



Commission for  
**Communications Regulation**

## Submissions to Consultation

### ComReg's approach to Regulatory Impact Assessment

#### Submissions received from respondents

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## **1 BT Ireland**

## **BT Response to ComReg Consultation**

### **Approach to Regulatory Impact Assessment**

**31 January 2007**

#### ***Executive Summary***

BT Ireland welcomes the opportunity to comment to the development and enhancements to the regulatory framework in Ireland. BT Ireland supports this initiative to formalise the existing and growing use of the Regulatory Impact Assessments within in the regulatory decision making process. BT Ireland notes that most, if not all of the actions already take place in the justifications and transparency supplied with recent decisions and this Consultation represents more of a formalisation of this process.

BT supports ComReg's view that it should maintain its ability to judge proportionality and thus the extensiveness of the RIA that is carried out. In addition, BT believes that ComReg should also be able to responsibly judge when sufficient depth has been achieved in more complex cases. BT Ireland welcomes the RIA process but is concerned that the process is not unduly delayed by endless postulations from those that are to be regulated.

BT strongly supports the statement in paragraph 4.10 where it says,

*“4.10 RIA also aims to determine that the option which is eventually selected will have the desired impact. If the regulatory obligation or rule is not complied with, then it will not achieve its objective. Therefore, when assessing various regulatory options, during the RIA stage, ComReg will consider how compliance will be monitored and be enforced.”*

BT Ireland is of the strong view that key regulations in Ireland such as undue discrimination requirements will only work properly when supported by strong transparency regulation and monitoring, such as requiring the publication of wholesale and retail quality of performance figures so that comparisons can easily be achieved. Today there is complete mystery as to whether the incumbent's retail arm is getting a better service than other providers. There is a perception held that the incumbent's retail arm do get a better service, but it is virtually impossible for providers to prove. BT therefore strongly supports the ComReg initiative to consider how compliance will be monitored. Publication is straight forward as eircom will have both the comparative wholesale and retail figures. Openness naturally forces compliance, and examples exist elsewhere where publication has increased confidence in relation to compliance such as WLR in the U.K. This will also save the regulator resource in investigation time.

## **Effectiveness Review of Existing Regulatory Remedies**

Finally, in carrying out RIAs BT Ireland believes that in setting remedies ComReg should continue to evaluate how effective such remedies have been in the past, and whether a tightening or additional supporting transparency remedies are required to improve the effectiveness of what is being proposed. BT believes an effectiveness review should be documented in the process in clause 6.23. This is absolutely essential to the success of any regulatory remedy. There needs to be a real measure as to what is considered a successful implementation of a regulatory remedy.

## ***Detailed Comments***

### **Comments to Section 4 – What is RIA?**

#### **Reference clause 4.8**

BT supports ComReg's view that the impacts of regulation should be quantified as far as possible in a proportional and reasonable timescale as there is a concern that endless postulating could delay the decision making process. BT Ireland supports ComReg continuing to request such information through Consultations etc. but as per today, after some point, further input should only be allowed when requested by ComReg to prevent a continuous reworking of the RIA.

#### **Reference clause 4.10**

BT strongly supports this clause by ComReg and would like to re-emphasise the importance of such an approach.

BT Ireland is of the strong view that key regulations in Ireland such as undue discrimination requirements, will only work properly when supported by strong enforcement and monitoring. BT Ireland believes that transparency regulatory remedies are the key to achieving this and requiring the publication of both wholesale and retail quality of performance figures would make monitoring and enforcement much simpler.

Today, there is complete mystery as to whether the incumbent's retail arm is getting a preferential service over other providers from the incumbent's wholesale arm. There is a perception held that the incumbents retail arm do get a better service, but the vertically integrated nature of the incumbent means that it is virtually impossible for providers to prove undue discrimination although the perception is continually fuelled by isolated incidents and situations such as the incumbents retail arm being able to provide same day PSTN services, where the rest of industry cannot via the relevant wholesale processes.

BT therefore strongly supports the ComReg initiative to consider how compliance will be monitored and enforced. BT Ireland believes that ComReg should consider regulatory remedies within the RIA that in themselves are designed to maintain compliance rather than the traditional approach of setting a regulation where

compliance or non compliance is not demonstrated and it is only through a complaint or subsequent investigation that non-compliance is proven.

Undue discrimination regulation is a corner stone to maintain a competitive environment yet it is generally by complaint that breaches emerge. BT Ireland is of the view that for the Undue discrimination regulation to become more effective, transparency regulatory remedies are essential.

The reason for this is that:

1. Transparency such as the publication of performance figures to all providers including the incumbent's retail arm will flush out any preferential treatment.
2. The lack of publication for any reason will immediately raise suspicion that something is wrong.

Although some may say publication is difficult, it is actually quite straight forward as the wholesale arm will have the figures and mechanisms can be used to hide the identities of specific providers. It's the differences that are being monitored which then can be checked. Examples exist elsewhere such as in relation to WLR in the U.K.

Furthermore, for example, BT refers to Section 10 of SI 308 of 2003, European Communities (Electronic Communications Networks and Services) (Universal Service and User's Rights) Regulations 2003. BT notes that under this legislation eircom should publish adequate and up to date information concerning its performance in relation to the provision of universal service obligations, based on the quality of service parameters. To date, BT is not aware that eircom publishes data in relation to the quality of service of its PSTN service (provision and service assurance) at a retail level, in the public domain. Moreover, there is a requirement for the development of publicly available wholesale data. Without a full and robust set of data at both a retail and wholesale level it is impossible for there to be any real or meaningful analysis of (1) eircom's quality of performance in relation to it's USO obligations; (2) any analysis in relation to eircom's obligation of equivalency in relation to both provision and service assurance.

### **Comments to Section 5 – When will ComReg conduct RIA?**

BT believes that in the exceptional circumstance that interim regulation is required, for whatever reason, there should be a mechanism for the regulator to act without the need for a lengthy RIA to establish such regulation.

For example, the communications industry has aspects that are fast moving and it is important that if issues arise suddenly (for example with the effect of abusing consumers etc), then the regulator should be able to act with speed and effectiveness.

### **Comments to Section 6 – Steps Involved**

**Reference 6.10** – BT agrees that a base-line type review can provide a useful benchmark of the value or otherwise of making a change.

**Reference 6.14** – BT supports this clause and requests that such consideration should equally applied to the alternative operator businesses who also have complex automated systems (such as order handling engines) that may be impacted by any proposed change. As an example, during 2006, the changes made to the eircom NDD to introduce X-Directory options, were made without proper technical consultation with the industry in the design stages which led to the industry having to fall into line with the eircom design rather than reaching agreement as to the best way forward. BT welcomes the introduction of X-Directory on the NDD but there should be proper consideration of the alternative operators who also have to use the system and prepare for the same.

### **Reference 6.23**

#### **Effective regulation and review**

BT Ireland supports the aim to have effective regulation and thus recommends that this step should include a review of existing regulations and whether they have been effective or not and this review should assist the development of effective remedies.

BT Ireland is of the strong view that the discrimination regulatory remedies are being undermined in some cases by a lack of supporting transparency remedies as the only test of compliance is complaint and investigation which has the effect of making the regulation ex Post rather than ex Ante. Public publication of performance against remedies imposed is the only way to ensure that the concept of ex-Ante regulation is respected.

#### **Sun Setting Clauses**

BT Ireland is of the view that if sun setting clauses are to be applied, the triggers and expected outcomes need to be very clear and subject of public Consultation so that the community, as a whole, is aware of a future change in the regulatory regime and the impacts that these changes will have. Companies and communities of interest can invest heavily in communications in Ireland and a firm but stable regulatory environment is essential hence changes need to be Consulted on publicly.

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## **2 Eircom**

**eircom Ltd.**

**Response to ComReg Doc. 06/69**

***Consultation: ComReg's Approach to***

***Regulatory Impact Assessment***

**31 January 2007**

## DOCUMENT CONTROL

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## EXECUTIVE SUMMARY

- As eircom is frequently the subject of “regulatory obligations on undertakings in the market for electronic communications” imposed by ComReg, we welcome this opportunity to respond to this consultation on the approach to be taken by ComReg when conducting a regulatory impact assessment (RIA).
- eircom, however, strongly disagrees with the statement, “ComReg believes it is appropriate to consult on the types of decisions which will be subject to RIA and also on the approach which will be taken when conducting RIA if deemed necessary.”
- The Ministerial Policy Directions issued in 2003 create an absolute requirement for ComReg to conduct a RIA in advance of issuing “regulatory obligations on undertakings in the market for electronic communications” – whether in the form of a decision, designation, determination, specification, requirement direction or any other act of an equivalent nature of ComReg.
- Conducting a RIA thus is compulsory for ComReg. eircom does accept, however, that in conducting RIAs, ComReg should be guided by the principle of proportionality. This means that a decision, which is likely to have a wide-ranging impact and/or impose substantial costs on stakeholders, will have a more comprehensive RIA than a decision, which will have a less significant impact.
- eircom could accept that where a requirement or obligation is imposed directly by statute, without any decision by ComReg then ComReg is clearly not itself imposing regulatory obligations on undertakings. Where in such instances, however, ComReg has any discretion in determining how the requirement or obligation is implemented, then a RIA should be conducted.
- A thorough and comprehensive RIA should be undertaken in advance of the imposition of regulatory obligations. And, on the basis of Regulation 9(6) of the Access Regulation, a RIA of access and interconnection obligations should ensure that any policy option considered or eventually imposed is “based on the nature of problem identified, proportionate and justified.”
- eircom welcomes the statement, “ComReg does not want regulation to be overly burdensome and will, where possible, identify the opportunities to withdraw from or reduce regulatory intervention in the relevant markets in the transition to more effective competition.” We look forward to ComReg putting this pledge into practice.
- eircom calls upon ComReg to establish objective standards for and define the cost and benefit analysis principles that it intends to apply in its RIAs. There must be a quantifiable and sustainable rationale for all ComReg policy measures that meets the standards of Better Regulation Department of the Taoiseach in “Regulating Better - A Government White Paper setting out six principles of Better Regulation” (January 2004).

## GENERAL REMARKS

### Types of decisions which will be subject to a RIA

The decisions that ComReg makes can impose significant costs on industry stakeholders. It is thus important for ComReg to think very carefully before adding to the burden of regulation. If intervention is justified, ComReg should aim to choose the least intrusive means of achieving its objectives, recognising the potential for regulation to reduce competition.

Section 13 of the *Communications Regulation Act, 2002* provides that the Minister may give policy directions to ComReg in relation to the exercise of its functions and ComReg is obliged to comply with any such direction: section 13(1). The Minister issued such policy directions in February 2003<sup>1</sup>, directing ComReg:

- to conduct, before deciding to impose regulatory obligations on undertakings in the market for electronic communications, a Regulatory Impact Assessment (RIA) in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme (Direction 6 of 2003).

Conducting a RIA thus is a key, non-optional part of the policy-making process and should inform all ComReg's policy decision about whether to engage in regulatory intervention and, if so, in what way. The process of conducting a RIA should be an integral part of ComReg's work and should begin as soon as it starts to consider an issue, with the RIA being developed from then onwards. A RIA should not be considered an additional step, which takes place after a policy decision has already been made. This applies both to new issues and where ComReg is reviewing existing regulation.

As for the scope of "regulatory obligations on undertakings in the market for electronic communications," this would comprise any ComReg decision, designation, determination, specification, requirement direction or any other act of an equivalent nature of ComReg.

eircom thus contends that ComReg has failed to comply with Direction 6 of the 2003 policy directions, which requires ComReg, before deciding to impose regulatory obligations on undertakings in the market for electronic communications, to conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.

While the market analyses, which ComReg began conducting in the context of implementing the European Union (New) Regulatory Framework<sup>2</sup>, are capable of constituting RIAs within the meaning of the Direction, eircom does not believe that they do so, as a RIA should properly include an identification and assessment of real market impacts of the universe of possible regulatory options. [These points are developed in detailed below.]

### **Double mandate: ERG Common Position on Remedies**

In addition to this national mandate to conduct a RIA, ComReg also has a mandate at the EU level. The European Regulators Group (ERG) has stipulated in its Common Position on remedies<sup>3</sup> that Member States' national regulatory authorities (NRAs) should conduct a regulatory options assessment in which they weigh the net benefits which implementation of the

<sup>1</sup> Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February 2003.

<sup>2</sup> First claim that market analysis in itself represented a RIA in ComReg Doc. 03/146, *Consultation Paper - Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops*, (11 Dec. 2003).

<sup>3</sup> , ERG (03) 30rev1, *ERG Common Position on the approach to Appropriate remedies in the new regulatory framework*, (1 April 2004) as replaced by ERG(06)33, *Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework*, (May 2006)

obligation would bring to the national economy against the cost of implementing the measure. The ERG states:

“Decisions should include, for any given problem, a consideration of alternative remedies wherever relevant, so that the least burdensome effective remedy that best meets the objectives can be selected. Each remedy may also achieve the objective of the NRA to a varying degree. This also needs to be considered. Second, in order to assess whether a remedy is proportionate and justified in the light of the objectives set out in the Framework Directive, NRAs should balance the burden of the remedy imposed on the undertaking with SMP and other costs which the imposition of a remedy may entail against its prospective benefits. Both assessments are already required by some national systems of administrative law and form part of the proportionality assessment under Community law. However, in order to make the choices involved more transparent, NRAs may carry out an assessment of the regulatory options available, including a qualitative assessment of the anticipated benefits and potential costs of the option selected ("regulatory options assessment").

When carrying out a regulatory options assessment, the justification of regulatory measures will generally be based on a qualitative analysis taking into account economic theory and market experience. Further to this, NRAs can where reliable data is readily available also use quantitative methods to support the assessment.“

As the text suggests, the regulatory options assessment, or RIA, of an NRA like ComReg usually should result in the least onerous obligations, which will deal with the problem identified and which is proportionate to the aims pursued.

eircom maintains that ComReg disregarded the above precise guidance on appropriate remedies and conducting RIAs as advised by its peers in the ERG.

## **Approach to be taken when conducting RIA**

RIAs form a key part of best practice policy making, which is reflected in ComReg's statutory duty to conduct them. They provide a way of considering different options for regulation and then selecting the best option. RIAs provide a framework for weighing up the costs and benefits of removing regulation, as well as analysing other options. They help to identify any possible side effects or hidden costs associated with regulation and to quantify the likely costs of compliance on the individual citizen or business.

At the outset ComReg should identify the issue to be addressed and the options available to it. In doing so, ComReg should continue to bear in mind the need for options to be linked with its statutory duties. Where existing regulation is in place, ComReg should start by considering the option of withdrawing that regulation – especially where no RIA was conducted when the original regulation was imposed (e.g., as was the case with the introduction of flat-rate Internet call access origination (FRIACO)). Where appropriate, ComReg should explore more market-led approaches to regulation and should consider whether there are alternatives to formal regulation, such as co-regulation and self-regulation. This option – of no sector-specific regulation – should be the benchmark against which other options are judged, i.e., what costs and benefits would be incurred additional to those which would be incurred if there were no intervention?

Next ComReg should consider the option of not changing the regulatory regime, either by not introducing regulation or by retaining existing regulation.

Then in identifying alternative options and developing policy proposals, ComReg's aim should be to think widely about the possible impacts of regulatory intervention, taking account of the whole value chain and knock-on effects across the communications sector. By doing so, it



would seek to minimise any unintended consequences (e.g., promoting the use of flat-rate dial-up Internet access at the expense of broadband penetration, as is the case with FRIACO<sup>4</sup>).

To be effective, the process of doing a RIA should begin immediately at the start of a project, with the RIA being developed from then onwards. A RIA should therefore be a core part of the policy-making process, not a bureaucratic add-on.

### ***“Full cost benefit analysis”***

In this consultation paper, ComReg maintains, “Full cost benefit analysis would arise only where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available.” ComReg, however, does not go on to define its criteria for assessing proportionality.

Despite the availability of “robust, detailed and independently verifiable” (e.g., in eircom’s and other SMP operators’ regulatory financial statements), to date ComReg has not conducted a single full cost/benefit analysis. eircom finds this completely unacceptable and a violation of ComReg’s duties as a regulator.

### ***Regulatory forbearance options***

In the purported RIAs that ComReg now is conducting, ComReg cites the following: “It is noted that the EU Framework requires ComReg to apply remedies when SMP is found, ***so the option of forbearing from any remedies is not something ComReg can consider***” [our emphasis]. eircom strongly disagrees with this position and refers ComReg back to the ERG guidance cited earlier.

Under the Framework Directive of the EU NRF, a NRA is to impose at least one obligation on the SMP operator; however, it should impose only proportionate, i.e. the least burdensome, one(s)<sup>5</sup>. A NRA chooses among a list of five in the Directive, namely transparency, non-discrimination, compulsory access, price control, cost accounting or accounting separation<sup>6</sup>. While complete forbearance is not a policy option for a NRA, it does not remove the requirement from the NRA to consider the policy option of forbearance of each of the individual possible access obligations.

### ***Dismissing the cost of pre-existing regulatory obligations***

In the purported RIAs that ComReg has conducted to date, eircom strongly objects to ComReg’s dismissal of the cost of existing regulatory obligations that ComReg has imposed earlier. In its recent market analysis of the “Retail Fixed Narrowband Access” markets<sup>7</sup>, for example, ComReg stated the following:

“Given both SB-WLR and CPS are now well-established products in common use by a large number of operators, ***the provision of such products does not impose substantial regulatory costs, and should be easily exceeded by the benefits of enhanced competition.***” [our emphasis]

eircom finds this completely unacceptable and a shirking of regulatory duties by ComReg.

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<sup>4</sup> A point made by eircom in previous submissions to ComReg, such as “ComReg Consultation 05/30 Forward Looking Strategic Review of the Irish Telecoms Sector: eircom Ltd. Response” (27 May 2005).

<sup>5</sup> Articles 16 of the Framework Directive, 8 of the Access Directive and 17 of the Universal Service Directive. Guideline on market analysis, para 118 and ERG (06)33 [see footnote 3].

<sup>6</sup> Articles 8-13 of the Access Directive for wholesale remedies, Articles 16-19 of the Universal Service Directive for retail remedies.

<sup>7</sup> p. 68, ComReg Doc. 06/39, *Consultation - Market Analysis: – Retail Narrowband Access Markets*, (17 Aug. 2006).

### ***Facile, subjective qualitative assessments of costs***

In the purported RIAs that ComReg has conducted to date, eircom strongly objects to ComReg's subjective and unsubstantiated assessment of the cost of implementing regulatory obligations. In its recent market analysis of the "Retail Fixed Narrowband Access" markets<sup>8</sup>, for example, ComReg stated the following in relation to proposed non-discrimination remedies: "The regulatory costs of this are not excessive, as this obligation is essentially behavioural and will not incur significant expense by the SMP operator." eircom finds this completely unacceptable and that it represents a shirking of regulatory duties by ComReg.

Single Billing Wholesale Line Rental (SB-WLR) is a regulatory construct that has been implemented to date only Ireland and in no other EU Member State where WLR has been imposed as an access obligation. In addition to an access obligation, when combined with a non-discrimination obligation, it creates for eircom the implicit obligation to "provide a wholesale equivalent for retail offerings" that appear on eircom's bi-monthly bill and to offer these services for resale under the same price control as the SB-WLR product. There are real costs – both operational and capital expenditure -- of this wholesale product development and provision. Such costs should be identified and assessed before ComReg can determine that "the regulatory costs of this are not excessive."

### ***Principle of proportionality***

Proportionality is one of the over-arching general principles of European law. It is described as the minimum intervention required, to achieve the objective set out<sup>9</sup>. In ComReg's *Strategy Statement (2005 – 2007)*, the importance of assessing the impact of regulatory measures to ensure that they are proportionate and justified is highlighted. ComReg claims that such assessments are carried out in accordance with European and international best practice. eircom, however, would contest this claim and ComReg's 'self assessment' in this domain.

Proportionate obligations are especially important in a small member state (e.g., Ireland, and the Baltics) and the "microstates"<sup>10</sup> (e.g., Luxembourg and Malta) because in the main:

- The costs of implementing any particular regulatory measure (e.g., regulatory product development; IT, systems and gateways development; service level agreements; key performance indicator reporting; etc.) vary little between SMP operators across the EU Member States;
- The regulatory benefits are broadly proportionate to the size of the market.

Thus obligations that might be proportionate in large member states, such as the United Kingdom and France, are not necessarily proportionate in small countries, like Ireland, with a market a fraction of the size.

### ***Assessment of costs and benefits***

Throughout this consultation document and in the purported RIAs that it has conducted to date, ComReg uses the terms "not material," "not excessive," "not significant," "of temporary and limited effect" in relation to the burden or cost to be borne by stakeholders with the imposition of a specific regulatory obligation. ComReg, however, commits a great oversight in failing to define the standards against which material burdens and costs are to be assessed. Similarly, there are no standards established for the assessment of benefits.

eircom recognises that in some cases – the exception, rather than the rule, it may be difficult to quantify all costs and benefits. In these cases, it may be hard to identify which option has the highest net benefit and choose an option solely on that basis. Nevertheless, every impact of the chosen option would result in costs and/or benefits. If such costs and benefits cannot be

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<sup>8</sup> *Ibid.*

<sup>9</sup> Case C-331/88, 13 November 1990, FEDESA

<sup>10</sup> Ovum and Indepen, "Applying the EU Regulatory Framework in microstates," a report to the CYTA, EPT and Maltacom, June 2005

quantified (or it is not proportionate to quantify them), they should still be described and taken into account in making our decision. At a minimum, costs and benefits should be described qualitatively.

We call upon ComReg to define the cost and benefit analysis principles that it intends to apply in its RIAs going forward. For example, where costs and benefits cannot be quantified precisely, ComReg should aim to give broad estimates (e.g., in the order of €x million) or ranges of costs and benefits (e.g., between €x million and €y million). It is also helpful to form an idea of the relative size of the respective costs and benefits.

Where cost and benefits cannot be quantified, it may be necessary to develop criteria by which to rank the options under consideration. These criteria should be linked to ComReg's statutory duties, in particular, to promote (sustainable) competition. We also call upon ComReg to specify these criteria.

### **3 Vodafone**



**Vodafone Response to the Consultation on ComReg's Approach to Regulatory Impact Assessment**

## Introduction

Vodafone welcomes the opportunity to respond to ComReg's consultation on the approach to Regulatory Impact Assessment (RIA). The RIA is essential in determining whether or not proposed regulatory actions are necessary, proportionate, and the minimum necessary to achieve explicitly stated objectives. Vodafone therefore considers that it is critical that RIAs conducted as a necessary part of ComReg's regulatory decision making adhere to international best practice and to the principles and elements set out in the government's RIA Guidelines. The present consultation is an important step in clarifying how ComReg intends to incorporate the key requirements for an effective RIA into its approach.

Vodafone must point out that, in our view, it is not made clear in ComReg's consultation document how the proposed approach to RIA relates to RIA exercises previously conducted by ComReg. RIA has been conducted as part of market analyses and other regulatory decisions made by ComReg in the period since it was mandated by the 2003 Ministerial Direction, Vodafone is uncertain as to whether this consultation merely specifies the details of an approach to decision making that ComReg considers it has followed in previous cases or presents an approach that constitutes a significant or fundamental change from past policy. Vodafone considers that it is important that ComReg provides clarification in this regard.

Vodafone fully agrees with the principles that ComReg intends to use in carrying out RIA as set out in the government's RIA Guidelines. However there are a number of issues, relating in particular to the role of the RIA in the overall market analysis process, and the prominence of cost-benefit analysis methods of quantification and monetisation, on which Vodafone wishes to comment. Vodafone's views on the above and other matters arising from ComReg's consultation document are set out in full below.

## Role of RIA in the Consultation Process

Vodafone agrees with ComReg's view, as expressed in paragraph 5.6, that the RIA is a central part of the decision making process and should be conducted from the outset of any review. It is clear that the RIA is just one element in the decision making and consultation process and can not be regarded as being equivalent to the entire process itself. ComReg's statement in paragraph 5.14 that the RIA, where appropriate, will be presented as an addendum to the main consultation document reinforces this conclusion. There have, however, been instances in ComReg's past approach to RIA that appear to deviate sharply from the position that RIA is a distinct sub-element of the consultation process rather than being essentially indistinguishable from the overall consultation and analysis. For example, in the consultation document on ComReg's Market Analysis of Interconnection Markets (04/106a) and in the Response to Consultation and Draft Decision (05/37a) no RIA is undertaken that is distinguishable from the consultation document as a whole. In paragraph 8.4 of document (05/37a) ComReg states:

*“ComReg believe the market analysis process is a comprehensive review of the sector under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction quoted above.”*

Vodafone contends that the requirement to conduct a RIA is not met by this approach. With regard to the need to conduct a RIA from the outset of a review, wherever possible, Vodafone

notes that in the preliminary market analysis of Wholesale Mobile Access and Call Origination (04/05) ComReg does not publish a preliminary RIA and states:

*“ComReg will conduct a Regulatory Impact Assessment which will form part of the decision-making process and would invite comments on the proportionality and justification of the proposed remedies in this consultation.”<sup>1</sup>*

It is notable that on the basis of the above statement ComReg had not at this stage conducted a RIA although the consultation document had preliminarily concluded that two undertakings in the market should be designated with SMP and described the remedies that ComReg was proposing to impose on foot of SMP designation.

Vodafone considers that departures from the principles set down by ComReg in the present consultation, such as the past instances outlined above, are inappropriate, hinder consultation respondents in providing effective feedback, and raise the risk of unnecessary or disproportionately heavy regulation being imposed on undertakings in the market. ComReg must give a clear commitment going forward to consistent early publication of RIA exercises that are distinct from the market analysis undertaken by ComReg as part of the relevant overall review.

## **Quantification and Monetisation of Impacts of Regulatory Decisions**

ComReg correctly incorporates the principle that where possible the costs and benefits of proposed regulation will be quantified to the greatest extent possible. Vodafone notes ComReg's view that a full cost benefit analysis would arise only where it would be proportionate or in exceptional cases where robust and independently verifiable data is available. Vodafone accepts that a full cost-benefit analysis is not proportionate for regulatory decisions that have minor impacts, however many of the regulatory interventions that ComReg has made, or may make in the future, are of major significance – in many instances having implications for overall national competitiveness - and warrant a thorough cost-benefit assessment. Notwithstanding the major significance of many of ComReg's past regulatory decisions and associated remedies, only one formal cost-benefit analysis – that commissioned by ComReg from Ovum on the impact of full mobile number portability (FMNP) has to Vodafone's knowledge been conducted to date.

Vodafone agrees with ComReg's view in paragraph 6.14 that the choice between the methods of assessing the impact of various regulatory options will depend on the feasibility of placing a monetary value on the benefits and costs of a proposal. However, Vodafone does not consider that the cases where cost benefit analysis is viable are in any way exceptional. A key rationale for conducting cost benefit analysis in the first instance is that it can monetise benefits and costs that do not have an immediately evident market value by linking them to factors to which a market value can be more readily assigned. Vodafone considers that most of the benefits and costs of any given regulatory proposal can be monetised in this manner once sufficient consideration is given to the linkages between the proposed benefits/costs and conventional markets for goods and services that can yield the necessary prices.

Vodafone recognises that risks and uncertainties in calculating monetised benefits and costs present some difficulties, however these can be effectively dealt with using a number of techniques. For example the robustness of the conclusions on the net benefits of a proposal can be established by making conservative assumptions about benefits and not assuming a 'best case scenario' for costs. If net benefits for the proposed regulatory action are found to arise from the

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<sup>1</sup> ComReg document (04/05), paragraph 6.72, p78

cost benefit assessment on these conservative assumptions over and above the next best alternative regulatory option then the proposed regulation can be justified without having to be overly concerned about ensuring strict accuracy regarding the actual value of the net benefits, or the component benefits and costs.

Vodafone notes that other approaches to dealing with uncertainty – sensitivity analysis and the use of ranges for the estimates of costs and benefits, are cited in the government's RIA Guidelines. These methods are regarded in the Guidelines as effective methods of addressing risk and uncertainty but are not mentioned in ComReg's consultation document. Vodafone considers that these methods can usually ensure findings of a cost benefit analysis that are robust in terms of their conclusions on the desirability or otherwise of any given regulatory option. These methods should therefore be implemented by ComReg, where appropriate, in the conduct of RIA.

The key point is that, when using techniques such as sensitivity analysis, highly accurate and detailed data that can be fully independently verified in all cases is not a necessary condition for obtaining robust conclusions. In addition, Vodafone does not consider that obtaining the necessary monetised data is possible only under exceptional conditions.

Vodafone agrees with the need to use an appropriate discount rate and also supports, in light of the foregoing, the identification of all significant risks associated with a RIA that could materially affect its outcome.

## **Facilitation of Effective Consultation Process with Stakeholders**

In the present consultation document ComReg proposes to adopt a 'common sense' approach to RIA where a less detailed RIA will be carried out in respect of decisions with relatively low costs.<sup>2</sup> Vodafone agrees in principle with an approach to RIA that is proportionate, however Vodafone believes that the scope of the RIA should remain open to revision during the course of the consultation process. This is necessary given the possibility that consultation respondents may provide evidence of impacts that were not initially considered, or were underestimated, by ComReg. Where valid points and/or credible evidence of additional impacts are provided by stakeholders, ComReg should where appropriate move to the completion of a full RIA rather than the light RIA originally envisaged. In this regard Vodafone welcomes ComReg's expressed openness to revise its RIA after the initial analysis should further information become available.<sup>3</sup>

ComReg's expressed intention to curtail or cease RIA where regulation is not viewed as the optimum way to achieve the objective<sup>4</sup> is appropriate in the context of market analysis where no undertakings are found to have SMP. However, Vodafone is concerned that ComReg has apparently also decided not to conduct a RIA in cases where it considers that withdrawing existing regulations would not be the optimum way to achieve its objectives.<sup>5</sup> Vodafone believes that a RIA must be conducted in cases where it is proposed by ComReg that existing regulatory measures should be kept in place. Vodafone considers that there are considerable risks to not relaxing existing regulation where market circumstances have become more competitive over the course of, for example, a two year review period. It is not appropriate to assume that because regulation is already in place and is proposed to remain unchanged, that the relative costs and benefits of this regulation have not changed in the period since the existing regulatory obligations were first imposed. Nor is it appropriate to overlook or downplay costs of existing regulation on the basis that

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<sup>2</sup> ComReg document (06/69), paragraph 2.6, p3

<sup>3</sup> Ibid, paragraph 6.3, p11

<sup>4</sup> Ibid, paragraph 5.10, p9

<sup>5</sup> Ibid



they were considered proportionate in a previous RIA. ComReg must have particular regard for the opportunity cost of existing regulation and how this can change over time. RIA must be conducted, even where ComReg proposes that existing regulation not be withdrawn or amended, to ensure that the current regulation continues to be necessary and proportionate relative to the alternative regulatory options.

Vodafone considers that effective input from stakeholders to consultations on proposed regulatory actions can be promoted by ensuring that a range of regulatory options are considered in the RIA. Vodafone considers that in addition to any 'status quo' regulatory option, the option of non-imposition of regulation, and the regulatory option favoured by ComReg, intermediate or other types of regulation should also be formally considered as options. In the present consultation ComReg indicates that it will consider a range of regulatory options in the RIA but Vodafone believes that ComReg should give a formal commitment to examine a minimum of three regulatory options in every RIA that is undertaken as this will improve the prospects of the appropriate level of regulation being chosen.

## Other Comments

While Vodafone agrees with the need to ensure that regulation is justified and uses the least intrusive means necessary to achieve the objective, as set out in paragraph 4.6 of the consultation document, we would question the phrasing of the last sentence in this paragraph where ComReg states:

*“Hence, regulation will only be used where it will improve welfare to society as a whole given that markets are not always perfect.”*

Vodafone contends that the term 'effectively competitive' should be used in place of the word 'perfect'. The concept of perfect competition, to which the use of the word 'perfect' in the above sentence presumably relates, is a purely theoretical construct that is observed nowhere in real world markets for goods and services. The key feature of a theorised perfectly competitive market, that price equates to marginal cost, has no relevance whatsoever to network industries such as telecommunications where the presence of large fixed and common costs makes marginal cost pricing incompatible with normal economic profitability. Perfect competition is therefore not a realistic objective for which regulation should be aiming and the absence of perfect competition cannot justify regulatory intervention. The relevant objective for regulation is to foster the development of effective competition only in those markets where it is found to be absent.

On a separate issue, Vodafone notes ComReg's statement that it will aim to deliver measurable improvements in consumer welfare year on year in areas such as price, choice, and quality. Vodafone would emphasise that competition in the market economy is the key to delivering improvements in the attributes of telecoms services, as in other markets for goods and services. Regulation should seek to improve product attributes such as price only indirectly, by fostering effective competition in those markets where it has been found to be lacking (those defined markets where undertakings have been designated with SMP).