a time based approach be applied - for example using the weighted average wholesale input from April 2012 (if the resultant Direction following this consultation is made in March 2012) for a period of six months with a move to use an input based on LLU+ approximately a year from the date of this paper – Autumn 2012."*

Such an arbitrary approach will significantly weaken competitive outcomes in the market. As noted above, using LLU prices in the net revenue test:

- Make further market entry highly unlikely, as a new entrant would have to invest in LLU. This will simply not happen, given that as ComReg have recognised on many occasions, the business case for LLU is based on scale
- Significantly disadvantage OAOs relative to Eircom.

ComReg have suggested that the proposed changes will encourage uptake of LLU However, this is unlikely to be the case. Currently, ComReg have put in place a series of price controls that are attempting to provide incentives for OAOs to climb the ladder of investment. As a result, there is an economic space between the floor price for WBA and the LLU cost oriented price. The object of this space is to encourage profit maximising OAOs to engage in infrastructure investment.

It is clear that OAOs do respond to such price signals. For example, where the price of LLU was reduced to a more appropriate level, OAOs responded by increasing the uptake of LLU. In reality, however, the cost orientated price of LLU remains too high to allow OAOs to profitably investment in LLU infrastructure. The proposed changes set out in this consultation do not improve incentives for a profit-maximising OAO to invest in infrastructure – if anything the proposals reduce such incentives as an OAO will find it more difficult to compete with Eircom under the proposals than under the current regime.

For the current proposals to increase incentives to invest in LLU, ComReg must believe that OAOs are not profit-maximising, and ComReg has provided no evidence to support this position. The reality is that LLU at the current regulated prices is simply not profitable. Moreover, the uncertainty regarding the roll out of NGB and viability of the copper network makes it less likely that a rational profit maximising operator will sink significant investment costs in unbundling.

Rather, than increase LLU take up, the proposals will simply squeeze efficient WBA operators, forcing exits from the market to the detriment of competition and consumers. If ComReg wishes to see a significant uptake in LLU investment, it needs to revisit the current LLU maximum prices. Doing so would also provide OAOs with greater flexibility to compete with cable.

Finally, we note again that just 18 months ago, ComReg was of the view that:

> *"ComReg also recognises that if LLU competition increases it would also need to consider through a market analysis process whether Eircom remains the SMP operator in retail narrowband access. However, currently the progress of these alternative platforms is at an early and vulnerable stage of development. Therefore, ComReg is of the preliminary view that to consider utilising LLU wholesale inputs in the net revenue (ex-ante imputation) test, the penetration levels of LLU operators would need to be significantly higher than they currently are in Ireland. Furthermore, ComReg considers that the competitive impact of such a move, possibly considered separately for certain urban centres and nationally, would need to be measured through the market analysis process."*

And just 4 months ago, ComReg recognised that:

> *"LLU take up in Ireland is still at relatively low levels. In Ireland just 7.2% of total DSL lines were provided to subscribers by OAOs using LLU. Furthermore, this is equivalent to approximately 25% of OAO DSL lines, which is significantly below the EU average of 76%."*

Setting an arbitrary date for a switch to the use of LLU as the input price, without any regard to market developments and without undertaking the market analysis that ComReg itself has recognised as necessary is simply irrational. A change of this magnitude just 18 months after the last consultation is also not consistent with providing the regulatory certainty OAOs need if they are to continue to invest in Ireland. It will not encourage further investment, and it will significantly harm the prospects for competition in the market.

Q. 3. Do you agree or disagree with the proposed revised net revenue test? Please give a detailed response with supporting data where appropriate to support your view.

See response to Question 1.

Q. 4. Do you agree or disagree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access? Please explain your response and provide detailed information to support your view.

Vodafone does not believe that ComReg should change the current test. As such, the pre-notification and pre-clearance requirements are consistent with those that are already in place, and Vodafone believes that they are appropriate.

In the event of changes to the test (e.g. allowing unregulated products to be included at LRIC) Vodafone believes that it will be difficult for ComReg to fully assess whether eircom's bundle passes the net revenue test. Vodafone is therefore of the view that ComReg should consider carefully whether a longer pre-notification period is required.

Q. 5. Do you agree or disagree that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that Eircom should modify / withdraw such bundle within twelve weeks? Please explain your response and provide detailed information to support your view.

ComReg are proposing to increase from 10 weeks to 12 weeks the period Eircom has to withdraw a non-compliant bundle. ComReg have provided no rationale or evidence to support the increase from 10 to 12 weeks. In light of the potentially serious impact on competition of non-compliant bundles, Vodafone believes that ComReg should re-consider extending the period from 10 to 12 weeks.

Vodafone notes that requiring eircom to withdraw a bundle would in effect require ComReg to direct eircom to do so. In order to be in a position to **require** withdrawal or modification of a bundle then ComReg must have reached something more than a "view" but must have a reached a finding that a bundle was unreasonable and therefore non-compliant. Anything less this does not appear to provide ComReg with any statutory powers to intervene. In the normal course undertakings have 28 days to remedy or make representations following such a finding of non-compliance. If anything ComReg would appear to be fettering its discretion by deciding in advance that, as a class, if eircom breaches this particular obligation it will be afforded a period that is multiples of the normal period for remediation. The context for the price control under consultation is to prevent an SMP operator leveraging its power on the market to the detriment of OAOs, directly, and consumers and end-users, indirectly. ComReg does not appear to have properly justified why an errant SMP operator would be given this latitude in such a blanket fashion.

Q. 6. Do you agree or disagree with ComReg's proposed REO test to minimise the risk of a margin/price squeeze to ULMP? Please explain your response.

Vodafone agrees in principle that it is important to ensure that there are appropriate controls in place to safeguard and incentivise investment in LLU. Vodafone also believes that, in the case of NWBA, there is also a need to ensure that there is no margin squeeze to its other wholesale products SB-WLR and WBA.

Vodafone also agrees that in principle minimum price floors based on REO are appropriate. However, Vodafone believes that in setting the price floors ComReg must take care to ensure that the following criteria are met:

- The price floor is acting to protect the appropriate products/investments, and
- The prices used in the price floor reflect the efficient costs of the network, to protect against too high retail prices being charged to final consumers, to the detriment of consumers

Vodafone does not believe that the proposals put forward by ComReg meet the first of these criteria. Given this, Vodafone is not in a position to comment on the second criteria.

Vodafone believes that it is inappropriate to consider a standalone price floor for SB-WLR to protect against a price squeeze of full LLU. This is because it is extremely unlikely that an operator that has invested in LLU would seek to offer only narrowband services. Clearly, an operator investing in LLU will be offering both narrowband and broadband services. In consequence, the key issue is to ensure that the combined price of SB-WLR and WBA are not so low as to squeeze LLU investment.

While in principle this could be achieved by simply combining the price floors for WBA and the proposed SB-WLR price floor, in practice this would not be appropriate, given that the WBA price control is based on Line Share rather than full LLU, and that the costs of a combined LLU broadband and narrowband offering will be different to the stand alone elements for each.

Vodafone also believes that it is inappropriate to consider a price floor to protect LLU investment from an NWBA price squeeze. Vodafone believes that the more pressing concern is that NWBA could squeeze OAOs who are currently using SB-WLR and Bitstream. As ComReg itself notes in this consultation, and elsewhere, WLR and WBA have been key enablers of competition. Indeed, in those areas of the country where LLU is economically infeasible and cable is not present, WLR and WBA represent the only credible form of competition. Again, as ComReg recognises:

> *Inappropriate application of proposed changes to the margin squeeze test to be applied to eircom could jeopardise this progress and lead to significant market exit of smaller players unable to offer Naked DSL/SAB under equivalent circumstances."*

Vodafone is of the view, therefore, that ComReg needs to consider whether the price floor for NWBA is appropriate not just with respect to LLU, but also with respect to the combination of WLR and WBA.
Notwithstanding the issues set out above, Vodafone notes that even if we agreed in principle with the proposed price floors, it would be difficult to comment on the appropriate network input costs:

- As recognised by ComReg, NGA will have an impact on areas where LLU is feasible, and more generally until more is known about the NGA rollout, costs, regulatory framework, and interaction with existing regulatory arrangements it is very difficult to identify what the appropriate costs for the price floors
- The price floors for WBA, which feed directly into ComReg's proposals are still under consultation.

In light of the above, Vodafone is of the view that ComReg should re-consider the scope of the proposed price floors, and re-consult on appropriate price floors after the WBA process is complete and when it has provided market participants with greater clarity regarding NGA.

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Q. 7. In your opinion, how should the cost of the network be calculated for setting the Wholesale Network Input ("WNI") for the purposes of the proposed WPNIA margin/price squeeze test to minimise the risk of a squeeze on ULMP? Please explain your response.

As set out in response to Question 6 above, Vodafone does not believe it is appropriate to consider a WLR price floor to protect an LLU margin squeeze on a standalone basis. The price controls should reflect the economic behaviour of operators in the market. It is highly unlikely that an LLU operator would invest in unbundling only to offer a standalone narrowband service. Consequently, the focus of the price floor should be on ensuring that the minimum prices for WLR and WBA combined are above a level that would squeeze LLU. Vodafone is therefore of the view that the calculation of the WNI should be on this basis, rather than on the basis set out in the consultation document.

The response to Question 6 above contains further details with respect to Vodafone's thinking.

Q. 8. Do you believe that the existing obligation not to margin/price squeeze in WBA should be further specified to include passing a margin squeeze test for bundles that include WBA? Do you agree or disagree that such a margin squeeze test should be similar to the proposed revised net revenue test in the Retail Fixed Narrowband Access markets? Please explain your response.

ComReg has set out a concern that:

> *"without an appropriate price control, there is a risk of Eircom masking its effective retail price for broadband and implementing a price squeeze vis-a-vis WBA when sold as part of a broader retail package potentially incorporating (fixed/mobile) calls, TV, etc. ComReg considers that such anti-competitive behaviour could render the WBA input ineffective and, given that retail broadband competition still depends to a significant degree on the effective provisioning of WBA, this could have significant negative implications for the structure of retail broadband competition where Eircom still has an influential presence (i.e. leveraging concerns)".*

Vodafone agrees with the concern set out by ComReg and is of the view that the adoption of a margin squeeze model for WBA/Naked WBA bundles is appropriate.

ComReg is suggesting that the proposed margin squeeze test should be similar to the proposed revised net revenue test in the retail fixed narrowband access market. In particular, the test envisaged by ComReg would appear to be based on passing:

- A portfolio rather than bundle-by-bundle test; and
- A test which includes the LRIC for unregulated services.

Vodafone does not believe that this test is appropriate. Rather, for similar reasons to those set out in response to questions 1-3 above, we believe that the test should be based on the existing net revenue test, which requires bundles to pass on a bundle-by-bundle basis and includes unregulated products on a no-margin basis.

In particular, given ComReg's very recent findings with respect to the state of competition in the WBA market (ComReg 11/49 published in July of this year) we find it surprising that ComReg is contemplating geographically differentiated remedies given its finding of a national market.

For the reasons set out in response to question 2 above, (in particular, the impact on niche, but efficient entry) we believe it would be inappropriate for ComReg to base the test on portfolios defined on the basis of geographic segmentation.

Vodafone is further concerned that, unlike the revised fixed narrowband access market, where there is at least some safeguard with respect to individual bundle pricing, the WBA bundle net revenue test contains no such protections.

In ComReg's own assessment, implementing a test on this basis would have the following impacts.

> *"ComReg believes that applying the obligation only to bundles as a whole would give Eircom a large discretion in selectively discounting individual bundles according to the degree of competition in the various segments, that is, it would allow Eircom to selectively reduce the prices of those bundles where competition is more intense. ComReg believes that this could negatively impact on those competitors, whose scope of retail products and bundles is smaller and which would not be able to reduce the price of their bundles without jeopardising the viability of their business case."*

Similarly, and for the reasons set out in the response to Question 1, Vodafone believes that the appropriate approach to taking account of unregulated products is to include them on a no-margin basis, as is the case under the current net revenue test.

Q. 9. Do you believe that the D01/06 price control should be amended from SEO to EEO? Please support your view with relevant data and evidence. If you believe it should remain at SEO, when do you believe it might be appropriate to use EEO? Please support your view with relevant data and evidence.

Vodafone does not believe that the test should be amended from SEO to EEO.

Vodafone agrees with ComReg's assessment in the consultation document that:

> *"Looking at the current market conditions, ComReg believes such an amendment may not be warranted at this time - as Eircom continues to hold a significant market share of DSL broadband lines as the latest Quarterly Report shows and, as noted in the recent WBA market review, Eircom is still a major provider of retail broadband. The D01/06 price control assumed the SEO would have a 25% market share."*

ComReg have recently reviewed the market and have found that there is a national market in which Eircom has SMP. Eircom have a share of over 65% of DSL lines, and even when the market is widened out to the full fixed retail broadband market, Eircom have a market share of over 45% whereas Vodafone the next largest DSL operator have a share of 16.6%. While Vodafone has grown its market share over time, we would highlight that its share, at just under 17%, is still substantially less than the assumed SEO share of 25% as set out in D01/06.

As to the more general question of whether, when and where it would be appropriate to use EEO rather than SEO, Vodafone believes it is important to base such an assessment within the context of the purpose of an SEO based price control. Essentially, the only time the distinction between an SEO and an EEO net revenue test is of importance is where a retail price would pass an EEO test but fail an SEO test. In such circumstances an SEO test is appropriate if the NRA believes that:

- There are competitor firms that are not currently as cost efficient as the incumbent (due to operating at lower scale or reduced scope) but who will become equally or more efficient than the incumbent if they are able to achieve efficient scale in the longer term
- The increase in competition in the longer term provides benefits to customers that outweigh any potential short term losses associated with restricting the price flexibility of the incumbent.

In the current market, therefore, for ComReg to move to an EEO based test from an SEO based test it would have to believe either:

- that OAOs have reached a minimum efficient scale that allows them to compete with Eircom; or
- that OAOs will be unable to achieve the minimum efficient scale required to compete with Eircom, and hence their presence in the market is inefficient and should not be supported by the NRA.

ComReg would also need to be of the view that further efficient entry to the market is unlikely and/or would not lead to additional customer benefits.

Vodafone does not believe that any of the above conditions exist. Neither Vodafone nor any other OAO has yet achieved the scale necessary to compete on a level playing field with Eircom. Vodafone's current share of the fixed broadband market is 16.6% compared to eircom's share of 45.2% of the total fixed broadband market and 66% of the DSL broadband segment. Vodafone of the view that a significant further narrowing of this gap would be required before one could contemplate a move to an EEO standard. This was recognised in D01/06 which assumed an SEO share of 25%.

Equally, Vodafone is confident that in time it can achieve the scale economies necessary to compete with Eircom, and so there is no sense in which its entry could be considered to be inefficient.

The reality is that competition in the market is developing to the benefit of customers, and the current regulatory framework is supporting the development of that competition. Moving too quickly to change that framework will damage competition to the detriment of consumers, and undermine confidence in the regulatory framework which is absolutely essential if OAOs are to make long-term investments and commitments to the Irish market.

With respect to 'where' ComReg might move from an SEO to an EEO standard, Vodafone assumes ComReg is alluding to geographically differentiated remedies. In this regard, Vodafone believes that ComReg's own market analysis clearly demonstrates that markets are national in their geographic scope and that there is at best limited evidence of locally varying competitive conditions. Vodafone is of the firm view that allowing Eircom varying pricing flexibility to respond to postulated differences in local competitive conditions is not in the interests of consumers, as it will harm entrants and undermine the prospects of effective competition developing in the medium term.

On a practical level Vodafone believes that, in the event of a move to EEO, much more detailed modelling of the additional costs incurred by an Access Seeker due to the fact that they are not vertically integrated within eircom would be required . These additional costs include those within the area of fault handling. As a vertically integrated operator who self supplies all element of ECS bundles eircom has certain structural advantages. These include the ability to deal with all aspects of a fault report. By way of example if an operator using WPNIA based Bitstream initially diagnoses a fault as being associated with the eircom provided copper path it will report this fault to eircom. If eircom proves this fault out of the copper and back into the Access Seeker network then they will close the fault from the point of view of its Network Operations team and the fault will be formally closed across the external interface between eircom and the Access seeker.

The Access Seeker will have to pick up this closure, identify that the eircom closure has not resolved the customer issue and recommence its own fault resolution. In contrast Vodafone believes that issue of fault localisation for eircom retail customers are handled entirely within the eircom Network Operations area and that the workflow management does not intersect with the eircom retail BSS stack. This gives clear efficiencies to eircom retail. This extended supply chain for Access Seekers raises costs and the time associated with the handling of formal transaction between eircom and Access Seeker extends the overall fault duration as perceived by the customer and so also increases customer costs.

On a more generic level at a presentation on 13 December 2011 given to Industry, and attended by senior ComReg managers, the Director of eircom's Wholesale Business Unit outlined that the current interfaces for Operators do not give Equivalence of Outcomes for Access Seekers as against eircom Retail. These differences have a cost and these would need to be factored into any EEO margin squeeze test.

Q. 10. Do you agree or disagree with ComReg's proposed floors for Naked WBA DSL to minimise the risk of a margin/price squeeze to WPNIA? Please explain your response.

Vodafone agrees in principle that it is important to set price floors to protect against an NWBA price squeeze. However, we believe that it will be important primarily to protect OAOs using WBA and WLR rather than LLU operators. In consequence, we do not agree with ComReg's proposals.

The response to Q6 above contains further details with respect to Vodafone's thinking.

Q. 11. Are there any relevant issues that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

Vodafone has addressed all relevant issues in its response to the other consultation questions. We note that while ComReg has considered making changes to controls in a number of wholesale and retail markets, it has not discussed changing the control with respect to LLU.

If ComReg is concerned about the slow take up of LLU and about the ability of Eircom/OAOs to compete effectively with cable, then it is essential that it reviews the current pricing of LLU. There is clear evidence that LLU prices are too high:

- take up of LLU in Ireland is significantly less than it was assumed to be when LLU prices were being determined

- the full monthly LLU price in Ireland is 44% higher than the EU average and twice that in the UK.

Moreover, as with Line Share, there is clear evidence that OAOs will respond and invest when prices are set appropriately.

Reducing the maximum LLU price would therefore provide Eircom greater price flexibility and encourage further investment by OAOs, while maintaining the critical regulatory safeguards that are in place and that fostered competition, entry and investment in the market to the benefit of all Irish consumers.

Q. 12. Do you believe that the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Vodafone's comments on the proposed wording of the draft Decision Instruments are without prejudice to its position as to the appropriateness of the proposed measures.

Vodafone does not believe that the proposed directions are, sufficiently detailed, clear and precise with regards to the specifics proposed. In particular Vodafone wishes to make the points set out below.

DRAFT DIRECTION IN RELATION TO DECISION D07/61

Definition of Bundles

The proposed definition of "bundles" is as follows: "*Bundle" means a package of services, consisting of Retail Fixed Narrowband Access and one or more other services, which is offered for sale by Eircom to end users.".* This definition defines bundles in terms of another undefined and unspecified term "*package of services*". This provides no clarity or certainty as to what groups of services will be subject to this proposed regulation.

- By way of example eircom could offer voice, broadband and mobile as a combined contract at a single price point, It could offer voice and broadband as a single contract at a single price point with mobile available as an optional "add-on" billed by eircom. For those customers who subscribe to the add-on this would be the same as the first scenario of the single price point.
- Eircom could offer voice and broadband as a single contract and at a single price point and its wholly owned subsidiary, Meteor, could offer a discounted mobile package for eircom customers but billed by Meteor. The effect to of this is the same as the first scenario but it could be argued that eircom retail hasn't sold a "package" of services but that Meteor has offered a promotion.
- Meteor could offer a mobile package and then sub vent eircom's offering of a "promotional" offer of reduced price fixed services for Meteor customers.
- Eircom could offer voice and broadband and Meteor run a prepaid mobile promotion with a €10 per month credit being given on the mobile for twelve months as long the Meteor number was nominated by an eircom account holder.
- Eircom could offer voice and broadband and reach an agreemnt with SKY to cross promote a TV offering for eircom customers with a discount on the TV element billed by SKY. No monies need be exchanged between eircom and SKY with the "value" to the parties being in the cross brand promotion of their respective services.

All of these have the same effect a single bundle or package offered by eircom directly to end users. Because some of them require the end user to self select and enter multiple billing arrangements, potentially with non-eircom Group entities for some elements, it might be argued by eircom that they are not a "bundle" or a "package" offered by eircom.

Vodafone believes that this lack of clarity in the definition runs the risk of avoidance of the regulation in circumstances where the offer set of products have a similar same market effect as a single consolidated bundle offered at a single price point under a single contract.

Therefore Vodafone believes that a much more explicit definition is required. One possible wording is as follows:

"A bundle is any group of services purchased by an end user, one of these services being Retail Fixed Narrowband Access purchased from eircom, and where the pricing of the aggregated group of services is conditional on all elements of the group being purchased. This includes groups of services purchased on separate contracts and from separate entities. For the avoidance of doubt promotional discounts or credits, including those applied to prepaid services, are to be treated as a price reduction for the purposes of this regulation"

References to external documents

Vodafone believes that as far as possible Directions should be self contained documents. This improves clarity and ensures that revision tracking and determining the provenance of external references is unnecessary. To this end Vodafone suggests that the text referred to in the definitions of **"Total Monthly Adjusted Bundle Cost"**, **"Total Monthly Bundle Revenue", "Total Monthly Portfolio Cost"**; **"Total Monthly Portfolio Revenue"** should be incorporated into an Annex of the Direction.

Pre Launch Assessment

Vodafone notes that it is proposed that eircom must obtain prior approval from ComReg for the launch of any bundle. Should ComReg decide to withhold such approval Vodafone believes that this amounts to a "*decision made or given by the Regulator*" within the meaning of Regulation 3(1) of the Framework Regulations (SI 333 of 2011) and is therefore amenable to appeal, most likely by eircom in the case of withholding approval. Similarly a decision to grant approval is also a decision amenable to appeal but in this case most likely by other providers including Vodafone. In order to vindicate the right of appeal such decisions cannot become effective until the appeal period expires and the decision, together with sufficient information to allow a prospective appellant formulate their appeal must be notified to affected parties. The proposed provisions of Section 4.7 of the draft direction appear to abrogate the appeal period for Vodafone and do not set out any mechanism whereby Vodafone might be informed that an appealable decision has been made. Therefore Vodafone is of the view that these proposals are incompatible with the Framework Regulations.

Post Launch Assessment

Please see Vodafone's comments on Question 5.

DRAFT DIRECTION IN RELATION TO DECISION D05/10

In order to facilitate monitoring and enforcement of the provisions of this draft Direction Vodafone believes that a further specification be made directing eircom to perform a test prior to the setting of any price for a Downstream Regulated Wholesale Service. It should be directed to hold copies of the tests its carries out to ensure compliance with the obligation and to provide these on a periodic basis to ComReg. Further as for the test set out in the Draft Direction in respect of Decision 07/61it should be directed to ensure that in documenting the tests "*all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence.*"

Q. 13. Do you have any views on this draft Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Vodafone does not believe that the RIA as set out in the consultation is complete. The RIA contains no quantitative analysis of any of the proposed changes on OAOs or market outcomes. Vodafone believes that, if ComReg wishes to make the sort of fundamental changes to the current controls that are suggested in the consultation paper, then it needs to:

- Carry out an appropriate market definition exercise
- Carry out appropriate market analyses
- Carry out a detailed quantitative impact assessment that considers the impact of the changes, in aggregate, on pricing and market outcomes, and assesses from both a static and dynamic perspective whether consumers will benefit from the proposed changes.

Vodafone believes that if ComReg carries out such analysis, it can only reach the conclusion that the proposals will harm competition and investment, deter further entry and ultimately lead to poorer choice and higher prices for Irish customers.

6: Magnet Networks Limited

Overall Magnet Networks welcomes that ComReg are reviewing the bundles marketplace. Magnet Networks notes that though the changes may seem innocuous the impact on the market may be severe and in some cases actually foreclose the market, thus, having a far reaching consequences which may in fact lead to a return to a monopoly marketplace.

Magnet Networks would like to point out that in the Market 5 review (10/81) ComReg decided against including mobile broadband within the definition. Based on this Magnet Networks does not understand how ComReg, without market analysis, can include mobile broadband within this consultation.

Magnet Networks feel that geographical deregulation can only be done with a large volume of market analysis, which has not occurred yet. Deregulating particular geographic areas without also doing a full consultation on LLU pricing would be misguided and would certainly lead to a foreclosure of the already tiny LLU market.

The proposal of a telecoms regulatory or advisory panel is usurping ComReg's role and also an effort to introduce another layer of bureaucracy in the system and slow down and delay the legal appeals process. Also, eircoms refusal to rebrand their service engineers is indicative of their failure to reform.

Q. 1. Do you agree or disagree with the proposals / preliminary views expressed by ComReg in relation to possible revisions to the net revenue test? Do you have any views on the matters ComReg seeks further input on in the above? Please give a detailed response with supporting data where appropriate to support your view.

Proposal at Page 27: Magnet Networks agrees with the aggregation of bundle assessment based on ATC. However, Magnet Networks has yet to understand ComReg's logic for their second part to the test. Magnet Networks would like further information about the second part of the test.

Proposal at Page 29: Magnet Networks has no issue with the two tests proposed in this proposal namely the splitting of the test into voice only and all bundles. However, Magnet Networks believes that the Larger Exchange Area can only be area 1 and 2 of Figure 4 of the Consultation. Even at that Comreg have acknowledged that the exchanges with less than 4000 lines and greater the 2500 lines have not been unbundled. Thus, it would lead Magnet Networks to suggest only Area 1 should be used or alternative create an Area 1+ which incorporates only those exchanges in Area 2 that have been unbundled. Then the second test is sufficient for all other areas. Magnet does not believe that further exchanges will be unbundled.

Proposal at Page 30: Magnet Networks accepts this proposal.

Proposal at Page 31(a): Magnet Networks accepts this proposal.

Proposal at Page 31(b): Magnet Networks believes that the test should be a similarly efficient operator as an equally efficient operator test can be to the benefit of the incumbent who may be more efficient then emerging or smaller competitors.

Preliminary View at Page 32: Magnet Networks agrees with this; however a review should take place when the ComReg becomes aware that a change in costs is imminent. This is to ensure total parity in the marketplace and the incumbent is not leveraging this change to their advantage. ComReg also needs to ensure that eircom are not using the basket/bundles to game the results.

Proposal at Page 36: Magnet Networks agrees that ATC is the costs standard for assessment.

Proposal at Page 36(b): Magnet Networks believes that the ATC should be disaggregated between the larger exchange area and outside that area. Within that larger exchange area eircom have to provide more competitive bundles and they may be providing these at a loss which are being funded by the areas outside the large exchange areas. However, a review of the LLU pricing structure needs to take place before this can occur.

Proposal at Page 37: Magnet Networks agree with the proposal outlined here.

Proposal at Page 40: Magnet Networks believe that only LRAIC or LRAIC+ should be used in relation to unregulated products. Magnet Networks is unsure of the usefulness of AAC to the tests.

Proposal at Page 40(b): Magnet Networks agree that no change should be made to the treatment of mailboxes.

Proposal at Page 41: Magnet Networks has difficulties with the statement made at point 4.82 that if the bundles fails the retail minus test it can be still deemed reasonable due to other factors being considered. Does this statement not undermine having a blanket test? Thus, if a bundle fails the test it should now be looked at from another angle to allow it circumvents the test. Magnet Networks does not agree with the proposal that the net revenue test can be circumvented.

Proposal at Page 42: As per Magnet Networks previous comment it feels if a bundle fails the net revenue test no other circumventing circumstances or reasons should be applied to it to allow it become a viable bundle. In relation to lifetime of customers with operators, Magnet Networks provided churn details. Magnet Networks believe that customers that have moved from the incumbent to another provider will continuously move to obtain the best deal for their requirements. Thus, the lifetime data acquired by ComReg from eircom reflects the areas outside the Larger Exchanges Areas an i.e. area where there is no significant fixed competition exists. ComReg should not rely so heavily on eircoms data and see information from other operators to assist in their research and analysis.

Proposal at Page 43: To reiterate Magnet Networks earlier points is a bundle fails the net revenue test it is below cost selling and will do damage irrespective of all the other factors that ComReg proposes to look at, in order to circumvent the initial test. This is allowing the incumbent two bites of the cherry and effectively undermines the whole concept of having a net revenue test in the first place.
Magnet Networks believes that a net revenue test is sufficient and no other information should be utilised to assist the incumbent in circumventing rules.

Proposal at Page 44 (a): Magnet Networks agrees with this proposal.

Proposal at Page 44(b): Magnet Networks agrees with this proposal however, notes that bundles should be monitored quarterly to ensure that they continue to satisfy the net revenue test.

Proposal at Page 45(a): Magnet Networks agrees with this proposal that margins cannot be carried forward or banked in some way.

Proposal at Page 45(b): Magnet Networks rebuts ComReg’s assertion on the lifetime of a customer. As noted in proposal at page 31(b) the test should be an SEO, also as per the proposal at page 42 Magnet gave ComReg churn details. Thus, Magnet Networks feel that ComReg should re-evaluate its calculation on the recovering of costs during a promotion or discount. It might be necessary for

ComReg to look at promotions in light of the larger exchange area and those outside that area to assess the lifetime of a customer. The larger exchange area has greater competition thus the lifetime is lower than that in the areas outside the larger exchange area.

Proposal at Page 46: Magnet Networks agrees with this proposal that it should be assumed that there is 100% opt in.

Q. 2. In defining the Larger Exchange Area where a different wholesale input may be allowed, what area(s) of Figure 4 do you believe should be included in the Larger Exchange Area? Do you agree or disagree with the proposed use of a weighted average wholesale input in the net revenue test in the Larger Exchange Area? When / what area(s) of Figure 4 do you consider it would be appropriate for Eircom to be allowed use a LLU+ network input cost in the net revenue test in the Larger Exchange Area? Please give a detailed response with supporting data where appropriate to support your view.

Firstly Magnet Networks believe only the exchanges that have greater than 4000 lines should be included. Magnet Networks believes only few exchanges with great than 2500 lines but less than 4000 lines will be unbundled. Thus, this is Area 1 in figure 4. There are a small number of exchanges that have been unbundled in Area 2 as stated by ComReg in this consultation. Magnet Networks highlighted that there would not be a widespread of unbundling exchanges in this area as it was not economically viable to do so unless the LLU price dropped significantly. Thus, Magnet Networks believe an Area 1+ should be created or Area 1 should be expanded to include those exchanges that are unbundled and fall within the Area 2 as outlined in Figure 4. Then Area 2 should be shrunk and contain all the remaining exchanges. Thus, the Larger Exchange Area will only contain the new revised Area 1.

Magnet Networks agrees that a weighted average wholesale input should be used in Area 1/Area 1+. In both these areas it should be used to encourage LLU uptake, but it should be used in conjunction with a lowering of the LLU wholesale price. This would require a further LLU/WPNIA consultation. Magnet Networks does not feel that some of Area 2 and all Area 3 should be included in the Larger Exchange Area. Magnet Networks cannot see a situation when LLU take up will ramp up or when it will become competitive. Fully unbundled LLU has been in the marketplace for ten years and irrespective of regulator controls LLU has stagnated at around 2.5% of the market. Offering a product that virtually unbundles an exchange still means the OAO is a wholesaler of eircom rather than moving up the ladder of investment.

These are the charges that Magnet Networks incur when providing LLU to the end user.
Line rental
Exchange Licence fee
Fault repair
ULMP connection/disconnection
Backhaul/engineering costs
CPE costs
Aircon/Power and Light
LLU failed orders.

Magnet Networks feel that the LLU price is still too high and does not encourage investment to unbundle new exchanges.

Magnet Networks believe Area 1 and Area 2 should be treated different as they have a different competitive set up. Area 1 has LLU, cable and eircom NGA, whilst Area 2 has very small number of LLU, small amount of cable and eircom NGA.

Magnet Networks feel that only Area 1/Area 1+ should be the only area included in the larger exchange areas so as to allow OAO's a more realistic LLU price than that already in the market.

Based on the proposal set out at Page 54 Magnet Networks agrees however, the larger exchange area should only be Area 1/Area 1+ to prevent leveraging or flexibility by eircom.

Magnet Networks does not agree with the LLU+ idea outlined in Clause 5.27 and 5.28. Magnet Networks feels that LLU is underdeveloped in Ireland to such an extent that it is even difficult to say there is a real LLU market in Ireland. Magnet Networks agrees with Clause 5.29 whereby like in the UK setting eircom a specific number of lines that are required to be unbundled before there is a change in the net revenue test.

As outlined in Proposal at Page 56 Magnet Networks believe that the trigger must be the number of lines. Magnet agrees that something like the number outlined in 1 would be the most transparent and easiest to monitor. Magnet Networks believes setting a date as outlined in 4 is arbitrary and does not create any incentive to move customers on to OAO's infrastructure or platform and may in fact create a disincentive by allowing eircom obfuscate unbundling through delaying tactics. Following the model in the UK is the fairest, easiest to monitor and most transparent.

Magnet Networks reiterates its stance that realistic of the 149 exchanges the majority would fall within Area 1. Thus, Magnet Networks feel either amend Area 2 to exchanges with greater than 3500 lines to includes those of the 149 exchanges which fall within Area 2 or exclude Area 2 altogether from the initial analysis and if there is a large increase in the unbundling of exchanges review the Larger Exchange Area and then see if Area 2 comes within it.

Q. 3. Do you agree or disagree with the proposed revised net revenue test? Please give a detailed response with supporting data where appropriate to support your view.

Magnet Networks agrees with the revenue aspect of the test.

Magnet Networks agrees with C1 costs and have provided a spreadsheet outlining OAO's unbundling costs. Again, Magnet Networks states that it believes the Area for the Larger Exchange Area should be Area 1/Area 1+.
Magnet Networks agrees that there must be no cross subsidisation by unregulated product for regulated products.

However, Magnet Networks does not agree with the unreasonable bundle assessment. Magnet Networks feel that if the bundle does not pass the original net revenue test then a second bite of the cherry should not be allowed. Magnet Networks do not see or have not been provided with any evidence where below cost selling is reasonable.

Q. 4. Do you agree or disagree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access? Please explain your response and provide detailed information to support your view.

Overall, Magnet Networks agree with the preclearance and notification of new bundles. However, there are some issues that arise. Firstly, Magnet Networks feel that the increase in two weeks to twelve weeks timeline for eircom to modify/withdraw the product is too long. It should remain at two weeks. This gives eircom a further 2.5 months of revenue as well as the stickiness of the customer. Secondly, Magnet Networks believe that ComReg should withhold consent irrespective of whether such consent is withheld reasonably or not. It should withhold providing consent to a bundle until Comreg is completely satisfied that the product will not damage the marketplace. This requires ComReg doing its own analysis and not relying on eircom's.

Q. 5. Do you agree or disagree that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that Eircom should modify / withdraw such bundle within twelve weeks? Please explain your response and provide detailed information to support your view.

Magnet Networks agree that the bundle should be ceased to be sold immediately from the time that it is deemed unreasonable. From that date, eircom should have 35 days to withdraw or modify. Magnet Networks feel that 12 weeks is too long. This gives eircom sufficient time to notify existing customers of that bundle that their contract and is changing or ceasing. It gives eircom the 30 day notice period window that allows customers to cease as per Regulation 14 of 2011 Regulations.

Also, Magnet Networks contends that the self regulation by eircom will not work. No company who are gaining market share will voluntarily tell the regulator that they are failing regulated tests. It will be important that ComReg carry out review of the bundles monthly or bimonthly. Relying on eircom to self regulate is not a sustainable model or good practice.

Q. 6. Do you agree or disagree with ComReg's proposed REO test to minimise the risk of a margin/price squeeze to ULMP? Please explain your response.

Magnet Networks believes that the REO test is the most appropriate test has OAO's and new entrants will not be able to be as equally efficient as the incumbent.

Q. 7. In your opinion, how should the cost of the network be calculated for setting the Wholesale Network Input ("WNI") for the purposes of the proposed WPNIA margin/price squeeze test to minimise the risk of a squeeze on ULMP? Please explain your response.

Firstly Magnet Networks believe that the Areas should only be Area 1 or Area 1+ which is the LLU unbundled exchange location and not the whole of Area 2.

Magnet Networks calculate the WNI to be as follows:-

1. LLU Cost
2. Fault Repair
4. ULMP connection/disconnection charge
5. IP Transit costs
6. Backhaul costs
7. Exchange Licence
8. Engineering Costs
9. Aircon/light and heat costs

These are the true costs of the WPNIA inputs.

Magnet Networks believe these costs should be used for minimum price floors.

Q. 8. Do you believe that the existing obligation not to margin/price squeeze in WBA should be further specified to include passing a margin squeeze test for bundles that include WBA? Do you agree or disagree that such a margin squeeze test should be similar to the proposed revised net revenue test in the Retail Fixed Narrowband Access markets? Please explain your response.

Magnet Networks believe that the existing margin/price squeeze should be extended to include bundles that include WBA. As ComReg indicated it may be looking to review such margin/price squeeze and remove such an obligation.

Magnet Networks agree with ComReg's view in relation to proposed net revenue test as outlined in the narrowband section earlier.

Q. 9. Do you believe that the D01/06 price control should be amended from SEO to EEO? Please support your view with relevant data and evidence. If you believe it should remain at SEO, when do you believe it might be appropriate to use EEO? Please support your view with relevant data and evidence.

Magnet Networks believe that the SEO is the test should remain and the price control should not be amended to an EEO test. Due to economies of scale, scope, externalities and ubiquity of network means it is unreasonable to apply an EEO test when it is evident that an OAO will never be equally efficient.

Q. 10. Do you agree or disagree with ComReg's proposed floors for Naked WBA DSL to minimise the risk of a margin/price squeeze to WPNIA? Please explain your response.

Magnet Networks believe the inputs that Magnet Networks has supplied at Question 7 should be looked at in light of Area 1/Area 1+ for Naked DSL input in LLU exchange areas.
Magnet Networks believes rolling Naked DSL out nationally is a way for eircom to circumvent the narrowband regulation by providing voice via VoIP. Magnet Networks would like ComReg to do further analysis on the effect of Naked DSL on the market. However, Magnet Networks does not object to proposed price floors once all costs are recovered and there is not margin squeeze with LLU.

Q. 11. Are there any relevant issues that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

Magnet Networks believe that ComReg has failed to consider the following:-

1. That the majority of ULMP is line share and not fully unbundled lines and fully unbundling a line has a migration cost.
2. If ULMP is the comparator for Naked DSL all things need to be considered in the price floor including migrations, faults, backhaul etc.

Q. 12. Do you believe that the draft text of the proposed directions are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

1. In relation to Clause 4.4 – Magnet Networks is concerned that the draft direction text which will form the legal basis allows for a level of interpretation if the test fails and such will allow eircom to

bring extreme pressure on ComReg that their view is better than that of ComReg. We consider the test should be black or white rather than the proposed ‘grey’ approach.

2. In relation to Clauses 4.10 and 4.11 – Magnet Networks considers the approach proposed in the draft direction allows eircom to game ComReg. For example eircom could wait until the 11th week before presenting ComReg with a potential solution. To reiterate our view is eircom should reasonably be aware of a solution much earlier and could thus obfuscate by waiting until the 11th week and then dragging the ComReg decision for a far longer period whilst a solution is discussed. The longer the process runs, the greater the potential damage to the market. We proposed eircom should have 35 days to either remedy or change and thus incorporate their Regulation 14 obligation. To support this view, ComReg normally give the industry less than six weeks to answer hugely complex data requests, thus, eircom should be subject to the same standard.

Q. 13. Do you have any views on this draft Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Magnet Networks believe that ComReg are making a significant assumption that the majority of LLU operators are using ULMP, which is not the case. The majority of LLU providers are only providing Line share.