



An Coimisiún um  
**Rialáil Cumarsáide**  
Commission for  
**Communications Regulation**

## Market Reviews

Wholesale Local Access (WLA) provided at a fixed location

Wholesale Central Access (WCA) provided at a fixed location for mass-market products  
Submissions to Consultation

Non-confidential

Submissions to Consultation

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**An Coimisiún um Rialáil Cumarsáide**  
**Commission for Communications Regulation**

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# alto

alternative operators in the communications market

**Consultation: WLA and WCA Market Reviews - Ref: 23/03**

**Submission By ALTO**

**Date: March 3<sup>rd</sup> 2023**

ALTO is pleased to respond to the Consultation: Market Reviews Wholesale Local Access provided at a fixed location and Wholesale Central Access provided at a fixed location for mass-market products (WLA and WCA) – Ref: 23/03.

ALTO welcomes this opportunity to comment on this important consultation.

### **Preliminary Remarks**

ALTO notes that this Market Review Consultation seeks to operate sunset periods for the first time on the market. ALTO welcomes this approach to sunset periods, the effect of which is protect access to services for vulnerable users of communications and to prevent unintended consequences for those users and other users of services impacted by this Market Review.

In the course of our answers below, we make the point that the ComReg economic analysis seems to cease at a certain point in time. That cessation does not take account of a high number of new economic conditions that have very clear impacts on the Irish communications market. ALTO suggests that ComReg considers some of the more contemporaneous economic issues in its deliberations, e.g., cost of living crisis, impact of Ukraine war, post Covid economics and the residual impacts of Brexit.

ALTO has made some important suggestions in our response to this Market Review Consultation that we would like ComReg to carefully consider during the course of its deliberations.

## **Response to Consultation Questions:**

**Q. 1 Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.**

A. 1. ALTO agrees generally with ComReg's assessment of the Relevant Markets arising in the consultation paper. We note the review period appears to have stopped around June 2022 and may fail to consider certain global and local economic pressures as a result. Our concern is there is a risk of the report being over optimistic in terms of forward growth trends as consumers and operators take stock of the energy crisis. Consumers endeavouring to upgrade services from FTTC to FTTP where disposable income is unavailable may cause knock on issues or a slowing in progress on the market. Global economic trend considerations are perhaps best described as found wanting in the conclusions section of the assessment and on an overall assessment basis.

**Q. 2 Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views**

A. 2. ALTO agrees generally with ComReg's proposed definition of the Retail Broadband Markets and the decision to leave the definition of a geographic market open. ALTO notes that ComReg is optimistic that the fibre roll-out will continue at pace, however economic forces may interfere with that particular optimistic outlook.

### **PIA Assumptions**

ALTO calls out ComReg's assumption at 4.7 on page 77 of the Market Review that the Physical Infrastructure Access ("PIA") market is functional and working well and subject to upstream regulation. We do not agree with this assumption at all. Other EU Member States have properly functioning PIA services and unfortunately despite the best efforts of the industry this is not the experience in Ireland.

### **Broadband Speed Assumptions – Over Copper**

ALTO notes that there appears to be a level of consumer confusion over the exact nature of the product offerings on the market – this point emerges at 4.64 and 4.65 of the Consultation paper. This issue appears to arise over the delivery of copper over sub-loops or sub-loop unbundling which is based on copper network. This issue is linked to another matter in the Consultation paper concerning WLA and the Draft Decision instrument and suggests that if ComReg deregulates copper SLUs as part of CG Broadband WLA then this will effectively undermine regulation of NG FTTC unless this gap is dealt with.

### **Direct Constraints – Preliminary Conclusions**

ALTO generally agrees with ComReg on the bulk of the points made at 4.164, we take issue with 4.64(f). In particular we submit that leased lines are unlikely to be an effectively substitute for broadband offerings due to the dedicated symmetrical capacity and particularly the ability to have very high-quality SLAs for service assurance which are not available for broadband products. We call on ComReg to reconsider this point.

**Q. 3 Do you agree with ComReg's product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

A. 3. ALTO agrees with ComReg's market assessment for the relevant WLA markets. There is one caveat to ALTO's agreement. We believe that ComReg should mandate that current generation copper sub-loop unbundling exists in both the CG WLA market and the NG FTTx market as in technical terms and in reality, copper sub-loop unbundling is an essential part of NG FTTC. This is apparent on any analysis of figure 25 of the Consultation paper.

### **Migrations**

ALTO submits that there is no VUA-to-VUA bulk migration facility on the Irish market. As there is a requirement on industry broadly to deliver alternative physical access to each premises this kind of bulk migration appears to be a complex and essential process (considering the complexity and expense of such solutions). ALTO submits that if ComReg believes this facility should be available, then strong regulatory remedies are urgently required together with ComReg utilising its additional powers to remove obstacles. In our view the current ComReg approach to resolving such issues and more broadly to the subject of enforcement, takes years and the delay in updating regulation often means the market opportunities expire for access seekers.

**Q. 4 Do you agree with ComReg's geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

A. 4. As stated above, ALTO remains concerned that the Market Review only considers data up to June 2022, and that substantial wider economic issues such as may not have been fully considered in this Market Review. ALTO notes that ComReg's optimism on the future of the market may not be as accurate as it was one year ago or more. Given the nature of the deregulatory proposals made by ComReg, we feel that the economic analysis is lacking to some extent.

An example of this is that ComReg has decided to deregulate CG services on a national basis as they are declining and on the surface is generally the case, but this assumption is not fine if you are a customer with no option for NG services and the regulator has removed the protection of competition and also where there is no protection in having Broadband within a USO right in Ireland.

ALTO submits that Within the IA area industry is aware of delays in the NBI roll-out which is acknowledged as being behind schedule and how do we know future plans will be delivered on time. So, within the IA how many years in reality will customers be limited to CG services, and if regulation is removed will CG Broadband customers be subject to significant price increases given potentially no competition. We are concerned that the market review is taking a pure economic review without consideration of the customer implications. It seems more reasonable that the CG regulation should be removed once NG services are made available rather than creating a monopoly environment for potentially years.

ALTO notes and welcomes ComReg's suggested criteria such as requiring three operators in an exchange area and then the percentage coverage criteria and the total coverage. ALTO remains concerned that large numbers of customers could be left to monopoly coverage as experience to date is that few operators will reach 100% coverage given the huge roll-out costs involve. Currently, Eircom has a ubiquitous network we would expect new entrants within the Commercial area to limit themselves to high value and or easier to reach customers than some other parts of the area. ALTO submits that while the plan may look good on paper, customers and services may ultimately suffer. We would certainly consider increasing the percentage coverage to circa 80% on a per operator basis to minimise the risks of competition gaps.

**Q. 5 Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the**



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

A. 5. ALTO welcomes ComReg's detailed and descriptive assessment of SMP on the Relevant WLA Markets and how ComReg sees the market evolving over the period of the market review.

ALTO submits that in relation to IA NG WLA that the assessment as the State funding and State contractual control of the NBP provider largely acts to constrain the growth of their perceived dominance as they roll out their plan. However, given their slow start to the project and need to have updated their plans so early on and ALTO members' poor experience with PIA we are cautious the speed of roll-out may be slower than anticipated. It is clear that this could potentially extend Eircom's dominance of CG WLA during the period. ALTO considers that it would prefer to see a sunset period on CG WLA in the IA whereby CGA SMP is removed to locations 1 year after the rollout (80% coverage) of NG WLA in that particular Exchange Area. This would act to protect service availability and customer choice for services and avoid potential leverage opportunities of the incumbent ultimately controlling CG WLA and then migrating customers to their own retail arm via NBI. It appears to ALTO that the SMP assessments conclude that customers will migrate to Eircom absent regulation.

**Q. 6 Do you agree with ComReg's market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

A. 6. ALTO notes that ComReg is taking a five-year view on whether competition will be established and, on that basis, regulating in two years' time for the environment

in five years' time. We also note this is the first Market Review in Ireland to test the new 5-year period as it has recently replaced the three-year review period. Our concern is 5 years is a long time and delays in implementation of what are hugely costly capital investments will quickly undermine ComReg's assumptions. ALTO considers that absent competitive network coverage ComReg should create sunset periods based on when competitive cover is available rather than taking a best guess or timed approach to that suggestion that competitive supply will simply emerge.

**Q. 7 Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

A. 7. ALTO agrees that the competition problems and the associated impacts on competition and end users identified are those that could potentially arise in the Irish Commercial NG WLA Market (and related markets). We note the ComReg statement that it is not required to list or describe issues but recognise that the opportunity and motive exists for such behaviours and *ex ante* regulation in the NG WLA market is required and as acknowledged by the European Commission identifying this as a market susceptible to competition problems.

**Q. 8 Do you agree with ComReg's proposals in respect of remedies in the Commercial NG WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

A. 8. ALTO welcomes the FTTC anchor product approach as it should potentially provide some certainty of pricing to assist the end-user migration from copper to fibre.

ALTO submits that it may have been easier to set an entry level FTTH price at circa the FTTC level as such removes the complexity of creating emulated FTTC products and trying to manage customers at an individual level when copper is no longer available to their premises whereas it may be still available next door. We can see can huge operational problems and customer complaints with the proposed solution as copper withdrawal appears to be happening by premises rather than by area.

**Q. 9 Do you agree with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

A. 9. ALTO submits an answer under the two headlines below:

### **1. CG WLA Market**

ALTO acknowledges that the CG market is clearly in decline and that those remaining areas not covered by NG substitute products services have no choice but to find alternative solutions. As ComReg's economic analysis earlier in the consultation suggests uncontrolled dominance has the potential to lead to all the customers migrating to the dominant player – that is an issue for the market. However, industry is not seeking to delay deregulation but to safeguard the consumer and in particular the vulnerable, consequently, we suggest that when an exchange area reaches 80% NG access then an automatic 1-year sunset should apply to deregulate CG in that exchange. If the customers were to be left with higher prices, poor services, etc. due to deregulation without a safeguard then we assume

ComReg will be accountable to them through the Government policy that ComReg must consider end-users.

## **2. IA NG WLA**

ALTO suggests that WLA is maintained within the IA NG market until 80% of an IA EA is rolled out by NBI at which point a 1-year sunset should trigger for operator to choose whether to migrate. We submit that to do otherwise, risks the foreclosure to some or all providers including through price hikes, withdrawal of service, and potential discrimination to other more favourable downstream providers.

**Q. 10 Do you agree with ComReg's proposals on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.**

A. 10. ALTO agrees with ComReg's Regulatory Impact Assessment save for the matters already mentioned in the response and set out above.

**ALTO**  
**3 March 2023**



## **BT Response to the ComReg Consultation:**

### **Market Reviews**

#### **Wholesale Local Access (WLA) provided at a fixed location**

#### **Wholesale Central Access (WCA) provided at a fixed location for mass-market products**

### **1.0 Introduction**

We welcome the opportunity to comment on the Wholesale Local Access (**WLA**), Wholesale Central Access (**WCA**) and the associated Passive Access Infrastructure (**PIA**) market reviews as we consider these markets to be directly linked in Ireland. In our view the PIA market needs more work for it to serve effectively as a fit-for-purpose input to the WLA/WCA markets. We are aware this market works well in other European countries and in the UK. It is somewhat frustrating for us to be where we are today. We welcome the many good initiatives that ComReg propose in the PIA review. These build on existing remedies but potentially, they do not go far enough to facilitate an effective, proper working market.

Recent macro events such as higher interest rates and inflation have made money expensive and has reduced end-user disposable incomes. Without an effective upstream input, this could lead to a slowdown in the roll-out of fibre competition. We note most of the data used in the market review is from the end of June 2022. This then excludes the recent price inflation, interest rates and hikes in energy costs.

We agree with some of ComReg's proposals but not all. Below are examples of ones where we disagree.

- **De-Regulation of CG products** – We partly agree with de-regulation of the Current Generation (**CG**) market. However, ComReg does not address those customers where Next Generation (**NG**) substitute products are not available or where they are impacted by say, slower fibre rollouts.

ComReg indicate within the review that it does not actually know the planned rollouts. This is a major concern given the proposals. The new European Union review period is for 5 years. This could exacerbate the issue for many CG customers who will be potentially absent competition for many years. We note ComReg indicated Eircom should continue WCA in the de-regulated area (which we assume means don't worry). ComReg should look at the urban price increases and the risk of discriminatory behaviour that could easily foreclose the market for some providers and not others.

We propose a simple fix to protect CG customers within the Commercial and Intervention Areas. This is to keep CGA in each Exchange Area (**EA**) until NBI (for the IA) or Operators for the Commercial Area pass circa 80% of the EA; then after a 1-year sunset period the EA would become de-regulated. We note ComReg appear confident to manage to small cell sizes (WPZs) in the last leased line review (MI WHQA); and to EAs during the broadband market review. We see then that this is a very pragmatic solution to both protect end users and meet ComReg's objective of de-regulation.

- **Sub-Loop Unbundling:** Sub-loop unbundling is required by both CG services and NG FTTC services. We expect this will remain regulated to avoid a potential loophole of supply problems.

- **De-regulation of WCA:** Since the D10/18 Decision we have become familiar with ComReg's approach to the de-regulation of the WCA market and the trend towards deregulation. The current proposal is to fully de-regulate WCA. Unless Eircom were to offer favourable terms or a commercial network solution to all or favourable operators, then national reach by competitors will no longer be viable. This is a major concern for us.
- **Pricing Approach** – we welcome the FTTC anchor product approach as it should provide some certainty of pricing to assist the end-user migration from copper to fibre. We believe it would be simpler to set an entry level FTTH price at circa the FTTC level to remove the complexity of creating emulated FTTC products and trying to manage customers at an individual level when copper is no longer available to their premises (but it may be still available next door). We can see can huge operational problems and customer complaints with the proposed solution as copper withdrawal appears to be happening by premises rather than by area I.e. we see inconsistencies as to when the emulated product will be offered.

## 2.0 Response to Questions

### Question 1:

**Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.**

### BT Response

Generally, we agree with ComReg's assessment (Section 3 of the consultation) but note the review period appears to have stopped around June 2022 and hence there appears little comment on the recent wider economic market changes due to the Ukraine War, the astronomical rise in interest rates, fuel costs, the rapid rise in inflation and the consequential impact on the international and more importantly, Irish economy.

We agree that normally a few months would make little difference to a market review, but the macroeconomic issues of 2022 and into 2023 have been considerable and are likely to impact us for at least the next couple of years.

Our concern is there is a risk of the report being over optimistic in terms of forward growth trends as consumers and operators take stock of the energy crisis. For consumers – will they keep upgrading particularly from FTTC to FTTP where disposable income is tightening and will broadband roll-out continue at the same pace as the cheaper money window appears to have closed? We are not suggesting things will stop, but it's possible they may slow as customers and operators adjust to higher costs.

While we would agree with ComReg's assessment of the recent growth spurt we believe consideration of substantial changes in the global and Irish economic market need to be factored into the Retail Trends and Conclusion.

We would like to offer comments to some points in Section 3.

We agree with ComReg's comments concerning the Covid pandemic which increased the level of home working and likely broadband rollout during this period. This appears to have accelerated the use of home working facilities such as Zoom, Teams, Hangouts etc.

We agree with the point Ref. 3.3(d) that during the past period with the widespread availability of **NG** broadband services that standalone applications such as streaming services Netflix,

Prime, Disney etc. and number of independent interpersonal communications services such as WhatsApp have become widespread. We welcome the extension of the regulation of electronic communications service to services that might otherwise not be deemed to consist of "wholly or mainly in the conveyance of signals on ECNs", but that "feel" like or are "functionally equivalent to" a traditional communications service. We note that some broadband providers are now bundling these commercially but recognise they can be independent of the broadband provider.

Reference 3.7 – We note ComReg reference the use of WLA for leased lines services and whilst it's possible to have private dedicated links (normally encrypted) over broadband access these may not be able to achieve the technical and service assurance characteristics a Wholesale Dedicated Capacity WDC service.

## **Question 2:**

**Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

### **BT Response**

In general, we agree with ComReg's proposed definition of the Retail Broadband Markets and its concluding decision (ref. 4.253) to leave the definition of a geographic market open. We note that ComReg is optimistic that the fibre roll-out will continue at pace. This optimism appears to be absent today given the recent downward changes in the economic environment. We are concerned that an over optimistic view of the speed of roll-out where costs are now higher could lead to upstream de-regulation that is too early.

We would like to offer the following comments to elements of the ComReg

#### **4.7 – Retail Market Assessment**

BT has concerns that ComReg is wrong in assuming the presence of upstream regulation of the PIA Market. BT is aware of the PIA market working well in the UK and say, Portugal, France, and Spain. In our response to the PIA Market Review, we offer suggestions coupled with ComReg's own proposals to achieve the market breakthroughs (including regulation) needed for this product.

#### **Broadband Speeds Over Copper - Ref. Clause 4.64 and clause 4.65. Sub-loop unbundling is copper.**

We note the customer confusion highlighted where the customer believes they are getting extremely high speeds over copper. There does appear to be an inconsistency possible because FTTC is delivered over copper from the Steet Cabinet to the customer over what is formally known as Sub-Loop Unbundling which is copper based. Hence customers will only see copper wires into their premises but given the very short distance involved these could potentially run to circa 110Mbps for shorter distances (we can see this in our systems). We accept the customer statement of 133Mbps is probably too high but certainly they could see 100Mbps over the copper delivery of FTTC. This raises a concern within the WLA analysis and in the Draft Decision instrument. If ComReg de-regulates copper SLU as part of CG Broadband WLA, then this effectively undermines the regulation of NG FTTC unless this loophole is closed.

#### **Preliminary Conclusion on Direct Constraints – reference 4.164 (f)**

Whilst we agree with the other points made in 4.164 we would like to specifically agree with (f) that leased lines are unlikely to be an effective substitute for the broadband focal product. Leased lines have dedicated symmetrical capacity and have very high-quality service assurance SLAs. These are not available for broadband products. We have also learned that certain LAN features are not workable

over broadband due to the way customers are all bundled into VLANs, thereby losing important LAN flags. We know this can be overcome but we are concerned this is not being made available to operators.

#### **Reference clause 4.72**

We are concerned that ComReg in its de-regulation could leave some customers stranded without a service in areas where there is no FTTx and where CGA/WCA have already been withdrawn. This will be unacceptable. Absent a Broadband USO in Ireland, ComReg need to consider that all customers should be afforded the right to have a broadband service.

#### **4.173 Switching between the Consumer Market and Business Market and vice versa.**

We are interested in the basis of ComReg's views on the opening of new market segments – say, a business operator suddenly opening a consumer arm. In our view, the work and investment to realise this is material. A very small operator on a local basis may be able to do this. We expect for this to happen at scale would involve say, opening or hiring call centre facilities to manage the much higher volume of customers and enquiries etc. and the related overhead. Our view is ComReg may not have fully considered the significant implications of doing this in practice - particularly at scale. Hence, we consider the ComReg statement is unrealistic when operating at scale.

#### **Question 3:**

**Do you agree with ComReg's product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

#### **BT Response**

We generally agree with ComReg's market assessment for the relevant WLA markets although we believe ComReg need to mandate that current generation copper sub-loop unbundling exists in both the CG WLA market and the NG FTTx market as in technical terms and in reality copper sub-loop unbundling is an essential part of NG FTTC. i.e. See Figure 25 within the consultation - FTTC uses copper wires from the cabinet to the end customer.

In our experience, de-regulated services are higher in price. We see competition at a national level will not be sustainable based on the WLA VUA inputs alone. It is likely that subscribers in the less dense locations within the Commercial areas may lose choice of provider and we consider this a detrimental step. Again, this market review may disregard customers that are in more remote locations.

#### **Migrations**

We are not aware of a VUA-to-VUA bulk migration facility in the Irish market. Given the requirement to deliver alternative physical access to each premises, this type of migration would appear to be a non-trivial process. In our view bulk migrations have often proved problematic and expensive. Hence if ComReg believe this facility should be available then a strong regulatory remedy is required with ComReg giving itself additional powers to quickly remove obstacles. In our view the current ComReg approach to resolving such issues takes years. The delay in updating regulation often means the market opportunities expire for Access Seekers.



#### Question 4:

**Do you agree with ComReg's geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

#### BT Response

We would like to raise the following concerns related to what may be unintended consequential outcomes of the geographic market assessment.

1. We are concerned that the Market Review has considered data up to June 2022 but that substantial wider economic issues such as the extraordinary rise in fuel costs and the cost of living is dampening the market; with interest rates rising at the fastest pace since the 1990's. Our concern is this will reduce customer disposable incomes and investment. Whilst acknowledging ComReg has said it does not have data on the future rollouts of operators other than NBI (which revised its forecast), we are concerned that ComReg appears optimistic of things moving quickly when they may not. This is important given the raft of de-regulation proposals within ComReg's proposals.
2. ComReg has decided on a national basis to de-regulate CG services as they are declining. This is mostly correct. However, some customers may have no option for NG services and are without any regulatory protection.

Within the IA area we are aware of the delays in the NBI roll-out. We do not know if the plans will be delivered on time. If they are not, then customers will continue to be limited to CG services. If regulation is removed, CG Broadband customers could be subject to significant price increases given potentially no competition. We are concerned that the market review is taking a pure economic review without considering the customer implications. It seems reasonable that the CG regulation should be removed once NG services are made available rather than creating a monopoly environment for potentially years. Please see our pragmatic solution within s1.0 above.

When deregulation takes place, there is the potential for wholesale services to be removed or hindered through price or supply difficulties. We need ComReg to protect the cohort that cannot migrate (in our view, mostly rural customers) - but we don't believe this point has been addressed in this Market Review. To work – CG regulation should be removed when NG FTTx service are available (as ComReg has noted this is the substitute product for the CG Broadband market). Thus, there should be no reduction in CG in areas where NG options are not available. These customers exist in both the IA and the Commercial Area.

#### **Re: 5.280 Criteria for assessing the WLA geographic markets**

We welcome the criteria that requires minimum three operators in an exchange area, the percentage coverage and the total coverage. Whilst these average figures look good, we are concerned large numbers of customers could be left to monopoly coverage as experience to date is that few operators will reach 100% coverage given huge roll-out costs. Hence, except for Eircom with their ubiquitous network, we expect new entrants within the Commercial area to limit themselves to high value and/or easier to reach customers. The proposal may result in some customers suffering. We consider increasing the percentage to 80% coverage per operator to minimise the risks of competition gaps.

## **Question 5:**

**Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

### **BT Response**

We welcome ComReg's detailed and descriptive assessment of SMP on the Relevant WLA Markets and how ComReg sees the market evolving over the period of the market review. We would like to offer the following comments to addresses some of the negative consequences of the proposal.

### **IA NG WLA**

#### **Extended relevance of CG WLA**

We generally agree with ComReg's IA NG WLA assessment as the State funding and State contractual control of the NBP provider largely acts to constrain the growth of their perceived dominance as they roll out their plan. We are cautious the speed of roll-out may be slower than anticipated for a number of reasons (including reliance on PIA). Delays have the potential to extend Eircom's dominance of CG WLA during the period. We consider it prudent to run a sunset on CG WLA in the IA whereby CGA SMP is removed to locations 1 year after the rollout (80% coverage) of NG WLA in that Exchange Area). This would act to protect service availability and customer choice for services. It would also avoid potential leverage opportunities of the incumbent controlling CG WLA and then migrating customers to their own retail arm via NBI. We note that the SMP assessments conclude customers will migrate to Eircom absent regulation.

#### **Sub-Loop Unbundling – Reference clause 5.197**

We note that ComReg keep defining Sub-Loop Unbundling within the CG WLA Product Market – for example within clause 5.197 itself part of the 'Overall conclusions on Relevant WLA Product Markets.' Whilst we agree with this, ComReg does not appear to consider that SLU is a fundamental component of the NG WLA FTTC product and hence it should be regulated. In our view this product needs to be properly addressed, as otherwise there is a risk of an operator with an incentive and opportunity to undermine and cease the operation of NG FTTC. Given the potential for legal/regulatory gaming (which experience in Ireland indicates will take a year or two to resolve), ComReg need to be absolutely and legally clear within this market assessment whether the SLU product is regulated or not. Our view is SLU should be regulated.

#### **Virgin Media as a WLA provider**

We believe ComReg is right in their cautious approach to Virgin Media (VM) plans. In the consultation ComReg cite that VM has an agreement with SIRO (a wholesale only FTTP provider) and an agreement with Vodafone (a downstream customer). It appears plausible that in some locations VM will be a customer for NG WLA rather than being a provider. We note no mention of an open VM NG WLA service.

Given this considerable uncertainty and that rolling out NG WLA is costly and complex; we agree that in the absence of evidence or information on roll-outs, ComReg is correct to be cautious at this time.

#### **Bulk Migrations – reference 5.252**

We are concerned with ComReg's comments on bulk migration and whether ComReg has evaluated that a bulk migration involving VUA from different network providers is non-trivial if migrating away from Eircom. If migrating to Eircom (who has the largest base of both FTTC and FTTP VUA), then there is a

reasonable likelihood of an existing access connection (including FTTC) or duct/pole being in place. However, new VUA providers only have FTTP access. We are of the view that bulk migrations now and potentially through most of this period of the review is asymmetrically in favour of Eircom.

In addition, we consider that specific and well drafted regulation is required to ensure migration will work. We note past difficulties in the 2000's with migrations between bitstream and LLU where ComReg had to intervene; and more recently, the bulk application of soft-dial tone (migration from Voice and broadband to standalone broadband).

#### **Question 6:**

**Do you agree with ComReg's market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

#### **BT Response**

We understand that ComReg is taking a five-year view of whether competition will be established and, on that basis, regulating in two years' time (Decision + Sunset) for the environment in five years' time. We also note this is the first market review in Ireland to test the new 5-year period as it has recently replaced the three-year review period.

We note that ComReg assess that the market is "tending towards competitiveness".

In 7.78 ComReg assert that the WLA and WCA markets in the commercial area are served by "at least five upstream operators". This is quite misleading, those exchange areas that are currently regulated for the provision of WCA services are served by one upstream provider only – and that upstream provider is also dominant in the provision of WLA services.

In 7.78 ComReg go on to highlight the availability of "alternative wholesale inputs". For these currently regulated WCA areas, the key alternatives are regulated leased line and CEI services. ComReg is reviewing the market for PIA services and BT has identified the weaknesses that limit PIA as a viable wholesale alternative currently.

ComReg may not be aware of how limited regulated leased line services are as an alternative wholesale input. In recent years, BT has sought to use Eircom leased line services as a way to avoid the high cost of deregulated eircom bitstream services. Our experience has been that Eircom is extremely slow to agree to provide such services. In the table below we summarize the time taken to procure leased line services for this purpose. Even though the locations are all eircom buildings, the average lead time is far in excess of general leased line performance.

Five years is a long time and delays in implementation are hugely costly capital investments. This will quickly undermine ComReg's assumptions. We can see how the NBI roll-out will bring the IA under the control of a company effectively regulated by State contract. It could be many years before all areas are passed with the risk of CG being restricted followed by a leverage opportunity to NG WLA. To close the loophole, a 1-year sunset period is needed for CG triggered once the EA is served by NBI NG WLA.

Similarly in the Commercial area, it seems unlikely that all areas will be covered by SIRO (who we expect will follow the general density/high value approach). We notice skeletal network in some areas with many sub-areas not rolled-out. For VM, we have little information other than we expect it to roll-over its existing CATV access network.

Absent competitive cover, we consider ComReg should create sunsets based on when competitive cover is available rather than assuming that competitive supply will arrive.

#### **Question 7:**

**Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

#### **BT Response**

We agree that the competition problems and the associated impacts on competition and end users identified are those that could potentially arise in the Irish Commercial NG WLA Market (and related markets). We note the ComReg statement that it is not required to list or describe issues but only recognise that the opportunity and motive exists for such behaviours; and ex ante regulation in the NG WLA market is required. As acknowledged by the European Commission - this market is susceptible to competition problems.

#### **Question 8:**

**Do you agree with ComReg's proposals in respect of remedies in the Commercial NG WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

#### **BT Response**

##### Price Control

Pricing Approach – we welcome the FTTC anchor product approach as it should provide some certainty of pricing to assist the end-user migration from copper to fibre. We consider it simpler to set an entry level FTTH price at circa the FTTC level. This would remove the complexity of creating emulated FTTC products and trying to manage customers at an individual level when copper is no longer available to their premises. We envisage operational problems and customer complaints with the proposed solution as copper withdrawal appears to be happening by premises rather than by area. I.e. we see huge inconsistency as to when the emulated product will be offered.

#### **Question 9:**

**Do you agree with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market? Please explain the**

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

### **BT Response**

We would like to offer the following comments:

**CG WLA Market** – Whilst we acknowledge the CG market is in decline, those remaining areas not covered by NG substitute products services have no choice. As ComReg's economic analysis earlier in the consultation suggests - uncontrolled dominance has the potential to lead to all the customers migrating to the dominant player. This is clearly not what it should be. We are not seeking to delay deregulation but to safeguard the vulnerable – thus our suggestion re the sunset period/stipulation. We assume ComReg will be accountable to customers adversely impacted (service, quality etc.).

### **IA NG WLA**

We would advocate that WLA is maintained within the IA NG market until 80% of an IA EA is rolled out by NBI at which point a 1 yr. sunset should trigger for operator to choose whether to migrate. To do otherwise risks the foreclosure to some or all providers including through price hikes, withdrawal of service and potential discrimination to other more favourable downstream providers.

### **Question 10:**

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

### **BT Response**

#### **NG WLA Response**

We would agree ComReg's proposals to apply the standard set of obligations to minimise the risk of behaviour not conducive to correct competition of the NG WLA market sector. That said we would like to provide the following detailed comments.

- With regards to clause 11.36(b), ComReg must have a clear understanding of what is being described. 1 to 1 VLAN tagging should allow the correct operation of business LAN services over broadband, however standard broadband in Ireland today does not do this as some key flags are lost in the process of dropping many customers into a common VLAN. What is needed and what we believe is achievable (already available?), is an option for a 1 to 1 VLAN where the key LAN tags can be carried. We took a complaint (VEA Complaint) to ComReg for Eircom to offer this as they self-provided but not to Access Seekers such as BT. That complaint lasted almost two years and found in our favour. However, by that time copper withdrawal was announced killing this copper-based business solution. If ComReg want more business take up of broadband, then the requirements must clearly specify the full set of flags necessary.
- We attempted to run the SLA approach described in D10/18 (and what is proposed in this draft Decision) re our repair SLA dispute in the CEI/PIA sphere. We do not believe this process is effective and it has the potential to benefit the dominant operator). We perceived the dispute process to be an uphill battle with hurdles (cost, time, scope etc.), not tangible support offered. One suggestion is ComReg chairing discussions to lend balance between a dominant incumbent and what is now a weak industry. Another suggestion is that ComReg consult

separately on this matter as we see that the current solution fails industry. Another suggestion is the return of ComReg and their active participation in industry meetings.

- Margin Squeeze – We note that a regulated margin squeeze can apply between the regulated pricing in the upstream market such as the WLA market and the de-regulated downstream prices. We have not found it viable to reach all the VUA points (which has increased in number). A de-regulated WCA market will mean that we expect to be exposed to WCA price increases - as has happened in the urban market. As this market is very price sensitive, a margin squeeze test between the VUA and WCA price is a real concern. This could have the effect of closing the market for access to the more costly VUA sites – this could be a reasonable number. We ask ComReg to check its figures.

### **Our Comments to IA NG WLA Market, CG WLA Market, and Revised Regional WCA Market Regulatory Impact Assessment.**

We understand ComReg's assessment of these markets. Whilst we agree with some of what is proposed, we believe ComReg has failed to observe temporal issues (that some things will take many years to resolve). We appreciate this is the first five-year review. We have not yet found a ComReg analysis of the differences between a 3- and 5-year review period.

- Our key comment is that while we welcome the changes proposed in PIA Draft Decision, we see that the PIA market is largely failing due to the absence of effective regulation. This impacts on the WLA market. We do not wish to see the new PIA proposals fall into the same category as those outlined in D10/18. We need ComReg to be strong in its application of regulation and we recommend ComReg to consider the market breakthroughs we suggest in the PIA Market Review. If these are all implemented, then we envisage improved uptake of the PIA product and thereby, the scope for Access Seekers to enter the market/expand their existing footprint to achieve VUA.
- Given the pessimistic market outlook, there is a risk the CA/IA roll-outs could be slower than currently planned. This could mean the complete de-regulation of CG and WCA in the IA area could disadvantage competition as there could be little incentive for the regulated party to give up its current wholesale and retail revenues.
- Whilst we are not seeking to delay appropriate de-regulation we would propose a 1-year sunset period safeguard of de-regulating CG and WCA in the IA area on the basis of an exchange area (EA) reaching 80% NG rollout by NBI. If ComReg's view of PIA working in a timely way transpires, then customers will have access to NG services in the short/medium term. However, if a view based on our experience applied, then competition and end customers will need protection.

**ENDS**

**eir**

**Response to ComReg Consultation and Draft Decision:**

**Market Reviews – WLA provided at a fixed location and WCA provided at a fixed location**

**ComReg Document 23/03**



**3 March 2023**

## DOCUMENT CONTROL

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| <b>Document name</b>  | eir response to ComReg 23/03 |
| <b>Document Owner</b> | eir                          |
| <b>Status</b>         | Non-Confidential             |

The comments submitted in response to this consultation document are those of Eircom Limited and Meteor Mobile Communications Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

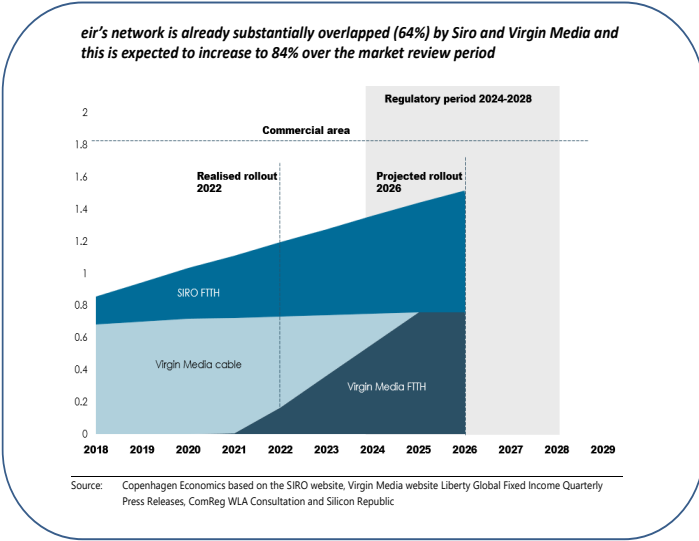
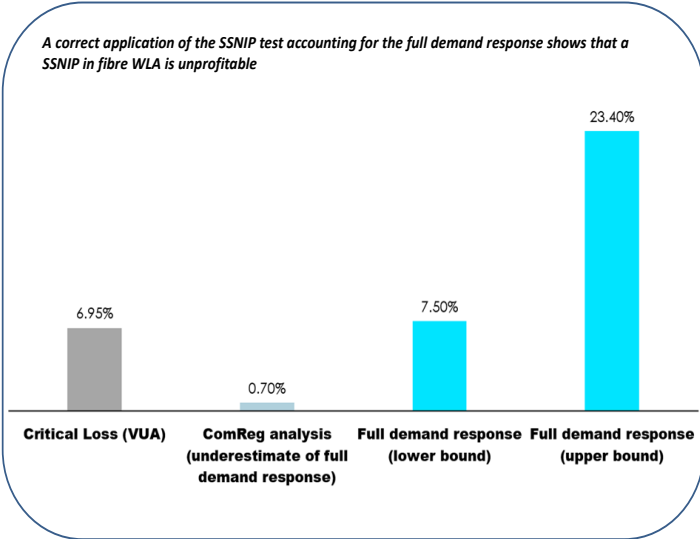
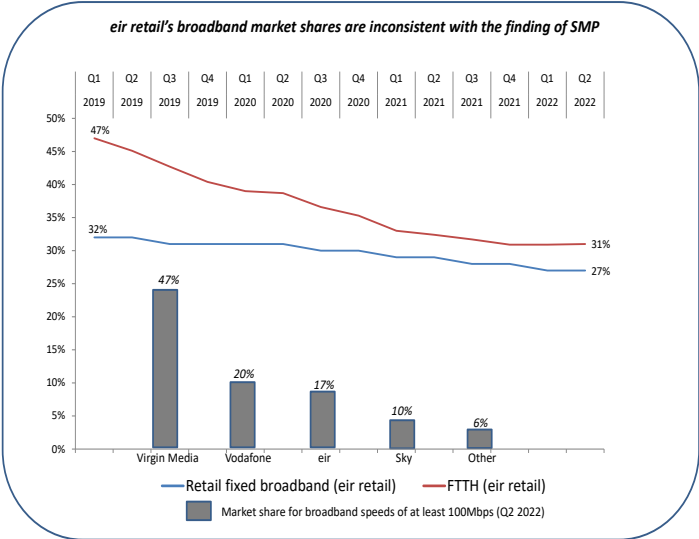
Please note that, for the purposes of the Freedom of Information Act 2014 and the Communications Regulation Act 2002 (as amended) and in the context of the eir Group's general rights and obligations, information supplied by the eir Group to you may contain confidential, commercially sensitive or price sensitive information consisting of financial, commercial, technical or other information, whose disclosure to a third party could result in financial loss to the eir Group, could prejudice the competitive position of the eir Group in the conduct of its business, or could otherwise prejudice the conduct or outcome of contractual or other negotiations to which the eir Group is a party.

Accordingly, you are requested to contact a member of eir Group's Regulatory Strategy Team where there is a request by any party to have access to records which may contain any of the information herein and not to furnish any information before the eir Group has had an opportunity to consider the matter.



# Why ComReg's assessment of SMP in the Commercial NG WLA market is wrong

- Inadequacy of ComReg's review of the Commercial NG WLA Market**
- ✗ ComReg fails to correctly interpret (or further investigate) the presence of variable barriers to entry. Along with the fact that barriers to entry have been overcome by some operators. The 3CT is not satisfied
  - ✗ ComReg's application of the SSNIP fundamentally departs from the established SMP Guidelines. The correct application, using ComReg's own evidence, demonstrates that a price increase is not profitable
  - ✗ ComReg incorrectly excludes cable from the relevant market
  - ✗ ComReg fails to adequately consider the substantial (and expanding) overlap of competing FTTH infrastructure operators. Increasing from 64% to 84% during the market review period
  - ✗ eir faces greater difficulty in growing (and in some cases maintaining) its wholesale business where it overlaps with Siro and/or Virgin Media
  - ✗ ComReg's analysis is not forward-looking which is inconsistent with its regulatory obligations
  - ✗ eir's FTTH penetration is ~><% . ComReg fails to consider that eir's wholesale customers are allies to drive FTTH take-up. eir does not have an incentive to foreclose its large and important wholesale customers. eir is reliant on its wholesale customers
  - ✗ Proposed remedies are disproportionate and inconsistent with the evidence of market developments
  - ✗ Proposed Regulatory Governance obligation, can only be imposed following a special request to the European Commission, and, is an obligation that is open to subjective assessment by ComReg
  - ✗ ComReg's proposed FTTH pricing constraints on eir are inflexible and anti-competitive. eir's permanent and promotional FTTH VUA offers will be priced out of the market



✗

Source: Copenhagen Economics based on the Siro website, Virgin Media website Liberty Global Fixed Income Quarterly Press Releases, ComReg WLA Consultation and Silicon Republic

## EXECUTIVE SUMMARY

1. “*Competition analysis has long understood that a firm’s attempts to exercise market power could be defeated by a new supplier entering the market*”.<sup>1</sup> Once market barriers to entry are not high or insurmountable it indicates that regulatory intervention is not warranted as the potential for entry is able to deter or counteract potential anti-competitive behaviour. From a market analysis perspective the importance of such a market characteristic is recognised as one of the central tenets using the Three Criteria Test (3CT) that a regulator must assess.
2. Consequently, ComReg’s conclusion that the barriers to entry and/or expansion in the Commercial NG WLA market are "variable" is significant. It is the first indicator that the market conditions are not homogeneous across all areas in the Commercial NG WLA market. The second indicator is the established and growing presence in the Commercial NG WLA market of Siro. The third indicator is the entry of Virgin Media as a wholesaler and the agreements it has with other significant retail service providers to use its network.
3. Such indicators provide clear evidence that the entry barriers in the Commercial NG WLA market are not absolute or insurmountable over the market review period — and is therefore a market that does not warrant regulatory intervention.
4. However, ComReg ignores and discounts these important indicators as representing only “limited entry”. This is a material error by ComReg. In order to support such a statement, the level of discounting required to dismiss the underlying facts is extraordinarily high, as:
  - i) 64% of eir’s network is already overlapped by Virgin Media and/or by Siro in the Commercial NG WLA geographic area;
  - ii) 84% of eir’s network in the Commercial NG WLA market is expected to be overlapped within the market review period;
  - iii) eir’s broadband market share continues to decline in both the wholesale and retail market;
  - iv) [X];

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<sup>1</sup> Bishop & Walker “The Economics of EC Competition Law”.

- v) 20% of Virgin Media’s network has already been upgraded from cable to full fibre to the home<sup>2</sup>; and
- vi) Virgin Media’s full fibre network upgrade is expected to be completed midway through the market review period.<sup>3</sup>

5. Similarly, in the assessment of market power there is no magic number in economics as to the required number of competitors in the market for it to be competitive. The notion that a market must have at least three established competitors to be considered competitive, as ComReg suggest, is without supporting evidence in the context of the Irish market circumstances. In fact, there is also no requirement in economics for those competitors to be already established in the market — thereby incorporating a forward looking assessment. Rather the required analysis is to first consider the competitive constraint of potential new entrants and then evaluate the competitive constraint by existing competitors to deter or counteract potential anti-competitive behaviours. As we have shown in our response<sup>4</sup>, ComReg fails to incorporate such a forward looking assessment in the Commercial NG WLA market.
6. ComReg also fails to accurately assess the current competitive constraint from existing competitors. Competition analysis recognises that even if there are high barriers to entry it only indicates that regulatory intervention may be warranted. It does not mean that regulatory intervention is required. Consequently a second step is required. That second step is to assess whether an operator(s) has in fact significant market power (‘SMP’) in the relevant market. As identified by our consultant Copenhagen Economics, ComReg has made a material error in this second step by incorrectly assessing the results of its Hypothetical Monopolist test.
7. Copenhagen Economics has undertaken an economic assessment using ComReg’s own analysis to consider whether eir has SMP in the relevant market. Critically, their report states:

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<sup>2</sup> <https://www.virginmedia.ie/about-us/press/2022/virgin-media-announces-wholesale-deal-with-vodafone-ireland/>

<sup>3</sup> Ibid.

<sup>4</sup> Which includes the report from our consultant, Copenhagen Economics, “Proposed SMP Regulation of Physical Infrastructure and Fibre WLA in Ireland, an economic assessment of ComReg’s January 2023 consultations”.

- (i) That eir retail's market shares and continued lowering of FTTH wholesale pricing ([REDACTED]) is not consistent with eir having SMP;
- (ii) The SSNIP assessment when applied correctly (consistent with the SMP Guidelines) demonstrates that eir's NG WLA pricing is already constrained in the Commercial NG WLA market;
- (iii) That evidence from other countries indicates that the level of current and projected overlap in Ireland is inconsistent with the finding of SMP;
- (iv) [REDACTED]; and
- (v) The evidence does not support the theories of competition concern put forward by ComReg that eir could/would behave anti-competitively. This is because eir is so reliant on its wholesale customers in the WLA market.

8. In summary, ComReg's own evidence does not support the finding of SMP in the Commercial NG WLA market. Therefore, to conclude eir has SMP is a significant error. Such errors leading to regulatory intervention are not costless. It is important to recognise that regulatory intervention can have unintended consequences, particularly when it is unwarranted. Unwarranted regulatory intervention can lead to complex and burdensome administrative process, which can be impede the pace of innovation, dampen competition and slow down the deployment (and/or adoption) of FTTH services. This is more commonly referred to as regulatory failure. Regulatory failure can result in delays in the delivery of new and improved services to consumers. In the context of Ireland's broadband objectives, unwarranted regulatory intervention can have particularly negative effects in areas where broadband coverage is poor, as operators may be less likely to invest in improving or extending their networks.

9. It is beyond the scope of this executive summary to list the various proposed remedies by ComReg. However, for the benefit of the reader there are two extremely concerning remedies proposed by ComReg that merit highlighting here. Both proposed remedies go far beyond the allowed European Commission Framework and regulatory good practice as outlined by the 2013 European Commission Recommendation regarding FTTH pricing:

- (i) **Regulatory Governance monitoring and intervention:** ComReg proposes that eir is required, as a regulatory remedy, to provide ComReg all its internal documentation, decision making processes etc., as to how eir manages

regulatory risk in the organisation. ComReg states that if it is not satisfied with eir's internal governance arrangements that it would further specify non-standard remedies. For good reason no such remedy is allowed under the European Electronic Communication Code (the 'Code') or under the existing European Framework. As a remedy it is too subjective and ultimately becomes an argument about what "good" governance looks like. It is also outside the expertise of telecommunication NRAs across Europe. In order to impose such a remedy ComReg requires special written permission from the European Commission. It is evident that ComReg wishes to step into the internal workings of eir as to how it would manage regulatory risk. This is in the context of ComReg also imposing the full suite of remedies available to it to monitor and ensure compliance. Such an intrusion into an operator's internal governance management is unprecedented. eir strongly urges the European Commission to intervene and reject any such proposal from ComReg.

(ii) **FTTH VUA pricing:** ComReg has in this Consultation suggested several complex approval mechanisms for FTTH VUA price decreases, ex-ante (and ex-post) FTTH VUA retail margin squeeze tests, setting FTTH VUA price floors and subjective regulatory approval for FTTH VUA promotions & discounts. These mechanisms unduly restrict the flexibility of eir to operate freely and efficiently. eir is being prevented from meeting competition on the merits because at all times ComReg has sought to shield Siro (and Virgin Media) from price competition. As a regulatory policy it is unclear why ComReg seeks to unduly restrict eir from competing in the FTTH market. ComReg are proposing that competitors like Siro are not only provided a regulatory buffer but are provided a clear signal from ComReg that eir will not be allowed compete below certain published prices either on a permanent or temporary basis. This is not consistent with the 2013 EC Recommendation which recommends that the SMP operator be granted full pricing flexibility for FTTH wholesale prices and that promotions/discounts are an effective way to share the investment risk associated with FTTH roll-outs.

## One step forward but two steps back

10. [X].
11. Given the number of material errors in ComReg's market analysis assessment, ComReg has no option but to re-consult. While eir is disappointed this will inevitably delay the deregulation of both the Regional WCA and WLA market it is necessary for ComReg to do so.

## RESPONSE TO CONSULTATION

### Question 1:

Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

12. eir broadly agrees with the main developments in the provision of retail broadband identified by ComReg. This includes the increase in FTTH subscriptions, and consumer demand for higher broadband speeds. However, eir considers that given the evolution and market developments that ComReg has failed to consider and present retail market share data in a meaningful way.
  
13. In Figure 5 of the Consultation, ComReg has correctly identified that eir's legacy network volumes are in decline this includes FTTC. Over the same period the market's FTTH volumes have seen rapid increases with cable volumes remaining relatively stable showing only a slight decline. Therefore, in the context of the retail market trend of "increases in download speeds on broadband subscriptions" as supported by Figure 9 of the Consultation and the fact that cable remains at 19% of all broadband subscriptions (as the next most prevalent technology outside of FTTx),<sup>5</sup> a more accurate reflection of retail market shares is by high speed broadband (which is not captured by Figure 7 of the Consultation – although the decline of eir's retail market share is also telling – particularly in the context of increased FTTH roll-out during that period).

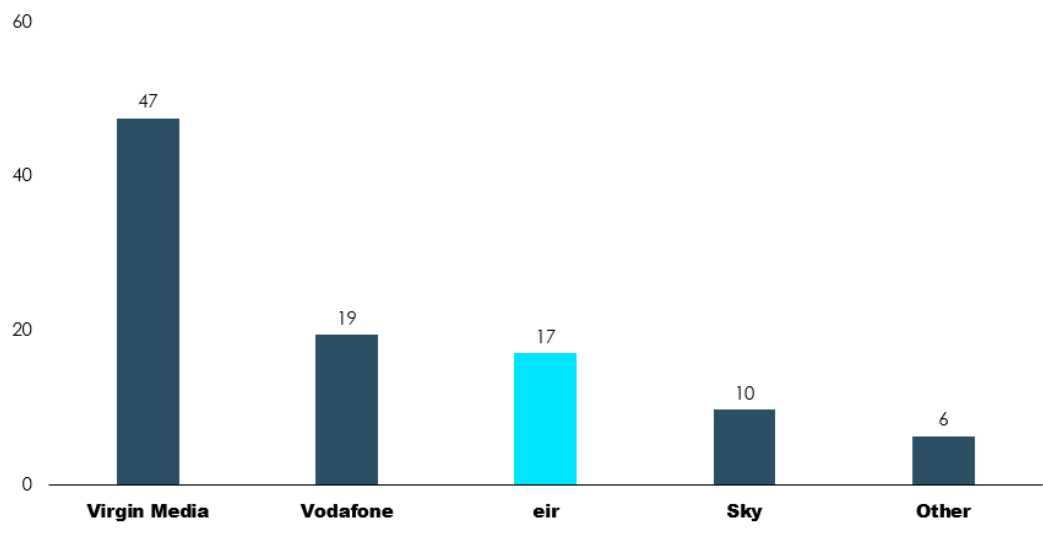
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<sup>5</sup> Paragraph 3.94 c of the Consultation

**Figure 1**

**eir is only the third largest operator in the high speed retail broadband market**

Share of total number of active broadband subscriber lines, in per cent



Note: We use data from ComReg's Quarterly Key Data Report for Q2 2022 to arrive at figures for a high-speed retail broadband market. We use data from Table 2 and 3 to determine how many of Virgin Media's cable-based subscriber lines deliver speeds of at least 100Mbps. We assume that 100 per cent of the FTTH network delivers speeds of at least 100 Mbps and assume that all FTTH providers are part of this high-speed retail broadband market. We assume that 97.5 per cent of Virgin Media's cable network is capable of delivering high-speed broadband, based on Virgin Media's own data.

Source: Copenhagen Economics based on ComReg's Quarterly Key Data Report for Q2 2022, eir data and the Virgin Media website.

14. Although ComReg has noted the trend of increasing subscriptions for broadband of speeds of at least 100Mbps and over, and consumer demand post-covid, ComReg has failed to consider the distribution of market shares in this important section of the retail broadband market, which is growing. This is also part of the market that is closely related to the fibre remedies that ComReg is proposing as part of this Consultation. As evident in **Figure 1**, in Q2 2022, Virgin Media had the highest share at 47.9% of market shares of retail broadband of at least 100 Mbps. This is over double eir's market share of 17.6% of retail broadband of at least 100Mbps. As highlighted by Copenhagen Economics when considering retail market shares on a segment for fixed internet of at least 100 Mbps, Virgin Media is the largest retail provider in this segment, followed by Vodafone. eir is only the third largest provider in this segment. ComReg should, to ensure a complete, forward looking analysis of the retail market, incorporate the retail market shares of providers offering broadband speeds of at least 100Mbps.



15. In the context of **Figure 1**, eir notes that ComReg has also not considered the impact of the development of Virgin Media’s FTTP network on Vodafone’s retail FTTP market share in the medium term, which is likely to increase further due to their commercial agreement. eir does not agree that Virgin Media has a “relative lack of FTTP rollout” as ComReg outline in paragraph 3.56. Virgin Media has stated it has already delivered 200,000 premises in a Q4 2022 investor call.<sup>6</sup> This is particularly relevant in the context of the declining copper-based services (including FTTC) on eir’s network [3<]. See **Figure 5, Figure 6, Figure 7**.
16. In addition, Copenhagen Economics in its assessment finds that access seekers are not exclusively reliant on eir. *“Vodafone, eir’s largest access seeker, sources less than half of its FTTH connections from eir. Vodafone is also a part-owner of SIRO<sup>8</sup>, eir’s largest fibre-based wholesale competitor.”<sup>9</sup>*
- “Similarly, eir’s second largest access seeker, Sky, relies on eir’s network for only approximately 60 per cent of its FTTH retail volumes.<sup>10</sup> Virgin Media, eir’s biggest competitor in the retail market, uses its own cable and FTTH networks”*
17. Finally, in the context of the various wholesale agreements between Virgin Media and Siro (of which Vodafone is a 50% shareholder) and the reciprocal arrangement by Vodafone agreeing to wholesale from Virgin Media, it is unclear what assessment ComReg has done even from a theoretical competition concern perspective as to whether such arrangements could dampen the expectation of competing network overbuild and competition. Similarly, based on those agreements whether ComReg’s proposed requirement to have 3 competing infrastructure-based FTTH operators as a criterion to justify de-regulation would actually occur in a number of eir exchange footprints.

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<sup>6</sup> Investor call, Q4 2022, Liberty Global plc, February 23, 2023.

<sup>7</sup> Around 45 per cent

<sup>8</sup> ComReg WLA Consultation, paragraph 3.31

<sup>9</sup> Copenhagen Economics, paragraph 3.20

<sup>10</sup> BT manages the wholesale procurement for Sky in Ireland. Accordingly, we map sales to BT in eir’s internal wholesale volume data to Sky’s retail volume – although we note that this may slightly overestimate Sky’s wholesale volumes via eir’s network, as BT also procures on behalf of other retail provider, hence conservatively overestimating the share of Sky’s retail volumes that are sourced from eir. We derive Sky’s retail FTTH volume based on ComReg’s quarterly report for the second quarter of 2022. This is 77,218 broadband lines. BT Ireland procured 46,850 broadband lines from eir in December 2022. We divide the latter figure by the former to conclude that eir supplies Sky with about 60 per cent of its FTTH volumes

18. In summary, eir considers that ComReg has not linked the retail market data to the wider context for use in SMP analysis and determination. As highlighted by Copenhagen Economics, the “[...] market outcomes are not consistent with eir having SMP in the entire commercial area. eir’s own retail market share is relatively modest and declining, having gone from 33 per cent in 2018 to 27 per cent in 2022, and the majority of high-speed retail volumes derive from wholesale networks other than eir’s. eir should have an incentive to continue providing access on commercial terms as eir is reliant on revenues generated by access seekers, and there is no evidence of eir attempting to foreclose retail competitors. eir has also reduced its wholesale prices in recent years in response to competitive pressure on the wholesale market, which is not consistent with an SMP operator acting independently of competition.
  
19. eir is of the view that ComReg should review the points above and incorporate these into its analysis to ensure an impactful, accurate review of the retail broadband market trends that can inform the SMP analysis.

## Question 2:

**Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

20. eir broadly agrees with ComReg's categorisation of the retail broadband market as comprising of two markets: (a) A national CG retail broadband market – including retail broadband provided over Eircom's copper-only network; and (b) A national NG retail broadband market – including retail broadband provided over FTTx and Virgin Media's DOCSIS 3.1 CATV network. However, eir disagrees with some aspects of the analysis of the retail broadband market, and with how ComReg has applied this analysis to assessing the WLA market. These points are outlined below.
21. eir agrees that retail broadband delivered over FTTx is the appropriate focal product in the retail broadband product market as over 50% of retail broadband subscriptions are delivered over FTTx. This share will only increase on a forward looking basis due to the FTTP roll-out by numerous operators. eir agrees that copper-based broadband is unlikely to be a sufficiently effective substitute for FTTx and should form a separate category of the retail market, due to the difference in service and the continued copper switch off, eventually leading to its removal.
22. eir agrees that the retail broadband market should not be segmented by customer type as there is limited difference between residential and business retail broadband services. In addition, eir agrees that the retail broadband market should not be segmented on the basis of whether end users purchase broadband on a standalone or bundled basis.
23. However, eir considers that ComReg has taken a narrow, somewhat conflicting approach to its analysis of the retail broadband market by excluding mobile and FWA from the retail market. Even though mobile is excluded from the retail market, ComReg, nonetheless considers the potential for supply-side substitution arising from vertically integrated MNOs entering the WLA markets, as well as self-supply, in its analysis of the WLA market. Mobile broadband still accounts for a relatively sizeable portion of the retail market, as in the latest QKDR Q3 2022, mobile

broadband accounted for 352,161 or 18% of active broadband subscriber lines. eir notes that FWA broadband demand has increased by 9% in the year to Q3 2022 but still remains a small part of the market, plus ComReg data suggest that the majority of FWA subscriptions fall into the IA and users will have the option of FTTP in the near future. Mobile broadband and broadband provided over FWA and satellite networks may not represent perfect substitutes for broadband provided over FTTC and FTTH, but they can belong to the same market as long as there is a chain of substitution between them. eir considers ComReg should therefore, have included mobile and FWA as part of the retail broadband market.

24. In addition, eir considers that ComReg should have accurately reflected the observations of the retail market into its assessment of the WLA market. For instance, in paragraph 4.230 of the Consultation, under the review of the retail broadband market, ComReg recognises that Virgin Media has begun to roll out FTTH and designates it as a network operator in this regard. Yet ComReg has not taken Virgin Media's FTTH roll-out into consideration when assessing the WLA market. This is despite significant progress to date with 20% of Virgin Media's footprint already upgraded to FTTH<sup>11</sup>.
25. eir notes that ComReg is not required to conclude on a precise definition of the retail market but has done so to inform the assessment of the WLA and WCA markets in terms of market definition and strength of any indirect retail constraints from the related downstream retail broadband markets. However, eir questions the value of the retail market assessment that is not reflected in the assessment of the wholesale market. For instance, although considering that cable is a substitute to fibre at the retail level, ComReg considers that retail substitutability is insufficient to impose indirect constraint on wholesale fibre. Copenhagen Economics has established that ComReg's SSNIP assessment has not been applied correctly.<sup>12</sup>
26. Copenhagen Economics considers that ComReg's SSNIP test to assess indirect constraints has several important flaws and that when corrected; there is evidence that the pricing of fibre WLA is constrained<sup>13</sup>. A correct application of the SSNIP test,

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<sup>11</sup> Investor call, Q4 2022, Liberty Global plc, February 23, 2023

<sup>12</sup> Copenhagen Economics, paragraphs 3.28 to 3.38

<sup>13</sup> Copenhagen Economics, paragraphs 3.39 to 3.43

using ComReg's own evidence, shows that the pricing of fibre WLA is in fact indirectly constrained. This means that the relevant WLA market should be broadened, and could have, for instance, included cable, as has been the case in several European countries and as ComReg have included cable in the retail broadband market. The incorrect SSNIP is further discussed in response to Question 3 and Question 4.

**Question 3:**

**Do you agree with ComReg’s product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

and

**Question 4:**

**Do you agree with ComReg’s geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

27. eir agrees that there is a National CG WLA market. eir agrees that there is a NG IA WLA market.
28. eir considers that the ComReg’s assessment of Commercial NG WLA market is wrong and incomplete. In particular, eir considers that:
  - ComReg fails to consider all of the demand response to a price increase (SSNIP assessment);
  - ComReg over-relies on static structural indicators; and
  - Recent case precedent from other countries suggests that the level of overlap in the Commercial NG WLA market is inconsistent with a finding of SMP.

***ComReg fails to consider all of the demand response to a price increase (SSNIP assessment)***

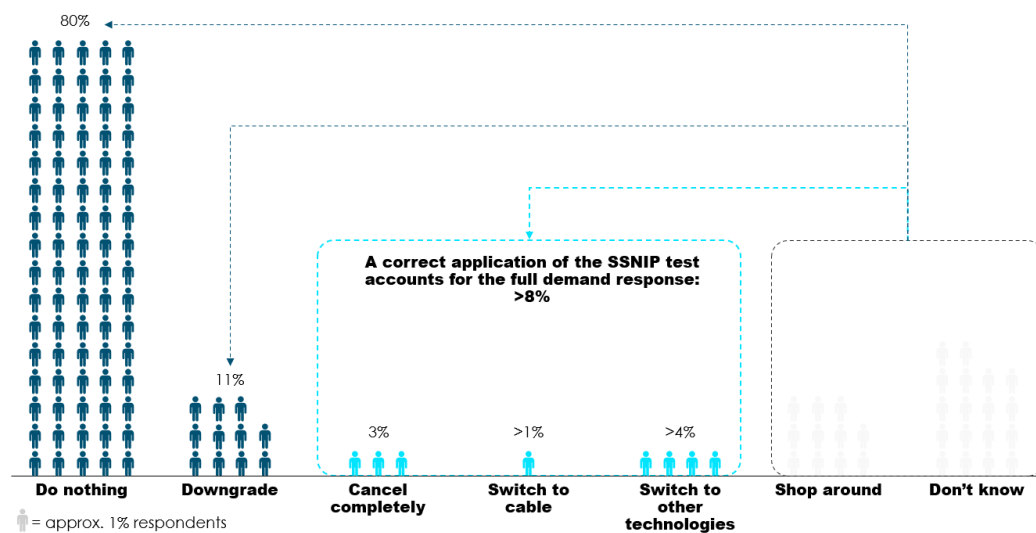
29. Copenhagen Economics finds that “[...] ComReg misapplies its own survey results by ignoring several categories of survey respondents, including those who respond that they would “cancel” their subscription in response to a price increase, those who “don’t know”, and, most crucially, those who say that they would “shop around”. While answers such as “shop around” and “don’t know” pose challenges to how they can be accounted for in the application of the SSNIP, simply

disregarding them entirely, as ComReg has done, results in an incomplete exercise that fails to appropriately estimate the full demand response.

**Figure 2**

**Corrected estimate of the full demand response to a price increase (lower bound)**

Action taken by consumers as response to a €4 price increase in broadband prices (in percentage of respondents)



Note: We adopt the conservative assumption that consumers whose response to the price increase is “stay but downgrade” would not affect the hypothetical monopolist’s profitability – although in practice, lower-speed products would often be associated with lower margins.

Source: Copenhagen Economics based on ComReg WLA Consultation and ComReg’s WLA WCA Residential Market Research (see slide no. 55)

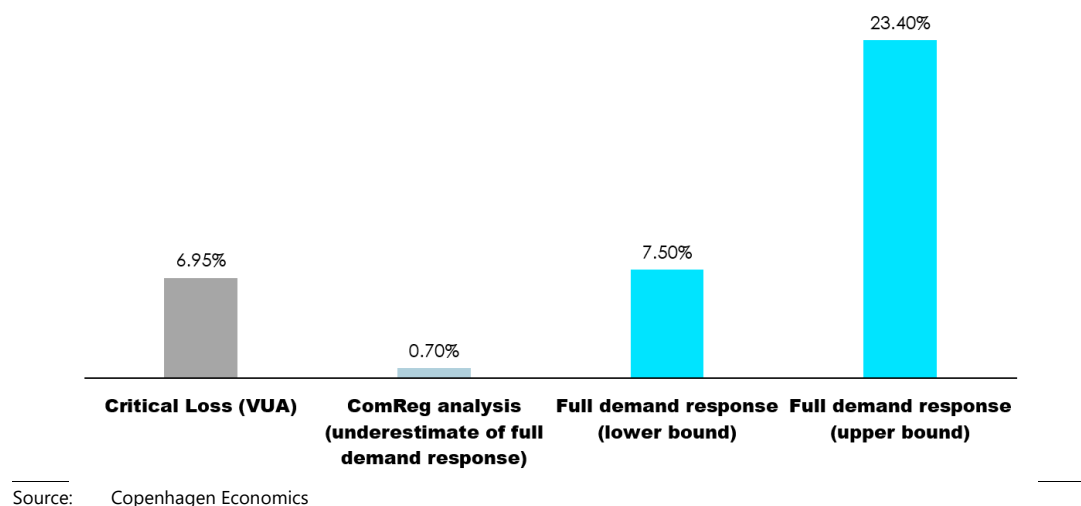
Copenhagen Economics states that “[w]hen including the full demand response to the SSNIP, we find, however, using ComReg’s own evidence, that it would in fact be unprofitable for the hypothetical monopolist to increase its price, even with relatively conservative assumptions”.<sup>14</sup> This is demonstrated below:

<sup>14</sup> Copenhagen Economics, paragraph 3.40

**Figure 3**

***A correct application of the SSNIP test shows that a price increase in the fibre WLA would be unprofitable***

Share of consumers lost by the HM as a result of the price increase (actual loss) vs critical loss



Copenhagen Economics states that “[w]e find that, when accounting for the full demand response, the actual loss exceeds the critical loss, in both lower and upper bound scenarios for the full demand response”.<sup>15</sup>

30. The results of the corrected SSNIP test show that fibre WLA is constrained by demand-side substitutability. This should have led ComReg to conclude that the relevant market should be broadened to include other technologies.

***ComReg over-relies on static structural indicators***

31. eir agrees with Copenhagen Economics finding that:

*“ComReg therefore relies too heavily on static structural indicators, at the cost of disregarding relevant evidence of effective competitive constraints on eir’s NGFTTX WLA products within the commercial area and puts undue emphasis on structural indicators. In defining the geographic market, ComReg requires a minimum of three network operators present to deem an area as having sufficiently different competitive conditions.”*

<sup>15</sup> Copenhagen Economics, paragraph 3.41-3.43



“In defining the geographic market, ComReg establishes a set of criteria for assessing sufficient differences in competitive conditions within the NG WLA Market. These criteria include conditions on the number of operators present capable of providing NG WLA. ComReg considers that for ‘for conditions of competition between geographic areas to be appreciably distinguishable, at least three Network Operators should be present’.

Structural indicators, such as counting the number of operators present in a certain geographic area, can be useful in informing an assessment of prevailing competitive conditions. However, considering such indicators in isolation, especially in the presence of other relevant evidence, can lead to an incomplete analysis on an operator’s ability to behave independently of its customers and competitors.

Available evidence on the competitive dynamics within the commercial area suggests that competition does not require the presence of three operators in Ireland.”<sup>16</sup>

***Recent case precedent from other countries suggests that the level of overlap in the Commercial NG WLA market is inconsistent with a finding of SMP***

32. Copenhagen Economic states “We find that *eir’s network has extensive overlap with rival networks within the commercial area*. Already today, eir overlaps with a rival network, either FTTH or cable, in 64 per cent of the commercial area. Assuming that rival networks continue to expand as planned, and in line with their current pace of expansion, this overlap is due to increase to 84 per cent by 2026. Recent case precedent from the European Commission suggests that markets with such high levels of parallel coverage are unlikely to be characterised by the presence of an SMP operator. At the very least, the evidence regarding overlap, along with other evidence showing differences in the developments of eir’s wholesale volumes in different areas, suggests that competitive conditions are not homogenous within the commercial area...”<sup>17</sup>

“In light of the Danish decision and the subsequent intervention by the European Commission, a BEREC draft report states the following: “DBA has concluded on the

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<sup>16</sup> Copenhagen Economics, paragraph 3.53-3.55

<sup>17</sup> Copenhagen Economics, paragraph 3.4

basis of the phase II investigation, that parallel coverage is a significant parameter that should be considered capable of altering the significance of other SMP parameters. The EC pointed to two thresholds in relation hereto – 40 percent parallel coverage being significant, and 60 percent being very significant.”<sup>18 19</sup>

“BEREC reports that the most frequently cited reason for NRAs to define sub-national geographic markets was regional differences in coverage of rival fibre or cable networks. This was the case in nine different countries: “The main reason is in nine countries geographical differences in coverage of alternative networks (e.g. cable or fibre)...”.<sup>20 21</sup>

33. eir agrees with Copenhagen Economics findings that the Danish decision is significant and that as stated by Copenhagen Economics:

“ComReg’s own data suggests that SIRO’s FTTH and Virgin Media’s cable network has substantial overlap with eir’s FTTX network. eir overlaps with a rival network in approximately 64 per cent of the commercial area”<sup>22</sup>

“precedent from the European Commission [Danish decision] indicates that the current level of overlap may not be consistent with a finding of SMP, any increase notwithstanding”<sup>23</sup>

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<sup>18</sup> BEREC BoR (22) 188, Report on competition amongst multiple operators of NGA networks in the same geographical region, page 16.

<sup>19</sup> Copenhagen Economics, paragraph 3.69

<sup>20</sup> BEREC BoR (22) 188, Report on competition amongst multiple operators of NGA networks in the same geographical region, page 9.

<sup>21</sup> Copenhagen Economics, paragraph 3.78

<sup>22</sup> Copenhagen Economics, paragraph 3.62

<sup>23</sup> Copenhagen Economics, paragraph 3.61

**Question 5:**

**Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

34. eir agrees with ComReg's assessment that no operator has SMP in the CG WLA market and that no operator has SMP in the NG IA market. This is based on the existing competition and potential competition (based on a forward looking view) in those markets.

35. eir does not agree with ComReg's assessment of SMP in the Commercial NG WLA market. ComReg's flawed assessment and deficiencies are identified in Copenhagen Economics report. eir supports the views of Copenhagen Economics and consider ComReg's assessment of SMP is based on a number of material errors. These include, but are not limited to:

- ComReg fails to consider all of the demand response to a price increase (SSNIP assessment)
- Incorrect conclusion of the direct and indirect constraints of existing and potential competition;
- Countervailing Buying Power; and
- eir's pricing behaviour.

***ComReg fails to consider all of the demand response to a price increase (SSNIP assessment)***

36. See response to Question 3 and Question 4.

***Incorrect conclusion of the direct and indirect constraints of existing and potential competition***

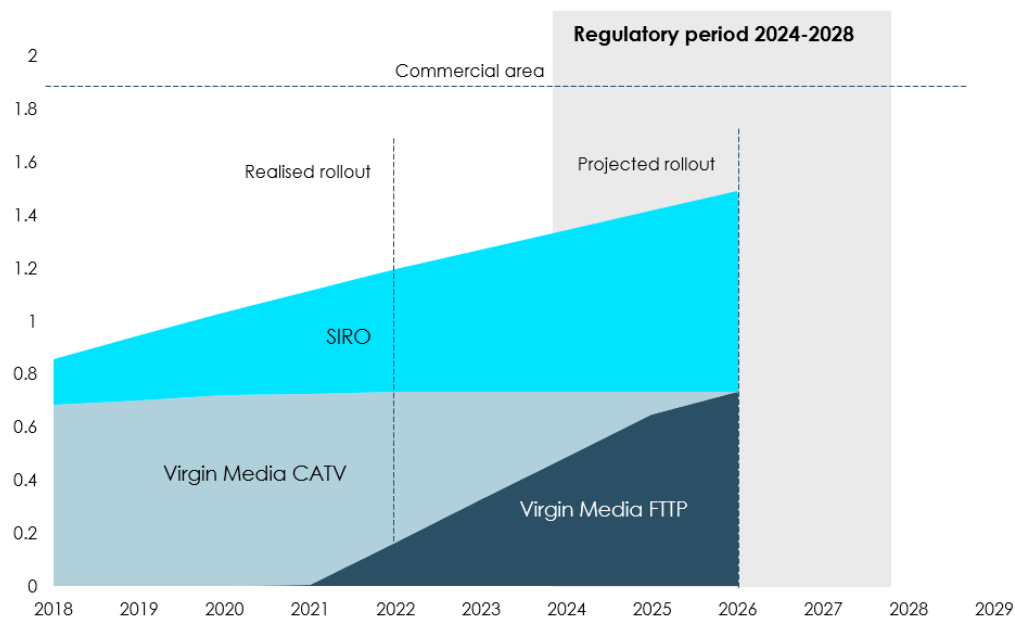
37. **Direct constraints:** eir considers that ComReg's assessment does not consider current and prospective competition in any meaningful way in the Commercial NG WLA market. There is a significant overlap of competing NG infrastructure and this is due to expand. Copenhagen Economics states that:

“We find that *eir’s network has extensive overlap with rival networks within the commercial area*. Already today, eir overlaps with a rival network, either FTTH or cable, in 64 per cent of the commercial area. Assuming that rival networks continue to expand as planned, and in line with their current pace of expansion, this overlap is due to increase to 84 per cent by 2026. Recent case precedent from the European Commission suggests that markets with such high levels of parallel coverage are unlikely to be characterised by the presence of an SMP operator. At the very least, the evidence regarding overlap, along with other evidence showing differences in the developments of eir’s wholesale volumes in different areas, suggests that competitive conditions are not homogenous within the commercial area”<sup>24</sup>

**Figure 4**

**eir will be constrained in 84% of the Commercial NG WLA area in the near future**

Number of premises passed, in millions



Source: Copenhagen Economics based on the SIRO website, Liberty Global Fixed Income Quarterly Press Releases and web articles

38. This level of overlap is having a real impact on the direct constraints on eir. As Copenhagen Economics states:

<sup>24</sup> Copenhagen Economics, paragraph 3.4

“ComReg’s evidence also shows that eir’s position in the wholesale market has been significantly weakened since SIRO entered the market, with SIRO accruing a market share between 30 per cent and 40 per cent<sup>25</sup> in the period between Q1 2019 and Q2 2022, primarily at the expense of eir”.<sup>26 27</sup>

and that:

“The presence of SIRO and Virgin Media in large parts of the commercial area, and their impending network upgrade and enhancement plans, clearly demonstrates that it is possible to overcome barriers to entry in at least some parts of the commercial area”<sup>28</sup>

“ComReg itself acknowledges that there are differences in barriers to entry within the commercial area: “[...] it is likely to be the case that ***the Commercial NG WLA Market is characterised by the presence of variable barriers to entry and/or expansion***, but that these barriers are being gradually overcome by certain Network Operators in certain geographic areas.”<sup>29</sup> The presence of “variable” barriers to entry, along with the fact that these barriers have been and are being overcome by some operators, suggests that the criterion of “high and non-transitory structural, legal, or regulatory barriers to entry”<sup>30</sup>, which is a necessary criterion for ex ante regulation to be imposed as part of the Three Criteria Test, is not universally satisfied within the commercial area.”<sup>31</sup>

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<sup>25</sup> ComReg WLA Consultation, footnote 432

<sup>26</sup> ComReg WLA Consultation, paragraph 5.235; ComReg WLA Consultation, footnotes 430 and 431

<sup>27</sup> Copenhagen Economics, paragraph 3.19

<sup>28</sup> Copenhagen Economics, paragraph 3.72

<sup>29</sup> ComReg WLA Consultation, paragraph 6.129. (our emphasis in bold). See also paragraph 6.122: ““SIRO has, to a reasonable degree, overcome barriers to entry in certain geographic areas, having rolled out to 460,000 premises as of October 2022...”

<sup>30</sup> ComReg WLA Consultation, paragraph 3.14

<sup>31</sup> Copenhagen Economics, paragraph 3.73

39. [X]

- Using ComReg's published quarterly report for the Fixed Broadband it is possible for eir to infer the growth of Siro each quarter. See **Figure 5** below. The eir Total data (i.e., eir group) on initial face value is as expected with a converse relationship between eir retail and eir wholesale customers. [X]

**Figure 5: Fixed broadband market**

[X]

- [X]

**Figure 6: eir’s fixed broadband base in the Commercial NG WLA market**

[✂]

Finally, based on eir’s estimate of existing overlap in Eircom exchanges by Siro and/or Virgin Media in the Commercial NG WLA market it is evident that [✂]. See **Figure 7**.

**Figure 7: eir’s wholesale FTTX volumes in the Commercial NG WLA market**

[✂]

Based on the continued FTTH roll-out by Siro and Virgin Media [✂]

**Figure 8: eir’s fixed broadband market share**

[✂]

40. Based on **Figure 7** data Copenhagen Economics Report states:

[✂]

*“ComReg’s evidence also shows that eir’s position in the wholesale market has been significantly weakened since SIRO entered the market, with SIRO accruing a market share between 30 per cent and 40 per cent<sup>32</sup> in the period between Q1 2019 and Q2 2022, primarily at the expense of eir”.<sup>33</sup>*

*“SIRO is thus exerting an increasingly strong direct constraint on eir, incentivising eir to retain (rather than foreclose) access seekers. Vodafone, eir’s largest access seeker, sources less than half<sup>34</sup> of its FTTH connections from eir.”<sup>35</sup>*

*“The European Commission has highlighted the importance of adequately accounting for differences in competitive dynamics along the geographic dimension, and assessing whether a potential SMP operator faces differing*

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<sup>32</sup> ComReg WLA Consultation, footnote 432

<sup>33</sup> Copenhagen Economics, paragraph 3.19

<sup>34</sup> Around 45 per cent

<sup>35</sup> Copenhagen Economics, paragraph 3.20

*competitive constraints: “When delineating the exact geographic boundaries of a relevant market, account has to be taken of the scope of the potential SMP operator's network and whether that potential SMP operator acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others.”<sup>36 37</sup>*

“ComReg also implicitly recognises that eir faces different competitive constraints in different areas within the commercial area by stating eir has greater incentives to innovate in areas where it is constrained by SIRO.<sup>38</sup> ComReg also notes that eir’s national market share is uninformative regarding regional competitive dynamics: “[eir’s national market share] likely masks non-trivial geographic differences at local level arising from the presence or absence of SIRO or NBI.”<sup>39</sup> (...) ComReg also recognises that eir’s position in the wholesale market has weakened considerably after SIRO’s entry.”<sup>40</sup>

41. ComReg’s conclusions skew in favour of regulation “just in case” future network roll-out does not happen. It is evident from Copenhagen Economics analysis that existing infrastructure is already having a direct constraint on eir (see also eir’s pricing behaviour). Nevertheless, in the context of future roll-out ComReg’s assessment must be forward looking and give more weight to network capability and more contestable market conditions as a result of announced roll-out plans over the market review period — particularly, given the clear evidence that network roll-out is happening in Ireland and at a pace. The regulatory risk is asymmetric in that it places eir with undue regulatory burden “just in case” FTTH deployment does not develop as extensively as anticipated by operators. However, there is no assessment by ComReg as to the impact on eir if network roll-out from operators continues as anticipated and eir is prevented from competing because of regulation over the market review period. In this context, it is also unclear as to whether ComReg has misinformed itself relative to the future plans of operators – which it discounts in this Consultation. While eir was unable to answer ComReg’s direct question as to the exchange/geographic order of eir’s anticipated FTTH roll-out in

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<sup>36</sup> Commission staff working document accompanying the SMP guidelines, SWD(2018)124 final of 27.4.2018, page 19.

<sup>37</sup> Copenhagen Economics, paragraph 3.77

<sup>38</sup> ComReg WLA Consultation, paragraph 8.44

<sup>39</sup> ComReg WLA Consultation, paragraph 5.227

<sup>40</sup> Copenhagen Economics, paragraph 3.76



later years as these are yet to be planned in detail — it is nevertheless anticipated that eir’s FTTH roll-out will be completed within the market analysis period.<sup>41</sup> As Copenhagen Economics Report identifies:

*“ComReg considers that there is not sufficient certainty regarding Virgin Media and SIRO’s planned rollout to support a conclusion that these networks will likely constrain eir during the regulatory period.”<sup>42</sup>*

*“ComReg cites instances of delays, targets that were missed and eventually revised downwards to argue that SIRO’s rollout is characterised by timing uncertainty. ComReg also notes that Vodafone is Virgin Media’s only wholesale FTTH customer thus far, and that there is a lack of rollout data which limits the scope of further uptake from access seekers”<sup>43</sup>*

*“However, as is apparent (...), the projected rollout of eir’s rivals does not seem implausible given their historical pace of rollout”<sup>44</sup>*

*“Both SIRO and Virgin Media are also currently in the process of expanding or upgrading their network coverage. On a forward-looking basis, eir will overlap with either SIRO or Virgin Media FTTH in 84 per cent of the commercial area by 2026”<sup>45</sup>*

*“eir’s rivals would merely need to approximately maintain the speed of rollout and upgrades that they have demonstrated over the past 3-4 years in order to achieve their stated ambitions:*

*Virgin Media’s FTTH footprint increased from 9k premises in the fourth quarter of 2021 to 220k premises in the fourth quarter of 2022, and its owners have a stated ambition of “FTTH upgrade accelerating in 2023”.<sup>46</sup>*

*“SIRO’s footprint increased from 175k premises in 2018<sup>47</sup> to 320k premises in 2020<sup>48</sup> to 470k premises at the end of 2022. Hence, SIRO increased its footprint by almost*

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<sup>41</sup> [X]

<sup>42</sup> Copenhagen Economics, paragraph 3.65

<sup>43</sup> Copenhagen Economics, paragraph 3.66

<sup>44</sup> Copenhagen Economics, paragraph 3.67

<sup>45</sup> Copenhagen Economics, paragraph 3.64

<sup>46</sup> <https://www.libertyglobal.com/wp-content/uploads/2023/02/Virgin-Media-Ireland-Fixed-Income-Q4-2022-Release.pdf>

<sup>47</sup> <https://www.siliconrepublic.com/comms/siro-fibre-home-network-roll-out>

300k premises in four years. SIRO has stated that its FTTH network aims to reach 770k premises. SIRO's current pace of expansion indicates that this target can be achieved by 2026. Furthermore, SIRO has secured significant funding for its expansion effort. SIRO announced it has procured additional funding worth €620m, including €170m from the European Investment Bank. This supplements the €450m that has already been invested.<sup>49</sup> Moreover, SIRO's partnership with Virgin Media<sup>50</sup> and its existing relationships with Vodafone and Sky, amongst 20 retail partners, indicate its importance as a provider of wholesale broadband access."<sup>51 52</sup>

42. In addition, as noted by Copenhagen Economics "ComReg therefore relies too heavily on static structural indicators, at the cost of disregarding relevant evidence of effective competitive constraints on eir's FTTX WLA products within the commercial area."<sup>53</sup>

"In defining the geographic market, ComReg establishes a set of criteria for assessing sufficient differences in competitive conditions within the NG WLA Market. These criteria include conditions on the number of operators present capable of providing NG WLA. ComReg considers that for "for conditions of competition between geographic areas to be appreciably distinguishable, at least three Network Operators should be present".<sup>54</sup>

"Structural indicators, such as counting the number of operators present in a certain geographic area, can be useful in informing an assessment of prevailing competitive conditions. However, considering such indicators in isolation, especially in the presence of other relevant evidence, can lead to an incomplete analysis on an operator's ability to behave independently of its customers and competitors."<sup>55</sup>

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<sup>48</sup> <https://siro.ie/news-and-insights/ftth-market-panorama-2020/>, <https://www.irishtimes.com/business/technology/siro-announces-620m-investment-to-upgrade-broadband-network-1.4712850>

<sup>49</sup> <https://www.irishtimes.com/business/technology/siro-announces-620m-investment-to-upgrade-broadband-network-1.4712850>

<sup>50</sup> <https://siro.ie/news-and-insights/virgin-media-expands-market-reach-on-the-siro-network/>

<sup>51</sup> ComReg WLA Consultation, paragraph 3.31

<sup>52</sup> Copenhagen Economics, paragraph 3.67

<sup>53</sup> Copenhagen Economics, paragraph 3.58

<sup>54</sup> ComReg WLA Consultation, paragraph A.8.39

<sup>55</sup> Copenhagen Economics, paragraphs 3.53 and 3.54

43. **Indirect constraints:** As identified in response to Question 3 and Question 4, including in detail in the Copenhagen Economics Report, ComReg has incorrectly applied the SSNIP. Copenhagen Economics states:

*“we scrutinise the SSNIP test that ComReg uses to define the relevant market, which ultimately supports ComReg’s conclusion that eir has SMP in the commercial area. We find that ComReg’s SSNIP test has several important flaws and that a corrected SSNIP test leads to the conclusion that the relevant product market should be broader. The relevant market could reasonably have been expanded to include cable, as has been the case in many other European markets. Regardless, the results indicate that a hypothetical monopolist of fibre WLA would be unable to profitably exercise any market power, which is inconsistent with ComReg’s finding of SMP in the entire commercial area.”*<sup>56</sup>

44. Copenhagen Economics states:

*“Although ComReg is correct in using a SSNIP test to define the market, ComReg misapplies the SSNIP test and fails to answer the key question. Instead of assessing whether a SSNIP would be profitable overall, ComReg instead focuses on a partial effect only, by investigating merely whether the number of end-users that would switch to a specific alternative technology would be sufficient alone to render the SSNIP unprofitable. This entails a bias by underappreciating the full extent of demand-side substitutability constraints.*

*ComReg states directly that its assessment seeks to answer not whether a SSNIP would be profitable but whether “retail broadband provided over a CATV network should be included in the WLA markets on the basis of the indirect retail constraint it is capable of generating. That is, in response to a 5 per cent to 10 per cent SSNIP [...] would a sufficient number [...] customers switch to CATV-based retail services such that it would render the SSNIP unprofitable?”*<sup>57</sup>

*ComReg’s application of the SSNIP therefore distinctly departs from the established framework. Indeed, as the SMP Guidelines clarify specifically: “It is not necessary that all consumers switch to a competing product; [in assessing demand side*

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<sup>56</sup> Copenhagen Economics, paragraphs 3.27

<sup>57</sup> ComReg WLA Consultation, paragraph 5.170

substitutability] it suffices that enough or sufficient switching takes place so that a relative price increase is not profitable”.<sup>58</sup>

By focusing exclusively on the share of consumers that respond to the price increase by switching to a specific technology, ComReg’s approach thus underestimates the full demand response to the SSNIP”<sup>59</sup>

“Regardless of how the relevant market is defined, the results of the SSNIP test show that a hypothetical monopolist of fibre WLA would be unable to profitably exercise any market power, which is not consistent with ComReg’s conclusion that eir holds SMP in the entire commercial area”<sup>60</sup>

45. See also eir’s response to Question 3 and Question 4.

### ***Countervailing Buying Power***

46. In paragraph 6.196 ComReg states “While Access Seekers are a significant source of revenue for Eircom in the Commercial NG WLA Market and the CG WLA Market, ComReg considers that their relative size is not suggestive of a sufficiently strengthened bargaining position regarding price or other terms of supply.” However, such a finding is at odds with the evidence including a number of ComReg’s own conclusions. As Copenhagen Economics states:

“Vodafone, eir’s largest access seeker, sources less than half<sup>61</sup> of its FTTH connections from eir. Vodafone is also a part-owner of SIRO<sup>62</sup>, eir’s largest fibre-based wholesale competitor”<sup>63</sup>

“Similarly, eir’s second largest access seeker, Sky, relies on eir’s network for only approximately 60 per cent of its FTTH retail volumes.<sup>64</sup> Virgin Media, eir’s biggest competitor in the retail market, uses its own cable and FTTH networks”<sup>65</sup>

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<sup>58</sup> European Commission, footnote 24

<sup>59</sup> Copenhagen Economics, paragraph 3.31 to 3.34

<sup>60</sup> Copenhagen Economics, paragraph 3.3

<sup>61</sup> Around 45 per cent

<sup>62</sup> ComReg WLA Consultation, paragraph 3.31

<sup>63</sup> Copenhagen Economics, paragraph 3.20

and

“Overall, given eir’s diminished retail market shares, the limited uptake on its FTTH network and the likelihood of increasing infrastructure-based competition, eir likely has a commercial incentive to retain its wholesale customers rather than foreclose them.”<sup>66</sup>

### *eir’s pricing behaviour*

47. In paragraph 6.86 of the Consultation, ComReg states “ComReg considers that there is no firm behavioural evidence to suggest that Eircom faces effective pricing constraints on the Commercial NG WLA Market”. Similarly, in paragraph 9.326 ComReg states that “Since 2018, no request has been received by ComReg from Eircom seeking approval of a price reduction for FTTC VUA rental, or FTTH VUA rental, in any geographic area”. The evidence does not support ComReg’s statements. As ComReg is aware, in the last two years eir has:

- i) Implemented a number of price reductions for FTTH VUA (and Bitstream)
- ii) Notified a number of FTTH volume/discount proposals which were rejected by ComReg
- iii) Provided a voluntary commitment (including a formal notification) to [X]

### *Pricing reductions*

48. As ComReg is aware eir has continued to keep the wholesale price of FTTH under review. In particular eir has:

- 1) Continually lowered FTTH wholesale prices:  
eir’s wholesale rental prices of the FTTH services are constantly under review. For example, the 1Gbps Bitstream product price was lowered in July 2020 from €44.34 to €34.72 due to pressure from other providers and lack of take-up. This is a

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<sup>64</sup> BT manages the wholesale procurement for Sky in Ireland. Accordingly, we map sales to BT in eir’s internal wholesale volume data to Sky’s retail volume – although we note that this may slightly overestimate Sky’s wholesale volumes via eir’s network, as BT also procures on behalf of other retail provider, hence conservatively overestimating the share of Sky’s retail volumes that are sourced from eir. We derive Sky’s retail FTTH volume based on ComReg’s quarterly report for the second quarter of 2022. This is 77,218 broadband lines. BT Ireland procured 46,850 broadband lines from eir in December 2022. We divide the latter figure by the former to conclude that eir supplies Sky with about 60 per cent of its FTTH volumes

<sup>65</sup> Copenhagen Economics, paragraph 3.21

<sup>66</sup> Copenhagen Economics, paragraph 3.23

reduction of 22%. Similarly, the 1G VUA product price was reduced in July 2020 from €38.50 in to €28.50. This is a reduction of 26%.

2) Increased FTTH profile speeds (at lower prices)

In October 2021, eir launched a 2Gbps FTTH product. This is priced at the same level of the 1Gbps when it was originally launched three years ago in 2020. Similarly, within 3 months of launching a 500Mbps profile in 2020, eir reduced its wholesale price to be in line with the 150Mbps and 300Mbps FTTH profile speeds. This means the entry level profile speed of FTTH has increased from 150Mbps to 500Mbps at no extra wholesale cost.

3) No wholesale charge for FTTH connection/migrations

The FTTH connection charge has fallen continually since 2017. The price was reduced from €270 to €170 in 2019 and further to €100 in 2020. The connection/migration charge has been set to zero for a 6 month period ending 31 March 2023. [REDACTED].

49. As stated by Copenhagen Economics “eir’s wholesale pricing does not seem consistent with that of an SMP operator, which can act independently of its rivals and customers.”<sup>67</sup>

### ***Notified measures to ComReg***

50. Over the past number of years open eir has tried to introduce FTTH prices that would encourage FTTH take up by rewarding wholesale customers for connecting end customers. In total eir has submitted 5 wholesale proposals to ComReg. These innovative proposals (set out in detail below) were declined by ComReg. Consequently, eir submits that the notified measures demonstrates a clear behavioural evidence that eir faces effective pricing constraints but were not able to respond due to apparent regulatory restrictions.

### **Price Promotion**

51. In November 2019 open eir notified ComReg of a price promotion:

52. [REDACTED]

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<sup>67</sup> Copenhagen Economics, paragraph 3.26

53. ComReg refused this proposal on the basis that as per D11/18 paragraph 12.51 “There shall be no wholesale promotions or discounts for WLA or WCA services.”

#### Pricing Trial

54. In December 2019 open eir notified ComReg of a pricing trial.
55. [REDACTED].
56. [REDACTED]
57. ComReg refused this proposal based on ComReg Decision D11/18 paragraph 12.51 which states that “There shall be no wholesale promotions or discounts for WLA or WCA services” with further detail in paras 12.39 to 12.51 of D11/18.

#### Copper Switch-off (CSO) Incentives 1

58. In November 2021 open eir notified ComReg of two price incentives to encourage wholesale customers to migrate end customers off copper and onto FTTH.
59. [REDACTED]
60. eir considered that the CSO FTTH incentive would encourage FTTH take-up and help prepare for the withdrawal of copper services. This incentive rewards the wholesale customers for migrating customers onto the FTTH network. This early migration of customers onto the FTTH will aid the smooth transition off copper when the withdrawal of copper services commences.
61. [REDACTED]
62. ComReg refused this proposal stating “The requirement, set out in paragraph 12.51 of ComReg Decision D11/18 that “there shall be no wholesale promotions or discounts for WLA or WCA services” is not restricted to products and services which are subject to cost-orientation but rather applies to all WLA and WCA Services. Both the text of D11/18 and the prior consultation (para 12:19) are clear on this point.”

CSO Incentives 2 (same as CSO Incentives 1 with different dates)

63. In June 2022 eir re-notified ComReg (as the planned launch dates for the proposed CSO Incentives 1 had passed) of the two price incentives to encourage wholesale customers to migrate end customers off copper and onto FTTH (with different starting and end dates proposed to CSO Incentives 1 which was previously notified and rejected by ComReg).
64. ComReg refused this proposal stating “*The requirement, set out in paragraph 12.51 of ComReg Decision D11/18 that “ there shall be no wholesale promotions or discounts for WLA or WCA services” is not restricted to products and services which are subject to cost-orientation but rather applies to all WLA and WCA Services. Both the text of D11/18 and the prior consultation (para 12:19) are clear on this point.*”

New lower tiered FTTH wholesale prices

65. On 1 February 2023, eir notified a new FTTH pricing tier.
66. [REDACTED]
67. [REDACTED]
68. eir awaits ComReg’s consideration on this latest proposal.

***Voluntary commitments (including a formal notification)*** [REDACTED]

69. On the 8 January 2021, as part of eir’s response to ComReg consultation 20/101, eir proposed a voluntary commitment to ComReg, inter alia, [REDACTED].
70. In response ComReg stated “*Article 79 of the EECC has yet to be transposed in Irish law and ComReg currently has no statutory basis in Irish law on which to accept commitments and make them binding as envisaged in Article 79*”.
71. [REDACTED]
72. Copenhagen Economics states that [REDACTED]



**Question 6:**

**Do you agree with ComReg’s market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

73. eir agrees with and welcomes ComReg’s assessment that the Modified Retail Broadband Market is likely to be effectively competitive in the absence of regulation in the Revised Regional WCA market and that the 3CT has been failed.
74. The European Commission’s 2020 Explanatory Note carefully mapped out, based on cogent reasoning, why it considered the WCA market to be no longer susceptible to regulatory intervention. This included a 3CT assessment which identified significantly lower barriers to entry, allowing alternative operators to deploy networks. Additionally, cable network upgrades to DOCSIS 3.x enable the possibility of offering wholesale cable access. As a result, the market is found to tend towards effective competition. All such indicators are present in Ireland. Consequently, eir agrees with ComReg’s finding that its 3CT assessment of the Irish national market has failed, and eir considers no other outcome was feasible.
75. eir is of the view that it would have been disproportionate to continue to impose SMP regulation on the Revised Regional WCA market which covers only 43% of premises in Ireland as set by the 2021 MTA decision. In addition, a low number of retail broadband subscriptions as of Q2 2022 are delivered using regulated eir NG WCA (8%) and between 40,000 to 50,000 are delivered using regulated eir CG WCA (paragraph 7.59).
76. In particular, eir agrees with ComReg’s forward looking assessment that barriers to entry to the Modified Retail Broadband Market are likely to be low over the five-year market review period. eir agrees this is apparent based on the fact 52 retail SPs currently offer retail broadband services on the basis of wholesale inputs delivered by NBI, SIRO and eir (paragraph 7.47).
77. As highlighted in Table 49 of the Consultation, there is also substantial alternative network operator coverage in the RR WCA market, including Siro and NBI’s current

and planned network roll out. In addition, the majority of CG WLA subscriber lines are likely to be located in the footprint of the IA where NBI has, or is scheduled to, roll out its FTTP network on a commercial basis (paragraph 6.29).

78. eir agrees with ComReg that the Modified Retail Broadband Market will tend towards effective competition over the 5-year time horizon of this market review absent regulation in the RR WCA market (there is also strong indications that the market is already competitive). As ComReg has identified, Access Seekers (dependent on location) can access WLA or WCA inputs from at least five upstream operators (Eircom, NBI, Siro, BT, and Enet) (paragraph 7.78). eir notes that the assessment of competitiveness of the market will be more accurate and tend toward higher levels of competition once Virgin Media's FTTP roll out is incorporated in the assessment.
79. eir therefore welcomes ComReg's decision to withdraw existing SMP obligations on the 2021 Revised Regional WCA Market based on its assessment of the Modified Retail Broadband Market. See eir's response to Question 9 for more detail on eir's views on the withdrawal of SMP in the WCA market.

### Question 7:

Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

80. eir does not agree that the competition problems and the associated impacts on competition and end users identified by ComReg are those that could potentially arise in the Commercial NG WLA. This is on the basis that ComReg has failed to accurately delineate the geographic market and failed to appropriately assess the level of competition that eir faces in terms of both direct and indirect constraints.
81. ComReg is of the preliminary view that, absent regulation, eir has the ability and incentive to engage in exclusionary practices, leveraging behaviour, and exploitative practices. ComReg has not produced any concrete evidence that the examples of anti-competitive effects and concerns submitted by ComReg in this Consultation are actually likely to occur in this market. In particular, eir considers that ComReg has over-relied on the theoretical economic abuse of foreclosure and has not adequately considered whether eir actually has sufficient market power at the wholesale level to follow such a pricing strategy. See also eir's response to Question 3 and Question 4.
82. ComReg has set out a number of simplified general anti-competitive concerns in Chapter 8 of the Consultation, which a vertically integrated firm could in ComReg's view theoretically undertake if found to have SMP at the wholesale level. While eir accepts that ComReg is not required to "catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuse". eir does not agree that "Rather, ComReg notes that the purpose of ex ante regulation is to prevent the possibility of such abuses arising" [emphasis added]. In the first instance this does not appear to comply with the stated objective of the Directive, as set out in Recital 28 quoted earlier, namely that 'This Directive aims to progressively reduce ex ante sector-specific rules as competition in the markets develops and, ultimately to ensure that electronic communications are governed only by competition law.' By ComReg's logic, ex ante regulation can never be lifted on the basis that there will always

remain a residual possibility that abuse might arise. Such an approach however, which would necessitate maintaining ex ante regulation effectively in perpetuity runs directly counter to the aims of the Code. Consequently, it is in regard to the “possibility of such abuse arising” where eir considers that ComReg has failed to undertake a sufficient economic assessment. ComReg’s fails to suitably determine whether the theoretical competition problems identified, arising from hypothetical pricing behaviours, are in reality “possible” or likely to occur in practice. In numerous places, its competition concerns are almost entirely cut and paste from its PIA proposals (and its previous market analysis consultations including ComReg 21/65 which was subject to a serious doubts opinion and ultimately vetoed by the European Commission). This results in ComReg proposing complex and disproportionate regulatory pricing remedies to “address” potential market failures well beyond any market outcomes that are actually “possible” to occur.

83. For example, ComReg states at paragraph 8.10 that eir would “*Impos[e] a margin squeeze between WLA and downstream services which would reinforce entry/expansion barriers in the Commercial NG WLA Market and related markets and potentially foreclose entry or investment by other SPs, including having regard to the fact that, ultimately, retail SPs look to compete on a national basis*”. However, this theoretical concern does not pass any level of scrutiny.

84. First, competition in the Commercial NG WLA market is not exclusively dependent on eir’s network. Siro and Virgin Media are both competing with eir’s WLA product and are not reliant on any WLA network inputs from eir. As identified by Copenhagen Economics “*Vodafone, eir’s largest access seeker, sources less than half<sup>68</sup> of its FTTH connections from eir. Vodafone is also a part-owner of SIRO<sup>69</sup>, eir’s largest fibre-based wholesale competitor.*”<sup>70</sup> “*Similarly, eir’s second largest access seeker, Sky, relies on eir’s network for only approximately 60 per cent of its FTTH retail volumes.*”<sup>71</sup> *Virgin Media, eir’s biggest competitor in the retail market, uses its*

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<sup>68</sup> Around 45 per cent

<sup>69</sup> ComReg WLA Consultation, paragraph 3.31

<sup>70</sup> Copenhagen Economics, paragraph 3.20

<sup>71</sup> BT manages the wholesale procurement for Sky in Ireland. Accordingly, we map sales to BT in eir’s internal wholesale volume data to Sky’s retail volume – although we note that this may slightly overestimate Sky’s wholesale volumes via eir’s network, as BT also procures on behalf of other retail provider, hence conservatively overestimating the share of Sky’s retail volumes that are sourced from eir. We derive Sky’s retail FTTH volume based on ComReg’s quarterly report for the second quarter of 2022. This is 77,218 broadband lines. BT

own cable and FTTH networks”<sup>72</sup> In addition, Copenhagen Economics considers that “eir’s incentives to increase its wholesale prices would be limited if its largest access seeker Vodafone could migrate volumes to another wholesale network (SIRO and/or Virgin Media, which is already contracted to provide access to Vodafone)”.<sup>73</sup>

85. Second, and consequently, the only margin squeeze eir could theoretically undertake is in respect to its own wholesale customers purchasing WLA inputs from eir. However, as crucially acknowledged in ComReg’s own consultant’s report “Eircom’s incentives to squeeze on FTTH VUA [i.e., the Commercial NG WLA Market] are uncertain and may vary over time...During the early stages of fibre-roll out, Eircom has the incentive to ‘fill up’ its FTTH network with subscribers to support the recovery of the large fixed and sunk costs of the investment...Eircom may not have the incentive to foreclose access seekers, which can act as ‘allies; and support it in growing the volume of subscribers on its FTTH network more quickly”. This is supported by Copenhagen Economics findings that “[...] eir has not engaged in margin squeeze during the ongoing regulatory period. The headroom between its retail and wholesale prices has been larger than that allowed by the MST. [...] Both ComReg and Oxera acknowledge that eir’s headroom is “above the level that would indicate a desire to squeeze margins to the minimum allowed amount.” This is not indicative of eir “making the most of” existing regulatory constraints with an attempt to foreclose downstream rivals but strongly suggests that the risk of margin squeeze is low, undermining the economic case for an MST.”<sup>74</sup>
86. Therefore, the potential competition problems cannot be said to be definitive or that they would even possibly occur. While ComReg’s consultants suggest that eir’s incentive could change “and may become stronger over time” this could critically be said to be an abstract hypothesis “over time” even in a competitive market. Copenhagen Economics states “[...] the fact that a similar logic could be a justification for any remedies on any market under any circumstances, no matter

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Ireland procured 46,850 broadband lines from eir in December 2022. We divide the latter figure by the former to conclude that eir supplies Sky with about 60 per cent of its FTTH volumes

<sup>72</sup> Copenhagen Economics, paragraph 3.21

<sup>73</sup> Copenhagen Economics, paragraph 3.20

<sup>74</sup> Copenhagen Economics, paragraph 4.54 and 4.55

*how competitive, Oxera's and ComReg's reasoning downplays the consequences of unwarranted regulation.*"<sup>75</sup>

87. From a competition analysis perspective it is not sufficient, either under competition law or under SMP Guidelines, to hypothesis a one-tailed test to simply postulate that it "may become stronger". Such a speculative statement, without concrete concerns, means that any market (irrespective of competitive characteristics) would require ex-ante regulation — despite it not being warranted, justified or proportionate. ComReg has crucially failed to establish concrete evidence to assess whether within the market review period the "stronger incentive" to undertake exclusionary practices etc. could possibly occur. Furthermore, as Copenhagen Economics states *"From an economic perspective, an incumbent would be expected to engage in foreclosure (e.g., through margin squeeze) at the early stages of market development. The incentive to foreclose competitors and grow a customer base are expectedly strongest when the market (or in this case the FTTH segment) is growing, less so (as Oxera claims) when the market has already matured. This – in our view more plausible – theory of harm does not appear to hold in the Irish FTTH segment with no evidence of attempts to foreclose competitors."*<sup>76</sup>
88. Conversely and equally, even under ComReg's consultant's own reasoning it is also possible (and eir argues more likely given current market characteristics) that eir may continue not to have an incentive to undertake anti-competitive behaviour over time and that eir would not have the ability due to lack of "significant market power" to behave independently of competitors and consumers. As regulation is intrusive and not cost free, where market behaviours are unclear or uncertain, ComReg must err on regulatory forbearance. On balance the facts do not support regulatory intervention at this time.
89. In that regard ComReg's consultant's statement that *"This risk cannot adequately be addressed by relying on ex post competition law"* is at odds with the development of competitive markets generally, ComReg's statutory obligation to deregulate competitive markets without delay (see Article 3(4)(f) and Recital 28 of the Code quoted earlier) and specifically the role of authorities like the CCPC

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<sup>75</sup> Copenhagen Economics, paragraph 4.63

<sup>76</sup> Copenhagen Economics, paragraph 4.60

including ComReg who has concurrent competition law powers. ComReg's consultant's statement effectively means that all markets should have ex-ante regulatory obligations including competitive ones. This is also inconsistent with the findings of the European Commission's Staff Working Document accompanying the Commission's 2020 Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation which states that *"ex-post competition law safeguards are more suitable to address potential (individual) market problems than ex ante regulatory intervention"*.

90. ComReg cannot just simply have regard to an extensive hypothetical list of abusive conduct. ComReg has failed to adequately consider the current and prospective competitive conditions in the market. The key question to justify regulation is whether there is an enduring economic bottleneck such that it is proportionate to impose a regulatory obligation. Regulatory intervention where not warranted or justified is not costless and ComReg's current proposed set of remedies (which is spring-boarded from the "competition concerns" from Chapter 7 of the Consultation) bears a significant risk of regulatory failure as a result of its heavy handedness, which is out of sync with the dynamics of the relevant markets.
91. Further, in a scenario where eir was determined not to have SMP in a particular market, it would still be subject to the behavioural constraints imposed by ex post competition law. All of eir's main competitors e.g., Sky, BT, Vodafone (including Siro) and Virgin Media, operate as part of large international corporations who leverage substantial economies of scale in terms of network deployment, product development at both the wholesale and retail levels, and purchasing power for content and would readily make a complaint in the event of an abuse of dominance. All evidence points to increased competition in the Commercial NG WLA markets and as such ComReg must do more than merely present a list of hypothetical of abusive conduct.
92. Finally, ComReg has given no consideration as to the asymmetric downside risk of regulation where eir is prevented from competing on the merits with other FTTH infrastructure-based operators. This is also a very relevant competition concern (created artificially by regulatory intervention) that would unduly restrict (and only restrict) eir's incentive to invest, compete and further roll-out its FTTH network —

bearing in mind ComReg's explicit obligations to support innovation, development and take up of very high capacity networks, and, per Recital 28 of the Code that it is '*vital to promote sustainable investment in the development of those new networks while safeguarding competition.*'. At this stage of FTTH deployment in the market the risk of regulatory failure is high due to unwarranted regulatory intervention.



**Question 8:**

**Do you agree with ComReg's proposals in respect of remedies in the Commercial NG WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

93. For the purposes of our response, ease of access and reading, a separate annex is dedicated to consider each of the following regulatory obligations:

- Annex 1 – Access Remedies for the Commercial NG WLA Market;
- Annex 2 – Transparency Remedies for the Commercial NG WLA Market;
- Annex 3 – Price controls and Cost Accounting for the Commercial NG WLA Market;
- Annex 4 – Accounting Separation for the Commercial NG WLA Market; and
- Annex 5 – Statement of Compliance Remedies for the Commercial NG WLA Market.
- Annex 6 – eir's comments on the proposed Decision Instrument

### Question 9:

Do you agree with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

94. eir agrees with ComReg's decision to withdraw SMP remedies on the Revised Regional WCA Market, CG WLA Market, and the IA NG WLA Market for the following reasons:

- The WCA market is no longer a recommended market for regulation per the European Commission, nor is it warranted in the Irish market.
- The continued decline of the CG WLA market; and
- Countervailing buying power in CG WLA and the IA NG WLA markets is constrained.

However, eir has concerns about the manner in which regulation is to be withdrawn in these markets as outlined below, including the application of an overbearing, restrictive and unnecessarily long sunset period.

#### *Regulation no longer warranted in WCA market*

95. The European Commission's 2020 Explanatory Note carefully mapped out, based on cogent reasoning, why it considered these markets are no longer susceptible to regulatory intervention. This included a 3CT assessment which identified significantly lower barriers to entry, allowing alternative operators to deploy networks. Additionally, cable network upgrades to DOCSIS 3.x enable the possibility to offering wholesale cable access. As a result, the market is found to tend towards effective competition. All such indicators are present in Ireland.

96. Consequently, eir welcomes the overdue withdrawal of SMP regulation in the Revised Regional WCA Market (RR WCA). This is a positive step to ensure the competitiveness of the WCA market. As eir previously highlighted, ComReg's decision to regulate the Revised Regional WCA market, following the 2021 MTA consultation, was unnecessarily restrictive and not reflective of the level of competition present in various parts of the state. This is especially apparent, as ComReg states in this Consultation, just two years after ComReg decision D10/21

(2021 MTA decision), access seekers (dependent on location) can access WLA or WCA inputs from at least five upstream operators (eir, NBI, SIRO, BT, and Enet) (paragraph 7.78). Rather than rely on overly cautious, unnecessary regulation, ComReg should adopt a proactive principles-based approach to guide its future regulatory decisions.

#### *Declining CG WLA market*

97. eir welcomes the removal of SMP regulation in the CG WLA market and fails to see how ComReg could justify an alternative decision. While eir has retained a 100% market share in the provision of CG WLA since 2018, as recognised by ComReg in paragraph 6.24 of the Consultation this is a declining market. The market has seen a decline of 66% in full and shared LLU subscriber lines from Q4 2018 to Q2 2022. Such a decline will continue.
98. No operator is going to enter the CG WLA market due to the upgrade plans of various SPs to FTTH/P networks. As ComReg recognises, this technological shift is unlikely to reverse or change, and arises from change in demand at end-user level.
99. However, eir considers that ComReg's assessment of whether CG WLA is constrained by NG WLA is unnecessary. ComReg has recognised "*the shift from CG WLA to NG WLA... which would be likely to occur regardless of whether NG WLA was capable of sufficiently constraining CG WLA*" (paragraph 6.31.) Therefore, the decline and eventual cease of CG WLA provision is sufficient to justify removing SMP regulation in the CG WLA market.
100. In addition, ComReg has stated that where eir continues to offer CG WLA, it is likely to be concentrated in the footprint of the IA, in which on a forward-looking basis, NBI's FTTH will likely constrain eir through asymmetric substitution (paragraph 6.207). eir notes that ComReg has taken a forward looking approach to de-regulation in the CG WLA market which it has not applied to the Commercial NG WLA market.

#### *Sunset period*

101. eir considers imposing a 12-month sunset period as unwarranted and disproportionate in all three markets.

102. eir considers a 12 month sunset period for the Revised Regional WCA market as completely unjustified. It is important to note that ComReg has already deregulated a significant number of Eircom exchanges which serve approximately 57% of premises in Ireland — following the expiry of a six-month sunset period. Therefore, to suggest that the remaining ca. 40% of premises in Ireland requires a longer sunset period is not reasonable, logical or consistent (bearing in mind ComReg’s obligation to ‘*promote regulatory predictability by ensuring a consistent regulatory approach over appropriate review periods*’ Article 3(4)(a) of the Code). Article 67(4) of the Code also requires a balancing exercise that avoids regulation continuing for longer than necessary as a result of over-extended withdrawal periods - ‘*National regulatory authorities shall ensure that parties affected by such a withdrawal of obligations receive an appropriate notice period, defined by balancing the need to ensure a sustainable transition for the beneficiaries of those obligations and end-users, end-user choice, and that regulation does not continue for longer than necessary.*’ Taking these factors together, eir submits that consistent with sunset periods used by ComReg in the previous WCA market reviews and mid-term assessments that a sunset period of six months is sufficient.
103. eir fails to understand the proposal of a 12-month sunset period in the IA NG WLA and CG WLA market. ComReg provides two single sentences as reasoning for the 12 month sunset period. ComReg considers that:
- “*need to obtain backhaul and interconnect to new aggregation nodes on SIRO’s and/or NBI’s network in order to facilitate their purchases of NG WLA at new network access points*”.
  - “*It is probable that LLU (CG WLA) is largely being used to provide retail services to business users and sufficient time would be required to ensure continuity of service provision and/or the exploration of alternatives.*”
104. ComReg has provided no analysis as to why such a long lead time is necessary to obtain backhaul and interconnection from either Siro or NBI. Indeed such, services are and will continue to be made available by eir. Similarly, ComReg considers it “probable” that LLU (CG WLA) is used to provide services to business users. First, no analysis is provided by ComReg to support its statement of “probable” or how large such a segment is. Second, ComReg again assumes the extreme scenario that

eir would discontinue services. This is not supported by eir's past behaviour in any market that has been deregulated (meaning that ComReg would need, at a minimum to provide an objective justification for its claims here). Therefore, eir submits that consistent with sunset periods used by ComReg in the previous WCA market reviews and mid-term assessments that a sunset period of six months is sufficient.

105. eir considers ComReg's plan to monitor effectiveness in the CG WLA market, the IA NG WLA Market, and the Revised Regional WCA is unnecessary. The evidence presented in the Consultation demonstrates that the markets are declining or operators are effectively constrained on a forward looking basis. Therefore, to warn operators about further review is an overly cautious and unnecessary regulatory approach which contradicts the evidence for removing SMP in this market.

**Question 10:**

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

106. ComReg's preliminary conclusions on the Regulatory Impact Assessment ('RIA') are critically flawed. The assessment proceeds on the assumptions that:
- a. eir has SMP in relation to Commercial NG WLA market; and
  - b. There are credible competition concerns in relation to the Commercial NG WLA market.
107. Given the costs and risks of distortions associated with inappropriate regulation, it is not enough for ComReg to rely only on general arguments about why it considers particular types of remedy (e.g., access, non-discrimination, transparency, etc.) to be appropriate or proportionate. It needs to demonstrate why the specific formulation of each of the remedies (i.e., their further specification) proposed is necessary, justified and proportionate. The Code stresses in relation to the imposition of remedies that *'In accordance with the principle of proportionality the national regulatory authority shall choose the least intrusive way of addressing the problems identified in the market analysis.'* (Article 68(2)). There is clearly not a mandate to automatically impose the full suite of every conceivable remedy on eir, as is proposed, but rather an explicit obligation to shape remedies so that they are the least intrusive way of addressing objective problems. Such analysis has not been carried out by ComReg in its assessment.
108. Furthermore, it is not sufficient for these justifications to be based solely on generic theoretical arguments made in the abstract in Chapter 7 of the Consultation. Rather, the specific further specification needs to be firmly rooted in the market circumstances in this particular case – for example, its justifications should not be simply 'cut and paste' from other market review proposals. It is also not the case the justification of a generic access obligation means that any further specification

of that access obligation is also proportionate, justified and the least onerous remedy that can be imposed to achieve the objective aim.

109. ComReg’s Commercial NG WLA proposals fail to meet this basic standard. In many cases, for example, ComReg fails to justify why each of the specific forms of access it proposes are justified at all. Furthermore, in other cases its justifications are purely theoretical with insufficient or no engagement with the Commercial NG WLA market realities. See eir’s response to Question 7. Consequently, the potential impact of eir distorting competition is overstated.
110. Given the highly intrusive and wide-ranging set of remedies that ComReg is proposing to adopt (significantly increasing the regulatory burden, for a smaller geographic market), such an approach is wholly inadequate. It also means that ComReg has failed to meet its legal obligations to demonstrate that its proposals are proportionate and least onerous to address the competition concerns identified.
111. The European Commission’s Staff Working Document accompanying the Commission’s 2020 *Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation* notes that:

*“Regulation must be targeted and balanced in accordance with the principle of proportionality. NRAs should therefore choose the least intrusive way of addressing potential harm to effective competition in the identified market. Indeed, an excessive regulatory burden on operators could stifle investment and innovation...”*
112. In that regard, it is worth recalling the relevant provisions of the Code, concerning both the support of investment, and the positive obligation on NRAs to avoid and to remove unnecessary ex ante obligation. While not yet transposed in Ireland, the Code has been directly effective in Ireland since the end of 2020, as confirmed by the European Commission to ComReg. For example, one of the aims of the Code set out in Article 1(2)(a) is to ‘*implement an internal market in electronic communications networks and services that results in the deployment and take-up of very high capacity networks, sustainable competition...and end-user benefits*’. Article 3 provides in respect of General Objectives that ‘*in carrying out the*

*regulatory tasks specified in the Directive, the national regulatory authorities shall take all reasonable measures which are necessary and proportionate for achieving the objectives set out in paragraph 2. In the addition to the objectives of promoting very high capacity networks, promoting efficient infrastructure based competition, Recital 28 states that 'it is therefore vital to promote sustainable investment in the development of these networks.' Article 3(4) stipulates that NRAs 'shall, in pursuit of the policy objectives referred to in paragraph 2 and specified in this paragraph...(f) impose ex ante regulatory obligations only to the extent necessary to secure effective and sustainable competition in the interest of end-users and relax or lift such obligations as soon as that condition is fulfilled.'* Recital 29 states that *'This Directive aims to progressively reduce ex ante sector specific rules as competition in the markets develops and ultimately to ensure that electronic communications are governed only by competition law.'* The Code therefore specifically mandates that ex ante regulation only be imposed where objectively necessary and lifted as soon as possible. This is particularly the case when account is also taken of ComReg legal obligations to act impartially and not to discriminate as between electronic communications service providers. The proposed decision from ComReg includes a number of regulatory buffers which prevent eir from competing on the merits. The net effect of the proposed regulations is that while a range of companies are rolling out FTTH broadband networks, offering wholesale and retail products, eir is singled out for the imposition of extensive obligations concerning notification, standstill time-periods, authorisation requirements, risk analysis notifications, cost controls etc., for the development of its products which are broadly the same as those of its competitors, yet they are subject to none of these restraints or costs.

113. In this response to Consultation we have carefully gone through to highlight where ComReg's proposed remedies (either as a general obligation or further specification of a remedy) are not proportionate, justified or the least intrusive way of addressing potential harm.



## Annex 1 – Access Remedies for the Commercial NG WLA Market

114. In Chapter 9 of the Consultation, ComReg considers set out a number of Access Remedies. We have focussed our response on the following Access Remedies:

- (i) Obligation to meet reasonable requests for access;
- (ii) Specific forms of access;
- (iii) FTTC emulation service on FTTH network;
- (iv) Co-location; and
- (v) Service Level Agreements

### Obligation to meet reasonable requests for access

115. Paragraph 9.28 of the Consultation states that there are specifically three corollaries to the obligation to meet reasonable requests for access.

116. First, that Eircom may only deny requests that are not reasonable. Such a requirement, in general, is consistent with Recital 191 of the Code. However, ComReg has incorrectly and unduly limited, contrary to its obligations, the meaning of Recital 191 of the Code in paragraphs 9.29-9.31.

- In ComReg’s view Eircom may only reject requests based on technical feasibility and network integrity. However, it is clear from the wording of Recital 191 of the Code that there is no such legal power to allow ComReg to only limit eir’s consideration to technical feasibility and network integrity. Recital 191 of the Code states “...[access] requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity.” [emphasis added]. Consequently, Recital 191 is not providing an exhaustive list. The stated requirement of Recital 191 is that any consideration for refusal must be based on objective criteria.
- It is clear that any assessment must be broader than “only” technical feasibility and network integrity. In addition, Regulation 12 of the Access Regulations (and the Code) specifically states that ComReg must also have regard, for example to “economic viability” and the “initial investment by the facility owner, bearing in mind the risks involved in making the investment” in imposing remedies. It is not the case that obligations can be imposed on eir

by means of an Access request, which could not have been imposed on Eircom by means of regulation on foot of the Code.

- As such, ComReg is incorrect in law by stating in paragraph 9.30 that *“Eircom’s commercial strategy, whether wholesale or retail or both, in terms of product or technology, and whether an access request aligns with such, or Eircom’s understanding and assessment of market trends and market needs, do not constitute objective reason for denying or refusing an access request.”* A request may not be reasonable for a number of objective reasons where, for example, based on the market trends and/or market needs may make such a request economically unfeasible. The only stated requirement under Recital 191 of the Code is that any such assessment (for example, in this case, economic feasibility) is based on objective criteria.
- The fact that there are additional considerations which would allow the refusal of an access request is also consistent with ComReg’s view as stated in paragraph 9.33 that *“ComReg does not believe that it would be proportionate to force Eircom to maintain access to facilities once granted in all cases and regardless of circumstances.”* If there are, correctly, proportionate circumstances that allow the withdrawal of access to facilities already granted it logically follows that there are also similar circumstances — using objective criteria — to refuse access based on similar considerations that would make an access request unreasonable.
- Similarly, taking into account Regulation 12 of the Access Regulations which provides that ComReg in making access obligations must have regard to inter alia *“economic viability”*; *“the initial investment by the facility owner, bearing in mind the risks involved in making the investment”*; and *“the need to safeguard competition in the long-term”*. This clearly acknowledges that there may be circumstances which make it reasonable to reject a specific access request — in particular, for example, if the SMP operator already provides viable alternative access/services that meet the needs of the access seeker and that this further access request may have an adverse impact on the business case of the SMP operator.
- The ability to impose Access obligations is derived from the Code, and, when adopted, the implementing Code Regulations. The Code is a harmonising Directive i.e., it sets the limits of the Access obligations that may be imposed. As Recital 5 of the Code notes ‘This Directive creates a legal framework to

ensure freedom to provide electronic communications networks and services subject only to the conditions laid down in this Directive'. NRAs have no legal authority to impose restrictions on SMP designated operators that are more restrictive than those laid down in the Code, other than by means of the exceptional provisions notification process. To do so would contravene the harmonising intent of the Directive. Section 7 of the draft Decision Instrument explicitly exceeds what is permitted by the provisions of the Directive and as such is not a valid proposal. In order for Section 7 to comply with the Code (and indeed the previous Access Directive) it is necessary to remove the provisions that go beyond what is permitted by EU law, in this case, Article 73 and Recital 191.

- The first sentence of section 7.2 states that '*all requests for Wholesale Local Access including Associated Facilities in the Commercial NG WLA Market shall be deemed reasonable.*' There is no provision in either the Access Regulations or the Code which would allow the imposition by an NRA of such a pre-emptive ruling on reasonableness. Indeed, this provision appears to directly contravene the Access Regulations and the Code. Both envisage that it is a matter for the SMP operator to assess requests, and require them to only accept requests that are 'reasonable requests'. It is clear therefore that NRAs are only granted the ability to impose an obligation to meet reasonable requests, but that the assessment of reasonableness is to be carried out by the SMP operator, by reference to objective criteria. There is no provision anywhere in the Code granting NRAs the right to remove an SMP operator's ability to objectively assess the reasonableness of Access requests by pre-emptively legislating that 'all requests...shall be deemed reasonable'.
- The final sentence of section 7.2 states that "*a request for Access may only be rejected, refused or otherwise denied for objective reasons such as where Access, as per the request, is not technically feasible or threatens network integrity and concerns in this respect may not be objectively mitigated satisfactorily by way of suitable terms and conditions.*" Again, the second half of this sentence is a new provision for which there is no legal basis in the Code or the Access Regulations, and which therefore exceeds the limits of the restraints NRAs are

permitted to impose. While eir agrees that any terms and conditions associated with granted access must be fair and reasonable there is no obligation of the type proposed in the Code. As such, both this provision and the first sentence of 7.2 noted above are not enforceable under the established rules on harmonisation and transposition of EU law. It is particularly surprising that, as a secondary instrument, the Decision Instrument is explicitly departing from the language of the Code, when the Code Regulations adopted by the Minister carefully transpose only the terms of the Code and do not exceed it, in the relevant provisions.

117. Second, that Eircom may not withdraw access to facilities already granted. In that respect, ComReg notes *“that that it would be proportionate to force Eircom to maintain access to facilities once granted in all cases and regardless of circumstances.”* eir agrees with this position.
- eir considers that an important consideration for the withdraw of access to facilities already granted is important in the context of the migration of copper to fibre. In that regard, in order to provide appropriate investment signals for infrastructure-based operators building very-high capacity network that any such agreement from ComReg should not be unduly withheld or subject to lengthy migration/copper switch-off periods.
118. Third, that Eircom is required to negotiate in good faith regarding requests for access. eir agrees with this requirement. However, in respect to ComReg’s view that this includes *“Eircom assisting Access Seekers in formulating, for instance, technical aspects and specifications of their requests for access, in light of its knowledge and expertise of its own network and systems”* it is important to note that there is a significant difference in “assisting” access seekers and requiring eir to reformulate an access seekers requirements on their behalf. It is not the responsibility of eir staff to reformulate access seekers requests be it from a technical, regulatory or network integrity perspective – ultimately the access seeker is responsible for their own access request. Those access requests will then be assessed using objective criteria by eir. Again, eir reiterates that as a harmonising measure, the Code does not provide for any such obligation to be imposed on SMP operators, and that per Article 68(3) *‘in exceptional circumstances, where a national regulatory authority*

*intends to impose on undertakings designated as having significant market power obligations for access or interconnection other than those set out in Articles 69 to 74 and Articles 76 and 80, it shall submit a request to the Commission.'*

### Specific forms of Access

119. In paragraph 9.44 of the Consultation, ComReg proposes to impose the following specific access requirements on Eircom:
- (a) to provide access to VUA (including FTTP-based VUA and FTTC-based VUA) and VUA combined with GNP where required;
  - (b) to provide access to co-location, co-location resource sharing and co-location rack interconnection;
  - (c) to provide access to interconnection services, namely In-Building Handover ('IBH'), In-Span Handover ('ISH'), Customer-Sited Handover ('CSH') and Edge Node Handover ('ENH');
  - (d) to provide access to an interconnection sharing service;
  - (e) to provide access to migrations;
  - (f) to provide access to Associated Facilities, including Multicast, traffic-based and circuit-based Class of Service ('CoS') and 1:1 VLAN tagging; and
  - g) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services.
120. eir notes that a number of the specific access requirements constitute a direct re-imposition of existing specific access requirements on eircom pursuant to ComReg D10/18. eir's comments above, concerning the obligation to positively assess the specific necessity for the proposed measure, and in particular to demonstrate that it is the 'least intrusive way of addressing the problems identified', apply to these measures. There is no right to re-impose obligations on eir simply because they have been imposed in the past, and eir considers that ComReg has not followed the steps prescribed, or provided the objective justifications required to engage in the proposed wholesale re-imposition of obligations on what is a newly defined market with competitive conditions that differ significantly from the last time these obligations were imposed on eir in 2018. For example, ComReg is proposing to re-impose an obligation on eir to provide VUA with Geographic Number Portability (GNP). However, eir notes that the obligation to provide VUA combined with GNP is no longer possible due to the change in industry process for porting. This change

means that the gaining Operator leads (i.e., the gaining operator is responsible for) the porting request via the Porting XS (PXS) system. In simple terms, this means the migration to VUA and the porting of the number are now two independent events. Therefore, the only role eir can provide is to facilitate the migration to VUA and respond to the PXS request to port out the number in line with the porting obligations to facilitate the port. eir urges ComReg to carry out the detailed assessment required of all obligations before it makes any final decision. In light of the very limited time given by ComReg to respond to this consultation (and the PIA consultation running in parallel) eir proposes to focus its submission on the new access requirements proposed by ComReg for the WLA market:

- Interconnection sharing service
- 1:1 VLAN tagging
- Emulated FTTC-like service on FTTH network

121. **Interconnection sharing service:** In paragraph 9.76 of the Consultation, ComReg states “*Interconnection Sharing Service provides the Guest Access Seeker with the facility to request Eircom to terminate its VUA traffic on a WEIL which is owned by the Host Access Seeker in circumstances where the Host Access Seeker agrees commercially to allow the Guest Access Seeker to use its WEIL(s).*”
122. However, in proposing such an access obligation ComReg has failed to consider the full impact on all stakeholders — in particular, on eir — for such a proposal. In summary, ComReg’s cursory consideration for the impact on eir is set out in paragraph 9.75 stating “ComReg notes that there is little burden involved for Eircom”. The paucity of ComReg’s consideration continues in Chapter 11 of the Consultation — which only contains an argument for a general obligation of access without considering whether the further specification of a new access obligation in this case for eir to allow “interconnection sharing services” is proportionate and justified. Consistent with Regulation 12 of the Access Regulations (and Article 73(2)(a), in further specifying this access specific access obligation ComReg is required to consider the “...economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection and access involved”. More generally, Article 73(2) also requires that ‘When national regulatory authorities consider the appropriateness of

*imposing any of the possible specific obligations referred to in paragraph 1 of this Article, and in particular where they assess in accordance with the principle of proportionality whether and how such obligations are to be imposed, they shall analyse whether other forms of access to wholesale inputs, either on the same or a related wholesale market, would be sufficient to address the identified problem in the end-user's interest. That assessment shall include commercial access offers, regulated access pursuant to Article 61 or existing or planned regulated access to other wholesale inputs pursuant to this Article.'* ComReg's proposal to allow access seekers to share WEILs fails to consider that there is a number of existing access remedies available to access seekers such that this further specification is unjustified and disproportionate (in particular that it is clearly not the 'least intrusive way of addressing the problem'). For example, the following existing regulatory remedies and commercial services already exist for access seekers:

- Co-location remedies, co-location resource sharing and co-location rack interconnection;
- access to In-Building Handover, In-Span Handover, Customer-Sited Handover, and Edge Node Handover; and
- the presence of a competitive WCA market which provides backhaul service to access seekers on a commercial basis.

123. Similarly, ComReg's proposal favours aggregators to the detriment of eir (with discriminatory effect). eir cannot replicate or offer the sharing of its own WEILs because of regulation – as WEILs are required to be cost-oriented.

124. Furthermore, and crucially, it is clear that such a service will have a negative impact on eir's business case to roll-out FTTH services. In order to make a (potential) return on its investment on FTTH, eir's business case assumes access seekers to purchase a combination of WLA and WCA FTTH services. eir submits that ComReg's proposal fails to consider the impact for this level of access to eir's business case and the implications on encouraging the roll-out of very-high capacity networks. ComReg's proposal therefore fails in respect to regulatory obligations being consistent with Regulation 12 of the Access Regulations and Article 73 of the Code, as well as Recital 28's provision that it is it 'vital to promote sustainable investment in the development of those new networks'.

125. Given the number of alternative access/service available to access seekers which already address this “demand”, ComReg has failed to identify the nature of the problem or the competition problem ComReg is seeking to address through this further specification of a general access obligation. Consequently, Interconnection Sharing is not proportionate or justified. Furthermore, ComReg has failed to consider the alternative forms of access that already supports access seeker’s ability to climb the ladder of investment.
126. **1:1 VLAN tagging:** In paragraph 9.88 of the Consultation, ComReg proposes to require eir to make available a new associated facility, namely a 1:1 Virtual Local Area Network (‘VLAN’) tagging feature which allows the use of C-VLAN ID range by end users to tag their traffic. ComReg simply states that “[u]sing this feature, an Access Seeker can innovate and differentiate its service offerings to their residential and non-residential end users”. ComReg’s proposal fails to consider (as required by Article 73 quoted above) that there is already a number of existing access remedies available to access seekers. eir currently provides an extensive set of medium to high speed data service on its NGN network with 1:1 VLAN Tagging.
127. Consistent with Regulation 12 of the Access Regulations and Article 73 of the Code, in further specifying this access specific access obligation ComReg is required to consider the “...economic viability of using or installing competing facilities, in light of the rate of market development, taking into account the nature and type of interconnection and access involved”. ComReg has failed to consider the implications of such access on the wholesale high-speed quality network market and in particular the impact on eir’s wholesale leased line business.
128. While eir provides an FTTC VEA product, it is important to note that demand to-date has been and continues to be low. In addition, the relevant bandwidth from a technology capability perspective is limited on its FTTC VEA service compared to the services eir also offers in the WHQA market. As such, the potential cannibalisation of eir’s leased line business is limited and does not jeopardise the economic viability of eir’s investment in the WHQA market. However, the economic impact for the provision of an FTTC VEA product is in stark contrast to the catastrophic impact from ComReg’s proposal to offer an FTTH 1:1 tagging service.



129. eir does not agree that the further specification of this access requirement is proportionate or justified. ComReg has failed to consider, as it is required to do, pursuant to Regulation 12 of the Access regulations and Article 73 of the Code the economic viability impact of such a proposal.

Emulated FTTC-like service on FTTH network

130. In paragraph 9.56 of the Consultation, ComReg states that “*an emulated FTTC VUA service is to be provided on the FTTH network, it is to be designed to deliver at least an equivalent level of service typical of a FTTC-based VUA, and priced at no more than the relevant regulated maximum price for FTTC based VUA” [emphasis added].*

131. eir has previously commented on this proposed principle in the context of ComReg 22/13 and is extremely disappointed to note that ComReg proposes to make it a requirement that in respect of Copper-Switch off that an FTTH VUA service must be offered at no more than the regulated wholesale price for FTTC-based VUA. This is not a requirement of Article 63 of the ECC Regulations/Article 81 of Code which specifically considers “Migration from legacy infrastructure”. The Code only contemplates the need for emulation to be of at least comparable quality. It categorically does not require an equivalent setting of an FTTH price.

132. Importantly, while the ECC Regulations provides that, following the designation of an SMP, ComReg may apply inter alia price controls on the SMP operator under Article 56, such price controls can only be implemented to address the nature of the competition problem identified for the focal product – in this case the WLA focal product. As such, ComReg following consultation may impose a pricing remedy on: FTTC-based VUA, which it has in proposing a pricing continuity approach in allowing the regulated FTTC-based price to increase post 30 June 2024 by CPI-0 (see paragraph 9.210 of the Consultation); and FTTH-based VUA, which it has in proposing continued pricing flexibility (see paragraph 9.224 of the Consultation). The ECC Regulations does not allow the imposition, using either Article 56 or Article 63, to justify a separate and completely different price control on FTTH-based VUA in the case of copper migration to FTTH networks.

133. ComReg does not therefore have the authority under the Access Regulations or the Code to specify the relevant pricing for the FTTC-based VUA emulated service on

the FTTH network. ComReg's proposal to include this pricing principle is ultra vires. eir notes that the Code is clear that where an NRA wishes to impose obligations other than those provided in Articles 69 to 74, the NRA is required to make a specific request under Article 68(3) which provides that *'In exceptional circumstances, where a national regulatory authority intends to impose on undertakings designated as having significant market power obligations for access or interconnection other than those set out in Articles 69 to 74 and Articles 76 and 80, it shall submit a request to the Commission.'* The Commission then considers whether to authorise or prevent these measures: *'The Commission shall, taking utmost account of the opinion of BEREC, adopt decisions by means of implementing acts, authorising or preventing the national regulatory authority from taking such measures. These implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 118(3).'*

134. Finally, if such an FTTC-like emulation service is to be developed commercially (and eir recognises that there may be some attractions to do so) then two conditions are already apparent to eir. The first is that the FTTC-like emulation service should still be at a slight price premium compared to FTTC VUA prices. A premium is justified for several reasons. The service will be better quality in terms of reliability, latency, packet loss rate and jitter. Equally, a premium cannot be so low as to undermine potential revenues from higher speed profiles. In order to balance that risk a second condition is required. The second condition is that the FTTC-like emulation service is only available existing customers migrating from eir's legacy copper network (including FTTC) to eir's FTTH network. In other words, the FTTC-like emulation service is not available to existing FTTH customers on eir's network. Such conditions would be essential in light of the Code objectives of promoting very high capacity networks, and sustainable investment in such networks.

### Co-location

135. See also submissions regarding "Co-location" in eir's response to PIA Consultation.
136. ComReg is proposing that the physical co-location product offering also includes a wireless PoH option so that Access Seekers can use wireless backhaul.
137. As eir does not own many masts and is unlikely to build many in the future it does not seem proportionate to impose this remedy. eir notes in any event that the NBP

will have such a remedy and that it is not necessary to impose it as a result in this market review. The major mast network operator in Ireland is Towercom who offer access to both fixed and wireless operators on a commercial basis. If any remedy were to be imposed it would be more suitable to impose it on Towercom, given the separate market in masts. Data circuits in Dublin are provided by Wireless OAOs today, open eir provide a significant variety of interfaces for interconnect and products for legacy, Ethernet and leased line services for network to network interfaces (NNI). There is no demand for a new interface for supporting wireless OAOs and no bottleneck justifying its imposition.

138. eir offers a commercial backhaul service for design and implementation for Wireless Operators (MNO) which is specific to meeting their managed service requirements. Typically these commercial services use existing interfaces, therefore no new point of handover is necessary for Wireless Operators. In any event there would be planning related delays associated with eir facilitating third party operator access to open eir masts for the purposes of wireless backhaul. First of all it would have to be determined, in each individual case, whether or not the installation of backhaul equipment on eir masts necessitated planning permission or determining whether the equipment is entitled to the benefit of exemptions. This would lead to further cost and delays in cases where eir does not own a sufficient number of masts to justify the imposition of such a regulatory burden and where there is no demonstrated market failure.
139. In paragraph 9.59 ComReg states that “ComReg notes that in some circumstances, wireless backhaul may be a viable alternative to fixed backhaul where it is not technically and/or economically feasible for the Access Seeker to use fixed backhaul services.” However, no evidence has been produced by ComReg as to the type of operator it is trying to protect. There is a lack of cogent reasoning as to why ComReg considers it appropriate in the current market to provide an alternative access facility for access seekers for whom “it is not technically and/or economically feasible for the Access Seeker to use fixed backhaul services.” If competitors are not at scale and are not likely to achieve same, then they should not be supported by any regulatory regime — as this would lead to productive inefficiency. Note that this does not imply that sub-scale operator capable of reaching scale should be protected. If there are already enough other firms

operating at scale, then it is not necessary and, indeed, productively inefficient, to offer regulatory protection to such sub-scale firms.

140. Finally, while eir notes that this requirement was also specified by ComReg pursuant to ComReg D10/18, there has been no demand for this product. It is not proportionate or justified to maintain obligations on eir where such regulated services are not demanded, essentially ignoring the objective fact that there is no demand, which must be a key factor in assessing the proportionality of imposing the burden of a regulatory obligation on an operator. It is equally consistent with ComReg's view as stated in paragraph 9.33 that "*ComReg does not believe that it would be proportionate to force Eircom to maintain access to facilities once granted in all cases and regardless of circumstances.*" it is appropriate to remove this obligation.

#### Service Level Agreements

141. In paragraph 9.117 of the Consultation, ComReg states that "*to ensure the quality of FTTH information provided by Eircom to Access Seekers, ComReg considers that a condition of access should be that, upon request, an SLA be put in place regarding the accuracy of FTTH related information.*" Such a position is incorrect in regard to the purpose of SLAs and inappropriate for ComReg to suggest in the context of its statutory requirements to be impartial.
142. SLAs form part of commercial contracts and set out a supplier's commitment to provide services to an agreed quality in terms of timing, e.g., within a specified period. As such, SLAs are attached to services in regard to the performance of activities within certain timings. SLAs are not attached to the "quality of information". Such information can only be provided on a best efforts basis and is clearly caveated as such by eir.
143. If there is a competitive advantage for infrastructure-based operators to provide "better information" regarding its network's availability it would be a natural competitive outcome without the need for regulatory intervention. This is particularly important regarding the amount of FTTH network overbuild that will occur over the market review period between eir, Siro and Virgin Media, where

ComReg continues not to impose equivalent regulatory obligations on either Siro or Virgin Media.

144. ComReg states in paragraph 9.121 that “if new SLAs or amendments to existing SLAs are required as a result of obligations arising from this Decision, these SLAs shall be available to Access Seekers at the launch date for these obligations, i.e., within 7 months of the Effective Date of the final Decision. Eircom may carry out expedited SLA negotiations to achieve the implementation of the updated or new SLAs within the timeline required”. However, the High Court has previously ruled, in respect of a ComReg Direction seeking to compel eir to implement a Decision during the 28 day appeal window, that the ComReg decision appealed ‘may not be operated in such a manner as would impair or curtail eircom’s right of appeal’ (See *Eircom v Commission for Communications Regulation 2005 No.152JR*). In other words, the High Court has ruled that a Decision may not be enforced during the appeal window. Given that Section 10.2.3(d) stipulates that SLA Negotiation Period may last ‘no more than six months’, this would mean that in order for eir to be able to provide for this six month period, it would need to have fully drafted and published all the proposed new SLAs within the first month after the Effective Date, i.e. during its 28-day appeal window, which would contravene the High Court’s ruling, as it would have the effect of removing eir’s right to appeal these SLA provisions. eir requests that this period be amended to a more feasible period that also complies with the High Court’s ruling.
145. In paragraph 9.129 of the Consultation, ComReg states that service levels must be meaningful and that “*Meaningful compensation means that Access Seekers recoup through compensation at a minimum the direct costs and any other loss of value arising from Eircom’s failure to meet the agreed level of service.*” [emphasis added]. This is further reinforced in the draft Decision Instrument, which stipulates in Section 11.2.2. that Service Credits ‘cover at a minimum the direct costs and any other reasonable loss of value incurred by the Access Seeker’. eir accepts, and already provides in its regulated contracts for the payment of reasonable Service Credits for non-compliance with Service Levels, which it considers appropriately recompenses Access Seekers. However ComReg’s proposed measure is highly punitive and goes beyond the established law on the limits of what service credits may legally provide for.

146. As ComReg will be aware, contractual clauses for damages can be categorised as either liquidated damages clauses or penalty clauses. As noted in *Clark on Contract Law*, penalty clauses are generally unenforceable. A liquidated damages clause will only be valid and enforceable if it is a genuine pre-estimate of loss, not if it is a penalty clause. The provision proposed by ComReg would not be a 'genuine pre-estimate of loss' as it is wholly open-ended, requiring estimation on a case-by-case of what the 'loss of value' is for each Access Seeker – this is simply not a liquidated damages clause at all, but rather a pre-determination of liability for both direct and indirect loss. In that regard it also goes far beyond what is considered reasonable in commercial contracts, where liability is inevitably capped and liability for indirect losses is specifically excluded. This is the case in all of eir's wholesale contracts, and eir expects, is also the case in contracts entered into by Access Seekers such as BT, VM, Siro etc. In other words, no reasonable business contracts to accepted unlimited liability for indirect losses either generally or by means of a service credit. In that regard, it is not proportionate and profoundly unfair and contrary to established commercial practice for ComReg to require eir to also compensate the access seeker for "direct costs and any other loss of value". Such unspecified and uncapped liability does not meet the criteria for a legally valid liquidated damages clause (as the damage is not liquidated) and also does not replicate the outcomes or conditions of competitive markets in respect to what would be reasonably expected from contract negotiations. It directly contradicts the liability provisions in eir's ARO which have been in place for many years. In that regard, it is important to note that ComReg has the ability under dispute resolution to review the service level agreements. As such, the incentives for access seekers are first negotiate with eir and then to raise a dispute regardless of outcome with ComReg in the knowledge that the access seeker will have a "no-regrets outcome". Conversely, the power to intervene by ComReg encourages eir to negotiate and provide fair and reasonable service levels.

## Conditions to ensure fairness, reasonableness and timeliness of access

147. In paragraph 9.92-9.93 of the Consultation, ComReg specifically provides an exhaustive list of the requirements on eir to provide access on fair and reasonable terms and in a timely manner. While eir agrees with these general requirements it specifically does not agree with how a number of these requirements are further discussed / elaborated on by ComReg. In particular:
- (i) eir's product development process; and
  - (ii) Changes to the rules or technical standards governing the deployment of access network equipment and network topology including changes to the Copper Loop Frequency Management Plan ('CLFMP').

### Product Development Process

148. In paragraph 9.109 of the Consultation, ComReg specifically sets out a number of timelines and associated actions with each stage. However, in a number of cases the timelines are not proportionate and significantly shorter than today. ComReg has provided no justification or cogent reasoning as to why the existing product development timelines and associated actions required pursuant to ComReg D10/18 are insufficient and do not address the competition problem identified in paragraph 9.106. Paragraph 9.107 of the Consultation merely states that "Eircom's current product development process is complex" but this is justified in the context of "complexity arises in part from the need to accommodate a number of competing priorities using finite resources". Therefore, it is unclear how an alternative product development process proposed by ComReg which is equally complex is capable of addressing the competition concerns raised by ComReg in paragraph 9.107. It is the case that eir is the only body with direct knowledge and experience of the time and work required to develop regulated products. It is therefore disappointing that ComReg did not speak to eir at all about the practical requirements of this process, before publishing a proposal to wholly change it, in a manner that both unfairly truncates, and greatly increases the bureaucracy involved in, the initial stages of product development and amendment.
149. eir notes that the current product development process is published on an external website. The published product development process sets out all the key decision gates and development stages and any process changes are communicated with

the Product Development Workshop (PDW). For ease of reference ComReg’s proposal and the existing extant obligations pursuant to ComReg D10/18 is set out below:

| Activity   | Consultation                     | ComReg D10/18                                |
|--|----------------------------------|--|
| Acknowledge the Request  | Within 3 days of receipt         | Within 3 days of receipt                     |
| Publish request  | Within 15 days of receipt        | Within 40 days of receipt                    |
| Publish engagement plan  | Within 15 days of receipt        | N/a – but need to publish project milestones |
| Publish Proposed solution and <b>indicative</b> timelines plan | N/a                              | Max 85 days                                  |
| Publish Proposed solution and <b>actual</b> timelines plan     | Within a max. 85 days of receipt | N/a  |
| Publish prioritisation   | Within a max. 85 days of receipt | Within a max. 85 days of receipt             |

150. As is evident there are a number of key differences in days and activities across the product development timelines. Each of those differences is discussed in turn below:
151. First, the activity of “Publish request” requires eir to “to include details of the request’s allocated unique reference number (to allow tracking of the request), a copy of the request, and a description of the key features and functionality requested”. Importantly, the number of days proposed to undertake this activity has been very significantly reduced from 40 days to 15 days. No justification is provided by ComReg for the proposed reduction — as such, ComReg’s proposal fails on a number of consultation grounds including proportionality and failing to consider whether existing obligations already address the competition problem identified. There is no consideration of whether this increase in the burden on eir, to be ready to publish within 15 rather than 40 days, is the ‘least intrusive way of addressing the problem identified’ as required by Article 68 of the Code in relation to the imposition and the amendment of obligations. Indeed no problem is identified with the existing time-line at all, which eir processes have been put in place to meet.
152. Importantly, the timeline needs to be sufficient to ensure that:
- i) eir has sufficient time to assess whether the request is complete and to request any clarifications (as necessary) from the requestor;



- ii) the requestor has sufficient time to respond to queries raised by eir;
- iii) eir must then re-assess whether the request is now fully understood based on any clarifications required from the operator; and
- iv) it is only when the request has been confirmed to be complete that eir then undertake a reasonableness assessment using objective criteria. Consequently, eir submits that the current timeline allowing 40 days to complete this activity is appropriate, proportionate and justified.

153. Second, ComReg proposes the activity to “Publish an engagement plan” must be undertaken within 15 days of receipt of request. This is an entirely new activity – which eir has no issue with in principle. However, for the reasons outlined above, it is not possible to undertake such an activity within the first 15 days of receipt of request. Each request is on a case-by-case basis which may require different levels of engagement with operators. Consequently, it is justified and proportionate that eir be allowed sufficient time to plan an effective engagement plan. eir proposes that once the first activity is complete that it will “Publish an engagement plan” within 15 days. Consequently, eir proposes that the timeline of this activity should be within 55 days of receipt of request and no more than 15 days following the completion of the “Publish request” activity.

154. Third, “Publish proposed solution with indicative timeline plan” vs “Publish proposed solution with actual timeline”. The current regulation provided for under ComReg D10/18 is the requirement to “Publish proposed solution with indicative timeline plan”. The requirement for an indicative timeline plan recognises that it is proportionate for forward plans to be subject to reasonable changes — as initial solution assessments and resource planning to provide indicative project timelines can only ever be indicative. Furthermore, it is self-evident that new requests achieving higher prioritisation scores may have necessary implications on the timelines for existing requests and therefore it is correct that plans can only be given as indicative and not definitive i.e., ‘actual’. Such an outcome is also recognised by ComReg in paragraph 9.109 d (iv). Consequently, in accepting that timelines may be reasonably impacted it follows that it is also necessary to accept that the requirement to “publish proposed solutions” can only be reasonably achieved with a requirement to include at that stage an “indicative timeline plan”.

155. For similar reasons therefore it is impossible (as timelines may be subject to reasonable change) as suggested by ComReg in paragraph 9.111 “that once set by Eircom, the product development timelines proposed by Eircom in 9.109 (d) must be adhered to and may only be deviated with ComReg’s consent”. This would imply that prioritisation scores and their impact require constant regulatory approval.
156. Paragraph 9.109 of the Consultation states that as part of the Product Development process that within the 85 days eir must provide “The priority level granted to the request and any impact on the priority granted to other Access request...and where other Access requests are being reprioritised as a result (whether granting a lower or higher priority), the reasons for same”. It is unclear to eir what ComReg is seeking eir to provide additional information on. It is already self-evident that a re-prioritisation arises from a situation where the priority score granted to a new request is higher than an existing priority score. eir requests clarification from ComReg what such additional information could reasonably contain and what additional value it would provide i.e., what is the basis on which ComReg might claim that this would be proportionate. This is particularly relevant where product development and new access requests is a continuing process meaning that it is not justified or proportionate to require eir to produce a report every cycle to justify the re-ordering of CRDs (if such an event occurs based on priority scores within that cycle) when it is self-evident from the prioritisation scores assigned.
157. Finally, eir notes that section 9.10 (ii) provides that the notification period is proposed to be extended by 6 months where “Availing of the new or amended product, service or Associated Facility or continuing to avail of Wholesale Local Access from Eircom on a like for like basis requires Access Seeker to carry out development work to their own IT systems as a result of changes to Eircom’s IT systems”. This language is too broad as it captures “all” IT development regardless of how minor a change. ComReg must clarify its proposal as nearly all requests may require some level of development on behalf of the operator but these may not be material.

#### CLFMP

158. ComReg proposes that eir should be required to seek approval from ComReg in writing for changes to the rules or technical standards for the deployment of

telecommunications equipment in the access network when such changes have the potential to impact on services already available and services in use, including changes to the CLFMP. eir agrees that any operator impacting network changes to the network which do not have an agreed “business as usual” classification should be submitted to ComReg for approval. However, any network changes that do not impact any operator should not need prior approval by ComReg. It is the eir view that a change in this procedure would impede efficient and cost effective development of changes in the network which would ultimately benefit other operators and consumers. It is imperative that some technical changes to meet customer operation requirements or changes to enhance or protect the network can be made in the shortest possible time.

159. For example, step increases in demand will require rapid deployment of technical equipment in the shortest possible time to preserve the quality of service. Requiring ComReg’s approval in writing will only serve to introduce delays in deployment. Any network changes requiring an outage should not require prior approval by ComReg but instead should be managed via the existing Change Management process. Any changes to Requirement for Access to Civil Engineering Infrastructure Network collateral (including CLFMP) contracted in the WLA market should be notified and approved through the normal regulatory governance processes rather than adding another layer of bureaucracy.

## Annex 2 – Transparency Remedies for the Commercial NG WLA Market

160. In section 9.3.3 of the Consultation, ComReg proposes a number of requirements which eir must make publicly available. The specified information to make public as listed in paragraph 9.147 of the Consultation is relatively standard in imposing transparency obligations. There are three elements that eir specifically focuses our response on:

- (i) Any vague or ambiguous language used in reference offers is to be construed in favour of access seekers;
- (ii) Changes to general terms and conditions have to be individually accepted by the access seeker into existing contracts;
- (iii) eir's NGA roll-out plan; and
- (iv) KPIs

each of these are considered in turn below:

### Clear and unambiguous language

161. Paragraph 9.146 of the Consultation states *“For the purpose of meeting transparency obligations, clear and unambiguous wording must be used in all material published or to be provided to Access Seekers. In accordance with general principles governing contracts, vague or ambiguous terms will be construed in the favour of Access Seekers.”* [emphasis added]. While eir agrees that there is a general principle in contract law of contra proferentum, i.e., that a provision should be construed against the party seeking to rely on it, in the first instance, eir would ask on what basis ComReg considers itself to be entitled to codify general contract principles, under Articles 69-74 of the Code. These provisions relate to the imposition of specific obligations relating to electronic communications services, not to legislate for general principles of contractual interpretation with a view to skewing them in favour of Access Seekers and against Eircom. As such it would appear to be an exceptional measure requiring specific notification, a BEREC opinion and Commission approval under Article 68(3).

162. In addition, the proposed measure appears to go beyond, and not comply with the contra proferentem rule, as many of the provisions in Eircom's Access Reference Offer are those prescribed by ComReg i.e., they are not provisions devised or

proposed by eir. In effect therefore, by this measure ComReg is stipulating that regulatory obligations it is imposing by means of the ARO **must also** be construed against eir if there is any vagueness or ambiguity, even if that provision is a result of a ComReg Decision Instrument. This goes well beyond any principles governing contracts, and therefore, ComReg's position is not a priori correct. In addition, as outlined below, such "general principles" cannot be implemented in a regulatory context due to inter alia non-discrimination obligations. It is important to note that in addition to the bulk of the ARO terms emanating from ComReg, others are proposed by Access Seekers so it is not the case that the contra proferentem rule, as applied to the ARO would mandate all "vague or ambiguous terms" be construed in favour of the Access Seeker i.e., what is proposed unfairly favours Access Seekers in a way the general rules of contract law would not. eir notes that given that it has a well-established process of consulting with Access Seekers, if an issue of vagueness or ambiguity arises, then there is ample scope to "close the loop" by raising this, and agreeing to amend the relevant reference offer for all Access Seekers to remove it.

163. eir submits that in the case of a regulated entity where ComReg has proposed to impose non-discrimination obligations that such a "general principle" also cannot apply on a one-to-one basis. It is clear that eir cannot "construe" terms in favour of only one purchaser due to its non-discrimination obligation<sup>77</sup>. Equally, it is not proportionate or justified that such "construed" terms would automatically apply to all purchasers for all the reasons outlined above. More generally, ComReg has not identified any specific problem to justify this proposed new measure.
164. Consequently, eir accepts that on a general principle level that the language it uses should be clear and understandable and that it is sufficient for the existing contract law rules (which apply to both eir and Access Seekers equally) to continue to apply, but that there is no legal basis or no justification to seek to codify and skew contract law against eir in the manner proposed. However, if any such language is subsequently considered not to be clear, eir will consider appropriate remediation and/or clarification.

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<sup>77</sup> There may also be issues in the context of pricing obligations and cost-orientation.

### Changes to general terms and conditions

165. In paragraph 9.176 of the Consultation, ComReg states “for the avoidance of doubt, in relation to existing contracts, text changes proposed by Eircom to the general terms and conditions will not be automatically incorporated into existing contracts. Amendments of existing contracts will require agreement of the parties to the contract as changes to Access Seeker contractual obligations. Eircom can negotiate with Access Seekers regarding any such changes.” eir notes that there are a number of necessary exceptions that must be automatically incorporated into existing contracts for regulatory purposes. These include:
- Eircom’s dispute resolution procedures to be used between it and Access Seekers;
  - Definition and limitation of liability and indemnity;
  - Glossary of terms relevant to wholesale inputs and other items concerned;
  - Changes associated with each of the products, services and associated facilities provided in the Commercial NG WLA Market, or to their technical characteristics including relevant engineering or technical standards for network access; and
  - Changes on foot of regulatory obligations including pricing and non-pricing amendments.
166. eir submits that it is self-evident that to ensure compliance with a number of regulatory obligations including pursuant to any subsequent decision (if any) taken by ComReg on foot of this obligation which requires the automatic incorporation of certain terms and conditions. To require eir and Access Seekers to have to individually negotiate and implement contract changes which have in fact been prescribed by law, is to introduce wholly unnecessary bureaucracy for both eir and Access Seekers. It will also create legal uncertainty for all parties as it will mean that rather than taking effect automatically, regulatory changes will not take effect until further contract negotiation has taken place. It also raises the question of what happens if individual Access Seekers then refuse to accept changes even though they have been mandated by ComReg. Finally, it is important to reiterate that it is necessary, on foot of eir’s non-discrimination obligations, that amendments to its regulated contracts take effect for all Access Seekers equally. This is why it is necessary that the contracts contain mechanisms that allow for this.

Transparency requirements with respect to NGA rollout plans

167. Paragraph 9.180 states that “ComReg proposes in this regard to impose a requirement on Eircom to ensure that the data included in its NGA Rollout Plan is accurate, clear and current. This means that Eircom is expected to proactively monitor the files included in its NGA Rollout Plan in order to identify any inaccuracies and to correct such inaccuracies at the earliest opportunity, and to reconcile the data contained in its NGA Rollout Plan files with as-built information at the earliest opportunity.” eir submits that where inaccuracies are identified they will be removed. However, eir respectfully submits that ComReg use of the definition of “NGA Rollout Plan” to be reconciled with up to date information is nonsensical. ComReg defines the “NGA Rollout Plan” to contain three files, NGA deployment plan (6 months), Order of Magnitude file (3 months) and APQ file. Therefore, to reconcile actual deployed information only requires update of the APQ file as both the NGA deployment plan and Order of Magnitude file are forecast deployment information and accordingly do not contain “as-built information”.
168. In addition, the Order of Magnitude file can contain over 600,000 entries every three months. Each entry represents an individual address. Each address has its own local characteristics and accordingly there may be unexpected issues. Consequently it is disproportionate to impose a *carte blanche* obligation on eir for the data to be “accurate”. As a consequence, and in acknowledgment of same, section 9.12 of the Decision Instrument needs to be amended and deleted “Eircom shall ensure the accuracy and completeness of the information included in the NGA Rollout Plan and to that effect shall in particular”. Information can only feasibly be provided on a best efforts basis as human and technical errors will always arise. Legislation must be necessary and proportionate, meaning that it is the least intrusive way of addressing problems identified, and that the burdens imposed by the regulation do not outweigh the benefits. This means, at a minimum that a regulatory obligation must be feasible – however it is not feasible and not proportionate, to seek to impose an absolute obligation of accuracy, particularly bearing in mind that under the Code Regulations it is a ‘hybrid offence’ not to comply. In that regard, eir notes that the Code Regulations take a more proportionate approach, in that they provide in Section 51(7) that “*in proceedings for an offence under paragraph (6) it is a defence for the undertaking charged to*

show that it took all reasonable steps and exercised all due diligence to avoid committing the offence.’ Again, ComReg is requested to amend its proposal to take a feasible and proportionate approach as required by the Code and taking account of the Code Regulations.

169. In paragraph 9.181 “ComReg proposes further to mandate that additional fields are included in the NGA rollout plans comprising the Deployment Plan, the Order of Magnitude File and Advanced PreQual File as described below. The additional fields are to be introduced by Eircom in a manner that would not require Access Seekers to carry out development work without which it would not be possible for Access Seekers to continue to process files included in the NGA Rollout Plan”. However, for the avoidance of doubt, while the addition of fields may not require development work — the addition of fields will obviously necessitate that access seekers update their systems/code to extract or query those additional fields. ComReg must accordingly clarify its proposed position.
170. In paragraph 9.182, ComReg states (on a number of occasions) that the Deployment Plan data file must contain the “list of cabinets” including associated information of those cabinets. However, cabinets are not used in the deployment of FTTH services.
171. In paragraph 9.183, ComReg “proposes further to require that the Deployment Plan is to be amended with respect to fibre Distribution Points (‘DP’) so that this plan is updated to include information on the identity, geographic coordinates, capacity, installation status, the expected Ready for Order Date and whether the RFO has been passed for DPs, as such information is determined by Eircom, and at least 3 months from the expected RFO when the Order of Magnitude File is updated”. In paragraph 9.184, ComReg proposes two additional information requirements over and above what is required pursuant to ComReg D10/18, namely that “identities of the DPs from which the premises are expected to be served; and “in respect of each entry, the date it was first included and the date it was last amended.” No evidence, or cogent reasoning is provided by ComReg as to why such additional information is necessary to “enable operators to identify the addresses to be passed by FTTP”. Furthermore, the identity of the “DP from which the premises are expected to be served” does not take into account that it is difficult to forecast such specific



information in advance as issues can occur during deployment and for localised reasons the DP may be subject to change. eir submits that consistent with obligations pursuant to ComReg D10/18 that the information provided is sufficient to enable operators to identify the addresses to be passed by eir's FTTH/FTTP network. As set out in the NGA IPM (v30) the Order of Magnitude file is an indicative list of premises identified by their Eircode which are in the open eir IFN FTTH programme and are included in the file at least 3 months in advance of the RFO date.

172. The additional overhead of maintaining the files to record the date for when each entry was first included and subsequent changes offers not benefit to the Operator or the end customer. This exercise can be achieved already by operators themselves by comparing the relevant previous files which are published for differences.
173. In paragraph 9.185, ComReg proposes that entries should be removed if older than 12 months. However, ComReg has not identified any reason for this. eir submits that the benefit of this is highly questionable. eir (like other infrastructure-based FTTH operators) cannot predict what issues may arise which prevent/delay delivering the network. In addition, from a customer perspective it appears counter-intuitive to remove an Eircode which would then require eir to start the whole notification/timeline process again — particularly, in circumstances where localised issues are capable of being resolved. Consistent with the practice today, eir submits that Eircodes are only removed from the Order of Magnitude File once they are published in the APQ.
174. In paragraph 9.186 ComReg proposes that the APQ file should identify in the case of FTTP the Eircode of each premises that is passed and whether or not the premises is connected. However, ComReg has not identified any reason for this additional information in the APQ file when this is already available in the Masked CLI file which can already be compared to each other as both the APQ and Masked CLI contain the ARD ID which is the unique eir identifier.

## KPIs

175. ComReg proposes to specify further this obligation for the time being by reference to the requirements set out in ComReg Decision D04/22. However, ComReg D04/22 sets out the obligation to monitor performance of regulated products which it is required to provide under D10/18. However, the list of regulated products specified by ComReg D10/18 includes products that are now proposed to be de-regulated in this Consultation.
176. As such, eir cannot properly consider and comment on ComReg's KPI proposals without visibility of the details of the KPIs themselves. A set of KPIs that is fundamentally disproportionate would render the entire requirement to monitor and report KPIs also disproportionate. The Code does not contain any provision entitling NRAs to 'further specify' SMP obligations outside of the process prescribed by Article 67, i.e., with public consultation and the notification of measures to the Commission. It is concerning therefore that ComReg states in Section 12.1 that "*Eircom shall publish Key Performance Indicators...as may be further specified by ComReg.*" Section 12.2 then states that "*by way of further specification, Eircom shall meet the requirements as set out in ComReg D04/22*". This appears to leave open the possibility that ComReg may seek to introduce new and different KPIs for Eircom's SMP obligations, by means of 'further specifying' under Section 12.1 i.e., without public consultation or EU notification. Such an approach would be without precedent; all previous KPI Decisions including D04/22 have followed consultation procedures. ComReg is requested to clarify that section 12.1 does not mean that it is seeking to reserve a right to impose new KPIs without public consultation and notification to the EU.
177. Further, the nature, scope and extent of KPIs may also have implications for the proposed timings. Therefore, eir urges ComReg to consult on all aspects of its proposed KPI regime alongside proposals for the KPIs themselves. At most the SMP obligations should set out an enabling power to impose a KPI regime, with all other details left for a subsequent consultation.

### Annex 3 – Price control and cost accounting

178. eir is in broad agreement with the pricing remedies proposed in the Commercial NG WLA market. However, there are a number of aspects that are only evident within the finer detail, behind the headline pricing remedies, that are clearly market distortive and inappropriately insulate other FTTH infrastructure-based operators from competition. eir’s response is divided under the following themes:

- (i) ComReg’s proposed FTTH VUA pricing remedies are anti-competitive and market distortive;
- (ii) eir agrees that a pricing continuity approach is appropriate for FTTC services;
- (iii) eir broadly agrees with the proposed FTTH MST; and
- (iv) ancillary services and facilities.

#### **ComReg’s proposed FTTH VUA pricing remedies are anti-competitive and market distortive**

179. ComReg has failed to consider the market implication and developments (including distortions) of imposing regulatory restrictions on eir’s FTTH VUA products. With eir, Siro and Virgin Media all investing to roll-out FTTH-based networks in the Commercial NG WLA market the strict (and in some case subjective) regulatory pricing restrictions proposed on eir risks stifling the market developments and the very competition that ComReg should be encouraging. There is no assessment by ComReg of these (regulatory failure) risks of market distortion and anti-competitive, discriminatory effect.

180. As noted, currently 64% of eir’s network (in the Commercial NG WLA market) is already passed by another operator. That will rise to 84% within the market review period. [X]. In addition, the future roll-out and upgrade plans of operators to FTTH is a further 900k from eir, 300k from Siro and 1 million premises by Virgin Media (based on market announcements these plans are well in progress and based on projected deployment timelines will all conclude within the market review period). The market positions of eir and its rivals are, therefore, much more balanced, and far from the “competitive concerns” that ComReg assumes could happen. Consequently, ComReg’s proposals to restrict eir’s wholesale promotions/discounts

and lowering eir's FTTH VUA pricing are market distortive and unduly favours and protects Siro and Virgin Media.

181. In paragraph 9.346 of the Consultation, ComReg states that eir can only lower its monthly FTTH VUA price if “[t]he reduction to the price for FTTH VUA is unlikely to dissuade new investment by alternative operators”. Similarly, in paragraph 9.343 that in order for eir to be allowed to lower its FTTH VUA price it must demonstrate to ComReg that the price proposed is not less than the higher of i) than a competing operators FTTH VUA price or ii) eir's proxy cost of deployment using a BU-LRAIC cost model.
182. Such asymmetric conditions and restrictions create an unfair advantage for Siro and Virgin Media. ComReg is effectively shielding Siro and Virgin Media from competition from eir. Conversely, eir's roll-out and competitiveness within areas is not protected from the actions or pricing behaviour of those operators. In fact, contrary to competition law principles and desired market outcomes (even those under ex-ante regulation) eir is priced out of the market by regulatory intervention. By proposing such restrictions ComReg is enabling regulatory failure. In particular, such restrictions/conditions is failing to ensure Article 3 of the ECC in:
- b) *promoting competition in the provision of electronic communications networks and associated facilities; ...*
  - d) *promote the interests of the citizens of the Union, by ensuring connectivity and the widespread availability and take-up of very high capacity networks.*

Similarly, it also does not appear to comply with the provisions of Article 3(4) that NRAs shall, in pursuit of the objectives in Article 3 ‘impose ex ante regulatory obligations only to the extent necessary to secure effective and sustainable competition’. A measure that shields some businesses from competition by preventing their competitor from fairly competing, clearly does not meet this requirement.

183. The risk of regulatory failure is particularly high as the level of overlap expected during the market review period is 84%. While ComReg may argue that it has provided a remedy that “on balance” protects operators and allows eir to compete,

eir submits that no such balance is achieved. The condition of regulatory intervention is that eir's wholesale price must always be higher than that of its competitors. Equally, irrespective of the rival operator's wholesale FTTH VUA price (which is protected from competition from eir in all scenarios) the condition also requires eir to calculate its network cost to demonstrate its prices are above cost. Deploying an expensive "empty" FTTH network that is uncompetitive (because of regulation) reduces the incentive for the regulated operator to invest, leading to reduced innovation, choice and ultimately harming consumers, contrary to the objectives in the Code. Put simply, ComReg's regulatory desire to protect operators such as Siro means that while it is willing for eir to roll-out its network it appears to prefer, from a regulatory perspective, that demand (including switching) is always skewed in the favour of other infrastructure operators. This approach is not consistent with ComReg's regulatory objectives to be impartial and to promote competition and investment in high capacity networks. eir therefore requests that ComReg reconsiders its approach to achieve a more balanced and impartial regulatory outcome.

184. Finally, it is only in what ComReg describe as exceptional circumstances, in paragraph 9.343, that eir would be allowed to price competitively. But again, this is caveated by subjective "case-by-case basis" assessment language and conditions including demonstrating loss of market share. While demonstrating a loss of market share is fairly straightforward, the need to also demonstrate that a price reduction is not less than full deployment costs with reference to a cost model is not proportionate. It would require significant effort to develop a cost model let alone a model that can accurately capture the costs of specific geographies (the difficulty of developing such a model is also recognised by ComReg in the Consultation). Further, it is unclear how this would interplay with the additional remedy proposed by ComReg that the FTTH VUA price could not go below the FTTC VUA price floor.

185. [X].

186. Regarding promotions and discounts we support the relaxation of a ban on wholesale promotions and discounts for FTTH VUA. We also agree that it is reasonable for these to be non-discriminatory and accessible in practical terms to other access seekers. We support promotions and discounts that are clear, easy for

wholesale customers to understand, and do not create any market distortions in unfairly benefitting or disadvantaging certain operators depending on their scale, promoting a level playing field for all customers.

187. We note that use of promotions and discounts is consistent with the open air White Paper on Copper Switch Off and the 2013 EC Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment to which ComReg also refer. Here it is noted that:

*“(49) Due to current demand uncertainty regarding the provision of very high-speed broadband services it is important in order to promote efficient investment and innovation, in accordance with Article 8(5)(d) of Directive 2002/21/EC, to allow those operators investing in NGA networks a certain degree of pricing flexibility to test price points and conduct appropriate penetration pricing. This would allow SMP operators and access seekers to share some of the investment risk by differentiating wholesale access prices according to the access seekers’ level of commitment. This could result in lower prices for long-term agreements with volume guarantees, which could reflect access seekers taking on some of the risks associated with uncertain demand. In addition, pricing flexibility at wholesale level is necessary to allow both the access seeker and the SMP operator’s retail business to introduce price differentiation on the retail broadband market in order to better address consumer preferences and foster penetration of very high-speed broadband services.”*

188. To summarise, the European Commission envisage that flexibility and innovation be allowed in the pricing of wholesale access services to increase the penetration of very high-speed broadband services like FTTH.

189. However, while ComReg proposes to allow promotions and discounts for FTTH it nevertheless proposes to restrict eir’s ability to offer competitive wholesale promotion/discounts. Such restrictions to eir’s FTTH VUA promotional price undermines competition in the market, ComReg states in paragraph 9.356 that wholesale promotions/discounts will only be allowed if “ComReg is satisfied, on the basis of the information provided by Eircom, that the promotions or discounts,

*individually and in aggregate, are unlikely to have a material impact on economically efficient alternative investment by alternative network operators that are either investing or planning to invest in VHCNs*". Such a condition is completely subjective. Equally, ComReg proposes that any wholesale promotion/discount cannot be lower than the published FTTC VUA wholesale price. Any signal to the limit of where eir cannot price below simply means that other providers can price (even slightly) more aggressively safe in the knowledge that eir is prevented by regulation from competing with them. Finally, eir is aware the Siro has a number of active promotions which specifically target eir's copper base (including FTTC). This again highlights the risk of regulatory failure. ComReg is proposing that eir cannot develop a wholesale promotion which may possibly have "*individually and in aggregate*" a "*material impact*" on Siro's business case — but in the knowledge that Siro (and possibly in future Virgin Media) already have no such restrictions they can specifically target promotions that may conversely "*individually and in aggregate*" have a "*material impact*" on eir's business case.

190. ComReg's criteria leave significant room for interpretation, can be difficult to assess and reflect a degree of intervention that is unwarranted. Further, the discussion leading up to that proposed criterion does not reflect the realities of the Commercial NG WLA market where three operators are rolling out FTTH in direct competition. See also Copenhagen Economics Report — in particular, paragraphs 4.79-4.82.
191. The key parameter driving the return from a fixed network investment is the take-up rate. It is unrealistic to suggest that eir has the ability or motivation to target geographic discounts at the wholesale level to discourage competing network investments. This assumes a level of foreknowledge of the deployment plans of other operators that is highly unlikely. Equally, it is disproportionate and lacks impartiality in the knowledge of market realities that rival operators have the freedom to offer and target wholesale promotions at eir's copper and/or FTTH network but eir cannot respond. For a measure to be proportionate it must be the least intrusive measure to address the problem identified **and** the disadvantages caused must not be disproportionate to the benefits. In the present case, ComReg has not carried out this assessment, but for the reasons outlined above, it seems clear that the 'unintended consequence' of shielding Siro and Virgin Media from

competition is a serious one which must be taken into account in assessing whether the measure is disproportionate, which eir believes it is.

192. ComReg must separate the desire to protect competition from the current disproportionate proposals which only protects competitors (which is not an objective of the Code). Not only is there a risk that eir cannot compete on the merits but that the position of Vodafone as both joint venture partner in Siro and anchor tenant in Virgin Media's wholesale network means that network competition is dampened entirely with the loss of consumer welfare through the regulatory sterilisation of eir's competitiveness.
193. eir should have the flexibility, including through wholesale promotions/discounts, as anticipated in the 2013 EC Recommendation, to price its FTTH VUA services at competitive prices. eir suggests that ComReg develop a regime of "standard FTTH promotions" that could be agreed, are non-subjective and could be implemented with minimal ComReg scrutiny (i.e., avoiding the need for 3 months of assessment by ComReg)<sup>78</sup>. These would include clear evaluation criteria (e.g., not geographically targeted and not discriminatory), a minimum notice period etc.

### **Pricing continuity is appropriate for FTTC VUA**

194. Gigabit connectivity has been highlighted as a priority of the European Commission for the 2020-2024 legislative cycle. In particular, the Commission's Communication on Shaping Europe's Digital Future<sup>79</sup>, the Recovery Plan for Europe<sup>80</sup> and the Commission's Recommendation on Connectivity<sup>81</sup> focus on widespread availability of ultrafast broadband.
195. While we can appreciate, and support, ComReg's arguments on the importance of FTTC VUA as a pricing anchor — we submit that it unnecessary where there are

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<sup>78</sup> In paragraph 9.376, ComReg proposes a three month assessment window for any proposed wholesale/promotion or discount. Followed by a further 2 month notification to operators. To wait 5 months to get an offer into the market is too slow. While eir agrees it is appropriate to give retail service providers appropriate notice it is unreasonable to assume ComReg needs 3 months for its review.

<sup>79</sup> European Commission, *Shaping Europe's digital future*, 19 February 2020, [https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020\\_en\\_4.pdf](https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf)

<sup>80</sup> [https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe\\_en](https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe_en)

<sup>81</sup> Commission Recommendation on a common Union toolbox for reducing the cost of deploying very high capacity networks and ensuring timely and investment-friendly access to 5G radio spectrum, [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=69383](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=69383)



competitive offers that can constrain the pricing flexibility of eir. Further, there is a risk that an anchor based on FTTC VUA price (at low levels) may not offer sufficient flexibility for FTTH prices to encourage efficient competitive investment and outcomes.

196. Nevertheless, eir considers that a price cap (subject to CPI adjustment) provides a balance between allocative and dynamic efficiencies, which should be of key concern to ComReg at this particular juncture. In addition, such an approach would ensure that ComReg's regulatory obligations are met, in particular encouraging efficient investment and innovation as well as regulatory certainty and stability.
197. The migration of users from the legacy network is currently customer demand driven and it is anticipated that this will continue to be the case in the short term. As a consumer's assessment of whether to switch to full fibre will depend on the relationship between the on-going charges for such a connection and the charges paid for their existing connection. If the prices of copper-based services (including FTTC) are low (either through commercial or regulatory intervention) then adoption rates for full fibre broadband will also be low.
198. In addition, low wholesale access prices for legacy networks delay infrastructure investment in NGA by alternative operators, as it increases their opportunity cost of investment. This is also true for resellers. The more alternative operators invest in their own infrastructure, the more the incumbent is incentivised to invest in response. eir considers that the interaction of these effects necessitates wholesale access prices for copper services that remain stable over the short term and have the flexibility to increase over the medium term, in order to create the correct signals for different types of operators and users at different points in the migration process.<sup>82</sup>
199. In recognition of this, a number of regulators have already started to move away from the classic ladder of investment based pricing remedies of cost plus, even for copper prices, in recognition of the dual role that copper plays in funding NGA

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<sup>82</sup> This holds true in the Intervention Area where legacy broadband prices can impact the migration incentives to the State funded FTTH network as well as in commercial areas.

deployment including incentivising other operators and migration incentives for legacy networks.

200. The Ofcom approach in recent years has been to set prices that are intended to encourage investment in competing networks, rather than solely by reference to Openreach's costs. eir considers that such an approach is relevant for FTTC services and that ComReg should exercise its discretion in setting pricing controls in favour of an approach that supports investment in fibre networks through promoting network competition, while protecting consumers from excessive pricing or a loss of retail competition.
201. Ofcom also considers that pricing continuity sends an important signal to investors that it continues to be committed to setting wholesale prices that support investment, thereby creating more stability and certainty over the medium term. Investor reports have demonstrated how these pricing signals contribute to investor confidence and a positive regulatory environment. A departure from this strategy and return to cost-based pricing would undermine the incentive for telecoms providers to build new networks. eir considers that such an approach would also be appropriate in the Irish context.
202. Prices act as a signal to consumers and service providers in that, consumer preferences determine how much they are willing to purchase at a given price. In this manner, price controls can encourage inappropriate economic activity. There is much discourse around the effect of access pricing on investment incentives for new technologies as well as on the migration from old to new technologies. Regulation can affect innovation especially in highly regulated industries. As network infrastructures are expected to be a strong contributor to economic activity, growth and indeed recovery in light of the COVID-19 pandemic, a fast transition from old network technologies to new ones will be a key challenge for policy makers. Full migration from copper networks is both socially and economically desirable.
203. ComReg proposes to apply a price cap of 'CPI-X' (where X=0) to the currently cost oriented FTTC VUA prices post 30 June 2024. Setting X to zero is reasonable as efficiencies have already been taken into account in in the ANM which is the basis

for the initial price path.<sup>83</sup> It would be unreasonable to project increased efficiencies going forward given the adjustments already made. In terms of the CPI adjustment we understand this can be made annually (at eir’s discretion) based on the percentage change from the previous calendar year. For example, assume we were to determine the price from 1 July 2024 to 30 June 2025 this would entail calculating the percentage change from June 2022 to June 2023<sup>84</sup>. ComReg should confirm whether this is a correct interpretation and make clear the notification requirements for eir. Similarly, clarification is needed by ComReg as to whether such price changes can only occur on 1 July each year.

### **Broad agreement with the proposed, albeit unnecessary, retail margin squeeze test**

#### *Cost orientation for FTTH services is unwarranted*

204. eir agrees that cost orientation is too inflexible and uncertain where new networks are being rolled out or where there is uncertainty about future demand volumes or cost levels for FTTH. The risk is that strict cost orientation will discourage operators from investing in new technology and limit their ability to set retail prices that encourage consumers to transition from copper or FTTC to FTTH. The primary concern of ComReg should be securing investment in new technology and ensuring an orderly transition from older technology solutions like copper to FTTH.
205. The move away from cost orientation is clearly reflected in the European Commission Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (“the 2013 Recommendation”) which is specifically intended to apply to NGA services such as FTTH. The 2013 Recommendation abandoned the older 2010 Recommendation which had recommended the use of Long Run Average Incremental Cost (LRAIC) models with the addition of risk adjusted premia for the setting of wholesale access rates for fibre-based broadband services. Instead, the 2013 Recommendation offers the prospect of pricing flexibility and introduced an “economic replicability test” (ERT). The 2013 Recommendation is important because it represented a fundamental departure

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<sup>83</sup> We note the ongoing court case with ComReg on the level of FTTC prices and that subject to the outcome of that court case the price path for FTTC VUA could be increased.

<sup>84</sup> Based on <https://visual.cso.ie/?body=entity/cpicalculator>.

from the approaches to costing that had been adopted by NRAs prior to that point. It concludes that whilst the costing methodologies which had been employed throughout the 1990s and 2000s should be retained for the setting of wholesale rates for the unbundled local copper loops that are provided as an anchor service, they should not be applied when setting wholesale rates for new high speed broadband services which involve a much higher degree of demand uncertainty and technology risk.

206. In paragraph 9.240 – 9.241 of the Consultation, ComReg refer to the development of a FTTH cost model. eir can see limited benefits from building such a model. ComReg has clearly established that cost orientation as a remedy is not fit for purpose, and we fail to see market conditions evolving to such an extent that it would make cost orientation an appropriate remedy at any time in the future. In this regard it is important to note that investments in FTTH will depend upon expectations of returns across multiple regulatory periods, not just the current review period. Introduction of a cost orientation remedy or simply the prospect of future capping of eir FTTH VUA prices at cost-oriented rates will be viewed by investors as reducing the prospect of earning a return on assets and hence deter investment.
207. ComReg should commit to a regulatory approach over the lifetime of the investments that will not inappropriately ‘curtail’ the returns of operators and thereby dampen their future investment incentives. One way to do this is through the “fair bet” approach that eir has referenced in previous submissions to ComReg. Such an approach would allow operators the opportunity to recover sufficient upside to compensate for the downside risk of investment.

#### Ex-ante margin squeeze test

208. The Code specifically requires NRAs to consider pricing flexibility as the default approach (if a pricing remedy is deemed necessary) to addressing SMP where:
- a demonstrable retail price constraint exists due to (potential) competition on the retail market; and
  - effective and non-discriminatory access is ensured by an ex-ante Economic Replicability Test (ERT) and by Equivalence of Inputs (EoI).

209. As discussed by ComReg these conditions are met in Ireland. At a principle level we therefore agree with ComReg that it is appropriate to allow pricing flexibility in the market and refrain from implementation of cost orientation that would be detrimental to the development of the market. As evidenced in the Copenhagen Economics Report, eir does not agree however that a pricing remedy is not necessary.
210. Use of an ERT means that the margin between the retail price of the relevant retail products and the price of the relevant NGA-based regulated wholesale access inputs covers the incremental downstream costs and a reasonable percentage of downstream common costs. Practical implementation of this test requires consideration of several methodological choices as evident from ComReg's analysis.
211. We generally agree with ComReg's apparent choices, but the actual implementation requires us to make several detailed methodological choices based on our interpretation of ComReg's requirements. Therefore, we welcome the invitation for a workshop with ComReg to ensure agreement on the implementation of ComReg's requirements in the ERT model. We have included the draft model of what we consider the requirements are (with a few justified minor adjustments. For example, as the retail line market and wholesale call market is no longer regulated we have, consistent with other unregulated services and competition law only, included the LRIC).
212. In the following we make specific comment on both principles and more detailed implementation issues. We have grouped these into
- a) the choice of relevant retail products and their aggregation level;
  - b) considerations relating to the relevant time period and periodisation;
  - c) The relevant cost standard;
  - d) notification and trigger for the test; and
  - e) the workshop.

Choice of relevant retail products (flagship product)

213. According to the EC Recommendation, the ERT should only be conducted on the most relevant (flagship) products offered by the SMP operator. These products are identified based on their relevance for current and future competition. The EC Recommendation allows for NRAs to consider testing niche or lower-quality products if they are important to access seekers. The ERT must also allow the SMP operator's commercial freedom and ability to engage in rational non-discriminatory pricing strategies, and not limit their ability to conduct penetration pricing by offering low prices initially. The European Commission does not specify how many flagship products should be tested.
214. ComReg proposes that the "flagship products" in the ERT should make up at least 75% of the total FTTH retail base. This could require eir to report on numerous individual bundles, at very low and immaterial volumes. eir proposes instead to report on the top 10 most popular eir bundles and the most popular eir stand-alone broadband product, with a minimum threshold of 50% of the overall FTTH base.
215. In paragraphs 9.598 - 9.599 of the Consultation, ComReg proposes that eir submit a modified quarterly monitoring report for all FTTH retail offerings (standalone and bundled), which includes the actual volume and revenue associated with each plan. However, it is not clear whether this would just be for the flagship product or all FTTH offers. Secondly, whether this report is still based on a DCF multi-year period – which, if so, would then involve retrospectively amending projected margins with actuals but still include forecast for the remaining DCF multi-year period. This level of adjustment/reconciliation seems unnecessary and complex – eir would in effect be demonstrating compliance twice and both on a forward looking basis. The first, demonstrates compliance over a forward looking 42 month period and the second a hybrid of actual outcomes for the previous quarter and forecast remaining 39 months. This would also appear contrary to ComReg's objective of using a multi-year period to assess whether ongoing margin on flagship products at a particular point in time is sufficient to recover costs over the average customer lifetime. To go back and retrospectively update for what actually happened over the customer lifetime is unnecessary and introduces systematic bias. As the probability of the regulated firm benefiting from things going better than expected should be similar to that of things going less well (i.e., higher costs). Therefore, eir submits that the

test is whether replicability is possible at the time the offer is made – that is not to say actual outcomes are ignored as they will help inform the forecast of future possible outcomes over the next 42 month period. [X]

216. eir proposes that a monitoring report is sent to ComReg which demonstrates that based on the multi-year period approach over the next 42 months that the margins are sufficient to recovery of those costs (i.e., based on a positive NPV calculation) – i.e., demonstrating that the flagship offer is replicable based on the cost including mix of promotional cost etc – that is currently in the market from eir on those flagship products.

#### Time frame and periodisation

217. There are two main options for periodisation: the period-by-period approach and multi-period approach (such as DCF). The period-by-period approach has the advantage of being simpler, especially when it comes to input data. It requires adjustments and amortisations for cost items that yield benefits beyond the period that is tested, but being constrained to one period only, it does not provide flexibility for changes in price and costs during a customer life. ComReg proposes to use the DCF method. While this is more complex to implement, we have in our draft model implemented these calculations.
218. The EC Recommendation states that an appropriate reference time frame for the analysis is the period in which the end users contribute to covering two types of downstream costs, specifically: i) Downstream costs that are annualised according to a depreciation method and a useful economic life that is appropriate for the assets in question, ii) Other downstream costs that are not normally annualised (typically sales and acquisition costs) and that the operator incurs to acquire customers and that should also be covered during the average customer lifetime.
219. We have in our draft model implemented an average customer life of 42 months in line with ComReg’s proposal. [X].

#### The relevant cost and cost standard

220. There are two main approaches to calculate the downstream costs when performing an ERT:

- An accounting approach otherwise known as a the Fully Allocated Cost (FAC) method or Average Total Cost (ATC)
- An economic approach implemented by, for example, using the long run incremental cost (LRIC) method.

221. The EC Recommendation suggests that the incremental cost of providing the relevant downstream service is the appropriate standard and that LRIC+ (i.e. LRIC including common costs) should be used to calculate costs related to the downstream activities. The EC states that a ‘reasonable’ percentage of common costs should be included in the downstream costs but does not provide guidance on what is ‘reasonable’.

222. One commonly used approach in costing models is to allocate common costs using the equi-proportionate mark-up method, where a percentage is calculated as the ratio of total common costs to total incremental costs. However, this is only one of potentially many ways such costs can be attributed. There is no single correct mechanism for allocating common costs or indeed for establishing what a ‘reasonable’ share is. Any allocation between products will largely be arbitrary. Arbitrary allocations are not consistent with the competitive dynamics and as such allocation would clearly distort eir’s ability to compete – to the detriment of end-users.

223. An alternative way to see this is simply to recognise that a positive margin for an ERT above incremental cost, recognises that an operator is contributing to its common costs. There is no need to specifically identify a share of common cost in the ERT. Common costs are recovered across the broadband market as a whole and not in defined regulatory regions or at the individual offer level. Further, in competitive markets, the quantum of recovery of common costs will naturally fluctuate year-on-year and recovery decisions between specific packages or portfolios will be dependent on the competitive strategy decisions of individual operators.

224. Separately, there are two main options available to determine the level of efficiency of an operator cost base:



- Equally efficient operator (EEO) – An operator in the downstream market (which then needs to procure essential inputs from the upstream division of the SMP operator), with a scale and efficiency level similar to that of the SMP operator.
- Reasonably efficient operator (REO) – An operator in the downstream market (which then needs to procure essential inputs from the upstream division of the SMP operator), with a scale and efficiency level lower than that of the SMP operator.

225. The EC Recommendation is clear that an EEO approach should be used. This is also appropriate given the stage of market development of the Irish broadband market.

226. As is evident from retail market shares, the Irish market has several well-established large multinational players. It is highly unlikely that a new entrant will enter the market to offer exclusively standalone broadband retail products. A new market entrant capable of achieving sufficient scale is more likely to acquire an existing operator and assume their market share rather than to try and build their base solely from churn between operators. Consequently, the use of an REO cost base would not promote efficiency, would not lead to sustainable competition, and would not maximise benefits to end-users. Consequently, eir agrees with ComReg's proposed (continued) use of EEO. The use of EEO broadband costs is also directly quantifiable from eir's AFI (which eir proposes to continue to make available to ComReg as part of its Cost accounting obligation).

#### Trigger for the test and notification

227. The underlying pricing principle followed by ComReg is flexibility. A tenet of this approach is that it limits the requirements for testing and approval by ComReg ensuring commercial flexibility is not hampered. Essentially, there are several rules that ComReg could propose: i) Periodic testing, ii) With launch of new products/promotions and/or iii) by complaint or by ComReg's own investigation. ComReg's proposal would appear to contain all three elements.

228. eir does not agree with ComReg's preliminary view that there is a need for a pre-clearance and approval by ComReg for eir to offer a new or revised bundle. This is completely disproportionate. The ex-ante margin squeeze test regime is long established. eir propose that considering that as promotion activity and accounting

for costs (for a number of double-play, triple-play and quadruple-play combinations) and the fact that the appropriate treatment for assessing the impact of these promotions is well known and agreed by eir and ComReg that such promotions would not require pre-notification.

229. Equally, any bundle that does not contain a flagship product (i.e., top 10) would not require pre-notification to ComReg. Under this proposal, eir would simply be required to provide the details of the retail amendment (e.g., relevant Bundle name, promotions details etc.) of the new or revised Bundle to ComReg pre-launch. Such notifications would not require ComReg's approval for launch. However, notifications would include a relevant retail notification number to facilitate the identification and monitoring.
230. In paragraph 9.519 ComReg notes that the portfolio (group) of flagship products may change over time and from one quarter to the next and that ComReg may identify other FTTH retail offerings which should be regarded as flagship products based on churn trends, expectations for a certain product to have significant market impact and relevance to other operators. In addition, paragraph 9.520 makes clear that ComReg can request that eir show proof of their compliance with the margin squeeze tests where complaints are received from RSPs about the compliance for specific FTTH retail offerings. eir finds this wholly inappropriate, unnecessary, and contrary to the concept of a flagship product.
231. The idea of conducting a margin squeeze test on a flagship product rather than individual products is that the flagship is a representative of eir's offerings and competition in the market. It gives eir the flexibility to compete and avoids time-consuming and resource-intensive notification procedures. With the additional caveats to the testing regime as explained above, the concept of a flagship is essentially rendered meaningless. eir has no incentive to launch a non-flagship product that fails the margin squeeze test. Products outside of the flagship are (by definition) marginal with little demand relative to other products. If such products were to become popular they would over time be added to the flagship ERT. In addition, eir fails to see why RSPs should have the option to request eir demonstrate compliance for products that have few subscribers.

232. While we recognise that an ERT (if required) for FTTH VUA must be effective in the sense that buyers of FTTH VUA can replicate a flagship portfolio of eir's commercially most attractive fibre-based retail products, we believe, as a general rule, this only requires the ERT to be carried out no more than twice a year.
233. The practice of the MST since 2018 (and its predecessor in 2013) is that all changes in retail proposition, including price promotions, must be notified in advance with an updated model that demonstrates future compliance. In the context of the fierce price competition evident in the market for retail FTTH bundles during migration from copper this micro-management is no longer appropriate or justified. While the test will be populated in advance by eir with LRIC costs for the flagship portfolio to give internal assurance of compliance, the requirement to pre-notify every new retail initiative should fall away as described above.
234. Instead, we suggest internal monitoring focusing on two types of checks. The first is that each new offering within the flagship portfolio is capable of passing ERT at LRIC on an individual basis. The second form of monitoring is to monitor that the flagship portfolio continues to generate a positive margin and therefore contribute to ongoing common costs. For internal governance reasons, including requirements to manage the portfolios over time, eir will continue to monitor margins on a quarterly basis. Then every 12 months eir will prepare a report for ComReg using that model (the same as today) to demonstrate compliance. At ComReg's request an interim margin report can be provided to demonstrate ongoing compliance (with no more than 2 overall reporting obligations in any 12 month period).

### Workshop

235. In paragraph 9.577 ComReg proposes that a workshop be scheduled with eir to discuss and finalise the full list of revenues and costs that should be included in the DCF Model. We support the idea of a workshop. In the interest of the obligations of fair procedure and consultation, if required, eir will provide a supplementary response to Consultation to cover any areas which are relevant based on discussions from the workshop.
236. We have created a draft working spreadsheet model of the ERT, based on our initial understanding of the ComReg specification. This model operationalizes Tables 52

and 53 in the consultation. Through this work, we have identified several issues that require further discussion with ComReg.

237. Consider for example R1, the forecasted monthly headline price of the standalone and bundled FTTH flagship product(s). Here we propose for simplicity that all bundles will have the 2P FV/BB price as the headline price. Similar to the current approach for bundles that include Mobile and/or TV, a revenue and cost from the relevant margin model for the unregulated service will be included in the margin calculations. The workshop will allow further discussion on these issues and allow us to further develop and refine the model.
238. ComReg notes in paragraph 9.537 that the allocation should not be based solely on costs common across the set of flagship products, but rather on Eircom's total common costs and should be allocated using an EPMU approach. However, it is not clear to Eir what this means. In our view this translates into, no change from the 2018 Bundles Decision, i.e.,:
- Calculate the total Retail broadband costs for all broadband speeds, i.e. a LRIC cost and a Fixed & Common cost per subscriber.
  - Use the LRIC cost as calculated and apply to FTTH bundles in the flagship product by product approach and apply the Fixed & Common cost per subscriber to the overall portfolio approach.

### **Ancillary services and facilities**

239. Ancillary services and facilities in the WLA Market include CG and NG services and facilities such as connections and migrations, co-location, multicast, Class of Service, VLAN tagging, and interconnection. As noted by ComReg the existing price control for CG and NG ancillary services and facilities in the WLA Market is in the form of an obligation of cost orientation. However, ComReg provide no evidence to support this conclusion but simply note that:

*“... ancillary services and facilities continue to be required to support a level playing field amongst operators and there are practical difficulties associated with replicating them”.*

240. While these services play an ancillary role compared to the main services, there is still a need to carefully analyse the development of these services and determine whether cost orientation remains an appropriate remedy. Cost orientation cannot simply be assumed to continue to be the most appropriate remedy in a market that is constantly evolving. Equally, ComReg cannot impose a cost-orientation obligation on ancillary services for markets that are no longer regulated.
241. ComReg does discuss FTTH connections and migrations at some length. ComReg conclude that an equalised connection/migration charge approach is still relevant and that a cap of €100 be applied where eir has the ability to fund any deficit in customer connection costs from both ongoing rentals and future migration charges over the lifetime of the connection. eir supports this approach. In a market with infrastructure competitors and demand uncertainty and evolving technologies the success of next generation broadband access is far from clear cut given the significant cost involved.
242. In previous decisions ComReg developed the position with separate price controls for FTTH connection (by cost orientation) and for FTTH rental (by margin squeeze test). The concern articulated by ComReg at the time when eir charged higher connection fees for FTTH services was that this would exclude other retail service providers from the market. Indeed, eir accepted this and reduced the €200 connection charge to €100 in line with rates charged by competing networks. In short, even without ComReg intervention, countervailing buyer power in the wholesale market has driven FTTH connection fees downwards.
243. At current price levels the connection fee will also require to be levied at migration between retail service providers to have any prospect of recovering the home connected investment over the life of the FTTH network. Recognizing that retailers are partners in selling FTTH broadband access, we believe that charging a national price of €100 per FTTH event provides appropriate signals to the market that eir is committed to its fibre investment.
244. However, we do have concerns with ComReg's analysis. First, we question the need for cost orientation. The combination between competitive price pressure and the inclusion of connection/migration fees in the Retail margin squeeze test is sufficient

to ensure against excessive FTTH connection fees. Second, ComReg state that information available to them suggests eir's annual average FTTH connection costs has been declining in recent years. However, this simplified analysis should be approached with caution. Setting connection/migration charges is complicated by several factors, including: i) the actual investment per connection, which can vary significantly by geography, ii) the return on investment, which should include the risk associated with uncertainty in demand for FTTH services over the connection assets' lifespan, iii) the economic life of the assets used to deliver the FTTH connection service, and iv) the number of connection and migration events over the economic life of the FTTH path into the building served. Referring to eir's AFI (Annual Financial Information) for a single year is meaningless [8]. Third, ComReg also appear to make the simplified assumption that migrations always will command a very low incremental cost suggesting this activity can be handled automatically. This is not accurate. There will in some cases be a need for manual handling. Further, migration costs will depend on the model of connection. Where an initial connection has been made for a retail service provider that has the NTU option and a subsequent re-connection is to a service provider that chooses the ONT option, there are costs incurred at this re-connection event. The first is the equipment cost of the ONT, the second is that of dispatching a contractor to connect the ONT to the NTU including a testing and commission service. These costs exceed €100.

## **Annex 4 – Accounting Separation**

245. ComReg has failed to use the consultation process as an opportunity, in the light of a rapidly evolving technological and competitive environment, to critically examine the on-going necessity (and for the re-imposition) for the maintenance of the full suite of regulatory obligations. ComReg merely takes the “easy way out” and imposes accounting separation obligations including the potential publication of sensitive commercial information without consideration of the detrimental impact such stringent regulation might have on eir or the Industry in general. In particular, eir submits that:

- (i) The requirements specified in ComReg D08/10 are outdated;
- (ii) Accounting separation is not justified in the Commercial NG WLA market; and
- (iii) It is not appropriate to publicly publish FTTH statements

### **ComReg D08/10 is outdated**

246. ComReg is proposing to impose Accounting Separation and Cost Accounting obligations for the Commercial NG WLA market and merely references ComReg D08/10 as the Decision Instrument that eir is required to publish in accordance with (a thirteen year old Decision).

247. In summary ComReg D08/10 states that the HCA Separated Accounts be completed on a “fairly presents” basis, Additional Financial Statements (AFS) which may be required to be prepared on a “properly prepared” basis or as unaudited Additional Financial Information (AFI). A review of D08/10 is long overdue particularly as it pre-dates all of the NGA technology and market developments that are being contemplated in this review.

248. Since ComReg D08/10 was published in 2010 there are new International Standards which are relevant to Regulatory Financial Statements. As a result, auditors are now required to undertake their audit of given Regulatory Financial Statements in accordance with this new standard. For example, on Auditing (UK) (ISAs (UK)) including ‘ISA (UK) 800 (Revised) Special Considerations – Audits of Financial Statements Prepared in Accordance with Special Purpose Frameworks’ and having regard to the guidance contained in the ICAEW Technical Release 02/16AAF

(Revised) Reporting to regulators on regulatory accounts. ISA 800 identifies financial reporting provisions established by a regulator to meet the requirements of that regulator as a “special purpose framework”. According to ISA 800, a suitable opinion framework for financial statements subject to special purpose frameworks would be a “Properly Prepared In Accordance with” opinion in accordance with the identified special purpose framework.

249. Consistent with international accounting standards ComReg must remove the option to require eir to obtain a “Fairly Presents” opinion on its regulated accounts from its regulatory auditors. Instead, eir should only be required to obtain an opinion that the regulated accounts are “Properly Prepared In Accordance” with its Accounting Methodology Documents.



## Accounting separation is not justified in the WLA market

250. Consistent with ComReg's obligations in imposing any regulatory remedies it is required to consider *inter alia* proportionality. In the case of accounting separation requirements, the reporting obligations should be proportionate to the benefits, not go further than necessary and be the least intrusive option. eir contends that ComReg has failed to act proportionately in proposing the continuation of an accounting separation obligation, given the evolution of the market and the cost accounting and pricing remedies proposed in the Commercial NG WLA market. ComReg dedicates only a single sentence in the Consultation to justify the Accounting Separation obligation "*This is a continuation of the current process and arises in light of the proposal for on-going price regulation of certain WLA products, services and facilities, and also supports transparency for stakeholders*". Therefore, the only two reasons for the accounting separation obligation as consulted on by ComReg is "on-going price regulation of certain WLA products" and "supports transparency for stakeholders". Each of these is discussed in turn below:

### *On-going price regulation*

251. ComReg submits without further support or reasoning that the accounting separation obligation is needed due to the continued on-going regulation of certain WLA products. eir considers that this is not correct. Accounting separation is a separate remedy, and there is no provision in the Code that states the imposition of access obligations *per se* justifies the imposition of accounting separation obligations *i.e.*, one does not follow the other. The need for such a separate and onerous obligation must be assessed and justified on its own terms. Therefore in terms of ComReg's statutory objectives the imposition of this obligation has not been justified or established as being proportionate.

252. First, it is important to note that ComReg is proposing to also impose cost accounting obligation in the Commercial NG WLA market. In that case, ComReg states in paragraph 9.602 that "*To ensure the effectiveness of the specified price control obligations, ComReg considers that it [cost accounting] is necessary*" and "*Obligations to maintain appropriate cost accounting systems generally support obligations of price control (and accounting separation) and can also assist ComReg in monitoring the obligation of non-discrimination*". Therefore, the first limb

of ComReg’s justification for requiring accounting separation is already satisfied through the imposition of cost accounting obligations. Second, in the context of “on-going” price regulation the importance of accounting separation also does not hold. As noted, above ComReg relies on the cost accounting data to support the setting and monitoring of both price control and non-discrimination obligations.

253. Eir’s cost accounting requirements are already extensive and provide the information required to assess the performance and position of the company in regards to compliance with price controls and non-discrimination obligations. As noted and supported by ComReg in paragraph 9.603 *“Eircom’s cost accounting systems contain significant detail on the costs and revenues associated with wholesale access services. While ComReg is of the view that there is currently too much fluctuation in costs and demand each year to use the information contained in the accounts from any single-year to derive prices (e.g. for wholesale services such as FTTC VUA), it is still possible to analyse the reported costs and revenues over a number of years to determine the extent that price levels in the past have been consistent with efficient cost recovery across the economic life of the assets”* [emphasis added].
254. Furthermore, ComReg is proposing to set FTTC pricing based on a “pricing continuity” approach where the underlying “cost” model departs from reality and is hypothetical<sup>85</sup> in assuming no FTTH network overbuild. As such, as recognised by ComReg in D11/21 *“[t]he fact that Eircom has now started to deploy FTTH in urban areas does mean that the cost modelled in both the NGA Cost Model and NGN Core Model can now be expected to diverge from the costs recorded in Eircom’s actual accounts as FTTH supplants FTTC as the main NGA technology”* [emphasis added]. Therefore, it is a clear and accepted position from ComReg that the information provided under accounting separation is not meaningful – thus equally of no utility to provide “transparency to stakeholders”.
255. Similarly, ComReg is proposing to allow FTTH VUA to be set using “pricing flexibility” whose parameters are monitored using retail margin squeeze pricing remedies – i.e., there is no reference to FTTH network cost. Consequently, accounting

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<sup>85</sup> See also paragraph 9.266 of the Consultation.

separation provides no additional information above that already generated under the Cost Accounting obligation.

256. Finally, while ancillary services in the Commercial NG WLA market are cost-oriented and the FTTH migration/connection cost is subject to cost-orientation that level of granular information is again already provided or is capable of being provided under the Cost Accounting obligation. In paragraph 9.605 ComReg states *“Having regard to the need to support the effectiveness of the proposed price control obligations above and to enable ComReg to monitor Eircom’s compliance with these obligations, ComReg considers that the continued imposition of cost accounting obligations on Eircom in the WLA Market is justified. In this respect, ComReg proposes that Eircom is required to maintain appropriate cost accounting systems to justify its prices/costs of WLA products, services, and facilities in the Commercial NG WLA Market. Consequently, Eircom needs to ensure that its cost accounting systems are capable of providing the level of granularity and transparency necessary to demonstrate compliance with its obligations arising from a finding of SMP in the Commercial NG WLA market, including its price control, accounting separation, and non-discrimination obligations”*.
257. ComReg is required to ensure that regulation is incremental, such that only those obligations which are necessary and proportionate to address the identified competition problems are imposed, as set out in Regulations 9 to 13 of the Access Regulations/Regulations 51 to 56, 58 and 62 of the ECC Regulations.
258. It is evident from ComReg’s stated positions that the accounting separation obligation does not add value and increases the complexity and cost of compliance. As such, it is not the least onerous remedy to address ComReg’s two stated objectives. eir submits that the accounting separation obligation in addition to the cost accounting obligation is unnecessary, excessive and disproportionate.

#### *Supports transparency for stakeholders*

259. Transparency in the context of accounting separation means that information is sufficiently transparent, such that a suitably informed reader can gain a clear understanding of the information presented. As discussed in paragraph 255, the nature of the pricing remedies imposed in the Commercial NG WLA market bear no

relation to the accounting separation information. As such, the imposition of accounting separation is not justified or proportionate.

260. Furthermore, for reasons set out below, eir does not accept, given the nature of competition in the market, that it is appropriate for it and only Eircom to produce information regarding its FTTH network.

### **Not appropriate to publish FTTH statements**

261. eir is concerned by the wording in paragraph 9.617 of the Consultation, which could suggest that ComReg is proposing that the Commercial NG WLA market requires eir to publish separate financial results for FTTC and FTTH services.
262. The imposition of obligations in respect of Price Control, Cost Accounting and Accounting Separation has to be considered in the context of market size and increasing competitive conditions in particular markets. In that regard, as acknowledged by ComReg in the Consultation, there are a number of operators rolling out FTTH services including Siro, Virgin Media and NBI. In addition, as recognised by ComReg, including for example, in paragraph 9.506 “...FTTH is at an early stage of growth in the market”.
263. Consequently, eir does not consider it appropriate or necessary to publish any separate and identifiable information related to its FTTH network. Such information is commercially sensitive and could inappropriately be used by our FTTH infrastructure-based competitors to distort the market to the detriment of end-users. ComReg must take into account that there are other infrastructure-based operators in the market and eir’s commercial investment programme over a 3 year period is operationally sensitive. In addition, as the relevant rates of this investment are largely based on external negotiated commercial contracts it is wholly inappropriate from a commercial law perspective to make such information public.
264. For example, competitors could use industry expertise to reverse engineer key information or metrics to influence tenders, rate card negotiations, targeted roll-out plans etc. The publication of FTTH information will only serve to provide competitive advantage to eir’s competitors. Consistent with current obligations eir is willing to continue to provide such information bilaterally to ComReg. Where accounting

separation obligations are removed, eir is willing to provide such information to ComReg under its Cost Accounting obligations.

## Annex 5 – Statement of Compliance Remedies

265. While ComReg today receives a statement of compliance under the 2018 Decision and 2020 WHQA decision it is important to highlight that eir conceded to those obligations in light of the Settlement Agreement.
266. Additionally, and crucially, the statement of compliance obligations ComReg is now proposing in the Consultation also go far beyond the current requirements. It is evident, from paragraphs like 9.631 that ComReg intends to undertake its own assessment of the appropriateness of the regulatory governance within eir. For example, paragraphs 9.634, 9.650 and 9.651 require eir to provide information to ComReg regarding the inner workings of how regulatory risk is managed in eir. As a remedy it is too subjective as to what “good” governance should look like.
267. eir does not agree with ComReg’s preliminary view regarding the requirement to impose a “Statement of Compliance” remedy on eir following designation of SMP in the Commercial NG WLA market. For the benefit of the reader, throughout this section eir has used applied the full meaning of such a statement as “Regulatory Governance Statement of Compliance”. In particular, eir considers that:
- (i) A Regulatory Governance Statement of Compliance obligation is not provided for under the ECC Regulations or the Code;
  - (ii) ComReg has failed to identify the nature of the competition problem; and
  - (iii) ComReg appears to have already prejudged any outcome.

### **A Regulatory Governance Statement of Compliance obligation is not provided for under the ECC Regulations or the Code**

268. The ECC Regulations provides that *“Where an undertaking is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 67, national regulatory authorities shall, as appropriate, impose any of the obligations set out in Articles 69 to 74 and Articles 76 and 80. In accordance with the principle of proportionality, a national regulatory authority shall choose the least intrusive way of addressing the problems identified in the market analysis.”*

269. The obligations referred to are: Access, Non-discrimination, Transparency, Pricing & cost accounting, and Accounting separation. Indeed this is accepted by ComReg in paragraph 6.49 of the Consultation. None of the relevant articles in either the Code or the Code Regulations provide for the imposition of an obligation to provide a Regulatory Governance Statement of Compliance of the kind now proposed by ComReg. There is therefore no legal basis for this proposal.
270. As previously noted, the Code states that NRA may not impose obligations other than those outlined above, unless they go through the ‘exceptional circumstances’ notification procedures in Article 68(3). This states that *‘In exceptional circumstances, where a national regulatory authority intends to impose on undertakings designated as having significant market power obligations for access or interconnection other than those set out in Articles 69 to 74 and Articles 76 and 80, it shall submit a request to the Commission. The Commission shall, taking utmost account of the opinion of BEREC, adopt decisions by means of implementing acts, authorising or preventing the national regulatory authority from taking such measures. These implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 118(3).’* It is clear from this provision that NRAs should only seek to impose a remedy not set out in Articles 69 to 74 and Articles 76 and 80 in “exceptional circumstances”, that it must be done by means of a **separate** notification procedure under Article 68 whereby it may be ‘authorised’ or ‘prevented’ by the Commission, taking account of an ‘opinion of BEREC’.
271. The extension of regulatory obligations into this sphere is contentious and as recognised by the ECC Regulations, ComReg should only go beyond the scope of the Code in “exceptional circumstances” by means of the prescribed procedure. It should be noted at this stage that eir is the only SMP operator where ComReg has imposed obligations to report on risk management. None of the other operators are required to report on how they manage risk of regulatory non-compliance, although all the mobile operators (such as Vodafone and Three) have all been designated as having SMP in relation to at least one market. ComReg has not provided any justification for this difference in treatment. Whilst eir does not accept that the imposition of statement of compliance obligations is strictly part of ComReg’s regulatory remit, it has been content to abide by the directions to date as eir would

typically conduct internal assessments independently. Critically though, until now, it has always been left to eir to determine the substance of what risks it identifies and what controls it implements.

272. eir is of the view that the Regulatory Governance Statement of Compliance obligation proposed is excessive. In particular eir believes the requirement to provide its Regulatory Governance analysis should not be mandated. The adequacy of how eir carries out its risk assessments and control design is a matter for eir. eir can see no statutory basis granting ComReg the powers it is now giving to itself, to compel the provision of the internal assessment of individual risks. eir is willing to providing ComReg with a list of new risks or controls identified, but not the analysis of how it arrived at its decision. It is eir's own responsibility to be satisfied that the governance arrangements including risk analysis and control development within eir are appropriate. Further, ComReg has provided no justification as to why it is imposing these significantly more onerous requirements (see below).

#### **Failed to identify the nature of the problem is already addressed by regulatory obligations**

273. Broadly ComReg's argument for the requirement for a Regulatory Governance Statement of Compliance remedy falls into three categories:
- a. Prevent potential anti-competitive behaviours to ensure compliance;
  - b. The alleged relevance of Regulation 15 being triggered; and
  - c. Failure to take account of the IOB reports on regulatory governance

#### Prevent potential anti-competitive behaviours

274. In paragraph 9.624, ComReg states *"A critical aspect in the effectiveness of WLA products in facilitating effective competition is the regulatory governance arrangements that are or need to be in place for the purpose of ensuring that Eircom provides access to its network in accordance with its regulatory obligations."*
275. However, this fails to consider that ComReg has already imposed the full suite of remedies available under the ECC Regulations (noting that the finding of SMP requires only at least one remedy to be imposed) to address potential anti-



competitive behaviour. ComReg has prescribed very specific access (including publication of relevant timelines regarding product development etc.), transparency, non-discrimination, cost oriented pricing, cost accounting and accounting separation to facilitate effective competition. Compliance with these remedies is also self-evident in a number of cases by means, for example, of the publication of reference offers and publication of regulatory accounts. Obligations are also already capable of being monitored through transparency measures, such as the prescribed KPIs, which make it easier to identify any issues of discrimination and to monitor compliance including identifying emerging issues during the review period.

276. In other cases, remedies are in themselves supporting the effectiveness of other obligations, for example, as ComReg itself states *“Non-discrimination obligations also play an important role in ensuring the effectiveness of other obligations such as those relating to access, transparency, and price control. In turn, obligations of transparency, for example those relating to KPI metrics and performance metrics, support non-discrimination obligations”*.
277. Finally, access seekers can raise a complaint or a dispute with ComReg if they consider that eir is not compliant with any of its regulatory obligations. ComReg can use its investigative powers to determine eir’s compliance with its regulatory obligations – including pursuit of financial penalties in respect of breaches. The Code, which, per Article 1(1) *‘establishes a harmonised framework for the regulation of electronic communications networks’* contains no specific provisions on regulating operators’ governance, nor, as noted above, do the Articles specifically dealing with SMP designated undertakings, contain any provision authorising NRAs to prescribe an SMP operator’s regulatory governance or its assessment of risk as now proposed. It is not clear therefore on what basis ComReg can claim, as quoted above that this is established as being a *‘critical aspect’* of regulation of Wholesale Local Access, when the Code is silent on the issue.
278. ComReg has also failed to consider the proportionality of the remedy in light of the extant regulatory obligations including dispute and investigative powers. In this regard eir notes that Article 73(2) of the Code requires that *‘where national regulatory authorities consider the appropriateness of imposing any of the possible*

specific obligations... and in particular where they assess in accordance with the principle of proportionality whether and how such obligations are to be imposed, they shall analyse whether other forms of access to wholesale inputs either on the same or related wholesale market would be sufficient to address the identified problem in the end user's interest.' This illustrates the importance, when assessing the proportionality of a proposed measure, of first considering the already available measures. This is particularly the case in relation to ex ante measures of the kind proposed, given that the Code also states that in Article 3(4) that 'national regulatory authorities shall in pursuit of the policy objectives [of the Code]... (f) impose ex ante regulatory obligations only to the extent necessary to secure effective and sustainable competition in the interest of end users and relax or lift such obligations as soon as that condition is fulfilled'. The additional exceptional obligations now proposed are not the least intrusive way of addressing any identified potential harm to effective competition in the identified market. Indeed there is simply no assessment by ComReg of why the existing measures are not sufficient. ComReg is required to ensure that regulation is incremental, such that only those obligations which are necessary and proportionate to address the identified competition problems are imposed, as set out in Regulations 9 to 13 of the Access Regulations/Regulations 51 to 56, 58 and 62 of the ECC Regulations.

#### The alleged relevance of Regulation 15

279. In paragraph 9.631, ComReg states "In light of the fact that Regulation 15 of Framework Regulations has been triggered, ComReg has an obligation to assess the impact of decision making by FNI and the associated incentives on the provision of WLA by Eircom". However, this fails to consider that FNI remains part of Eircom, is controlled by Eircom and all regulatory obligations are discharged by Eircom.<sup>86</sup> This is also recognised by ComReg itself in its PIA Consultation:

- Paragraph 3.32 of the PIA Consultation [~~X~~] *On the basis of the Transaction Documents reviewed by ComReg, it is notably the case that FNI will be limited to an activity that is essentially auxiliary to one of its parents' (Eircom's) and it does not have its own direct access to, or presence on, the market. It is also does not appear that FNI will have sufficient resources to*

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<sup>86</sup> See also eir's response to PIA Consultation.

*operate independently on the market, i.e., sufficient assets, staff and financial resources to perform its activity on a day-to-day basis”*

- Paragraph 3.34 of the PIA Consultation “*a number of agreements mean that Eircom in practice retains operational control...*”

280. Furthermore, as identified – acknowledged and signed by the parties, in ComReg 22/57, that as provided for in the Investment Documents entered into between Infravia and Eircom that inter alia “Eircom remains wholly responsible for and has all of the legal rights and entitlements required by it to ensure that the regulatory obligations associated with its status of operator with Significant Market Power including but not limited to the obligations under ComReg Decision D10/18 dated 19 November 2018 (“Decision D10/18”) are met in full” [emphasis added] and “that none of us [meaning Infravia or Eircom] will invoke or apply any provision of the Investment Documents or otherwise take, or omit from taking, any action which would impede or obstruct Eircom from complying with or discharging its obligations in full under Decision D10/18” and “that no Service Level Agreement or any other performance agreement is entered with FibreCo, directly or indirectly, which could have the effect to incentivise the prioritisation of FibreCo's business or favour FibreCo or Eircom in any way”.
281. Consequently, it is not proportionate or justified to suggest as ComReg does that the FNI requires additional obligations beyond those provided for under the ECC Regulations. The FNI transaction involved the re-organisation of shareholding within Eircom Limited – **no assets have left the Eircom Group**. This type of intra-group restructuring is common in facilitating new investment to the benefit of the parent company which in this case is and will remain Eircom Limited.
282. Finally, Regulation 15 of the Access, which eircom does not accept has been triggered, provides that ComReg “15(2)...assess the effect of the intended transaction on existing regulatory obligations under the Framework Regulations. For that purpose, the Regulator shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Regulation 27 of the Framework Regulations. On the basis of its

*assessment, the Regulator shall impose, maintain, amend or withdraw obligations in accordance with Regulations 12 and 13 of the Framework Regulations”.*

283. In other words, the triggering of Regulation 15 requires ComReg to conduct a fresh market analysis (Regulation 27) and may impose obligations as a result of that analysis (i.e., access, transparency, non-discrimination, pricing & cost accounting, and accounting separation). As such, the triggering of Regulation 15, does not allow ComReg to impose Regulatory Governance Statement of Compliance obligations on eir. More generally, this specific transaction, which has already been subject to intensive regulatory scrutiny and disclosure, cannot in and of itself, justify the imposition of a sweeping, ongoing obligation to report on the assessment of all types of regulatory risks, whether or not they are even related to FNI. ComReg has extensive powers to require the provision of information for the purposes of carrying out its duties, meaning that if it has specific concerns, it can request information relevant to them. Instead however, it appears to be imposing highly onerous new Regulatory Statement of Compliance obligations as a means of recurring information gathering, but without identifying the ‘nature of the problem’ which this information gathering is meant to address, or assessing whether imposing such an onerous ongoing reporting obligation is an appropriate means to achieve it.

#### *Failure to take account of the IOB reports on regulatory governance*

284. ComReg has also failed to take into account the very detailed reporting on regulatory governance and compliance that eir is already providing to the Independent Oversight Board (‘IOB’) established on foot of the Settlement Agreement. As ComReg is aware, the role of the IOB role is “*to provide assurance to eir and ComReg that there is in place a clear and unambiguous set of measure, arrangements, structures and internal controls that will ensure compliance with the eir’s Regulatory obligations*” (Annex 3 to Settlement Agreement date 10/12/2018 IOB charter).

285. ComReg noted “*that the IOB Report was wholly based on evidence provided by Eircom and that Eircom had not yet permitted the independence and effectiveness of these functions to be independently assured in a way that ComReg considers adequate.*” It is misleading to suggest the IOB’s entire report is in some way insufficient under the Settlement Agreement, because of an absence of external

assurance i.e., review by a further third party such as an accountancy firm. The IOB's two reports to date have fully complied with what was required of it by the Settlement Agreement and ComReg has not challenged this. The Settlement Agreement is explicitly structured to require eir to provide a list of reports (as prescribed by ComReg as the requirement) to the IOB, and for the IOB to base its expert opinion on this information. There is no requirement in the Agreement for the IOB (a third party whose members have considerable telecoms expertise and experience, and a majority of whom are appointed by ComReg, independently of eir), to bring in yet another third party to review eir's data for it. ComReg is aware that this model was explicitly raised and rejected in the negotiation of the Settlement Agreement (which ComReg accepted and contractually signed), so it is also misleading to present it as an issue that has now emerged, or as something that is required by the Settlement Agreement, when it is neither.

286. Furthermore, ComReg states that *“Eircom had not yet permitted the independence and effectiveness of these functions to be independently assured in a way that ComReg considers adequate.”* ComReg is aware that eir has voluntarily allowed the independence of its internal audit function to be independently reviewed by a major accountancy firm, against a recognised, international standard. Furthermore, eir notes that the KPMG review ComReg commissioned to report on the EY's External Quality Assurance assessment is broadly positive and while it recommends a small number of "considerations" these are heavily caveated. As such, ComReg's opinion regarding the adequacy of a review undertaken by professional accountancy body qualified in the conduct of such reviews is not only incorrect but also outside its professional expertise.

### **ComReg appears to have prejudged the outcome**

287. A common aspect of risk management is the development of a register of risks, and a 'risk and control matrix' or RACM. Typically, this is an internal company spreadsheet that lists key risks identified by a company and the controls put in place to reduce the possibility that those risks might materialise. Companies do not typically publish their internal risk registers or RACM. They are also not typically required to provide them to regulators. For example, Virgin Media, Three or Vodafone have no obligation to provide their registers of regulatory risks to ComReg.

288. All companies must manage risk and this is typically not the subject of regulation. Some regulatory obligations are strict, and it is a matter for each regulated company how it manages its risk of non-compliance. However, ComReg has not only indicated that it intends to substitute eir's risk management approach with its own and introduce "non-standard" remedies. eir considers this implies that ComReg intends to prescribe how eir manages its regulatory risks, a clear departure from the norm where such matters are the sole responsibility of the company. For example, ComReg states in paragraph 9.631 that *"Eircom's obligations may be respecified or complemented by further requirements, including non-standard remedies where and if justified, depending on the outcome of ComReg's review of the effectiveness of Eircom's RGM as referred to in the Electronic Communications Strategy Statement."*
289. eir is concerned that the nature such statements gives the impression that ComReg considers that it is entitled to go further than provided for in the ECC Regulations or Framework to first impose such obligations and second that it can form its own view of what it considers eir's internal RACM should contain. There is no basis in the ECC Regulations or the Framework to impose such a "remedy". Even if there were such a basis, it cannot be the case that ComReg could substitute its own view of what constitutes 'adequate' risk consideration for that of eir's.
290. First, ComReg states that eir's obligations may be subject to 'further requirements' or 'respecification'. eir notes that any imposition of further or new obligations must comply with the procedures set out in Article 68 for the imposition of SMP obligations, including the obligations to publicly consult, and notify the European Commission, and, in the case of 'exceptional cases' outside the relevant Articles, follow the procedure in Article 68(3). In that regard, eir is aware that ComReg has in the recent past adopted Directions purporting to 'further specify' eir's obligations under D10/18 and that it has argued that when adopting such Directions its obligations to publicly consult and notify the EU Commission do not apply. eir reiterates therefore that is no provision in the Code allowing NRAs to bypass the requirements of Article 68 by characterising new obligations as either 'further specifying', 'further requirements' or 'respecifications'. Second, as set out in paragraphs 269-273, neither the ECC Regulations nor the Framework allows

ComReg following SMP designation to impose “non-standard remedies”. Third, any such “review” of eir’s RGM by ComReg would be entirely subjective regarding appropriate governance structures.

291. It is the nature of the subjectivity of an assessment that concerns eir. ComReg has already publicly, and incorrectly in eir’s view, stated that it had “*some concerns around the state of competition and the culture of compliance within Eircom in the presence of the enhanced RGM*”. This appears at odds to the significant deregulation that has been occurring over the past number of years in Ireland based on competition and the extensive use of self-supply by competing operators in the PIA market. As such, it appears ComReg has already prejudged any such assessment to the extent that any such review would likely to suffer from confirmation bias.
292. Finally, as ComReg is aware, eir voluntarily allowed the independence of its Internal Audit Regulatory Governance function to be independently assessed by a major accountancy firm, as to its conformance with the Institute of Internal Auditors Global Standards and the Internal Audit Code of Practice. That report remarked positively regarding eir’s Internal Audit Regulatory Governance function.

*Additional specific comments (section 15 of the Decision Instrument)*

293. eir notes that the length and complexity of section 15 of the Decision Instrument, which includes repetition, makes it difficult to ascertain the full extent of its obligations, however they are both significant and onerous. One clear additional provision, for example is the requirement in Section 15.2.3 to provide ‘*a description of the methodology followed to identify risks of noncompliance.*’ This is in addition to the separate obligation in section 15.2.6 to provide ‘*a description of the risk analysis and control development process carried out.*’ The obligation in section 15.2.3 appears therefore to be an entirely new obligation to describe a methodology of how risks are identified in the first place, before then separately being required to describe in detail the process of assessing those risks. No justification has been provided in the Consultation for the introduction of this highly intrusive new requirement. Section 15.2.5 introduces new requirement for eir to describe controls in significantly greater detail, including a description of the process used to assess

the adequacy and effectiveness of controls. This is then further duplicated in section 15.2.6 which separately requires eir to provide a “description of the risk analysis and control development process”.

As noted above, eir’s overarching concern is the unwarranted intrusiveness of the new obligations, in that they reach further into the conduct of eir’s internal management, in a manner not set out in any legislation. Rather than requiring eir to report on the risks and controls it has identified as in D10/18, these provisions indicate an intention on the part of ComReg to adjudicate upon eir’s methodologies, processes, and the individual risk assessments and controls it is compelling eir to provide. This is evident from provisions such as section 15.2.6(b) ‘*the outcome of the Process in respect of the identification of regulatory risk and the **justification** for the outcome*’. This is a new obligation, which appears not simply to require that eir has controls in place, but also that these controls will be adjudicated upon by ComReg. ComReg is aware that while eir has previously consented to informing ComReg of the risks and controls it has identified, there is a fundamental difference between doing this and a regulator granting itself the power to adjudicate upon how a company identifies risk, or to determine what specific risks and controls that company identifies. The risks and the controls a company identifies, fundamentally impact how a company conducts its day-to-day business. Consequently, for a regulator to be entitled to subjectively determine what a company’s risks and controls are, is tantamount to empowering a regulator to determine the day-to-day operation of a company; what costs it incurs, what employees it hires etc. Indeed this is explicit in section 15 of Decision Instrument which for example repeatedly requires eir to report on the expertise of the personnel it uses. eir can see no provision in the Code which would allow for such micromanagement of an operator; and indeed no NRA has the skills or the experience in the day to day operation of a company, or in the identification and management of operational risk. eir is particularly surprised by these proposals given that no compliance issues have been raised from the large volume of Statements of Compliance provided to ComReg for the last five years, and the fact that, in the context of the Settlement Agreement with eir, ComReg explicitly acknowledged in correspondence that it would not seek to substitute its assessment of risk for that of eir. However this appears to be the intention of the provisions of



section 15 of the Decision Instrument, taken together with the statements made in the Consultation.

## Annex 6 – eir’s comments on the proposed WLA Decision Instrument

### Doubling of the length of the regulatory provisions

294. Under Decision D10/18, the current decision instrument regulating both wholesale local access and physical infrastructure access is 36 pages long. The new regulations now are proposed by ComReg, covering wholesale local access and physical infrastructure together are 69 pages long. This near-doubling of the length of the regulation imposed, illustrates the point made by Eircom in its Response to Consultation that the effect of ComReg’s proposal is to impose the most onerous SMP regulation it has ever faced in respect of its business. The Code states as one of its objectives in Recital 29 that ‘*This directive aims to progressively reduce ex ante sector specific rules*’. The proposed legislation at almost double the length of the previous legislation clearly runs counter to this objective of the Code.

### Necessity to comply with the Code

295. While the Consultation is being conducted on foot of the Access Regulations 2011, as a matter of established EU law the Code has been directly effective since 20 December 2020, when it was legally required to be implemented by all Member States, meaning that NRAs are legally obliged to comply with the principles, objectives and provisions it contains, regardless of whether or not, in Ireland, the implementing Code Regulations (which have been adopted by the Minister) have been brought into effect. The comments below refer therefore to the relevant provisions of the Code.

### Section 2 Definitions

296. There is no definition of ‘Access’ in the Decision Instrument. Instead a reader has to go to a separate piece of legislation to find out what Access comprises. Given that ‘Access’ is one of the core definitions in the Decision Instrument, not including a definition in the Decision Instrument is inexplicable, making it more difficult and cumbersome for Access Seekers and any other interested party, including members of the public, to understand the scope of the Decision Instrument. It would be more transparent to define the term Access in the Decision Instrument. See also other key terms such as Electronic Communications Network, Electronic Communications Service and End User where again, a reader is compelled to go to other legislation to understand what these terms mean. This approach lacks transparency.

297. 'Intervention Area' is defined as the 'geographic areas for State intervention...as more particularly set out in Schedule 1.' However Schedule 1 is currently empty, meaning that it is not possible for consultation participants to know the exact geographic area covered by the Intervention Area. In particular, consultation participants are entitled to know whether, for example, the IA is that covered by the original NBP contract with the State, or whether it has changed/expanded since then, and whether the IA to be covered by the proposed Decision is to be fixed or whether ComReg proposes that it may be subject to change and if so, under what criteria. ComReg should provide consultation participants with this information and give participants the opportunity to comment on this prior to making any Decision incorporating an Intervention Area. As noted by the High Court in the *Kennedy* case, when engaging in a public consultation, it is necessary for the consulting body to consult on the 'particular option' they actually decide upon — which ComReg does not appear to have done in not providing details of the Intervention Area.
298. 'Service Level Agreement.' this is defined to mean 'a legally binding contract between Eircom and an access seeker in relation to the service levels which Eircom commits to from time to time.' This definition is too broad as it extends beyond the scope of the decision instrument to potentially apply any contracts entered into with access seekers for unregulated services. The definition of SLA should be limited to contracts or parts of contracts for products or services regulated by this decision instrument only.

#### Section 7 Reasonable requests for Access

299. The ability to impose Access obligations is derived from the Code, and, when adopted, the implementing Code Regulations. The Code is a harmonising Directive i.e., it sets the limits of the Access obligations that may be imposed. As Recital 5 of the Code notes 'This Directive creates a legal framework to ensure freedom to provide electronic communications networks and services subject *only* to the conditions laid down in this Directive'. NRAs have no legal authority to impose restrictions on SMP designated operators that are more restrictive than those laid down in the Code, other than by means of the exceptional provisions notification process. To do so would contravene the harmonising intent of the Directive and the provision of Article 68. Section 7 of the draft Decision Instrument explicitly exceeds

what is permitted by the provisions of the Directive and as such is not a valid proposal. In order for Section 7 to comply with the Code (and indeed the previous Access Directive) it is necessary to remove the provisions that go beyond what is permitted by EU law.

300. The first sentence of section 7.2 states that *'all requests for Wholesale Local Access including Associated Facilities in the Commercial NG WLA Market shall be deemed reasonable.'* There is no provision in either the Access Regulations or the Code which would allow the imposition by an NRA of such a pre-emptive ruling on reasonableness. Indeed, this provision appears to directly contravene the Access Regulations and the Code. The final sentence of section 7.2 states that *'a request for Access may only be rejected, refused or otherwise denied for objective reasons such as where Access, as per the request, is not technically feasible or threatens network integrity and concerns in this respect may not be objectively mitigated satisfactorily by way of suitable terms and conditions.'* Again, the second half of this sentence is a new provision for which there is no legal basis in the Code or the Access Regulations, and which therefore exceeds the limits of the restraints NRAs are permitted to impose. As such, both this provision and the first sentence of 7.2 noted above are not enforceable under the established rules on harmonisation and transposition of EU law. It is particularly surprising that, as a secondary instrument, the Decision Instrument is explicitly departing from the language of the Code, when the Code Regulations adopted by the Minister carefully transpose only the terms of the Code and do not exceed it, in the relevant provisions. See also eir's more detailed submissions on this issue in the main response.

#### Section 7.4 Conditions for Access

301. Section 7.4 provides that *'Eircom shall at all times grant Access in a fair, reasonable, timely, transparent and non-discriminatory manner, as may be further specified by ComReg from time to time.'* Such a provision, whereby ComReg grants itself the power to 'further specify' Eircom's obligations, is repeated four further times in the Decision Instrument. In other places, ComReg reserves for itself the right to impose further obligations by providing that it may a change to the terms of the Decision Instrument as may be 'directed' by ComReg from time to time. The cumulative effect of so many reservations of a power to 'specify' and 'direct' new terms, is that a significant percentage of Eircom's obligations in the Decision

Instrument, including the core obligation to grant Access, are not fully set out, but rather, Eircom may be subjected to further, unknown obligations and some unknown future date. Eircom is also aware, further, that ComReg has previously taken the view that it does not have an obligation to carry out a public consultation before 'further specifying' or 'directing' Eircom, and that it can be done without updating its market analysis. This was the case in respect of two Directions adopted in 2021, once of which, Direction 21/60R, is currently the subject of a High Court appeal. However, no power to 'further specify' SMP obligations outside of the procedure in Article 68 is granted to NRAs by the Code. While the Code Regulations do contain a provision in section 104 allowing ComReg to 'further specify', there does not appear to be any legal basis in the Code for the granting of this power to ComReg in the context of SMP obligations. As such it does not comply with the terms and the harmonising intent of the Code. In particular, Eircom is aware that ComReg's has taken the view that its obligations under the Code to notify measures to the European Commission do not apply when it 'further specifies' or 'directs' SMP obligations. However, this would appear to be directly contrary to the requirements of Article 68(4) of the Code which stipulates that '*Measures taken in accordance with paragraph 3 and 4 of this Article shall be subject to the procedures referred to in Articles 23 [consultation] and Article 32 [notification of measures to the Commission].*' There is no mechanism to impose or amend SMP obligations outside of the process in Article 68 by simply 'further directing'. Separately, the imposition of 'further specifications' or 'directions' without public consultation also contravenes ComReg common law obligation as a public body to publicly consult on measures, as well as its statutory obligations to consult on measures, and to act impartially and transparently in exercising its powers. This obligation is not met where a public body engages in private communications with separate interested parties, but without making them public and giving other affected parties the opportunity to make submissions, as occurred with previous directions adopted by ComReg. In light of this extensive reservation of powers, eir requests that ComReg remove them or at a minimum confirm that it will only exercise them in compliance with the requirements of the Code to notify and consult, and the common law rules on fair procedures and public consultation.

### Section 7.5 Supervision

302. The effect of a blanket obligation in section 7.5 ‘to ensure that any supervision requirements are applied in such a way that they do not have the effect of delaying or preventing access seekers from commencing or continuing work in the absence of an eircom supervisor, will have the effect in practice of unreasonably preventing eir from supervising potentially highly intrusive activities by access seekers, particularly in relation to any large scale access requests, in circumstance where it is not practically feasible for eir to resource supervision of this activity, but it is prohibited by section 7.5 from requiring access seekers to wait until it can get supervision in place. This greatly heightens the risk of damage and service outages, which is harmful not just to eir but to Access Seekers.

### Section 7.6 CLFMP

303. Eircom’s concerns in relation to the obligations around seeking permission for changes to the CLFMP have been set out in more detail in the response to consultation. From a drafting perspective, eir notes that while it is required to seek approval from ComReg, there is no obligation on ComReg to respond within any particular time frame, nor are there any criteria set out against which approval must be assessed, meaning that eir has legal certainty as to what criteria will be applied – it is left entirely to ComReg’s discretion and timing. Further the provision simply states that ComReg may apply “terms and conditions”, but again without giving any indication as to what these may consist of. The effect of this drafting is that eir is compelled to seek approval but with no indication of when it might receive a response or what criteria may or may not be applied. This does not appear to meet the requirements of the Code relating to regulatory predictability and fairness, nor does it support innovation or investment.

### Section 7.9 Consent to withdraw Access to facilities

304. Similar to the provisions on the CLFMP noted above, again this clause contains an open-ended requirement for eir to seek the prior approval of ComReg in accordance with terms and conditions as may be determined by ComReg. Again there is no time frame for ComReg to respond to any such request nor is there any indication of the criteria that may be applied either to grant approval or the extent of the terms and conditions that may be applied. Consequently the same legal infirmities apply to this provision as are noted above in relation to CLFMP.

Section 7.10 withdrawing FTTC based VUA - conditions

305. As set out in detail in the response to consultation, there is no provision the Code entitling ComReg to impose the obligation proposed in section 7.10, whereby Eircom may only withdraw Access to FTTC based VUA if it ‘*makes available to Access Seekers an FTTP based VUA product designed to deliver at least an equivalent level of service typical of a FTTC based VUA at the price set in Section 14.3.2.*’ As part of its obligation to consult and act transparently, NRAs are required at a minimum to identify the legal basis for secondary instruments; ComReg is requested to identify what legal provision grants ComReg the power to impose this obligation. As noted above in relation to sections 7.6 and 7.9, the open-ended nature of this obligation to seek approval, with no time frame or criteria for ComReg to abide by, also does not appear to comply with the Code objectives are regulatory consistency objectivity and fairness. The absence of any prescribed timeframe for the granting of approval, increases the distortion of competition which these provisions will create in the market as between eir and its competitors, who are subject to no such obligation to seek prior approval.

Section 8.2 obligation on ‘Access and information’

306. From a drafting perspective eir notes that clause 8.2 imposes an obligation to provide ‘Access and information” to all Undertakings. As the term information is not defined, it is simply not clear what is meant by this provision and what information is caught by it. eir requests that this term ‘information’ in this clause be defined so that eir can understand what scope of information is meant to be regulated by the Equivalence of Input obligation in clause 8.2.

Section 9.4(iii) description of technical characteristics

307. With regard to the obligation to publish a description of technical characteristics and engineering or technical standards, it is important to note that such features are liable to evolve and change as the telecommunications sector is a rapidly evolving one. Consequently the relevant section must also acknowledge eir’s entitlement to amend features such as the description of technical characteristics, without having to separately negotiate it with Access Seekers. Otherwise, the requirement to include this information in the ARO, and consequently to negotiate any changes with Access Seekers, will in fact act practically as a brake on

technological improvement and change of the technical characteristics of eir's network. Again, this would appear to run counter to the Code objectives are promoting the rollout of very high capacity networks and of innovation. Additionally where eir is required to make changes to its network or to other aspects which are published in the ARO as a result of regulatory changes introduced by ComReg, it should not be a requirement for such changes to additionally be negotiated with access seekers, when all that is happening is the implementation of regulatory change.

Section 9.10 Changes to access seekers IT systems

308. Clause 9.10 provides for a delay in the product development process and an obligation to provide a justification to ComReg, where changes to eir's IT systems mean that '*Access seekers will require to carry out development work to their own IT systems.*' Detailed concerns in relation to this provision have already been set out in the response to the PIA consultation. From a drafting perspective eir notes that this clause lacks practical provisions needed in order for need to work in practice. For example how is eir meant to know that work is required for IT systems of access seekers, where there is no obligation for Access seekers to inform eir of this fact in a timely fashion early in the product development process. Further it is not clear how abuse of this provision by eir's competitors can be avoided, without any obligation for Access seekers to objectively demonstrate the need for changes to their IT systems. For example a competitor of eir could simply claim at a late stage in product development that they need to make changes to their IT systems, for strategic reasons to trigger the lengthy process in Clause 9.10, in order to delay the launch of eir's product, so that it does not have to face competition from eir, or from wholesale customers of eir availing of it.



Section 9.12 NGA rollout Plan

309. Detailed comments on the requirement in section 9.12 have already been set out in the main response to consultation. Section 9.12 of the draft Decision Instrument stipulates that *‘Eircom shall ensure the accuracy and completeness of the information included in the NGA Rollout Plan.’* For the reasons set out previously, it is not possible for any organisation to ensure 100% accuracy of its information – human and technical errors will always arise, and it is unfair and disproportionate to impose such a strict obligation on Eircom, exposing it to both criminal and civil liability, noting the enforcement provisions of the Code Regulations, which make it a ‘hybrid offence’ for an SMP Operator not to comply with its prescribed SMP obligations (section 51(6)) and which provide in Section 51(7) that *‘In proceedings for an offence under paragraph (6) it is a defence for the undertaking charged to show that it took all reasonable steps and exercised all due diligence to avoid committing the offence.’* The Consultation and the Decision Instrument fail to take account of these provisions of Section 51(7) and appear to be in conflict with it, particularly in circumstances where ComReg is aware that it is not reasonable, proportionate or feasible to achieve 100% accuracy at all times, and the Code Regulations explicitly provide for this.

Section 10.1 no equivalent provision of clause 8.10(iv) in D10/18

310. Under D10/18 clause 8.10(iv) there is a clear decision point for the granting or refusal of a request, in that it provides that eir shall *‘confirm in writing to the undertaking that has made the written request whether it agrees to provide the requested product service or facility or amendment thereto.’* There is no equivalent provision in the proposed new decision instrument. There appears to be no express provision at all whereby eir can refuse a request, as all that is provided for, under section 10.2.2(d) is that within 85 working days it is to provide *‘a status update including l. an outline of the product service or associated facility proposed in response to the access request including, as the case may be any aspects which do not fully meet the requesters requirements and the objective reasons therefor.’* This absence of a provision similar to the current clause 8.10(iv) appears to directly contradict the provisions of Section 7, which explicitly anticipate that eir may refuse requests that are not reasonable for objective reasons. eir assumes that an equivalent provision to the existing clause 8.10(iv) has been omitted in error and requests that it now be reinserted at the 85 working days point as is currently the

case, so that both eir and access seekers have clarity as to the stage at which a decision has to be made as to whether or not to agree to a request as reasonable. eir further notes, that given that there may well be both WLA and PIA features of requested products, the product development timelines in the two separate decision instruments need to align to avoid conflict between the two decision instruments which would cause logistical and compliance issues for both eir and for access seekers.

Section 10.2.3(b) Provision of engagement timetable within 15 days

311. Detailed comments on the lack of proportionality and fairness of the proposed timelines set out in section 10.1 are set out in the main response. From a drafting perspective what is noted here is the lack of consistency whereby eir is required to provide an engagement timetable within 15 working days. What this means in practice is that eir is being required to provide an engagement timetable even before it has completed a reasonableness assessment of the product to determine whether in fact it constitutes a reasonable access request. It is neither fair, proportionate nor efficient to mandate that eir develop engagement timetables for products before they are even assessed for reasonableness.

Section 11 Service level agreements

312. Detailed comments on the proposed service level agreement provisions are set out in the main response. Eircom reiterate here that the proposed Section 11 provisions on what are termed 'service credits' go beyond what any commercial contract would provide for, by compelling eir to compensate for indirect losses. Per Section 11.2.2(b) eir is meant to set out '*an itemised list of the direct costs and other losses contributing to the service credit calculation.*' This appears to envisage a clause containing categories which eir must compensate rather than any actual pre estimated amount. This is simply not a service credit clause at all. It is also practically unworkable (how will these indirect losses be proven) and it goes against the purpose of service credits, which is to agree predetermined estimate of loss which can be readily paid out where a service level is not met.

Section 11.6 on implementation of new SLAs

313. Section 11.6 requires Eircom to negotiate and implement new SLAs within 7 months of the Effective Date of the Decision Instrument. However, as noted, the High Court

has previously ruled that Eircom may not be compelled to implement a Decision during the 28 day appeal window where that has the effect of depriving it of its right of appeal and to seek a stay. Given that Section 10.2.3(d) stipulates that SLA Negotiation Period may last ‘no more than six months’, this would mean that in order for Eircom to be able to provide for this six month period, it would need to have fully drafted and published all the proposed new SLAs within the first month after the Effective Date, i.e., during its 28-day appeal window, which contravenes the High Court’s ruling. Eircom requests that this period be amended to a more feasible period that also complies with the High Court’s ruling.

#### Section 12 Key Performance Indicators

314. As previously noted, the Code does not contain any provision entitling NRAs to ‘further specify’ SMP obligations outside of the process prescribed by Article 68, with public consultation and the notification of measures to the Commission. It is particularly concerning that ComReg states in Section 12.1 that Eircom develop Key Performance Indicators ‘*may be further specified by ComReg.*’ While Section 12.2 says that ‘*by way of further specification, Eircom shall meet the requirements as set out in ComReg D04/22.*’ This appears to leave open the possibility that ComReg may seek to introduce new and different KPI metrics and processes by means of ‘further specifying’ but without following the requirements of Article 68 including consultation or EU notification. Such an approach would be without precedent; all previous KPI Decisions have followed consultation procedures. ComReg is requested to clarify that section 12 does not mean that it is reserving the right to impose new KPI processes or metrics without public consultation and notification.

#### Section 15.1 Regulatory Governance

315. Section 15.1 introduces an entirely new regulatory obligation mandating the establishment of regulatory governance arrangements. It states that ‘*Eircom shall have in place transparent regulatory governance arrangements which facilitate effective and non discriminatory provision of access by Eircom to its Pole and Duct networks in accordance with the requirements of the Decision Instrument.*’ in the first instance ComReg is aware that Eircom already has detailed regulatory government arrangements in place on foot of the settlement agreement entered into in 2018. Consequently there appears to be no justification, given that ComReg retains its rights of legal enforcement under the settlement agreement, to also

legislate for a regulatory governance model. It is in effect complete duplication with the effect of rendering the settlement agreement apparently meaningless, even though the work of the IOB continues and the regulatory governance model mandated by the Settlement Agreement is still in place. Further the clause in question is highly problematic because of its almost complete lack of specificity. In the Settlement Agreement, the precise parameters of the regulatory governance structure are set out so that it is clear for Eircom what it needs to do in order to secure compliance with the Settlement Agreement. No such clarity or specificity is consulted upon or provided in section 15.1 which consists of a single sentence. As a consequence, it is almost impossible for Eircom to know with any confidence what constitutes compliance with this requirement. Eircom is particularly concerned by this, given the highly subjective nature of regulatory governance, whereby a wide variety of different regulatory governance models are adopted by different companies. If ComReg wishes to legislate for regulatory governance models then it needs to consult upon and set out what constitutes compliance rather than simply impose an open ended, highly subjective obligation.

Provision re Director liability

316. Under the existing D10/18, an eir Director is required to sign a statement ‘*acknowledging that Eircom is responsible for securing compliance with its obligations.*’ The draft decision instrument proposes to introduce a new declaration, concerning the director’s own responsibility, namely that ‘*the Directors acknowledge that they are responsible for Eircom securing compliance with its regulatory obligations.*’ The area of director’s liability in corporate law is a complex one, and is governed by a separate statutory regime, with a Director of Corporate Enforcement. It is not an area regulated by the Code. The Code relates only to the imposition of obligations on undertakings, and eir can see no provision in the Code authorising ComReg to regulate acknowledgements of responsibility by individuals, rather than regulate eir as an undertaking. Indeed, this would appear to risk cutting across the existing Companies Acts, which is meant to regulate the roles and responsibilities of directors for all companies, including companies that provide electronic communications services. eir therefore requests that this provision be removed. To the extent ComReg claims that it merely reflects existing company law, it is duplicative and creates uncertainty for eir’s directors as to how to comply with both the Companies Acts and this obligation. If it is a novel provision not covered by

the Companies Acts, it has not identified what provision in the Code authorises it to regulate individual directors rather than undertakings. In this regard, it is noteworthy that no such declarations of director responsibility are required from any other electronic communications providers (including those currently designated with SMP such as Vodafone and Three) regulated by ComReg; again this appears to breach the fundamental obligation of fairness and impartiality.

General comments on cumulative impact of obligations to notify ComReg, provide justifications to ComReg, and to seek ComReg approval

317. The draft Decision Instrument provides for a range of separate requirements for Eircom to seek ComReg approval, to provide a 'justification' to ComReg, as well as other separate obligations to formally notify ComReg, and further obligations to seek 'consent'. These notification obligations range from proposed amendments to products, to contracts. In most cases, these are open-ended notifications in that there is no requirement for ComReg to respond or provide feedback. There is no explanation as to the length of many of these pre-notification periods, and in particular why Eircom is required to wait many months before it can launch or amend products, in circumstances where it is not required to obtain ComReg approval, but only to notify ComReg. The cumulative effect of all of these provisions on justification and notification provisions is to wholly 'bog down' the product development and amendment process in paperwork and rigid time-lines, and to significantly slow down the launch of new or amended products, even where there is clear demand or end-user benefit in launching them more quickly. This will inevitably have an effect on competition, in particular where Eircom is competing with other wholesale and retail providers who can launch identical, competing products but without any of these costs and delays. It is not clear how this complies with the statutory objective of promoting innovation, end-user benefits, as well as to act fairly and impartially.

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# PROPOSED SMP REGULATION OF PIA AND WLA IN IRELAND

An economic assessment of ComReg's  
January 2023 consultations

COMMISSIONED BY EIRCOM LIMITED  
2 MARCH 2023

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## **PREFACE**

### Proposed SMP regulation of PIA and WLA in Ireland

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On 9 January 2023, the Commission for Communications Regulation (ComReg) published two consultations relating to wholesale telecoms markets in Ireland: one concerning the market for physical infrastructure access (PIA) and another concerning the market for wholesale local access (WLA).

According to ComReg's provisional findings in the consultations, eir has significant market power (SMP) on both markets. In relation to PIA, ComReg finds that eir has SMP on a national market. In relation to WLA, ComReg finds that eir has SMP in a part of Ireland referred to as the 'commercial area', covering approximately 80 per cent of premises, for access provided to fibre networks, including both fibre-to-the-cabinet (FTTC) and fibre-to-the-home (FTTH). ComReg has proposed a range of regulatory obligations to address the competition concerns it identifies.

Eircom Limited (eir) has requested Copenhagen Economics to provide an economic assessment of ComReg's two consultations. Our assessment is provided in this report.



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## INTRODUCTION AND EXECUTIVE SUMMARY

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### **ComReg provisionally finds that eir has SMP in relation to PIA and WLA**

On 9 January 2023, the Commission for Communications Regulation (ComReg) published two consultations relating to wholesale telecoms markets in Ireland: one concerning the market for physical infrastructure access (PIA) and another concerning the market for wholesale local access (WLA). According to ComReg's provisional findings in the consultations, Eircom Limited (eir) has significant market power (SMP) on both markets. Consequently, ComReg has proposed a range of regulatory obligations to address the competition concerns it identifies.

Against this background, eir commissioned Copenhagen Economics to assess ComReg's PIA and WLA consultations from an economic perspective.

### **PIA: SMP regulation of eir's entire network may be disproportionate**

ComReg finds that eir has SMP in a national market for physical infrastructure. Based on our analysis, we agree that there is an economic case for securing access to physical infrastructure, the wholesale input most upstream in the telecoms supply chain. However, it is not clear that SMP regulation is the most proportionate approach.

First, **there is already regulation in place which secures access to physical infrastructure.** The Broadband Cost Reduction Directive (BCRD) already requires all physical infrastructure providers to grant access to their networks, regardless of market power. Article 72 of the European Electronic Communications Code (the Code) also allows national regulatory authorities to impose access to physical infrastructure as a stand-alone remedy. It is disproportionate to impose additional regulation if existing regulation already addresses the same concerns. ComReg should reconsider whether there is a need for additional regulation beyond the BCRD and other forms of symmetric regulation, in combination with the safeguard of competition law.

Second, **there are other physical infrastructure networks in Ireland.** While eir's network is national and ubiquitous, there are other physical infrastructure networks which already today support the provision of wholesale telecoms services in Ireland, including i) the network of the national electricity provider ESB, which is also national and ubiquitous (and which supports fibre operator SIRO), and ii) the network of the cable operator Virgin Media. As ComReg appears to acknowledge, downstream competition does not depend on access to eir's physical infrastructure.

Third, **demand for access to physical infrastructure is very low.** Commercial operators have requested access to only 0.5 per cent of eir's duct network. ComReg acknowledges that volumes on the commercial market for access to physical infrastructure are relatively trivial. This limits the extent of any impact that regulated access to eir's physical infrastructure would have on competition, and consequently mitigates the extent of any competition concern.

Even if eir is deemed to hold SMP in relation to PIA, **SMP regulation need not apply to eir's entire network**. ComReg's decision to define a single national market for PIA may mask some differences in competitive conditions, and it may not be necessary to regulate all of eir's physical infrastructure. Moreover, SMP regulation of newbuild, specifically, is likely to distort competition. This would be the case since eir's incentive to invest in newbuild would, as the only physical infrastructure provider subject to SMP regulation, be weakened relative to competing providers.

### **WLA: Evidence is not consistent with eir having SMP in the entire commercial area**

ComReg finds that eir has SMP in the market for fibre WLA in a part of Ireland defined as the 'commercial area', covering approximately 80 per cent of premises in the country. We have scrutinised ComReg's analysis and the supporting evidence. We find that ComReg's analysis and the supporting evidence is not consistent with the finding that eir has SMP in the entire commercial area.

First, **market outcomes are not consistent with eir having SMP in the entire commercial area**. eir's own retail market share is relatively modest and declining, and the majority of high-speed retail volumes derive from wholesale networks other than eir's. eir should have an incentive to continue providing access on commercial terms as eir is reliant on revenues generated by access seekers, and there is no evidence of eir attempting to foreclose retail competitors. eir has also reduced its wholesale prices in recent years in response to competitive pressure on the wholesale market, which is not consistent with an SMP operator acting independently of competition.

Second, **evidence shows that the pricing of fibre WLA is constrained**. ComReg finds that wholesale fibre does not compete with other technologies, but the SSNIP<sup>1</sup> test which leads ComReg to this conclusion does not stand up to scrutiny. A corrected SSNIP test shows that the relevant market should be broadened and could reasonably include cable, as has been the case in several other European countries. Regardless, the results of the corrected SSNIP test show that a hypothetical monopolist of fibre WLA would be unable to profitably exercise market power, which is not consistent with ComReg's conclusion that eir holds SMP in the entire commercial area.

Third, **eir's network has extensive overlap with rival networks within the commercial area**. Already today, eir overlaps with a rival network, either FTTH or cable, in 64 per cent of the commercial area. Assuming rival networks continue to expand as planned, and in line with their current pace of expansion, this overlap will increase to 84 per cent by 2026, during the regulatory period. Recent case precedence suggests that such a level of overlap may not be consistent with a finding of SMP. At the very least, the evidence regarding overlap, along with evidence showing differences in the developments of eir's wholesale volumes in different areas, supports that competitive conditions are not homogenous within the commercial area.

Fourth, **eir may not have the ability and incentive to exercise market power even where there is no overlap**. eir does not currently price differentiate its FTTH pricing between different geographic areas. In fact, competitive pressure currently flows the other way: when eir has reduced its wholesale FTTH prices in response to competitive pressure in areas with overlap, this has resulted in lower wholesale pricing nationwide, also in those areas where eir does not overlap with a rival network. [text redacted]

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<sup>1</sup> Small but significant and non-transitory increase in price

### **Any competition concerns could be addressed by less intrusive remedies**

ComReg proposes an extensive set of remedies to address competition concerns on the fibre WLA market. We have assessed the proposed remedies and find that they are intrusive and could distort competition.

First, **many of ComReg's proposed remedies are not proportionate to the competition concern**. ComReg has proposed some of the most intrusive types of remedies despite no evidence that this is necessary to address competition concerns. ComReg's remedy proposals suffer from a degree of circularity as they are heavily based on Oxera's recommendations while Oxera, in turn, does not conduct any independent competition analysis, but bases its remedy assessment on ComReg's findings on the existence and nature of competition concerns.

Second, **prolonging the regulation of FTTC VUA through a price cap based on a bottom up long run incremental cost (BU-LRIC) model appears disproportionate**. BU-LRIC is the most intrusive form of regulation and is warranted only in circumstances where there are i) limited or no competitive constraints and significant concerns over excessive pricing and ii) no substantial demand or cost uncertainties and therefore a low risk of capping the prices at the wrong level. Neither of these conditions seem to apply to the Irish WLA market.

Third, **there is unequivocally no evidence to suggest that eir has sought to engage in a margin squeeze or other exclusionary conduct in the FTTH segment** where ComReg proposes to maintain a detailed (and burdensome) ex ante margin squeeze test. eir has reduced its FTTH wholesale prices, and the headroom between its wholesale and retail prices has been much larger than the current margin squeeze test permits. If anything, eir has become increasingly reliant on its wholesale customers, which does not support ComReg's and Oxera's concerns over foreclosure.

Fourth, ComReg proposes further detailed remedies to constrain eir's ability to reduce wholesale prices below pre-determined levels, or to do so without a lengthy regulatory process. Especially in areas where there is apparent infrastructure-based competition, **constraining eir's price reductions runs the risk of dampening competition between eir and its competitors**. The proposed approval process may be subjective and lengthy relative to how quickly eir may need to respond in negotiations with wholesale customers.

### **Report structure**

Below, we elaborate these findings in greater detail. The remainder of the report is structured as follows:

- Chapter 1 summarises the main elements of ComReg's findings;
- Chapter 2 sets out our assessment of ComReg's analysis of the PIA market;
- Chapter 3 reviews ComReg's market definition and SMP analysis in the WLA market;
- Chapter 4 examines the proportionality of ComReg's proposed remedies on fibre WLA; and
- Chapter 5 concludes with our views on the risks of undue regulation.



## CHAPTER 1

**COMREG PROVISIONALLY FINDS THAT EIR HAS SMP IN RELATION TO PIA AND WLA**

- 1.1 In this chapter, we briefly present the main findings of the two consultations and draft decisions published by the Commission for Communications Regulation (ComReg) in January 2023. Below, we summarise ComReg's provisional findings relating to the rationale for regulation, market definition, competition assessment and proposed remedies, on the markets for physical infrastructure access ('PIA'), and for wholesale local access ('WLA') and wholesale central access ('WCA'), respectively.

**PIA: COMREG PROVISIONALLY FINDS THAT EIR HAS SMP IN A NATIONAL MARKET**

- 1.2 In its PIA consultation and draft decision, ComReg sets out its analysis of the PIA market and presents a proposal to regulate the market to address the competition concerns that it believes could arise in the absence of regulation.
- 1.3 ComReg identifies three categories of potential competition concerns that could occur in the absence of regulation: i) exclusionary practices: where an operator with SMP forecloses access to its physical infrastructure, thus preventing or reducing competition in downstream markets; ii) leveraging: where a vertically-integrated operator with SMP exerts undue influence in downstream markets which distorts competition; and iii) exploitative practices: where an operator with SMP engages in exploitative behaviours, such as excessive pricing.
- 1.4 ComReg proposes to designate a national market for PIA, including all 'telecoms-specific' physical infrastructure – ducts, poles, and associated facilities such as chambers – that is capable of housing wired telecoms networks.
- 1.5 The European Commission did not include PIA in its 2020 Recommendation on Relevant Markets which lists the markets that it considers susceptible to ex ante regulation. As such, ComReg is required to carry out the Three Criteria Test in accordance with Article 67(1) of the Code. The test sets out three criteria<sup>2</sup> that must be cumulatively satisfied for a relevant market to be deemed suitable for ex ante regulation.

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<sup>2</sup> The three criteria are:

- The presence of high and non-transitory barriers to entry;
- A market structure which does not tend towards effective competition within the relevant time horizon; and
- The insufficiency of competition law alone to adequately address the market failure(s) concerned.

- 1.6 ComReg provisionally finds that all three criteria are satisfied in relation to PIA and thus that the market is deemed susceptible to ex ante regulation. Moreover, ComReg’s competition assessment finds that eir is the only owner of a ubiquitous national telecoms-specific duct and pole network, which has capillarity and is not easily duplicated. ComReg acknowledges that alternative physical infrastructure providers, such as Virgin Media and ESB, are present in the market and are investing in the construction of new physical infrastructure but deems that they are not sufficiently close substitutes or capable of exercising a sufficient competitive constraint. Accordingly, ComReg provisionally finds that eir has SMP and could engage in anti-competitive behaviour.
- 1.7 Based on this finding, ComReg provisionally proposes a suite of regulatory remedies on eir, including access, non-discrimination, transparency, and pricing remedies, aimed at ensuring effective competition in downstream wholesale and retail telecoms markets.
- 1.8 Specifically, eir is required to provide access to the entirety of its pole (pole access) and duct network (duct access, sub-duct access and direct duct access). Together with access, eir is required to meet certain terms and conditions including requirements governing fairness, reasonableness, and timeliness of access. ComReg also proposes non-discrimination remedies in the provision of PIA to access seekers, thus requiring eir to provide the same systems and processes as eir provides to itself. Furthermore, ComReg proposes transparency remedies that require eir to publish a physical infrastructure rollout plan, information regarding performance and product development. Lastly, ComReg proposes price control obligations that mostly follow the existing price control for ducts and poles set out in the 2018 WLA market decision.

## **WLA: COMREG PROVISIONALLY FINDS THAT EIR HAS SMP IN THE ‘COMMERCIAL AREA’**

- 1.9 In its WLA and WCA consultation and draft decision, ComReg conducts a competition assessment in the wholesale local access (WLA) and the wholesale central access (WCA) broadband markets. According to ComReg, the rationale for regulating these markets, which are downstream markets to PIA, ultimately supporting the provision of retail broadband, is to “*promote long term sustainable competition by enabling efficient investment in fibre networks.*” Mirroring ComReg’s assessment of PIA, ComReg sets out that an operator with SMP could engage in exclusionary practices, leveraging and exploitative practices.
- 1.10 ComReg defines the following three relevant WLA markets in Ireland:
- a national current-generation WLA market (‘CG WLA’), including local loop unbundling (‘LLU’), sub-loop unbundling (‘SLU’), and line share (‘LS’);
  - an “intervention area” (‘IA’) next-generation WLA Market (‘IA NG WLA’) including WLA delivered via fibre optic cable networks, including virtual unbundled access (‘VUA’), in the part of Ireland where commercial operators will not roll out networks;
  - a “commercial area” next-generation (‘NG’) WLA market (‘Commercial NG WLA’) including VUA delivered over full or partial fibre optic cable networks in the part of Ireland falling outside the “intervention area”.

- 1.11 ComReg finds in its competitive assessment that the CG WLA market and IA NG WLA market are characterised by a tendency towards effective competition over the period of the review. As such, ComReg proposes that no regulation need apply to these markets.
- 1.12 ComReg finds in relation to the Commercial NG WLA market, however, that there could be competition concerns. ComReg defines a set of focal products that includes WLA provided via Fibre to the Cabinet ('FTTC') and Fibre to the Home ('FTTH').<sup>3</sup>
- 1.13 ComReg considers that services provided via cable networks would be the closest substitute to these focal products<sup>4</sup>. However, ComReg concludes that cable does not sufficiently constrain fibre. First, ComReg assesses the direct constraints. While acknowledging that it is technically feasible to provide VUA over cable, ComReg concludes it is unlikely that such an offer will exist over the lifetime of this market review, noting that the existing cable network will soon start to be overlaid with fibre. Second, ComReg assesses the indirect constraints by investigating the retail demand response to a price increase in wholesale fibre. Although considering that cable is a substitute to fibre at the retail level, ComReg considers that retail substitutability is insufficient to impose an indirect constraint on wholesale fibre, based on evidence from a consumer survey.<sup>5</sup>
- 1.14 ComReg identifies that eir has SMP on the fibre WLA market. Accordingly, ComReg proposes to impose a set of regulatory obligations on eir in the Commercial NG WLA Market. These include access obligations, transparency obligations, non-discrimination obligations, statement of compliance obligations, price control and cost accounting obligations, and accounting separation obligations.
- 1.15 ComReg's provisional proposals for remedies draw on the analysis conducted by its economic adviser, Oxera Consulting LLP (Oxera).<sup>6</sup> Oxera's assessment, set out in two reports, focuses on i) the need for and design of price controls for NG WLA products, namely FTTC and FTTH; and, specifically, ii) the need for and design of an ex ante margin squeeze test for eir's FTTH products. Based on Oxera's analysis, ComReg provisionally proposes an array of price control regulatory remedies, see Table 1.

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<sup>3</sup> The term 'FTTH' can be considered equivalent to the term Fibre to the Premises ('FTTP') for the purposes of this report, in keeping with the definition proposed by ComReg

<sup>4</sup> Although ComReg does not explicitly state that it considers cable as the closest substitute to fibre at the wholesale level, ComReg i) considers cable a substitute at the retail level and ii) starts with cable when assessing whether the wholesale market should be broadened to include other technologies. This is consistent with market definition practice where investigating broadening the candidate relevant market should start with considering including closest substitutes (cf. SMP Guidelines)

<sup>5</sup> Annex 2: Residential Market Research

<sup>6</sup> The reports hereinafter referred to as Oxera Part and Oxera Part 3

**Table 1**  
**Summary of ComReg's proposed price control regulatory remedies**

| <b>PRODUCT</b>                                 | <b>PROPOSED REMEDY</b>                           |
|--|--|
| FTTH VUA rental                                | Pricing flexibility, ex ante margin squeeze test |
| FTTC VUA rental                                | Based on BU-LRIC model + CPI                     |
| Emulated FTTC-like service on the FTTH network | Pricing parity with FTTC VUA                     |
| Ancillary service and facilities               | Cost orientation                                 |

Source: Copenhagen Economics

- 1.16 ComReg finds that ex ante regulation is not warranted in the WCA market, as, in the presence of WLA regulation, retail broadband competition is likely to be effective over the time of the review.

## CHAPTER 2

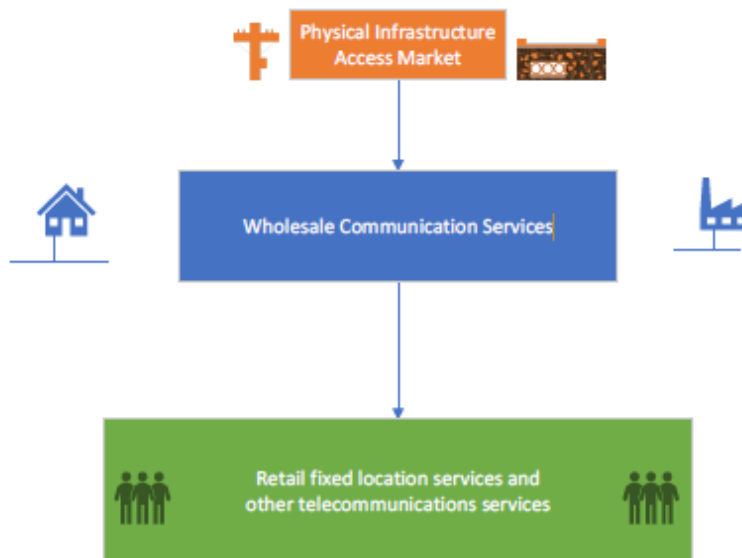
**PIA: SMP REGULATION OF EIR'S ENTIRE NETWORK MAY BE DISPROPORTIONATE**

- 2.1 In this chapter, we assess ComReg's proposed approach to the regulation of PIA. ComReg finds that eir has SMP in a national market for physical infrastructure. We find that, while it is important to secure access to physical infrastructure, it is not clear that SMP regulation is the most proportionate approach in Ireland, and in relation to newbuild, specifically, ComReg's proposed approach is likely to distort competition.
- 2.2 First, we assess whether regulation may be necessary to support access to physical infrastructure. We find that **access to physical infrastructure is important to support downstream competition**, and that regulation may be necessary because physical infrastructure markets are generally characterised by high barriers to entry, meaning that competition alone may not be sufficient to ensure good outcomes.
- 2.3 Second, we assess which type of regulation would be most suitable to ensure that access continues to be provided. We find that while SMP regulation, as proposed by ComReg, has been used in many EU countries to support PIA, **it is not clear that SMP regulation is the most proportionate approach** in Ireland. This is because there is already regulation in place which requires all physical infrastructure providers to grant access to their networks, including the Broadband Cost Reduction Directive (BCRD). Furthermore, there are other physical infrastructure providers in Ireland, and demand for access is very low, which mitigates the extent of any competition concern. ComReg should reconsider whether there is a need for additional regulation beyond the BCRD and other forms of symmetric regulation, in combination with the safeguard of competition law.
- 2.4 Third, we assess whether, if ComReg regardless decides to pursue with single SMP regulation, this regulation should apply to all parts of eir's physical infrastructure network. We find that **SMP regulation need not apply to eir's entire network**. ComReg's decision to define a single national market for PIA may mask some differences in competitive conditions, and it may not be necessary to regulate all of eir's physical infrastructure. Moreover, SMP regulation of newbuild, specifically, is likely to distort competition. This would be the case since eir's incentive to invest in newbuild would, as the only physical infrastructure provider subject to SMP regulation, be weakened relative to competing providers.

**ACCESS TO PHYSICAL INFRASTRUCTURE IS IMPORTANT TO SUPPORT DOWNSTREAM COMPETITION**

- 2.5 Physical infrastructure is the most upstream market in the fixed telecoms supply chain. Accordingly, the presence of any market failure at the most upstream level would affect competition in the downstream (wholesale and retail) markets, see Figure 1.

**Figure 1**  
**Value Chain in Fixed Telecommunications Service**



Source: ComReg PIA Consultation, Figure 1.

- 2.6 Barriers to entry are generally high on the physical infrastructure market because the deployment of physical infrastructure is associated with very high sunk costs. According to the European Commission, the costs of setting up physical infrastructure can represent up to 80 per cent of the total costs of deployment of new networks.<sup>7</sup> This means that there is a high risk that, in the absence of regulation, access to physical infrastructure could become a bottleneck, limiting competition in downstream markets.
- 2.7 Furthermore, the deployment of several networks entails unnecessary infrastructure duplication that could be inefficient: the presence of several parallel physical infrastructure network assets does not provide any economic value via increased differentiation since physical infrastructure is a largely homogenous input.
- 2.8 Regulation can thus be an important tool to avoid duplication, and to support access to physical infrastructure on fair and reasonable terms. The rationale for regulating access to existing physical infrastructure is summarised by the European Commission: “[...] where civil engineering infrastructure exists and is reusable, effective access to such infrastructure may significantly facilitate the roll-out of very high capacity networks and encourage development of infrastructure-based competition to the benefit of end-users”<sup>8</sup>.

<sup>7</sup> (European Commission, 2020b), page 62

<sup>8</sup> (European Commission, 2020), paragraph 26

## IT IS NOT CLEAR THAT SMP REGULATION IS THE MOST PROPORTIONATE APPROACH

- 2.9 ComReg finds in its consultation that the PIA market in Ireland satisfies the Three Criteria Test and that eir has SMP on this market. ComReg therefore proposes to impose access remedies on eir.
- 2.10 While high and non-transitory barriers to entry represent an important argument for regulatory intervention in the PIA market, SMP regulation specifically is warranted only if the suggested SMP remedies are proportionate to the competition concern and incremental to any existing regulation which addresses the same concern.
- 2.11 It is not clear that SMP regulation is the most proportionate approach in Ireland case since i) there is already regulation in place which secures access to physical infrastructure, ii) there are other physical infrastructure networks in Ireland, and iii) demand for access to physical infrastructure is very low.

### There is already regulation in place which secures access to physical infrastructure

- 2.12 Although most NRAs have, according to BEREC<sup>9</sup>, imposed SMP regulation to physical infrastructure, the European Commission did not include PIA in its most recent recommendation specifying the list of telecoms markets that it considers susceptible to ex ante regulation. This was in part because there are: “*significant differences in network topologies, availability of ubiquitous ducts and level of demand for access to ducts and poles across the Union*”.<sup>10</sup>
- 2.13 However, it was in part also because of existing regulatory safeguards addressing the same concern, such as the European Electronic Communications Code (the Code). Article 72 of the Code allows NRAs to impose access to civil engineering as a stand-alone remedy on any relevant wholesale market. Moreover, the Code, stresses the importance of considering the impositions of obligations set out in Article 72 as a proportionate means to promote competition in PIA market: “*Such obligation to provide access to civil engineering [...] **should be considered by national regulatory authorities before other access obligations** are imposed downstream, if proportionate and sufficient to promote competition in the benefit of the end-users.*”<sup>11</sup>
- 2.14 Apart from via the Code, access to physical infrastructure, is also, in parallel with the SMP framework and independent of market power, supported via the BCRD. The European Commission clarifies the role and scope of the Directive as follows: “*According to the Directive, network operators (electronic communication, energy utilities, etc.) are to give access to their physical infrastructure (e.g. ducts, manholes, cabinets, poles) to electronic communication network operators intending to roll out high-speed broadband networks under fair and reasonable terms and conditions, including price.*”<sup>12</sup>

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<sup>9</sup> (BEREC, 2019a), page 7

<sup>10</sup> (European Commission, 2020), paragraph 27

<sup>11</sup> (European Commission, 2020), paragraph 28 (our emphasis in bold)

<sup>12</sup> (European Commission, 2023)

- 2.15 Any regulator considering imposing additional regulation should therefore consider whether existing legislation is already sufficient to address any concerns. In the context of PIA specifically, as explained by BEREC: “[...] *the NRA will have to ascertain to what extent the existence of general legislation (namely the BCRD), as well as instruments other than SMP regulation and that might be in place (such as symmetric regulation regulating access to physical infrastructure), **may be sufficient on their own to prevent distortions of competition** at the retail level.*”<sup>13</sup> BEREC also explicitly notes that the Code could provide a sufficient safeguard: “*NRAs shall also examine whether the imposition of obligations on civil engineering alone in accordance with Article 72 would be a proportionate means to promote competition and the interests of end users.*”<sup>14</sup>
- 2.16 It is not only in relation to physical infrastructure that the presence of alternative regulatory frameworks has reduced the need for SMP regulation. For example, both i) the wholesale market for international roaming and ii) the markets for call termination for fixed and mobile have been removed from the list of markets recommended for SMP regulation, following the introduction of regulation specifically aimed at addressing international roaming charges, and the Eurorate regulation, respectively.<sup>15</sup>
- 2.17 Indeed, while most NRAs have pursued with SMP regulation in relation to PIA, there are also eight NRAs<sup>16</sup> in Europe that chose not to impose SMP remedies to any physical infrastructure “*[either] because the [downstream] relevant market is deregulated, or because other remedies/legal instruments are deemed to be sufficient or more appropriate.*”<sup>17</sup> In Denmark, for example, duct access obligations on the SMP operator were withdrawn as the obligations from the BCRD were considered sufficient. Similarly, the Czech NRA did not impose access to physical infrastructure due to replication of remedies with BCRD obligations.<sup>18</sup> Similarly, the Luxembourgish NRA withdrew regulated access to ducts due to an observed lack of demand and because there were alternative ways of ensuring access via legislation.<sup>19</sup>
- 2.18 ComReg identifies that the BCRD has, in practice, been seldom used in Ireland so far. However, this does not provide evidence that the BCRD could not provide a sufficient safeguard against any anti-competitive conduct going forward. It could be that the BCRD has not until now had to play any major role in Ireland simply because i) commercial agreements have been possible and/or because SMP regulation has been in place and/or, ii) because demand for physical infrastructure in Ireland is in any case very low (see later section).
- 2.19 Apart from the BCRD and any other symmetric regulation that can be used to secure access, competition law also provides an existing safeguard against anti-competitive conduct by a dominant operator. In its analysis, as part of the Three Criteria Test, ComReg reaches the conclusion that competition law would be insufficient to address competition concerns on the PIA market.

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<sup>13</sup> (BEREC, 2019b), page 24 (our emphasis in bold)

<sup>14</sup> (BEREC, 2019b), page 6

<sup>15</sup> (WIK Consult, 2018)

<sup>16</sup> Namely, Austria, Czech Republic, Denmark, Finland, Croatia, Malta, the Netherlands and Romania.

<sup>17</sup> (BEREC, 2019b), page 2

<sup>18</sup> (BEREC, 2019a), page 13

<sup>19</sup> <https://ec.europa.eu/newsroom/dae/redirection/document/72442>, footnote 198



- 2.20 However, it is unclear which, if any, substantial analysis ComReg develops to support this conclusion (e.g. because ComReg specifically considers market failures in relation to PIA in Ireland “extensive” and/or because “frequent and/or timely intervention” is indispensable).<sup>20</sup> Competition law could be considered a sufficient safeguard specifically in relation to PIA in Ireland because demand for access is very limited and because there is no evidence that eir would not continue to provide access on reasonable terms in the absence of regulation.

### **There are other physical infrastructure networks in Ireland**

- 2.21 ComReg argues that alternative physical infrastructure present in Ireland cannot be considered close substitutes to eir’s physical infrastructure network, which leads ComReg to the conclusion that eir holds SMP.
- 2.22 Apart from eir’s network, there are at least two other physical infrastructure networks in Ireland which currently support the provision of wholesale telecoms services, competing with eir in downstream markets: Virgin Media and ESB (used by SIRO).
- 2.23 In relation to Virgin Media, ComReg argues that the Virgin Media network cannot be considered a relevant competitor on the physical infrastructure market as it lacks in capillarity and is non-contiguous in nature. However, it is not clear whether capillarity or contiguity would indeed be key features that should be crucial in relation to competition for on a physical infrastructure market. For instance, BEREC’s guidance on how to treat cable networks in relation to PIA assessments does not mention capillarity or contiguity as critical features.<sup>21</sup>
- 2.24 In relation to ESB, ComReg argues that the ESB network cannot be considered a relevant competitor on the PIA market due to capacity limitations “*arising from the fact that ESB PI was not built to house anything other than electrical equipment*”.<sup>22</sup> However, this is inconsistent with the fact that telecoms operator SIRO has already made extensive use of ESB’s physical infrastructure to reach more than 470k premises<sup>23</sup>, and has announced its commitment to reach 770k<sup>24</sup>. In addition to this, SIRO claims that using ESB’s network is an advantage to deploy new fibre network and discussed its benefits to homebuilders. Cian O’Mahony, SIRO Head of Operations and New Developments, recently declared that SIRO’s “*unique proposition is that it uses the existing infrastructure*”, concluding “*the key element to remember is that we sit inside the ESB assets so you don’t need to dig up anything to put us in*”.<sup>25</sup>

<sup>20</sup> See “*Competition law interventions are likely to be insufficient where for instance the compliance requirements of an intervention to redress persistent market failure(s) are extensive or where frequent and/or timely intervention is indispensable.*” <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020H2245&rid=1>

<sup>21</sup> “*In countries where cable operators are present, another issue that may be raised in an SMP assessment is the extent to which the physical infrastructure that was used by the cable operator for the purpose of deploying its own network may also be used for the purpose of deploying other types of networks (such as copper/fibre networks), and thus may effectively constrain, to some degree, the market power of the incumbent operator in the physical infrastructure market (or be argued to be in a position of joint dominance). In this regard, features such as coverage may become relevant for the purpose of assessing the competitive pressure that the physical infrastructure of the cable operator may exert.*” (BEREC, 2019b), page 20

<sup>22</sup> ComReg PIA Consultation, paragraph 3.84

<sup>23</sup> According to the SIRO website, available at <https://siro.ie/>

<sup>24</sup> (O’Mahony, What’s unique about Siro’s offering to the construction industry?, 2023)

<sup>25</sup> (O’Mahony, What’s unique about Siro’s offering to the construction industry?, 2023)

- 2.25 Moreover, in a Presentation on the National Broadband Plan, ESB claims that its extensive network represents a “*business opportunity to use electricity network to bring fibre to homes and premises*”.<sup>26</sup> ComReg also acknowledges that ESB has “*a nationally ubiquitous electrical network with capillarity*”.<sup>27</sup>
- 2.26 Even if capacity constraints mean that ESB’s network cannot house any telecoms provider other than SIRO in the commercial area, this would not imply that the ESB network could not constitute a viable alternative to eir’s physical infrastructure in the intervention area, where SIRO will not be installing any telecoms infrastructure. This is a particularly important distinction since NBI is by far eir’s biggest access seeker in relation to physical infrastructure (see later section).
- 2.27 ComReg’s stance on the exclusion of the ESB network also is not aligned with guidance provided in the BCRD regarding which types of networks can support telecoms infrastructure. It is explained that the BCRD “*applies not only to public communications network providers but to any owner of [...] extensive and ubiquitous physical infrastructures suitable to host electronic communications network elements, **such as physical networks for the provision of electricity, gas, water and sewage and drainage systems, heating and transport services.***”<sup>28</sup> As elaborated by BEREC: “*The current BCRD (Art. 3(2)) foresees that **network operators of ‘all’ sectors** (according Art. 2(1)) have the obligation to meet all reasonable requests of ECN operators for access to its physical infrastructure*”.<sup>29</sup>

### **Demand for access to physical infrastructure is very low**

- 2.28 Demand for access to physical infrastructure in Ireland is very low, which mitigates the extent of any competition concern.
- 2.29 According to eir’s data, access to its duct network has been requested (and granted) for just 16 per cent of the total network, the vast majority of which is consumed by non-commercial operator NBI.<sup>30</sup> From May 2019 to February 2023, access was requested by third-party operators to 6,248km of ducts out of eir’s total network of 38,000km. Of those 6,248km, 97 per cent was provided to the NBI, with commercial operators requesting access to less than 200km, cumulatively, see Figure 2.

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<sup>26</sup> (ESB, 2019), page 2

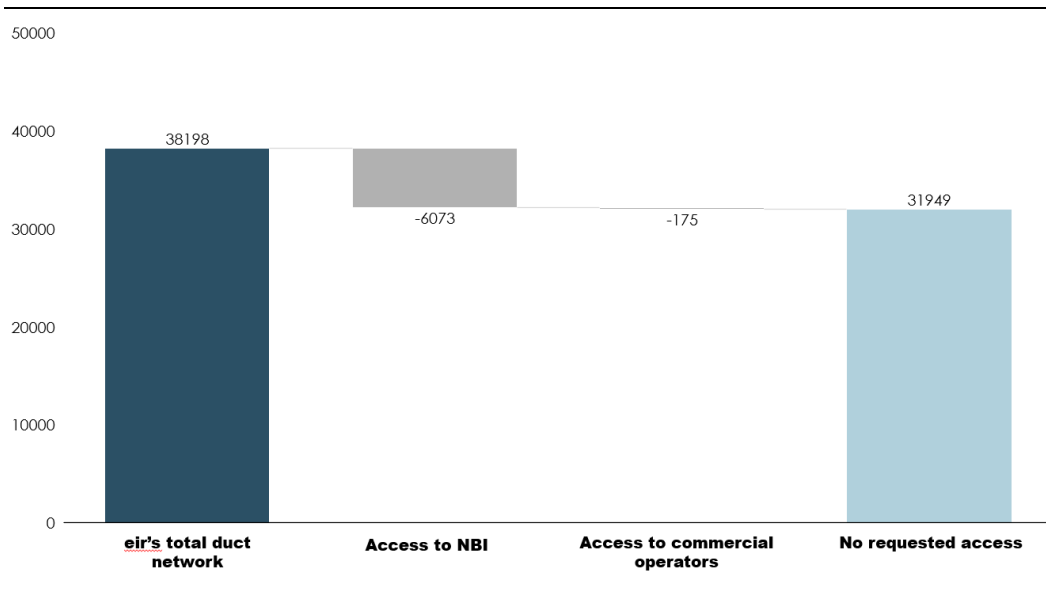
<sup>27</sup> ComReg PIA Consultation, paragraph 4.51

<sup>28</sup> (European Parliament and Council of the EU, 2014), paragraph 13 (our emphasis in bold)

<sup>29</sup> (BEREC, 2021), page 9 (our emphasis in bold)

<sup>30</sup> We refer here to standalone PIA, which is the product that ComReg proposes to regulate, rather than PIA as part of some broader wholesale input, e.g. WLA.

**Figure 2**  
**Requested access to eir's duct network**  
Kilometres of ducts



Source: eir data

- 2.30 ComReg summarises: “[...] the volume of traded PI in the wholesale merchant market is trivial in comparison to that of self-supplied PI [...]” and confirms: “The only SP which currently makes use of (and is expected to make use of) Eircom PIA at any level of scale is NBI.”<sup>31</sup>
- 2.31 The fact that there is only trivial demand for PIA suggests that eir has limited ability to influence downstream competition via anti-competitive behaviours in relation to PIA. This mitigates the extent of any competition concern beyond securing NBI’s continued access to physical infrastructure, which would mostly or exclusively be in the intervention area (i.e., a targeted remedy could be sufficient to address competition concerns).
- 2.32 Furthermore, specifically in relation to NBI, it is not clear why there would be a material competition concern: eir should have no incentive not to provide access to NBI because NBI will only be rolling out its network in the intervention area and hence is not a direct retail competitor.
- 2.33 ComReg itself acknowledges that PIA regulation will not in practice have any significant impact on competition: “Based on the evidence available, ComReg is of the view that, within the lifetime of this five-year market review period, other than for NBI, **regulation of the PIA market and its use by other SPs is unlikely to have a significant impact on competition** within the WLA and WCA (and related) markets.”<sup>32</sup>

<sup>31</sup> ComReg WLA Consultation, paragraph 6.15

<sup>32</sup> ComReg WLA Consultation, paragraph 6.15 (our emphasis in bold)

## **SMP REGULATION NEED NOT APPLY TO EIR'S ENTIRE NETWORK**

- 2.34 Even if eir is deemed to hold SMP, this need not lead to the conclusion that eir should be subject to SMP regulation across all of its physical infrastructure. It could be sufficient to apply SMP regulation to those parts of the network that are the most difficult to replicate, e.g. ducts in the last mile, and/or those parts where there is a material competition concern, whilst avoiding SMP regulation in other parts of the network.
- 2.35 SMP regulation of newbuild, specifically, would distort competition because it would impact the different providers in an asymmetric manner. eir's incentives to invest in new physical infrastructure, would, as the only operator subject to SMP regulation, be reduced relative to other physical infrastructure providers.

### **A national market for PIA may mask differences in competitive conditions**

- 2.36 Best practice in relation to market definition entails departing from the narrowest potential markets, focusing on the focal products with the greatest competition concern. In the competitive assessment of the PIA market, this approach would mean departing from narrow product and/or geographic markets, e.g. focusing only sub-ducts, or only on some part of the country. As explained by BEREC, the market for PIA need not, along the geographic dimension for instance, be national: *"[...] if there is no credible alternative presence to that of the incumbent operator in the whole national territory, it may be concluded that the market is national. [...] The conclusion may, however, be different in the event that the NRA identifies some geographic areas where alternative operators supplying telecommunications physical infrastructure are capable of providing wholesale access services that are fully equivalent to the type of access provided by the incumbent operator."*<sup>33</sup>
- 2.37 However, ComReg simply departs from a national market encompassing all types of PIA, and based on this starting point reaches the conclusion that there is no network quite like eir's. Taking this point of departure may mask differences in competitive conditions. For example, by taking the approach of defining a single national market for PIA, ComReg overlooks potential differences in competitive conditions between the intervention area and the commercial area. As anticipated above, ESB's network could potentially constitute a viable alternative to eir's physical infrastructure in at least the intervention area, where SIRO will not roll out its network, and where the ESB network could thus have more capacity. In any case, since NBI is the only operator that relies on PIA, it could be sufficient to apply a remedy which addresses this specific concern, which would be limited to the intervention area.

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<sup>33</sup> (BEREC, 2019b), page 19

- 2.38 Regardless of the definition of the relevant market, ComReg does not appear to have thoroughly considered the option of imposing differentiated remedies that would apply to less than the entirety of eir's physical infrastructure network nor has it considered to carry out its competition assessment distinguishing between different parts of the network (e.g., backhaul network<sup>34</sup>).

### **Asymmetric regulation of newbuild would distort competition**

- 2.39 In its assessment, ComReg acknowledges that other operators have entered and are investing in the physical infrastructure market, but states that, in its view, the amount of newbuild will not be significant: "*PI entry and expansion plans [...] do not indicate that there will be any significant investment in the construction of new PI to support fixed telecoms in the medium term.*"<sup>35</sup>
- 2.40 This statement does not fully reflect the results of ComReg's own survey, with five out of eight respondents saying that there will be some newbuild, and the remaining three out of eight saying that the amount of newbuild will be 'significant'.<sup>36</sup>
- 2.41 As further evidence that there could be a meaningful amount of newbuild during the upcoming regulatory period, we note that the total size of eir's duct and poles networks have increased by 1.7<sup>37</sup> and 1.1 per cent, respectively, from 2021 to 2022, suggesting a potential expansion of 8.5 per cent for ducts and 5.5 per cent for poles, over the five-year regulatory period, if growth continues at the same rate.
- 2.42 SMP regulation of newbuild, specifically, would distort competition by undermining eir's incentive to invest in newbuild relative to competitors, see **Box 1**.

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<sup>34</sup> In France, for instance, the SMP operator Orange must provide non-discriminatory access to its infrastructure, "*except if the infrastructure is used to deploy backhaul networks, where it is sufficient to ensure that the wholesale conditions are comparable to those provided by Orange for its own operations*", (Cullen International, 2020), page 8

<sup>35</sup> ComReg PIA Consultation, paragraph 4.11

<sup>36</sup> Copenhagen Economics based on ComReg PIA Consultation, paragraph A3.90 – A3.92

<sup>37</sup> Copenhagen Economics based on eir's data

**Box 1 Example of Physical Infrastructure Access in newbuild areas**

For the sake of illustration, consider a situation in which a developer is building a new housing estate and laying ducts for telecoms (say, fibre access) networks. The developer would typically run a competitive tender and choose the operator (or other infrastructure provider) with the best offer to build and maintain the physical infrastructure underlying the fibre network. Consider a situation where there are two bidders: eir and an alternative operator (e.g., ESB/SIRO). Expected returns would be:

|                                 | <b>EIR</b>                           | <b>ALTERNATIVE OPERATORS</b>           |
|---------------------------------|--------------------------------------|--|
| ROI via self-supply             | Yes                                  | Yes                                    |
| ROI via the provision of access | Yes, at regulated SMP rate           | Yes, at non-regulated rate             |
| <b>Total ROI</b>                | <b>Constrained by SMP regulation</b> | <b>Unconstrained by SMP regulation</b> |

The expected returns from investing in physical infrastructure would thus differ depending on whether the owner is subject to SMP regulation. eir's returns (post physical infrastructure deployment) would be capped by regulation. This means that the net present value of eir's investment would be constrained, while the competitor would not face a similar constraint and could generate higher returns over the lifetime of the physical infrastructure investment. This would, in principle, place eir's competitor in an advantageous position: in anticipation of higher returns after network deployment, it would not need to bid as aggressively to win.

The presence of asymmetric regulation of newbuild would thus:

- distort competition for new ducts,
- reduce the likelihood that fair and reasonable access to newbuild is guaranteed since it would be more likely that the non-SMP operator would win.

- 2.43 Symmetric regulation, such as via the BCRD (i.e., regulation that applies generally to a whole category of operators, regardless of market power), of newbuild areas would, contrary to SMP regulation, ensure that all operators have access to any physical infrastructure under fair and reasonable terms, hence promoting investment and preventing distortion of competition at the retail level. This would alleviate any competition concerns in newbuild areas (including those where physical infrastructure is not eir's) and ensure a level playing field in the competition for deploying physical infrastructure and fibre to newbuild areas, thereby addressing the issue set out in Box 1.
- 2.44 WIK Consult, a specialised telecoms consultancy, stresses the potential benefits of symmetric regulation, especially on in-building wiring, to encourage and speed up the deployment of high-capacity networks. In their report on "best practice for passive infrastructure access" they write that: "*Experience suggests symmetric in-building wiring provisions coupled with duct access from the SMP operator, where this exists, is likely to be most relevant and useful in the deployment of VHC broadband.*"<sup>38</sup>

<sup>38</sup> (WIK Consult, 2017), page 6

- 2.45 Experience from other NRAs also shows how symmetric regulation has been successful in promoting infrastructure competition and fast deployment of next generation access (NGA) deployment – mostly in relation to in-building wiring. France, Spain and Portugal all have legislation that pre-dates the 2014 Broadband Cost Reduction Directive<sup>39</sup> and opted for symmetric regulation on in-building wiring provisions, see **Box 2**.

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<sup>39</sup> (European Parliament and Council of the EU, 2014)

## Box 2 Evidence of symmetric regulation of physical infrastructure from Portugal, France and Spain

### PORTUGAL

Portugal applies the strictest symmetric access regulation to physical infrastructure. All information concerning ducts (e.g., who is to be addressed in case of a request for access to ducts and poles, the timeframe for access and usage rights, procedures and renewal conditions contractual terms, prices, technical instructions, penalties, and other relevant aspects for the provision of access) are integrated into a central information system (SIC), launched by Portuguese NRA ANACOM in January 2016.

The symmetric access regulation has been beneficial for high-speed broadband roll-out, as described by ITU:

*"The symmetric access regulation and detailed technical standards for Portuguese buildings had a significant impact on the Portuguese market. On the one hand, due to transparent pricing and standardised in-house equipment, investment was encouraged, and uncertainty reduced. The risk posed by the investor's lack of knowledge on whether the inhouse wiring will be capable of transmitting the desired QoS parameters, was taken out of the equation. Furthermore, it encouraged providers to expand their in-house-cooperation to outside plant deployment as well. This resulted in reciprocal access deals (e.g., between Vodafone and Portugal Telecom) as well as substantial co-investment, making the country one of the leading countries in Europe regarding its FTTB/FTTH connectivity."*<sup>40</sup>

### FRANCE

France adopts a complementary approach, employing asymmetric and symmetric tools to regulate access to physical infrastructure. Arcep's regulation for NGA network is based on two complementary pillars:

- Asymmetric regulation on existing infrastructure (copper LL + ducts and poles + associated facilities).
- Symmetric regulation of fibre termination:
  - Access and co-investment obligation in the last "drop"
  - Aims to preserve competition dynamics for new networks, expected to be deployed by a large number of private or public initiative operators (Art. 12 FD & 5 AD) (EECC art.61(3) and 61(1))<sup>41</sup>

### SPAIN

Spain was the first country to impose symmetric regulation on in-building wiring in 2009. The General Law on Telecommunications establishes that *"newly created urban projects must provide for the installation of civil works infrastructure to facilitate the deployment of public electronic communications networks, including passive network elements and equipment, which must be made available to operators on equal, transparent and non-discriminatory basis."*<sup>42</sup> In practice: *"the first operator deploying the fibre local access segment within a building (i.e. the segment of an NGA network that connects end-user premises to the first distribution point) must make it available to third parties at reasonable prices."*<sup>43</sup>



- 2.46 Apart from the other benefits mentioned, symmetric regulation of newbuild could also stimulate co-operation across providers and promote co-investment, which could in turn accelerate network roll-out. In this regard, the experience of Portugal is exemplary: the use of symmetric access regulation has enhanced transparency and thus in turn promoted co-investment and reciprocal access deals, making the country a leader in FTTH connectivity (see Box 2).

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<sup>40</sup> (ITU, 2020), page 19

<sup>41</sup> (Arcep, 2019), page 12

<sup>42</sup> (ETNO, 2021), page 21

<sup>43</sup> (BEREC, 2019a), page 5

## CHAPTER 3

**WLA: EVIDENCE IS NOT CONSISTENT WITH EIR HAVING SMP IN THE ENTIRE COMMERCIAL AREA**

- 3.1 In this chapter, we assess ComReg's proposed approach to the regulation of fibre wholesale local access (WLA). ComReg finds that eir has SMP in the market for fibre WLA in a part of Ireland defined as the 'commercial area', covering approximately 80 per cent of premises in the country. We have reviewed ComReg's analysis and the supporting evidence. We find that the evidence is not consistent with the finding that eir has SMP in the entire commercial area.
- 3.2 First, we explore the evidence in relation to retail market shares and wholesale pricing. We find that **market outcomes are not consistent with eir having SMP in the entire commercial area**. eir's own retail market share is relatively modest and declining, having gone from 33 per cent in 2018 to 27 per cent in 2022, and the majority of high-speed retail volumes derive from wholesale networks other than eir's. eir should have an incentive to continue providing access on commercial terms as eir is reliant on revenues generated by access seekers, and there is no evidence of eir attempting to foreclose retail competitors. eir has also reduced its wholesale prices in recent years in response to competitive pressure on the wholesale market, which is not consistent with an SMP operator acting independently of competition.
- 3.3 Second, we scrutinise the analysis that ComReg develops to conclude that wholesale fibre does not compete with other technologies. ComReg's SSNIP<sup>44</sup> test to assess indirect constraints has several important flaws. We find that, upon further inspection, the survey **evidence suggests that the pricing of fibre WLA is constrained**. A correct application of the SSNIP test, using ComReg's own evidence, shows that the pricing of fibre WLA is in fact indirectly constrained. This means that the relevant market should be broadened and could reasonably include cable, as has been the case in several European countries. Regardless of how the relevant market is defined, the results of the SSNIP test show that a hypothetical monopolist of fibre WLA would be unable to profitably exercise any market power, which is not consistent with ComReg's conclusion that eir holds SMP in the entire commercial area.
- 3.4 Third, we assess the extent of network overlap within the commercial area. We find that **eir's network has extensive overlap with rival networks within the commercial area**. Already today, eir overlaps with a rival network, either FTTH or cable, in 64 per cent of the commercial area. Assuming that rival networks continue to expand as planned, and in line with their current pace of expansion, this overlap is due to increase to 84 per cent by 2026. Recent case precedent from the European Commission suggests that markets with such high levels of parallel coverage are unlikely to be characterised by the presence of an SMP operator. At the very least, the evidence regarding overlap, along with other evidence showing differences in the developments of eir's wholesale volumes in different areas, suggests that competitive conditions are not homogenous within the commercial area.

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<sup>44</sup> Small but significant and non-transitory increase in price

- 3.5 Fourth, we assess the extent of any residual competition concerns in those parts of the commercial area where eir does not overlap with rival networks. We find that **eir may not have the ability and incentive to exercise market power even where there is no overlap**. eir does not currently price differentiate its FTTH pricing between different geographic areas. In fact, competitive pressure flows the other way: when eir has reduced its wholesale prices in response to competitive pressure in areas with overlap, this has resulted in lower wholesale pricing nationwide, also in those areas where eir does not directly overlap with a rival network. [text redacted]

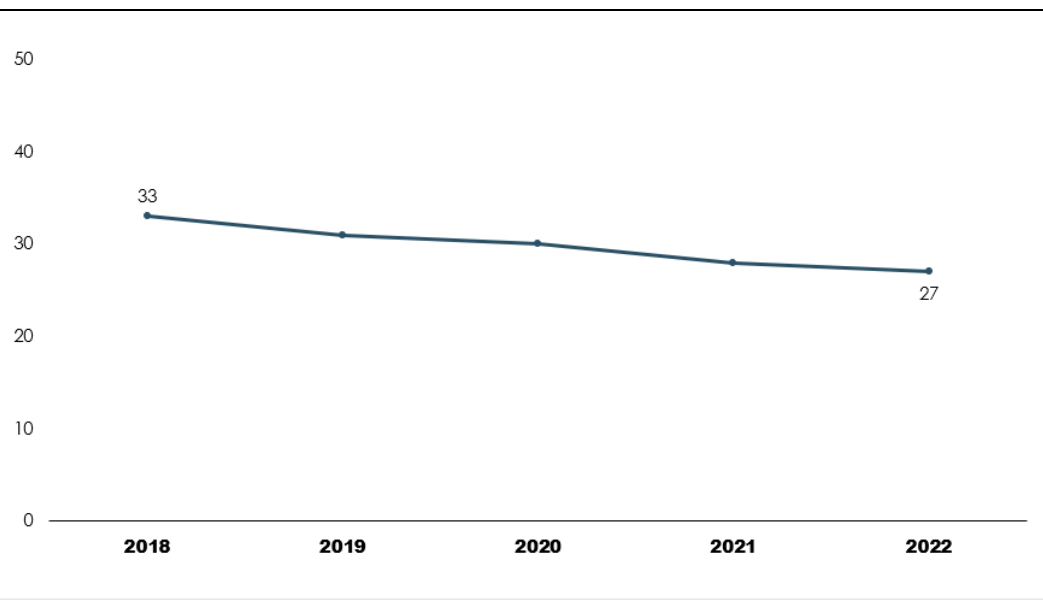
## **MARKET OUTCOMES ARE NOT CONSISTENT WITH EIR HAVING SMP IN THE ENTIRE COMMERCIAL AREA**

- 3.6 In the following, we assess whether the evidence of market outcomes is consistent with the notion that eir holds SMP at the wholesale level and, therefore, supports the need for continued regulation. We explore market outcomes in relation to retail market shares, eir's wholesale volumes, and eir's wholesale pricing.
- 3.7 We find that market outcomes are not consistent with eir having SMP across the entire commercial area. First, eir's own retail market share is relatively modest and declining, and the majority of high-speed retail volumes derive from networks other than eir's. Second, we expect eir to have an incentive to continue providing access on commercial terms, as eir is increasingly reliant on revenues generated by access seekers, and there is no evidence of eir attempting to foreclose retail competitors. Third, eir has reduced its wholesale prices in recent years in response to competitive pressure on the wholesale market.
- 3.8 We explain these findings in greater detail below.

### **eir's retail market share is declining**

- 3.9 Evidence of market outcomes on the retail market can help inform an assessment of SMP in the WLA market. eir's market power on the wholesale level would be limited if a substantial share of retail volumes derives from networks other than eir's. Vertically integrated providers that self-supply network inputs, such as Virgin Media, can also exert an indirect constraint on eir's ability to increase prices (we return to an assessment of the strength of these constraints below). Furthermore, rival operators may provide retail services over the networks of other wholesale suppliers, notably SIRO's FTTH network. Either way, retail market shares that are independent of eir's network are indicative of competitive constraints on eir's wholesale pricing.
- 3.10 eir's fixed retail broadband market share is relatively modest and has been declining in recent years. ComReg's data shows that eir's market share has declined from 33 per cent in 2018 to 27 per cent in 2022, see **Figure 3**.

**Figure 3**  
**eir's fixed retail broadband market share has been declining**  
Per cent



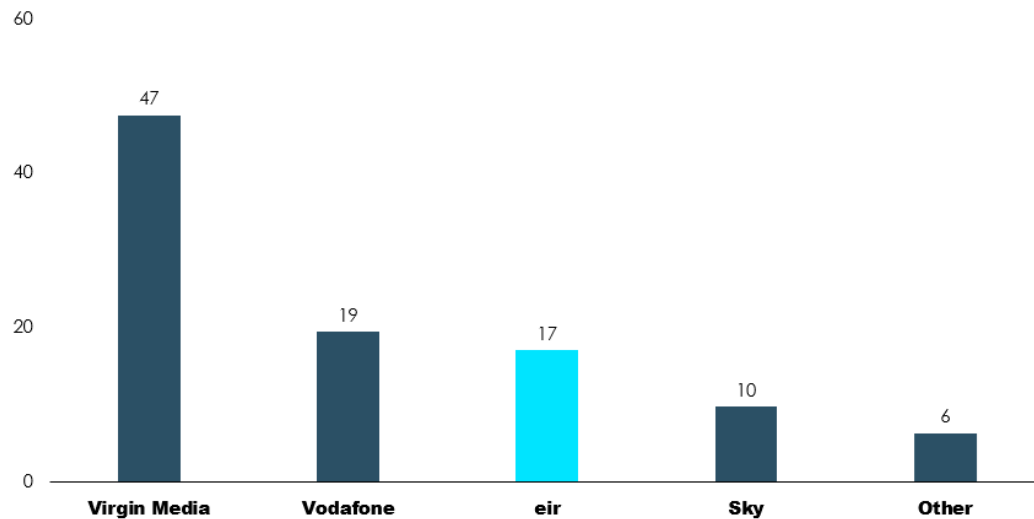
Note: The fixed retail broadband market includes broadband provided over copper (DSL), FTTC, FTTH, DOCSIS 3.1 cable, FWA and Satellite

Source: Copenhagen Economics based on Figure 6 in ComReg WLA Consultation.

3.11 eir's retail market share is even smaller when considering only the high-speed segment of the market. When considering retail market shares on a segment for fixed<sup>45</sup> internet faster than 100 Mbps, we find that Virgin Media is the largest retail provider in this segment, followed by Vodafone. eir is only the third largest provider in this segment, see **Figure 4**.

<sup>45</sup> The inclusion of mobile broadband would further erode eir's market share

**Figure 4**  
**eir is only the third largest player in the high-speed retail broadband market**  
Share of total number of active broadband subscriber lines, in per cent



Note: We use data from ComReg's Quarterly Key Data Report for Q2 2022 to arrive at figures for a high-speed retail broadband market. We use data from Table 2 and 3 to determine how many of Virgin Media's cable-based subscriber lines deliver speeds of at least 100Mbps. We assume that 100 per cent of the FTTH network delivers speeds of at least 100 Mbps and assume that all FTTH providers are part of this high-speed retail broadband market. We assume that 97.5 per cent of Virgin Media's cable network is capable of delivering high-speed broadband, based on Virgin Media's own data.

Source: Copenhagen Economics based on ComReg's Quarterly Key Data Report for Q2 2022, eir data and the Virgin Media website.

- 3.12 Analogous to the above, eir's market share on the FTTH segment has also been declining in recent years, as explained by ComReg: *"When retail broadband market shares are assigned based on FTTP subscriptions only (which ComReg started recording at a granular level in Q1 2019), the most notable change is the decline in Eircom's retail market share (from 47 per cent in Q1 2019 to 31 per cent in Q2 2022 – although the FTTP base at the start was small) [...]"*<sup>46</sup>
- 3.13 When combining the volumes of Virgin Media with volumes supported by SIRO's network (including via Vodafone), it is apparent that the majority of volumes on the high-speed retail market derive from networks other than eir's.
- 3.14 Overall, evidence of the state and development of market shares is not consistent with the notion that eir would have exploited its alleged SMP to the detriment of rival operators. eir's diminished role is most pronounced in the important and growing high-speed segment, where competitors significantly rely on own or alternative networks other than eir's.

<sup>46</sup> ComReg WLA Consultation, paragraph 5.231

### **Growing reliance on wholesale customers limits eir’s incentives to foreclose competitors**

3.15 Evidence of the structure of retail market can inform an assessment of eir’s incentive to continue providing access on a commercial basis should ComReg scale back some or all of the SMP remedies. Incumbent operators can have sound reasons to provide access on commercial terms insofar as this enables them to expand and ‘fill the network’ with customers their retail arm otherwise would not attract. **The incentive to attract and retain wholesale customers is most pronounced in the presence of alternative infrastructures.** This is because any attempt to foreclose could result in diversion of access seekers to other wholesale providers.

3.16 More specifically, raising wholesale prices would be profitable for eir only if eir’s retail arm would be able to capture a sufficiently large share of end users to offset the decrease in wholesale profits. This would be unlikely if access seekers could, along with end users, migrate to an alternative infrastructure provider such as SIRO or Virgin Media.<sup>47</sup> The more eir’s revenues are derived from wholesale customers active in the retail market, the greater is eir’s incentive to retain these customers on its network.<sup>48</sup> As articulated by Oxera in its report for Liberty Global:

*“Incumbent operators currently providing regulated access have built up a profitable wholesale business over the years, and already incurred fixed costs in setting up various wholesale access products and supporting services such as wholesale billing and support functions. There are many circumstances in which these operators will have strong incentives to continue providing wholesale access on a commercial basis in order to protect their existing wholesale access revenue stream and investments. Stopping provision of these wholesale access services runs the risk of losing a source of profit to a rival infrastructure operator.”<sup>49</sup>*

3.17 There is no evidence to indicate that eir is attempting, or has attempted, to foreclose its downstream competitors. On the contrary, the evidence indicates that eir has engaged its access seekers and is increasingly reliant on their demand. [text redacted], see Figure 5.

**Figure 5**  
**[text redacted]**

Number of premises passed and connections sold, in thousands

[figure redacted]

Note: We map eir’s wholesale sales data for December 2022 to the latest figure for eir’s FTTH footprint.  
Source: Copenhagen Economics based on eir data and eir’s website.

<sup>47</sup> Currently such diversion would take place on the retail level; going forward also on the wholesale level if and when Virgin Media offers wholesale access

<sup>48</sup> Economic research by Ordovery and Schaffer (2007) explores the conditions under which the provision of access makes economic sense.

<sup>49</sup> Oxera (2017), p. 36.

- 3.18 This shows that **eir is to a significant extent reliant on access seekers' demand**. ComReg's adviser Oxera also notes that eir is reliant on its access seekers: "[...] a significant share of Eircom's wholesale FTTH lines are sold to access seekers (such that Eircom is not focused solely on self-supply)."<sup>50</sup> Oxera also acknowledges that eir has made no attempt to foreclose access seekers at present.<sup>51</sup>
- 3.19 ComReg's evidence also shows that eir's position in the wholesale market has been significantly weakened since SIRO entered the market, with SIRO accruing a market share between 30 per cent and 40 per cent<sup>52</sup> in the period between Q1 2019 and Q2 2022, primarily at the expense of eir.<sup>53</sup>
- 3.20 **SIRO is thus exerting an increasingly strong direct constraint on eir, incentivising eir to retain (rather than foreclose) access seekers.** [text redacted]<sup>54</sup> of its FTTH connections from eir. Vodafone is also a part-owner of SIRO<sup>55</sup>, eir's largest fibre-based wholesale competitor. eir's incentives to increase its wholesale prices would be limited if its largest access seeker Vodafone could migrate volumes to another wholesale network (SIRO and/or Virgin Media, which is already contracted to provide access to Vodafone).<sup>56</sup>
- 3.21 Similarly, eir's second largest access seeker, Sky, relies on eir's network for only [text redacted] of its FTTH retail volumes.<sup>57</sup> Virgin Media, eir's biggest competitor in the retail market, uses its own cable and FTTH networks.
- 3.22 **eir is likely to face even more direct wholesale competition in the FTTH market over the upcoming regulatory period.** Both SIRO and Virgin Media are currently in the process of rolling out FTTH networks. SIRO provides WLA to 20 different access seekers, including Vodafone and Sky. Virgin Media is already contracted to provide wholesale access to Vodafone, and will likely seek to secure more wholesale customers going forward.
- 3.23 Overall, given eir's diminished retail market shares, the limited uptake on its FTTH network and the likelihood of increasing infrastructure-based competition, eir likely has a commercial incentive to retain its wholesale customers rather than foreclose them.

### **eir has reduced its wholesale prices in recent years**

- 3.24 eir has not increased the price of any its wholesale FTTH products over the last three years.<sup>58</sup> On the contrary, eir has reduced the price of several of its FTTH wholesale products since 2020, see **Figure 6**.

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<sup>50</sup> Oxera Part 3, paragraph 5.17

<sup>51</sup> Oxera Part 3, paragraph 5.17

<sup>52</sup> ComReg WLA Consultation, footnote 432

<sup>53</sup> ComReg WLA Consultation, paragraph 5.235; ComReg WLA Consultation, footnotes 430 and 431

<sup>54</sup> [text redacted]

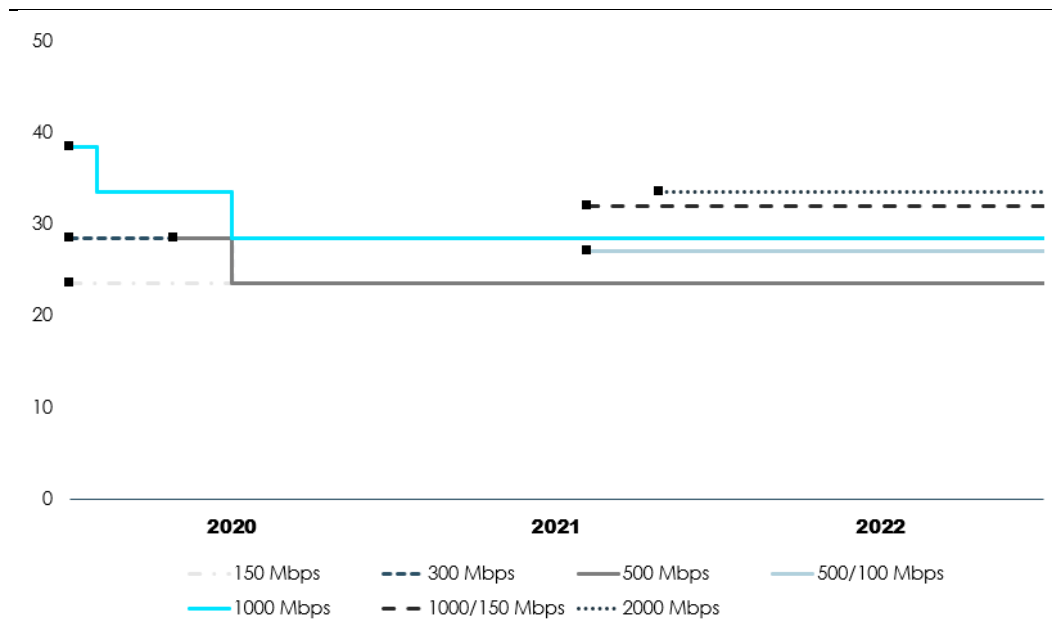
<sup>55</sup> ComReg WLA Consultation, paragraph 3.31

<sup>56</sup> (Liberty Global, 2022)

<sup>57</sup> [text redacted]

<sup>58</sup> Except for negligible price increases of less than 1 per cent (well below inflation) on a few of the bitstream (standalone) services in July 2021. eir's FTTH prices have therefore declined in real terms

**Figure 6**  
**FTTH VUA Rental Charges (Standalone)**  
In € per month



Note: Coinciding lines indicate that different products were priced at the same level.  
Source: Copenhagen Economics based on eir data

3.25 During 2020, the price of the 1000 Mbps VUA (standalone) service was substantially reduced from €38.5 to €28.5 per month. The prices of both the 300 and 500 Mbps VUA (standalone) products were also reduced in 2020. Similarly, the connection/migration charge has decreased from €170 in 2020 to zero in 2022.<sup>59</sup>

3.26 **According to eir, these price reductions are responses to competitive pressure.** The timing of the price reductions also coincides with the rollout of SIRO’s rival FTTH network and with the decline that eir experienced in its wholesale market share from 2019 to 2022.<sup>60</sup> eir’s wholesale pricing does not seem consistent with that of an SMP operator, which can act independently of its rivals and customers.

<sup>59</sup> We understand that eir’s connection/migration charge is due to increase again from April 2023 – but also that eir is reviewing its pricing and could consider lowering it once more

<sup>60</sup> ComReg WLA Consultation, paragraph 5.235



## EVIDENCE SHOWS THAT THE PRICING OF FIBRE WLA IS CONSTRAINED

3.27 In the following, we scrutinise the SSNIP test that ComReg uses to define the relevant market, which ultimately supports ComReg's conclusion that eir has SMP in the commercial area. We find that ComReg's SSNIP test has several important flaws and that a corrected SSNIP test leads to the conclusion that the relevant product market should be broader. The relevant market could reasonably have been expanded to include cable, as has been the case in many other European markets. Regardless, the results indicate that a hypothetical monopolist of fibre WLA would be unable to profitably exercise any market power, which is inconsistent with ComReg's finding of SMP in the entire commercial area.

### ComReg's SSNIP test has several important flaws

#### *ComReg answers the wrong question*

3.28 ComReg correctly uses a SSNIP test to determine the extent of the relevant market, seeking to account in particular for indirect constraints. The SSNIP is a key instrument in market definition as it provides information on demand-side substitutability over the focal products/services and helps to determine whether competitive pressure would be sufficient to protect against anti-competitive conduct.

3.29 The key question that the SSNIP test attempts to answer is whether a hypothetical monopolist would be able to profitably apply a SSNIP on the focal product. As explained by the European Commission in the guidelines on market analysis and the assessment of significant market power (SMP Guidelines):<sup>61</sup>

- “Under this test [SSNIP test], an NRA should ask what would happen if there was a small but significant and non-transitory increase in the price of a given product or service (...).”<sup>62</sup>
- “[...] the key issue is to determine whether the sales lost by the operators would be sufficient to offset their increased profits, which would otherwise be made following the price increase”<sup>63</sup>

3.30 The answer to this question is critical for the outcome of the market definition. If a small but significant non-transitory increase in prices (by 5-10 per cent) is profitable, the focal products/services constitute a single product market (a market worth monopolising). If the price increase is not profitable, the market definition exercise should progress by broadening the candidate market by adding the next closest substitute, see **Box 3**.

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<sup>61</sup> (European Commission, 2018)

<sup>62</sup> (European Commission, 2018), paragraph 29

<sup>63</sup> (European Commission, 2018), paragraph 30

**Box 3 The SSNIP test and critical loss analysis in assessing indirect constraints**

Defining a wholesale market involves assessing indirect constraints driven by substitutability on the downstream (retail) markets. The need to consider indirect constraints when defining a wholesale market is provided by the SMP Guidelines:

*"When analysing the market boundaries and market power within (a) corresponding relevant wholesale market(s) to determine whether it is/they are effectively competitive, direct and indirect competitive constraints should be taken into account [...]"<sup>64</sup>*

Downstream substitutability can be such that it renders a SSNIP at the wholesale level unprofitable. This can be the case when a wholesale price increase is passed on (partially or totally) to retail prices and enough end-users react by switching to an alternative provider on a different network. The significance of this effect is also stressed by literature: *"indirect constraints are sometimes more powerful than direct constraints"*, *"[...] in particular when downstream competition is intense."*<sup>65</sup>

The critical loss analysis (CLA) framework can be used to assess the indirect constraints. The CLA is a standard tool used in market definition. It tests whether the actual loss resulting from a SSNIP would exceed the loss above which the SSNIP is rendered unprofitable. Where the actual loss exceeds the critical loss, the candidate market should be broadened.<sup>66</sup>

ComReg employs a CLA to measure the indirect constraints stemming from retail demand substitutability. In this context, three main factors affect the result of the CLA analysis: i) dilution (the proportion of the wholesale price as a share of the retail price), ii) incremental margin (the proportion of wholesale revenues which does not go towards covering incremental costs), and iii) retail price elasticity of demand – the relative change in demand of a product in response to a relative change in the price of that product.

In its CLA, ComReg derives the critical loss using data on WLA prices and costs, assuming a full pass-through of the wholesale price increase to retail. ComReg then uses consumer surveys to identify the expected demand response – based on consumers' answers to the question of what they would do if retail broadband prices were to increase by €4 (for bundle customers) and by €2 (for standalone customers).

Source: Copenhagen Economics

- 3.31 Although ComReg is correct in using a SSNIP test to define the market, ComReg misapplies the SSNIP test and fails to answer the key question. Instead of assessing whether a SSNIP would be profitable overall, ComReg instead focuses on a partial effect only, by investigating merely whether the number of end-users that would switch to a specific alternative technology would be sufficient alone to render the SSNIP unprofitable. This entails a bias by underappreciating the full extent of demand-side substitutability constraints.

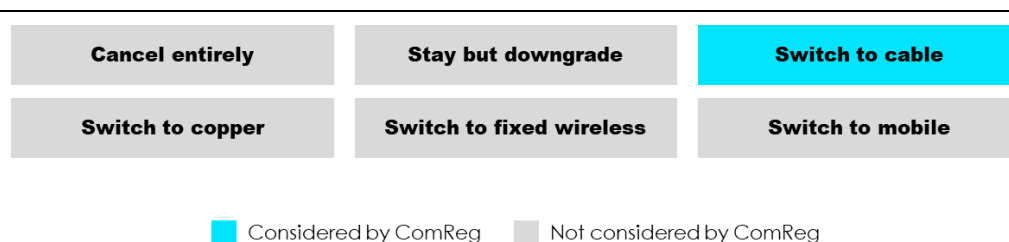
<sup>64</sup> (European Commission, 2018), paragraph 22

<sup>65</sup> (Inderst & Valletti, Indirect versus Direct Constraints in Markets with Vertical Integration, 2009)

<sup>66</sup> (European Commission, 2018), paragraph 30

- 3.32 ComReg states directly that its assessment seeks to answer not whether a SSNIP would be profitable but whether “*retail broadband provided over a CATV network should be included in the WLA markets on the basis of the indirect retail constraint it is capable of generating. That is, in response to a 5 per cent to 10 per cent SSNIP (...) would a sufficient number (...) customers switch to CATV-based retail services such that it would render the SSNIP unprofitable?*”.<sup>67</sup>
- 3.33 ComReg’s application of the SSNIP therefore distinctly departs from the established framework. Indeed, as the SMP Guidelines clarify specifically: “*It is not necessary that all consumers switch to a competing product; [in assessing demand side substitutability] it suffices that enough or sufficient switching takes place so that a relative price increase is not profitable*”.<sup>68</sup>
- 3.34 By focusing exclusively on the share of consumers that respond to the price increase by switching to a specific technology, ComReg’s approach thus underestimates the full demand response to the SSNIP, see **Figure 7**.

**Figure 7**  
**Consumers considered by ComReg vs. consumers that could/would contribute to rendering a price increase unprofitable**



Source: Copenhagen Economics

*ComReg fails to consider all of the demand response to a price increase*

- 3.35 Apart from answering the wrong question, ComReg misapplies its own survey results by ignoring several categories of survey respondents, including those who respond that they would “cancel” their subscription in response to a price increase, those who “don’t know”, and, most crucially, those who say that they would “shop around”. While answers such as “shop around” and “don’t know” pose challenges to how they can be accounted for in the application of the SSNIP, simply disregarding them entirely, as ComReg has done, results in an incomplete exercise that fails to appropriately estimate the full demand response.
- 3.36 Answering the fundamental question of whether a SSNIP is profitable involves assessing the full demand response to the price increase – i.e., accounting for the sum of all end-users’ reactions that would decrease the profitability of the price increase. ComReg’s approach to the SSNIP test, focusing solely on the share of consumers that would switch to cable, underestimates the full demand response to a retail price increase, see **Figure 8**.

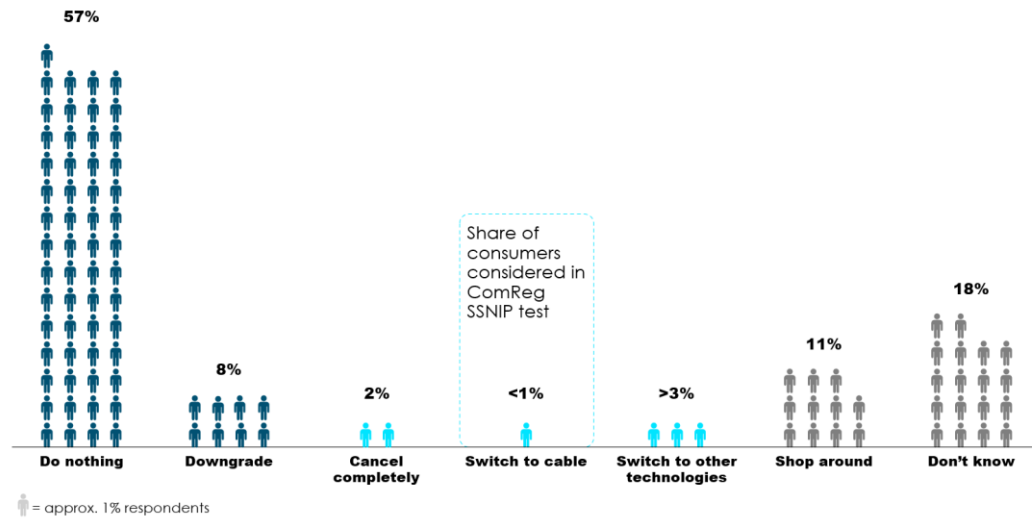
<sup>67</sup> ComReg WLA Consultation, paragraph 5.170

<sup>68</sup> (European Commission, 2018), footnote 24

**Figure 8**

**ComReg analysis (underestimate of full demand response to a price increase)**

Action taken by consumers as response to a €4 price increase in broadband prices (in per cent of respondents)



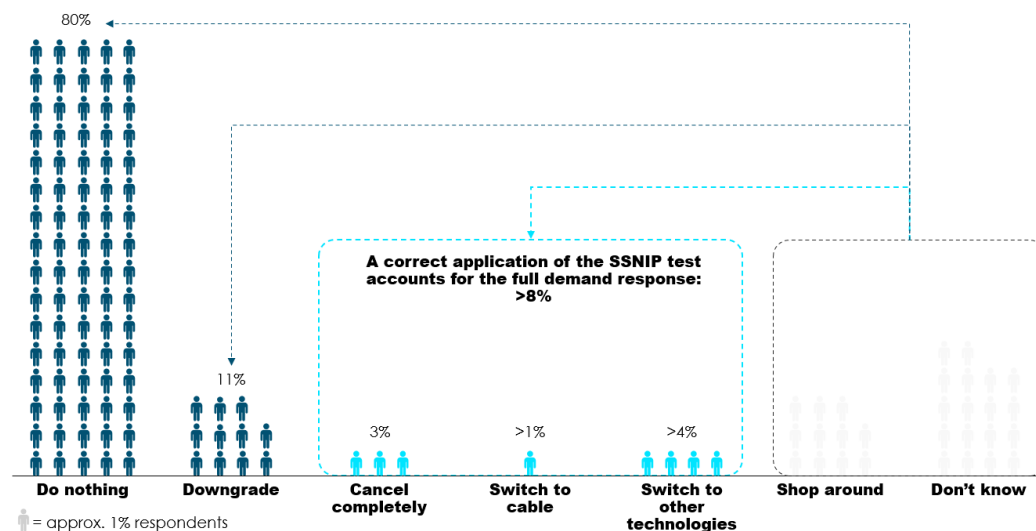
Note: We adopt the conservative assumption that consumers whose response to the price increase is "stay but downgrade" would not affect the hypothetical monopolist's profitability – although in practice, lower-speed products would often be associated with lower margins.

Source: Copenhagen Economics based on ComReg WLA Consultation and ComReg's WLA WCA Residential Market Research

- 3.37 An appropriate estimate of the full demand response to a price increase should account for i) all consumers that switch or cancel and ii) the portion of "shop around" and "don't know" respondents that could reasonably be expected to cancel and switch, see Figure 9.

**Figure 9**  
**Corrected estimate of the full demand response to a price increase (lower bound)**

Action taken by consumers as response to a €4 price increase in broadband prices (in percentage of respondents)



Note: We adopt the conservative assumption that consumers whose response to the price increase is "stay but downgrade" would not affect the hypothetical monopolist's profitability – although in practice, lower-speed products would often be associated with lower margins.

Source: Copenhagen Economics based on ComReg WLA Consultation and ComReg's WLA WCA Residential Market Research (see slide no. 55)

- 3.38 In this illustration, based on ComReg's total results for residential bundle consumers, we depict a lower bound estimate for the full demand response to a SSNIP in which "shop around" and "don't know" respondents are allocated to the remaining categories according to the relative likelihoods among other respondents (i.e., assuming these consumers would behave in the same way as the other respondents, on average).

### **A correct application of the SSNIP test shows that the pricing of fibre WLA is indirectly constrained**

- 3.39 Based on information regarding costs and prices, ComReg estimates the critical loss of a 10 per cent SSNIP on the wholesale VUA product to be 7 per cent for residential customers and 6.70 per cent for business customers, giving a 6.95 per cent critical loss on average.<sup>69</sup> When assessing whether the indirect constraints warrant broadening the market, ComReg compares this number with the share of consumers that are likely to switch to cable specifically (0.7 per cent)<sup>70</sup> as a result of a price increase. ComReg concludes that the low share of respondents that would switch to cable specifically is not enough to render the price increase unprofitable.

<sup>69</sup> Weighted average calculated by CE, based on the share of standalone vs bundle subscribers within each segment (residential and business) and the share of each segment in the total number of broadband subscriptions. See the Appendix for detail on the methodology we followed.

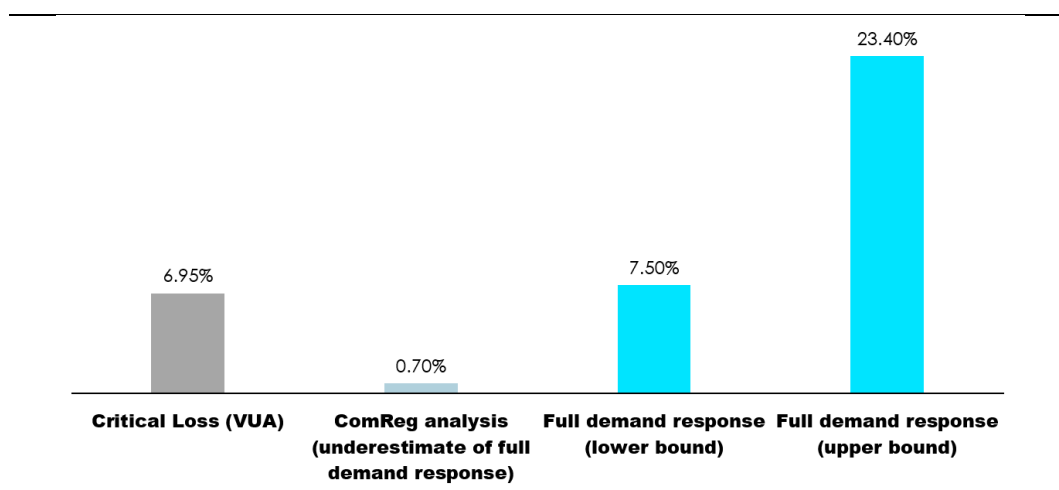
<sup>70</sup> ComReg WLA Consultation, paragraph 5.175

- 3.40 When including the full demand response to the SSNIP, we find, however, using ComReg’s own evidence, that it would in fact be unprofitable for the hypothetical monopolist to increase its price, even with relatively conservative assumptions, see **Figure 10**.

**Figure 10**

**A corrected SSNIP test shows that a price increase in fibre WLA would be unprofitable**

Share of consumers lost by the HM as a result of the price increase (actual loss) vs critical loss



Note: See the Appendix, for detail on the methodology.

Source: Copenhagen Economics

- 3.41 We find that, when accounting for the full demand response, the actual loss exceeds the critical loss, in both lower and upper bound scenarios for the full demand response.<sup>71</sup> In both the lower and upper bound scenarios, we apply a full and corrected SSNIP analysis, where we:

- Use the responses only for those who purchase fibre-based broadband, i.e. only those respondents that would actually experience a retail price change due to a wholesale fibre WLA SSNIP.
- Exclude those respondents who report that their reaction to a price increase would be to switch to another fibre provider, on the basis that, despite switching, these consumers would still be served by a supplier that relies on the hypothetical monopolist’s network.<sup>72</sup>
- Allocate “don’t know” respondents according to the average respondent, on the basis that this response is not informative for the purpose of determining the actual loss. This approach is compatible with existing case practice in other countries.<sup>73</sup>
- Adjust the share of users that would “cancel” or “switch” downwards proportionally to the price difference between the price increase used in the survey questions for bundle customers (€4) and the expected retail price increase due to a 10 per cent SSNIP at wholesale level (€3.4 for VUA and €1.06 for LLU products, respectively).

<sup>71</sup> See the Appendix for details on the methodology.

<sup>72</sup> In relation to this point, the SSNIP test used in relation to market definition deviates clearly from the thought experiment of whether a specific fibre WLA operator, such as eir, could exercise market power. Nevertheless, for the purpose of the market definition exercise, it is important that customers who would switch retail providers but remain within the candidate relevant market (e.g., switch from eir to SIRO) are not deemed to decrease profitability.

<sup>73</sup> (Competition and Markets Authority, 2018), paragraph 4.23.

- Assume unchanged profitability for those consumers who would “stay but downgrade”, on the basis that the effect of downgrading at the retail level on the hypothetical monopolist’s profits at the wholesale level are unclear – although in practice, lower-speed products would often be associated with lower margins. (i.e., this is likely a conservative assumption)
  - Use the full national survey sample despite the fact that this includes respondents in the intervention area, who would probably be less likely to respond to a retail price increase by switching than those in the commercial area (which is the market of interest for this exercise) since, as ComReg acknowledges, consumers in this area are less likely to have alternative providers.<sup>74</sup> (i.e., this is a conservative assumption)
- 3.42 In the more conservative “lower bound” scenario, “shop around” respondents are assumed to stay, cancel, or switch with the same relative propensity as the average respondents – i.e., the majority end up staying with the service and tolerating the price increase.<sup>75</sup> This scenario likely underestimates the actual demand response as “shop around” respondents would presumably in fact be more likely to cancel or switch. In the “upper bound” scenario, all “shop around” respondents either switch or cancel. This scenario likely overestimates the actual demand response to a price increase (as it portrays a highly elastic demand), as it is likely that at least some of the “shop around” respondents would, in practice, stay despite the price increase.
- 3.43 Even in the conservative scenario (the lower bound), the actual loss suffered by the hypothetical monopolist is greater than the critical loss computed by ComReg.<sup>76</sup> This means that our corrected SSNIP finds that the additional profits from higher margins on non-reactive customers would not cover the loss of consumers who cancel/switch, rendering the price increase unprofitable. In other words, the hypothetical monopolist of wholesale fibre would be unable to profitably exercise any market power due to indirect constraints.

### **ComReg should broaden the relative market**

- 3.44 The results of the corrected SSNIP test show that fibre WLA is constrained by demand-side substitutability. This should lead ComReg to conclude that the relevant market should be broadened to include other technologies, such as cable.
- 3.45 ComReg’s relevant market includes only FTTC and FTTH and not cable – despite the fact that FTTX technologies differ appreciably in the broadband speeds that they support, the most salient product characteristic from the perspective of end users.<sup>77</sup> Most notably, cable and FTTH are capable of supporting download speeds of 1 Gbps whilst FTTC is not, see Figure 11.

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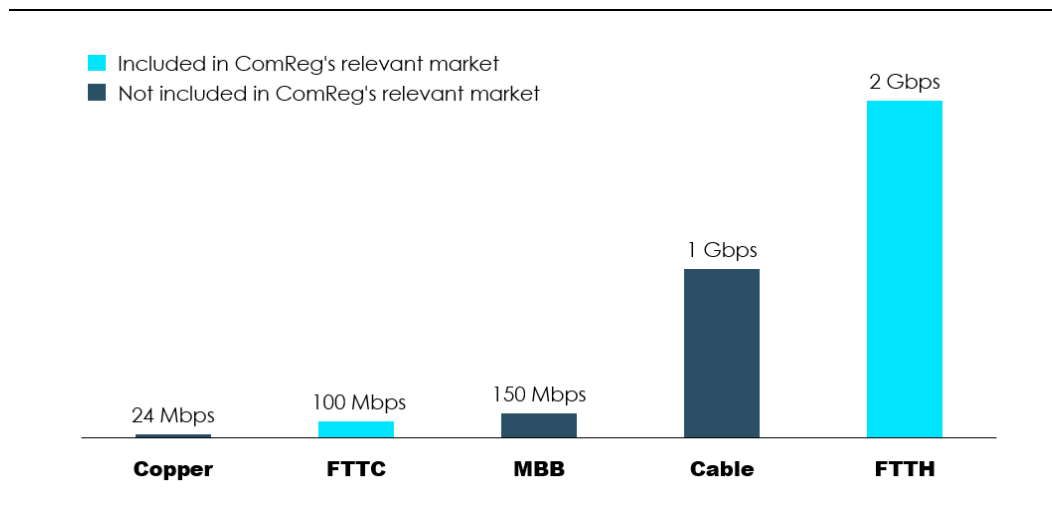
<sup>74</sup> ComReg “considers it highly likely that many of the premises within the NBP IA are copper-only premises and, pending NBI rollout, do not have alternative FTTx networks available to them” (ComReg WLA Consultation, paragraph 5.88). The survey data also shows directly that the most rural respondents (those in region 1), who would most closely approximate respondents in the intervention area, are less likely to respond to a retail price increase by cancelling or switching, see Annex 2: Residential Market Research, slide 26.

<sup>75</sup> This depicts the lower bound of the full demand response, as it is reasonable to believe that “shop around” respondents are more likely to switch than the average – i.e., this scenario is relatively conservative.

<sup>76</sup> See Appendix, Table 8.

<sup>77</sup> ComReg WLA Consultation, para. 3.64.

**Figure 11**  
**The relevant WLA product market defined by ComReg includes FTTH and FTTC**  
 Maximum download speeds (Mbps/Gbps)



Source: ComReg WLA consultation, Table 4

3.46 Broadening the market would be in line with the approaches of many other regulators in Europe that have concluded that wholesale fibre is constrained by cable, see Table 2.



**Table 2**  
**Many regulators have included cable in the same relevant market as fibre at the wholesale level**

| COUNTRY         | CONCLUSION ON MARKET DEFINITION  | ANALYSIS   | WHOLESALE CABLE AVAILABLE?                        |
|-----------------|--|--|---|
| UK              | Cable (retail) in the same relevant market with WLA and WCA                                    | Quantitative SSNIP-test. Evaluation of key parameters, incl. margin, dilution, etc.  | No  |
| Finland         | Cable in the same relevant market with WCA   | Descriptive/qualitative evidence of product characteristics and take-up  | No  |
| The Netherlands | Cable in the same relevant market with WLA and WCA   | Direct constraints based on product characteristics; quantitative SSNIP to assess indirect constraints                               | Limited; no regulation after court ruling in 2020 |
| Denmark         | Cable included in the market for high-capacity networks at both the retail and wholesale level | Qualitative; based on product characteristics and customer choices at the retail level and their implications to the wholesale level | Yes   |
| Spain           | Cable in the same relevant market at the WCA level   | Qualitative; takes into account significant investments in NGA networks and the increasing importance of FTTH                        | No  |

Source: Copenhagen Economics based on regulatory decisions: Ofcom (2018); Viestintävirasto (2018); ACM (2018); European Commission (2020a); European Commission (2019); DBA (2021); CNMC (2021).

- 3.47 Regulators have generally based their market definitions on an analysis of indirect constraints stemming from retail-level competition. Direct substitutability on the wholesale level has generally not played a decisive role (or has not played any role) in regulators' decisions to include cable in the relevant wholesale market.<sup>78</sup>
- 3.48 For example, Ofcom, the UK regulator, includes (retail) cable in the relevant product market for wholesale local access (WLA) and wholesale central access (WCA). Ofcom notes that a SSNIP by a hypothetical monopolist of copper or fibre connections would be unprofitable, owing to retail-level substitution towards cable-based connections: “[...] *we consider that a hypothetical monopolist of copper/fibre connections, either vertically integrated or wholesale-only, is unlikely to be able to profitably impose a SSNIP above the competitive level due to substitution to retail packages over cable. We therefore conclude that cable is a sufficiently close substitute to retail services over copper/fibre connections, and expand our focal product to include cable.*”<sup>79</sup>

<sup>78</sup> Cable-based wholesale offers have not been available in most EU countries.

<sup>79</sup> (Ofcom, 2018), paragraphs 3.86-3.87.

- 3.49 Similarly, the Dutch regulator, Autoriteit Consument & Markt (ACM), also noted that the competitive constraint exerted by retail cable on both wholesale and retail fibre to conclude that cable belongs in the same relevant market: “ACM concludes that access to cable networks also belongs to the relevant market because (i) the available capacity of cable networks will increase in the upcoming regulatory period, (ii) comparable retail services can be offered based on access to cable networks, and (iii) indirect price pressure is exerted by retail services over cable on retail services over copper and fiberoptic networks.”<sup>80</sup> ACM’s product market definition includes both central and local access and therefore the indirect constraint from the retail market constrains the pricing of WLA (not just WCA).
- 3.50 The Danish regulator, the **Danish Business Authority (DBA; Erhvervsstyrelsen** in Danish), also concluded that cable is part of the relevant markets for high-capacity networks. The DBA included cable-based broadband in the same relevant market at both the retail and wholesale levels. The DBA cited similar functionalities from the end-user’s perspective for including cable in the same relevant product market at the retail level. It then cites the retail market definition as the reason for also including cable in the wholesale market: “*The Danish Business Authority considers that the division made in the retail market should be transferred to the wholesale market. This is because demand in the retail market is directly reflected in the wholesale market as far as the infrastructure used is concerned.*”<sup>81</sup>
- 3.51 These examples demonstrate that in circumstances where alternative infrastructures have been available to consumers, regulators have often reached market definitions that ensure an alignment between the retail and wholesale markets. Insofar as cable and fibre-based wholesale products are substitutable and serve the same retail broadband market, they should *prima facie* be part of the same wholesale access market.
- 3.52 Apart from cable, ComReg should also recognise that the survey evidence indicates that other technologies also pose an indirect constraint on wholesale fibre. Specifically, some of the respondents who indicate that they would switch in response to a retail price increase say that they would go to copper, mobile, FWA or satellite alternatives.<sup>82</sup> Indeed, mobile broadband subscriptions, for example, account for 18 per cent of the total retail broadband market in Ireland.<sup>83</sup> Regardless of whether these technologies are deemed to be part of the same relevant market at retail or wholesale level, the competitive constraint that they exercise on wholesale fibre should also be accounted for in relation to the evaluation of market power and remedies.

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<sup>80</sup> (ACM, 2018), page 3. We note that this decision was later overturned on appeal by a Dutch court, although this ruling was made based on the evidence being insufficient to support the regulator’s finding of joint SMP, not because the market definition was deemed to be incorrect

<sup>81</sup> (DBA, 2021), page 50

<sup>82</sup> ComReg’s WLA WCA Residential Market Research, slide 60

<sup>83</sup> ComReg’s Quarterly Key Data Report for Q2 2022

### ComReg relies too heavily on static structural indicators

- 3.53 In defining the geographic market, ComReg establishes a set of criteria for assessing sufficient differences in competitive conditions within the NG WLA Market. These criteria include conditions on the number of operators present capable of providing NG WLA. ComReg considers that for “*for conditions of competition between geographic areas to be appreciably distinguishable, at least three Network Operators should be present*”.<sup>84</sup>
- 3.54 Structural indicators, such as counting the number of operators present in a certain geographic area, can be useful in informing an assessment of prevailing competitive conditions. However, considering such indicators in isolation, especially in the presence of other relevant evidence, can lead to an incomplete analysis on an operator’s ability to behave independently of its customers and competitors.
- 3.55 Available evidence on the competitive dynamics within the commercial area suggests that competition does not require the presence of three operators in Ireland.
- 3.56 First, the results of the corrected SSNIP test show that any fibre operator would be constrained if/where it overlaps with just one cable operator (i.e., that two next-generation networks, such as eir and Virgin Media, would be enough to generate competition).<sup>85</sup> Furthermore, while the corrected SSNIP test does not directly shed light on whether the presence of two competing fibre operators (such as eir and SIRO) would be sufficient to generate competition, logic would dictate that the competition between two fibre operators would be at least as great as between an fibre operator and a cable operator (which is already enough to constrain market power) – and indeed this is supported by evidence regarding eir’s wholesale volumes, see Figure 15.
- 3.57 Second, as we show below, data on eir’s FTTX volumes is consistent with eir facing constraints where overlap with one network exists. [text redacted], see Figure 15. Further, eir has reduced its FTTH wholesale prices on commercial grounds, which is not consistent with eir having SMP in the entire commercial area.
- 3.58 ComReg therefore relies too heavily on static structural indicators, at the cost of disregarding relevant evidence of effective competitive constraints on eir’s FTTX WLA products within the commercial area. The risks of overemphasizing structural considerations at the cost of disregarding other relevant elements were also rightly highlighted by ComReg’s advisers Oxera in 2018 in a report for Liberty Global:

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<sup>84</sup> ComReg WLA Consultation, paragraph A.8.39

<sup>85</sup> Because the actual loss comfortably exceeds the critical loss on the upper bound, and because the diversion specifically to cable is minimal, the corrected SSNIP in fact suggests that a fibre operator would be constrained even where it does not overlap with cable, simply because retail users could switch to other alternatives, such as copper or mobile, or because they might cancel their broadband subscription entirely

*“The requirement for ex ante analysis is not in itself a reason to put more emphasis on structural elements, as an analysis focused on structural features will inevitably be incomplete. Structural market features on their own cannot provide strong evidence on whether competition between oligopolists will be effective”* further noting that in some situations “[...] markets with just two operators competing with differentiated but substitutable products, and different cost structures, and facing significant competitive constraints from external forces (...) can produce significantly more competitive outcomes than markets with many operators [...]”<sup>86</sup>

- 3.59 Also from a static perspective, ComReg’s three-operator criterion appears to establish a high threshold when considering the reality of network overlap across Europe. According to BEREC, in most European countries the area covered by three next-generation networks remains below 25 per cent, and below 10 per cent in 10 countries.<sup>87</sup>
- 3.60 In Ireland specifically, the three-operator criteria is unlikely to be fulfilled in the near future because Vodafone is a major anchor tenant on the Virgin Media network and 50 per cent owner in SIRO. This suggests that Vodafone would have no interest in developing SIRO’s network where the Virgin Media network is already present. This need not imply that effective wholesale competition could never materialise in Ireland.

## **EIR’S NETWORK HAS EXTENSIVE OVERLAP WITH RIVAL NETWORKS WITHIN THE COMMERCIAL AREA**

- 3.61 In the following, we show that there is already substantial overlap between eir’s and rivals’ networks within the commercial area, and that this overlap is expected to increase during the regulatory period. We also show that a recent case precedent from the European Commission indicates that the current level of overlap may not be consistent with a finding of SMP, any increase notwithstanding.

### **eir’s overlap with other next-generation networks is set to increase from 64 to 84 per cent by 2026**

- 3.62 ComReg’s own data suggests that SIRO’s FTTH and Virgin Media’s cable network has substantial overlap with eir’s FTTX network. eir overlaps with a rival network in approximately 64 per cent of the commercial area, see Figure 12.<sup>88</sup>

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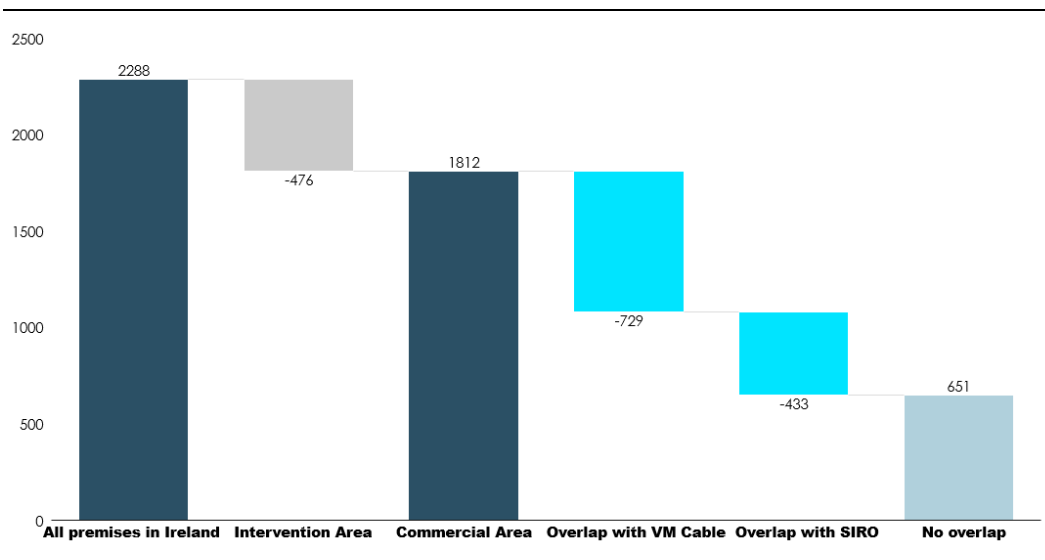
<sup>86</sup> (Oxera, 2018), page 4

<sup>87</sup> (BEREC, 2022), page 3

<sup>88</sup> The numbers used in Figure 12 are derived from ComReg WLA Consultation. In particular, the figures for the total number of premises, intervention area, commercial area and SIRO’s coverage are derived from Table 35. The coverage for Virgin Media is deduced from paragraphs 4.227 and 6.139

**Figure 12**  
**eir already has substantial overlap with SIRO and Virgin Media**

Number of premises, in thousands



Note: eir has complete coverage in the commercial area. We assume that there is no overlap between SIRO's FTTH and Virgin Media's cable network because ComReg states that overlap is limited in paragraph 4.222 and Table A8.4. SIRO's partnership with Virgin Media's retail arm further suggests that there is no overlap between the two networks. We use figures for Q2, 2022 because this allows for a consistent comparison.

Source: Copenhagen Economics based on ComReg WLA Consultation.

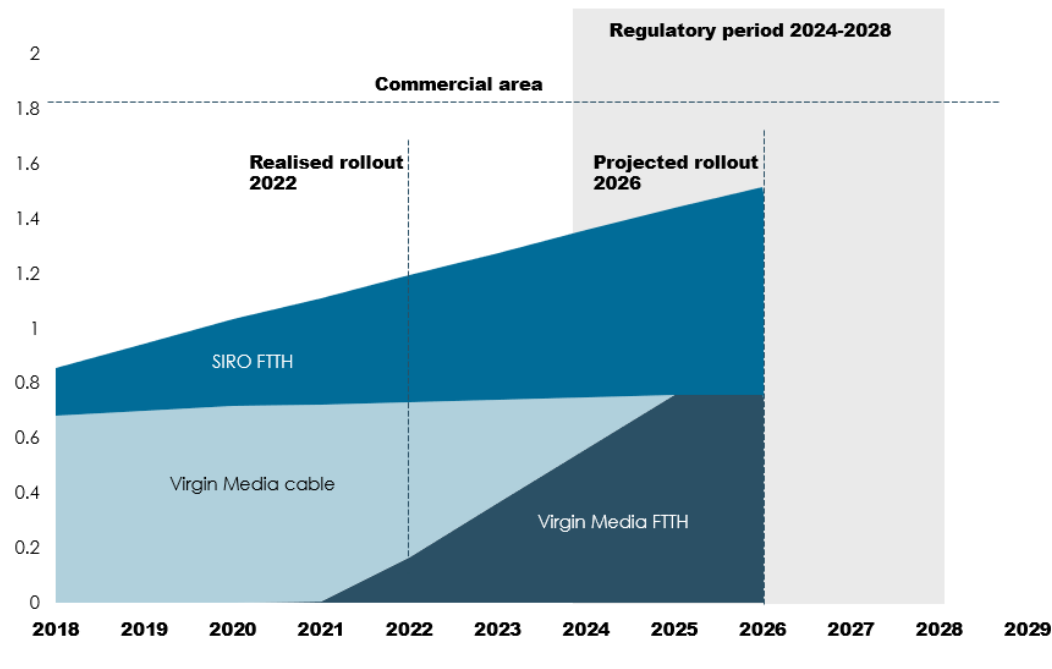
3.63 eir is thus the only FTTH or cable provider in just 36 per cent of the commercial area.<sup>89</sup> We note that the numbers shown here are for Q2 2022, since when SIRO has further expanded its reach.

3.64 Both SIRO and Virgin Media are also currently in the process of expanding or upgrading their network coverage. On a forward-looking basis, eir will overlap with either SIRO or Virgin Media FTTH in 84 per cent of the commercial area by 2026, see **Figure 13**.

<sup>89</sup> This figure is derived by dividing the number of premises served by eir only, around 651k, by the total number of premises in the commercial area, around 1.8 million.

**Figure 13**  
**eir will overlap with a rival FTTH network in 84 per cent of the commercial area by 2026**

Number of premises passed, in millions



Note: We use data from the Virgin Media website, the SIRO website, Liberty Global Fixed Income Quarterly Press Releases and web articles to plot SIRO and Virgin Media's network from 2018 to 2022. We linearly interpolate for SIRO and Virgin Media for 2019. We linearly interpolate between realised rollout in 2022 and stated targets in 2025 and 2026. All figures have been scaled to the commercial area using ComReg's WLA Consultation. We also assume that the size of the commercial area does not change over time.

Source: Copenhagen Economics based on the SIRO website, Virgin Media website Liberty Global Fixed Income Quarterly Press Releases, ComReg WLA Consultation and Silicon Republic

- 3.65 ComReg considers that there is not sufficient certainty regarding Virgin Media and SIRO's planned rollout to support a conclusion that these networks will likely constrain eir during the regulatory period.<sup>90</sup> ComReg also believes, as part of the Three Criteria Test, that current and planned rollout is not indicative of a trend towards effective competition.
- 3.66 ComReg cites instances of delays, targets that were missed and eventually revised downwards to argue that SIRO's rollout is characterised by timing uncertainty. ComReg also notes that Vodafone is Virgin Media's only wholesale FTTH customer thus far, and that there is a lack of rollout data which limits the scope of further uptake from access seekers.

<sup>90</sup> There appears to be an inconsistency between ComReg's view that Virgin Media's cable network will not exercise a direct competitive constraint on fibre-based products during the regulatory period because of Virgin Media's plans to upgrade its cable network to FTTH (ComReg WLA Consultation, paragraph 5.97) whilst ComReg also believes that "it is not possible or appropriate to take VMI FTTP rollout into account on a forward-looking basis in its geographic market assessment or its competition assessment [...]" (ComReg WLA Consultation, paragraph 5.72).

3.67 However, as is apparent from Figure 13, the projected rollout of eir’s rivals does not seem implausible given their historical pace of rollout. eir’s rivals would merely need to approximately maintain the speed of rollout and upgrades that they have demonstrated over the past 3-4 years in order to achieve their stated ambitions:

- Virgin Media’s FTTH footprint increased from 9k premises in the fourth quarter of 2021 to 220k premises in the fourth quarter of 2022, and its owners have a stated ambition of “*FTTH upgrade accelerating in 2023*”.<sup>91</sup>
- SIRO’s footprint increased from 175k premises in 2018<sup>92</sup> to 320k premises in 2020<sup>93</sup> to 470k premises at the end of 2022. Hence, SIRO increased its footprint by almost 300k premises in four years. SIRO has stated that its FTTH network aims to reach 770k premises. SIRO’s current pace of expansion indicates that this target can be achieved by 2026. Furthermore, SIRO has secured significant funding for its expansion effort. SIRO announced it has procured additional funding worth €620m, including €170m from the European Investment Bank. This supplements the €450m that has already been invested.<sup>94</sup> Moreover, SIRO’s partnership with Virgin Media<sup>95</sup> and its existing relationships with Vodafone and Sky, amongst 20 retail partners, indicate its importance as a provider of wholesale broadband access.<sup>96</sup>

### **Recent case precedent suggests that such a high level of overlap may be inconsistent with a finding of SMP**

3.68 The European Commission has, in relatively recent comments to The Danish Business Authority (DBA), indicated that an overlap in excess of approximately 40-60 per cent (between just two networks, FTTH and cable) could be inconsistent with a finding of SMP. The DBA demarcated 21 different geographic submarkets and proceeded to analyse them separately. The European Commission subsequently expressed serious doubts regarding the DBA’s finding of SMP in five submarkets. The DBA subsequently withdrew its notification concerning SMP findings in four of these five submarkets. The DBA ultimately found SMP on only one market with overlap in excess of 40 per cent<sup>97</sup>, and on no markets with overlap in excess of 60 per cent, see Figure 14.<sup>98</sup>

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<sup>91</sup> (Liberty Global, 2023)

<sup>92</sup> (Kennedy, 2018)

<sup>93</sup> SIRO website, (O’Connor, 2020) (Burke-Kennedy, 2021)

<sup>94</sup> (Burke-Kennedy, 2021)

<sup>95</sup> (SIRO, 2022)

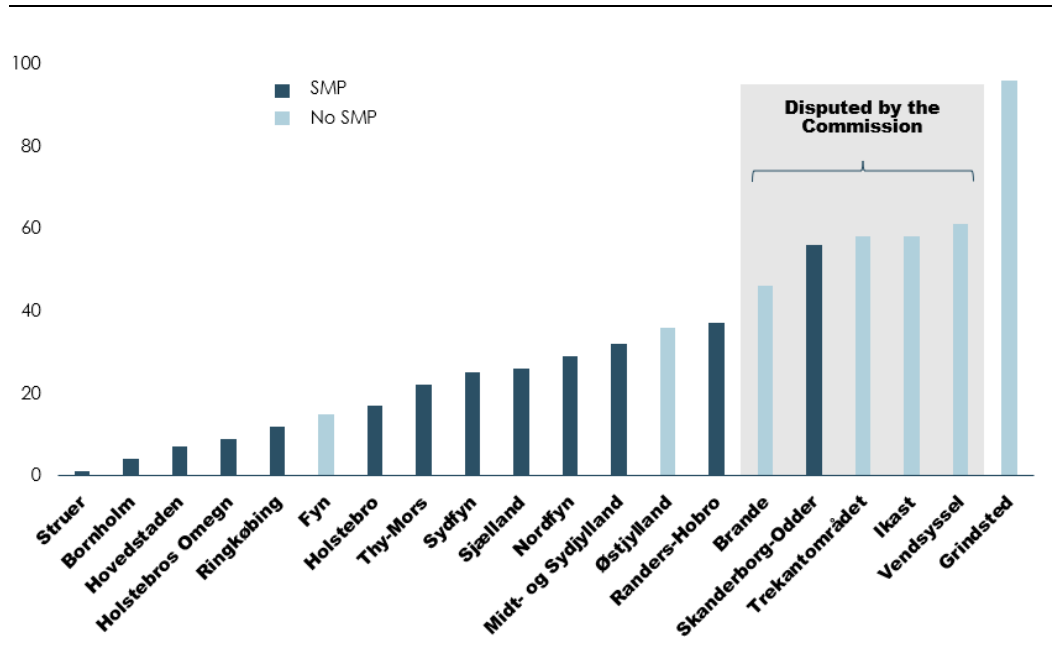
<sup>96</sup> ComReg WLA Consultation, paragraph 3.31

<sup>97</sup> This was Skanderborg-Odder where the finding of SMP was ultimately upheld despite an initial expression of serious doubts from the Commission. However, the context to this SMP finding was an increasing market share for the SMP designated operator, along with a substantial fibre rollout also attributable to the SMP-designated operator.

<sup>98</sup> No overlap figures were available for Langeland. The DBA deemed Langeland as an “immature” market with low high-capacity coverage. Consequently, Figure 14 contains overlap information for 20 out of the 21 different submarkets in Denmark

**Figure 14**  
**Danish markets with high levels of overlap were less likely to be associated with a finding of SMP**

Overlap in per cent



Note: The dark blue bars indicate markets wherein the DBA ultimately deemed a wholesale operator has SMP, following input from the Commission. The light blue bars indicate markets wherein the DBA concluded no wholesale operator has SMP. The light grey background indicates markets wherein the European Commission expressed serious doubts regarding the DBA's initial findings of SMP in all five markets. The DBA subsequently withdrew its SMP findings in four of these five markets, the only exception being the Skanderborg-Odder market. The European Commission eventually withdrew its serious doubts in relation to this market following a response from BEREC siding with the DBA's finding of SMP.

Source: Copenhagen Economics based on the Danish Business Authority

- 3.69 The 40 per cent and 60 per cent overlap figures may provide soft guidance when assessing whether a market is characterised by the presence of an operator with SMP. In light of the Danish decision and the subsequent intervention by the European Commission, a BEREC draft report states the following: *“DBA has concluded on the basis of the phase II investigation, that parallel coverage is a significant parameter that should be considered capable of altering the significance of other SMP parameters. The EC pointed to two thresholds in relation hereto – 40 percent parallel coverage being significant, and 60 percent being very significant.”*<sup>99</sup>

### Competitive conditions are not homogenous within the commercial area

- 3.70 ComReg defines the commercial area as a single geographic relevant market. A relevant market should be characterised by relatively uniform competitive conditions.

<sup>99</sup> (BEREC, 2022), page 16



- 3.71 In this section, we explain why, based on our analysis, competitive conditions are not homogenous within the commercial area. Specifically, it is apparent that eir meets overlap from either Virgin Media and/or SIRO's network in some but not all parts of the commercial area, and that this has a material impact on competitive dynamics. Accordingly, ComReg could have considered either defining separate geographic markets within the commercial area, to reflect differences in competitive conditions, and/or imposing geographically differentiated remedies.
- 3.72 First, barriers to entry are not uniform throughout the commercial area. The presence of SIRO and Virgin Media in large parts of the commercial area, and their impending network upgrade and enhancement plans, clearly demonstrates that it is possible to overcome barriers to entry in at least some parts of the commercial area.
- 3.73 Indeed, ComReg itself acknowledges that there are differences in barriers to entry within the commercial area: "[...] it is likely to be the case that **the Commercial NG WLA Market is characterised by the presence of variable barriers to entry and/or expansion**, but that these barriers are being gradually overcome by certain Network Operators in certain geographic areas."<sup>100</sup> The presence of "variable" barriers to entry, along with the fact that these barriers have been and are being overcome by some operators, suggests that the criterion of "high and non-transitory structural, legal, or regulatory barriers to entry"<sup>101</sup>, which is a necessary criterion for ex ante regulation to be imposed as part of the Three Criteria Test, is not universally satisfied within the commercial area.
- 3.74 Second, data regarding eir's wholesale volumes clearly demonstrates that eir is faced with varying levels of competition within the commercial area. [text redacted], see Figure 15.

**Figure 15**

[text redacted]

Wholesale FTTX access volumes, indexed to 2020 = 100

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[figure redacted]

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Note: eir's self-supply has been excluded from this figure.

Source: Copenhagen Economics based on eir data.

- 3.75 [text redacted]<sup>102</sup> [text redacted].<sup>103</sup>

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<sup>100</sup> ComReg WLA Consultation, paragraph 6.129. (our emphasis in bold). See also paragraph 6.122: "SIRO has, to a reasonable degree, overcome barriers to entry in certain geographic areas, having rolled out to 460,000 premises as of October 2022..."

<sup>101</sup> ComReg WLA Consultation, paragraph 3.14

<sup>102</sup> Average growth in retail FTTX volumes was 19 per cent from 2020 to 2022. ComReg WLA Consultation, figure 4

<sup>103</sup> [text redacted]

- 3.76 ComReg also implicitly recognises that eir faces different competitive constraints in different areas within the commercial area by stating eir has greater incentives to innovate in areas where it is constrained by SIRO.<sup>104</sup> ComReg also notes that eir’s national market share is uninformative regarding regional competitive dynamics: “[eir’s national market share] likely masks non-trivial geographic differences at local level arising from the presence or absence of SIRO or NBI.”<sup>105</sup> As discussed in paragraph 3.19, ComReg also recognises that eir’s position in the wholesale market has weakened considerably after SIRO’s entry.
- 3.77 The European Commission has highlighted the importance of adequately accounting for differences in competitive dynamics along the geographic dimension, and assessing whether a potential SMP operator faces differing competitive constraints: “When delineating the exact geographic boundaries of a relevant market, account has to be taken of the scope of the potential SMP operator’s network and whether that potential SMP operator acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others.”<sup>106</sup>
- 3.78 BEREC reports that the most frequently cited reason for NRAs to define sub-national geographic markets was regional differences in coverage of rival fibre or cable networks. This was the case in nine different countries: “The main reason is in nine countries geographical differences in coverage of alternative networks (e.g. cable or fibre) [...]”<sup>107</sup>
- 3.79 Several regulators have defined sub-national markets based on differences in competitive conditions. Three relatively recent examples include Denmark, Sweden and Spain:
- Precedent from **Denmark** indicates that the competition from other providers in regional areas should be reflected in the geographic market definition. Differences in the market share of the incumbent, TDC, across the country and the presence of network overlap in some areas ultimately led the DBA to conclude that conditions were not sufficiently homogenous to arrive at a national market.<sup>108</sup> Whilst the European Commission expressed doubts regarding the designation of SMP in five different submarkets, the Commission did not dispute the geographic market definition itself. This example is notable as it reflects a country with a broadly comparable size to Ireland where, after detailed analysis, the national regulator and the European Commission accepted a much higher number of geographic markets, compared to what ComReg proposes for Ireland.
  - The European Commission’s assessment of the geographic market definition in **Sweden** also indicates a need to reflect regional differences in competitive dynamics. The Swedish regulator, **PTS**, concluded that the relevant market for WLA was national in scope. The Commission, however, delivered a letter of serious doubts which explicitly underlined that a market in which competition conditions are heterogenous cannot constitute a single geographic market. The Commission considered that PTS had not adequately accounted for the variance in the rollout of fibre networks in Sweden, typically at municipal level<sup>109</sup> and ultimately vetoed PTS’ decision

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<sup>104</sup> ComReg WLA Consultation, paragraph 8.44

<sup>105</sup> ComReg WLA Consultation, paragraph 5.227

<sup>106</sup> (European Commission, 2018)

<sup>107</sup> (BEREC, 2022), page 9.

<sup>108</sup> (DBA, 2021), page 71.

<sup>109</sup> (European Commission, 2019), page 13.

on these grounds.<sup>110</sup>

- The **Spanish** market is characterised by very high levels of FTTH rollout and uptake. However, CNMC noted that the incentives to invest are not equal throughout Spain, reflected in variable barriers to entry on a national basis. The regulator, the Comisión Nacional de los Mercados y la Competencia (CNMC), accordingly defined geographic markets at municipality level, dividing the 8k+ municipalities in Spain into two categories: a “competitive” zone and a “non-competitive zone”.<sup>111</sup> The competitive zone, accounting for approximately 70 per cent of the country, is characterized by a higher degree of competition in infrastructure based on NGA<sup>112</sup> networks.

## **EIR MAY NOT HAVE THE ABILITY AND INCENTIVE TO EXERCISE MARKET POWER EVEN WHERE THERE IS NO OVERLAP**

- 3.80 eir’s increasingly large overlap with SIRO and Virgin Media in the commercial area already limits eir’s market power in the overlapping areas. However, eir may have limited ability or incentive to exercise market power even in the areas where there is no network overlap.
- 3.81 First, we find that eir does not currently differentiate its FTTH pricing between geographic areas. This indicates an absence of either the ability or incentive to do so today. It also means that low wholesale prices in some areas benefit access seekers in all areas. The absence of a geographically differentiated wholesale pricing strategy may be attributable to geographically uniform retail prices and/or increasing infrastructure competition in the commercial area and/or a lack of precise information on the magnitude of overlap at exchange level.
- 3.82 Second, [text redacted].

### **eir does not currently price differentiate between geographic areas**

- 3.83 eir does not currently differentiate its FTTH wholesale prices between geographic areas. For instance, eir’s VUA FTTH retail prices, as depicted in Figure 6 above, are not specific to a certain geographic area. Hence, any decrease in prices in response to competition in some areas has also benefited access seekers in other areas. The fact that eir does not practice geographically differentiated FTTH wholesale pricing today is indicative of an absence of either the ability or incentive to do so.
- 3.84 There could be at least three reasons that explain why eir is unable or unwilling to exercise any local market power via geographically differentiated wholesale prices.

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<sup>110</sup> (European Commission, 2020c)

<sup>111</sup> (CNMC, 2021)

<sup>112</sup> Mostly fibre-optic but includes cable.

- 3.85 **First, eir’s ability to exercise market power via geographically differentiated wholesale prices is constrained by the fact that it sets geographically uniform retail prices.** The fact that eir charges geographically uniform prices at retail level flows through to the wholesale level via a margin squeeze constraint. Thus, even if/where eir in principle has an incentive to increase its wholesale prices on a local exchange where it faces a low level of local wholesale competition, it still faces a cap on wholesale pricing set relative to a retail price determined by national retail competition.
- 3.86 **Second, eir’s ability to establish geographically differentiated prices is also weakened by increasing infrastructure competition in the commercial area, where alternative networks are undergoing meaningful expansion.**<sup>143</sup> Increasing wholesale prices in areas where static competition is currently less pronounced could reinforce incentives for alternative operators to deploy networks in those areas. This incentive could be particularly strong considering that barriers to expansion have been overcome in a significant part of the commercial area.<sup>144</sup>
- 3.87 Even if such a strategy yielded short-term gains, competition from alternative overlapping networks would likely force eir to reduce prices to competitive levels that would erode any marginal short-term gains. Evidence shows that where overlap exists, eir faces several effective competitive constraints. [text redacted] The prospect of foregoing actual and prospective revenues provides a strong incentive to avoid engaging in geographically differentiated prices to exercise any short-term market power.
- 3.88 **Third, eir’s ability to exercise market power via geographically differentiated wholesale prices may be constrained by the fact that it is not straightforward to simply categorise exchange areas into those areas where there is overlap and those where there is not.** As ComReg notes in relation to a separate topic, when considering whether to impose a specific obligation on eir’s rural FTTH network, conditions even within exchange areas cannot necessarily be considered homogenous.<sup>145</sup> Furthermore, there is no public data regarding the extent of overlap by exchange area. While eir can piece together some information regarding where its FTTH network overlaps with either SIRO’s fibre network or Virgin Media’s cable network, this data is imperfect and perhaps not sufficient for the purpose of informing pricing decisions.

**[text redacted]**

- 3.89 [text redacted]

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<sup>143</sup> ComReg also acknowledges the trend of increasing infrastructure competition within the commercial area through SIRO’s and Virgin Media’s FTTH rollout

<sup>144</sup> ComReg also recognises that in part of the commercial area barriers to entry have been overcome “to a reasonable degree” (see paragraph 6.122 of the draft decision), further noting that “Some operators have already built networks and incurred sunk costs” (see paragraph 6.70 of the draft decision) and that “despite the high entry barriers associated with building a WLA network at scale, there is some evidence of entry by other operators on a commercial basis”, further underlining that main entry barriers have been overcome

<sup>145</sup> ComReg WLA Consultation, paragraph 9.277: “There are however practical difficulties in implementing such an approach. In particular, the Rural FTTH footprint is spread across c.900 exchange areas (‘EA(s)’) and no EA is entirely within the Rural FTTH footprint. This means that the Rural FTTH footprint does not align with Eircom’s EAs and the majority of EAs will include premises that are in Eircom’s IFN (that are currently passed with a viable FTTC service), premises that are in the Rural FTTH footprint (c.85 per cent of which cannot receive a viable FTTC service) and premises that are in the NBP IA (that will depend on the NBP to receive NGA broadband).”

3.90 [text redacted]<sup>116</sup> [text redacted]

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<sup>116</sup> [text redacted]

## CHAPTER 4

**WLA: ANY COMPETITION CONCERNS COULD BE ADDRESSED BY LESS INTRUSIVE REMEDIES**

- 4.1 In this chapter, we assess whether the regulatory obligations proposed by ComReg are proportionate and sound from an economic perspective. We review the reasoning behind ComReg's proposed remedies, which have been developed with economic advisor Oxera, and assess their proportionality and effectiveness in addressing any competition concerns. **We find that the proposed remedies are intrusive and potentially conducive to distortions to competition.**
- 4.2 First, we explain why regulatory remedies need to be tailored to address the nature and gravity of any competition concerns. We find that ComReg proposes an array of detailed and – by international standards – intrusive remedies. We also find that ComReg's remedy proposals suffer from a degree of circularity, since they are heavily based on Oxera's recommendations. Oxera, in turn, does not conduct an independent competition analysis, but bases its remedy assessment on ComReg's findings on the existence and nature of competition concerns.
- 4.3 Second, we assess the case for prolonging the regulation of FTTC VUA through a price cap based on a bottom up long run incremental cost (BU-LRIC) model. A price cap based on BU-LRIC is the most intrusive form of regulation and is warranted only in circumstances where there are i) limited or no competitive constraints and significant concerns over excessive pricing and ii) no substantial demand or cost uncertainties and therefore a low risk of capping the prices at the wrong level. As we elaborate below, neither of these conditions seem to apply to the Irish WLA market.
- 4.4 Third, we find that there is unequivocally no evidence to suggest that eir has sought to engage in a margin squeeze or other exclusionary conduct in the FTTH segment where ComReg proposes to maintain a detailed (and burdensome) ex ante margin squeeze test. eir has reduced its FTTH wholesale prices, and the headroom between its wholesale and retail prices has been comfortably larger than the current margin squeeze test permits. If anything, eir has become increasingly reliant on its wholesale customers, which does not support ComReg's and Oxera's concerns over foreclosure.
- 4.5 Fourth, ComReg proposes further detailed remedies to constrain eir's ability to reduce prices below pre-determined levels, or to do so without a lengthy regulatory process. Especially in areas where there is apparent infrastructure-based competition in the wholesale market, constraining eir's pricing runs the risk of dampening competition between eir and its competitors. The proposed approval process may be subjective and lengthy relative to how quickly eir may need to respond in negotiations with wholesale customers.

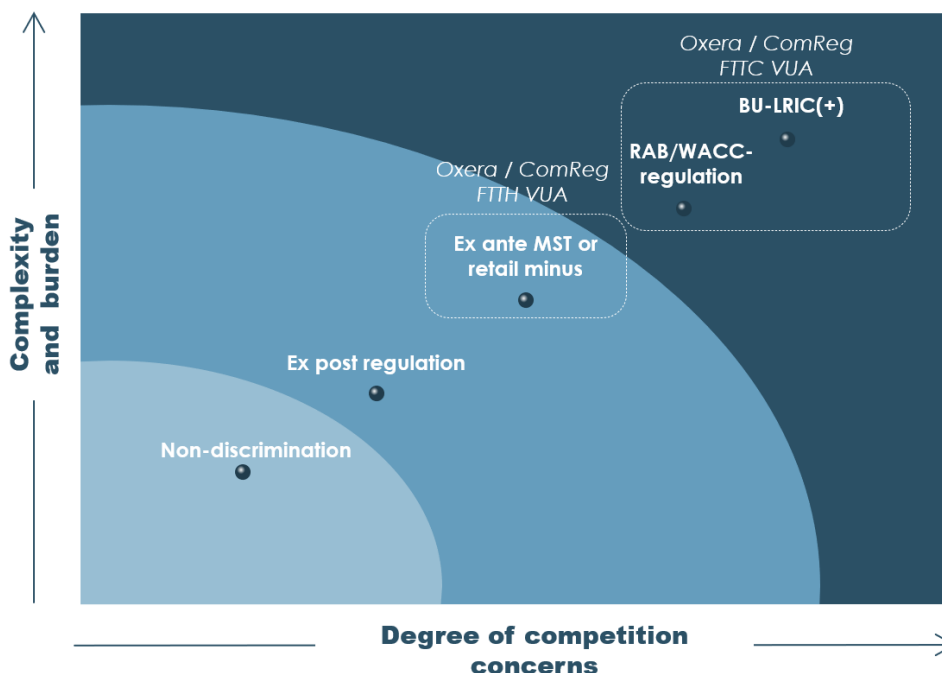
## THE DESIGN OF REMEDIES SHOULD CORRESPOND TO THE DEGREE OF COMPETITION CONCERNS

- 4.6 The design of remedies imposed on an SMP operator needs to strike the right balance between ComReg's objectives of i) promoting competition and ii) promoting investments in very high-capacity networks (VHCNs).<sup>117</sup> Even if SMP is identified, any remedies can be tailored to reflect the levels of competition in the market. Where remedies are needed, they ought to address the **nature** of competition concerns in question and be commensurate with the **gravity** of competition concerns identified.
- 4.7 To ensure that regulation does not have unintended consequences e.g., by diluting the SMP operator's and/or access seekers' incentives to investment, the imposed remedies should not go beyond to what is necessary to preserve competition where there are insurmountable barriers to entry. Oxera discusses the economic properties of the different approaches to regulate eir but provides limited guidance on how the regulatory options map with different degrees of market power or the theories of harm.
- 4.8 First, the design of remedies should build on evidence of the **nature of competition concerns**:
- Cost orientation is warranted if and only if there is evidence to suggest that absent price regulation eir would charge **excessive prices** and generate returns that are substantially and persistently above competitive levels (namely, the weighted average cost of capital, WACC).
  - An ex ante margin squeeze test (or conceptually similar *retail minus*) can be appropriate if eir has an **incentive and ability to foreclose** competitors.
- 4.9 Second, further to an assessment of the nature and extent of competition concerns, the design of remedies should reflect the cost and volume risk of the service in question. The greater the **uncertainty over demand and cost of investment**, the more complicated it is for the regulator to prescribe pricing *ex ante*, and the higher the risk of unintended consequences (e.g., underinvestment).
- 4.10 Remedies designed to address more severe competition concerns also come with higher complexity and regulatory burden (even if the relationship is not necessarily linear), see Figure 16.

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<sup>117</sup> Article 3 of the European Electronic Communications Code (European Parliament and Council of the EU) provides that national regulatory authorities should pursue, among others, the objective of promoting connectivity and access to, and take-up of, very high-capacity networks, through reasonable measures which are necessary and proportionate for achieving it. ComReg acknowledges this objective in its draft decision, see, e.g., paragraphs 9.194 and 9.195.

**Figure 16**  
**Stylised illustration of regulatory options**



Note: The design of different types of remedies varies both in terms of their intrusiveness and complexity. Thus, the positioning of regulatory options depicted in the figure should be interpreted as illustrative.

Source: Copenhagen Economics

- 4.11 The remedies proposed by ComReg are appropriate in circumstances where there are serious concerns over excessive pricing (FTTC VUA) and anti-competitive foreclosure (FTTH VUA). The types of remedies and (as discussed below) ComReg's way of implementing them necessitate accurate information about the prospect of competition absent regulation and come with substantial data requirements about costs and volumes.

### **WLA remedy design should build on remedies imposed on PIA**

- 4.12 ComReg has not sufficiently accounted for the presence of PIA regulation when considering the rationale for WLA regulation (or vice-versa). If access to PIA is already secured via SMP regulation (and/or via other regulatory frameworks, such as the BCRD), then this would reduce the competition concern on the WLA market since PIA regulation should address the highest barriers to entry on the WLA market and reduce the need for stringent remedies. Conversely, if PIA regulation does not secure low barriers to entry in relation to WLA, it is unclear what would be the rationale for PIA regulation. As BEREC sets out:



*“Before imposing specific access obligations, NRAs shall analyse whether other forms of access to wholesale inputs, either on the same or a related wholesale market, would be sufficient to address the identified competition problem in pursuit of the interests of end users.”<sup>118</sup>*

- 4.13 ComReg’s regulatory objective is to support retail competition and avoid unnecessary duplication of network assets. Even if ComReg finds SMP on different layers of the supply chain, the intrusiveness of remedies should reflect the varying asset replicability and consequent market power. There is no need to impose multiple sets of regulation if narrower interventions would be sufficient to address competition concerns.

### **Remedies can be designed to reflect geographic variations in competition concerns**

- 4.14 ComReg has provisionally defined the commercial area to exhibit sufficiently homogeneous competitive conditions not to warrant distinct geographic markets within the commercial (non-NBI) area (see Chapter 1). Further to a broad market definition, ComReg has not taken differences in competitive conditions into account in the design of remedies.
- 4.15 In principle, the well-established economic framework for market definition (i.e. hypothetical monopolist test described in Chapter 3) should suffice to identify areas that exhibit distinct competitive conditions. In practice, however, the limited demand-side substitutability between locations means that the assessment of homogeneity in competitive conditions is not based on a critical loss analysis but rather on the presence or prospect of competitors in any given area.
- 4.16 Irrespective of market definition, regulators can take geographical variations into account at the stage of remedy design, as established by BEREC: *“The second approach consists of defining one market, analysing it and then differentiating remedies to take into account geographical differences”*.<sup>119</sup> From an economic perspective, there is no material difference on whether the differences are considered as part of market definition or remedy design, as long as the resulting remedies are reflective of different degrees of competition.

### **Regulators in other EU countries have adopted more lenient approaches to NGA regulation**

- 4.17 NRAs in other European countries have taken more lenient approaches towards regulating the market for next generation wholesale products relative to the approach proposed by ComReg. Below we summarise examples for four different countries demonstrating that less prescriptive approaches can be deployed towards remedies in the market for next generation wholesale products.

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<sup>118</sup> (BEREC, 2019a)

<sup>119</sup> (BEREC, 2014), paragraph 162

- 4.18 In **the Netherlands**, the ACM accepted voluntary commitments from KPN and Glaspoort in lieu of imposing its own suite of remedies. KPN and Glaspoort offered a voluntary commitment to keep wholesale access prices low by indexing them to inflation, and even accommodated for the current high inflationary environment. The ACM accepted these commitments and made them binding for the forthcoming eight-year period. [text redacted].<sup>120</sup>
- 4.19 In **the UK**, Ofcom has not imposed any ex ante margin squeeze requirements on VULA products. Instead, Ofcom imposed a cost-based charge on BT's 40/10 VULA product, capable of delivering speeds of up to 40Mbps. It has only imposed a general remedy of "fair and reasonable" charges on VULA products capable of delivering higher speed broadband. Ofcom notes consumer substitutability between high-speed and low-speed broadband and the need to balance investment incentives in this regard: "[...] our general access remedies include a fair and reasonable charges obligation that applies where no charge control or basis of charges obligation is in force, and will therefore apply to all VULA services other than the charge-controlled VULA 40/10 service. We interpret this condition as a requirement not to impose a margin squeeze, providing further protection against the risk of distorted competition."<sup>121</sup> Ofcom stated that continuing the imposition of an ex ante margin squeeze test would not be proportionate and any "residual risk" of BT imposing a margin squeeze is addressed by general access remedies.<sup>122</sup>
- 4.20 In **Denmark**, the DBA also accepted voluntary commitments in seven different geographic markets where an operator was deemed to possess SMP, and made these commitments binding. This included the Skanderborg-Odder market, where BEREK eventually sided with the DBA's finding of SMP. In all other markets where no voluntary commitment was offered, the DBA's remedies did not include an ex ante margin squeeze test or a cost-based price control. Rather, they only entailed general remedies that did not extend further than requiring "fair", "non-discriminatory" and/or "transparent" pricing.<sup>123</sup>
- 4.21 In **Finland**, Traficom found in 2018 that Elisa, amongst other regional operators, held SMP in several geographic WLA markets. Given the alleged severity of competition concerns, Traficom imposed a cost orientation (price cap) remedy based on an LRIC+ model. Following Elisa's complaint, the Finnish Supreme Administrative Court, repealed price cap remedies for fibre access and the whole SMP decision concerning wholesale access in Helsinki and Tampere regions, i.e. cities where Elisa is active. Central to the Court's ruling was that the competitive conditions in the aforementioned differed from other regions, and that the presence and prospect of alternative networks was not adequately considered.<sup>124</sup>
- 4.22 We note that regulatory approaches vary and there are also examples of more stringent regulations than those witnessed in the four example countries above. The examples nevertheless demonstrate that where there is evidence of infrastructure-based competition nationally or sub-nationally, an incumbent operator may not have an SMP, or there may be a case for less intrusive remedies.

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<sup>120</sup> [text redacted]

<sup>121</sup> (Ofcom, 2018), paragraph 9.106.

<sup>122</sup> Ofcom states that its approach to any disputes in the context of higher bandwidth products would be to allow a LRIC retail margin by reference to an equally efficient operator.

<sup>123</sup> (DBA, 2023)

<sup>124</sup> (Designation as a company with considerable market power, 2020).

### **Oxera bases its assessment on ComReg’s questionable findings of SMP**

- 4.23 The choice of remedies as proposed by ComReg (summarised in Chapter 1 above) suffers from a degree of circularity. ComReg bases its remedy proposals on the recommendations of its economic adviser Oxera who, in turn, draws heavily on ComReg’s findings on the existence and gravity of SMP.
- 4.24 Oxera has advised ComReg in the design of remedies for products with respect to which ComReg has deemed that eir holds SMP. Oxera has set out options for regulatory approaches and has generally drawn on well-established regulatory pricing models applied in the telecoms and other regulated industries. The economic framework underlying Oxera’s assessment is reasonable.
- 4.25 Oxera’s assessment and consequent recommendations are, however, largely premised on ComReg’s competition analysis. While Oxera considers the role of competitive constraints on the retail and wholesale levels throughout its assessments, **Oxera has not conducted an independent assessment of the competitive constraints**. Rather, Oxera repeatedly draws on ComReg’s conclusions on the finding of SMP and lack of effective pricing constraints. As Oxera defines its task:
- “[Oxera’s] recommendations should take into account ComReg’s concerns that, absent regulation, Eircom as the SMP operator would have the incentive and ability to set excessive wholesale prices and/or engage in exclusionary behaviours through low, or loyalty-enhancing, wholesale pricing and/or impose a price squeeze, leading to negative outcomes for consumers.”<sup>125</sup>*
- 4.26 Oxera’s findings are highly dependent on ComReg’s (not Oxera’s own) premise and limited consideration given to the evidence of competitive constraints. Consequently, as we explain below, many of Oxera’s recommendations appear disproportionate and inconsistent with the evidence of market developments.

### **LESS INTRUSIVE REGULATION OF FTTC VUA COULD BE SUFFICIENT TO ADDRESS COMPETITION CONCERNS**

- 4.27 ComReg provisionally proposes that eir’s FTTC VUA products will be subject to “pricing continuation”. This means setting the price based on a BU LRIC cost model, adjusted for inflation over the review period (2024-2029), see **Box 4**.

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<sup>125</sup> Oxera Part 1, paragraph 1.8.

**Box 4 FTTC VUA Price control**

- FTTC VUA prices are currently oriented to BU-LRAIC+ costs (cost-oriented price control).
- ComReg proposes to apply a price cap of 'CPI-0' annually to FTTC VUA prices post 30 June 2024.
- ComReg proposes to rely on existing cost models to determine future FTTC VUA prices. This price cap will be determined based on existing cost models to determine future FTTC VUA prices.
- These models primarily use a *Bottom-Up* (BU) approach. ComReg acknowledges limitations of existing models (e.g., it assumes that the hypothetical efficient operator continues to rely on FTTC to provide broadband when in fact FTTC is in decline). However, ComReg considers that updating the BU cost models to reflect the current demand trends would undermine regulatory consistency.

Source: Copenhagen Economics

**Proposal to continue BU-LRIC is not reflective of competitive conditions**

- 4.28 Oxera does not assess eir's ability or incentives to increase prices. Rather, Oxera bases its findings on ComReg's conclusions on SMP and an alleged lack of competitive constraints. As evidence of eir's likely pricing behaviour, both ComReg and Oxera refer to price increases introduced after the 2013 Market Review, when eir was not subject to price controls of cost-orientation.
- 4.29 We understand that the price increases in 2016 were disputed and considered as evidence of eir's market power.
- 4.30 Aside from whether the price increases around seven years ago were reflective of costs or market power, ComReg or Oxera do not consider **external pricing constraints** in the current market environment. These constraints are manifested through the direct pricing constraints exerted on FTTC VUA by SIRO and (especially going forward) by Virgin Media; and the indirect pricing constraints exerted already by cable-based broadband. In particular, the role of SIRO is already manifestly different compared to 2016 and is set to strengthen over the regulatory period (see Chapter 3).
- 4.31 The presence of competitive constraints has implications for the design of appropriate remedies and justification of a stringent cost orientation remedy akin to BU-LRIC.
- 4.32 First, **evidence shows that eir has reduced its wholesale prices in recent years in the face of increasing competition.** As shown in Figure 6 above, in the last three years eir has reduced the price of many of its FTTH wholesale services in response to competitive pressure. The timing of these price reductions is consistent with increasing competition from SIRO's FTTH network and coincides with the decline of eir's wholesale market share.

4.33 Second, **there is no evidence to suggest that eir would charge excessive prices.** The rationale for capping prices is to prevent excessive pricing. While eir has (for the reasons outlined above) increased its FTTC wholesale prices seven years ago, its incentives for doing so today appear limited in the face of increased competition from alternative infrastructures. We identify at least four reasons why eir may lack the ability and/or incentive to charge excessive prices, currently not adequately reflected in Oxera's (or ComReg's) analysis:

- eir sets geographically uniform prices at the retail level. Insofar as eir is subject to a margin squeeze constraint, this limits eir's ability to exercise market power via geographically differentiated wholesale prices. Even in areas where eir faces less pronounced local wholesale competition, wholesale prices are constrained relative to the retail price that is determined by national (not local) competition, thereby constraining eir's ability to charge excessive prices.
- Increasing wholesale prices can further strengthen alternative operators' networks deployment in areas where eir would, in a static sense, have the strongest incentives to hypothetically increase prices. Such a constraint erodes incentives eir might have to charge higher prices in areas with less pronounced competition.
- eir's ability to exercise market power via geographically differentiated wholesale prices may be constrained by a lack of precise actionable information on overlap at exchange level which could inform eir's pricing decisions.
- [text redacted]<sup>126</sup> [text redacted]

4.34 Third, **regulatory costing and asset valuation approaches designed for monopoly regulation are not well-suited for products facing competition.** Cost orientation remedies seek to establish prices that are reflective of competitive conditions. This involves ensuring that prices reflect efficiently incurred costs and valuing regulated assets at values corresponding with modern equivalent assets (MEA).<sup>127</sup> We agree with the principle that BU-LRIC+ with MEA provides appropriate build-or-buy signals promoting efficient entry and maintaining incentives to invest. However, given the presence of competitive constraints, and the fact that other operators have already invested in networks (and are committed to invest substantially more), it is not clear whether such a rationale makes economic sense.

4.35 We note that Oxera recognised this when advising ComReg on NGA pricing in 2013: "*[--] cost-plus regulation is unlikely to be meaningful, given the conceptual and practical difficulties associated with asset valuation of networks that are, to some extent, subject to competitive constraint in the retail market.*"<sup>128</sup> While this consideration is absent in Oxera's most recent advice, it would seem relevant in the face of (if anything) greater competitive constraints than those that prevailed around 10 years ago.

4.36 Fourth, **Oxera's assessment of internal pricing constraints appears questionable.** Oxera finds that eir's FTTH pricing is constrained by its FTTC pricing – i.e., eir cannot increase FTTH prices due to a constraint it faces from regulated lower-end FTTC prices (referred to as "anchor"):

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<sup>126</sup> [text redacted]

<sup>127</sup> ComReg and Oxera refer to a hypothetical efficient operator (HEO) principle. See ComReg WLA Consultation, paragraphs 9.214-9.262 and Oxera Part 1, paragraph 4.33.

<sup>128</sup> (Oxera, 2013), page ii

*“under the assumption that FTTC and FTTH services are part of the same relevant economic market (...) any attempts by Eircom to increase FTTH VUA prices will be unprofitable, given the availability of a cheaper price-capped alternative.”<sup>129</sup>*

- 4.37 However, the evidence referred to by Oxera itself suggests that i) the FTTH segment is likely to face significant competition and ii) any incentives to increase FTTC prices would be diluted by retail and wholesale customers migrating to FTTH, which is offered by alternative providers in large parts of the Commercial NG WLA. Oxera correctly acknowledges the ongoing and increasing switching from FTTC and FTTH and competitive constraints between them: Oxera notes that the “[...] number [of subscribers who obtain broadband over FTTC] may be expected to decline over the course of the market review (on the basis that Eircom is continuing to roll out FTTH over its FTTC network)[...]”<sup>130</sup> and that increasing FTTC prices would “encourage migration [to FTTH].”<sup>131</sup> Insofar as the FTTH segment is competitive and there is no evidence of market power at the retail or wholesale level, eir is unlikely to have any significant unilateral market power in the FTTC segment.<sup>132</sup>

### **BU-LRIC can be problematic in the presence of volume risks**

- 4.38 Oxera correctly labels cost-based price controls as “intrusive” and notes that they are best suited when “take up and other volume risks; cost risks; competition risks” have crystallised.<sup>133</sup> Oxera further acknowledges that: “a balance must be struck between price controls that set a cap on the SMP operator to prevent excessive pricing (a focus on allocative efficiency) and overly tight controls on the SMP operator that courage discourage investment by the SMP operator and by independent competitors [...]”<sup>134</sup>
- 4.39 ComReg (and Oxera) recognises these factors with respect to FTTH VUA products and does not recommend ex ante price caps for FTTH VUA. ComReg nevertheless proposes a (in Oxera’s words) “tight” form of price control on FTTC VUA, i.e., bottom-up LRIC based price cap (BU-LRIC). ComReg proposes to implement the remedy as an inflation-adjusted “continuation” of the current BU-LRIC based price.
- 4.40 In our view, irrespective of whether ComReg builds a new model or relies on an existing one, **determining prices for a 2024 - 2028 necessitates a sound understanding of costs and volumes over the next five years.** Without such an understanding, there is a pronounced risk of (in Oxera’s words) “capping the prices too tightly / at the wrong level”.<sup>135</sup>

<sup>129</sup> Oxera Part 1, paragraph 4.30

<sup>130</sup> Oxera Part 1, paragraph 4.14

<sup>131</sup> Oxera Part 1, paragraph 4.15

<sup>132</sup> We note that there ComReg and Oxera are of the view that FTTC and FTTH belong to the same relevant market (i.e. a price increase of one leads to customers switching to another)

<sup>133</sup> Oxera, Part 1, paragraphs 3.09 and 4.99

<sup>134</sup> Oxera, Part 1, paragraph 3.109

<sup>135</sup> Oxera Part 1, paragraph 4.73

- 4.41 FTTH volumes are uncertain due to uncertainties relating to consumers' willingness to pay for and uptake of VHCNs. **FTTC volumes, in turn, are largely determined by the take up of FTTH-based subscriptions, since the pace of decline in FTTC volumes is driven by consumers migrating to FTTH.** The two types of services are therefore intrinsically linked, and insofar as FTTH uptake is uncertain (as ComReg recognises it is), the same uncertainty applies to FTTC volumes.
- 4.42 Further to the inherent uncertainty over consumers' willingness to pay for (and switch to) FTTH, the rapid growth of alternative VHCN networks (in particular, SIRO and Virgin Media) add to the uncertainty over eir volumes. While we have not had reviewed the regulatory model and its volume and costs assumptions, the current transformative changes in the market cast serious doubts on whether and how eir's volumes could be projected with any reasonable accuracy.
- 4.43 Overall, the evidence of competitive constraints and demand uncertainty suggests that continuing cost-based price cap regulation is unlikely to be proportionate. Oxera's reasoning for not recommending cost-based price controls for FTTH apply to FTTC, too, given the interplay between the two types of wholesale products.

### **There are less intrusive ways to ensure that eir does not charge excessive prices**

- 4.44 Oxera sets out the main characteristics of different alternatives to price regulation. These include: anchor pricing, "retail minus" – which is economically similar to an ex ante margin squeeze test (MST) – and regulatory asset base (RAB) regulation.<sup>136</sup>
- 4.45 Oxera's reasoning to discount any less intrusive approaches to regulation is, however, unclear. For example, Oxera appears to position RAB regulation strictly in the form in which it is commonly applied in regulation of natural monopolies and (in our view correctly) notes that in "*Irish WLA market, however, Eircom is expected to face direct competition from SIRO in some areas, as well as indirect competitive constraints from Virgin Media.*"<sup>137</sup> This recognition of the implications of competition is not, however, reflected in Oxera's recommendation to largely prolong the use of existing remedies, including a BU-LRIC based price cap on FTTC VUA.
- 4.46 If, notwithstanding increasing competition and demand uncertainty, ComReg remains concerned over excessive FTTC VUA prices, ComReg could consider less intrusive remedies.
- 4.47 First, [text redacted]
- 4.48 Second, if considered necessary, ComReg could monitor eir's returns generated through its SMP products and intervene if eir's returns were to exceed levels deemed as excessive. Intervening only if there is evidence of excessive returns allows for a greater pricing flexibility, which would be conducive to an orderly, market-based migration to FTTH.
- 4.49 Any safeguard mechanism to trigger an intervention in the event of excessive returns should honour **the 'fair bet' principle**, a concept also supported by Oxera, see **Box 5**.

<sup>136</sup> We return to the possible case for MST below in the context of ComReg's proposals for FTTH VUA

<sup>137</sup> Oxera Part 1, paragraph 4.84

**Box 5 The fair bet principle**

The regulated company (and its investors) face uncertainty when undertaking a risky investment in, say, FTTH networks. 'The 'fair bet' principle departs from the notion that a regulated company needs to be able to earn returns commensurate with the risk it faces at the time of the investment. The 'fair bet' means that the realised returns are not capped below what was expected at the time of the investment, nor are any returns above the expected returns clawed back mid-way through the lifetime of the investment.

The honouring of the 'fair bet' principle entails an understanding of the distribution of cash flows at the time an investment takes place and an ex ante cost of capital. The fair bet principle can, in principle, be embedded in the design of a forward-looking price cap. Where the regulator is concerned about cost recovery and investments, it may choose to monitor returns retrospectively. Returns that substantially and persistently exceed the cost of capital could be considered "excessive".

Source: Copenhagen Economics. See for example: Oxera (2017), Does Ofcom's approach in the WLA market review honour the fair bet principle?

- 4.50 Given the competition and volume risks characterising eir's fibre products, coupled with eir's voluntary commitments, the fair bet principle could be honoured less intrusively without the need for continuing the BU-LRIC based prices into the upcoming five-year regulatory period.
- 4.51 Overall, the proposed BU-LRIC-based "price continuation" is questionable from an economic perspective in the circumstances that eir is subject to over the next regulatory period. Monitoring of eir's proposed undertakings and, if necessary, any of eir's returns, would likely suffice to address ComReg's concerns.

## **COMREG DOES NOT PROVIDE EVIDENCE TO SUPPORT AN EX ANTE MARGIN SQUEEZE TEST FOR FTTH**

- 4.52 eir has been subject to an ex ante margin squeeze test (MST) with respect to wholesale FTTH bitstream to FTTH VUA, its bundled offers and standalone FTTH.<sup>138</sup> ComReg proposes to alter the bundles MST and to focus on FTTH, to include standalone FTTH in the proposed MST, and to remove the existing wholesale FTTH Bitstream to wholesale FTTH VUA MST.<sup>139</sup> ComReg's (and Oxera's) finding is premised on the notion that an MST will "*mitigate the risk of margin squeeze, leverage and foreclosure.*"<sup>140</sup>
- 4.53 ComReg's (and Oxera's) theory of harm – that eir would engage in exclusionary practices without ex ante remedies – lacks any empirical foundation, as is explained in the followingo.

<sup>138</sup> ComReg WLA Consultation, paragraph 1.24

<sup>139</sup> Specifically, ComReg proposes an MST for 'eir's flagship' products that consist of the highest volume FTTH retail offerings which together account for at least 75 per cent of total FTTH retail product volumes, see ComReg WLA Consultation, paragraph 9.379

<sup>140</sup> ComReg WLA Consultation, paragraph 9.220



- 4.54 First, eir has not engaged in margin squeeze during the ongoing regulatory period. **The headroom between its retail and wholesale prices has been larger than that allowed by the MST.** For example, [text redacted], see Figure 17.

**Figure 17**

**[text redacted]**

NGA Portfolio ATC Margins (in €)

[figure redacted]

Note: [text redacted]

Source: Copenhagen Economics (based on data provided by eir)

- 4.55 Both ComReg and Oxera acknowledge that eir’s headroom is “*above the level that would indicate a desire to squeeze margins to the minimum allowed amount.*”<sup>141</sup> This is not indicative of eir “making the most of” existing regulatory constraints with an attempt to foreclose downstream rivals but strongly suggests that the risk of margin squeeze is low, undermining the economic case for an MST.
- 4.56 **eir relies significantly on wholesale customers.** [text redacted]<sup>142</sup> This is indicative of eir’s incentive to “fill” the FTTX network and recover the associated fixed costs through its own retail customers *and* those of access seekers. It is well documented that, when faced with competitive pressure from alternative infrastructures, an incumbent operator can have strong incentives to provide access.<sup>143</sup> This is particularly true if the alternative infrastructures are set to provide wholesale access rather than just inputs to their own retail arm (see Chapter 3).<sup>144</sup>
- 4.57 ComReg acknowledges this by noting that “*In circumstances where there are alternative network infrastructure providers present, the incentive of the SMP operator to engage in a margin squeeze at the wholesale and retail level may be weakened.*”<sup>145</sup> While ComReg (in our view correctly) recognises that both wholesale and retail level competition can undermine eir’s incentives and ability to engage in margin squeeze, ComReg does not believe that these constraints are effective enough.

<sup>141</sup> ComReg WLA Consultation, paragraph 9.433

<sup>142</sup> [text redacted]

<sup>143</sup> (Oxera, 2017)

<sup>144</sup> (Ordover & Shaffer, 2007)

<sup>145</sup> ComReg WLA Consultation, paragraph 9.400

- 4.58 ComReg’s reasoning is based on the alleged lack of direct and indirect pricing constraints, which, in the light of our assessment (Chapter 3) appears questionable. For example, the evidence informing ComReg’s market definition is indicative of direct pricing constraints at the retail level and indirect constraints between retail and wholesale products. This is also inconsistent with ComReg’s own views on the mechanism through which end-users switching to alternative providers would constrain eir from engaging in margin squeeze. Indeed, ComReg itself sets out that the lower retail prices resulting from a margin squeeze could trigger a price reduction by other end-to-end networks, and retail customers currently subscribed to eir or its wholesale customers could divert to other networks.<sup>146</sup> ComReg nevertheless concludes on such constraints being insufficient without providing any clear evidence of the strength (or lack of) these constraints.
- 4.59 Furthermore, according to Oxera, the growth of access seekers’ market shares and lack of evidence of attempts to engage in a margin squeeze do not suffice to rule out competition concerns. Rather, Oxera opines that eir’s incentives to squeeze may vary over time and that “*once Eircom has developed sufficient volumes on its network (in particular, after significant volumes of customers have migrated from FTTC to FTTH), it have the incentive to engage in a margin squeeze to foreclose access seekers, with their customers and expand its market shares*”.<sup>147</sup>
- 4.60 **Oxera’s reasoning appears speculative and not consistent with standard theories of harm concerning incentives to foreclose.** From an economic perspective, an incumbent would be expected to engage in foreclosure (e.g., through margin squeeze) at the early stages of market development. The incentive to foreclose competitors and grow a customer base are expectedly strongest when the market (or in this case the FTTH segment) is growing, less so (as Oxera claims) when the market has already matured.<sup>148</sup> This – in our view more plausible – theory of harm does not appear to hold in the Irish FTTH segment with no evidence of attempts to foreclose competitors.
- 4.61 Overall, the available evidence unambiguously shows that eir does not seek to foreclose competitors from the FTTH market. There is therefore no reasonable justification to impose an MST.

### **An undue MST creates regulatory burden and may be distortive**

- 4.62 ComReg’s and Oxera’s conclusion on the need for an MST does not account for the risk of distortive effects of unwarranted regulation. Without evidence of a margin squeeze Oxera views that “*the consequence of errors from choosing not to impose an MST and later observing a squeeze compared to imposing and MST and finding it may not have been necessary would suggest that, on balance, it would be proportionate to impose margin squeeze obligations, given the risks of not doing so.*”<sup>149</sup>
- 4.63 Further to the fact that a similar logic could be a justification for any remedies on any market under any circumstances, no matter how competitive, Oxera’s and ComReg’s reasoning downplays the consequences of unwarranted regulation.

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<sup>146</sup> ComReg WLA Consultation, paragraphs 9.400-9.405

<sup>147</sup> Oxera Part 3, paragraphs 1.17 and 5.31

<sup>148</sup> (Inderst & Valletti, Incentives for input foreclosure, 2011)

<sup>149</sup> Oxera Part 3, paragraph 5.38

- 4.64 First, the design of the proposed test is in many ways lenient and allows eir to price its products flexibly.<sup>150</sup> In particular, the level of aggregation (portfolio-based approach) and efficiency assumption (equally efficient operator, EEO) are consistent competition law principles and not restrictive.<sup>151</sup> That said, **it is not clear why LRIC+ or average total costs (ATC) is required as the cost standard for bundled products.** ComReg suggests this approach is more consistent with its regulatory objectives (including the promotion of entry) and that “*multi-product firms cannot be foreclosed across the portfolio of products in the long run*”.<sup>152</sup>
- 4.65 However, given the lack of any evidence to indicate that eir would be close to engaging in a margin squeeze or distortionary cross-subsidisation between products, it would seem reasonable to employ a cost standard that allows eir to price both bundles and stand-alone products as flexibly as possible, as long as eir’s pricing remains compliant with competition law. Promotion of entry, while an important regulatory objective in nascent markets, should be given lesser weight in the design of an MST when entrants have already gained scale. More clarity on the rationale for ATC is needed, given the relatively high market shares already achieved by access seekers. Market conditions may not warrant a stringent ATC standard which limits eir’s ability to price flexibly across stand-alone and bundled FTTH products. Oxera appears to recognise the lack of any concerns over such cross-subsidisation.<sup>153</sup>
- 4.66 Second, unlike suggested by Oxera, **the proposed MST comes with non-negligible regulatory burden.** The test composed of several assumptions requires constant monitoring and data requirements that may impede or slow the launch of new retail or wholesale products. For example, eir will need to demonstrate that any new offers or price plans are net present value (NPV) positive based on assumptions and a discount rate (WACC) prescribed by ComReg (summarised in Table 52 in ComReg’s consultation). This is a non-trivial modelling exercise likely complicating eir’s decision-making and constraining its ability to respond to competition. Further, the focus on (in ComReg’s terms) “flagship” products involves significant reporting requirements. The flagship products need to be determined on a quarterly basis with the submission by eir of its quarterly monitoring statements and modified monitoring statements.<sup>154</sup> In the absence of any evidence to support the imposition of an MST, adding such significant regulatory costs does not seem proportionate.

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<sup>150</sup> See e.g., ComReg WLA Consultation paragraphs 9.209-9.241, and Oxera Part 1, paragraph 4.10

<sup>151</sup> ComReg (as any NRA) can, in certain circumstances, introduce an MST that is less lenient than the test that competition authorities would apply, given ComReg’s statutory duty to promote competition.

<sup>152</sup> ComReg WLA Consultation, paragraph 9.484

<sup>153</sup> On the one hand, Oxera notes that “*there is no evidence to suggest that there may be concerns that Eircom could cross-subsidise the recovery of common costs between standalone and bundled FTTH products to foreclose [...]*” and, on the other, that the recommended option “*limits Eircom’s ability cross-subsidise across standalone and bundled FTTH products.*”

<sup>154</sup> See ComReg WLA Consultation, paragraph 9.518: in determining which of eir’s FTTH retail offerings should be considered as “flagship products”, it is proposed that eir identifies the highest volume FTTH retail offerings, which together account for at least 75 per cent of eir’s total retail FTTH volumes. Furthermore, paragraph 9.517 holds: “*In addition, the flagships must include the highest volume standalone FTTH retail offering and the highest volume bundled FTTH retail offering if not identified as part of the 75%.*”

## COMREG'S PROPOSALS TO RESTRAIN EIR'S ABILITY TO REDUCE PRICES CAN DISTORT COMPETITION

4.67 ComReg proposes continued forms of restrictions on eir's ability to reduce prices and offer discounts. ComReg proposes to relax the prevailing ban of discounts for FTTH VUA.<sup>155</sup> The proposed approach would mean that such offers are subject to case-by-case approval by ComReg and to be permitted "*only where ComReg is satisfied that the promotion or discount is consistent with the promotion of network competition and encouraging investment [...]*"<sup>156</sup> **ComReg further notes that since 2018, it has not received any applications from eir seeking approval of a discount for FTTC VUA or FTTH VUA.**<sup>157</sup> ComReg states that network investments and upgrades of rival operators could lead to "*more aggressive price competition in the WLA market*".<sup>158</sup> Finally, ComReg identifies risks of distortionary effects in geographically deaveraged prices and considers it necessary to maintain a pre-approval mechanism for any sub-national discounts. Box 6 summarises ComReg's proposals.

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<sup>155</sup> In its 2018 decision, ComReg imposed a ban on wholesale promotions and discounts for WLA or WCA services. However, it noted that it may permit reductions in wholesale VUA prices in cases where the price reduction met a number of criteria and did not fall below a level consistent with eir's full deployment costs in the specific geographic area.

<sup>156</sup> ComReg WLA Consultation, paragraph 1.23

<sup>157</sup> ComReg WLA Consultation, paragraph 9.326

<sup>158</sup> ComReg WLA Consultation, paragraph 9.326

**Box 6 Summary of proposed price controls restricting eir's ability to reduce prices**

- **Pre-approval requirement for lowering regulated FTTC VUA prices**

Under ComReg's proposal it is possible for eir to reduce its wholesale FTTC VUA price below the regulated price. In such cases approval requires that eir demonstrates that it is losing market share *"as the result of price competition and that the proposed price reduction is necessary to allow it to compete with the prices from other operators"*.

If seeking to lower FTTC VUA prices in specific geographic areas, ComReg requires eir to demonstrate that i) *"it is not in the position to compete on the basis of applicable prices, providing evidence of loss of market share in the geographic area concerned"* and ii) the proposed reduction is not less than the higher of either an alternative operator's VUA price or eir's full deployment costs for VUA in the geographic area concerned based on a BU-LRAIC+ model.

- **Price floor on FTTH VUA**

ComReg proposes that the FTTC VUA price acts as price floor for FTTH VUA. In principle, eir will be allowed to price FTTH VUA below FTTC VUA in a specific geographic area. Such situations can occur only under what ComReg identifies as *"exceptional circumstances"*, when eir demonstrates that lower FTTH VUA prices are necessary to allow eir to compete with rival operators. ComReg's approval requires eir to show that: i) it is not in a position to compete based on applicable prices; and that ii) the proposed reduction is not less than the higher of either an alternative operator's VUA price or eir's full deployment costs for VUA in the geographic area concerned based on a BU-LRAIC+ model.

- **Pre-approval requirement on FTTH promotions and discounts**

ComReg's proposal allows for promotions or discounts in FTTH VUA. However, eir is required to obtain ComReg's prior approval. ComReg will assess promotions and discounts on a case-by-case basis and focus on ensuring that these will *"not have a detrimental impact on actual or potential economically efficient alternative investment in very high capacity networks"*. ComReg proposes *"that Eircom should not be allowed to introduce wholesale geographically differentiated promotions and discounts that target specific areas"*, except in *"exceptional circumstances"*. While ComReg does not provide additional detail on what type of circumstances these may be, geographic differentiation is one of the dimensions ComReg will look at when assessing the approval requests.

- **Pre-notification and publication requirements for price reductions and discounts**

Besides being required to obtain ComReg's prior approval, eir is also required to give access seekers advance notice of wholesale price reductions and discounts. Under ComReg's proposal, lowering prices will take eir at least three or seven months. Access seekers must be notified at least two months in advance (in some cases, six months in advance) of any price reductions.

Source: Copenhagen Economics based on ComReg WLA Consultation

4.68 We assess the economic rationale for such restrictions and how they might impact on eir's ability to compete effectively.

### ComReg does not sufficiently substantiate the need for restrictions

4.69 ComReg's theory of harm appears to be that eir would engage in below-cost pricing with an intention to make competitors' entry unprofitable and unattractive, and to then increase prices when competitors are foreclosed. While ComReg's price floors involve significant detailed cost modelling, ComReg (or Oxera) has not provided evidence to suggest that eir would foreclose its rivals through below-cost discounting. The pre-requisites for such foreclosure are that i) eir is **dominant** in the WLA market, ii) eir has an **incentive** to engage in sustained discounting in order to make it unprofitable for competitors to enter the market, and iii) eir has an **ability** to offer discounts only to increase its prices after its competitors have exited the market. ComReg's evidence on each of these conditions seems questionable:

- **Competitive constraints in overlap areas diluting market power:** ComReg's itself alludes to "*aggressive price competition in the WLA market*" which is inconsistent with eir holding a dominant position especially in areas where competing networks are present and where ComReg's theory of harm is of most relevance (as explained in detail in Chapter 3).
- **Incentives to meet competition, not to foreclose rivals:** [text redacted]; eir's FTTC VUA price is already more than €18.<sup>159</sup> Operators compete predominantly on price and eir has an apparent incentive to meet competition. Restraining eir's ability to doing so would dampen competition (we return to this below).
- **Ability to engage in below-cost pricing limited in wholesale market:** ComReg or Oxera do not explain whether eir could under any conceivable circumstances engage in below-cost pricing just to foreclose rivals and remain profitable in the long term. **eir's main rivals, SIRO and Virgin Media, have already invested or committed to investing in FTTH networks.** Even if eir was (for the sake of argument) successful in attracting wholesale customers in the next regulatory period at the expense of its rivals due to below-cost pricing, SIRO (in particular) and Virgin Media will have incurred the sunk cost of deploying networks and will have an incentive to fill them at competitive prices irrespective of eir's costs.

4.70 Thus, ComReg's proposals to prescribe the terms for eir's ability to meet competition are not based on evidence of eir seeking to foreclose competitors through below-cost pricing, or eir having an incentive and ability to do so.

### Overly prescriptive restrictions on price reductions can dampen competition

4.71 ComReg acknowledges that limitations on promotions and discounts skew competition in favour of eir's rivals but dismisses the magnitude of such effects. ComReg recognizes that "*the fact that rival operators are themselves able to offer wholesale promotions and discounts may leave Eircom at an unfair commercial disadvantage or limit price competition to the detriment of Access Seekers in downstream markets and ultimately end-users*".<sup>160</sup>

<sup>159</sup> Information provided by eir.

<sup>160</sup> ComReg WLA Consultation, paragraph 9.349

- 4.72 However, ComReg disqualifies how these restrictions on eir’s pricing freedom dampen competition. ComReg asserts that “*discounts does not appear to have hampered Eircom’s ability to compete for FTTH subscribers*”.<sup>161</sup> ComReg however fails to provide a counterfactual on how competition would have developed if eir had the ability to use promotions and discounts at the wholesale level. Considering that eir faces competitive constraints especially in areas where other network operators are present (as shown previously), promotions and discounts could have conceivably been an effective pricing instrument to compete in the wholesale market. We cannot rule out the possibility that pricing restrictions may have led to less competitive outcomes than would have otherwise occurred, especially in areas where other operators are already present.
- 4.73 The proposed prescriptive price floors coupled with a minimum three-month assessment phase and two-month notification period would undermine eir’s ability to explore suitable price points in a nascent market and runs the risk of dampening competition between eir and (in particular) SIRO.
- 4.74 First, **the FTTH segment is growing rapidly but still faced with demand uncertainty**. This means that operators are testing customers’ willingness to pay for FTTH services and finding appropriate price levels. Evidence of eir’s commercially driven price changes illustrates this (see Chapter 3). Both ComReg and Oxera recognise the demand uncertainty surrounding FTTH but this recognition does not seem to be reflected in the proposed approach to regulating price reductions.
- 4.75 Second, **eir’s restricted ability to price below the prescribed FTTC VUA based price floor will not encourage rival operators to price more than marginally below eir’s allowed wholesale price**. There is already evidence of direct wholesale competition between (especially) SIRO and eir. [text redacted] This is consistent with economic theory: in circumstances where operators compete on price (we understand that FTTH VUA is a relatively homogenous product) even small price reductions can suffice to win customers from an incumbent that cannot meet competition without regulatory approval.
- 4.76 Third, **the proposed prohibition of geographically targeted discounts lacks economic foundation**. ComReg proposes that eir should not be allowed to introduce wholesale geographically differentiated promotions and discounts that target specific areas.<sup>162</sup> ComReg acknowledges that non-urban CAPEX per FTTH connection will likely be higher than in urban areas<sup>163</sup> but bases its proposal on practical difficulties. By restraining eir’s ability to respond to the varying competitive conditions ComReg would provide SIRO and Virgin Media with a significant competitive advantage. We note that ComReg’s provisional conclusion is not consistent with Oxera’s recommendation. Consistent with our view, Oxera recommends that any geographically targeted discounts should be permitted insofar as they are reflective of costs.<sup>164</sup>
- 4.77 Fourth, **ComReg’s proposed timeframe further obstructs eir’s ability to compete**. Under ComReg’s proposal, lowering prices will take eir at least three or seven months. Accordingly, access seekers must be notified at least two months or six months in advance of any price reductions, see **Box 7**.

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<sup>161</sup> ComReg WLA Consultation, paragraph 9.350

<sup>162</sup> ComReg WLA Consultation, paragraph 9.372

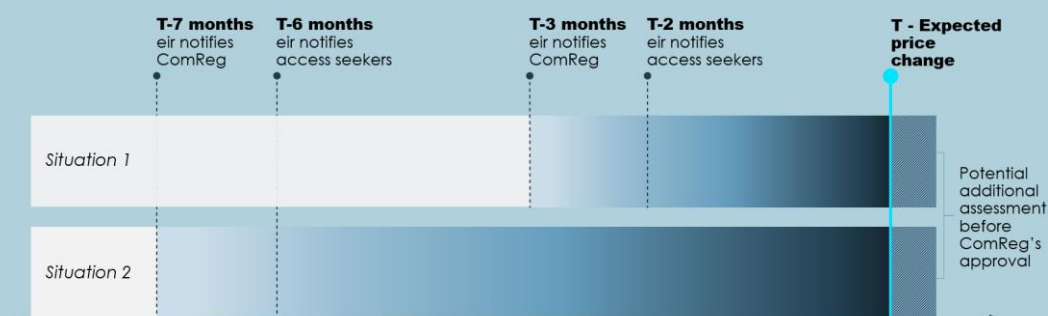
<sup>163</sup> ComReg WLA Consultation, paragraph 9.367

<sup>164</sup> Oxera Part 1, 5.40

### Box 7 Relevant timeframe for wholesale price reductions, promotions and discounts

Under ComReg's proposal, eir is required to seek approval and inform access seekers of wholesale promotions and discounts in FTTH and price reductions in FTTC VUA or FTTH VUA (below price floor). According to the timeframe applicable to these requirements, eir is required to notify:

- ComReg (including the submission of a pricing statement of compliance):
  - at least three months in advance
  - one month in advance of notification to Access Seekers
- Access seekers
  - two months in advance
  - six months in advance if pricing changes require access seekers to prepare IT systems or source and purchase new equipment to access the service.



Note: Situation 1 depicts the relevant timeframe for changes requiring a two-month notice period to access seekers and Situation 2 depicts the relevant timeframe for changes requiring a six-month notice period to access seekers.

Source: Copenhagen Economics

- 4.78 This lengthy process leaves eir at a significant competitive disadvantage relative to its wholesale competitors when competing for access seekers.
- 4.79 First, **this provides eir's competitors the ability to marginally undercut eir**. Transparent price controls gives eir's competitors accurate information about eir's (lack of) freedom to set prices. As a result, eir's wholesale competitors can identify the price points at which they can (marginally) undercut eir.
- 4.80 Second, **lengthy approval times will impede eir to timely engage in the competitive process via lower prices**. In a competitive process, eir would seek to compete with lower prices to those of its competitors. A (at least) three-month approval process and the resulting uncertainty on the ability to provide the desired price renders this scenario unlikely. ComReg's proposal largely undermines the fairness of the competitive process, leaving eir's competitors with information and time related advantages in any negotiation.



- 4.81 ComReg underestimates the level of existing competition hence misjudging the flexibility eir needs to be active in the competitive process. ComReg recognises that allowing eir price flexibility ultimately benefits wholesale customers and end-users, stating that “*providing Eircom with the necessary flexibility to compete fairly could be to the benefit of Eircom’s wholesale customers and ultimately end-users in the form of lower prices*”.<sup>165</sup> ComReg further notes that this particularly true where “*network platform expansion or technology upgrades by rival operators could lead to more aggressive price competition in the WLA market*”.<sup>166</sup> However, when setting the remedies ComReg fails to acknowledge several of its own findings. In particular, ComReg fails to consider that i) there is already significant (and increasing) network overlap within the commercial area and that ii) eir is constrained in WLA in the commercial area.

### **Discounts can be used to share investment risks**

- 4.82 Temporary or longer-term reductions in prices are features of a competitive market. In the context of ComReg’s objectives to foster investments in fibre access networks, volume-based discounts can have an additional benefit through sharing the fixed-costs of network investment. The European Commission sets out that permitting pricing flexibility in the form of discounts “*would allow SMP operators and access seekers to share some of the investment risk by differentiating wholesale access prices according to the access seekers’ level of commitment. This could result in lower prices for long-term agreements with volume guarantees, which could reflect access seekers taking on some of the risks associated with uncertain demand.*”<sup>167</sup>
- 4.83 ComReg acknowledges these principles. While ComReg does not propose an outright ban on volume-based discounts, **more clarity appears needed on the circumstances under which such discounts could be anti-competitive.** These circumstances are discussed in the Oxera report and drawn upon in ComReg’s consultation (e.g. loyalty-enhancing or exclusive agreements). They are, in their current form, generic and theoretical and as such unlikely to provide eir with sufficient certainty before entering into a lengthy approval process.

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<sup>165</sup> ComReg WLA Consultation, paragraph 9.326

<sup>166</sup> ComReg WLA Consultation, paragraph 9.326

<sup>167</sup> (European Commission, 2013), paragraph 49

## CHAPTER 5

**CONCLUDING REMARKS: UNDUE  
REGULATION RUNS THE RISK OF  
DISTORTIONS**

- 5.1 In this report, we have set out how the upcoming regulatory period is likely to be characterised by intensifying infrastructure-based competition with both SIRO and Virgin Media constraining eir directly in the wholesale market and indirectly via the retail markets. The available evidence from the ongoing regulatory period indicates that eir is already faced with increasing competition. We did not find evidence to suggest that eir would have sought to foreclose its downstream competitors, crowd out competitive investment or charge excessive prices. On the contrary, in the WLA market, eir has enabled access seekers to gain significant ground in the FTTH segment and has offered steady (in real terms declining) pricing of its FTTC rentals. In the PIA market, volumes have remained very low and there is no evidence of any material competition concerns.
- 5.2 In this market context, any access regulation should be targeted and proportionate to the gravity of any competition problems identified. Where the evidence does not support a finding of SMP, or an imposition of stringent remedies, ComReg ought to weigh the benefits of prolonged regulation against the corresponding costs. While ComReg is taking steps to phase out some of the remedies currently in place, we find that ComReg has not fully assessed the likely adverse effects of some of the proposed remedies that continue to dictate eir's pricing and – consequently – its ability to compete and invest. In particular:
- 5.3 **Symmetric access to physical infrastructure:** It is unclear why eir remains as the only provider of PIA that is subject to strict cost orientation remedies. Duplication of costs associated with physical infrastructure with limited room for differentiation is not efficient and, therefore, guaranteeing third-party access on reasonable terms appears reasonable. That said, with substantial self-supply by SIRO and Virgin Media, and with widespread physical infrastructure deployed by ESB, we find that ComReg's objectives could be achieved through other, more symmetric, approaches to regulation, such as the BCRD, which already requires all physical infrastructure providers to grant access, regardless of market power. ComReg's proposed approach to designate eir as the only operator subject to SMP regulation will, with respect to newbuild sites, specifically, run the risk of undermining eir's investment incentives and distorting competition.
- 5.4 **Orderly migration to FTTH:** Central to ComReg's objectives is to provide a regulatory framework that incentivises deployment and uptake of fibre-based broadband. While this is recognised by ComReg and its economic adviser, it is unclear to us why ComReg regardless proposes a set of caps and floors to dictate eir's prices, restrictions on geographic differentiation, and lengthy approval periods for price cuts. Orderly migration to FTTH could be achieved through further flexibility, e.g. voluntary wholesale access commitments, non-discriminatory access terms and monitoring of prices and returns to safeguard against any risk of excessive prices.

- 5.5 **Vibrant VUA wholesale competition:** In the light of evidence of price reductions in response to SIRO's presence and an increasing share of access seekers relying on alternative networks, restrictions to eir's ability to compete on prices will dampen competition. Insofar as eir's prices are effectively bound by strict and published regulatory-mandated price floors, competitors are unlikely to compete as fiercely as they could. There is a strong case for ComReg to reconsider its approach to the currently proposed approval process, which, if implemented, needs to enable swift responses to competitors' prices.
- 5.6 Ex ante regulation inevitably involves a degree of judgement and careful balancing between different regulatory objectives. The well-established aim of the regulatory framework is to gradually scale back regulation as competition in the markets develops.<sup>168</sup> The European Commission makes clear that "*NRAs should therefore choose the least intrusive way of addressing potential harm to effective competition in the identified market.*"<sup>169</sup>
- 5.7 There is clear evidence of competition in the market today. It is also evident that the level of competition will increase during the upcoming regulatory period, due to the expansions and upgrades of other networks. Despite this, ComReg reaches the conclusion that extensive and intrusive regulation is required and that for WLA this ought to apply across the entire commercial area. When exercising judgement in these markets, it is important that ComReg takes a forward-looking approach to market definition, to the presence of competitive constraints and the design of remedies. Given the evidence of recent and upcoming market developments, we believe that there is a strong case for revisiting the case for, the scope of, and the degree of intervention required.

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<sup>168</sup> (European Commission, 2020), paragraph 3

<sup>169</sup> (European Commission, 2020b), page 10

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## APPENDIX A

**CORRECTED SSNIP TEST METHODOLOGY**

- 5.8 In this appendix, we describe the methodology that we adopted in performing a corrected SSNIP test to properly account for the full demand response to a wholesale price increase. We briefly describe the reasoning behind each relevant methodological choice and present intermediate results where relevant.
- 5.9 Based on ComReg's data<sup>170</sup>, most centrally the residential and SME customer surveys regarding how different users would respond to price increases, we determine the estimated actual loss suffered by the hypothetical fibre WLA monopolist as a result of a 10 per cent wholesale price increase.
- 5.10 According to the sequential calculations performed as part of this exercise, this chapter is organized as follows:
1. Allocation of consumers that "don't know".
  2. Allocation of consumers that "shop around".
  3. Excluding consumers that switch to other fibre .
  4. Computing the average across residential and SME respondents.
  5. Scaling the survey results to the expected retail price increase due to a wholesale SSNIP.
  6. Computing the average across bundle and standalone respondents.

**ALLOCATION OF CONSUMERS THAT "DON'T KNOW"**

- 5.11 The main objective of CE's corrected SSNIP is to account for the full demand response to a price increase. While a share of consumers responded that they did not know how they would react to a hypothetical price increase, how they would actually react to this price increase must be considered in the SSNIP test.<sup>171</sup>
- 5.12 We consider that on average "don't know" respondents will react to a price increase in the same way as the remaining survey respondents. This is an adequate approach as their answer seems insufficient to determine whether these consumers have higher or lower price sensitivity or likelihood of switching.
- 5.13 "Don't know" consumers were therefore allocated to the remaining response categories i) do nothing, ii) stay and downgrade, iii) cancel completely, iv) cancel but switch broadband only, v) cancel but switch all, and vi) shop around, according to their relative weight.<sup>172</sup>

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<sup>170</sup> Annex 2: Residential Market Research, and Annex 3: SME Market Research.

<sup>171</sup> Answering the survey question "Which of the following would best describe what you and your household would be most likely to do in response to this hypothetical €4 price increase of your broadband service?" (see Annex 2: Residential Market Research, slide 64).

<sup>172</sup> We did not allocate any "don't know" respondents to the very small additional response category labelled "something else".

- 5.14 This exercise was performed for bundle and for standalone consumers, both in the residential and the SME segment. For residential consumers, the starting point was the set of results for fibre consumers response to a price increase, presented in slides 55 and 64 of the residential survey results.<sup>173</sup> For SME consumers, the starting point was the set of results for fibre consumers response to a price increase, presented in slides 47 and 53 of business consumers survey results.<sup>174</sup> The results of this exercise are presented in Table 3.

**Table 3**  
**Results for the action taken by fibre consumers respondents in response to price increases (by €4 for bundles consumers and by €2 for standalone consumers), after allocating “don’t know” respondents**

| ACTION TAKEN IN PRICE INCREASE   | RESIDENTIAL BUNDLE | RESIDENTIAL STANDALONE | SME BUNDLE | SME STANDALONE |
|----------------------------------|--------------------|------------------------|------------|----------------|
| Do nothing                       | 63.5               | 52.1                   | 62.0       | 71.2           |
| Stay and downgrade               | 8.2                | 2.5                    | 2.0        | 0.0            |
| Cancel completely                | 0.0                | 2.5                    | 2.0        | 0.0            |
| Cancel but switch broadband only | 2.4                | 6.2                    | 13.0       | 8.3            |
| Cancel but switch all            | 2.4                | 3.7                    | 3.0        | 8.3            |
| Shop around                      | 23.5               | 31.0                   | 17.0       | 11.3           |
| Something else                   | 0.0                | 1.0                    | 0.0        | 2.0            |

Source: Copenhagen Economics

## ALLOCATION OF CONSUMERS THAT “SHOP AROUND”

- 5.15 Accounting for the full demand response to a price increase involves considering the actions of consumers who answered that they would react to a price increase by shopping around.
- 5.16 It is reasonable to consider that these consumers’ responses signal that they are more price sensitive than the average. However, since the available evidence is insufficient to determine how much more sensitive these consumers are, we create two scenarios.
- 5.17 In the *first* scenario, we allocate “shop around” consumers assuming they respond to a price increase in the same way as the average consumer. This is a conservative scenario that assumes that “shop around” consumers are just as likely to switch or cancel as the average respondent. This scenario thus establishes a lower bound for the full demand response to a SSNIP. Shop around consumers are allocated to the response categories (i) do nothing, (ii) stay and downgrade, (iii) cancel completely, (iv) cancel but switch broadband only, (v) cancel but switch all, according to each category relative weight.<sup>175</sup>

<sup>173</sup> Annex 2: Residential Market Research

<sup>174</sup> Annex 3: SME Market Research

<sup>175</sup> As with the reallocation of “don’t know” respondents, we do not reallocate any “shop around” respondents to the very small additional response category labelled “something else”.



- 5.18 In the *second* scenario, we allocate “shop around” consumers assuming they all either switch or cancel – i.e., all “shop around” are allocated to the response categories (i) cancel completely, (ii) cancel but switch broadband only, and (iii) cancel but switch all, according to these categories’ relative weights. Thus, this scenario depicts an upper bound for the full demand response to a price increase.

## **EXCLUDING CONSUMERS THAT SWITCH TO OTHER FIBRE PROVIDERS**

- 5.19 Part of the fibre consumers that switch providers are expected to remain supported by a fibre network, which would also be controlled by the hypothetical monopolist. A conservative approach to determining the full demand response to a price increase involves estimating the share of switching consumers that, despite switching retail providers, remain on the hypothetical monopolist’s fibre network.
- 5.20 Since the published data does not provide detail on the share of fibre consumers switching to other providers supported in fibre network, CE computed a proxy based on ComReg’s data – slides 60 and 69 for residential consumers and slide 49 for SME consumers.
- 5.21 First, we exclude respondents that answered “*Broadband service provided over a Fibre supplier*”. to the question “*Which type of broadband service would you be most likely to switch to?*”, then recalculate the relative weight of each remaining response category<sup>176</sup>. This is adequate because switching to a “*Broadband service provided over a Fibre supplier*” would not be a valid response to fibre customers for whom the answer category “*continue with the same type of service offered by a different service provider*” was one of the possible responses. In the case of SME respondents, we further recalculate the relative weight of each response by excluding respondents that answered “*don’t know*”.
- 5.22 The resulting weight for the option “Same type of service offered by a different provider” is a proxy for the share of switching fibre consumers that would switch to other fibre-based retail services. We apply this share to the two categories “cancel but switch all” and “cancel but switch broadband only” to create a new category “Switch to another fibre provider”.
- 5.23 This step was performed after the allocation of consumers that “shop around” for both scenarios (lower bound and upper bound). Revised results for the actions taken by fibre consumers respondents as a response to a price increase are presented in Table 4 and Table 5.

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<sup>176</sup> In the case of SME customers, the recalculated weight was performed also excluding the category “*don’t know*” (besides the category “*Broadband service provided by a Fibre supplier*”).

**Table 4**  
**Results for the action taken by fibre consumers respondents in response to price increases (by €4 for bundles consumers and by €2 for standalone consumers), after excluding fibre consumers that switch but remain in fibre networks – lower bound**

| <b>ACTION TAKEN IN PRICE INCREASE</b> | <b>RESIDENTIAL BUNDLE</b> | <b>RESIDENTIAL STANDALONE</b> | <b>SME BUNDLE</b> | <b>SME STANDALONE</b> |
|---------------------------------------|---------------------------|-------------------------------|-------------------|-----------------------|
| Do nothing                            | 83.1                      | 76.2                          | 74.9              | 80.4                  |
| Stay and downgrade                    | 10.8                      | 3.6                           | 2.4               | 0.0                   |
| Switch to another fibre provider      | 0.4                       | 2.0                           | 14.4              | 0.0                   |
| Cancel completely                     | 0.0                       | 3.6                           | 2.4               | 0.0                   |
| Cancel but switch broadband only      | 2.9                       | 7.8                           | 4.0               | 9.3                   |
| Cancel but switch all                 | 2.9                       | 4.7                           | 0.9               | 9.3                   |
| Something else                        | 0.0                       | 1.0                           | 0.0               | 2.0                   |

Source: Copenhagen Economics

**Table 5**  
**Results for the action taken by fibre consumers respondents in response to price increases (by €4 for bundles consumers and by €2 for standalone consumers), after excluding fibre consumers that switch but remain in fibre networks – upper bound**

| <b>ACTION TAKEN IN PRICE INCREASE</b> | <b>RESIDENTIAL BUNDLE</b> | <b>RESIDENTIAL STANDALONE</b> | <b>SME BUNDLE</b> | <b>SME STANDALONE</b> |
|---------------------------------------|---------------------------|-------------------------------|-------------------|-----------------------|
| Do nothing                            | 63.5                      | 52.1                          | 62.0              | 71.2                  |
| Stay and downgrade                    | 8.2                       | 2.5                           | 2.0               | 0.0                   |
| Switch to another fibre provider      | 1.7                       | 4.8                           | 23.2              | 8.5                   |
| Cancel completely                     | 0.0                       | 8.7                           | 3.9               | 0.0                   |
| Cancel but switch broadband only      | 13.3                      | 18.7                          | 6.4               | 9.7                   |
| Cancel but switch all                 | 13.3                      | 11.2                          | 1.5               | 9.7                   |
| Something else                        | 0.0                       | 1.0                           | 0.0               | 2.0                   |

Source: Copenhagen Economics

## COMPUTING THE AVERAGE ACROSS RESIDENTIAL AND SME RESPONDENTS

- 5.24 We compute the weighted average response of overall bundle consumers and overall standalone consumers, for each scenario, based on the relative weights of residential and business broadband subscriptions. According to ComReg, in 2022 Q3, the residential segment accounted for 95.8 per cent (443,756) of the total number of FTTH broadband subscriber lines. Business subscribers accounted for the remaining 4.2 per cent (19,497).<sup>177</sup> Table 6 presents the results of this procedure, for both types of products.

**Table 6**  
**Average full demand response from bundle consumers and from standalone consumers in both scenarios (lower bound and upper bound)**

| <b>ACTION TAKEN IN PRICE INCREASE</b> | <b>BUNDLE (LOWER BOUND)</b> | <b>BUNDLE (UPPER BOUND)</b> | <b>STANDALONE (LOWER BOUND)</b> | <b>STANDALONE (UPPER BOUND)</b> |
|---------------------------------------|-----------------------------|-----------------------------|---------------------------------|---------------------------------|
| Do nothing                            | 81.6                        | 77.0                        | 63.3                            | 55.5                            |
| Stay and downgrade                    | 9.3                         | 3.0                         | 7.1                             | 2.0                             |
| Switch to another fibre provider      | 2.9                         | 1.7                         | 5.5                             | 5.5                             |
| Cancel completely                     | 0.4                         | 3.0                         | 0.7                             | 7.1                             |
| Cancel but switch broadband only      | 3.1                         | 8.1                         | 12.1                            | 17.1                            |
| Cancel but switch all                 | 2.5                         | 5.5                         | 11.2                            | 10.9                            |
| Something else                        | 0.0                         | 1.2                         | 0.0                             | 1.2                             |

Source: Copenhagen Economics

## SCALING THE SURVEY RESULTS TO THE EXPECTED RETAIL PRICE INCREASE DUE TO A WHOLESALE SSNIP

- 5.25 ComReg determines that a 10 per cent SSNIP of fibre WLA products would result in an effective retail price increase of €3.40 and €1.06 and for VUA and LLU products respectively. However, ComReg's surveys investigate how (i) bundle consumers react to a €4 price increase, and how (ii) standalone consumers react to a €2 price increase.

<sup>177</sup> Based on ComReg's data on Residential & Business Subscriber Lines x Platform, Quarterly Key Data Report.

- 5.26 To correct for the possible overestimation of demand response to a SSNIP, we adjusted the survey results downwards in the proportion of the price differences when survey data was based on a hypothetical price increase above the expected price increase in retail assuming a full pass-through. In summary, we adjusted:
- the average overall response from bundle customers so that we applied only 85 per cent (corresponding to the price ratio 3.4/4) of the overall demand response, when performing the critical loss analysis considering a 10 per cent SSNIP on VUA products.
  - the average overall response from bundle customers so that we applied only 27 per cent (corresponding to the price ratio 1.06/4) and the average overall response from standalone customers so that we applied only 53 per cent (corresponding to the price ratio of 1.05/2), when performing the critical loss analysis considering a 10 per cent SSNIP on LLU products.
  - we conservatively applied no adjustment to the average overall response of standalone customers in response to a SSNIP when performing the critical loss analysis considering a 10 per cent SSNIP on VUA products, where the survey response indicates the likely reaction to a €2 price increase, even though the price increase due to a 10 per cent SSNIP on VUA products at wholesale level would lead to a €3.4 price increase at retail level.
- 5.27 These adjustments were performed over the expected actual loss resulting from the consumers' response to a 10 per cent SSNIP (see Table 6) comprising the responses (i) cancel completely, (ii) cancel but switch broadband only and (iii) cancel but switch all. Table 7 presents the results of this adjustment applied over the average overall demand response.

**Table 7**  
**Price-adjusted actual losses for overall bundle consumers and overall standalone consumers in response to a 10 per cent SSNIP in fibre WLA (VUA and LLU)**

| <b>PRICE-ADJUSTED ACTUAL LOSSES IN RESPONSE TO A 10 PER CENT SSNIP IN FIBRE WLA</b> | <b>BUNDLE (LOWER BOUND)</b> | <b>BUNDLE (UPPER BOUND)</b> | <b>STANDALONE (LOWER BOUND)</b> | <b>STANDALONE (UPPER BOUND)</b> |
|---|-----------------------------|-----------------------------|---------------------------------|---------------------------------|
| Actual loss (not adjusted for price differences)                                    | 6.1                         | 16.6                        | 23.9                            | 35.2                            |
| Actual loss in VUA 10 per cent SSNIP (adjusted for price differences)               | 5.1                         | 16.6                        | 20.3                            | 35.2                            |
| Actual loss in LLU 10 per cent SSNIP (adjusted for price differences)               | 1.6                         | 8.8                         | 6.3                             | 18.6                            |

Source: Copenhagen Economics

## COMPUTING THE AVERAGE ACROSS BUNDLE AND STANDALONE RESPONDENTS

- 5.28 To present the aggregate demand response considering both type of products, we proceeded with a weighted average based on the corresponding relative weights in the number of total FTTH subscriptions. According to ComReg, in 2022 Q2, bundled broadband subscriptions accounted for 79,5 per cent of total subscriptions with a broadband component, while standalone represented 20,6 per cent of the total.<sup>178</sup>
- 5.29 Departing from values in Table 7, we computed the corresponding weighted average for the price-corrected actual losses. Table 8 presents the resulting average demand response in both scenarios.

**Table 8**  
**Average full demand response to a 10 per cent SSNIP in WLA and corresponding actual loss per in the lower bound and upper bound demand response scenarios**

| FULLY ADJUSTED DEMAND RESPONSE TO A 10 PER CENT SSNIP IN WLA          | LOWER BOUND | UPPER BOUND |
|---|-------------|-------------|
| Actual loss in VUA 10 per cent SSNIP (adjusted for price differences) | 7.50        | 23.40       |
| Actual loss in LLU 10 per cent SSNIP (adjusted for price differences) | 3.08        | 8.88        |
| <b>Critical Losses</b>  |             |             |
| 10 per cent SSNIP on WLA VUA products                                 | 6.95        | 6.95        |
| 10 per cent SSNIP on WLA LLU product                                  | 1.81        | 1.81        |

Note: Actual loss includes the responses (i) cancel completely, (ii) cancel but switch broadband only and (iii) cancel but switch all, after all previous corrections (allocation of don't know and shop around consumers and the exclusion of fibre consumers who switch but remain in fibre networks). Values for critical loss are those computed by ComReg (see WLA Consultation)

Source: Copenhagen Economics

<sup>178</sup> ComReg WLA Consultation Table 8, page 116



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**Re: ComReg 23/03 WLA and WCA Market Reviews – margin squeeze test modelling**

Dear James,

Further to recent engagement, including the workshop and most recently ComReg's email of 30 August, I am writing to highlight eir's serious concerns regarding recent comments made by ComReg about the development of the discounted cashflow (DCF) *ex ante* margin squeeze test (MST) model proposed in the WLA and WCA Market Reviews consultation (ComReg 23/03).

This engagement is without prejudice to eir's primary position on ComReg's market analysis, as set out in its response to ComReg 23/03. As you are aware, eir has been working with ComReg on the development of a DCF MST model to support compliance with the proposed MST. This has included sharing eir's proposed compliance model based on the principles and approach set out in ComReg 23/03.

ComReg's latest correspondence<sup>1</sup> suggests that it may be considering departing from the principles and approach it consulted on in ComReg 23/03. In particular, it appears that ComReg is considering an alternative approach which eir is concerned could involve departing from the proposed DCF approach set out in the consultation.

Any material departures from the approach set out in ComReg 23/03 would raise serious concerns. Should ComReg be considering an alternative approach, it is critical that eir has visibility of that approach and a meaningful opportunity to comment on it before ComReg makes any final decisions. It would be highly inappropriate and procedurally unfair for ComReg to impose an alternative approach in the final decision without giving eir a proper opportunity to provide its views on that approach.

Should ComReg persist with the regulatory regime set out in ComReg 23/03<sup>2</sup>, the MST compliance model will be a key input into eir's pricing decisions in the next market review period. Given the intense competition eir will face over that period, it is

<sup>1</sup> An email from Vanessa Devereux (ComReg) to Paul Harmon (eir) on 30<sup>th</sup> August 2023.

<sup>2</sup> eir set out why ComReg's proposed regulatory framework should be amended in its response to ComReg 23/03.

imperative that the MST model is well-founded to prevent it from distorting competition on the merits. An ill-conceived or otherwise inappropriate MST would have serious consequences for eir and would risk harming consumers by inappropriately constraining eir's ability to compete with rivals.

In the remainder of this letter, we will address the following:

- why eir is concerned about potential departures from the consultation approach; and
- why ComReg's apparent concerns with eir's modelling approach are unfounded.

### **Our concerns about ComReg's alternative approach**

In an email to eir at the end of August, ComReg set out that it has "*some concerns with regard to the assumptions applied in developing the proposed MST (NPV) model*". ComReg explains that these concerns relate to "*how realistic*" eir's assumptions are, and whether the model will "*lead to an overestimation of the NPV calculation*". ComReg also raises other aspects of the modelling related to the treatment of bundle migrations/movements, winning and losing customers and the potential for further promotions.

Based on these observations ComReg goes on to explain that "*[g]iven these deficiencies and the complexity of monitoring all customers on a bundle or flagship offer due to the varying stages of customer lives, we are considering whether an alternative approach could be used*". It sets out that this approach would involve calculating "*the average level of acquisition promotions and separately the average level of retention promotions per flagship offer*".

While ComReg's current thinking is not clear from the limited discussion in the email, its discussion of "*an alternative approach*" raises serious concerns for eir:

- First, ComReg's reference to "*monitoring all customers on a bundle or flagship*" raises questions about whether ComReg is considering a departure from the forward-looking DCF approach set out in ComReg 23/03 to an approach more akin to that adopted for the current period-by-period analysis.
- Second, ComReg's apparent contemplation of modelling customers on acquisition offers separately from customers on retention offers also raises serious concerns about a departure from the DCF approach consulted on in ComReg 23/03.

These concerns are explained further below.

#### **Monitoring all customers on a bundle**

Under the 2018 Bundles Decision, the current MST is based on a period-by-period methodology. This approach, which is inherently backwards looking, involves calculating the margin earned for each bundle in each relevant time period using data on actual revenues and costs from eir's billing systems and audited regulatory

accounts. It calculates the margin based on all customers on each bundle – i.e. it is based on “*monitoring all customers on a bundle or flagship offer*”.

In ComReg 23/03, and consistent with the European Commission’s 2013 Non-Discrimination and Costing Recommendation, ComReg proposed to switch to a DCF (or NPV) approach for the next market review period.<sup>3</sup> The DCF/NPV approach involves calculating the margin for each bundle using forecasts of revenues and costs for those customers purchasing the product at the point when the NPV analysis is conducted. The forecasts cover the average customer lifetime (ACL) for customers in the cohort. The forecast cashflows are converted into a margin NPV using eir’s regulatory WACC.

The two approaches have some important differences:

- The DCF approach calculates margins using forecasts of costs and revenues, as opposed to the period-by-period approach, which relies on actual billing system and audited regulatory accounting data.<sup>4</sup>
- The DCF approach calculates bundle margins for the cohort of customers purchasing the product at the point in time when the NPV analysis is conducted<sup>5</sup>, whereas the period-by-period approach calculates the margin for all customers on a bundle.
- The DCF approach accounts for the time value of money throughout the calculations, unlike the period-by-period approach. This implies that costs and revenues in the future are worth less in the NPV calculation than those earned/incurred earlier in the period.
- The DCF approach does not require margins to be positive in each and every month (as is the case under the period-by-period approach), but rather it requires that the NPV of the revenues and costs over the ACL results in a positive margin.

eir’s proposed DCF MST modelling is consistent with these features.

The DCF approach reflects how competition can work in markets characterised by minimum term contracts. When a firm is competing to sign up customers, it will likely consider whether it can profitably replicate a rival’s current pricing offers. This is done by forecasting the margins it expects to generate from those customers over their lifetime based on the rival’s pricing. Firms are unlikely to focus only on the short-term profitability, for example, they would likely be willing to make lower margins in the short term if the discounted expected margins over the customers’ lifetimes are positive overall.

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<sup>3</sup> ComReg 23/03 also set out how ComReg proposed such a DCF approach to work, for example, in Table 52.

<sup>4</sup> Although key forecast parameters for the DCF approach can be based on data on actuals in the base period, as eir has done in a number of cases.

<sup>5</sup> See paragraph 6.85 of Oxera, *WCA/WLA market review – Oxera report: Part 3 Prepared for Commission for Communications Regulation*, 16 December 2022.



ComReg's reference to "*the complexities of monitoring all customers on a bundle or flagship offer*" and its resulting consideration of "*an alternative approach*" raises concerns for eir. It suggests that ComReg is considering an approach to individual bundles that is not based solely on "*the cohort of customers purchasing the bundles at the point in time when the NPV analysis is conducted*"<sup>6</sup>, but rather it is seeking ways to follow every customer on a bundle or flagship offer to calculate bundle margins. While such an approach would be more consistent with the current period-by-period approach, it would involve a departure from the DCF approach ComReg proposed in the consultation (i.e. ComReg 23/03).

### Acquisition and retention

As set out above, the use of financial forecasts is central to the DCF approach. These forecasts capture the costs and revenues for those customers from the cohort purchasing the bundle at the point the NPV analysis is conducted, and are forecast over those customers' ACL.

An advantage of the DCF approach is that the use of forecasts over time means it is dynamic and can take into account how monthly costs and revenues can change on a month-to-month basis for individual cohorts of customers. These changes can arise, for example, as a result of a customer cohort moving from one type of promotional discount to another.

By forecasting costs and revenues over the ACL, the DCF approach covers the entire typical customer journey for each bundle. This includes customers benefitting from acquisition discounts at the beginning of their customer life, and then moving to any retention offers later in their customer life. Crucially, the DCF approach considers these different phases in the customer life within an overall customer journey assessment; it does not treat cohorts of 'acquisition customers' and 'retention customers' as separate groups of customers to be considered separately.

Given the purpose of the DCF approach is to consider customer profitability over the entire ACL<sup>7</sup>, it would be inconsistent with the DCF's objective to model acquisition and retention customers separately. Such an approach would align more closely with the current period-by-period approach.

ComReg has not provided eir with sufficient detail on the alternative approach it is considering, making it difficult for eir to assess the compatibility of this approach with the DCF framework that ComReg has already consulted on. However, we are concerned that references to calculating acquisition promotions and retention promotions separately implies that ComReg could be contemplating modelling acquisition and retention customers separately for each bundle. Such an approach would be inconsistent with the DCF methodology and the approach and principles that ComReg consulted on in ComReg 23/03.

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<sup>6</sup> See paragraph 6.85 of Oxera, *WCA/WLA market review – Oxera report: Part 3 Prepared for Commission for Communications Regulation*, 16 December 2022.

<sup>7</sup> To avoid distortions that arise from considering profitability over too short a time horizon. See, for example, paragraph 9.569 of ComReg 23/03.

## **ComReg's concerns with eir's proposed modelling are unfounded**

ComReg's consideration of an alternative approach seems to be motivated by concerns about "*deficiencies*" in eir's proposed modelling. The underlying concern seems to be that eir's proposed modelling will "*lead to an overestimation of the NPV calculation for the relevant retail bundle*". However, ComReg's concerns are misplaced, as explained further below. The assumptions and approach eir has proposed are, in fact, highly conservative, resulting in a material underestimate of the margin for each bundle.

Our understanding is that ComReg's concerns relate to:

- retention discounts;
- changes in the base of customers on bundles over time;
- potential further promotions; and
- bundle migrations/movement between bundles.

Below is explained why each of these concerns is unfounded and does not constitute a 'deficiency' or a source of margin overestimation.

### Treatment of retention discounts

eir's proposed approach to modelling retention discounts assumes that retention promotions<sup>8</sup> are applied for their full duration starting at the beginning of the customer life (i.e. month 1). ComReg raised concerns about "*how realistic this assumption is, as customers are at different stages of their customer life (which may not necessarily be at the beginning i.e. month 1)*". It also set out that this will, in its view, "*lead to an overestimation of the NPV calculation for the relevant retail offer (bundle)*".

Our proposed approach to retention discounts is based on a simplifying assumption about which month the discounts fall within the ACL. This approach is highly conservative; it underestimates the margin by overstating the promotion costs. We therefore disagree with ComReg that this approach results in a deficiency.

ComReg is correct to note that, in reality, customers will not benefit from retention discounts from the beginning of their customer life. In practice, typically any retention discounts would start at the end of the initial minimum term (i.e. at the end of acquisition discounts). Based on the current acquisition promotions, this means retention promotions, where available, would start after 12 or 24 months.

Our assumption that all retention promotions start at the beginning of the customer life is a reasonable simplification given the complexity of modelling the full set of combinations of acquisition and retention promotions currently available. The number of combinations is large; for instance, a customer that receives a 12 month acquisition offer for a particular bundle could then receive either a 12 or 24 month retention offer or could move to full price. For each of these promotion durations there are then multiple different discount levels available. This complexity is then replicated for

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<sup>8</sup> As opposed to 'Forecast Retention', which is discussed below.

customers on a 24 month acquisition offer. Each of these combinations then arises for each of the flagship bundles.

The DCF approach forecasts the expected value of monthly promotions that customers in the relevant cohort will receive. eir has based this promotions forecast on data from actual promotions received by current customers in the base period (i.e. month zero). Our approach takes data on the incidence of each type of discount across the entire base in month zero (split by bundle) to estimate the expected value of each type of promotion. By basing the calculation on the base as a whole (not just new customers), it reflects customers at different points in their customer life, and therefore, the full range of discounts an average customer would expect to receive over their ACL. It also captures that some customers will pay full price for at least part of their customer life.

We then assume that the customer cohort being modelled will receive the average promotion discounts for the maximum duration of each promotion. For example, if customers are currently enjoying an average monthly discount under a 12-month retention promotion, we assume that the average monthly discount for customers applies for a full twelve months (starting in month one). That means that despite the base data reflecting customers at different points in their customer life, including some whose discounts will be lapsing over a shorter period of time, the discounts are applied for their full maximum duration and, therefore, avoid a risk of overestimating the margin.

This approach captures the full suite of promotions that customers for each bundle are benefitting from in month zero. However, as it is based on a snapshot in a single period of time, it does not provide information on where the underlying customers are in their customer lifetime. It therefore does not provide us with information to map average discounts to specific months in the ACL.

A more granular approach to establishing the pattern of discounts over time for each bundle would require a more complex MST model and a highly complicated and time-consuming task of forensically tracking existing customers through their customer journey for each flagship bundle and the various discount combinations.<sup>9</sup> This would need to be refreshed every quarter. Not only is such an exercise highly disproportionate, it has its own inherent problems. For example, tracking large numbers of customers over time is a task fraught with measurement difficulties that increases the potential for significant inaccuracies.

We therefore need to make an assumption about the timing of retention discounts within the ACL. One option could be to assume that they only start after acquisition discounts have finished. However, this faces the complexity that some acquisition discounts end after 12 months, while others end after 24 months. Instead, our proposed approach is to assume that all retention promotion discounts start in month one<sup>10</sup>. This is the most conservative approach under a DCF/NPV approach, where costs and revenues that arise further in the future have a smaller impact on the margin

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<sup>9</sup> ComReg appears to recognise this complexity when it notes “*the complexities of monitoring all customers on a bundle or flagship offer*” in its email dated 30<sup>th</sup> August.

<sup>10</sup> Excluding ‘forecast retention’ discounts as discussed below.

because of discounting. Therefore, by including discounts earlier in the ACL, the discounts reduce the NPV margin by more than if we were to assume that they arise after 12 or 24 months.

In our proposed model, the average level of monthly promotion discounts per customer declines over the ACL. This is partly a consequence of assuming retention discounts start at month one, rather than at the end of acquisition discount periods. However, it also reflects that, in practice, the average retention discounts given to customers decline over time. This is a consequence of the pool of customers approaching us for a retention discount declining after each retention re-contracting period ends<sup>11</sup>, but also because there are fewer retention offers made available for customers staying on the same bundle over time.

We recognise that our assumption of retention discounts starting in month one does not reflect how retention discounts arise in reality. However, due to the use of discounting in the DCF model, this is a highly conservative approach. Contrary to ComReg's concerns, our methodology leads to an underestimate of the margin for each bundle, not an overestimate.

Furthermore, our approach becomes even more conservative because we include an additional 'forecast retention' cost item. To guard against any risk of underestimating retention promotions we have included separate and additional costs from months 13 and 25 which add further retention costs. The inclusion of these costs, which are calculated using the maximum retention discounts currently available, have been included to ensure that the modelling further errs on the side of understating the margin.

On this basis, eir sees no deficiency in its proposed modelling.

### Winning and losing customers

ComReg suggests that there is a deficiency with eir's proposed model because it does not include forecasts of customers that eir will win and lose over the ACL of the cohort being modelled. We disagree with this assertion.

As set out above, the DCF approach forecasts the profitability of customers in the cohort purchasing the bundles at the point in time when the NPV analysis is conducted. Future changes in the base of customers are not relevant at the point in time the NPV analysis is conducted. Rather, cohorts of future customers will be captured by future quarterly refreshes of the model.

Furthermore, forecast changes in the customer base over time will not change the forecast incremental costs and revenues per customer used to estimate the NPV margin for each bundle. This is because the incremental costs and revenues do not change with volumes – they are incurred on a per-customer basis. For example, VUA

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<sup>11</sup> e.g. at the end of each offer period there is a proportion of customers that choose not to contact us for a discount, therefore, the probability of an average customer in the cohort getting a retention discount declines after each offer period ends.

wholesale charges or the monthly subscription revenues are not dependent on bundle volumes.<sup>12</sup>

On this basis, eir sees no deficiency in its proposed modelling as suggested by ComReg.

#### Potential further promotions

ComReg also suggests that there is a deficiency with eir's proposed model because it does not capture potential further promotions. eir disagrees with this assertion.

Our proposed model is based on the set of currently live promotions. In the future, it is possible that we may make new promotions available and/or we may withdraw existing promotions. However, we have no way of reliably forecasting how the portfolio of promotions could change over the next 42 months. Changes to our portfolio of promotions depend on market circumstances and the actions of our competitors, which are inherently difficult to predict.

However, this uncertainty does not invalidate our modelling for several reasons:

- First, DCF modelling relies on forecasts, which are subject to variance. The key is to utilise the most accurate forecasts possible, a criterion our model meets.
- Second, if in the future the forecast parameters and assumptions depart from actuals, such as, new offers emerge or others are withdrawn, those deviations will be captured by quarterly refreshes of month zero.
- Third, the purpose of the DCF MST for individual bundles is to ensure that competitors<sup>13</sup> can replicate eir's current offers and contest customers available to sign-up to bundles at the point in time when the NPV analysis is conducted. Customers and competitors will be aware that operators, including eir, may change their portfolios of live promotions in the future. This could result in discounts either increasing or decreasing. However, like eir, they will not have a reliable basis for forecasting such changes. Therefore, they are unlikely to place considerable weight on potential changes when making decisions. Rather, competitors' capability to replicate eir's current offers will be of far greater relevance. This is precisely what eir's DCF MST modelling assesses.

On this basis, eir sees no deficiency in its proposed modelling.

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<sup>12</sup> While there is a line in each bundle worksheet with the customer base in month zero (which is then replicated across each month), this is only used to: 1) establish base period per subscriber costs and revenues which are then held constant over relevant subsequent months; and 2) to establish the bundle weights for the portfolio test.

<sup>13</sup> Specifically competitors who are as efficient as eir.

### Bundle migrations/movement between bundles

Finally, ComReg also suggests that there is a deficiency because eir's proposed model does not take into account potential future bundle migrations/movement between bundles. eir rejects any such suggestion.

eir's proposed modelling assumes that the cohort of customers purchasing the bundle when the NPV is conducted remain on the same bundle over their customer lifetime. Although, customers can migrate to other bundles when they are outside of any minimum contract periods, this does not mean that the modelling is defective:

- First, any movement between bundles by customers will be captured by the quarterly refresh of month zero. Therefore, bundle changes will feed into future MST assessments.
- Second, robustly forecasting the impact on margins today from potential migrations to future bundles (which may not currently exist) is not possible. Therefore, when customers in the modelled cohort, and eir's rivals contesting those customers, are making decisions about offers to make and accept, they are unable to place significant weight on possible, but highly uncertain, bundle migrations in the future. Rather they are more likely to base their decisions, like eir, on the assumption that the customer remains on the same bundle over its ACL.
- Third, all flagship bundles need to pass the DCF MST every quarter. Thus, even if customers move between flagships bundles, they should be moving from one positive margin bundle to another positive margin bundle.
- Fourth, even if there was a theoretical possibility that customers could migrate to a new bundle before any initial incremental losses on the previous bundle had been recovered, that is not relevant to eir as all of our flagship bundles are incrementally profitable in each month (even with highly conservative assumptions). In any event, focussing on profitability in individual months or for only parts of the ACL is inconsistent with the DCF approach and therefore irrelevant.

On this basis, eir sees no deficiency in its proposed modelling.

### **Conclusion**

In conclusion, we believe that this letter has demonstrated that an alternative approach to eir's DCF MST modelling is neither necessary nor appropriate. We are confident that our proposed modelling is based on a highly conservative methodology that fully aligns with the principles and approach ComReg consulted on in ComReg 23/03.

Despite this, if ComReg continues to pursue an alternative approach to the MST modelling, it is critical that eir is granted full visibility of that approach and an opportunity to meaningfully comment on it before any final decision is made. It would be highly inappropriate and procedurally unfair for ComReg to impose an alternative

methodology in the final decision without giving eir a proper opportunity to provide its views on that methodology.

We would welcome the opportunity to discuss any points raised in this letter in further detail with ComReg.

Yours sincerely,

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Kjeld Hartog  
Director of Regulatory and Public Affairs

Consultation and Draft Decision

Reference: ComReg 23/03

Market Reviews: Wholesale Local Access and Wholesale Central Access

Response from Imagine

### **About Imagine**

Imagine are an industry-recognised/accredited innovator, in the use of 4G, LTE Advanced and 5G Fixed Broadband technologies. Furthermore, Imagine's successful acquisition of spectrum at the recent MBSA2 Auction – supported by its shareholders, underscores the confidence investors worldwide have in FWA's ability to deliver broadband in line with consumer expectation.

Imagine, in accordance with the company's business plan, continue to invest in the rollout its FWA highspeed broadband network across rural Ireland. As such, Imagine and their shareholders are confident, that this ongoing investment in our FWA network, will not only provide services in underserved areas, but moreover, it will stimulate competition as well as investment across the entire market. This, in turn, will afford the consumer greater choice. Furthermore, it is Imagines view, that 5G will deliver a "step change" in connectivity that will not only improve customer experience but expand the range of services it can support.

### **General Consultation Response**

Imagine acknowledges the important role ComReg plays in the Irish Communications market and would like to take this opportunity to commend the work undertaken by ComReg in the preparation of this in-depth review of the Wholesale Access market. Whilst we acknowledge that the reports central focus is on the "Wholesale Access Market", its objective data analysis, affords all undertakings, a unique insight into the complexities involved in the provision of broadband services, using both CGA and NGA technologies. In this regard Imagine concur with the view set out in paragraph 1.3, that vibrant competition amongst networks is the best way to ensure that consumers and businesses reap the maximum benefits in terms of choice, high-quality service at a price point driven by competition. This is in line with Imagines vision, as set out in the introduction above.

In terms of the reports content Imagine, as an FWA access provider with the potential to deploy 5G, does not subscribe to many of the statements the report makes in relation to FWA, but it notes and welcomes the statement, acknowledging that, "5G FWA in particular is expected to play a significant role as a substitute for fixed access, particularly in rural areas across some Member States" (4.136)

Notwithstanding this view, Imagine nonetheless wishes to endorse ComReg's preliminary conclusion, as set out in 4.164(d) "that the inclusion of FWA in the retail broadband market is not warranted".

Furthermore, Imagine also endorse the ComReg view as set out in 6.136 namely that *"ComReg does not consider that that retail-only SPs delivering broadband over FWA, localised alternative FTTP, or satellite are likely to warrant consideration as a sufficiently effective constraint on the exercise of market power by means of potential competition.*

On this basis, therefore, Imagine are of the view that we would not wish to offer further specific comment or opinion in relation to the questions presented in Annex 13 of ComReg 23/03, but would welcome inclusion of this document as part of the overall consultative process.



# Wholesale Local Access provided at a fixed location and Wholesale Central Access provided at a fixed location for mass-market products

Response to ComReg's Consultation and  
Draft Decision 23/03

NON- CONFIDENTIAL VERSION FOR  
PUBLICATION

3<sup>rd</sup> March 2023

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## 1 Introduction

National Broadband Ireland (NBI) is pleased to provide its response to ComReg’s consultation and draft decision on Wholesale Local Access (WLA) provided at a fixed location and Wholesale Central Access (WCA) provided at a fixed location for mass-market services.<sup>1</sup>

In November 2019, NBI signed the National Broadband Plan (NBP) Project Agreement with the Minister for the Environment, Climate and Communications, committing NBI to roll out a full-fibre network to those areas of the country that had been identified as unserved by commercial broadband providers, i.e. the NBP Intervention Area (IA).

The IA was defined by the Department of the Environment, Climate and Communications (DECC) following an extensive mapping exercise which was completed prior to the signing of the NBP Project Agreement. The IA was based on those premises where there was no commitment from a commercial operator to provide a high-speed broadband service within the timeframe of the NBP network deployment.

NBI’s Fibre to the Home (FTTH) network deployment is now well advanced – at end-February 2023, the NBI FTTH network had passed just under 119,000 premises, with in excess of 33,000 end-users connected to the network and availing of high-speed broadband services from a variety of Retail Service Providers (RSPs).

NBI anticipates that it will complete the NBP network deployment within seven years. The deployment is now early in its fourth year and NBI is on target to complete the rollout in line with its contractual obligations.

The main relevant products covered by this market review are Wholesale Line rental (WLR), Local Loop Unbundling (LLU), Bitstream services and related Virtual Unbundled Access (VUA). While NBI is not a customer for these products, it is indirectly regulated by ComReg’s proposed measures relating to these products, by virtue of the fact that the NBP Project Agreement, Schedule 5.2, refers to “regulated prices” in the context of setting reference prices for NBI’s wholesale pricing.<sup>2</sup>

In responding to this consultation, NBI has confined its comments to areas of direct relevance to it and, in this regard, NBI offers the following high-level observations on ComReg’s proposals:

- NBI notes ComReg’s proposal to define a WLA market for Next Generation (NG) services which is geographically based on the NBP IA. While NBI does not object to this market definition, ComReg’s analysis underpinning it would appear to be at least partially flawed, due to its focus on Eircom exchange areas as well as the apparent assumption that the NBP IA is a fixed, stable geographic unit whereas in reality it is dynamic and ever-changing;

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<sup>1</sup> ComReg Consultation and Draft Decision, Document No. 23/03, 9<sup>th</sup> January 2023 (the “Consultation Document”).

<sup>2</sup> Schedule 5.2 is published in full, available at <https://www.gov.ie/pdf/?file=https://assets.gov.ie/76793/f76d2635-8af5-4af2-915d-4201a2393618.pdf#page=null>

- NBI notes ComReg's preliminary conclusion that no operator, including NBI, holds a position of Significant Market Power (SMP) within the NBP IA NG WLA market, though we would also note that, in the short-term at least, Eircom has the potential to gain significant share in the IA and that this will be facilitated by withdrawal of SMP on Eircom. In NBI's case, its operations are constrained by the extensive and strict terms of the NBP Project Agreement;
- Notwithstanding the above, NBI also notes that the presence of new premises in the IA has the potential to change the economics of network deployment within the IA for other operators and afford such other operators the opportunity to distort competition in the IA in the absence of regulation;
- NBI agrees with ComReg's preliminary position that Eircom has SMP in the Commercial NG WLA market and that the range of remedies outlined by ComReg should be imposed on it;
- NBI notes ComReg's preliminary conclusion that no operator holds a position of SMP in the national Current Generation (CG) WLA market. While this market is declining in size as the deployment of fibre networks continues apace and more end-users are switching to fibre broadband services, NBI would – as pointed out above - still caution that there is potential for Eircom to gain significant share providing services on its CG network in the IA, in particular in the short-term, and that this will be facilitated by withdrawal of SMP on Eircom in this area.

## 2 Responses to ComReg's consultation questions

In this Section, NBI provides its response to each of the questions posed by ComReg in its Consultation Document.

*Q. 1 Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.*

NBI agrees that ComReg has identified the main developments in the provision of retail broadband in recent years. These include a decline in demand for stand-alone voice services and the increasing importance of broadband as an infrastructure to support not just internet access, but also voice and TV services.

NBI considers that all of the most notable trends (a) to (f) listed in the preliminary conclusion in Section 3.6 of the Consultation Document (Para. 3.94) are supported by evidence. There is, however, a lack of detail in the Consultation Document in support of item (f), the continued rollout and network upgrades by Service Providers (SPs) and the uptake of high-speed broadband services. There is reference to Eircom, SIRO and NBI rolling out FTTP and Virgin Media upgrading from Cable Television (CATV) to FTTP. This section is, however, somewhat short on detail and hints, without providing any supporting evidence, at a very competitive market where end-users will have a choice of several SPs using up to five FTTP networks as well as a number of legacy networks.

It should be noted, however, that NBI, in general, will only deploy the NBP FTTP network where no other operator had committed to doing so. Aside from limited encroachment by commercial providers inside the NBP IA, NBI's network will be the only FTTP network to which premises in this area can be connected.

NBI also notes that there is little discussion of the overlap between other networks outside the IA. In general, Virgin Media's CATV coverage does not overlap significantly with the footprint of SIRO's FTTP network and it is unclear whether or not many premises will be served in the future by both the SIRO and Virgin Media FTTP networks.

It is furthermore unclear whether Eircom's FTTP network outside the NBP IA will ever have coverage as extensive as its legacy copper network, which has been subject to a Universal Service Obligation (USO). As Eircom's copper network is gradually retired, ADSL and ultimately VDSL/FTTC services will be withdrawn and there is no guarantee that every premises currently served by ADSL or VDSL will be able to connect to FTTP. Similarly, there may be some premises served by CATV which will not be served by Virgin Media via FTTP. In the absence of regulation (or, in NBI's case, a contractual requirement), there is no onus on any operator to connect every premises. So, it is possible that premises connected to high-speed broadband today would not have any FTTP service available in the future.

Some premises simply may not be passed by FTTP because it is not economic to pass them. The existence of the voice telephony USO resulted in these premises having copper connections which could support FTTC, but they may not be economic to support the deployment of FTTP.

Some premises may be “passed”, in the sense of having a fibre cable running past their entrance, but they still may be deemed uneconomic to connect. This might be due to distance from the road, underground duct or buried cable or other lead-in types which are not suitable for FTTP. Similarly, Virgin Media may choose not to pass, or not to connect their FTTP service to some premises which currently have CATV-based high-speed broadband. As a premises which is deemed uneconomic by Eircom to serve is also likely to be uneconomic for SIRO and Virgin Media, such premises could well be offered no FTTP connection at all.

This potential for some premises to have less choice, or even no broadband, in the future has not been identified within the analysis. Remarks made in the Consultation Document, such as that at Para. 4.239 which suggest every premises on the Eircom FTTx network will eventually be upgraded to FTTP, do not seem to be supported by the facts.

It is at least possible that most premises will, depending on location, have a future choice of one FTTP network (which may be NBI or Eircom), two FTTP networks (generally Eircom and SIRO or Eircom and Virgin Media) or, for some premises located outside the NBP IA, no FTTP connection at all. This is a somewhat less competitive and less benign outlook than that which seems to have formed the underlying basis of the draft decision.

Paragraph 4.230 and Table 10 appear to address this point to some extent but, as they only deal with overlapping networks, the position regarding premises served by just one FTTP network or not served at all by FTTP is not addressed. In any event, as all of the underlying data on overlapping networks are redacted, we cannot comment in further detail on this point.

*Q.2 Do you agree with ComReg’s proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

NBI agrees with ComReg’s proposed definition of the Relevant Retail Broadband Markets. The evidence put forward by ComReg strongly supports the definition of the relevant markets on a national basis and, from a technology standpoint, it equally makes sense to distinguish between CG retail broadband services and NG broadband services. As a result, ComReg’s proposal to define separate national markets, for CG and NG retail broadband services, makes sense and is supported by the evidence.

*Q. 3 Do you agree with ComReg's product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

*Q. 4 Do you agree with ComReg's geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

As Questions 3 and 4 are inter-related, NBI is responding to both together.

NBI notes that ComReg proposes to designate two WLA focal products, Local Loop Unbundling (LLU) and Virtual Unbundled Access (VUA), which ComReg has determined are not mutually substitutable.

It is worth pointing out at the outset that the LLU product currently supports just above 10,000 lines, while the VUA product supports over 400,000 lines.<sup>3</sup> In addition, most of the LLU lines are line share, with a very small volume being fully unbundled, and none being unbundled sub-loops.

We note the extensive analysis of supply-side and demand-side substitution of VUA by Fixed Wireless Access (FWA), as well as by mobile services and leased lines. However, there is no detailed analysis of substitution of LLU by VUA, rather a dismissal (at Para. 5.86) that such is not possible where a premises is not passed by both CG and NG networks. Given the rapid decline of LLU, it might make more sense for ComReg not to consider only those premises actively using LLU products today rather than all CG premises. Only a limited number of exchanges have been unbundled, and within those only shorter lines capable of supporting a reasonable broadband offering (i.e. with a high 'pre-qual' value) have actually been used for LLU.

In fact, it seems probable that most premises currently using LLU are likely to be passed by Eircom's FTTP network and many may also be passed by the SIRO network. Without a proper geographical analysis, it is not clear if any premises currently using LLU are not also passed (or will be passed) by an FTTP network, which the relevant retailer(s) could switch to with little or no financial penalty. In fact, if all such LLU-served premises are already supported by NG networks offering VUA, there may be no need for an LLU focal product at all.

Regarding the SSNIP tests, NBI cannot comment in any real detail as all the values are redacted. We do, however, note that ComReg may (footnote 387) be overestimating end-user switching costs. ComReg suggests that these costs include the purchase of new Customer Premises Equipment (CPE) but in practice most retailers supply the relevant CPE as part of the service rental. Customers may have some cost of reprogramming CPE, or re-establishing WiFi connections using a newly supplied modem/router but this is limited. CPE purchase is thus most likely not a material barrier to switching.

The analysis of CATV retail services as a constraint suffers from a similar problem to the LLU analysis. ComReg has used national numbers to show that Virgin Media's coverage for the provision of retail

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<sup>3</sup> Consultation Document, Para. 5.19.

services is smaller than Eircom's. ComReg has not, however, clearly demonstrated whether or not a lack of overlap between NBI, SIRO and Virgin Media means that many, perhaps most, premises have a choice of at least one other wholesale or retail network provider.

NBI appreciates that this point overlaps with the geographic definition of the markets, but it is necessary to take both product and geographic aspects together. If every premises served by Eircom FTTx has at least one alternative, even though any one alternative does not cover all premises, the conclusion that regulation must substitute for lack of alternative constraints may not be valid.

A more detailed analysis, taking full account of the choices faced by end-users at each premises, may lead to a conclusion that no LLU service is a focal product, or that full unbundling or sub-loop unbundling does not require regulation. Similarly, ComReg might have reached a conclusion that FTTC is not a focal product, but that (only in the "300k rural area") FTTP is a focal product.

NBI notes ComReg's decision to analyse the relevant markets geographically on the basis of (modified) Eircom exchange areas, and the Three Criteria Test. We note the conclusions reached by ComReg that the CG WLA market is national and that the NG WLA market has two geographical parts, that falling within the NBP IA, and that outside the IA, i.e. the Commercial NG WLA market.

While Eircom exchange areas were, for the most part, traditionally stable and well-defined from a geographic point of view, that stability was associated with a long period where the primary service was voice telephony provided over copper cables. Exchange areas were designed to ensure the copper loops were capable of carrying a voice service and these areas were not relevant to ADSL broadband.

FTTC broadband is provided primarily within areas served by footway cabinets and small areas close to exchange buildings where exchange-launched VDSL can offer improved service compared to ADSL. Eircom's FTTP network uses Optical Distribution Frames (ODF) rather than the legacy copper Main Distribution Frames (MDF). There are many cases where FTTP is served from a different centre than the legacy copper services.

The NBI network is not based on Eircom exchange areas, nor are those of SIRO nor Virgin Media either. ComReg appears to have chosen this geographic unit based on convenience and expediency and so it would not be valid to assert that these areas have any natural meaning in the context of NG WLA.

NBI also has a concern with the implication in ComReg's analysis that the NBP IA is fixed and that no other operator will provide services within it. Neither assumption is correct.

The IA is not simply a fixed set of Eircodes, instead it is a dynamic surface area that is constantly changing. Other operators can, and do, build to premises that they did not previously commit to serve.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It is also possible that Copper Switch-off (CSO) may result in exchange-fed VDSL or even some premises fed from cabinets having their VDSL services withdrawn. The position on this is not yet clear but, if VDSL services are withdrawn in this way and no operator moves to provide an FTTP service on a commercial basis, such premises may be added to the IA.

There are also cases where FTTP build (by Eircom, SIRO or CATV/FTTP build by Virgin Media) enables service to premises that did not previously have an FTTC connection supporting a data speed in excess of 30Mbps. Examples would include direct exchange-fed premises which were too far from the Eircom exchange building. In this scenario, the in-fill premises (which may be whole housing estates, or isolated premises) to which FTTP connectivity is provided could be taken out of the IA.

Taking all the above factors together, it is clear that the NBP IA is not a static concept but is instead a dynamic area, with constantly changing boundaries and where premises can and do get added to it and removed from it. ComReg's analysis and the conclusions it draws from its analysis should recognise this fact.

*Q.5 Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

In general, NBI agrees with the reasoning set out in Section 6 of the Consultation Document and in particular that NBI does not have SMP in the relevant WLA market in light of, amongst other things, the strict terms of the NBP Project Agreement. NBI also notes however that the presence of new premises in the IA has the potential to change the economics in the IA for other operators and afford such other operators the opportunity to distort competition in the IA in the absence of regulation of such operators.

We have already mentioned as part of our response to Q.3/4 above that new premises can be commercially viable to serve with FTTP on a commercial basis and, by doing so, act to make currently unviable premises attractive as well. This is not just because of the mere existence of the premises themselves. In building its network, NBI incurs costs to make a route ready for fibre deployment – costs such as duct remediation, pole replacement and tree trimming. Once NBI has incurred these costs, the investment required by another operator considering overbuild is much reduced.

Any such operator contemplating the deployment of parallel FTTP infrastructure would, of course, have to consider the alternative of simply availing of a wholesale service from NBI. [REDACTED]

[REDACTED] A vertically integrated operator would consider building or renting to supply its retail arm and may also decide to build. The incentive to build in parallel - and to do so before NBI does - would be enhanced in a situation where it did not have SMP in the IA. In such a situation, the non-SMP FTTP provider could refuse to serve other retailers or, because rules relating to non-discrimination or uniformity of pricing would not apply, undercut the NBI VUA price.

NBI considers that ComReg has not sufficiently analysed this potential outcome when dismissing the possibility of competition in the IA and in deciding that no operator has SMP in the IA.

*Q.6 Do you agree with ComReg's market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

NBI agrees in principle with ComReg's market assessment but notes that ComReg perhaps overstates the choices available to a Service Provider in respect of any given premises. If the premises is in the NBP IA, both WLA and WCA will be available on a non-discriminatory basis from NBI, as provided for under the terms of the NBP Project Agreement. Other WLA and WCA services may be available too. If the premises is outside the IA, WLA may be available from Eircom, SIRO or, in the future, from Virgin Media. WCA may be available from Eircom, SIRO, BT and Enet, and perhaps also from Virgin Media.

For a majority of smaller SPs, providing their own backhaul with a VUA purchase is likely to be less economical than buying a Bitstream service, though this depends on how the VUA service is configured in relation to the number and location of local Points of Presence (POPs), which can, and do, vary between operators.

*Q.7 Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

NBI agrees with the analysis of competition problems as presented. We note the possibility that Eircom could leverage its SMP in the Commercial NG WLA Market into the IA NG WLA market and, as a result, could potentially capture a significant share of customers within the latter market.

*Q.8 Do you agree with ComReg's proposals in respect of remedies in the Commercial NG WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

NBI agrees that the full set of remedies is required in the Commercial NG WLA Market. We offer some comments on certain elements of detail.

NBI agrees with most of the elements of the access obligations. However, in Section 9.55 it is suggested that customers using FTTC-based VUA services will be required to undertake migration to FTTH. It is unclear whether "customer" in this context refers to "end-users" or to "Access Seekers".

The wording of the obligation is vague (i.e. "ComReg may impose") and "an equivalent level of service typical of a FTTC-based VUA" (Para. 9.273). ComReg should be clear that such an obligation will be imposed in respect of every active FTTC connection. ComReg should also be clear that the equivalent service is "at least" as good as the FTTC service being withdrawn. In practical terms, if the FTTC offering was "up to 100Mbps" then the emulated service should also be 100Mbps. If the emulated service were to match an average rather than the best service, many end-users would experience a degraded service.

It is possible that FTTC and FTTH prices might converge to the point where a higher quality FTTH service would be available at the same or lower price than the FTTC offering. We find this emulation service to be

rather poorly defined, and we suggest ComReg consider carefully whether bulk migration, at Eircom's expense, from the old to new service might be required.

NBI does not envisage being a customer of Eircom's in the Commercial Area but its concern with this proposal is that premises currently served by high-speed broadband should not have that broadband service degraded or discontinued. If this were to happen, it is probable that many such premises would be examined for inclusion in the IA and so NBI would be required to serve them. In this event, there may be an economic incentive for Eircom to seek to have isolated premises added to the IA, even if they were viable, because the net income it would derive from Physical Infrastructure Access (PIA) provided to NBI might exceed the potential WCA net income.

NBI agrees that some form of Price Control is required and that a combination of Margin Squeeze Test (MST) and price cap, rather than strict cost orientation, is appropriate.

ComReg proposes that FTTH VUA prices will be subject to both MST and a price floor. However, this does not address the concerns expressed by ComReg in Para. 9.212, which can apply equally to FTTH as to FTTC, at least over the latter part of the price control period.

ComReg suggests that FTTC prices act as an indirect constraint on FTTH prices, but that will no longer be the case as CSO proceeds and FTTC is withdrawn.

For FTTC, NBI notes that no MST is proposed and that ComReg seems to rely on the lack of incentive for Eircom's retail arm to foreclose competition (Para. 9.221). However, the investment in FTTC is already sunk and while the operating costs are a significant element of the total cost allocated each year, allowing the price to rise by CPI is quite generous. In this regard, ComReg has not explained what costs are likely to change in the future, or why. Furthermore, the decision not to allow carryover of any unused proportion of CPI is likely to drive Eircom to make the maximum increase possible as soon as possible, as any FTTC increases need apply only at the wholesale level. It may be more appropriate for ComReg to require some justification for any increase in FTTC prices, while capping the maximum increase at CPI.

NBI understands the proposal to modify the MST, and to apply it only to FTTH VUA. NBI agrees it is appropriate to apply both ex-ante submissions and to require actual quarterly reports. We note that the DCF test will continue to apply over a 42-month period, despite ComReg's analysis suggesting the average lifetime of a bundle is 44 months (Para. 9.525) and potentially increasing, given the lower propensity to switch for FTTH. The period for which retention offers are allowed seems unclear (e.g. the discussion at Para. 9.526 and the entry in Table 54 are not identical).

NBI notes that the cost accounting and accounting separation proposals will require significant revision to the statements as currently published, and that details will be worked out within the annual discussions on published statements, AFS and AFI. NBI welcomes the planned increased visibility of costs, revenues and volumes for FTTH NGA WLA.

*Q.9 Do you agree with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

NBI notes ComReg's proposals on the withdrawal of SMP remedies in the CG WLA Market and its preliminary position that no operator holds a position of SMP in the IA NG WLA Market. NBI would, however,

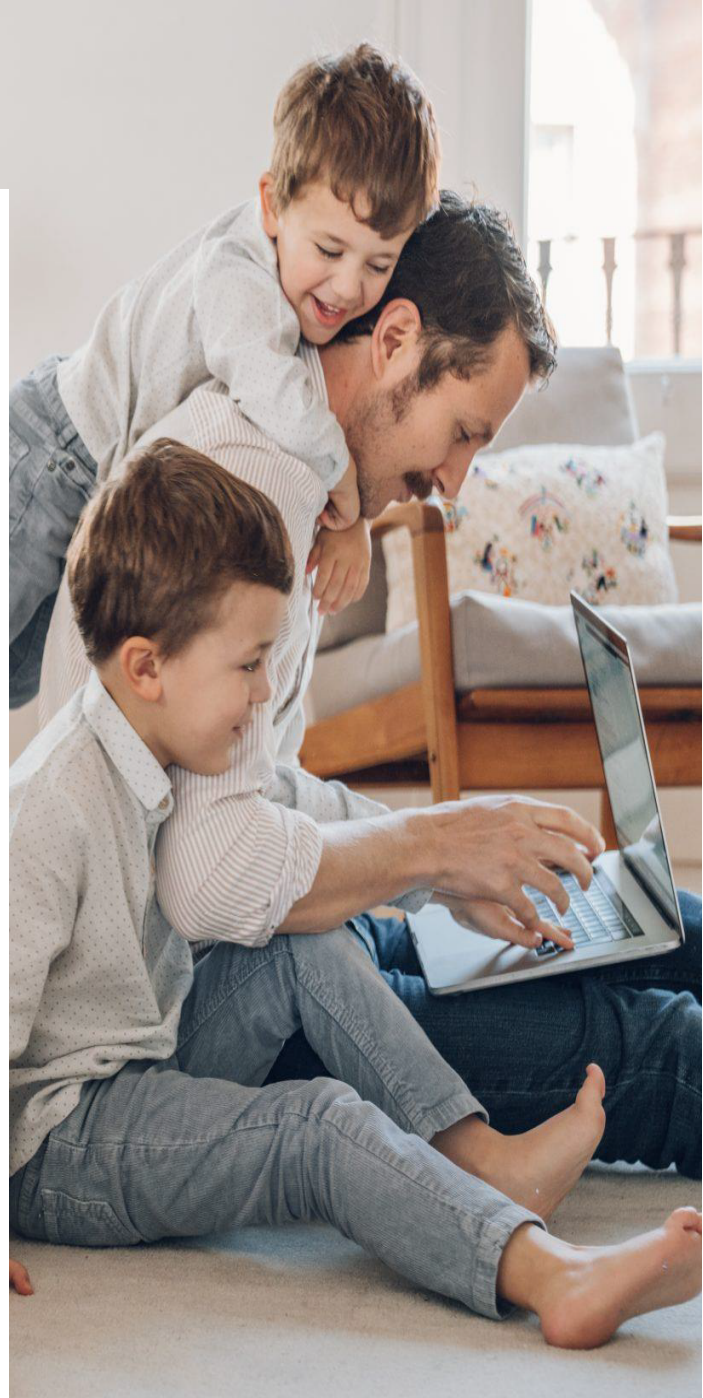
point to the potential for Eircom to gain significant share in the IA, in particular in the short-term, and that this will be facilitated by withdrawal of SMP on Eircom in this area.

*Q.10 Do you agree with ComReg's proposals on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.*

NBI has no comments or observations to offer in relation to ComReg's proposals on the Regulatory Impact Assessment.

# SIRO WLA/WCA Market Review Response

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**SIRO DAC**

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# Introduction

This document comprises our formal response to Comreg’s consultation entitled ‘WLA WCA Market Review’, published on 9 January 2023.

SIRO believes that the outcome of this market review has the potential to be the key enabler to facilitating the development of a competitive infrastructure market for broadband in Ireland. Access to high-quality broadband is essential for economic growth, social inclusion, and technological innovation. However, Ireland currently lags behind other European countries in terms of broadband availability, speed, and affordability. The lack of physical competition in the infrastructure market is one of the main reasons for this situation.

SIRO believes that a competitive infrastructure market, with multiple providers offering open access to their networks, is essential for achieving the national broadband objectives and ensuring that Irish consumers and businesses have access to affordable, high-quality broadband. Open access networks, such as SIRO, where different service providers can use the same infrastructure to offer services to customers, have been successful in other countries in promoting competition, lowering prices, and improving service quality. A competitive infrastructure market would also stimulate investment in new technologies and improve coverage in rural areas.

ComReg should consider at a high level measures to encourage competition in the infrastructure market, such the promotion of open access, non-vertically integrated, networks where different service providers can use the same infrastructure to offer services to customers and encourage the entry of new infrastructure providers by creating a level playing field for all players and ensuring SMP operators are properly regulated.

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# Question 1

Do you agree that the main developments identified in the provision of broadband are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.

SIRO agrees that the recent trends in cable and MBB delivered service take-up does not represent a significant change in the underlying dynamics of the retail market or have any substantial identifiable impact at wholesale level. The market momentum is towards FTTP.

SIRO would agree with ComReg that the most notable and relevant trends within the retail broadband market are:

1. The increase in download speeds and traffic on broadband subscriptions. SIRO believes that this trend is likely to continue and perhaps accelerate, especially in the context of the migration of existing copper (xDSL & DOCSIS) to FTTP.
2. The movement away from copper and towards fibre-based broadband.
3. Bundled packages are the large majority of Broadband subscriptions and will continue to be.
4. The behavioural shift in broadband usage as a result of the Covid-19 pandemic is not likely to revert and has supported a fundamentally different consideration in end-user minds as to the importance of a high quality, very high-capacity broadband subscription.

Notwithstanding the consideration in section 3.2.2, the pace of planned roll-out of FTTH networks by network operators is always only an aspirational snap-shot and in the context of increasing interest rates, increasing inflationary cost pressures and more challenging than expected take-up rates, the scope of the planned roll-outs by all



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companies is under constant review. It is of paramount importance for competitive networks that market certainty is ensured and that a stable investment environment is preserved to ensure the continued pace of build or even the continued build. The risk for ComReg in weakening the price controls that Eircom are subject to is that introduction of aggressive discounting by Eircom will serve to increase the frailty of investment plans by competitive network builders and ultimately undermine ComReg's objective of encouraging competitive infrastructure and societal wellbeing.

SIRO notes that the ComReg assessment of the market environment appears to have stopped circa June 2022. We are concerned that the continuing increases, since that date, in input costs of building competitive networks, interest rates increases and general sentiment towards the commerciality of building competitive FTTH networks, in the context of the incumbency advantages of Eircom, has changed substantially.

Moreover, as a user of PIA, and in anticipation of further using PIA, to roll-out access networks where economic using PIA, SIRO believes there is a strong linkage between the PIA market and the WLA market which is not evidenced in the considerations outlined in section 3.2. The linkage is determinative of investment choices between no investment in the PIA market to provide services or substantial investment in PIA product to provide competing network. SIRO believes that there should be a wholesale margin squeeze test to ensure that operators who invest in PIA cannot be squeezed out of business by aggressive pricing strategies of Eircom in the WLA market.

Notwithstanding the growth in bundled offers in the market. SIRO believes that Stand-Alone Broadband is being under-measured. It is our experience that the provision of VoIP on top of the broadband, in many cases, is provided as an additional service purely because it does not cost the retailer anything extra to provide. Once the CPE has a VoIP ATA port, which is now de facto, there is no real incremental cost to a retailer to provide a 'double play'. Any notional line rental /value attributed to voice in the majority of bundles is a largely false misstatement. It is our understanding that a significant portion of double-play bundles are really taken up by the customer, only because the VoIP is 'thrown-in' on top of the broadband. From a customer's perspective the entire value of the service they are purchasing is the Stand-Alone Broadband. There is a natural

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incentive with retail operators to do this in order to be in a position to state that their base is comprised of a higher level of consumers taking multiple RGUs, as this looks good in group reporting. In reality, however the consumer is not buying the VoIP RGU, they have no choice but to take it, as a free buy, to be able to avail of the retail offers in the market.

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## Question 2

Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SIRO agrees that the pricing and product characteristics of retail broadband delivered over FTTx is an appropriate focal product.

SIRO agrees that retail broadband delivered over FTTx and copper may be characterised by asymmetric substitution, whereby end users deem FTTx retail broadband to be a sufficiently effective substitute for copper, but they do not deem copper retail broadband to be a sufficiently effective substitute for FTTx.

SIRO agrees with the ComReg proposal at 4.210 to define the NG retail broadband market in Ireland consisting of broadband provided over FTTx and CATV.

### **Geographic Assessment**

Geographic differences in entry conditions over time (paragraphs 4.215 to 4.223);

SIRO agrees with ComReg that there are differences in competitive conditions between those areas where multiple Network Operators are present, and those areas where Eircom is the only Network Operator present, even allowing for the capacity of Access Seekers to purchase wholesale inputs from multiple operators in an absent regulation scenario.

However, SIRO would propose that areas subject to these differences are likely to only slowly decrease over a long period of time as alternative FTTP network rollout

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progresses, and that for the foreseeable future, into 2030, a great many parts of the State are, and will be, characterised by the presence of Eircom FTTP only.

Evolution and distribution of market shares (paragraphs 4.224 to 4.235);

SIRO agrees with ComReg that the likely evolution and distribution of market shares is indicative of geographic differences in competitive conditions, and despite, on a forward-looking basis, the possible continuation of FTTP rollout by Eircom, NBI, SIRO, and Virgin Media, those differences will continue into the long term, towards 2030.

Variation in the number and size of potential competitors (paragraphs 4.236 to 4.243);

SIRO agrees that, bearing in mind the expected scattered and delayed future FTTP rollout by competitive Network Operators, the similarities and patterns in the makeup of market shares across EAs, (i.e., several large SPs operating alongside smaller, more fringe, localised operators), are, on balance, likely sufficiently similar to warrant a national retail broadband market on a forward-looking basis.

Evidence of differentiated pricing strategies or marketing (paragraphs 4.244 to 4.247);  
and

SIRO agrees that based on the information presented, and our experience in the market, retail SPs pursue a policy of uniform, national pricing, suggesting that, from this perspective, competitive conditions for retail broadband are sufficiently homogenous nationwide.

Geographical differences in product functionality and demand characteristics (paragraphs 4.248 to 4.250).

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SIRO agrees that retail broadband can be provided over a range of inputs, through merchant market purchases of different combinations of WLA and/or WCA inputs, or self-supply by vertically integrated SPs. Overall, although there are some variations in demand for retail broadband, these are largely dictated by supply side factors such as availability and are insufficient to conclude that the provision of retail broadband is characterised by geographic differences in product functionality and demand characteristics.

Overall, SIRO agrees with the ComReg proposal to define two Relevant Retail Broadband Markets:

1. A national CG Retail Broadband Market; and
2. A national NG Retail Broadband Market.

together referred to as the 'Relevant Retail Broadband Market(s).'

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## Question 3

Do you agree with ComReg's product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

### **WLA Product Markets**

SIRO agrees with the ComReg proposal, at section 5.76-5.77, to designate the following two focal products (collectively, the 'WLA focal products'):

1. VUA products provided over Eircom's FTTx NG network (including VUA delivered over both FTTC and FTTP), over SIRO's FTTP network, over NBI's FTTP network and, on a forward-looking basis, Virgin Media's FTTP network (the 'VUA focal product'), and
2. LLU products provided over Eircom's copper CG network (including Line Share and SLU) (the 'LLU focal product').

SIRO agrees with the ComReg view, expressed at 5.192 and 5.192, that indirect retail constraints from CATV, satellite, localised alternative FTTP and FWA platforms are unlikely to be sufficient to warrant inclusion in the WLA market.

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## Question 4

Do you agree with ComReg's geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

### **WLA geographic market(s)**

Regarding the ComReg assessment of the geographic scope of the WLA markets according to the following factors:

Geographic differences in entry conditions over time (paragraphs 5.209 to 5.219);

SIRO agrees that there appears to be sufficient evidence to suggest that there are some differences in geographic entry conditions in the NG WLA market, arising from the presence or absence of commercial SPs, as characterised by the presence in areas of higher premises density of NG networks rolled out on a commercial basis.

Variation in the number and size of potential competitors (paragraphs 5.220 to 5.224);

SIRO agrees that absent regulation, the NG WLA market is likely to be characterised by some variation in the number and size of potential competitors from a geographic perspective, and on this basis that the number of potential competitors in the provision of NG WLA across the State is likely to vary, based on current and expected network rollout.

Distribution of market shares (paragraphs 5.225 to 5.256);

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SIRO agrees that the distribution and evolution of market shares on the NG WLA Market is indicative of geographic differences in competitive conditions, arising from the presence or absence of alternative FTTP networks capable of providing VUA, in an absent regulation scenario.

Evidence of differentiated pricing strategies or marketing (paragraphs 5.257 to 5.265);

SIRO agrees that, insofar as potential differences in prices across different geographic areas are concerned, there is no evidence to suggest that operators vary WLA pricing across different areas of their networks for equivalent WLA products. SIRO itself does not do this.

Geographical differences in product functionality and demand characteristics (paragraphs 5.266 to 5.269).

SIRO agrees that there is insufficient evidence to conclude that the provision of WLA is characterised by geographic differences in demand characteristics across different sub-national geographic areas, noting inter alia that Access Seekers may purchase inputs, or self-supply, from more than one operator.

SIRO would note, at section 5.212, that neither SIRO, Eircom nor Virgin Media were willing to commit to provide ComReg with sufficiently reliable deployment data in advance of their rollout plans. Despite press releases, the market environment is such that business cases for the roll out of FTTP are frail and are continuously reviewed, being very susceptible to market environment uncertainty. This needs to be more fully considered in the context of ComReg's expectations, at section 5.272 that the Eircom, SIRO FTTP rollouts will continue.

Overall, SIRO agrees, as set out in section 5.285, that there are three distinctive WLA product and geographic markets (collectively, the 'Relevant WLA Markets'), based on the analysis of the criteria laid out in paragraph 5.281.



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## Question 5

Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SIRO agrees with ComReg's assessment of SMP on the Relevant WLA Markets.

With regards to Section 6.4 - Existing Competition in the Relevant WLA Markets

At paragraph 6.17, SIRO agrees with the ComReg decision not to assess the proposed VMI WLA provision under the existing competition heading. The delivery of WLA services by VMI is still tentative, and the level of homes passed over the course of the market review period is likely in our view, to be inconsequential.

At paragraphs 6.34-6.40, ComReg notes the high market share of Eircom on the Commercial NGA Market. SIRO expects the Eircom market share to remain constant and possibly grow over the course of the market review. Their aggressive network roll-out and secured funding under the FNI initiative adds further credence to the ComReg assessment. SIRO believes that there are unlikely to be sufficiently effective or immediate direct constraints from existing competition on Eircom in the Commercial NG WLA Market over the course of the market review period. SIRO would also note the strength of the Eircom self-supply brand to end-users and that they are capable of ramping up their market dominance in their new rollout areas leveraging the consumer trust and confidence in the only national self-supply retail operator. Eircom's own confidence highlighted at paragraph 6.40 of occupying a market leading position is quite understated in the context of their likely market dominance.

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Regarding the IA NG WLA Market, SIRO would question the ComReg approach to not designating NBI with SMP. In SIRO's opinion NBI should be designated as having SMP in the IA, with the contract between itself and the State being designated as the remedy. In this case, if the contract were, for any reason, to fall away, the SMP designation would continue to apply, without a further market review, and an interim set of updated remedies could be applied to NBI. A designation of NBI as having SMP is factually the case in the IA areas over the course of the market review period.

SIRO agrees with ComReg at paragraph 6.51 that Eircom would have the ability to behave, to an appreciable extent, independently of competitors, customers and consumers on the Commercial NG WLA Market, and should be assessed as having SMP in that market.

SIRO agrees with ComReg, at paragraph 6.69, that arising from its incumbency in the Commercial NG WLA Market in particular, Eircom has largely overcome such barriers to entry and expansion, and is capable of providing VUA to itself and Access Seekers on a widespread basis outside the IA. SIRO would echo the assessment by ComReg at paragraph 6.70 that there are significant barriers to entry and/or expansion in respect of networks potentially capable of facilitating indirect retail constraints in the NG WLA market. SIRO believes that ComReg in assessing the rollout of its own plans and those of VMI should weigh cautiously the hoped for roll-out volume and timelines in line with the difficulties that new entrants have experienced to date in competing with the Eircom legacy rollout advantages.

Having considered paragraphs 6.17 to 6.89 above, SIRO's view echoes that of ComReg, that absent regulation in the Commercial NG WLA Market, it is unlikely that Eircom would be sufficiently constrained by existing competition, such that it would prevent it from behaving, to an appreciable extent independently of its competitors, customers and end users. Eircom's persistently high market shares, the lack of an effective pricing constraint and the absence of clear evidence of competition constraining its pricing behaviour are all suggestive of Eircom holding a position of SMP in the Commercial NG WLA Market.

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With regards to Section 6.5

At paragraphs 6.122-6.124 SIRO would urge ComReg to take a more cautious view in anticipating SIRO's roll-out. Although SIRO is working hard to roll-out network, the same factors as came to bear on our Phase 1 rollout are apparent in Phase 2. It is likely, as further detailed in paragraph 6.145, despite our best efforts, that our roll-out volume and timelines will be impacted by the practicalities of rolling out a new broadband network in a green/brownfield scenario. The impact of this will be that Eircom who enjoy the incumbency advantages of their FTTH roll-out being a relative simple overlay of one FTTH network on top of a FTTH network (to a large extent), will have a greater likelihood of rolling out on time and within commercial parameters.

In summary SIRO would agree with ComReg that it is likely to be the case that the Commercial NG WLA Market is characterised by the presence of variable barriers to entry and/or expansion. Although, these barriers may be gradually overcome by certain Network Operators in certain geographic areas, this should not be taken for granted. This limited entry to date does not appear to provide sufficient evidence in favour of the contention that the market is characterised by the absence of barriers to entry and expansion. As a result, SIRO would agree with ComReg, concluding at paragraph 6.130, that the Commercial NG WLA Market is likely to be characterised by the presence of variable barriers to entry and expansion.

Regarding the potential entry of Virgin Media into the WLA market, at paragraphs 6.138-6.144, SIRO would highlight that its experience is that timelines for onboarding retailers are not only a function of the attractiveness of the commercial offer and the quantity of homes passed, but from a retailer perspective IT / BSS integration can have a significant cost and take up to 18 months whether for the supply of WCA or WLA products, and then the commercial ramp-up of by those retailers to full activity can take a further 12 months. As such, we would echo ComReg's view, at paragraph 6.143, that Virgin Media NG WLA market entry is not likely to be sufficiently timely or at a scale such that it would potentially constrain Eircom in the Commercial NG WLA Market within the timeframe of the Market Review period.

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Considering Section 6.5 in whole, SIRO agrees with ComReg's view that that absent regulation, it is unlikely that Eircom would be sufficiently constrained by potential competition in the Commercial NG WLA Market, such that it would prevent it from behaving to an appreciable extent, independently of competitors, customers and end users.

With regards to Section 6.6 and having regard to the analysis in paragraphs 6.178 to 6.199, SIRO agrees with ComReg's view that it is unlikely that Eircom would be sufficiently constrained by Countervailing Buyer Power such that it would prevent it from behaving to an appreciable extent, independently of competitors, customers and end users, on the Commercial NG WLA Market.

In conclusion, SIRO agrees with ComReg's view, at Section 6.7.1, that the Commercial NG WLA Market is not effectively competitive, and that Eircom would not be sufficiently constrained by factors such that it would prevent it from behaving, to an appreciable extent, independently of competitors, customers and end users, on that market. SIRO is of the view that Eircom should be designated as having SMP in the Commercial NG WLA Market.

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## Question 6

Do you agree with ComReg's market assessment, for the Modified Retail Market absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SIRO agrees with ComReg's market assessment, for the Modified Retail Market absent WCA regulation.

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## Question 7

Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SIRO agrees with ComReg's view, expressed in Section 8.5, that, absent regulation, Eircom, as the proposed vertically integrated SMP SP in the Commercial NG WLA Market, has the ability and incentive to engage in the types of exclusionary practices, leveraging behaviour, and exploitative practices identified and outlined therein, which is likely to negatively impact on competition and end users in related retail and/or wholesale markets, as well as having the potential to reinforce its SMP in the WLA market over time.

SIRO is of the view, on the basis of the foregoing, that ComReg is justified and acting in a proportionate manner imposing robust obligations on Eircom in the Commercial NG WLA Market relating to access, non-discrimination, transparency, price control, cost accounting, accounting separation, and Statements of Compliance ('SoC').

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## Question 8

Do you agree with ComReg’s proposals in respect of remedies in the Commercial NG WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SIRO generally agrees with ComReg’s proposals in respect of remedies in the Commercial NG WLA Market, however there are some few areas where we would have concerns:

At paragraph 9.48, SIRO would argue that ODN sharing is technically and economically feasible in local access networks during the lifetime of this market review. SIRO believes that the challenges as outlined in Figure 1.3 of the ODN Sharing Report are surmountable and that ComReg should specify at this time non-active ODN sharing among the access remedies which Eircom must make available. The commercial realities of non-incumbent competitive network roll-out are such that innovative network sharing approaches could support the commercial viability of these builds. SIRO would argue that ODN sharing is a less intrusive form of access, than methods such as fibre unbundling which is an alternative remedy that SIRO believe would also be of use to support competitive infrastructure roll-out.

At paragraph 9.109, SIRO would argue that Eircom should be subject to an explicit ban on publishing a product request that would -not be allowed for under regulations, where the proposal is made by Eircom. The concern here is that Eircom could use the product forum process to signal pricing initiatives, or red herrings, that might distort the market or allow them to leverage their market incumbency in an anti-competitive way.

At paragraph 9.220, SIRO agrees with the ComReg proposal to apply a price cap of ‘CPI-0’ to the currently cost oriented FTTC VUA prices post 30 June 2024. SIRO agrees that

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this approach, referred to as “pricing continuity,” allows for changes to underlying costs to be reflected in prices while mitigating the risk to end users of excessive prices, both directly for FTTC and indirectly for FTTH.

SIRO agrees with ComReg's view, at paragraph 9.266, having considered the level of uncertainty that currently exists in respect of cost and demand forecasts due to the ongoing transition from copper to fibre networks, and recognising the extent that this uncertainty is further compounded by the continuing economic uncertainty in respect of future cost trends, that its proposed pricing continuity approach (applying CPI-0 price cap annually to the currently cost oriented FTTC VUA prices post 30 June 2024) is the most appropriate form of price control for a review period where investment by network operators in the expansion of their FTTH network footprints is expected to continue.

Regarding 9.283-9.316, FTTH connections and migrations,

1. SIRO is of the view that currently, Eircom, is masking the true connection cost for retailers. Currently, in agreement with its SSP, it provides a ‘remediation’ service for a high and increasing number of FTTH installs. This service is charged in a non-transparent way, indirectly, with payment directly to it-s SSP. It is not considered as part of the connection charge, despite it being a necessary cost to connect a large cohort of Eircom premises.
2. SIRO would suggest that Eircom cover this non-transparent cost from within their €100 connection costs for all premises designated non-standard or agree to charge a direct supplemental cost orientated connection cost for every home designated as non-standard.
3. This indirect charge is arguably funding the extension of Eircom's network opaquely. To mitigate the impact of this, to ensure that Eircom don’t benefit from this retailer capital expenditure one approach would be that for each premise, where an operator has funded a remediation, that where they lose a customer the operator should be entitled to be re-imbursed by the gaining operator for the monies they spent on remediating the Eircom network. This is in line with a previous Eircom proposal which was made regarding connection costs.



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4. Moreover, in the APQ file, ComReg should require Eircom to provide an indication of which premises passed will require a non-standard install. Or at the very least, stand up an SLA/KPI to measure transparently the accuracy to the APQ file, on a monthly basis.

SIRO believes that there is a risk, that Eircom may be overstating their homes passed base substantially. Between, non-deliverable homes and homes requiring non-standard remediation Eircom's APQ file is arguably materially inaccurate. The mere fact that Eircom can claim a home passed figure, materially above the actual homes passed and serviceable, subject only to the €100 connection charge, can have a chilling effect on the market. Service Providers are always more attracted to integrate with, and put sales focus on, an operator with a larger claim of homes passed.

Regarding paragraphs 9.302, SIRO believes that the arbitrary choice of €100 as a connection cost cap is too low to allow Eircom to recoup transparently all the costs that they may be required to carry. In order to ensure a basic level of price flexibility, SIRO believes, in the first instance, that Eircom should not be subject to a connection cost price cap, however in the event that a cap is to be imposed, that it should be in the order of the €270 which was a connection cost in the market prior to 1<sup>st</sup> January 2019.

Regarding paragraph 9.340, SIRO supports the ComReg proposal that adopting a price floor for FTTH VUA that references FTTC VUA prices, which have formed the basis of build or buy decisions for FTTH investment since the 2018 Pricing Decision, should better support the objective of promoting competition and encouraging investment by commercial operators than would be the case if the price floor was based, in a context of significant uncertainty, on an estimate of future FTTH costs and demand derived from Eircom's own business case for FTTH.

Regarding paragraphs 9.347-9.378, wholesale promotions or discounts.

SIRO believes, with regard to paragraph 9.347, that the current 'status quo,' whereby discounting schemes are prohibited but pricing flexibility is allowed, provides sufficient

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and transparent mechanisms for Eircom to drive demand for their FTTH offering without impacting on the roll-out of alternative networks.

A corollary of paragraph 9.350 is that Eircom have already proven their capability to reach FTTH penetration rates greater than 55%, anecdotally as high as 57% in the Eircom 300k region, without the need to resort to discounting schemes. Eircom's current pricing flexibility provides demonstrably sufficient levers to accelerate uptake and retain market share. At this level of penetration there is no longer any risk to the investment of shareholders.

The risk to ComReg in adopting a 'no change' position to its current regulatory ban on discounting for Eircom, is low. However, the benefits of a continued prohibition of wholesale promotions and discount schemes, providing pricing stability and transparency to the market, both retail and wholesale, which is critical for alternative network builders in making long-term investment and planning decisions, are high.

Promotions and discounts by a dominant market player can have a distorting impact on the market. The promotional price can become the established price. In the absence of a cost-based pricing environment, long-term promotions are likely to be unsustainable without incurring losses and therefore can hide anti-competitive pricing.

With regards to timing, and paragraph 6.349, notwithstanding the imperative on ComReg to plan for the full term of the future market review validity period, the impact of short- and medium-term changes to the pricing environment will create significant uncertainty at a time when the context for funding of FTTH rollout is at a critical juncture:

1. Interest Rates / Cost of Capital are increasing, and investors are looking to de-risk their investments portfolio. The introduction of pricing instability, by way of removing the ban on Eircom discounting, and the arising negative impact on the attractiveness of investment in competitive FTTH infrastructure, could be perceived as counter to ComReg's own objective to increase the availability of alternative infrastructure investment in Ireland, and to provide for – ultimately – an increase in societal welfare.

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2. The Commercial sustainability of multiple competing infrastructure operators in a relatively small Irish market is unproven and evidence from the UK showing insolvency of certain FTTH operators in certain contexts, is a clear warning against market meddling.

3. The marginal impact on FTTH business cases of lower market prices is substantial and the ability for Eircom to turn on discounts and then turn them off once market entrants have been squeezed out is an appreciable risk. Business cases to fund investment in FTTH in Ireland is highly sensitive to ARPU and forecast ARPU.

Furthermore, it is clear that this 'high-risk' environment is likely to only continue for a relatively short period of time, until the end of 2026, by which point the majority of the network investment being proposed by SIRO and Virgin will likely be completed.

As such the sensitivity period, where ComReg should adopt a light touch, in terms of not changing the status quo is limited to that period from the present until the end of 2026. Any pre-emptive changes within the time period, would be premature in light of the tentative rolling out of networks which while still in train, could be disrupted with the lightest of touches, however well intentioned.

SIRO maintains -that it is likely that all market participants will have continuing funding covenants/commitments in place, that were made in the regulatory context of an absence of Eircom discounting schemes, which, if infringed, could cause further construction of alternative networks to stop, despite the operators ostensibly being in a 'building phase.'

In February 2022, the Government launched Harnessing Digital: The Digital Ireland Framework, a strategy which seeks to enable digital transition across the economy and society and deliver access to a gigabit network to all premises by 2028. SIRO believes that ComReg should forebear on eliminating its restriction on Eircom discounting schemes until 2026 with the aim of aligning with this Government target and of

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mitigating the risk that its intervention may lead to negative consequences as outlined above.

## THE POTENTIAL FOR ABUSE OF EIRCOM'S INHERENT INCUMBENCY ADVANTAGES

Regarding paragraph 9.354, alternative network operators face significant challenges in establishing themselves and overcoming Eircom's incumbency advantages, such as economies of scale, a large customer base, established relationships with ISPs, and integrated systems and processes. Compounding those advantages through the leveraging by eircom of an additional mechanism of promotions and discounts, distorts the competitive market in Eircom's favour.

Discounts and promotional schemes offered by Eircom could induce retailer lock-in, leveraging their incumbency advantages, which could discourage ISPs from switching demand to new alternative networks and undermining the investment plans of alternative operators, which is not in the best interest of consumers. There is significant investment upfront, for an ISP, to establish and maintain an integration with an alternative network. This cost may never be recovered –in light of the additional economic hurdle that Eircom discounts will pose.

## RISKS TO THE ROLL-OUT OF ALTERNATIVE NETWORKS

Regarding paragraph 9.355, Eircom and InfraVia have already publicly announced, on the 1st of July 2022, plans, arising from their significant infrastructure deal, to cover substantially all premises in the country.

SIRO believes the implication is that there is no benefit to the market or consumers in providing additional incentives to Eircom, who have already committed to this build. Allowing Eircom to offer promotions and discounts will not result in any incremental network investment but SIRO believes will only risk undermining investment by alternative network builders, reducing long-term network competition and maintaining Eircom's dominance in the market.

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In the UK, OpenReach CEO, Philip Jansen told the Financial Times, on the 2 February 2023, “Why do you need to have multiple providers?” “There is only going to be one national network.” The parallel in Ireland is that the Eircom/InfraVia investment in FTTH is described by Eircom themselves as allowing Eircom to increase the pace of expansion of its fibre-to-the-home broadband network.

The increased pace of the Eircom build combined with the planned, but not committed, overlap of Eircom network by alternative networks is significantly higher than was apparent during the previous market review, which concluded that discounting schemes were prohibited due to, inter alia, the impact on competitive roll-out.

If discounting is allowed following on from this market review the negative consumer and societal impact can be expected to be higher than that which was anticipated in the previous market review, with no additional benefit arising from increased roll-out of Eircom network.

#### ABUSE RISKS OF SOPHISTICATED DISCOUNTING SCHEMES

Regarding paragraph 9.359 Eircom is the only operator with a national network footprint, and ISPs must purchase at least some wholesale services from Eircom in areas where there is no alternative network. Eircom could design commercial terms that result in ISPs facing a significantly higher average charge if they do not purchase all their services from Eircom, undermining the business case for sub-national competition.

There is no way to construct a transparent and efficient mechanism to effectively prevent the geographic targeting of discounts. Eircom may seek to offer discounts linked to phases of network roll-out, such as pre-sales discounts, early-life discounts, or refarming discounts, which are functionally equivalent to geographically targeted discounts.

ISP's choice of whether to use an alternative network will be heavily influenced by whether this affects the ISP's ability to meet the volume commitments of a discounting scheme. Alternative networks, whose build plans are more dependent on term/volume commitments than Eircom, seek to establish upfront, extended commitments from ISPs. Without these commitments, alternative network build plans may not be viable.

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Moreover, it is likely that any Eircom discounting scheme will bring a level of ‘smoke and mirrors’ to the true costs of providing FTTH into the retail market by an ISP. The removal of transparency of price, -will lead to confusion and friction in the market likely to inhibit new retail market entrants.

Regarding paragraph 9.357, the negative impact of Eircom discounting schemes will include increased base Lock-In compounded by migration difficulties between fibre networks. Historically, when migration between retail operators occurred in the context of FTTC the physical impact was merely the need to switch modems. In the context of FTTH, and migration between competitive networks, the requirements include to undertake what might amount to relatively major construction work, comprising of significant non-standard installation costs, which might, due to retail competition, need to be carried by the ISP. This results in a situation where the ISP will be unlikely to switch a customer between competing networks, even after the expiry of a discounting period, and the ISP will in effect be locked into Eircom despite the notional availability of switching options.

Regarding paragraph 9.360, the mechanisms by which discount tiering works will tend to consolidate the market into the 4 major retailers at the expense of the smaller specialist ISPs, and ultimately reduce market competition and innovation resulting in discriminatory pricing. This inherent bias of ‘laddered’ discount schemes against the interests of smaller ISPs will impact disproportionately those ISPs:

1. Operating in targeted regional areas,
2. Targeting smaller niche market segments such as SME,
3. Relying on FTTP to provide connectivity for added value services such as VoIP, or backup/redundancy services.

It is important to bear in mind that discounting will not necessarily accelerate Copper Switch Off. Current market dynamics show that the mere presence of FTTH as an alternative for consumers leads to relative rapid migration from Copper to Fibre without the presence of discounting. This happens primarily because the main retailers offer into the market a simple broadband product, which is delivered based on best available technology business rules. E.g. Where FTTH is available, the retailers will only provide

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service over FTTH even if FTTC/ADSL is also available, notwithstanding the comparatively higher price. This tendency has proven out in the Eircom Rural 300k where close to 57% penetration has been achieved in a relatively short period without the presence of discounting.

Given the composition of Eircom's retail base, which has emerged as a result of its inherent legacy advantages, is likely to be unique in the market, Eircom is in a position to offer discounting schemes into the market that could be designed to favour the base composition of their own vertically integrated retail ISP. In so far as Eircom is composed of both a retail and a wholesale entity, it is clear, at the very least, that Eircom may have a perceived bias in both offering variants of discount schemes favourable to itself into the market, or not offering other schemes that might favour competing retail operators.

The commercial imperative from a corporate structure, in the context that the group is ultimately controlled by Iliad, is that Eircom as a whole will seek to maximise gain at a group level, notwithstanding the artificial and superficial nature of the 'Chinese Walls' between Eircom's Retail and Wholesale divisions.

It is arguable that the purported benefit of discounting schemes bringing benefits to end users is a fallacy and disingenuous. The recent connection pricing promotion did not result in any end-user pricing reduction by the major ISPs. The benefit of the discount arguably accrued largely, given their volumes, to the shareholders of Vodafone, Sky and Eir, but most definitely not to the end-users or to Irish society as a whole.

#### INCREASED POTENTIAL FOR ABUSE OF PRICE SIGNALLING

Eircom have already demonstrated through the connection pricing promotion, and the recent signalling of promotional discounts as part of the Eircom product forum that they are eager to leverage their position to encourage pricing uncertainty in the market to their benefit.

These Eircom initiatives are part of a series of offers that are calibrated to create uncertainty for ISPs and, as a result, significantly, deter them from committing meaningful volumes to alternative networks. The effects of this overarching exclusionary strategy are that alternative networks seeking to operate in the market lack the certainty in terms of demand outlook to make the necessary long term investment

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decisions. Should the bar on discounting schemes be lifted, Eircom could be in a position to leverage price signalling to foreclose network-based competition.

#### INSUFFICIENCY OF PROPOSED MITIGATION

The current proposal for a price-floor (inclusive of discounts), based on fibre-to-the-curb (FTTC) pricing does not account for the additional costs associated with rolling out an FTTH network. The price floor for discounts should be based on the evolving FTTC market price, adjusted for the Consumer Price Index (CPI), and comprising an additional margin to mimic the relatively greater costs of FTTH deployment compared to FTTC.

It is important to bear in mind that FTTC infrastructure was rolled out in a different era when costs for network build were substantially lower. Setting the price floor for discounting at too low a level will impact the ability of alternative fibre network builders to continue to fund competitive infrastructure build and competition, ultimately impacting on end-users. Moreover, while Eircom is able to leverage its current well-maintained infrastructure and way-leaves to keep its network build costs low, market entrant alternative network operators are constructing networks in a green-field scenario without that competitive advantage. Setting the price-floor too low will allow Eircom to leverage its incumbency advantages to foreclose the market to alternative infrastructure investment.

#### DISCOUNTING GOVERNANCE AND MECHANISMS

Notwithstanding SIRO's preference for a time limited continuation of the wholesale promotions and discount ban, SIRO is of the view that the initial proposals of ComReg at paragraph 9.375 are an appropriate consideration of the necessary guiderails that removing the ban would require.

However, the proposed notification mechanism and timelines do not provide sufficient certainty to other operators (OAOs) as promotions and discounts are not proposed to be signalled in a manner that is transparent and consultative. Advance notification alone does not adequately mitigate uncertainty for OAOs.



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SIRO believes, in line with paragraph 9.376, that there is merit in following the UK example of consulting with industry on any proposed wholesale promotions and discounts as part of any ComReg assessment of an Eircom proposed wholesale promotion.

This consultation framework would provide for the publication of the Eircom request to ComReg, the draft determination of ComReg, the responses of industry, together with the finalized ComReg position. The industry consultation period should not be less than 4 weeks, on top of the three month notification to Comreg, and the two-month industry notification, to provide for due time to make considered responses and to allow retailers to deal with the commercial fall-out.

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## Question 9

Do you agree with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

SIRO agrees with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market and the Revised Regional WCA Market.

However, SIRO is of the view that NBI should be designated as having SMP in the IA NG WLA Market, notwithstanding that the 'state contract' may be determined to be the sufficient remedy at this point in time.

Although not currently foreseen, that contract does have provisions for termination and the Government and NBI may agree, for commercial and/or prudential reasons, to vary in whole, or in part, that contract, removing restrictions, especially in the context that NBI may not achieve the penetration targets that are foreseen in its business plan. This scenario is likely to unfold in the medium term of 2-3 years during the course of the market review period.

If Eircom were unable to move far beyond 57% penetration in the rural 300k, after many years of the network having been built, then it is a clear challenge and risk for NBI to achieve the higher penetration levels required of its ambitions.

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## Question 10

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

SIRO believes, subject to the points made in our responses to the previous questions, that the ComReg approach to conducting the Regulatory Impact Assessment is appropriate.

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**Private and Confidential**

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For the attention of: Donal Leavy

27<sup>th</sup> October 2023

**BY EMAIL**

**Eircom Wholesale (Open eir) | WCA Market Position**

Dear Mr. Leavy,

**A. Introduction**

We understand that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

SIRO’s concerns regarding the WBAS market encompasses the totality of the wider WCA equivalent services including;

1. The WCA offer of Eircom;
2. The offer of bundled Eircom WLA service together with a separate deregulated Eircom leased line product; and
3. The offer of access to a bundled WLA service of NBI, SIRO and Virgin Media together with a separate deregulated Eircom leased line product.

**B. SIRO’s concerns in respect of any potential change in Eircom’s existing market position in the WCA and aggregation market**

[REDACTED]  
[REDACTED] For example, any constriction of the WBAS market to one

dominated by Eircom enhancing its dominance is worrying from the point of view of potential impacts on SIRO's business.

Eircom are enlarging their position as the dominant WBAS provider through the expansion of their presence, beyond just their own network, and into all FTTH networks in the State, including Virgin, NBI and SIRO. SIRO has a particular concern that Eircom will over time exercise their market position to gather and migrate customers away from independent WLA providers towards their own products.

Moreover, we are concerned that Eircom will be in a position in the WBAS market where they may leverage a form of cross subsidisation between the WCA and WLA markets, to arbitrage their pricing flexibility in the 'backhaul' element of the bundle (of services) to the disadvantage of SIRO as a competitor in the same markets.

### **The importance of network competition and the impact of the hardening dominance of Eircom in the WBAS Market**

We are aware ComReg are proposing to de-regulate the WCA market and understand from Section 7 of the WLA/WCA market review the ComReg proposal for wholesale deregulation, absent competition restrictions, in the downstream retail market.

In our view the enhanced dominance of Eircom in the WBAS market will see independent WBAS providers potentially leave the market and whilst larger retail providers could leverage beneficial pricing from Eircom, smaller retail broadband providers are likely to struggle without competitive aggregation options.

### **C.Next Steps:**

SIRO would expect ComReg as the national regulator:

- To review the changed circumstances highlighted in this letter in your WCA / WLA market review and in future regulatory interventions with an awareness of the effect that Eircom's actions may have on the WBAS market.

SIRO would also make the following observations:

- That the use of a bundled WLA + "commercial" backhaul product, is essentially equivalent to the regulated WCA product; it could potentially be used to evade price regulation, and offer preferred pricing to select retail operators in a targeted fashion.
- We request that in line with the changes in this market as set out above that Comreg now reconsider its proposal to deregulate this market at this time.

We appreciate your consideration of our concerns, and we would request a meeting to discuss this matter further.

Yours sincerely

No signature as sent by email

Rory Ardagh

Regulatory Affairs Manager

**For and on behalf of SIRO**



# **Sky's Response to ComReg's Consultation and Draft Decision: Market Review of Wholesale Local Access and Wholesale Central Access**

Reference: ComReg 23/03

03 March 2023

Sky Ireland welcomes the opportunity to provide a submission to ComReg's WLA/WCA market review consultation. At the outset, we note that we are acutely aware that this market review represents a forward-looking decision which will cover a five-year period.

In this context, we are of the view that the differing competitive conditions, which are already evident to a certain extent, will continue to develop during this time. We would therefore be of the view that further differentiation is required in the Next Generation WLA market than simply demarcating the Intervention Area and the Non-Intervention Area.

We provide more detail on potential approaches we believe ComReg could take in this regard in our subsequent responses, outlined below.

1. Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets?

Sky Ireland agrees with the main developments that ComReg has identified in the provision of retail broadband. We would also note, on a forward-looking basis, that announcements by operators on their roll-out plans cannot be taken as guarantees of roll-out in and of themselves. As ComReg is well aware, roll-out announcements and projections by wholesale operators have historically over-estimated their ability to roll-out at pace and underestimated the time and challenges involved, often for understandable reasons.

In this vein, we would agree with ComReg's position with regard to Virgin Media's FTTH plans, namely that there is a 'significant degree of uncertainty around this rollout'<sup>1</sup>. As well as the general uncertainty regarding the potential pace of the rollout we would also query the products that Virgin Media are likely to offer to the market. While ComReg is in a better place to assess this than we are, our starting assumption would be that Virgin Media is more likely to offer bitstream rather than VUA and is therefore unlikely to have an impact on the WLA market. Even if Virgin Media offered VUA at some point during the next five-year market review period, retailers would have to achieve a critical mass in terms of penetration within a 'point of handover' (POH) area for it to be economical to invest in the infrastructure required to switch from Bitstream to VUA. This may be viable at a subset of POH over the course of the market review period but without detailed information on the topology and footprint of the VM network, it is impossible to determine if VUA is a viable alternative to Bitstream, even if offered by Virgin Media in the future.

Notwithstanding the above, Sky is also of the view that ComReg should closely monitor the developing market conditions and the potential for quite starkly different competitive conditions to develop in different parts of the country. This is particularly the case when we think of what might be referred to as the 'Urban/Suburban Commercial' area (where Eir, SIRO and potentially Virgin Media will all likely be present as wholesalers) vs the 'Rural Commercial' or 'Rural non-IA' footprint where only Eir (as a result of the agreement it entered into with the Government of the time to take approximately

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<sup>1</sup> Footnote 54, p 43, Market Review WLA WCA, ComReg 23/03



340,000 homes out of the original National Broadband Plan intervention area) are likely to be offering services during the lifetime of this market review.

2. Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets?

ComReg references the geographic differences that may make up the retail broadband market including the differing competitive conditions between areas where there are multiple network operators and areas where Eircom is the only network operator in an absent regulation scenario. Sky agrees with the assessment that different parts of the national market have differing levels of competition, however Sky is surprised that ComReg has not made specific reference to the 'Rural Commercial' footprint, and in particular the 340,000 premises<sup>2</sup> that Eir passed as part of an agreement with the Irish Government ahead of the commencement of the National Broadband Plan. Sky is of the view that the Rural Commercial footprint should be treated as a distinct and separate market. Without this distinction there is a risk that Eir will have the incentive to engineer significant price increases in this area, during the next five-year period, to the obvious detriment of end-users in this footprint.

In this regard, we note that there are currently no alternative providers in this footprint and the expectation from ComReg is that they do not expect to see any competition in the future. As ComReg noted in its ANM decision, Eircom's share of FTTH lines in this footprint 'is assumed to be 100%'<sup>3</sup> on an ongoing basis and should therefore be considered a distinct market.

3. Do you agree with ComReg's product market assessment for the Relevant WLA Markets?  
Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers

Sky supports the product market assessment within the relevant WLA markets as outlined by ComReg. The split between Current Generation and Next Generation products is sensible in light of the continued decline in the use of Current Generation technology.

However, ComReg should consider the implication for end-users in the Intervention Area WLA market if NBI has not rolled out and end-users are left with Eir Current Generation technology after the sunset period has expired with no other realistic options available to them. An obvious solution would be for the current regulated pricing to be maintained until NBI have passed all relevant premises.

4. Do you agree with ComReg's geographic market assessment for the Relevant WLA Markets?  
Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

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<sup>2</sup> According to ComReg ANM model, Eir rolled out to 340,000 premises rather than the 300,000 originally agreed to by Eircom with DECC, as per footnote 32, p16, Review of the Access Network Model, Decision No. D11/21

<sup>3</sup> Paragraph 5.81, p63, Review of the Access Network Model, Decision No. D11/21

As noted above, Sky does not agree with the proposed geographic market assessment due to the significant difference in competitive conditions that exists in the different regions (separate to just the distinction between the intervention area and the non-intervention area) and the likelihood that these differences will become starker over the next five years. Our view is that the Rural Commercial footprint (the 340k) is a distinct market and should be regulated as such.

5. Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Sky agrees that Eir should be designated as having SMP within the relevant WLA Markets. However, as we have outlined, there are clearly differing levels of competition evident within the WLA market. While we agree that Eir has SMP across the relevant WLA markets it is also clear that Eir's ability to exploit this does vary between different areas. Indeed, we note that when ComReg drafted the ANM decision, ComReg explicitly called out<sup>4</sup> the lack of competition within the Rural Commercial area and used this as a basis for ComReg's costing exercise. We also note that ComReg has been clear that FWA is deemed to not provide a sufficient competitive constraint.

6. Do you agree with ComReg's market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Sky agrees that ComReg's market assessment for the Modified Retail Broadband Market is reasonable.

7. Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)?

FTTC clearly remains a significant technology platform with a large number of end users. In that context, we would have concerns regarding the proposal to remove the FTTC margin squeeze, particularly when ubiquitous FTTH is still some way off. As ComReg itself highlights in p.8.30-8.31, a margin squeeze can be used by an operator to engage in anti-competitive behaviour. As ComReg highlights within the draft decision<sup>5</sup>, it has historically been difficult for operators to roll-out FTTH network at the pace they would have wished. It would also seem obvious that operators are likely to leave the most difficult to reach areas to last so if anything, we can expect the pace of the various operators roll out to slow down as each tranche of homes is marginally more difficult to reach than

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<sup>4</sup> 'In exchange-footprints where there were no competing FTTH operators (such as in general the Rural Commercial Area)', Paragraph 5.81, p63, Review of the Access Network Model, Decision No. D11/21

<sup>5</sup> Roll-out by wholesale operators are 'market developments (with the caveat that several are in the early stages of planning and are subject to revision) if and when they come to fruition', paragraph 3.93, p.73, Market Review WLA WCA, ComReg 23/03

the last. Our concern therefore is that, if FTTH roll out is not completed at the pace that Eir is currently suggesting, Eir may be in a position to operate a FTTC margin squeeze, leaving other operators unable to compete without making a loss.

In the same way that ComReg correctly urges caution regarding Virgin Media's planned FTTH roll-out and SIRO's 'phase two' rollout, it should adopt the same position when it comes to Eir's FTTH rollout plans. Indeed, it seems particularly perplexing that ComReg seems to have factored this into its decision making with regard to the proposal to not introduce cost orientation for FTTH but has opted to not include it for consideration with regard to Eir's potential incentives to margin squeeze FTTC in certain scenarios.

#### 8. Do you agree with ComReg's proposals in respect of remedies in the Commercial NG WLA Market?

As stated above, we are of the view that it would be premature to remove the margin squeeze test for FTTC at this juncture.

In relation to pricing continuity for FTTC, Sky notes that the intention is for FTTH pricing to be constrained by the FTTC price acting as an anchor price. However, as FTTC pricing will be allowed to increase in line with CPI-0% from mid-2024 onwards the price of FTTH will also be variable and hence it may not be as effective a constraint, particularly in light of recent inflation trends<sup>6</sup>.

We are particularly surprised by the CPI-0% proposal in light of the fact that ComReg expressly stated in the ANM decision<sup>7</sup> why it believed inflation linked increases were inappropriate.

It is clearly the case, as is evident from their published accounts, that Eir remains a highly profitable entity and, as such, the CPI-0% would appear very generous in the context of Eir's actual cost of providing FTTC, which continues to decrease over time.

In respect of FTTH, we would come back to what we have stated previously with regard to the need for a differentiated approach in the 'Rural Commercial' or 'Rural non-IA' area and the 'Urban/Suburban Area'. In the Rural Commercial footprint, we are of the view (and ComReg has also stated this view) that Eir is unlikely to face any significant competitive constraint over the lifetime of the market review period and hence an FTTH cost orientation obligation would be the most appropriate remedy.

However, in the Urban/Suburban footprint, where Eir does face competition from SIRO and, potentially from Virgin Media in the future, we are of the view that the pricing flexibility approach is the most reasonable one. Indeed, we would also urge ComReg to continue to monitor developments in this area and to ensure that the best interests of consumers and end users are prioritised.

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<sup>6</sup> According to the European Commission, inflation in Ireland reached 8.1% overall for 2022. As of submission date, Ireland had just recorded an increased rate of inflation for the month of February of 8%, up from 7.8% in January, according to the CSO. Inflation rates can be viewed here <https://www.cso.ie/en/csolatestnews/pressreleases/2023pressreleases/presstatementflashestimatefortheharmonisedindexofconsumerpricesfebruary2023/>

<sup>7</sup> ComReg made arguments in the ANM decision in relation to FTTC pricing that included the suggestion that an inflation factor was not appropriate, can be found at paragraphs 5.297 and 5.568, Review of the Access Network Model, Decision No. D11/21

In our view, this means allowing competition to occur to the fullest extent possible where the market conditions allow it. This may mean, for example, giving Eir more freedom to compete even below the proposed price floor, where it is clear that the market can support a lower price. It would seem unreasonable for SIRO or Virgin Media to be able to respond to any reductions in price that Eir may offer the market but for Eir to be unable to respond in kind to any moves that their competitors may make in the market. ComReg's role in this regard should be focused on promoting competition for the benefit of consumers and end users.

At the same time however, and in the interests of fairness to all market participants, any price reductions that Eir offer, particularly in the form of discounts, must be transparent such that it is clear and obvious what the effective price is that Eir is making available in the market. This is particularly important considering the significant variation in competitive conditions in different parts of the country and the incentives that that may create with regard to pricing strategies.

Sky also agrees with the point made by ComReg at paragraph 9.117 that Eir needs to ensure the quality of the information it provides to Access Seekers in relation to FTTH. Sky outlines below examples of areas where Eir needs to improve the flow of information to alleviate significant problems that persist for Access Seekers and ultimately consumers and end-users:

1. The **accuracy of the homes passed files** is critical to the service provided to consumers and end users. Beyond SLAs, ComReg should put in place remedies that improve the data provided within these files. In cases where premises are found to be unserviceable through a standard process, the files should be updated to either remove the Eircode from the passed list or the Eircode should be flagged as non-standard. In addition, where it becomes obvious that clusters of Eircodes are not viable based on orders associated to the area – these Eircodes should also be flagged accordingly.
2. **Eir's user gateway (UG)** – the system used by Access Seekers to place an order or log a fault is not fit for purpose and is a consistent source of problems for Access Seekers and ultimately for consumers and end users. In 2022 alone, Sky recorded [REDACTED] [REDACTED] where the system was performing poorly and there were delays to the system functionality. What this means in practice is that Access Seekers, such as Sky, cannot use the system properly, we are unable to place orders or log any service faults for our customers. [REDACTED], [REDACTED] but we know from our contact centre that advisors are frequently left unable to support customers when this happens. For example, when Eir's UG is performing slowly our contact centre advisors cannot view available appointment slots for our customers. [REDACTED] [REDACTED].

Eir has been saying for many years that an overhaul of its IT system would take place. [REDACTED] [REDACTED]. ComReg should consider how they can ensure Eir's UG is working effectively so that Access Seekers and ultimately consumers and end users are not left behind. We also query whether Eir is complying with its non-discrimination obligations in this regard. Is Eir retail experiencing the same problems when ordering services, booking appointments or logging faults?

3. Eir should be required to **proactively manage ‘aged orders’** – that is orders where end-users have been waiting an unreasonable amount of time for a broadband connection. The maximum amount of time for non-standard orders to be completed should be 6 weeks. At least 15-20% of orders with Sky are classified as non-standards orders. From internal records, as of mid-2022, over 50% of Sky’s non-standard orders were taking 13 weeks or more. This is unacceptable for end-users.
4. Key performance reports issued by Eir should be reviewed by ComReg prior to publication. For example, Open Eir recently published statistics on First Time Installs that suggest 80% of customer orders are activated on the first appointment. However, this statistic does not appear to take account of other factors such as the local arrangements process where multiple visits can take place which are not recorded on the UG.
9. Do you agree with ComReg’s proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market?

With regard to the IA NG WLA market, Sky would caution that SMP remedies should only be withdrawn once NBI’s roll out has sufficiently advanced to make this a relatively riskless proposition. We welcome the use of sunset periods in this regard and would submit that taking an exchange area by exchange area approach is likely to be the most sensible approach.

We take a similar view with the CG WLA market, again noting that remedies should only be withdrawn once the roll out of NG products has sufficiently advanced. The use of sunset periods is welcomed and taking an exchange area by exchange area approach is likely to be the most sensible approach here as well.

We are comfortable that the withdrawal of SMP remedies in the revised regional WCA market is reasonable considering the competitive conditions that exist in that market.

10. Do you agree with ComReg’s proposals on the Regulatory Impact Assessment?

We have no specific comments to make on the Regulatory Impact Assessment.

- ENDS -

## Executive Summary

SFG welcome the opportunity to respond to ComReg's WLA/WCA market review consultation. Our response is laid out by way of this Executive Summary in addition to responses to the specific questions in the consultation.

### Market Definition and SMP - WLA

SFG are of the view that geographic market definitions proposed by ComReg are not correct and if not amended runs the risk of having a **material detrimental impact on competition** and end-users. ComReg appear to have fallen into error by starting with an "**unduly wide**" definition of the geographic WLA market contrary to the approach advocated for by the EU **SMP Guidelines**.

SFG consider there is a **Rural Commercial Area NG WLA** market and Eircom should be subject to a cost orientation obligation in this footprint if "**windfall gains**" to Eircom are to be avoided. ComReg's correspondence with the European Commission in 2021 confirms this would be the outcome if, as is currently proposed, NBI were required to **share the cost of Eircom's PI** in Commercial Areas.

SFG are also concerned that ComReg's current definition of the **IA NG WLA** should be refined to **only** include premises where **NBI is available**. Firstly, where NG WLA is not available in the IA then by definition it should not form part of **any NG market**. Secondly, where Eircom has deployed FTTP but NBI is not available in the IA, Eircom's **incentive and ability** to exploit its market power under those conditions is no different than in Commercial Areas where ComReg suggest it has SMP. [REDACTED]

In a similar vein, where NBI has not yet offered service and where Eircom has not rolled out NG services, Eircom will continue to have **market power** in the CG WLA market as end-users have no broadband alternatives to this footprint.

Consequently, SFG consider that until such time as NBI service is available in the IA, Eircom's **NG WLA** service should continue to form part of **the Non-IA market definition** (or the Rural Commercial Area under SFG's recommended market definition) in which Eircom has SMP. In addition, until such time as NG services are available in the IA (from either Eircom or NBI), there is a specific **IA CG WLA** market in which Eircom **continues to hold SMP** as the only provider of WLA broadband in the geography.

### Market Definition and SMP - WCA

SFG consider ComReg has fallen into a similar error in starting with **too broad a geographic definition** of the market in considering the boundaries of the WCA market. ComReg's approach in not starting from the existing WCA market definition is perplexing given that as recently as the **2021 Mid-Term Assessment (MTA)** it found that as many as **968 of 1,203 Exchange Areas (EAs)** failed to meet the established criterion on which ComReg would deem the market to be competitive. Little has changed in the market since that MTA and yet the same 968 EAs are now deemed to be competitive. ComReg should have considered the possibility that the existing **Revised Regional WCA** market remained a valid definition and examined the competitive conditions in this footprint accordingly. It is notable, that at least in SFG's experience, where Eircom exchanges have been deregulated (such as in D10/18

and the MTA), SFG has been subjected to **significant bitstream price increases**. [REDACTED]

The risks associated with the proposed **deregulation of this market** are exacerbated by the following proposals:

- **not to impose a cost orientation** obligation on FTTH VUA,
- the removal of the existing WLA obligation **not to cause a margin squeeze** between VUA and Bitstream (VUA-BS MST)
- the removal of existing FTTC wholesale and retail MSTs
- the **relaxation of existing FTTP VUA-Retail margin squeezes test**

### Remedies

Without prejudice to SFG's view that the **Revised Regional WCA** market should not be deregulated, it is imperative that the existing **VUA-BS MST is retained**. This current obligation applies to Eircom nationally and flows from its SMP in the WLA market. The VUA-BS MST performs an important function in preventing Eircom **leveraging its market power** in the WLA market into the WCA market. The justifications offered by ComReg (and Oxera) in the consultation for no longer requiring this test are not convincing and fails to adequately account for Eircom's incentives and capabilities. This, in combination with the relaxation of the **VUA-Retail MST** in favour of a "**flagship**" approach will allow Eircom to exercise its market power through retail and/or wholesale pricing strategies that targets areas depending on the competitive conditions that pertain in those areas. SFG demonstrate in this response how Eircom can exploit this proposal in a manner that ComReg/Oxera appear not to have considered.

SFG are also of the view that the removal of the current MSTs (both wholesale and retail) on FTTC is not justified and is **predicated** on the assumption that Eircom will achieve **complete overlay** of the existing FTTC network with FTTP. Eircom's own position on the network upgrade is that it will be completed **no sooner than 2026** but there is no guarantee that this will happen. ComReg are rightly cautious about future SIRO and/or VMI network roll-out but, for reasons that are unclear, harbours no such reservations when it comes to Eircom. If Eircom do not achieve such an overlay, and quickly, the relaxation of regulation with respect to FTTC poses a material risk to competition.

On the matter of **non-price remedies**, SFG largely agree with the proposed remedies (whether the market is defined geographically as the "**Non-IA**" or based on a split of the Commercial Areas as proposed by SFG). We are concerned about Eircom's current **Enhanced Provisioning Process (EPP)** as it operates mainly outside the existing UG process and thus is not consistent with the "**Equivalence of Inputs**" standard applied under **D10/18**. There is no reason a EPP type solution could not be provided in a more transparent manner **and via the UG**.

[REDACTED]

Finally, the current WLA/WCA SLAs need to be renegotiated as they **lack the appropriate incentive levels** for Eircom to meet targets. We are also of the view that **a 6 month** negotiating period before Eircom provides its 'Best and Final Offer' (**BAFO**) is too long. [REDACTED]

[REDACTED] SFG consider a more hands on approach by ComReg during the negotiating process may be required to **change this dynamic**.



## Answers to specific questions

**Q1. - Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets?**

SFG agree that many of the main developments in the retail broadband market has been captured in this analysis but have comments on some of the specific issues raised by ComReg in this section of the consultation.

We would note that ComReg has indicated that at p. 3.77 that *“Eircom no longer offers standalone broadband...as part of its core product offering on its website which is likely a contributing factor to its customers having a greater tendency to have a bundles plan”*. SFG consider this to be an entirely misleading characterisation of Eircom’s retail strategy and if not revised is one that can potentially be exploited by Eircom in terms of how it seeks to meet its retail margin squeeze tests, particularly if the proposed relaxation of the tests are to be confirmed in a final decision. [REDACTED]

[REDACTED]

SFG consider it is therefore wrong to characterise such customers as purchasing a “bundle” for Eircom. If Eircom chose to provide something to a customer it neither requested, needs or places value on and Eircom can do this at no incremental cost then for all intents and purposes these customers are in fact purchasing standalone broadband. Identifying such customers is a straightforward exercise as those that have neither made nor received calls over their access line. [REDACTED]

[REDACTED]

SFG agrees with ComReg’s observations with respect to the *“pandemic induced”* trends such high data usage and the *“persistent degree of hybrid on and on-line working”*. Consequently, SFG would ask that ComReg give particular weight to this consideration when seeking to promote the needs of end-users. Current proposals around deregulation in this consultation offer no protection to many end-users in terms of **price, choice and quality** in many instances and there is even a risk of some losing service altogether with no alternative on offer particularly in the Interventional Area (IA). While the general trend to move away from copper towards fibre based broadband is obviously occurring, that is only possible where the fibre option exists for the end-user. Where the option does not exist, by definition, there has been **zero such migration**.

[REDACTED]

**Q. 2 - Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

SFG agrees with ComReg that FTTx should be the starting point ("focal product") in carrying out its analysis of the retail market. We further agree with ComReg's "chain of substitution" analysis vis-à-vis **Current Generation (CG)** and **Next Generation (NG)** in the broadband market whereby the former is not a substitute for the latter and therefore does not form part of the same product market definition.

ComReg's **exclusion of leased lines** from the notional retail broadband market is correct for the reasons outlined in p. 4.148 to 4.159 and p. 5.115 to 5.120 of the consultation. This is also consistent with the European Commissions 2020 Explanatory Note.

In addition, SFG agree that **Fixed Wireless Access (FWA)** and **mobile broadband** should be excluded from the product market definition and note ComReg's observation that FWA demand growth is "transitory in nature" (p.4.135) and will be subdued by FTTP take-up. This is important in the context of the Rural Commercial Area where Eircom already face no platform competition from a demand substitution perspective. This means it also faces **diminishing influence** on its pricing behaviour from services outside the WLA market definition such as FWA.

SFG consider ComReg's summary (p. 4.223) of the geographic differences in entry conditions over time is entirely understated in the context of the Rural Commercial Area. ComReg state:

*"there may be differences in competitive conditions between those areas that has multiple Network Operators and those areas where Eircom is the only Network Operator present... However, these differences are likely to decline over time as alternative FTTP network rollout progresses, such that fewer parts of the State are characterised by the presence of Eircom FTTP only. Thus, as network rollout progresses, at retail level, differences in geographic entry conditions sufficient to warrant defining separate geographic markets are likely to decline."*

This summary, however, ignores an appropriate analysis of the **Rural Commercial Area**. The omission is surprising given the Access Network Model was predicated on capturing the distinct competitive conditions that pertained in this footprint. At no stage over the review period are entry conditions in this footprint of 300-340k premises likely to change. The **absence of discussion** around this distinct footprint is hard to justify given the particular focus ComReg gave this geography as part of the 2018 WLA Market Review (D10/18) and the **draft CEI Pricing Decision** less than 18 months ago. In terms of ComReg's "absent regulation" analysis carried out by ComReg, if Eircom were to withdraw access to VUA, Access Seekers would have options either today or prospectively of **NBI in the IA**, and of **SIRO in its existing footprint** today and possibly SIRO (through network expansion) and VMI in the **Urban Commercial Area** prospectively. However, the one geographic footprint where there is no other option today or prospectively is in the Rural Commercial Area. This footprint is sufficiently large in size (with a scale of circa 60% of the premises currently in the NBP) to merit greater attention in ComReg's analysis of the retail market.

In examining the distribution of market shares ComReg has also failed to consider the Rural Commercial Area and the presence of Eircom-only FTTP scenario is not even called out in **Table 10**. If it had been it is likely it would have represented the second or third highest footprint considered in the table<sup>1</sup>. Furthermore, if an assessment of market shares split by the Rural Commercial and Urban Commercial areas was presented, it is likely ComReg would observe a material difference in the makeup of both with Eircom enjoying a **far higher market share** in the Rural Commercial Area. This again would likely support a different conclusion in relation to the nature of the retail market. The fact that such a split has not been considered is again unusual in light of the **current structure of the ANM** already incorporating this geographical distinction.

While ComReg's review of retail broadband pricing suggest there was no geographic differences in broadband pricing strategies, given the scale of "below the line" and "retention" offer strategies conducted by retailers it is impossible for ComReg to have confidence that what is advertised on operator websites offers a true reflection of what is happening on the ground. For example, if an existing or prospective customer rings a retail SP looking for better pricing terms than are advertised,

[REDACTED]

[REDACTED] customers in this footprint will derive the greatest retail pricing benefit from these wholesale price reductions and offers.

Finally, on ComReg's analysis on potential geographic differences in product functionality it is SFGs understanding the Eircom's FTTP network in the Rural Commercial Area is **GPON** while its network in the Urban Commercial Area is an **XGS-PON**. Eircom's VUA Product Description also suggests the service is provided "*over two types of Fibre Networks*" (section 5). There are a **number of differences between these technologies** that would allow for product differentiation but the most obvious is XGS-PONs ability to provide speeds up to a **10Gbps** service while GPON is likely to be capped around **1-2Gbps**. ComReg's analysis ought to consider this distinction and how it might manifest itself in the market over the review period.

For the reasons outlined above SFG are of the view that the evidence for **geographic differentiation** of the retail market is stronger than has been suggested by ComReg. While ComReg are not required to be conclusive on a precise definition of the retail market this puts a **greater onus** on it to consider alternatives where that high level analysis has a knock-on effect on its approach upstream market definitions.

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<sup>1</sup> It is unclear why the information in this table has been redacted. ComReg provide detailed market shares on retail operators even down to their share of the FTTP market in Quarterly reports. If that information is not deemed to be commercially sensitive there appears to be no basis for such a claim here. SFG consider greater transparency by ComReg in such instances would better inform responses to the consultation.

**Q.3 - Do you agree with ComReg’s product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

**Q. 4 - Do you agree with ComReg’s geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views**

ComReg has posed Questions 3 and 4 together to cover the analysis in Chapter 5 of the consultation and so it is appropriate to answer these questions together. ComReg should also refer to SFG’s visual aid at Annex 1 Figures 5 and 6 in response to this question.

As per SFG’s position in relation to the retail market assessment, ComReg’s analysis with respect to the specific **product market definitions** appears to be correct. CG broadband is unlikely to be substitute for NG broadband. By contrast NG broadband is a substitute for CG broadband and so there is an asymmetrical substitution relationship between the two services. Crucially, however, NG broadband can only substitute for CG broadband where the former is available. While this may be self-evident it appears to be an actuality that has been overlooked by ComReg in relation to its geographic market analysis (despite this point being acknowledged at p. 5.86).

SFG agrees with the “focal product” set of VUA (‘VUA focal product’) over the networks of Eircom, SIRO, NBI and prospectively VMI. [REDACTED]

[REDACTED]. SFG also agrees with ComReg’s ‘LLU focal product’ to include LLU, LineShare and SLU.

SFG agree with ComReg’s supply and demand side substitution analysis and in particular that the leased lines does not form an effective substitute to VUA and LLU from a demand and supply side perspective.

#### **Geographic assessment of WLA markets**

SFG consider ComReg’s **geographic assessment** of the WLA market **is flawed**. It is unclear as to why ComReg has not considered looking at the geographic units that underpin the **Access Network Model** in which considerable internal and external resources (including via consultation with Access Seekers) were expended in developing. In this respect the ANM considers the IA, the Rural Commercial and the Urban Commercial footprints. As per our response to **Question 2**, SFG consider that the evidence for geographic differentiation of the retail market is stronger than has been suggested by ComReg in its assessment of the same for the reasons outlined in our response to that question.

The differentiation was certainly at a level that merited closer examination at the **upstream WLA market level**. At the very least ComReg should have conducted an assessment of these geographies based not just on evidence from the retail market and the structure of the ANM but also based on previous analysis as outlined in D11/21 and in the Draft CEI Pricing Decision published less than 18 months ago.

SFG has constructed a high-level analysis of these geographies to assess competitive conditions in those footprints from a platform perspective. The analysis has been split into the situation that “**Currently**” pertains in each of the footprints against a reasonable forecast of what is likely to pertain “**Prospectively**” over the market review period. We consider that this analysis should have been carried out by ComReg (see **Figure 1**).

SFG consider that there a clear case that different competitive conditions pertain in the Rural Commercial footprint **Currently** and **Prospectively**, when compared with the equivalent in the Urban Commercial Area. Prospectively in the Rural Commercial Area, Eircom FTTP VUA will be the only alternative available to Access Seekers (and by extension end-users). It is notable that currently, the competitive condition in the Rural Commercial Area is in fact **worse than in the IA** where Eircom do currently provide some FTTP VUA coverage (albeit the extent to which this overlaps NBI current premises passed is unclear).

**Figure 1**

| <b>Current Status</b>              |           |                         |                         |
|------------------------------------|-----------|-------------------------|-------------------------|
| <b>Characteristics/Geographies</b> | <b>IA</b> | <b>Rural Commercial</b> | <b>Urban Commercial</b> |
| Eircom offer FTTH VUA              | <10% (a)  | 100%                    | c50% (b)                |
| Eircom offer FTTC VUA              | No        | No                      | 100%                    |
| Eircom offer CG LLU                | <100% (f) | 100%                    | 100%                    |
| NBI offer FTTH VUA                 | <25% (c)  | No                      | No                      |
| SIRO offer FTTH VUA                | No        | No                      | c40% (d)                |
| VMI offer FTTH VUA                 | No        | No                      | No                      |
| VMI offer FTTH BS                  | No        | No                      | ? (e)                   |
| VMI offer Retail Services          | No        | No                      | 85-100%                 |

| <b>Prospectively over market review</b> |           |                         |                         |
|---|-----------|-------------------------|-------------------------|
| <b>Characteristics/Geographies</b>      | <b>IA</b> | <b>Rural Commercial</b> | <b>Urban Commercial</b> |
| Eircom offer FTTH VUA                   | 10-15 (g) | 100%                    | c80% (g)                |
| Eircom offer FTTC VUA                   | No        | No                      | <100% (i)               |
| Eircom offer CG LLU                     | No        | No                      | No                      |
| NBI offer FTTH VUA                      | 100%      | No                      | No                      |
| SIRO offer FTTH VUA                     | No        | No                      | c60% (j)                |
| VMI offer FTTH VUA                      | No        | No                      | No                      |
| VMI offer FTTH BS                       | No        | No                      | ? (e)                   |
| VMI offer Retail Services               | No        | No                      | 85-100%                 |

(a) Based on encroachment of 40k premises in NBP.

(b) Based on 660k premises passed outside Rural Commercial/IA coverage.

(c) Based on 120k premises currently passed in IA.

(d) Based on 460k premises current passed.

(f) There is no reliable data on the total number of premises not served by either LLU or VUA products in the Intervention but it could be reasonably estimated to be 20-30%.

- (g) Assumes Eircom reach between 70-100k in IA.
- (h) An assumption that Eircom will cover up to 80% of Urban Commercial footprint seems reasonable. Even if they reach 100% not much turns on this from an analysis perspective.
- (i) It is purely speculative at this point as to whether Eircom will decommission its FTTC network. However it is highly improbable that FTTC will be fully decommissioned before the end of the review period and equally probable that high volume of premises will continue to be passed by FTTC either because Eircom does not reach full FTTP coverage or the transition from FTTC to FTTP will not have occurred in this timeframe even if they do.
- (j) Assume SIRO roll-out to up to 770k premises passed.

Eircom FTTP VUA will be the only WLA service (CG or NG) offered in the Rural Commercial Area in the near future. This is of relevance because while CG broadband (LLU and Bitstream) are not in the same product market as FTTP VUA they at least place **some degree of a pricing constraint** on that service today. As such while competitive conditions in the Rural Commercial Area are set to deteriorate prospectively, they are set to improve in the Urban Commercial Area. In SFG's view the evidence strongly points to the need for a distinct Rural Commercial Area market definition and as is currently reflected in the ANM. [REDACTED]

In accordance with SMP guidelines ComReg ought to start with a narrower definition of a product/area and add products and/or area thereafter as required by the analysis. It would seem both reasonable and obvious that ComReg use the narrower geographic previously identified as its starting point i.e. **IA, Rural Commercial and Urban Commercial Areas**. In its analysis ComReg quickly recognises the need to separate out the IA as starting point for a geographical assessment as noted in A. 8.24:

*"By definition, the IA encompasses those premises in the State where it is not deemed commercially viable for SPs to roll out. This, in and of itself, is inherently suggestive of a difference in competitive conditions between those areas where NBI is operating, or planning to operate, and those areas where it is not and where there is commercial rollout"*

However, this conclusion could **equally be applied** to the Rural Commercial Area where service provision currently (and prospectively) is only deemed to be viable by Eircom. The Rural Commercial Area therefore has "*clear and stable boundaries*" now and going forward consistent with the condition at **paragraph 49** of the SMP Guidelines. In ComReg D11/21 (p.5.47) ComReg confirmed that the **Demand Module** of the ANM assumes there are no competing operators in the Rural Commercial Area and Eircom's market **is set at 100%**. This is consistent with SFG's analysis in Table 1.

By definition, with the presence of just one operator and technology it also "*reflects the network structure of relevant operators*". It is worth recalling that this footprint was originally a subset of the government's NBP. This, in and of itself is inherently suggestive of a difference in competitive conditions between the Rural Commercial Areas and other areas where services have been rolled out commercially. By using as its starting point the IA and **Non-IA** (i.e. **combing both Commercial Areas**), ComReg has taken too broad a starting point that means real market dynamics will be misinterpreted.

For example, when looking at the Non-IA as whole we can see the presence of VMI in the retail market and SIRO in the wholesale market and prospectively VMI in the wholesale market and conclude that **entry conditions** across this geography are therefore similar. In reality however, neither SIRO or VMI are going to roll-out FTTP services (except perhaps in very limited circumstances) in the Rural Commercial Area.

Similarly, starting with the narrower geographic definition, ComReg would observe that **market shares** in Rural Commercial Area in the NG-WLA market is very different than in the Urban Commercial equivalent. Eircom currently have and are likely to retain **100% market share** in the former. This split should have been considered by ComReg in **Table 35**. We can see therefore that in starting with too broad a geographic definition detailed analysis will not lead you back to the correct narrower geographic scope based on the test criterion used by ComReg. Indeed the SMP Guidelines warns NRAs against the “*inherent risks of **unduly widening the scope of the relevant market***” (paragraph 43) and this equally applies to the assessment of the geographic dimension of the market (see paragraph 47 of SMP Guidelines).

With respect to differences in **pricing or marketing strategies** this criteria is something of a “*red herring*” because Eircom are obliged to charge the same price for FTTP VUA nationally. However it is notable that it has gradually revised its connection/migration charges downwards as roll-out continued into Urban Areas. ComReg would be able to assess the percentage of customers in Rural Commercial Areas that paid connections charges at the original level of **€270** (this price never applied in the Urban Commercial Area) **€170, €100** and as part of the recent six month promotion for **€0** by comparison to what charge was typically paid by Urban Commercial Area customers. [REDACTED]

On the issue of **product differentiation** SFG has already outlined in response to Question 2 that it is our understanding, based on Eircom’s published documents, that the Rural Commercial Area’s FTTP network is **GPON**, while its Urban Commercial Area network is **XGS-PON**. ComReg make no mention of this in the consultation. This means that prospectively the Urban Commercial Area can reach speeds >2Gpbs but the Rural Commercial Area cannot. It is also notable that Eircom, through OpenEir has also consistently marketed its Urban network under the name ‘**Ireland’s Fibre Network**’ (**IFN**) which excludes the Urban Commercial Area and this delineation is carried through to its wholesale **Order of Magnitude** (OM) deployment plan files. Another feature that differs is the service connection model options available depending on whether an end-user is in the Rural or Urban Commercial Areas. Eircom’s “*Bitstream and VUA Industry Process Manual*” outlines an option for connections – the NTU Connection Variant – that is available to wholesale customers “*on XGS-PON in IFN areas only*”. This service allows providers to maintain their own ONT in the end-users premises the purpose of which is avoid “*truck rolls*”. The requirement for such a product in the Rural Commercial Area **has not been provided by Eircom** [REDACTED]

SFG consider that the differing competitive conditions in the Rural Commercial Area vis-à-vis the Urban Commercial Area are so pronounced as to warrant a distinct geographic market definition of the Rural Commercial Area. Furthermore, given that there is no longer uncertainty in relation to take-up and costs of FTTP in this footprint and for a range of other factors (which we return to in detail in response to Question 8), it is incumbent on ComReg, including in accordance with EC Recommendations that a cost oriented FTTP VUA price is set for the Rural Commercial Area. In SFG’s

view having settled on this market definition it is appropriate to consider whether the Urban Commercial Area also forms a distinct geographic market and we turn to this issue next.

### Urban Commercial Area

Given that, based on evidence already considered, there is a strong basis for a distinct Rural Commercial Area geographic market it is worth examining whether a further distinction within the Urban Commercial Area might be appropriate. The obvious starting point for this exercise would be to examine currently and prospectively where Access Seekers might have alternatives to Eircom's FTTP VUA. SFG has repeated its analysis from **Figure 1** but on this occasion considered a split between **SIRO** and **Non-SIRO** footprints in the Urban Commercial Area (see **Figure 2**).

The only competition Eircom face in this regard is from SIRO. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] will have an incentive to offer it on an "open access network" basis [REDACTED] over the review period [REDACTED] SIRO footprint that Access Seekers will have a **genuine alternative to Eircom**.

While the FTTx market shares between Eircom VUA and SIRO VUA in the SIRO footprint are not publicly available it would be something ComReg could easily assess given both operators log connections against **unique Eircodes**. Outside of SIRO (in the remaining Urban Commercial Area) Access Seekers will continue to be wholly reliant on Eircom for FTTx access and Eircom currently holds a 100% market share in the provision of FTTx VUA in this geographic footprint. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Again this is information that ComReg should have to hand.

<sup>2</sup> VMI-SIRO – [Silicon Republic](#)



**Figure 2**

| <b>Current</b>                     | <b>Urban Commercial</b> |                           |
|------------------------------------|-------------------------|---------------------------|
| <b>Characteristics/Geographies</b> | <b>SIRO Footprint</b>   | <b>Non-SIRO Footprint</b> |
| Eircom offer FTTH VUA              | c50% (a)                | c50% (a)                  |
| Eircom offer FTTC VUA              | c100%                   | c100%                     |
| Eircom offer CG LLU                | 100%                    | 100%                      |
| NBI offer FTTH VUA                 | No                      | No                        |
| SIRO offer FTTH VUA                | 100%                    | No                        |
| VMI offer FTTH VUA                 | No                      | No                        |
| VMI offer FTTH BS                  | No <sup>(1)</sup>       | ? (c)                     |
| VMI offer Retail Services          | <30% (b)                | 85-100%                   |

| <b>Prospectively</b>               | <b>Urban Commercial</b> |                           |
|------------------------------------|-------------------------|---------------------------|
| <b>Characteristics/Geographies</b> | <b>SIRO Footprint</b>   | <b>Non-SIRO Footprint</b> |
| Eircom offer FTTH VUA              | >50% (f)                | >50% (f)                  |
| Eircom offer FTTC VUA              | <100% (d)               | <100% (d)                 |
| Eircom offer CG LLU                | No                      | No                        |
| NBI offer FTTH VUA                 | No                      | No                        |
| SIRO offer FTTH VUA                | 100%                    | c40% (e)                  |
| VMI offer FTTH VUA                 | No                      | No                        |
| VMI offer FTTH BS                  | No <sup>(1)</sup>       | ?                         |
| VMI offer Retail Services          | <30% (b)                | 85-100%                   |

(a) Estimate

(b) Estimate at the upper end of the scale. SIRO and VMI overlap may be considerably lower is unlikely to increase.

(d) While it is not possible to estimate if and when Eircom decommission FTTC over the review period, it is reasonable to assume that were Eircom continue to offer FTTC prospectively it is likely to be more prevalent where SIRO do not currently have coverage.

(e) Based on SIROs plans to reach 770k premises. This would represent 310k currently in the Non-SIRO footprint.

(f) Eircom's coverage in the existing SIRO footprint and Non-SIRO footprint is likely to increase from current levels. However, given greater opportunities for subscribers may exist in the Non-SIRO, Eircom may achieve higher penetration here.

There are no obvious differences in the products offered by SIRO or Eircom from a technology perspective but it is notable that because SIRO carryout network **surveying in advance of wholesale customer orders** this lends itself to a better end-user experience in terms of setting expectations around standard v non-standard orders.

On balance it is not clear that a further distinction of geographic markets within the Urban Commercial Area would be merited but there is certainly sufficient evidence to suggest that geographically differentiated remedies is merited between the SIRO and Non-SIRO footprints in that market. In particular it would seem reasonable that Eircom should be permitted to compete more robustly **in the wholesale market** in the SIRO footprint but given Access Seekers have no alternatives to Eircom in the Non-SIRO footprint such latitude should not be granted.

### CG – WLA market definition should be modified

While the IA will eventually be serviced 100% by NBI FTTP VUA, it is a fact that for a large portion (possibly greater than half) of the review period this will not be the case and in such a scenario many end-users' **only option** will continue to be **Eircom's CG broadband** platform. As such the CG WLA market clearly takes on a distinct geographic dimension in terms of being identified by where NBI has not yet made services available. During this period, absent regulation, [REDACTED]

Eircom's market power in the CG WLA market in the IA **will only be undermined** by NBI. [REDACTED]

[REDACTED] As noted in the SMP guidelines market analysis "*is not a mechanical or abstract process*" and requires "*an overall understanding of the mechanics of a given sector*". Understanding the mechanics specific to Ireland is therefore important and in this respect, the transition from copper to fibre in the IA reflects a unique situation whereby the Network Operator that is rolling out NBP is not the incumbent. The incumbent however remains in-situ and retains its market power in all respects until such time as a customer has the option of choosing NBI. ComReg must therefore take account of this dynamic specific to Ireland and draw a distinction in the CG WLA market where NG services is not available ("CG without NG – WLA Market") and where NG is available ("CG with NG – WLA Market"). The complete deregulation of the CG-WLA market nationally without regard to this reality would, in SFG's view, be reckless.

### IA-NG WLA Market should be modified to cater for presence and absence of NBI

A similar issue will arise with respect to NG WLA service provided by Eircom but where NBI is not yet providing service. While prospectively, SFG can see that premises in the IA should be classified as being in the NG IA WLA Market **from the time** NBI service is made available, until that occurs these premises *de facto* do not form part of this market and should continue to sit in the WLA Non-IA (or Rural Commercial Area for reasons outlined above) until such time as this occurs. Therefore a premises should only be deemed to be in the NG IA-WLA market once NBI has passed the premises and can provide service to it.

Without such a condition we are left with the **wholly illogical** situation that currently the vast majority of premises in the IA, all of which currently sits in ComReg's proposed NG IA WLA market definition **cannot even avail of an NG service**. Many will be unable to do so **for years** to come. It would truly unique and likely unprecedented to define the geographic boundary of the relevant product (based on the 'focal product') where the 'focal product' cannot even be purchased by the majority of customers wishing to avail of that service in the market.

The reason this is important is because in the pockets of the IA where Eircom currently have rolled out FTTP but where NBI is not yet available, Eircom's market power **remains fully intact** [REDACTED]

[REDACTED] Without this modification to the IA-NG WLA Market we could end up in the perverse situation where a premises in the Rural Commercial Area sits next door to one in the IA (where NBI has not yet provided service [REDACTED])

[REDACTED] ComReg's proposed deregulation of Eircom in this scenario is simply not justified. Currently this proposal effects up to 40,000 premises and potentially more on a forward-looking basis. It would appear to be an oversight that ComReg has not considered the regulatory impact of withdrawing obligations from Eircom in the IA WG WLA.

ComReg should also take account of the fact that the list of premises that will not be covered by commercial operators **is a dynamic list**. It is unclear if or how NBI will be required to provide service to Eircodes not included in the original IA when its contract with the government was signed. Furthermore, the current contract includes provisions for compensation to NBI (**up to €100m**) where **encroachment by private operators has occurred in the IA**. In such a scenario Eircom are the most likely private operator to undertake such network deployment (as they already have). If NBI are compensated under such a scenario they are no longer be obliged to rollout service to these customers. Eircom's market power in such a scenario will be no different than in the Rural Commercial Area but it would be deemed not to have SMP until at least the next market review period. This example highlights the importance and logic of **maintaining Eircom's SMP status until such time as NBI offers service in the IA**.

Summary in response to Q.3 and Q.4

- There is sufficient and compelling evidence to justify a distinct geographic **Rural Commercial Area** market definition.
- There is some evidence that suggests the Urban Commercial Area contains two separate geographic markets split by the "**SIRO**" and "**Non-SIRO**" footprints. Even if this is not the case there is sufficient and compelling evidence to support differentiated remedies between these footprints in a geographically distinct **Urban Commercial Area** market.
- The CG WLA market should be geographically defined by **whether or not** NG services are available in the footprint given the materially different competitive conditions that pertain between these distinctions.
- The IA WLA market definition should be refined to **exclude premises** that have **not been passed by NBI**. It is illogical that a NG market can be so defined where NG services are not even available and where Eircom remain the only provider of NG services in the IA, these premises should properly continue to form part of the **Rural Commercial Area/Non-IA NG WLA market**.

**Q. 5 Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

The assessment of SMP is **inextricably linked** to the definition of the markets against which the assessment is being made. SFG’s responses to Questions 3 and 4 has identified alternative geographic market definitions than those outlined by ComReg. This inevitably requires a SMP assessment against each market definition. **Table 3** summarises the proposal from ComReg in the current consultation and the set of more appropriate market definitions, in SFG’s view, including on the assessment of SMP:

**Figure 3**

| ComReg           |                  |                | SFG              |   |                                    |
|------------------|------------------|----------------|------------------|---|------------------------------------|
| Proposed Markets |                  | SMP            | Proposed Markets |   | SMP                                |
| Product          | Geographic       |                | Product          | Geographic  |                                    |
| CG WIA Market    | National         | None           | CG WIA Market    | NG Not Available<br>NG Available  | Eircom<br>None                     |
| NG WLA           | Commercial<br>IA | Eircom<br>None | NG WLA           | Rural Commercial<br>Urban Commercial*<br>IA - NBI present<br>IA - NBI not present | Eircom<br>Eircom<br>None<br>Eircom |

\*It may be appropriate to split this market on the basis of "SIRO" v "non-SIRO" footprints. Alternatively differentiated remedies may be appropriate in the Urban Commercial market

It is only in the CG WLA market where NG WLA services are available and in the IA where NBI are present would Eircom be unlikely to have SMP for the reasons outlined by SFG in response to Question 3 and 4. In all other markets it is clear that Eircom is capable of acting to appreciable extent, independent of Access Seekers. As the **only provider of WLA services** in the Rural Commercial Area currently and where only FTTP VUA will be offered prospectively, Eircom’s 100% market share renders the SMP designation self-evident.

The only competitor Eircom faces in the Urban Commercial Area currently for **FTTx VUA** is SIRO. This suggests there may be merit in exploring further whether distinct geographic markets where SIRO are and are not present may be merited but equally it may be more appropriate to consider that distinction at the **market remedies phase**.

In the ‘**CG WLA (NG unavailable)**’ market with Eircom again having 100% market share the issue of its SMP is not in question.

Finally in the IA where NBI is not present (“**NG WLA – IA (NBI absent)**”) the competitive conditions faced by Eircom will be no different than is the case in the Rural Commercial Area. Where it rolls out further into the NBP (where NBI has not yet reached) in tandem with ComReg’s proposal to completely deregulate the CG WLA market, **Access Seekers will potentially have no option** for CG or NG WLA. It is clear **no consideration has been given to this scenario** by ComReg including in relation to the RIA. Furthermore, the current proposal may incentivise Eircom to target more NBP areas for FTTP roll-out. While ostensibly ComReg may view this as a positive, it would be a strategy underpinned by gaining **first mover advantage** over

NBI [REDACTED]

[REDACTED] While the act and the EEECC seeks to promote investment in VHCNs this needs to be considered in the context of promoting such investment while at the same time constraining the **anti-competitive tendencies** of investors where they have SMP.

It is notable for example that ComReg are concerned with **protecting the prospective roll-out of FTTP** by **SIRO and VMI** in terms of the remedies imposed on Eircom. Under the current proposals however Eircom would be free to target NBI areas [REDACTED] For the purposes of market analysis and the designation of SMP the fact that NBI is state subsidised should not factor into ComReg's analysis – a point it accepts. As such it needs to explain the difference between its approach to protecting [REDACTED]

Without prejudice SFG's views on the proposed appropriate market definitions as outlined above and the associated SMP designations, it is clear that in the **Non-IA NG-WLA** market provisionally defined by ComReg, Eircom has SMP. With respect to the IA NG-WLA market while SFG acknowledge that NBI's market power is curtailed by virtue of its wholesale only status and under the terms of its contract with the government, ComReg should **continue to monitor its performance** and behaviour in the market over the review period.

**Q. 6 Do you agree with ComReg's market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

SFG does not agree with ComReg's market assessment of the **Modified Retail Broadband Market** absent WCA regulation. It is important to recall that ComReg does not conclude on the precise nature of the Modified Retail Broadband market and as per SFG's response to **Question 2** we are of the view that there is a sufficient basis to consider sub-geographic markets in the upstream markets (in this case Regional and Urban WCA markets) in conducting a market analysis.

In 2018 ComReg identified "*rural areas*" as potentially justifying a sub-geographic definition on the basis that "*there is typically little or no presence of alternative networks*"<sup>4</sup>. This description **precisely covers the Rural Commercial Area** (which would substantially overlap with the **Revised Regional WCA** market) where only Eircom are providing services and where Eircom itself will only provide FTTP prospectively (as confirmed by the **Demand Module** in the ANM). ComReg also noted that separate Modified Retail Broadband Markets may be justified prima facie "*where [there are] differences between geographic areas in the number of competing SPs and market share differences*"<sup>5</sup>. As already

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<sup>3</sup> It is no longer reasonable to assume that all of the IA is commercially not viable. Eircom has already demonstrated that in the case of 40-50k premises previously thought to be not commercially viable that this was not the case. Added to this is the fact that NBI are making significant capital investment in upgrading Eircom's PI infrastructure [REDACTED]

<sup>4</sup> Paragraph 1.49 of D10/18

<sup>5</sup> Para. 8.4 of D10/18

pointed out by SFG in response to Question 2 there are clearly differences between in the Rural and Urban Commercial Areas in this regard.

**Art. 67 (1) of the EECC** requires that ComReg take utmost account of the SMP guidelines in carrying out its analysis including for markets not included in the European Commission’s relevant market Recommendation (EU 2018/72). This includes starting its analysis from a definition of the market that is “**unduly wide**” both from a product **and geographic perspective**. When the Rural Commercial Area, much of which overlaps Regional WCA Market is considered in the context of the “three test criteria” (3CT) it is clear that the imposition of *ex-ante* regulation may be justified. It is equally clear that under a “national” starting point that the extent to which the 3CT is satisfied will be materially and **inappropriately diluted**.

The Revised Regional WCA market continues to be characterised by “*high and non-transitory barriers to entry*” and a market structure that which does not tend towards effective competition “*having regard to the state of infrastructure-based competition*”. As recently as 14 months ago ComReg determined that Eircom continued to have **SMP at 968 of 1,203 Exchange Areas** in the WCA market. The extent to which these barriers to entry and structural changes in these Exchange Areas have been removed since that time is not even considered. The reason for this seems to be entirely grounded in ComReg’s conclusions with respect to the Modified Retail Broadband market which is not a binding/conclusive market analysis in any event.

The threat posed to competition from the withdrawal of obligations in the Revised Regional WCA market is **too casually dismissed** by ComReg based on a market analysis that has set **too broad** a definition for geographic scope of the market. Based on the analysis ComReg has conducted between **170-190k** customers could be impacted by the deregulation of the market. That is a substantial number and represents almost **70% of the entire Eircom WCA merchant market** which ComReg estimates covers up to 260k customers<sup>6</sup>.

This figure also represents up to **almost 40%**<sup>7</sup> of subscriptions in the Revised Regional WCA market according to ComReg’s analysis at Table 14 of **ComReg 21/105**. By contrast in the Revised Urban WCA market **less than 10%** of subscriptions rely on Eircom merchant market WCA inputs. This suggests there remains **substantial differences** between the regional and urban footprints.



<sup>6</sup> Fn 558 of consultation

<sup>7</sup> 170k/438k

[REDACTED]

Furthermore, ComReg's proposal to remove the current **VUA-Bitstream MST** (a WLA remedy) would likely see a **reversal in any competitive gains** made in recent years. We go into greater detail on why this remedy should not be removed in response to **Question 7** but assuming ComReg proceeds with this proposal a RIA on how this might impact on the Revised Regional WCA market (and indeed the Revised Urban WCA market) should be carefully considered. The current RIA does not consider this factor.

ComReg should explain why the criterion outlined in **Table 1 of ComReg 21/105** is no longer deemed relevant for the purposes of assessing the competitive conditions in the WCA market when it was deemed to be appropriate **just over one year ago**. In SFG's view this criterion ought to have been revised as there was **increasing evidence** that it was leading to the **premature deregulation** of a large number of exchanges. This was reflected in the fact that as soon as ComReg deregulated exchanges following **D10/18** or its **Mid-Term Assessment**, Eircom has consistently materially increased the price of bitstream [REDACTED]

[REDACTED] Nevertheless, applying a set of assessments that are too lax, such as the 2018 criterion, is better than applying no assessment whatsoever as has occurred on this occasion.

ComReg has not offered a convincing explanation for the obvious anomaly that where Exchange Areas has been deregulated Eircom has increased prices and that Urban bitstream has tended to be, almost without exception more expensive (and often materially so). In fact, **ComReg wrongly state** that *"generally, the regulated price tends to be more expensive than the commercial price for CG WCA and NG WCA delivered over FTTC"* (p.7.37). SFG trust this is a factual error on ComReg's part given that standalone and POTS based FTTC Bitstream is **28% and 58% more expensive** in urban (deregulated) areas, respectively.

In fact, the only bitstream service that is offered cheaper in the Urban market is for Standalone ADSL (8-24Mb). SFG expect that the number of wholesale customers on this service would be exceptionally low (a small portion of the current DSL base of 57,000<sup>8</sup>) and the lower price is likely to be better explained by Eircom's requirement to meet margin squeezes tests where its own customers are availing of this service. ComReg's suggestion that Eircom's CG bitstream price increases **might be explained by its desire to encourage migration to FTTx** ignores the fact that following deregulation of various exchanges FTTC bitstream **prices increased by multiples** of the increase in many of the CG bitstream services. This explanation is therefore not definitive and other factors appear to be at play.

While FTTP bitstream is charged at the same level (based on **headline/published prices**) in the Revised Regional and Urban WCA markets it should be noted that there is currently no cost orientation obligation on Eircom in the provision of FTTP VUA or Bitstream and so given Eircom can set prices at any level it desires regardless of the footprint and faces no transparency obligation in relation to the Urban WCA market it is impossible to read too much into this fact (e.g. there is no difference in pricing strategies between the geographies). [REDACTED]

<sup>8</sup> Based on ComReg quarterly data Q2 2022

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As ComReg’s analysis in 2021 revealed if NBI are to share the cost of PIA with Eircom in the Rural Commercial Area, Eircom would be in receipt of “windfall gains” (discussed in greater detail later).

In summary SFG consider that there remains a Regional WCA market susceptible to *ex ante* regulation in Ireland that ComReg has failed to identify and based on evidence in the market today we are of the view the footprint should in fact be widened beyond the existing boundaries of the Revised Regional WCA market. In particular we would note:

- ComReg has started its analysis from an “**unduly wide**” perspective based on a flawed analysis of the Modified Retail Broadband market.
- At the very least ComReg should have examined markets based on **existing definitions** and broadened the geographic scope thereafter if required in accordance with the SMP Guidelines and the 2020 Explanatory Note.
- The **removal of the WLA (VUA-BS) wholesale margin squeeze** could have a material impact on the competitive conditions in the WCA market in both the Regional/Rural and Urban footprints. This appears to have been given no consideration by ComReg.
- Where Exchanges have been deregulated to date Eircom has materially increased the price of bitstream [REDACTED]

**Q. 7 Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)?**

SFG agrees with the competition problems identified in this section of the consultation. In particular SFG would draw attention to analysis with respect to ‘Price based vertical leveraging behaviour’. ComReg note that a “*vertically-integrated SMP operator is likely to be better able to sustain a margin squeeze than its **downstream retail competitors***”. This of course is correct, but it is unclear why ComReg has not equally acknowledged this behaviour can also have implications for Eircom’s **downstream wholesale competitors**. By contrast ComReg were alive to this risk in its 2018 review where it noted as follows:

*“Eircom, as a vertically-integrated SP with SMP, has the incentive to use its market power in upstream markets to affect the competitive conditions **in downstream wholesale and/or retail markets**, in particular, through its ability to control the key inputs used by **wholesale customers** which compete against Eircom in such markets” (p. 6.97 of D10/18)*

The reason for the omission of reference to the implications for **downstream wholesale competitors** on this occasion is troubling in light of ComReg’s proposed removal of the existing VUA-BS MST. The very real implications for competitors like SFG as a consequence of this proposal are not negated by ComReg’s failure to even recognise the potential competition problem (on this occasion) or its failure



to carry out a proper RIA of what the withdrawal of this obligation from the WLA market might mean. SFG explain in response to Question 8 why it is **imperative that this existing obligation is maintained**.

SFG agree with ComReg's observations in relation to excessive prices particularly where there is "*no effective pressure to bring them down to competitive levels over the duration of the review period*". We consider there is a real risk of this particularly in the Rural Commercial Area (discussed in response to Question 8.).

The **non-pricing** issues identified by ComReg also have the potential to damage competition. While non-compliance with Eircom's existing EOI non-discrimination obligation is not as problematic in the case of VUA and Bitstream services provided by Eircom compared to PIA for example, certain issues remain of concern. Unlike PIA, all order handling and in-life management of these services is supposed to be managed through the Eircom Unified Gateway (UG). This reduces the risk of Eircom being able to act in a discriminatory manner. However, there are concerns that over the last review period certain activity, particularly around provisioning (through the "*enhanced provisioning process*" (EPP)) now **sits outside that UG process**. [REDACTED]

Once it has been taken outside the UG environment, Access Seekers are effectively operating in the dark in relation to their own customers and often are unable to clearly communicate on an order status with them.

[REDACTED] Access Seekers has no recourse in such situations and are forced to go through the rescheduling process again either through the UG or the EPP.

Therefore under the current review SFG would strongly recommend the removal of Eircom's "**missed appointment penalties**" which has resulted in a significant administrative burden to Access Seekers and is a process that is open to abuse. When the current regime was implemented, it was negotiated with Access Seekers at that **advent of the launch of NGA services**. However, Access Seekers should not be stuck with a charging regime that is inherently unfair and unreasonable in perpetuity particularly when aspects of **the process has change materially** from what was envisaged when the penalty was agreed. We are also concerned that the current penalty creates the wrong incentives for Eircom's subcontractors – it is financially and reputationally optimal to blame customers than bear the responsibility themselves. The ongoing imposition of such a charge amounts to **de facto regulation of Access Seekers by the SMP provider** which is anathema to how regulation should operate. It is the SMP provider, not the Access Seeker, that is supposed to have remedies imposed on it. Eircom currently have no cost orientation obligation on FTTP and as such the justification for such a penalty is entirely redundant especially in an environment where there is such a lack of transparency to what is actually occurring in the field [REDACTED]

[REDACTED] By contrast there are insufficient service credit penalties under current SLAs to incentivise Eircom in the same way and a material revision to existing SLAs is required.

SFG therefore seek clear guidance from ComReg as part of this review on whether Eircom, as the SMP provider, can continue to enforce “missed appointments” charges [REDACTED]

ComReg has identified the potential problem, absent regulation, of Eircom withdrawing access to services already granted. SFG are concerned that there is evidence this is already happening in the market with respect to FTTC VUA/BS. In ComReg 21/43 it set out its view on how the migration from legacy to modern infrastructure should be managed (aka “Copper Switch Off” – CSO). [REDACTED]

[REDACTED] The problem is exacerbated by the fact that there is no guarantee that the customer can actually receive FTTP in all instances and even if they can, on when it will be delivered. This is because **Eircom do not survey their network** in advance of an order being received unlike SIRO and NBI. SFG would call on ComReg to deal with this withdrawal of access issue separately and/or as part of the current review.

#### **Q. 8 - Do you agree with ComReg’s proposals in respect of remedies in the Commercial NG WLA Market?**

At the outset SFG would refer ComReg to our response to **Questions 3 and 4**. SFG does not agree with ComReg’s approach to its market definition analysis. In this regard SFG are of the view that there is strong evidence to support at least a splitting of ComReg’s **Commercial NG WLA Market** into a **Rural Commercial NG WLA Market** and an **Urban Commercial NG WLA Market**. Therefore, SFG’s response to this question should also be considered in the context of remedies that should apply under those definitions.

However, SFG will first address the question on the basis of ComReg’s Commercial NG WLA market and more specifically in relation to the withdrawal of an existing remedy, namely, the current Wholesale FTTx VUA to Wholesale FTTx Bitstream margin squeeze test (“**VUA-BS MST**”).

#### **Removal of VUA-BS MST**

At p. 11.42 ComReg proposes (a) to end all current MST tests for FTTC and CG based broadband and (b) the removal of the of the MST between **FTTP Bitstream and FTTP VUA**. Combined therefore the proposal entails the complete removal of the VUA-BS MST.

This proposal would represent a **material and potentially hugely detrimental** change to regulation in Ireland. The implications of that change are compounded by, in SFG’s view, the wholly inappropriate proposal to fully deregulate the **Revised Regional WCA market**. These proposals combined runs the

risk of **undermining more than a decade of investment** by Access Seekers in wholesale services upstream from FTTx retail services and downstream from FTTx VUA. Given the magnitude of the proposed changes SFG are troubled by the lack of robust analysis around the potential implications of these proposals including no mention whatsoever in ComReg's Regulatory Impact Assessment (RIA).

SFG are concerned that the materiality of the proposal is entirely underestimated by ComReg as evidenced by the fact that just 2 paragraphs of the consultation ((9.581-9.582) is dedicated to a discussion on this matter. While ComReg does reference the **Oxera Report III** as having also considered this matter, it is instructive that **less than 1 of 84 pages** is dedicated to its high-level analysis of this issue. More importantly, the substance of the limited case put forward by Oxera for dropping the VUA-BS MST is not dissimilar to the case put forward by Eircom but subsequently (rightly) rejected by ComReg in 2018 (discussed below).

Oxera III notes at p. 6.103 that *"if Eircom decided to lower Bitstream prices to engage in squeeze relative to FTTP VUA, then downstream rivals...would be able to lower retail prices. Eircom would not be able to respond by matching these prices given that the FTTP VUAN MST [VUA-Retail MST] prohibits this"*. The Oxera analysis however entirely ignores the possibility that Eircom could target such price reductions much more creatively than a mere *carte blanche* offer to the market in general which **appears to be the limit of Oxera's analysis**. It has entirely ignored the scope and potential distortion to competition from a geographically targeted BS margin squeeze strategy by Eircom. [REDACTED]

#### **Scenario 1 – Use BS to target competitors in the VUA market**

Where Access Seekers currently favour SIRO's (or prospectively VMI's) VUA service, Eircom could offer the backhaul **at below cost** [REDACTED]. This is particularly the case where there is no cost orientation obligation on FTTP VUA. This level of pricing flexibility allows a dominant provider to charge at a level that allows any negative margins on backhaul to be cross subsidised by above cost oriented FTTP VUA pricing or from other services in the case of a bundle. The capability to maintain above cost FTTP VUA prices will be enhanced against the backdrop of a FTTC price that is no longer subject to cost orientation obligation (being replaced by a Price Cap against prices last updated in 2021). This is an example of strategy where Eircom can use a bitstream margin squeeze to target competitors in the VUA market. Its **ability and incentive to leverage its market power in the WLA market** in this manner is undeniable when combined with ComReg's "flagship" approach to the VUA-Retail MST (discussed below).

#### **Scenario 2 – Use BS to target competitors in the WCA market**

However, even where Eircom face no competition in the VUA market e.g. the Rural Commercial Area, it may also have an incentive to engage in aggressive backhaul pricing strategies on a geographic basis to **undermine WCA competitors**. As ComReg has noted at p. 9.371 Eircom's rural FTTP investment is and will benefit from the funding contribution of the PIA revenues from NBI. That is not something ComReg had intended as outlined in its draft CEI Pricing Decision in 2021 whereby it proposed that NBI **would only** have to contribute to the **incremental costs of PIA** in the Rural Commercial Area. As such, based on ComReg's own admission, this revised approach is likely to result in *"windfall"* profits for Eircom in this footprint.

In fact it was ComReg's unequivocal position "that pricing CEI access for NBI's transit access in the Commercial Areas on the same basis as for Generic Access to CEI would lead to excess cost recovery / excess revenues on the part of Eircom leading to **competitive distortions in the Commercial Areas**"<sup>9</sup>. ComReg further described such revenues as constituting "windfall gains" to Eircom and its external consultants Dot Econ noted:

*"if Eir earned significant margins from CEI access supplied to NBI in the commercial area, then 'see-saw' effects lead to lower prices for other services. This could lead to a distortion of competition in **various downstream services**. This risk is our main concern as, unlike transient windfall gains for Eir, its effects could be persistent."* [emphasis added]

The European Commission agreed with ComReg that "windfall profits for Eircom should be avoided" but that it should be done under the "holistic review of [the] regulatory approach to the WLA, WCA and CEI markets, in order to ensure that remedies for all markets are still fit to ensure equal treatment of operators while avoiding cost recovery over-recovery". The EC therefore shared ComReg's concerns that "windfall gains" should not be permitted and did not dispute that in requiring NBI to share the burden of PIA costs in Rural Commercial Area that, all else being equal, such an outcome was likely. The EC was merely of the view that this matter should be dealt with **as part of the current market review/remedies process**.

Nevertheless, despite ComReg reversing its position from 2021 and now proposing that NBI shares the costs of PIA in the Commercial Areas, ComReg makes no mention of the previously identified "windfall gains" to Eircom anywhere in the consultation. When ComReg formed its view that requiring NBI to share the cost of PIA in Commercial areas "would lead to excess cost recovery" it was against a backdrop of Eircom's entry level FTTP VUA price being €23.50. This price is unchanged since ComReg reached that conclusion.

As such the risk previously identified by ComReg (and accepted by the EC) will be and **is now fully in play**. ComReg could propose the imposition of a cost orientation obligation in the Rural Commercial Area for FTTP to address "windfall gains". SFG believe there is strong grounds for this either under geographic market definition of the Rural Commercial Area or **differentiated remedies** under ComReg's proposed market definition. Furthermore, no revision to FTTC pricing has been made since ComReg made its representations to the EC.

It is clear therefore that based on current FTTP VUA pricing, Eircom could use these "windfall gains" to sell below cost backhaul profitably in the Rural Commercial Area [REDACTED]. As per the first scenario, such a strategy would be assisted by the proposed "flagship" approach to VUA-Retail MST oversight (discussed next).

#### **"Flagship" MST approach incentivises VUA-BS margin squeeze**

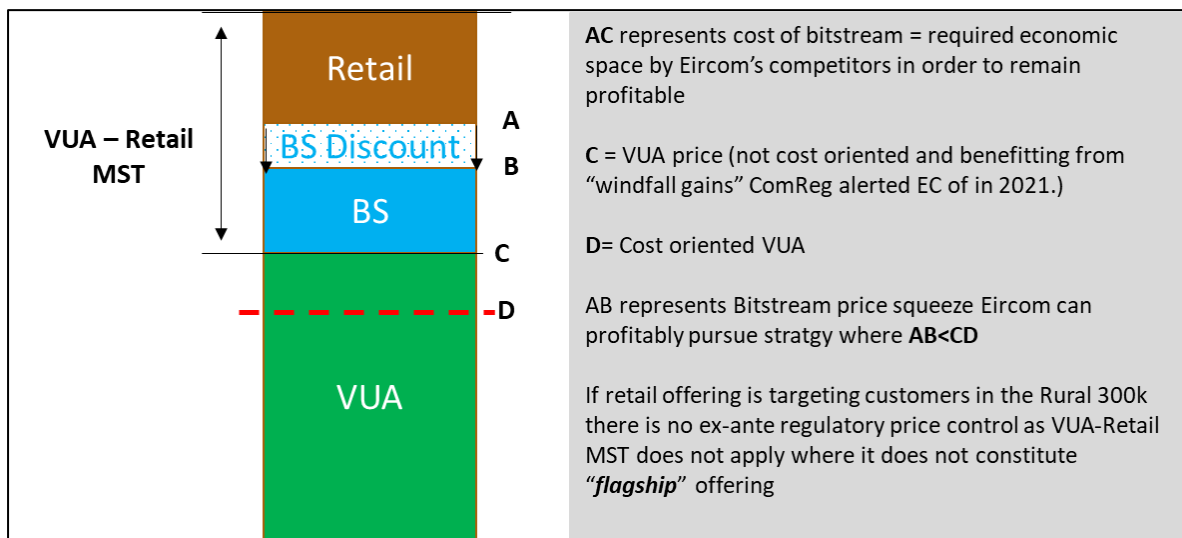
In both scenarios considered above Oxera's suggestion that Eircom would not have an incentive to reduce bitstream prices in this manner because it is constrained by the VUA-Retail margin squeeze (p.6.103 Oxera) **simply has no substance** under the "flagship" VUA-Retail MST mechanism being proposed by ComReg. In both scenarios the relevant footprints could be targeted from a retail pricing

<sup>9</sup> p. 223 of draft 2021 Pricing Decision

perspective and not breach the 25% threshold under which it has **free rein from ex-ante controls**. In fact, combining a strategy of offering below cost BS and more aggressive retail pricing on a geographical basis is **arguably incentivised** by the current proposal given Eircom’s SMP in the WLA market.

Such a strategy can be pursued without any financial losses to Eircom given (a) the “windfall” profits in the Rural Commercial Footprint as confirmed by ComReg (and accepted by the EC) to now be available where NBI share PIA costs in Commercial Areas and (b) the pricing flexibility afforded Eircom on FTTP VUA (see Fig. 4)

**Figure 4**



Furthermore, the **“notional” nature of wholesale input costs** to the VUA-Retail MST materially undermines its effectiveness as a tool to prevent a bitstream margin squeeze as described by Oxera in any event even if the “flagship” approach wasn’t applied. This is particularly the case where bundles are concerned. When Eircom argued in 2018 that it did not have an incentive to engage in a retail margin squeeze because it did not have market power in the retail market ComReg pointed out as follows:

*“ As a vertically-integrated operator with SMP in the WLA Market, given the **notional nature** of its wholesale input costs, Eircom would be able to sustain a reduction in retail revenue for longer than many of its competitors having regard to the more immediate cash flow impact of these wholesale input costs on its competitors (relative to the impact on Eircom)”<sup>10</sup>*

This same argument could equally apply to bitstream **even if** current FTTP VUA prices are currently not above cost. However, that seems highly improbable given ComReg’s “windfall” analysis and Eircom’s freedom to price FTTP VUA as it please. Thus the problem identified by ComReg in 2018 is even pronounced with respect to VUA-BS.

ComReg furthermore noted:

<sup>10</sup> Para. 7.1339 of D10/18

*“...that in an ex-ante context, one of its objectives is to promote the development of effective competition which is achieved, inter alia, by promoting entry and expansion. In this context **an ex-ante margin squeeze test does not necessarily operate under the same parameters as an ex-post margin squeeze abuse assessment**. For example, an ex-ante margin squeeze test can take account of circumstances where the Access Seeker may have differing cost structures relative to Eircom having regard to potential lower economies of scale/scope”<sup>11</sup>.*

Eircom clearly has the referred to **scale advantage** over many of its competitors in the BS market even if ComReg (wrongly in SFG’s view) maintain its position that Eircom does not have SMP in the Revised Regional WCA market. This scale advantage, combined with its WLA market power increases its scope and incentive to engage in the type of BS margin squeeze activity outlined above.

Importantly, in D10/18 ComReg imposed the VUA-BS MST nationally including **making it applicable in the fully deregulated Urban WCA market**. The extent to which this MST has **facilitated and protected competition** in this market is given no consideration in ComReg’s analysis. Equally no Regulatory Impact Assessment (RIA) has been carried out by ComReg as to how removal of this MST could impact competitors particularly where the type of geographic targeting as highlighted by SFG becomes a **commercial tool at Eircom’s disposal**. ComReg should explain why it deemed a VUA-BS MST should apply in the deregulated Urban WCA in 2018 but should not apply to the deregulated WCA markets in 2023.

Given Eircom’s ongoing SMP in the WLA market in the provision of FTTx VUA, as was the case in 2018, then all else being equal there is no logical basis for not maintaining the test as part of the current remedies. All however is not equal, as ComReg materially diluted Eircom’s existing retail MSTs (through the “flagship” approach) and has proposed the nationwide deregulation of the WCA market. **As such the VUA-BS MST is even more critical based on the proposed amendments than it was in 2018.**

SFG are strongly of the view that ComReg should reconsider its current proposal and that a comprehensive RIA is carried out on it that addresses the issues raised by SFG.

In summary, for the same reasons ComReg consider it is important that put in place VUA-Retail MST, it is incumbent on it to maintain a VUA-BS margin squeeze for a host of reasons:

- A. Eircom’s “windfall” gains in the Commercial Area as a consequence of NBI sharing PIA costs **will fund a Bitstream margin squeeze strategy** in the Rural Commercial Area
- B. The “notional” nature of wholesale input pricing to the VUA-Retail MST means this is not an effective tool to ensure a VUA-Bitstream margin squeeze can be avoided **especially where bundled services** are being tested.
- C. The relaxation of the VUA-Retail MST to cover only “flagship” offers means that Eircom **faces no MST on up to 25% of offers**. This effectively amounts to “regulatory forbearance” on these offers (because there is no price control) and would allow Eircom to target VUA competitors (indirectly) and Bitstream competitors (directly) through aggressive/below cost bitstream offers.

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<sup>11</sup> Fn. 1500 of D10/18

- D. There is no reason why at VUA-BS MST would not be appropriate now if it was deemed appropriate in the 2018 review where it applied nationally even where Urban WCA market had been deregulated.

### **Cost orientation of FTTP is now merited in the Rural Commercial Area**

Based on SFG view that there is a distinct **NG Rural Commercial WLA** market for reasons already outlined in our response, it is incumbent on ComReg to impose a cost orientation obligation on FTTP-VUA in this footprint.

The **2013 Non-Discrimination Recommendation** provides guidance on when cost orientation should be imposed by NRAs. It identifies two scenarios<sup>12</sup> in which cost orientation might not be appropriate for a SMP operator:

- (i) Where a cost-oriented price control on a “anchor” product exercises a “*demonstrable retail price constraint*” or
- (ii) Where the NRA can show that operators are providing retail services “*over one or more alternative infrastructures that are not controlled by the SMP operator*”.

It is beyond dispute that **neither of these conditions are satisfied** with respect to the NG Rural Commercial WLA market. ComReg is proposing the removal of all regulation in the CG WLA market and in any event, CG is longer considered to act as a price anchor for NG products as it is not in the same product market definition. Furthermore, there are no competing alternative infrastructures in this geographic market, an assumption ComReg has carried forward through the demand module of the ANM where Eircom retains 100% market share in the future.

In 2018 ComReg considered imposing cost orientation on Eircom’s FTTP VUA and its decision not to was clearly a **close call** as evidenced by this extract from D10/18:

*“ComReg acknowledged it has **residual concerns** that Eircom may have the ability and **incentive to price excessively** in relation to FTTP services even in the presence of a margin squeeze price control. ComReg notes that in the areas where FTTP is currently planned to be rolled out there is little or no competing infrastructure through which a sufficiently meaningful competitive constraint could be exercised on Eircom’s pricing over the period of the current market review. ComReg will keep this matter under review during the price control period and consider whether **more stringent price control obligations are required in future** (including when considered alongside other factors). ComReg will continue to monitor the relevant price trends in this regard”.*<sup>13</sup>

Ultimately ComReg chose not to impose cost orientation at that time on the basis of the inherent “*uncertainty regarding the precise estimation of costs and the penetration levels for FTTP-based VUA services*”<sup>14</sup>. This basis for **regulatory forbearance with respect to cost orientation** no longer holds based on the merits of ComReg’s own argument. The costs of Eircom’s Rural Commercial Area

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<sup>12</sup> Article 49

<sup>13</sup> Para. 7.1361 of D10/18

<sup>14</sup> p. 7.1236 of D10/18

network roll-out are known in **precise detail** to the extent that they have been used to inform the PAM and DAM nationally. Eircom’s customer base in the market is now **well beyond critical mass** and take-up rate trends can **be easily identified**.

ComReg will be aware that if it agrees there is a separate NG Rural Commercial WLA market that it **will be bound** to impose a cost orientation obligation on Eircom’s FTTP. SFG are concerned ComReg may be shying away from the appropriate geographic definition for this very reason. However, even if ComReg maintain the inappropriate **Non-IA** geographic market definition, it is bound to deal with the “windfall gains” problem ComReg itself brought to the attention of the EC where NBI share the cost of Eircom PI. As SFG outlined in the previous section, the “windfall gains” to Eircom will be assured under the new PIA proposals but **no counter-balance** to address this has even been mentioned let alone considered by ComReg in the current consultation. If ComReg are to maintain its position on the geographic market definition and on remedies then it needs to clearly explain in the final decision how this can be reconciled with the unequivocal representations it made to the EC in 2021, which in turn advised ComReg that such “windfall gains” should not be permitted and **should be dealt with as part of this current review**. Current proposals do in any way deal with this issue.

Indeed the “windfall gains” ComReg warned about may in fact be higher than it originally thought. This is because as ComReg point out at p. 9.309 that imposing a price cap on connection charges at €100 will now allow Eircom to recover all FTTP connection costs over the lifetime of the connection asset. This means that **rental charges will no longer be required to make a contribution** to the recovery of these costs (as was historically the case). When ComReg made its observation about “windfall gains” it did not appear to have this information to hand which suggest the prospect that they will be higher than expected is reasonable to assume and the case in favour of FTTP cost orientation and a more circumspect approach to the removal of standing MST obligations is therefore warranted.

#### FTTP Discounts

SFG agrees in principle that “promotions and discounts for FTTP VUA are not targeted at Eircom retail and can be achieved by a range of Access Seekers” except that they should be achievable by **all Access Seekers** rather than just a “range of Access Seekers”. This is especially important to Access Seekers who operate throughout the country or are focussed in particular regions and perform a vital function in terms of offering **price, choice and quality** to end-users. [REDACTED]

[REDACTED]. This could have a **distortionary effect** on the competition and so should be prohibited.

#### FTTC

[REDACTED] An “anchor” that is permitted to rise in this manner inevitably allows the price of what it was supposed to restrain to also continually rise – something which an SMP provider will welcome given its incentive and ability to sustain such increases. What ComReg is proposing is an upward “floating anchor”.



The combination of the CPI-0% price increases and ComReg's proposal to remove all existing MSTs with respect to FTTC [REDACTED]. FTTC is currently the dominant technology on Eircom's network and will continue to provide service to hundreds of thousands of customers for some time even after this is no longer the case. ComReg reference uncertainty about the extent to which FTTP will be rolled out in the Urban Commercial Area throughout the consultation yet a 100% coverage assumption is effectively 'baked' into many of the proposed relaxation of remedy proposals, which in SFG's view are **premature and unwarranted changes**. It is less than 15 months since ComReg determined in D11/21 that an adjustment to FTTC price incorporating inflation would not be justified on the basis that it faced lower **Repair and Maintenance** costs going forward and due the departure of higher salaried staff from the business<sup>15</sup>. Furthermore, in the current PIA review ComReg noted as follows:

*"ComReg considered that [Eircom's subcontractor hedging] should insulate Eircom's PIA costs from the effect of wage inflation as the work required to upgrade Eircom's duct and pole network during this period will be performed mainly by contractors rather than Eircom's own staff. This means that the risk of wage inflation for a significant cost component of PIA costs is borne by the contractor rather than Eircom. ComReg also considered that efficiency gains arising from a renewed PIA network would also be an offsetting factor to wage inflation"<sup>16</sup>*

This observation is at odds with ComReg's claim at p. 9.265 that allowing FTTC prices to increase by CPI would be justified so that "*underlying cost pressures are captured*". Such cost pressures are not in evidence **according to ComReg's analysis in the PIA consultation** and so allowing FTTC prices to increase by inflation over the control period could lead to excessive pricing outcomes. As noted, that risk is **exacerbated by the proposal to completely withdraw FTTC MSTs**. We would strongly urge ComReg to reconsider these proposals in light of this evidence.

#### **Relaxation of FTTP VUA-Retail MST not justified**

SFG do not agree with ComReg's proposal to relax the current FTTP VUA-Retail MST in favour of a "flagship" approach for reasons already outlined in our response to the proposed removal of the VUA-BS MST. Giving Eircom free rein on 25% pockets of the market is **dangerous proposal** intensified by the **removal of all FTTC MSTs**. Given Eircom's FTTP service currently covers only about 50% of its FTTC network means Eircom could engage in a retail margin squeeze across 50% of its FTTC footprint plus 25% of its FTTP footprint with complete impunity from a *ex-ante* regulatory perspective. This level of pricing freedom afforded to a SMP provider would pose a significant risk to competition and especially where the wholesale pricing controls are equally lax [REDACTED]. It cannot be ComReg's intention to facilitate such commercial strategies by Eircom.

Consequently, SFG strongly disagree with ComReg's "flagship" approach as the arguments against this approach are far stronger than the weak justification for its adoption which appears to be focussed solely on a purported **administrative burden**. SFG would note the **FACO market** has now been fully deregulated and ComReg is proposing to fully deregulate the **CG WLA market** The regulatory burden

<sup>15</sup> P. 5.568 of D11/21

<sup>16</sup> p. 7.157 of PIA consultation

on both ComReg and Eircom will therefore have been materially lifted over the next review period and given that up until now there was no known issues with overseeing a range of FTTC and FTTP MSTs for a range of wholesale and retail services this is not an adequate reason not to maintain the FTTP VUA-Retail MST for 100% of offers.

## SLAs

SFG welcome ComReg's proposal on SLAs and in particular the need for service credits to capture the cost to Access Seekers where Eircom has failed to achieve targets. SFG agree with ComReg that *"unreliable or incorrect information can result in poor outcomes for end users in their attempts to obtain a connection to the FTTP network, which can have a negative impact on Access Seekers' reputation"*<sup>17</sup>. [REDACTED]

[REDACTED], that theoretically can access a service, into its ordering handling system without it actually knowing whether (and under what circumstances<sup>18</sup>) service can be provided to such customers. [REDACTED]

SFG are concerned that the current 'Request-Negotiate-BAFO' approach to SLAs provides insufficient incentive to Eircom to offer fair and reasonable SLAs and ultimately many requests are likely to end up in dispute before being resolved. SFG consider that ComReg should identify ways in which Eircom can be incentivised to offer a BAFO that is fair and reasonable without the 'last resort' option of **dispute resolution**. For example, ComReg could provide guidance to negotiating parties during negotiations and/or take non-compliance action against Eircom where it deems it is not engaging in the process in "good faith". SFG are also of the view that **6 months is too long** of a negotiating period. If Access Seekers are of the view that no progress is being made in negotiations they should be permitted to bring disputes to ComReg much sooner. If there is a prospect of a dispute being raised one or two months after the commencement of negotiations it will create at least some incentive on Eircom's part of progress matters in meaningful way.

### Q. 9 - Do you agree with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market?

SFG objections to the withdrawal of a host of existing obligations as covered in detail in response to the preceding questions which ComReg should review. In summary we disagree on the withdrawal to the following obligations:

1. The removal of the current **VUA-BS MST**.
2. The removal of the **FTTC cost orientation** obligation – being replaced by a Price Cap proposal.

<sup>17</sup> p. 9.1117 of consultation

<sup>18</sup> Standard v Non-Standard, wayleave permissions required etc.

3. The removal of all **FTTC MSTs**.
4. The relaxation of Eircom's **VUA-Retail MST** under the "flagship" proposal.
5. The removal of **all obligations** with respect to CG WLA in the IA where **NBI are not yet offering services**.
6. The removal of **all obligations** with respect to NG WLA in the IA where **NBI are not yet offering services**.
7. The removal of **all obligations** with respect to the Revised Regional WCA market.

**Q. 10 - Do you agree with ComReg's proposals on the Regulatory Impact Assessment?**

SFG are concerned that owing to the fact that, in its view, markets has not been properly defined in the current consultation, that this will inevitably lead to **significant gaps** in the Regulatory Impact Assessment (RIA). In failing to identify a geographic market that exists in the **Rural Commercial Area** for the provision of NG WLA services, ComReg focuses no attention on the fact that no cost orientation obligation is being proposed for this market in accordance with the 2013 ND Recommendation.

ComReg has also not given any consideration to the impact of withdrawing obligations on Eircom in the CG and NG WLA markets in the IA where **NBI is currently not offering service**. Eircom's market power and incentive to use in this footprint is **not in any way diluted** by the prospect of NBI's arrival.

As such SFG consider that until such time as NBI are offering service, premises in the IA are not deemed to be part of the IA geographic market. (see response to **Question 4**).

SFG would also encourage ComReg to conduct a proper assessment of the potential implications of the removal of the VUA-BS MST particularly in the context of the scenarios outlined by SFG in response to **Question 8** and the proposed VUA-Retail MST "flagship" approach. We are of the view that any competition that has been allowed to prosper in the WCA (however geographically defined) is materially down to the existing VUA-BS MST which is a remedy that is derived from the WLA market. Eircom's ability to leverage its market power from a market in which it has SMP (WLA) to a market in which it (ostensibly<sup>19</sup>) does not (WCA) is precisely the same in 2023 as it was in 2018. In 2018 ComReg responded appropriately by imposing a VUA-BS MST. In 2023 it is proposing to remove this under precisely the same conditions which reflects an inconsistent approach to regulation.

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<sup>19</sup> SFG are of the view Eircom still hold SMP in the Revised Rural WCA market

Annex 1 – Figure 5

Areas not covered by NBP leaves end-users exposed to Eircom market power

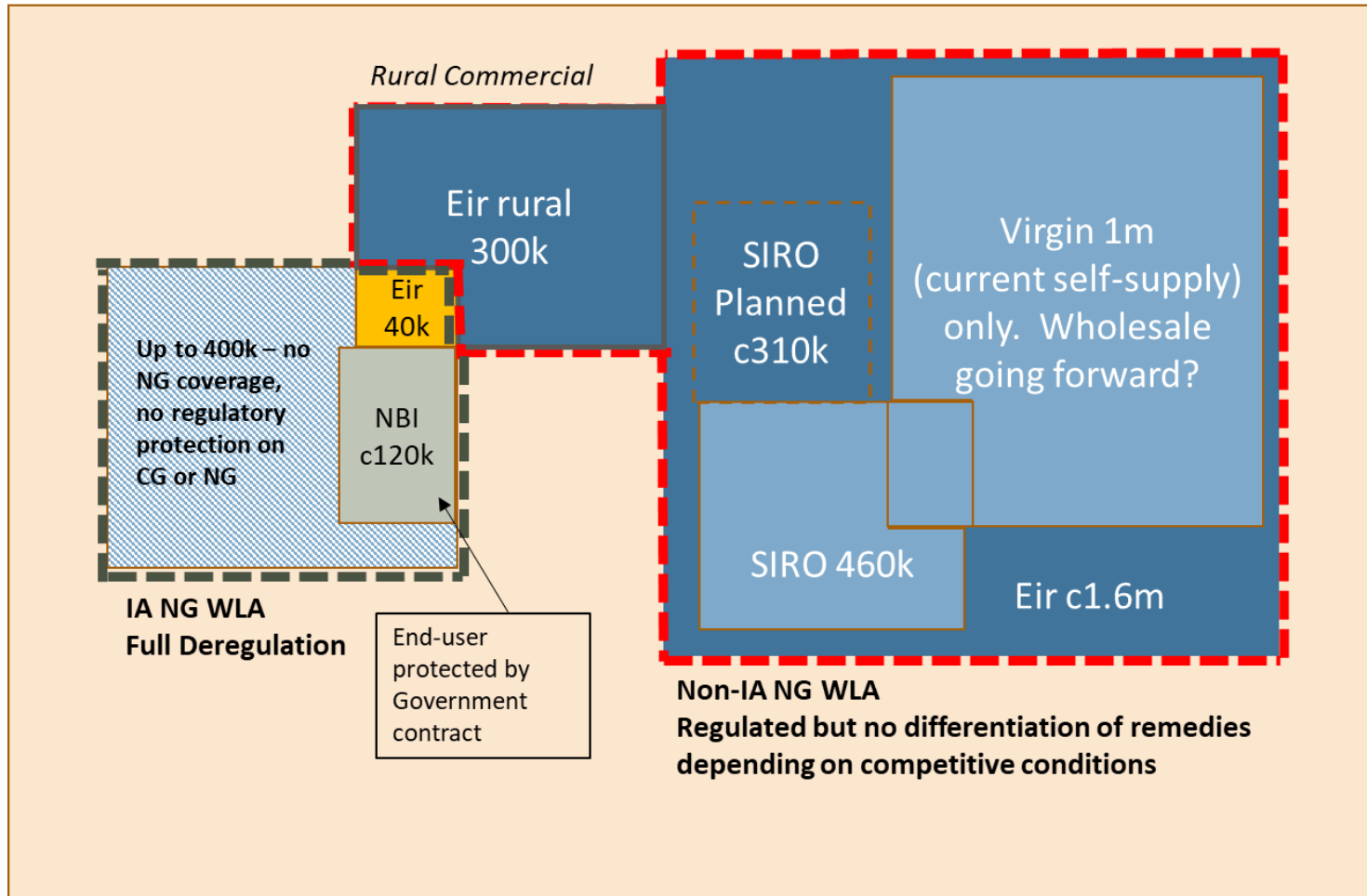
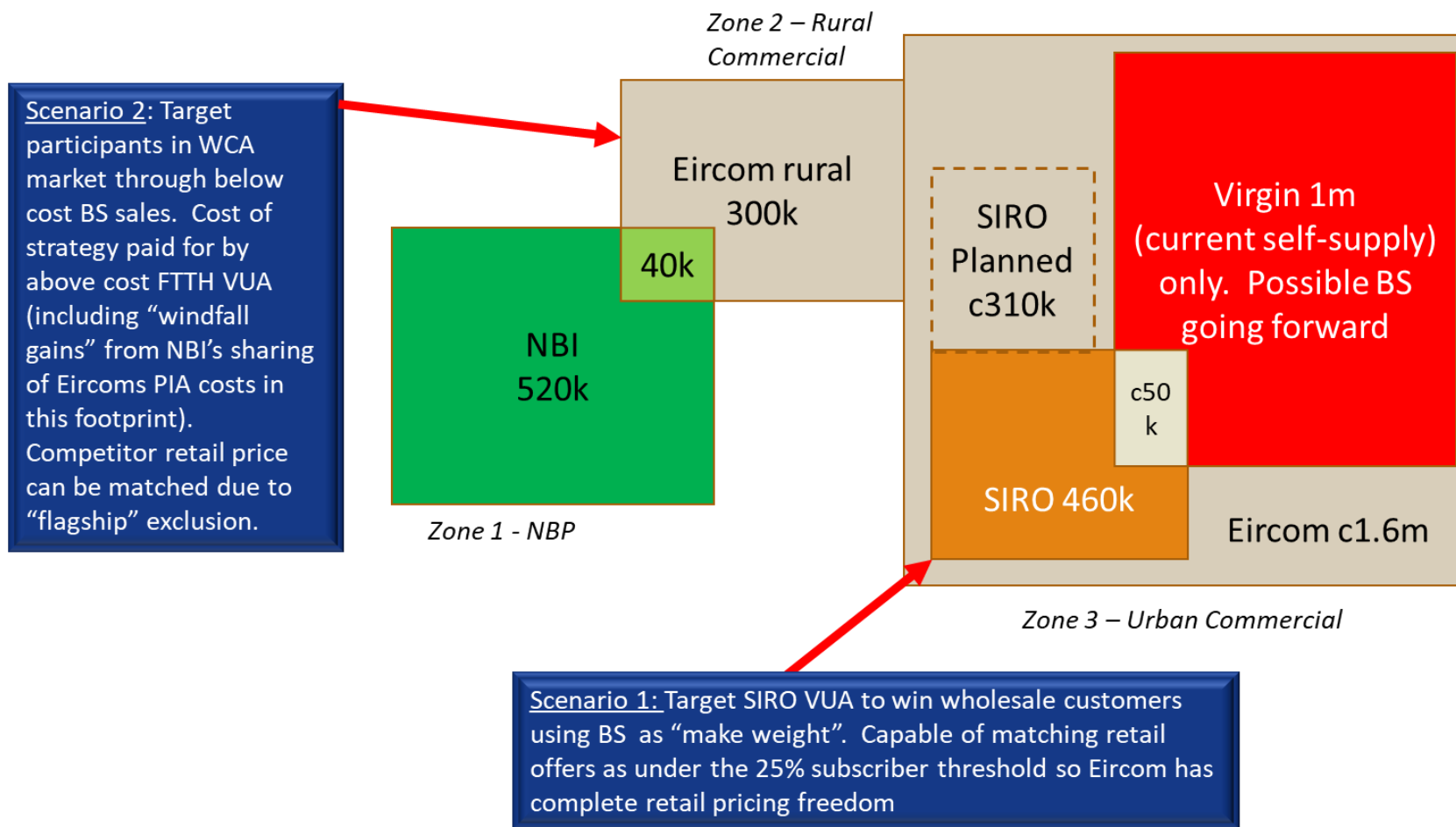


Figure 6

### Visual Aid to Question 8 - Illustrative footprint of fixed NG (FTTx/CATV) market







constrained. The risk of the downside to withdrawing this obligation could be material In terms of anti-competitive behaviour and/or market distortions. The upside appears to reside solely in reducing Eircom's and ComReg's administrative burden. The balance of the argument therefore is heavily in favour of maintaining the existing VUA-BS MST through the next market review period.

Yours sincerely

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Noel Ryan, Chief Financial Officer

Cc: Donal Leavy, Director of Wholesale at ComReg.

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**Virgin Media response to:**

ComReg's Wholesale  
Local Access and  
Wholesale Central  
Access Market Reviews

**March 2023 - Non-Confidential Version**



# Foreword

This is the Virgin Media Ireland Limited ('Virgin Media') response to ComReg's Wholesale Local Access ('WLA') and Wholesale Central Access ('WCA') Market Review Consultations.

This response is non-confidential.



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# 1 Introduction

## Market context and Virgin Media plans

The Commission for Communications Regulation ('ComReg') Market Review Consultations are happening at an important point in the development of fixed communications markets in Ireland. Technology is changing the way that customers now access broadband, with fibre to the premises ('FTTP') starting to take off, and copper-only based services in rapid decline.

A number of organisations (including Eircom, NBI, SIRO and Virgin Media) are investing in the deployment of FTTP networks (Virgin Media is in the very early stages of its investment journey). This creates the prospect of network-based competition emerging over the next five years, which if allowed to develop should bring long term benefits and choice to consumers and to the Irish economy at a time when access to high quality broadband has never been more important.

Virgin Media is starting to embark on a number of strategically important investments. Virgin Media has commenced (since Q1 2022) the deployment of FTTP across its network and is also for the first time moving into wholesale markets, with Vodafone confirmed as the first customer in October 2022,<sup>1</sup> [REDACTED]

Setting the right regulatory framework through the Market Reviews will be crucial to the development of a well-functioning market driven by fair competition. The **emergence of network-based competition is not inevitable** – it needs the right regulatory environment to ensure it develops successfully. In particular, the framework put forward by ComReg needs to encourage long term investment in Very High-Capacity Networks ('VHCNs') and to ensure that in markets where Eircom has Significant Market Power ('SMP') it is prevented from harming the development of network-based competition, which it would otherwise have the ability to do, and which would be to the long-term detriment of Irish consumers and the economy.

[REDACTED]

In its current Strategy Statement for the electronic communications sector ComReg sets out its strategic intent as "...a competitive sector that delivers efficient investment, innovation, and choice." Amongst the five key indicators of this strategic intent are "...regulatory certainty that allows for efficient investment" and "...a sector that is attractive to investors."<sup>3</sup> ComReg makes similar commitments in its Draft Strategy Statement for 2023-25 (which is presently subject to a consultation process).

1 See [Virgin Media announces wholesale deal with Vodafone Ireland](#)

2 Data over cable service interface specification.

3 See [ComReg-ECS-Strategy-Statement-English-Dec-7-Final-Web-1.pdf](#)

There is therefore a great opportunity for ComReg (and a duty for it under the Communications Regulation Act and the European Electronic Communications Code) – to establish an appropriate regulatory framework, which will be one that combines (i) setting strong incentives for investors; (ii) preventing the SMP operator from harming efficient competition; and (iii) safeguarding the long-term interests of consumers. Such a framework will help ensure that network based VHCN competition can develop and in turn help deliver positive outcomes for consumers including better prices, more choice and greater innovation.

In this regard, Virgin Media notes Recital 27 in the European Electronic Communications Code ('EECC'), in which it is stated:

*“Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, where necessary, to achieve effective competition in retail services. An efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.”<sup>4</sup>*

This shows that the European Union ('EU') recognises that incentives to efficient investment need to be **complemented** where necessary by regulation to achieve the end goal of effective competition.

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<sup>4</sup> See Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance. ([europa.eu](http://europa.eu)) paragraph (27).

## 2 Executive Summary

Material progress can be made over the coming years in the development of infrastructure / network-based competition in fixed wholesale markets and in the proliferation of FTTP across the state. If successful, these outcomes will confer benefits to consumers in terms of choice, price, and innovation and to Ireland in terms of competitiveness and productivity.

The WLA and WCA markets will play a key role in the evolution of broadband in Ireland, and it is essential that ComReg creates the right regulatory framework for the potential progress noted above to be delivered.

Virgin Media intends to play a positive role in the development of broadband in Ireland. In Q1 2022 Virgin Media commenced the upgrade of its CATV DOCSIS network to FTTP, while in October 2022, the business announced its entry into wholesale markets for the first time. Again, for these projects to be successful, the regulatory environment needs to be right.

Virgin Media seeks a regulatory environment that incentivises investment in VHCNs while ensuring that competition is allowed to develop, for the good of the market.

Virgin Media supports several of ComReg's WLA and WCA proposals:

- ComReg is right to impose SMP on Eircom in the Commercial NG WLA Market. This market is critical to the successful evolution of broadband in Ireland and evidence shows that Eircom retains dominance in this market on a forward-looking basis;
- ComReg makes a number of proposals that will support investment in VHCNs including the proposal to continue with an anchor-pricing approach; the proposal to maintain (upwards) price flexibility for FTTP; and the proposal to impose a CPI-0% price cap on FTTC VUA; and
- ComReg is right to be alert to risks posed by anti-competitive practice that could occur if it does not impose the right remedies where SMP is found. In this regard remedies such as the FTTC VUA price floor have an important role to play.

However, Virgin Media considers that ComReg's proposals are not optimised in some areas, and certain changes are needed:

- Now is precisely the wrong time to water down the MSTs that are currently in place. ComReg should reverse the proposal to remove the FTTP VUA to FTTP Bitstream MST which will create a direct risk to Virgin Media's own wholesale plans; and
- Virgin Media is concerned that the proposed relaxation in Eircom's ability to do commercial promotions and discounts for FTTP is premature and could harm the evolution of network-based competition. If ComReg does persist with its proposals it also needs to tighten up the process for approval. Please refer to Virgin Media's response at question 8 where we set out in detail our concerns with how these proposals are currently framed.

Given the critical importance of this market review for Virgin Media, Virgin Media has commissioned a report by the economic consultants SPC Network. The report focuses on ComReg's pricing remedies in the Commercial NG market, and is set out in full at Annex 1, with further supporting comments below in response to question 8.

Virgin Media is at the early stages of its investment and rollout of FTTP. The right regulatory outcomes from this market review are therefore critical for Virgin Media as it seeks continued investment to deliver its strategic plans. This market review must send clear signals to investors that the regulatory regime here in Ireland is one that continues to encourage investment in VHCNs.

# 3 Market Definition and Assessment of Market Power

## Key points

ComReg is proposing to place Passive Infrastructure Access ('PIA') in a separate market (it is currently a remedy in the WLA market), which becomes the most upstream of the markets being reviewed by ComReg.

Virgin Media notes this here (in the WLA and WCA response) because, as ComReg would recognise, there is a benefit from all wholesale fixed markets being discussed together in relation to the definition of markets and findings of SMP – which are the foundations of ex-ante regulation.

Other than National Broadband Ireland ('NBI' - who don't really have any other choice), PIA is currently little used for supporting FTTP deployment outside the Intervention Area ('IA'). As discussed in more detail in the response to the PIA Market Review, Virgin Media considers that it is questionable whether PIA take-up will reach any scale outside of the IA through the period covered by the Market Reviews, and so the WLA / WCA Markets will continue to be the key areas where competition (including network-based competition) will develop.

Virgin Media does not consider that regulation of the most upstream market (ComReg rightly proposes that Eircom continues to have SMP on a national basis in the PIA Market) should automatically lead to deregulation downstream of that market. While ComReg should take account of the interconnectedness of the markets, it should also (as it has) carefully examine the market conditions in each market and assess SMP on that basis. Virgin Media notes ComReg's statutory obligation to evidence the clear basis for and provide a detailed statement of reasons in the event it considers de-regulation of an individual market is required. A similar approach was taken recently in the UK in the Wholesale Fixed Telecommunications Market Review ('WFTMR'), where Ofcom imposed SMP on BT in the Passive Infrastructure Market, whilst also finding that BT has SMP in parts of the markets downstream of that.<sup>5</sup>

Virgin Media supports the split of the product markets between Current Generation ('CG') and Next Generation ('NG') products - there is a clear emergence of different services based on technology, with divergence set to continue through the period covered by the Market Reviews, and with CG becoming increasingly obsolete.

ComReg rightly notes that the trajectory for CG is a low base which is moving towards terminal decline and that has an asymmetric relationship with NG services in terms of substitutability. These factors serve as the justification for the proposed removal of SMP in the CG Market. This approach works **provided that** ComReg's wider proposals to encourage the take up of NG services are effective, that migration from copper to fibre is ensured in a truly non-discriminatory manner, and that islands of CG aren't left which could be subject to exploitative practice by Eircom (who are likely to retain near 100% of the CG market through the period of the Market Reviews).

Virgin Media also supports the split of the NG market, noting that the IA is something of an Irish novelty, given that Ireland has (proportionally) what is probably the largest FTTP State Aid plan with a single beneficiary, in the EU. What ComReg appears to be saying here is that NBI will be the dominant undertaking in this market during the period covered by the Market Reviews, but that a finding of SMP is not necessary given the separate set of contractual commitments entered into by NBI with the Irish State which, inter alia, replicate the commitments that would normally be imposed as ex-ante SMP remedies.

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<sup>5</sup> See Statement: Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26 - Ofcom March 2021.

This pragmatic approach works **provided that** the commitments made by NBI are indeed sufficiently robust and comprehensive to protect competition, and that there are appropriate change control provisions to ensure that the commitments are not degraded in future (e.g., through NBI being purchased by another party, from a change in the IA geographic boundary, a change in EU guidance to NRAs etc). Further assurance from ComReg is sought in relation to this point, and this is discussed further in Section 5 below.

Virgin Media strongly supports the finding of SMP for Eircom in the Commercial NG WLA Market. This is clearly right and a key plank to enable growth of network-based competition in this crucial market by enabling, through the implementation of ex-ante remedies, measures that will address the competition problems identified, including prevention of exploitative and exclusionary behaviour that Eircom has the incentive and, absent SMP regulation, the ability to exercise, to the detriment of competition and consumers.

The Commercial NG WLA Market is critical to Virgin Media's own plans and setting the appropriate regulatory environment there – which needs to include SMP and a balanced set of associated remedies – is key to Virgin Media's continued investment in FTTP networks. Virgin Media's own plans support the finding of SMP for Eircom through the period covered by the Market Reviews. In particular, the scale of Virgin Media's FTTP footprint and wholesale business by the end of the period, is likely to be relatively small

[REDACTED]

[REDACTED]

[REDACTED] ComReg is therefore right to conclude that Eircom will have SMP in the Commercial NG market on a forward-looking basis.

Regarding the WCA market Virgin Media notes ComReg's position which is that over the lifetime of the Market Reviews, the Modified Retail Broadband Market ('MRBM') is characterised by low barriers to entry and will exhibit a tendency towards effective competition, even in the absence of upstream WCA Market regulation. This is then used to justify deregulation of the 'Regional' parts of the WCA Market (the 'Urban' part already being deregulated). Virgin Media is somewhat concerned with this approach and the assumptions made by ComReg in this regard – it is clear under Irish and EU law and best regulatory practices that any proposed de-regulation must be accompanied by clear factual and economic evidence as well as detailed reasons necessitating this change to ensure it is in line with ComReg's legal obligations. Virgin Media considers that Eircom retains a dominant position in parts of the Regional WCA Market (including via ownership of exclusive network infrastructure), and encourages ComReg to monitor this market closely, to ensure anti-competitive (or even anti-consumer) practices are not allowed to take hold.

ComReg is proposing significant amounts of deregulation in the Consultations (in the WCA, IA NG WLA and CG WLA Markets), and where this happens, is proposing to implement a 1-year sunset clause for existing services. Virgin Media supports ComReg's overall intent here (which is to ensure a smooth transition from a regulated to non-regulated environment, for the good of consumers) but suggests that ComReg should show a little more flexibility – there may be instances where 1 year is not sufficient to make alternative arrangements to protect the interests of end customers. There is also a gap that needs to be addressed in terms of continuity of Quality of Service ('QoS') obligations on Eircom to go with the sunset period adopted.

It is also important to note that in the event the 'forward-looking' market conditions (envisaged by ComReg) in its SMP assessments do not materialise (and in fact, leave operators commercially damaged, and insufficiently protected against Eircom and / or NBI dominance), it is imperative that ComReg promptly reassesses that market's susceptibility to *ex-ante* regulation, prior to regulatory intervention.

## Response to ComReg questions

**Q1. Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.**

ComReg has identified the main themes in play in retail broadband markets that are relevant to consideration of the WLA and WCA Markets. These themes are the increased use of and importance of high-quality broadband, with ever increasing volumes of data being transmitted over broadband connections; the migration of customers from copper to fibre based services with the improvements to quality and bandwidth this offers; continued use of product bundles, but with stand-alone purchases remaining important (including the increased use of standalone broadband as some customers see little value in having fixed home phone connections); and the change in usage patterns (associated for example with the increase in levels of home working), associated with the Covid-19 pandemic and its aftermath.

Virgin Media has seen the evidence of these themes in its own experience of retail broadband markets. For example, in Q1 2018, Virgin Media's retail CATV customers downloaded an average of 207GB per month, and in Q3 2022 this had risen to 423GB, an increase of over 100%.<sup>6</sup>

Other themes identified by Virgin Media are that, while prices have risen, prices paid per megabyte of information used has continued to decrease. Also, the development of 5G and 4G / LTE is likely over time to increase levels of fixed / mobile convergence, and finally the move to an Internet Protocol ('IP') landscape has helped catapult an increase in over the top ('OTT') type services.

ComReg also identifies the rollout of competing networks / upgrade to networks as a theme in retail markets. On this point, and as noted elsewhere in this response, ComReg should be careful not to view continued rollout of competing scale FTTP networks as an inevitability – it is still relatively early days in the roll-out and take-up of competing FTTP networks in Ireland (Eircom remains dominant in terms of scale and ubiquity). Setting the appropriate regulatory framework (which ensures fair and efficient competition and encourages investment) – particularly in wholesale markets, will be key in driving positive outcomes at a retail level (including the continued migration to FTTP).

**Q2. Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Virgin Media agrees that 'FTTx' is the right focal product in the retail broadband markets. As noted in the ComReg research, there is a clear pattern of migration to fibre based broadband services, with fibre to the cabinet ('FTTC') continuing to support the largest volume of broadband connections by technology type, and the greatest degree of migration happening with FTTP, which offers the highest speed connections.

<sup>6</sup> See [8.-All-Data-Q3-2022.xlsx \(live.com\)](#)



ComReg is also right to include CATV as a demand side constraint to the focal product in retail broadband markets, although it is likely that the degree of constraint would be less strong for FTTP versus FTTC based services (given the bandwidths available from the different technologies). ComReg also rightly notes that any constraint from CATV is also limited by the extent of Virgin Media's CATV network, and that this constraint will tend to decline over time as Virgin Media deploys FTTP within its own network footprint.

ComReg also rightly notes the asymmetric nature of substitution between copper and fibre based broadband services, where the predominant pattern is that customers will substitute copper-based broadband for fibre-based broadband but not vice-versa. Virgin Media expects that this pattern is set to continue.

ComReg proposes to exclude from the relevant retail broadband market (on grounds that they are not substitutes for the focal product): mobile broadband, broadband over Fixed Wireless Access ('FWA'), broadband over leased lines, and broadband using satellite. These exclusions are justified predominantly on grounds of differences in functionality / price. Virgin Media broadly agrees with the approach taken by ComReg. That said, technology and commercial terms do not stand still (particularly over the lifetime of market review). Virgin Media recommends that ComReg considers this further and includes an explicit statement in its final decision, demonstrating that it will remain open to altering its assessment in circumstances where changes justify this e.g., broadband over leased lines becoming less expensive at lower bandwidths, the technology used for FWA improving and FWA-based and satellite-based services gaining retail market share, on a transitory or longer-term basis, and so on.

Virgin Media supports, on an assessment of the overall evidence, that it would not be appropriate at this point in time to separate the retail market by residential / business customers, or by bundled / stand-alone products.

ComReg leaves open its conclusion on the geographic nature of relevant retail broadband markets. It notes that there is evidence of different competitive conditions in different geographies but considers that these geographic differences may diminish over time as competing FTTP networks are rolled out, and in consequence the number of areas characterised by Eircom NG SMP can only reduce. This appears rather premature and speculative, given that FTTP network-based competition for Eircom is not yet well established and that presently, there is a lack of scale FTTP networks which can effectively compete with the Eircom FTTP network. Absent a sufficient regulatory framework (i.e., the maintenance of appropriate SMP remedies), other FTTP network operators will struggle to develop their service offering to a level upon which they might be considered to constitute a (credible) competitive constraint on Eircom (timing for this remains unclear).

**Q3.** *Do you agree with ComReg's product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

**Q4.** *Do you agree with ComReg's geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

## Product Markets

Virgin Media agrees with the focal products selected by ComReg – namely Local Loop Unbundling ('LLU') in the CG market (wherein the LLU focal product rightly includes Eircom self-supply), and VUA (covering both FTTC and FTTP) in the NG market. These are the obvious foundations for competition at a product level in the CG WLA and NG WLA product markets. It is also clearly right, given the decline in the importance of the CG market, to identify a new focal product for the NG market that is likely to be relevant for the period covered by the Market Reviews.

ComReg rightly includes Eircom self-supply of VUA and, on a forward-looking basis, Virgin Media self-supply of VUA on its FTTP network (also noting the further comments on Virgin Media's FTTP plans which are provided below).

ComReg identifies VUA from SIRO, NBI and, in due course, from Virgin Media, as actual or potential constraints on Eircom VUA. While this is right in theory, Virgin Media makes the following points:

[redacted] and (ii) for both the SIRO and Virgin Media networks, the extent of the constraint will obviously be limited by the extent of VUA availability and network coverage.

ComReg is correct to find that CATV will not provide an effective supply-side constraint to either LLU or VUA over the period of the Market Reviews. Virgin Media recently announced plans to overlay its CATV network with FTTP. [redacted]

[redacted] As noted by ComReg, and the WIK report it commissioned, offering WLA services over DOCSIS 3.0 would be expensive and time consuming, as would upgrading the network to DOCSIS 4.0 (which in theory is better able to offer WLA services, but where further investment would still be required). In the European Commission's staff working document ('SWD') accompanying its 2020 Recommendation on markets susceptible to *ex-ante* regulation, reference is made to the inability of DOCSIS 3.0 and 3.1 to provide wholesale access. It states categorically that: "Access to current generation of cable networks (DOCSIS 3.1) can only be provided at central level. Therefore, the WLA market does not include access to cable networks." This all suggests that CATV can be excluded from the WLA market on technological grounds.

Further, the current retail price difference between CATV and FTTP for standalone broadband access means that if a 5-10% SSNIP<sup>7</sup> were applied to WLA under the Hypothetical Monopolist Test ('HMT') the resulting retail price increase would not lead to sufficient retail customers switching to cable to make that price increase unprofitable. Thus, CATV does not impose an indirect constraint on products in the WLA market, and so CATV should also be excluded from the wholesale market definition on economic grounds.

Virgin Media's offerings in the WCA and WLA markets will be solely through the offering of FTTP based Bitstream and VUA respectively, not through further investment in the DOCSIS CATV network. As such, ComReg is right to find that CATV will not offer an effective supply-side substitute in WLA markets (either CG or NG).

Virgin Media also agrees with ComReg that Virgin Media CATV retail broadband is unlikely to act as a sufficiently effective indirect retail constraint on the provision of CG WLA or NG WLA. Virgin Media's CATV network is sub-national in nature, and Virgin Media also notes (and agree with) the ComReg research at paragraph 5.175 which sets out the weakness of constraint by reference to a SSNIP test.

<sup>7</sup> Small but significant non-transitory increase in price.

Virgin Media generally supports ComReg’s finding that localised FTTP networks, satellite, FWA and mobile based solutions do not offer an effective constraint on grounds of scale / product functionality for the foreseeable future (also noting the response to Question 2, above).

## Geographic Markets

Virgin Media agrees that the CG WLA market is national in nature. Against the five geographic assessment criteria, the evidence overall suggests relative uniformity across the state rather than a tendency towards differentiation in different geographies. Accordingly, it is appropriate to find that a national market exists.

For the NG WLA market, ComReg finds that on balance, there is evidence that the market is tending towards a situation of differentiation across the state. This is a finely balanced judgement – ComReg find that three out of the five criteria used are suggestive of a tendency towards geographic differentiation, whereas two are not.

Virgin Media supports the use of the modified Eircom Exchange Area (‘EA’) as a sensible geographic unit. This approach uses a currency that is familiar and well understood by stakeholders, strikes the right balance in terms of size (noting the risks of going too large and small), and which is rightly adjusted to account for coverage from other operators.

ComReg then goes on to use a set of criteria (three in total) based on presence of network operators able to offer VUA / network operator coverage and premises passed to justify the split of the NG WLA product market based on different competitive conditions into the NBI IA (the ‘IA NG WLA Market’), and the remainder of the state (named the ‘Commercial NG WLA’ Market). On balance this assessment is probably right – the scale and extent of the rollout plans for NBI in the IA are apt to create different competitive conditions that exist elsewhere across Ireland.

Virgin Media notes that the UK regulator, Ofcom, explicitly rejected **prospective** network build when defining geographic markets that may be competitive in its WFTMR in 2021 on the basis that regulation could only be reduced or removed if other networks were actually present.<sup>8</sup>

## Comments on Annex 8

ComReg sets out further detail on its geographic assessment of the NG WLA Market in Annex 8 of the WLA and WCA Market Reviews.

In selecting a geographic unit on which to base its assessment, ComReg selects a modified EA. Virgin Media agrees with this approach – the EA as a basic unit is well understood and tends to be stable over time. ComReg then rightly modifies the EA which would otherwise be distorted (and lose its usefulness) due to the composition of the IA.

ComReg then lays out three criteria for assessing differences in competitive conditions. Virgin Media agrees with ComReg that using one criterion only for this assessment would not be sufficient and would be prone to producing unreliable results.

ComReg’s first criterion is that a minimum of three Network Operators (‘NO’s) must actually be present, or reasonably forecast to be present at the modified EA within the lifetime of the market review period, where ‘reasonably forecast to be present’ means “*..that a Network Operator has provided ComReg with data on the specific premises which it will pass with a high degree of forecast reliability.*”<sup>9</sup> Virgin Media agrees with ComReg that it is right to have a minimum of three NOs present – two is not sufficient or likely to produce reliable results. As noted by ComReg, having three NOs also has precedent with other NRAs. Virgin Media is, however, concerned at the inclusion of the ‘*reasonably forecast*’ element.

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<sup>8</sup> See 2021 WFTMR Volume 2: Market analysis ([ofcom.org.uk](http://ofcom.org.uk)) paragraph 7.69.

<sup>9</sup> See WLA and WCA Market Reviews Consultation, paragraph A 8.55 (a).

Even with the additional definition provided, this is somewhat subjective and may not be reliable – forecasts and network rollout plans are, after all, apt to change. [REDACTED]

[REDACTED] an illustration of how unreliable forecasts can be, particularly with the backdrop of a volatile macro-economic picture given factors such as Brexit, Covid-19, the war in Ukraine, labour shortages, supply-chain issues and the current cost of living crisis.

Virgin Media therefore is of the view that ComReg should only use actuals rather than forecasts to achieve its statutory objectives. If ComReg does continue to use forecasts, Virgin Media would suggest it should only include forecasts that are either subject to contractual obligation within a specified time horizon, or where expenditure has been confirmed / signed off for build within a specified time horizon. Further, Virgin Media agrees with ComReg that only NOs that are likely to be credible scale competitors to Eircom should be included in the assessment.

ComReg's second criterion is that the NOs must have network coverage of at least 60%. Virgin Media agrees that the coverage needs to be quite high to signify the potential for effective competition to be present; although ComReg needs to say more on how it derived this figure. Again, ComReg includes premises passed and those 'reasonably forecast to be passed.' Virgin Media makes the same comments as above re: idea of including forecast data in the assessment.

ComReg's third criterion is that at least 50% of premises must be passed by at least 3 NOs. This is a reasonable measure to assess competitive conditions, but Virgin Media would again like to understand the derivation of the 50%. Virgin Media makes the same comments as above re: idea of including forecast data in the assessment.

Finally, it is right that the criteria are evaluated cumulatively, as proposed by ComReg.

**Q5. Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

## **Passive Infrastructure Access Market Review**

ComReg is separately defining a PIA Market, which sits upstream of the WLA and WCA markets, in which it is rightly proposing that there is a national market in which Eircom is the sole undertaking to have SMP.

Because the PIA, WLA and WCA markets are interconnected, it is right that ComReg considers what impacts, if any, the PIA Market will have on the WLA and WCA Markets during the period covered by the Market Reviews.

Virgin Media agrees with ComReg's assessment of the impact the PIA Market on the WLA and WCA Markets. To date, PIA has only been used at any scale by NBI, and in Virgin Media's view this is set likely to continue for the period covered by the review.

As ComReg notes, neither SIRO nor Virgin Media rely to any material extent on Eircom PIA for the provision of WLA or WCA services (nor has Virgin Media plans to do so, although with a better PIA product, Virgin would make more use of the service as discussed further in the response to the PIA Market Review Consultation). It therefore follows that the provision of WLA and WCA services by SIRO and Virgin Media will be largely unaffected by the presence of PIA regulation.

10 See SIRO – Ireland's Ultrafast 100% Fibre Broadband, Built on ESB Network as at 22 February 2022.

ComReg is right not to automatically deregulate markets that are downstream of the PIA market. The approach taken, which Virgin Media supports, is to note and assess the interplay between the markets, plus carefully analyse the conditions in each of the markets. In this regard, Virgin Media references the Commission's 2020 Recommendation and its designation of certain markets that are susceptible to ex-ante regulation. Virgin Media further notes ComReg's obligation to carry out the 3 Criteria Test ('3CT') assessment to determine whether a market not identified in an EC recommendation should be subject to regulation (and by extension have included, certain SMP obligations). Prior to an attempt to deregulate any market, Virgin Media reminds ComReg of its legal obligations and statutory objectives that require it to carry out complete and evidence based SMP/ex-ante assessments prior to such de-regulation.

Virgin Media notes that in the UK, in the WFTMR Ofcom continued to regulate BT in downstream wholesale markets having also found BT to have SMP in an upstream passive infrastructure market.<sup>11</sup>

## **Current Generation Product Market**

In the CG WLA Market ComReg propose to find, on a forward-looking basis, that no undertaking has SMP. This then results in the proposed removal of SMP for Eircom, which is currently designated as having SMP for the provision of CG services.

ComReg's justification for its proposed finding of no SMP turns on the CG WLA Market becoming increasingly small and irrelevant, and on CG services being supplanted by NG services, where the latter will continue to grow over the period of the Market Reviews. In this context, ComReg says that the 100% market share that is held (and in all likelihood will continue to be held) by Eircom in relation to the CG market, is not in of itself a reliable indicator of SMP.

Virgin Media generally agrees with ComReg's analysis and proposed approach – it is clear that CG based services are in rapid decline and are being rendered obsolete in the presence of NG services, with which, as ComReg points out, they have an asymmetric relationship in terms of substitutability.

However, ComReg also notes that **currently**, there is an absence of constraint on Eircom in this market; with the finding of no-SMP being based on a future looking assessment of the market. Prior to an attempt to deregulate any market, Virgin Media reminds ComReg of its legal obligations and statutory objectives that require it to carry out complete and evidence based SMP/ex-ante assessments prior to such de-regulation. Additionally, it is important, to safeguard the interests of consumers who use CG services, that ComReg continues to check its implicit assumptions through the period of the Market Reviews. Virgin Media refers to the importance of ComReg continuing its regulatory 'checks & balances' in respect of the CG WLA market at Section 5 below. In the CG WLA market, ComReg should in particular ensure that there aren't in future vulnerable customers still using CG based services, who may have difficulty moving to NG services, and may not be so well protected following the removal of SMP from Eircom.

## **The Commercial Next Generation WLA Market**

Virgin Media strongly agrees with the proposed finding of SMP for Eircom in the Commercial NG WLA Market. This is the appropriate finding based on current and future-looking conditions in this market.

ComReg's assessment of SMP here (and elsewhere) is based on an assessment of three areas: (i) the state of Existing Competition; (ii) the state of Future Competition; and (iii) the assessment of Countervailing Buyer Power ('CBP'). Virgin Media sets out further comments in relation to this assessment in the Commercial NG WLA Market below.

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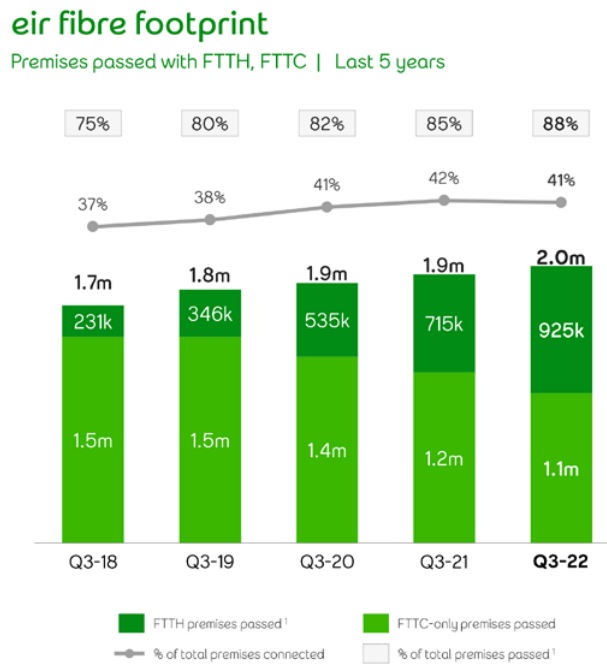
<sup>11</sup> See [Statement: Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26 - Ofcom](#). Ofcom found that BT continued to have SMP in downstream WLA markets in the presence of upstream SMP in the PIA market.

## Existing Competition

ComReg considers several factors in its assessment existing competition, all of which point to the existence of SMP for Eircom.

In relation to **market shares**, ComReg rightly notes that Eircom has a very high current market share, given that its only present competitor is SIRO, which is a much smaller scale operator. Eircom also has a position of considerable strength against current and prospective competitors given the scale of its existing FTTP network deployment, the scale of future deployment, and the number of customers currently using the service.

**Diagram 1 - Eircom Fibre Footprint (from results Eircom presentation for quarter up to 30 September 2022)**



<sup>1</sup> Approximate percentage calculated using an estimated total premises in Ireland of approximately 2.3 million, based on total GeoDirectory address points.

This position of strength is recognised by Eircom itself and Virgin Media notes the statements made in the recent Eircom results which said, *inter alia*, that Eircom's Fibre to the Home ('FTTH') network now passed 925k premises an increase of 29% year on year.<sup>12</sup> As shown in Diagram 1, above, Eircom has continued to deploy FTTH at speed within its larger fibre footprint, and FTTH now makes up 46% of the overall fibre footprint.

Eircom is seen to have an advantage over all operators save Virgin Media (which has not yet entered this market at scale) through dint of being a **vertically integrated** operator.

ComReg also rightly notes that there is an absence of **indirect constraints** in this Market to prevent Eircom from behaving to an appreciable extent, independently of competitors.

In relation to **barriers to entry and expansion**, ComReg notes that such barriers exist, and that Eircom is particularly well placed given, *inter alia*, its incumbency in the Commercial NG WLA Market, and the stage of its FTTP rollout, where significant costs have already been sunk.

On pricing behaviour, ComReg finds that there is no evidence suggesting that Eircom faces effective pricing constraints. ComReg rightly finds that, absent regulation, Eircom would have the incentive and capacity to raise the cost of VUA without real impediment.

<sup>12</sup> See Eircom Group results for third quarter ended September 2022. PowerPoint Presentation (eir.ie)

As the incumbent Eircom has an advantage of economies of scale over a new entrant rival for the self-evident reason of being already present in the market and so having more customers from whom to recover its fixed costs. Even if an entrant has the same Long Run Average Cost ('LRAC') curve as the incumbent, its smaller size will mean that at any volume of production below that of the incumbent it will face a higher average cost per unit.

Thus, given Eircom's high market share it will benefit from economies of scale not enjoyed by any rival.

Further, Eircom's WLA network is geographically ubiquitous. Eircom's FTTP network covers around twice as many properties as its nearest rival and, even where it does not currently provide FTTP, it provides VDSL or ADSL. Eircom also has a ubiquitous physical infrastructure network of ducts and poles that reduces its cost of fibre rollout. Much the cost of these networks is already sunk and may be fully depreciated.

### Potential Competition

ComReg's assessment of potential competition (again) strongly supports a finding of SMP for Eircom in the Commercial NG WLA Market.

In relation to **barriers to entry and expansion**, ComReg rightly notes the advantages enjoyed by Eircom in relation to economies of scale and scope.

When discussing the **strength of competition**, ComReg notes the existence of SIRO and Virgin Media.

[REDACTED]

[REDACTED]

Overall, Virgin Media considers that while competition to Eircom in the form of SIRO and Virgin Media may start to emerge in this regulatory period, its scale will not be sufficient to act as an effective constraint on Eircom on a forward-looking basis. The European Commission's SWD on SMP recognises that the ability to achieve scale may be critical in the determination of whether potential entry is feasible. Once Eircom, SIRO and Virgin Media have completed their planned rollout of FTTP, Eircom will still have the largest full-fibre network, and so still enjoy superior economies of scale, even if that benefit is reduced.<sup>13</sup>

[REDACTED]

### Countervailing Buyer Power

ComReg's assessment of the extent of CBP is further supportive of a finding of SMP. Virgin Media agrees with ComReg's findings – there is an absence of evidence that Eircom faces effective pricing constraints in the provision of WLA, beyond those constraints imposed by SMP remedies. This strongly suggests an absence of CBP, notwithstanding that the purchasers of Eircom wholesale services includes some large and powerful organisations.

<sup>13</sup> See [Staff Working Document - Guidelines on market analysis and the assessment of SMP under the EU regulatory framework for electronic communications networks and services | Shaping Europe's digital future \(europa.eu\)](#)

## The Intervention Area Next Generation WLA Market

In the IA NG WLA Market, ComReg is proposing to find that no undertaking has SMP on a forward-looking basis, and that in consequence, SMP should be removed from Eircom.

The justification offered by ComReg is based on a novel set of conditions that exist in Ireland. ComReg appears to be saying is that it is NBI that will be the dominant undertaking in the IA NG WLA Market on a forward-looking basis, but that its ability to abuse its dominant position will be tightly constrained by the set of commitments that exist between NBI and the Irish State, thereby rendering a finding of SMP and attendant ex-ante remedies superfluous.

This is a rather unusual formulation for an assessment of SMP, although the outcome is appropriate from a competition perspective **provided that** that the following statements are true: (i) the set of commitments entered into by NBI and the Irish state are sufficiently strong and comprehensive, and contain all of the obligations that would otherwise exist through the imposition of ex-ante remedies following a finding of SMP; (ii) there is appropriate change control within the commitment mechanism to ensure that changes in circumstances are dealt with without any dilution of the commitments (e.g. what would occur if NBI was acquired, how would changes to the geographic boundary of the IA be handled and so on); and (iii) the processes available to other parties for taking NBI to task in circumstances of alleged breaches of its commitments should be at least as efficient as those available to parties when an SMP undertaking has allegedly breached its SMP remedies.

Confirmation on these points of detail by ComReg would give further assurance that its finding is sound, and that future competition will not be distorted by an insufficiently constrained dominant undertaking.

Finally, Virgin Media would like to understand if ComReg has considered a 'hybrid' approach whereby NBI would be found to have SMP in the IA NG WLA Market, but that limited SMP remedies tailored to wholesale-only undertakings found to hold SMP (Article 80 EECC) and/or those resulting from voluntary commitments by SMP operators (Article 79 EECC) would be applied (at least at this stage), based on the presence of a formalised set of commitments included in ComReg's Final Statement. The current approach put forward by ComReg appears, on the face of it, to give it very little agency in the future regulation of NBI which seems an unusual situation for a National Regulatory Authority ('NRA') to be in.

Virgin Media discussed the importance of ComReg continuing its regulatory 'checks & balances' in respect of the IA NG WLA Market further in Section 5 below.

**Q6. Do you agree with ComReg's market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

ComReg is proposing to impose SMP and associated remedies on the Commercial NG WLA Market but is proposing to withdraw SMP in the IA NG WLA and the CG WLA Markets. ComReg then considers how this may impact the MRBM in the absence of WCA market regulation, per the Modified Greenfield Approach ('MGA').

ComReg goes on to find that the MRBM is characterised, on a forward-looking basis, by low barriers to entry and a tendency towards effective competition, even in the absence of upstream WCA regulation (but assuming regulation of the Commercial NG WLA Market). This is then used to justify full deregulation of the WCA market, where Eircom presently has SMP in the Regional WCA Market.



While this approach is noted, Virgin Media still has some concerns that there are parts of the WCA Regional Market where Eircom retains a dominant position and where competition is not well established such that Eircom will, under normal market conditions, seek to take advantage of this position.

As recently as its mid-term 2021 review decision ComReg observed that the revised Regional WCA market still had high entry barriers, as shown by the low rate of alternative network deployment. Furthermore, based on observable trends it found the market was not likely to be tending towards effective competition, due to the lower level of potential entry, limited technological developments, and Eircom's high and stable market share. Therefore, ComReg concluded at that stage that the Revised regional WCA Market was not likely to tend towards effective competition.

In its mid-term review, ComReg therefore concluded that the revised regional WCA market passed the 3CT and still warranted the application of *ex-ante* regulation.

ComReg has therefore wholly changed its position in relation to the Regional WCA market since 2021. It would be helpful if ComReg could more clearly outline the specific developments in the last two years, that justify such a change of approach.

# 4 Commercial Next Generation WLA Market Competition Problems and Impacts and Proposed SMP Remedies

## Key points

The Commercial NG WLA Market is an important one for industry (including Virgin Media), and for consumers. This is the market where there is the greatest opportunity for competition to develop, including network-based competition, to the benefit of Irish consumers in the long term. The emergence and sustainability of network-based competition is uncertain and fragile for the foreseeable future and is particularly vulnerable to practices that Eircom could engage in (for which has clear incentive and, absent SMP, the ability to undermine).

ComReg rightly find that Eircom has SMP in this market on a forward-looking basis. Having established this, it is essential that ComReg accurately and comprehensively assesses the competition problems present and designs / imposes an appropriate set of SMP remedies.

## Competition problems

While the assessment of competition problems by ComReg contains good and relevant material, Virgin Media considers that the analysis would be strengthened if ComReg were to also specifically assess the risks of abusive behaviour by Eircom towards organisations such as Virgin Media and SIRO that aim to bring **network-based** competition to Eircom **in addition** to competition that relies on wholesale inputs from Eircom (essentially competition by retailers on the OpenEir platform). Currently, the analysis appears to be more mindful of the latter type of competition, and in consequence, doesn't fully identify the risks to a network-based competition model.

Network-based competition, if it is allowed to develop, offers significant potential benefits to consumers from greater choice, innovation, and sustainability. It appears in the Consultations that ComReg is (rightly) keen to promote this type of competition and so Virgin Media proposes that the section examining the potential competition problems in the market (that will be critical to both Virgin Media and SIRO) contains a more explicit consideration of the risks to this form of competition. ComReg's analysis would be strengthened by a more thorough review of this area.

## Remedies

It is important that the remedies imposed by ComReg encourage investment in VHCNs; prevent Eircom (as the dominant undertaking) from engaging in anti-competitive practices including exclusionary practices that could prevent / arrest the development of network-based competition; and help protect the interests of consumers.

In its proposed pricing remedies, ComReg is right to put forward several proposals that will encourage investment in FTTP networks, both by Eircom and alternative providers such as Virgin Media and SIRO – these remedies include using an anchor pricing approach with FTTC VUA being used as the anchor price; allowing continued pricing flexibility for FTTP; and setting a CPI-0 price cap for FTTC VUA. It is also right that ComReg set a firm price floor for FTTP VUA which is pegged to FTTC VUA. This will be important in preventing the emergence of exclusionary practice from Eircom.

However, Virgin Media does not support the watering down of the Margin Squeeze Test ('MST') proposals – in particular the proposed removal of the VUA FTTP to Bitstream FTTP MST is not sensible at this point. Network-based competition is just starting to take off in this market and needs to be protected from exclusionary or other anti-competitive behaviour from Eircom. Removing the FTTP VUA to FTTP Bitstream MST would provide unwarranted flexibility [REDACTED]

Virgin Media is also concerned about the proposed relaxation on the rules that would allow Eircom to offer wholesale promotions and discounts for FTTP. Virgin Media considers that this is a premature step given that competition is still nascent in the market, and that it would be better to maintain the current arrangements that have worked well for stakeholders (including Eircom). If ComReg does press ahead with the proposals, the process for evaluating requests needs to be improved – in particular a process of public consultation would improve transparency and decision making by involving all interested / affected parties rather than a process which is (at least for a large portion of the assessment) bilateral between ComReg and the SMP operator and that lacks transparency.

Virgin Media also notes that the action of a dominant undertaking **discussing** potential discount schemes with potential customers (whether or not they come to fruition) can have a chilling effect on competition – with potential customers unwilling to commit to an alternative provider until the commercial terms offered by the dominant undertaking are clear. ComReg needs to further consider this risk in developing its policy. In this regard, Virgin Media notes that Eircom has **already** sought to commence a discussion with industry on offering rental discounts for its FTTP VUA and Bitstream services (notwithstanding that at the time of making the notification Eircom is banned under regulation from offering discounts to FTTP VUA).<sup>14</sup> Virgin Media considers this a provocative action by Eircom, and it emphasises that the concern raised on this topic is real.

Virgin Media's comments on ComReg's proposed pricing remedies in the Commercial NG WLA market are also supported by a report that Virgin Media has commissioned by the economic consultants SPC Network. This report, which should also be fully considered by ComReg as part of its review, lays out in detail an evaluation of: (i) ComReg's proposed price control remedies; (ii) ComReg's proposed arrangements in relation to Eircom price decreases and wholesale commercial offers; and (iii) ComReg's MST proposals. In addition to evaluating the proposals, SPC also makes recommendations where the ComReg proposals can be improved.

Virgin Media supports the application of a full suite of non-pricing remedies. Given the finding of SMP for Eircom, the critical role that this market will play in the development of VHCNs in Ireland, and the transitional stage this market is at, the stability and certainty offered by a comprehensive set of *ex-ante* remedies is justified and needed.

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<sup>14</sup> See Eircom notification CRD-967.

## Response to ComReg questions

**Q7.** *Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

As discussed further below, Virgin Media considers that the analysis would benefit from a more specific and detailed consideration of the risks posed to network-based competition developing on a sustainable basis. That said, Virgin Media broadly agrees with the top-level assessment conducted by ComReg.

ComReg is right to find that, absent regulation, Eircom would have the incentive and ability to harm competition and consumer outcomes in the Commercial NG WLA Market. In this context, ex-ante regulation has a critical role to play in preventing the possibility of anti-competitive practices Eircom.

The Commercial NG WLA Market will be the main broadband market in Ireland where competition, including network-based competition, has the opportunity to develop, to the great benefit of the Irish economy and consumers (residential and business).

However, as ComReg rightly finds, Eircom is dominant in this market, and will continue to have dominance on a forward-looking basis. It is in Eircom's commercial interests to prevent and / or suppress the development of network-based competition in this market. If Eircom was left unchecked in this market, it would have the ability to control how the market evolves by setting the wholesale (VUA) terms that retailers' offers are based on (notably in terms of the price to quality (including downstream and upstream speed ratios), maintain / grow market share, and reduce choice for consumers, and – in the long term – leave consumers paying higher prices than would exist in a more competitive environment.

Regulation therefore has a key role to play to help create the conditions in which competition, including network-based competition (which is likely to be the most sustainable in nature) is able to develop. At this early stage of the development of competition in the Commercial NG WLA Market, and in the presence of a dominant Eircom, regulation must prevent abuse arising in the first place – and so ex-ante measures are needed. It will not be sufficient at this stage of the market's development to rely on ex post Competition Law – the damage to competition would already have happened to the great detriment, potentially in the long term, of consumers.

Virgin Media is at the beginning of its investment in rolling out FTTP over its network and is launching a wholesale business for the first time. The Commercial NG WLA market is central to Virgin Media's plans. If Virgin Media can compete fairly in the Commercial NG WLA Market, it is confident that the plans can be successful, and bring long-term benefits to competition and consumers. However, Virgin Media remains very concerned that, absent appropriate regulation, Eircom would inevitably seek to damage Virgin Media's progress by abuse of its dominant position in the market and by leveraging that dominance into other markets.

ComReg that has (sole) responsibility for monitoring and enforcing compliance with SMP obligations, and that every instance of non-compliance has the potential to seriously damage competition (as well as investment confidence). As indicated in paragraph 6.12 of ComReg's draft Statutory Statement, while 'partial compliance' by a SMP operator may be sufficient for the purposes of encouraging market entry, every form of discrimination and / or anti-competitive conduct, continues to wear away the industry's confidence that appropriate compliance structures are in place. As such, it is crucial that an appropriate ex-ante regulatory framework is maintained.

In its analysis, ComReg examines three types of abusive behaviour: exclusionary practices, leveraging and exploitative practices. Virgin Media comments below on each in turn.

### **Exclusionary practices**

This area of abusive behaviour is of particular importance to Virgin Media. As an organisation that plans to bring network-based competition to Eircom in the Commercial NG WLA Market (which will be in the early stages of its competitive development during the period covered by the Market Reviews), practices by Eircom aimed at preventing or harming the development of competition are particularly relevant.

ComReg defines exclusionary practices as a “..specific set of actions carried out by an SMP SP in an attempt to defend or consolidate its position in a relevant market, by constructively or actively blocking potential competitors from entering (or expanding in) the market, or by inducing or forcing competitors to exit the market, where they are already present.”<sup>15</sup> Virgin Media agrees with this definition, although again it would be useful for ComReg to identify the different forms of competition that exist, and that exclusionary practices could harm. ComReg then goes on to identify a set of (non-exhaustive) exclusionary practices that could occur.

ComReg notes the risk of Eircom imposing a **margin squeeze** between WLA and downstream (which could be both at the retail and wholesale levels) services to reinforce entry / expansion barriers in the Commercial NG WLA market and related markets. Virgin Media agrees with this assessment. Virgin Media considers that there is a risk of Eircom imposing a margin squeeze between WLA **and** retail markets and between WLA and WCA markets. [REDACTED]

[REDACTED] Virgin Media makes further comments on the latter in the response to Question 8 below. ComReg should also refer to the SPC Network report on this topic.

ComReg is right to identify the risk of Eircom using **exclusivity** arrangements to damage the emergence of competition. However, the brief discussion in the Consultation suggests that ComReg is defining such arrangements too narrowly – focussing as it does on the risk of practices that would raise switching costs for Access Seekers and end users. The ComReg assessment would benefit from a wider examination of the risk associated with exclusivity-type arrangements. This could include, for example, the risk of Eircom developing commercial offers / promotions with wholesale customers that were loyalty inducing, and that would have the effect of reducing the scope of business that would otherwise be prospectively available to network-based competitors such as Virgin Media (and so have a chilling effect on competitive switching). Virgin Media considers that this type of risk is significant, and ComReg should examine it further – particularly in circumstances where it is proposing to loosen the regulation on Eircom in this Market in relation to its ability to do wholesale deals and promotions for FTTP based VUA (which Virgin Media considers inappropriate). This appears to be a lacuna, and ComReg should address this in the Final Statement. Virgin Media also makes further comments on this topic in its response to Question 8 below. Virgin Media again notes the recent notification by Eircom (CRD-967), which highlights that this concern is a credible one that needs to be addressed.

ComReg’s analysis would be strengthened by recognising that, absent regulation, Eircom would have the incentive and ability to engage in pricing strategies that could be described to be predatory in nature, in that they would have the intention or effect of harming the entry and / or development of competition, whether that be network-based or on the OpenEir platform. Such strategies could include pricing services **below** the level at which efficient network-based competition could happen.

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<sup>15</sup> See WLA and WCA Market Reviews Consultation, paragraph 8.9.

This is important as it tees up the need for remedies that deal with the risk of the SMP operator engaging in anti-competitive practices by pricing too low as well as pricing too high (noting that a strategy of pricing low to exclude competition would likely result in higher prices for consumers in the long term).

ComReg also notes potential risks of Eircom **refusing to supply access** to WLA products and **raising the costs of downstream competitors that rely on Eircom WLA inputs**. ComReg is right to identify these risks, which are generally less relevant to Virgin Media given that its plans do not rely to a large extent on taking input Eircom WLA inputs.

## **Leveraging**

ComReg rightly identifies leveraging as a potential risk, whereby “..a vertically-integrated SP with SMP in one market leverages its power to exert influence in other vertically or horizontally related markets..”<sup>16</sup>

Again, ComReg’s analysis appears to place rather greater emphasis on the risk to competitors using Eircom WLA inputs, as opposed to competitors bringing network-based competition. The analysis would be strengthened by ComReg examining the risks to both models.

Virgin Media is particularly concerned in relation to what ComReg refer to as ‘Vertical Leveraging’ whereby an operator can leverage its SMP position in downstream markets, in which it is also active. Virgin Media agrees that this is a risk, and there is a risk to Virgin Media’s business plans through Eircom exploiting its SMP in WLA Markets (and potentially PIA Markets) in the WCA market such as by offering terms in the WCA market that had the effect of reducing network-based competition. A specific risk that is of great concern to Virgin Media is that Eircom will seek to leverage its dominance in the Commercial NG WLA Market into the WCA market, by conducting a margin squeeze between VUA FTTP [§< [REDACTED] >§]. Virgin Media makes further comments on this in its response to Question 8 below.

The Non-Price Based Leveraging behaviour rightly identified as a risk by ComReg is less relevant to Virgin Media as it appears to be more about risks to competitors that rely on Eircom WLA inputs.

## **Exploitative Practices**

ComReg rightly identifies the risks of Eircom, absent regulation engaging in exploitative practices, whereby it would increase prices above and / or reduce output below competitive levels, to the detriment of consumers. Such a strategy would have the effect of inflating Eircom’s profitability.

This outcome would be a real possibility in circumstances where Eircom was not subject to an appropriate suite of SMP remedies that would prevent (i.e., *ex-ante*) it abusing its dominant position. Exploitative practices, to an extent, are the end game of an SMP operator that has been successful in arresting the development of competition and a sign that such practices have been successful. ComReg should explicitly recognise the role that network-based competition has to play in preventing the SMP operator from being able to engage in exploitative practices. This in turn emphasises the role that SMP and the attendant remedies must play in allowing efficient network-based competition to get established, and that a key risk that needs to be considered is the specific risk that Eircom will seek to prevent network-based competition taking hold in the Commercial NG WLA Market.

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<sup>16</sup> See WLA and WCA Market Reviews Consultation, paragraph 8.11.

**Q8. Do you agree with ComReg's proposals in respect of remedies in the Commercial NG WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Given the criticality of the Commercial NG WLA Market to Virgin Media's own plans, getting the right set of *ex-ante* remedies is of paramount importance to Virgin Media as well as the industry as a whole.

ComReg should also consider the content and recommendations in the SPC Network report (contained at Annex 1), which Virgin Media has commissioned and that focuses on ComReg's proposed pricing remedies in the Commercial NG WLA Market.

ComReg's proposals need to meet its statutory objectives and legal obligations and (i) set the right signals to encourage investment – particularly infrastructure-based investment, which will facilitate network-based competition that is sustainable; (ii) ensure appropriate protections are in place to prevent Eircom (as the SMP undertaking) from abusing its position of dominance and thereby harming the development of competition, including network-based competition; and (iii) driving positive outcomes for consumers in the long-term.

Virgin Media provides detailed commentary on ComReg's proposed pricing remedies and non-pricing remedies below.

### **Non-Pricing Remedies**

ComReg is proposing to re-impose a broad suite of non-pricing remedies in the Commercial NG WLA Market. This is the appropriate approach for ComReg to take – this is a critically important market for the development of broadband in Ireland, and it is one that has clear competition problems arising from the presence of an SMP operator (Eircom). The market is also at an important transitional point in its development – in which, for example, network-based competition is not well established and vulnerable to various forms of anti-competitive behaviour by the SMP operator.

Given this context it is right that ComReg imposes a comprehensive suite of non-pricing remedies – this will be needed to provide stability across the regulatory period and to underpin the development of sustainable competition.

### **Access Remedies**

The access remedies are necessary to give access seekers the inputs that they need from Eircom to offer their own services, and to compete effectively in the market.

ComReg's draft Strategy Statement holds true that access seekers' confidence to continue to invest may continue to be undermined if, for example, they discover that they have been treated in a discriminatory fashion or that access requests have been unnecessarily delayed. Thus, ComReg is right to require Eircom to meet a full set of remedies, including obligations to meet reasonable requests (and justify where requests are rejected); obligations to provide access to specific products and facilities that are needed to foster competition; plus obligations to meet certain standards offering services on fair and reasonable terms, having fit for purpose SLA arrangements, and being required to negotiate in good faith.

ComReg includes the new obligation for Eircom to offer an 'Emulated FTTC' service (in cases where FTTC is not available due to Copper Switch Off or 'CSO'). This is the right approach for ComReg to take and is required to ensure the effectiveness of ComReg's anchor pricing approach (discussed further below).

ComReg includes an obligation, when Eircom is seeking to withdraw a service, that it obtains prior permission from ComReg ahead of doing this. It is right that ComReg includes this point of control, but Virgin Media further requests that ComReg provide assurance in the Final Statement that it will take into account the views of all interested industry stakeholders as part of its decision-making process for product withdrawals.

For the Eircom product development process, ComReg is proposing some simplification. Virgin Media agrees that the current process is complex and rather opaque, and there is a risk that this could assist Eircom in obfuscating / delaying requests it does not want to progress, to the potential detriment of competition. Proposals that improve transparency and enable a better assessment of how well the process is functioning are therefore welcome.

ComReg then goes on to say that it is not proposing to impose a maximum timescale on product development for Eircom (as it is separately proposing for PIA), on the grounds that imposing such an obligation would not cater for the wide range in complexity of the requests that Eircom may need to consider. It is hard on the evidence put forward to assess how sensible this approach is – for example, if further analysis showed that the Eircom product development process in this market was too slow and cumbersome, irrespective of the complexity of the request – then there could be a case for imposing a similar obligation as that being proposed for PIA (perhaps with an ability for Eircom to get longer if justified on a case by case basis). It would be helpful if ComReg could offer more analysis on the performance of the existing Eircom process to justify its proposal.

### **Non-Discrimination**

It is clearly essential that Eircom continues to offer regulated services in a manner that does not favour its own downstream retail business, as this would immediately undermine the whole purpose of ex-ante SMP regulation. ComReg is accordingly right to re-impose non-discrimination obligations.

### **Transparency**

Transparency is essential for all market participants to understand the wholesale services that are subject to ex-ante regulation, irrespective of whether they are using them, considering using them, competing with them, or any combination thereof.

Transparency obligations also give ComReg necessary insight into whether other obligations imposed are working effectively (or not), and so be in a position take timely action where required. It is also essential that access seekers are given necessary notice where changes to process, terms and conditions are happening – this will enable them to make changes their side and so not be disadvantaged from a competition standpoint. Virgin Media therefore supports the broad set of transparency obligations proposed by ComReg.

### **Pricing Remedies**

The pricing remedies imposed by ComReg in the Commercial NG WLA Market will play a critical role in how that market develops.

Given the importance of these remedies to Virgin Media's own plans, Virgin Media has commissioned SPC Network to provide a report that focuses in on this topic, and provides both an evaluation of the ComReg proposals, and makes recommendation where the proposals could be improved. The full report is contained in Annex 1 to this response. Where relevant the response to this question also contains references to the SPC Network report.

### **Anchor product approach**

Virgin Media agrees with ComReg's anchor product approach. It helps to underpin the separate strategy of giving price flexibility to Eircom in relation to FTTP VUA (provided that the prices are above a price floor), whilst helping to prevent the risk of FTTP VUA prices becoming excessive.



In order for the anchor product approach to work, the product chosen needs to be an effective anchor for the whole period of the Market Reviews (i.e., to be a real constraint preventing Eircom from raising FTTP prices excessively).

Virgin Media considers that FTTC VUA is, at this point, a credible anchor. This could, however, change over the period of the Market Review for example, in circumstances where the availability and bandwidths on offer from FTTP grew to such an extent that the typical bandwidths associated with FTTC VUA based services were no longer a credible alternative. ComReg should stay alert to the risk of the FTTC anchor becoming less effective (or ineffective) over time and intervene in future if required. For now, and subject to ongoing ComReg review, FTTC is a pragmatic choice.

ComReg should also guard against any gaming from Eircom that could impact the effectiveness of the remedy, for example, through Eircom offering a lower bandwidth FTTC product that would be a less effective constraint on lower bandwidth FTTP based services. Any such moves should be subject to proactive regulatory scrutiny and intervention as needed.

This topic is further discussed in the SPC Network report, including the importance of ComReg monitoring the chosen anchor product over time to ensure that it remains effective.

## **Emulated FTTC Obligation**

Virgin Media supports the proposal that Eircom be required to offer an emulated FTTC product in circumstances where FTTC would not be available because, for example, it is being withdrawn as part of CSO.

The anchor product approach will not work if the anchor product doesn't exist in an area, and so ComReg is right to impose an obligation that ensures that the anchor product coverage is comprehensive.

To be effective, the emulated FTTC product also needs to be at least as good as the standard FTTC VUA offering from Eircom, and so ComReg is also right to impose the same obligations on the emulated FTTC product as the main FTTC VUA product. It is also right that the emulated product is designed to deliver, at least, an equivalent level of service (including the bandwidths available) as typical FTTC VUA.

Virgin Media notes the ComReg proposal to not require Eircom to offer the emulated FTTC service in FTTP-only areas where FTTC has never been available, on grounds that the complexity associated with delivering such an obligation would not be proportionate. Virgin Media would like to understand why ComReg considers this to be the case – in Virgin Media's view Eircom should in theory be able to configure its FTTP to offer the emulated service in the same way everywhere. If there are sound operational reasons why this isn't the case, ComReg should explain its reasoning.

In any event, Virgin Media considers that such cases should very much be the exception and should only represent a small proportion of end customers. It is also important that ComReg protects end customers in such locations by monitoring Eircom's FTTP pricing approach.

## **FTTC VUA Rental**

Virgin Media broadly supports ComReg's proposal for a 'pricing continuity' approach for FTTC VUA rental that is based on imposition of a price cap of CPI-0%.

It is appropriate at this point not to move to a form of price control based on benchmarking, retail minus or MST. The alternatives are not appropriate at this point, for the reasons set out by ComReg, i.e. benchmarking is not likely to reflect Irish conditions without the application of a complex set of corrections, which may still not create an accurate view; retail minus may lead to wholesale prices that are out of alignment with the efficient costs of the SMP operator; and MSTs, while helpful as part of wider suite of pricing remedies, will not sufficiently constrain the SMP operator if relied on in isolation.

ComReg is also right to move away from an approach based on strict cost orientation, where determined prices are set by reference to detailed cost modelling. As noted by ComReg, the principal drawback with this approach is that “.. *it may be too inflexible where new networks are being rolled out or where there is uncertainty about future demand volumes or cost levels.*”<sup>17</sup> Given the stage the market is at – i.e., in a transitional period between old and new technologies, where sustained investment and the establishment of infrastructure-based competition will be needed to facilitate a successful transition, this is no longer the appropriate form of price regulation.

Virgin Media supports the ComReg proposal to allow Eircom’s prices for FTTC rental to rise in line with inflation (measured as CPI).

By allowing reasonable returns to be made from the regulated price, this approach gives a good signal to organisations investing / planning to invest in VHCN networks (including Eircom, SIRO, and Virgin Media) that they should be able to make a reasonable return in the medium term for their investments, which will be crucial for ComReg to meet its objective of fostering investment in VHCN networks.

By using inflation as a proxy for the movement of costs, the approach also aims to maintain (albeit less intrusively) the relationship between price and cost. In this regard, Virgin Media considers that the approach proposed strikes a good balance between encouraging investment in VHCN networks, whilst protecting consumers from excessive prices.

Virgin Media notes that a similar approach has been taken in the UK by Ofcom in the recent WFTMR.<sup>18</sup>

However, for this approach to be effective, the starting price that the regulation is applied to (that is to say the determined price of €19.12 that applies to Eircom up to 30 June 2024) needs to be right. In this regard and as discussed in more detail in the SPC paper at Annex 1 to this response, Virgin Media is concerned that the entry level price, as determined by the ANM cost model, may be too low. This is because the ANM takes insufficient account of the impact of inflation on costs / prices. Because inflation has been unusually high in recent times, this gap cannot be ignored, particularly because inflation has had an impact on the costs of Virgin Media (and no doubt the costs of other operators). This could set the Eircom FTTC price, which plays a key role in the overall architecture of ComReg’s pricing proposals, being below the efficient costs borne by potential Eircom competitors, which would undermine the effectiveness of the regulation, and potentially leave Virgin Media and others at a disadvantage.

ComReg should address this issue, and fully take account of what has happened since the existing arrangements were put in place (where the recently very high inflation levels could not have been reasonably predicted by ComReg but have nevertheless been a reality in recent times and have affected costs borne by operators). Further commentary on this issue is provided in the SPC Network report.

### FTTP Rental

ComReg is proposing a light-touch approach for FTTP pricing, by essentially allowing upwards pricing flexibility subject to the anchor pricing approach described above, plus margin squeeze and price floor obligations.

Virgin Media supports the idea of allowing a degree of upwards price flexibility for FTTP. While FTTP is growing quickly, it is still in the relatively early stages of its lifecycle as a product – and there is much potential investment still to come, both from Eircom and alternative network operators such as SIRO and Virgin Media (for Virgin Media, the investment has only very recently commenced).

It is right at this important juncture that ComReg sets signals to encourage investment in multiple FTTP networks (to enhance competition). An approach that allows some pricing flexibility for FTTP will help in this regard by: (i) providing confidence and clarity that returns will not be regulated away; (ii) enabling operators to test price points; and through this (iii) providing greater certainty to operators in a phase where there is a degree of uncertainty in demand and cost.

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<sup>17</sup> See WLA and WCA Market Reviews Consultation, paragraph 9.216.

<sup>18</sup> See Statement: Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26 - Ofcom

As noted throughout this response, it is not inevitable that investment will continue to happen in FTTP network, either from Eircom or from operators such as Virgin Media that offer network-based competition to Eircom. In this context, and given its objective to foster investment in VHCNs, ComReg is right to allow a reasonable level of pricing flexibility for FTTP.

## FTTC VUA as a Price Floor for FTTP VUA

Virgin Media strongly supports ComReg's proposal to make FTTC VUA rental the price floor for FTTP VUA. Whilst it is right that ComReg gives Eircom some upwards pricing flexibility for FTTP VUA, it should not grant Eircom pricing flexibility to the extent that Eircom is able to engage in exclusionary practices that could prevent and / or arrest the growth of network-based competition, to the detriment of consumers and investment.

Having a price floor that Eircom cannot go below for FTTP VUA will be a key plank in preventing on an ex-ante basis exclusionary behaviour from Eircom as the SMP operator. It offers continuation of a price floor remedy that has, so far, been effective in preventing Eircom from engaging in exclusionary pricing in relation to FTTP. Virgin Media argues that, given the transitional period covered the Market Reviews, where infrastructure-based competition can take off (but equally could be hampered by an insufficiently constrained SMP operator), now is the right time to **maintain** such important remedies such as this.

Virgin Media notes that, notwithstanding the price floor obligation, Eircom could offer FTTP in certain geographies below the price floor, provided that it could show that (a) it was not able to otherwise compete on the basis of applicable prices; and (b) its proposed reduction was not less than “..(i) An alternative operator's wholesale VUA price or equivalent VUA price (e.g., its retail price minus retail costs and relevant network costs) or (ii) Eircom's full deployment costs for FTTP VUA in the specific geographic area concerned (including, for the avoidance of doubt, customer specific connection costs), calculated on the basis of a BU-LRAIC+ costing methodology and with Eircom's RAB applied to Reusable Assets.”<sup>19</sup>

Virgin Media considers that the likelihood of Eircom having a valid reason to offer FTTP prices below the FTTC VUA cost floor is remote. ComReg is right to identify such instances as 'exceptional' in nature – such practice must not be allowed to become 'business as usual'. In this regard, Virgin Media thinks it is right for ComReg to characterise Eircom offering FTTP below the cost floor as essentially forbidden, and only permissible in exceptional circumstances where Eircom has been able to provide compelling evidence that it needs to take such action to compete fairly. The goals of the regulatory framework do not include providing the SMP operator with a safety net entitling it to 'nip competition in the bud' by matching a competitor's WLA pricing to maintain its wholesale market position. In addition, in the wording at paragraph 9.334, the inclusion of the phrase “..or equivalent VUA price..” is rather vague and would benefit from either a more precise definition or from being removed.

Finally, in circumstances where Eircom did make a request to offer FTTP VUA prices below the price floor, Virgin Media considers that in evaluating such a request, ComReg should improve the transparency and validity of its decision-making process by (i) ensuring that any request was made public to industry as well as to ComReg; and (ii) considering running a short public consultation which invited views from interested stakeholders as ahead of making a final decision. This would improve transparency and improve decision making by enabling ComReg to gather views from respondents that would be affected by Eircom's proposals as well as Eircom itself. Virgin Media makes further comments on the topic of Eircom's ability to do wholesale promotions and discounts below.

Further comments on this topic are provided in the SPC Network report.

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<sup>19</sup> See WLA and WCA Market Reviews Consultation, paragraph 9.343 (b).

## Cost Model for FTTP

Virgin Media notes that a full cost model for FTTP has not at this stage been developed, but that ComReg intends for such a cost model to be developed during the period of the Market Reviews. Virgin Media supports this intent – when developed such a cost model will help to support accurate regulatory decision making. Virgin Media would expect that further consultation will be needed with industry prior to such a cost model being used, and requests that ComReg confirms its intentions in this regard.

Further detailed comments on ComReg’s FTTP pricing proposals are contained in the SPC Network report.

## Wholesale Promotions and Discounts

Under existing regulation, Eircom is forbidden from offering wholesale promotions and discounts for FTTP, and from offering below-floor prices other than in exceptional circumstances (as discussed above).<sup>20</sup> ComReg notes that it put such a ban in place because it had particular concerns that such promotions and discounts could lead to undue discrimination between access seekers; and could foreclose economically efficient alternative investment by other operators investing or planning to invest in VHCNs.

ComReg is now proposing to change its approach to one where Eircom can do FTTP wholesale promotions and discounts, subject to obtaining ComReg’s approval on a case-by-case basis.

ComReg justify the change in approach by saying “..since 2018, there has been material FTTP network deployment in competition with Eircom, and this is expected to continue during this market review period. In this context, maintaining an outright prohibition on wholesale promotions and discounts may no longer be appropriate. In particular, the fact that rival operators are themselves able to offer wholesale promotions and discounts may leave Eircom at an unfair commercial disadvantage or limit price competition to the detriment of Access Seekers in downstream markets and ultimately end-users.”<sup>21</sup>

Virgin Media disagrees with ComReg’s change of approach and the legal and factual basis of the same. The extent of FTTP network that has been deployed in competition with Eircom is relatively modest. Specifically, SIRO has c.470k<sup>22</sup>, [REDACTED], set against Eircom that has >925k<sup>24</sup>. NBI numbers have not been included as not relevant to the Commercial NG WLA Market. The phase that we are entering into is the crucial transition stage during which VHCN network-based competition in Ireland will either thrive or not depending on the environment (including, crucially, the regulatory environment). This is precisely the wrong time to be lessening restrictions on a dominant operator that is strongly incentivised to prevent and / or suppress the development of sustainable network-based competition. ComReg should not assume that network-based competition is already well established and will inevitably thrive. Further, ComReg should recognise the possibility of Eircom losing market share for the simple reason that it faces fair competition that is competing with it more efficiently. In this regard loss of the incumbent market share may be simply a reflection of fair competition taking hold, and not a justification for a dominant provider seeking relief from the NRA.

As stated above, the goals of the regulatory framework do not include providing the SMP operator with a safety net entitling it arrest competition by matching a competitor’s WLA pricing to maintain its (de-facto geographically wider) wholesale market position (similar concerns apply with regard to potential wholesale margin-squeeze between WLA and WCA, where Eircom has a clear incentive to prevent alternative WCA provision taking hold in the market, or to drive access seekers to its own (unregulated) WCA offerings).

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20 See [ComReg-1895.pdf](#) November 2018.

21 See WLA and WCA Market Reviews Consultation, paragraph 9.349.

22 See [SIRO – Ireland’s Ultrafast 100% Fibre Broadband, Built on ESB Network](#)

23 [REDACTED]

24 See [PowerPoint Presentation \(eir.ie\)](#)

In other words, the risk of Eircom using FTTP wholesale promotions and discounts to foreclose economically efficient alternative investment is as relevant now as it was when ComReg imposed the ban in the first instance. In order for ComReg to take an alternative view, Virgin Media believes it needs to properly evidence and justify such a change in approach.

Virgin Media seeks fair competition, and if ComReg has concerns the continuation of a ban would harm Eircom's ability to compete (noting that very little evidence is put forward to demonstrate this has been the case to date), ComReg could rely on a similar mechanism to that for reviewing Eircom requests to offer FTTP VUA below the FTTC VUA floor price – i.e. make such a consideration subject to Eircom being able to additionally demonstrate that the promotion / discount is required to enable them to fairly compete.

## Process to Assess Wholesale Promotions and Discounts

Continuation of a general ban is therefore Virgin Media's clear preference, as Virgin Media considers relaxing the ban is likely to tilt the playing field to the benefit of Eircom as the dominant operator, which is already a highly profitable operator<sup>25</sup>.

If ComReg nevertheless opts to relax the ban as proposed, it is essential that it must optimise the process employed to assess and either approve or reject requests from Eircom.

ComReg appears to be saying that the process will rely on Eircom obtaining advance permission from ComReg on a case-by-case basis before it is able to launch a wholesale promotion or discount.

In assessing the request, ComReg indicates that it will pay particular attention to the following:

- (a) *The cumulative effect of the wholesale promotions and discounts should not result in a price that is lower than the 'price floor' namely for FTTP VUA, the FTTC anchor regulated price.*
- (b) *The promotions and discounts for FTTP VUA should not prevent new investment by alternative operators or undermine competition through any conditional or loyalty enhancing effects arising from offers such as retroactive rebates, exclusivity discounts, long-term commitments or volume thresholds undermining an equally efficient operator's incentive to compete or prevent offnet migration;*
- (c) *The promotions and discounts for FTTP VUA are not targeted at Eircom retail and can be achieved by a range of Access Seekers; and*
- (d) *The promotions and discounts for FTTP-based VUA are not targeted at a specific geographic area. In particular, the wholesale promotions and discounts should not give rise to a geographic differentiation of prices.*<sup>26</sup>

If ComReg does relax the rules on Eircom, it is right that each Eircom request should be assessed on its merits, and subject to obtaining advance approval from ComReg. This is a necessary point of control, since launching a scheme that was subsequently withdrawn could lead to the damage being done. In this regard, Virgin Media notes the Competition Act case that Ofcom brought against the Royal Mail in the UK, in which the Royal Mail launched prices that were found to breach Competition Law, and which it quickly removed, but whose **mere notification** had major consequences – namely a potential wholesale competitor changing its plans and withdrawing from the market.<sup>27</sup> This is also a salutary lesson regarding the inadequacy of ex-post Competition Law in dealing with risk in SMP markets; ex-ante remedies that **prevent** risk emerging are also required.

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<sup>25</sup> See for example [Eir dividends hit €1.73bn since Xavier Niel takeover – The Irish Times](#)

<sup>26</sup> See WLA and WCA Market Reviews Consultation, paragraph 9.375.

<sup>27</sup> See [Royal Mail fined £50m for breaking competition law - Ofcom August 2018](#).

In terms of the factors that ComReg indicates it will pay particular attention to, it is right to emphasise the continued importance of the FTTC price floor; to focus on preventing damage to efficient investment by alternative network operators; for Eircom not to favour its own downstream arm; and to avoid geographic pricing. All these considerations are important to help reduce the risk of Eircom launching schemes that are anti-competitive in nature, and that could lead to exclusionary effects and higher prices for customers in the long term. However, Virgin Media considers that the principles lack specificity, and could in practice lead to a potentially wide range of deals being waived through. The principles would be strengthened by some additions, for example, by ComReg stating for the avoidance of doubt that loyalty inducing schemes (including schemes that reward volume commitments) will not be permitted.

A further specific comment from Virgin Media is that in relation to paragraph 9.346, sub-part (b), ComReg talks about the reduction in the price for FTTH VUA being ‘*unlikely*’ to dissuade new investment from alternative operators. This is too vague and weak – the word ‘*unlikely*’ should be replaced with ‘*will not*’ and the word ‘*new*’ should be deleted. This is necessary to ensure that future ComReg decisions ensure that FTTP entry is not rendered unsustainable by Eircom stratagems even in the presence of ComReg decisions.

ComReg should also keep a close eye on the duration / frequency of any schemes proposed by Eircom. In particular, it could be very damaging to the development of fair competition if Eircom sought to launch a series of short-duration promotions or discounts.

Testimony from the UK suggests that the mere act of an SMP operator **discussing** potential discount schemes (i.e., ones that haven’t even been launched) can have a chilling effect on competition by creating greater inertia (through potential wholesale customers saying that they won’t place business with an alternative provider until they are clear on the terms from the SMP provider, for fear of missing out). Connected to this, Virgin Media also notes concerns in the UK being raised about Openreach’s alleged practice of repeatedly amending its FTTP prices that could act as a barrier to alternative network entry and expansion, a matter which Ofcom is currently looking at.<sup>28</sup> To cater for these problems, ComReg should consider regulating to ensure that notification of discount schemes by Eircom is tightly controlled (e.g. Eircom should have no or heavily constrained ability to discuss arrangements at length **ahead** of notification), and ensuring that any deals are not overly short-term in nature. Failure to do this could lead to a chilling effect on the market, where potential customers are reluctant to give business to alternative operators.<sup>29</sup>

On this, Virgin Media again notes that on 27 February 2023, under notification CRD-967, Eircom announced a “*Review of FTTH (VUA and BS+) tariff structures. The proposed structure will lower rental charges. The reduced rates would be applicable based on the operators FTTH base portfolio. The rules are designed to benefit all Operators on a non-discriminatory basis.*” While further information needs to be gathered, Virgin Media is concerned that Eircom is **already** (even at a time when FTTH VUA discounts are forbidden, and matters remain undecided and subject to open consultation by ComReg) seeking to discuss with potential customers commercial discount arrangements for FTTH. Such a discussion as Eircom is proposing could have the effect of chilling competition to Eircom (by placing doubt in the minds of potential wholesale customers). Virgin Media considers that such communications need to be more tightly controlled by ComReg, and this should include consideration of the chilling effect that such communications may have on the emergence of network-based competition.

ComReg should further include in its considerations how to avoid a situation where there are multiple short-term deals in the offing, and where discussion with potential customers is biased by the discussion of deals from the SMP operator, whether or not they are going to happen.

Virgin Media considers that the decision-making process would be improved by being more transparent. ComReg seeks stakeholder views on whether there may be merit in it consulting with industry as part of the decision-making process.

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28 See [Consultation: Openreach Proposed FTTP Offer starting 1 April 2023 - Equinox 2 \(ofcom.org.uk\)](#)

29 On 17 February 2023 Lindsey Fussell from Ofcom noted: “*Alongside that, we are gathering information on whether regular pricing changes, like those announced by Openreach this year, are making it harder for other firms to compete fairly.*”

On this, the impression created in the current consultation document is that there is a process of communication between the SMP operator (Eircom) and ComReg, whereby Eircom makes a request to ComReg and (presumably) supplies information to ComReg to enable it to assess the request, after which ComReg either approves or rejects the request, and (if it is approved), the request would be subject to minimum notification obligations ahead of coming into effect.

Such a process lacks transparency. It would not be desirable or appropriate for decisions to be made based solely on communication between Eircom and ComReg as ComReg would not be able to appropriately assess the market conditions or make a fully informed decision. If Eircom is seeking to launch a wholesale FTTP promotion or discount, it is inevitable that such a discount, if approved, will have an impact on others competing with Eircom in the market (i.e., there are other interested stakeholders). In such circumstances, it is right that such interested stakeholders are involved in the process ComReg runs to evaluate and decide on Eircom's request. ComReg would remain the ultimate decision maker in such a process, but by gathering input and opinion from interested stakeholders, as well as Eircom, ComReg is likely to gather a stronger base of evidence which should facilitate better decision making than would otherwise be the case. The most straight-forward way for ComReg to run such a process would be via a short public consultation. There is precedent in this regard in the UK, where Ofcom frequently consults where required on similar requests from Openreach.

In circumstances where a more open and transparent process were adopted, in which interested stakeholders (in addition to Eircom) were consulted via public consultation, there should be no stepped notification process for ComReg and other interested parties (such as Virgin Media) – it would make more sense for Eircom to make the request and justify that request to all parties at the same time.<sup>30</sup>

Further comments on this matter are provided in the SPC Network report.

### **Margin Squeeze Tests**

MSTs play an important role by helping to prevent the dominant operator from reducing the margin between upstream and downstream inputs (by increasing the former and decreasing the latter or both), to the detriment of competition.

These remedies play an important role as part of a package of wider pricing remedies and help to create an environment where the SMP operator is constrained from acting in an anti-competitive manner.

Although ComReg is proposing to maintain several MSTs, which Virgin Media supports, Virgin Media is also concerned that ComReg is diluting the obligations that are presently in place on Eircom. In particular, Virgin Media is very concerned that ComReg is proposing to entirely remove the MST that Eircom is presently required to meet between FTTP VUA and FTTP Bitstream. This is a mistake which, if not addressed, will directly threaten Virgin Media's wholesale plans (which initially relies solely on a FTTP Bitstream offering which Eircom will now be able to unfairly undercut). ComReg can address this potential risk by simply keeping in place the MST between FTTP VUA and Bitstream.

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<sup>30</sup> Eircom would still be able to put confidentiality markings in place for items that only ComReg needed to know.

## The FTTP VUA to FTTP Bitstream MST Should be Retained

[Redacted]

[Redacted]

(e.g., offering it as same or similar price to the FTTP VUA input product)<sup>31</sup>. Virgin Media notes ComReg's justification for the proposed removal is that (i) the retention of the MST between FTTP VUA and FTTP based retail services will continue to provide protection from a margin squeeze between FTTP VUA and FTTP Bitstream; and (ii) Eircom will be disincentivised from lowering Bitstream prices as wholesale providers that use its Bitstream service could lower their retail prices, which Eircom would not be able to respond to.

Virgin Media considers that these justifications are flawed, in particular: (i) the retention of the MST between FTTP VUA and FTTP based retail services would still leave very significant scope for Eircom to reduce FTTP Bitstream prices to levels it would be difficult to compete with (by Virgin Media or any other new entrant), and certainly doesn't not offer the level of protection offered by the MST that ComReg are proposing to remove (and that is still needed); and (ii) the issues here are that the cost to Eircom from reducing the FTTP Bitstream price could still be justified by the benefit of damaging competition that would otherwise come from Virgin Media, [Redacted]

[Redacted]

[Redacted]

the removal of the FTTH VUA to FTTH Bitstream MST is premature, and that the remaining controls (e.g., the MST between FTTH VUA and FTTH based retail services) will not adequately control Eircom from acting in an exclusionary manner. [Redacted]

[Redacted]

Significant further detail on MSTs is set out in the SPC Network report. In the report SPC Network clearly set out that Eircom still has a strong incentive to conduct a margin squeeze between FTTP VUA and FTTP Bitstream, that the FTTP VUA to FTTP retail MST (which is being retained) will not offer sufficient protection in of itself from such a margin squeeze occurring, and that ComReg is wrong to remove the FTTP VUA to FTTP Bitstream MST.

The SPC Network report also contains a detailed analysis of the models proposed by ComReg for the evaluation of MST compliance and makes a number of recommendations as to how those models can be improved, including the most appropriate cost standards to be used in different scenarios.

<sup>31</sup> Eircom may well also have a broader interest in setting its WCA pricing in a manner which encourages access seekers to purchase WCA from it, rather than WLA, because this would reinforce Eircom's ability to drive and indeed control to some extent the features and related pricing of the retail offers of all wholesale access takers.



## Connection and Migration Prices

For **FTTP VUA** connection and migration prices ComReg is proposing to maintain the obligation that the prices should be at the same level, and to set a price cap of €100 for both services.

This is a rather tricky judgement – ComReg (rightly) doesn't want to discourage take up of new FTTP by having very high connection charges (noting the much higher costs associated with new connections), but there is also a risk that migration charges set significantly above cost (which the price cap would allow) could lead to market distortions at a time when FTTP availability is growing (and set to continue growing).

There may not be a precisely right answer at the moment and ComReg should keep the approach under review. That said, the proposals may strike about the right balance since in practice they allow significant flexibility, particularly when noting that evidence shows that to date Eircom (and others) have adopted a pricing strategy that encourages take up and migration, with costs recovered via the product rentals.

It will be important that ComReg continues to monitor the market to ensure that the approach remains appropriate, intervene if evidence arises that indicates a change of approach is merited.

For **FTTC VUA** connection and migration prices ComReg is proposing to maintain the existing cost orientation obligation. Virgin Media supports this approach, which gives stability, and is appropriate given the wider approach to FTTC VUA pricing (see separate comments on FTTC VUA rentals above).

## Ancillary Services and Facilities

For ancillary services and facilities ComReg is proposing to maintain a tight cost orientation approach. This is correct – these services are essential facilities that enable access seekers to make use of key regulated inputs from Eircom and cannot be readily replicated. Stability / tight control in relation to pricing is wholly appropriate for such services.

## Cost Accounting and Accounting Separation

ComReg is right to re-impose cost accounting and accounting separation obligations on Eircom. These obligations play a key role in supporting the operation of other SMP remedies, and in providing ComReg with insight necessary to monitor compliance in certain areas. It is essential that these obligations are maintained to retain the strength of the overall remedies framework that will be necessary to drive pro-competitive outcomes in the market.

The cost accounting obligation is needed to underpin price control obligations, and to help monitor compliance with non-discrimination obligations. The accounting separation obligation provides more detailed information which again supports monitoring of compliance with non-discrimination obligations and helps to prevent unfair cross-subsidy happening within Eircom (as a vertically integrated SMP operator).

## Regulatory Governance

ComReg rightly highlights the importance of Eircom complying with the SMP obligations to be imposed on it in the Commercial NG WLA Market. If this does not happen, it undermines the whole purpose of the ex-ante regime, with potentially significant and negative consequences for other operators. As observed in Section 7 of ComReg's (current) Strategy Statement, it is only when an SMP operator complies with the full suite of *ex-ante* obligations that the identified competition problems are mitigated. In addition to ComReg enforcement, Virgin Media is of the view that it is Eircom's duty (given its status of SMP and previous ComReg investigations and settlements) to have in place internal controls to proactively prevent and detect non-compliance. Virgin Media considers that either Eircom has not put in place the appropriate operational and governance measures to ensure compliance with its SMP obligations, or they are not being correctly utilised.

The context in this regard is not promising. For example, ComReg note that the Information Oversight Body ('IOB') set up by Eircom as part of a set of commitments it agreed to following High Court proceedings was not Independent as it should have been, with ComReg saying: *"However, following its review of the IOB's first report of 8 September 2021, ComReg noted that the IOB Report was wholly based on evidence provided by Eircom and that Eircom had not yet permitted the independence and effectiveness of these functions to be independently assured in a way that ComReg considers adequate. As such ComReg considered that the IOB was not in a position to adopt an opinion on the overall effectiveness of Eircom's RGM and as a result, the IOB Report – while providing some information about aspects of Eircom's RGM – did not provide ComReg with reason to place meaningful reliance on the effectiveness of Eircom's RGM when ComReg is exercising its regulatory functions."*<sup>32</sup> ComReg then go on to say that it *"..continued to have some concerns around the state of competition and the culture of compliance within Eircom in the presence of the enhanced RGM, and that it would continue to review the effectiveness of the RGM and Settlement Agreement and consider if more regulatory action is required."*<sup>33</sup>

The picture being painted by ComReg is that Eircom cannot be trusted to fully comply with its SMP obligations, and that the current processes and culture that exist in Eircom to monitor and ensure compliance are inadequate.

This is a worrying and unacceptable situation – which cannot be explained away as being associated with set up problems – given that Eircom has been an SMP operator for decades and has had more than sufficient time to put in place the necessary processes to ensure that a proactive culture of compliance is established.

Given this backdrop and noting the importance of effective SMP remedies to the development of the Commercial NG WLA Market, Virgin Media does not understand why ComReg is choosing to take the *"least interventionist"* option available to it to address the shortcomings identified. ComReg's proposals would be strengthened if it were to lay out the options (including the more interventionist options available) in more detail, with a better explanation and statement of what is appropriate in the light of the evidence at hand.

That said, Virgin Media supports ComReg's recognition that there is a problem, and that it is proposing to act. The proposal appears to be based on a strengthened Statement of Compliance ('SoC') obligation, which will be comprehensive in nature, and which will need to be signed by Eircom person(s) of appropriate seniority. Virgin Media also supports the proposed timescales for the SoC to be submitted (within three months of the Final Decision) and considers that the SoC should be available to stakeholders to review. Eircom demonstrating compliance with its obligations will have a direct bearing on all other operators in the Commercial NG WLA Market – and it is right that those operators can view (and comment as necessary) on the SoCs produced. If Eircom's culture of compliance is currently in question, which it appears to be, then wide transparency in relation to compliance may be a useful tool to drive improvement. To note, if this approach does not lead to improvements in the near term, ComReg should not delay in taking further steps to ensure that a proactive culture of compliance is embedded at Eircom.

Finally, Virgin Media notes that the culture of compliance at Eircom would benefit from a genuinely independent IOB and active enforcement with use of ComReg's new civil enforcement powers. Virgin Media notes in this regard the positive role played for in the UK by the Equality of Access Board (in relation to Openreach as the SMP incumbent). It would be useful in its Final Statement if ComReg should provide an update on the status of genuinely independent IOB being created, and even if this is not a matter for the Market Reviews, what steps are being taken by ComReg to ensure that such a body is properly constituted.

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<sup>32</sup> See WLA and WCA Market Reviews Consultation, paragraph 9.628.

<sup>33</sup> See WLA and WCA Market Reviews Consultation, paragraph 9.629.

# 5 Withdrawal of SMP and Remedies in the Current Generation WLA Market, the Intervention Area Next Generation WLA Market, and the Revised Regional WCA Market

## Response to ComReg question

**Q9.** *Do you agree with ComReg’s proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

Where ComReg is proposing that SMP is being withdrawn, ComReg is proposing certain ‘sunset’ arrangements, to last for 12 months from the date of the final decision, in which Eircom will be required to offer prices for **existing** services at no higher than the prevailing prices (which Virgin Media takes to mean the prices that were in place at the end of the current SMP period).

That is the extent of the obligations; all other SMP obligations would fall away on the date of the final decision – and so, for example, Eircom would not be obliged to meet **new** requests for access or maintain any other *ex-ante* obligations in relation to the existing services (for example relating to transparency, performance levels etc).

As ComReg indicates, sunset periods are necessary to ensure an orderly transition from a regulated to non-regulated environment, and to provide access seekers that hitherto relied on regulated inputs to make alternative arrangements where necessary. This approach will also, in theory, help to reduce harm that could otherwise happen to end customers that rely on the regulated inputs.

ComReg notes several scenarios that justify a 12-month sunset period, including the need of access seekers to make alternative backhaul and interconnect arrangements, and the need, where (now deregulated) inputs are being used to provide retail services to business users, and where time is needed to ensure continuity of services and / or the exploration of alternatives. On the last scenario, Virgin Media also argues that for business customers, the overall solution provided may be a complex one in which the (now deregulated) input may be a small, but essential, part of a wider solution. In such cases, significant time may be required to find what deregulated inputs are present, what role they play, and in some the whole solution for the end customer will need to be reconfigured.

Virgin Media also questions if ComReg has considered the scenario where existing (now deregulated) inputs are being used to support services for a site that is providing Critical National Infrastructure type applications (e.g., power stations, hospitals), and where the end customer may not want to move and where disconnection of service could have serious negative consequences. The same applies for long-duration contracts with business customers and public administrations taking services at multiple sites, with a contract expiry date beyond the sunset period.

ComReg should also consider the scenario where an access seeker is relying on Eircom providing another service (e.g., backhaul) to facilitate the move away from the deregulated input, and where Eircom is either unwilling or unable to provide that service in a sufficiently timely manner to hit the 12-month deadline.

Taking these factors into consideration, a more flexible approach is merited – for example, the general sunset period is set at 12 months, but this can flex on a case-by-case basis if operators can put forward evidence showing that a longer period is necessary. This approach would incentivise all parties (including Eircom) to act in a timely manner and would also better safeguard the interests of end customers **where justified**. Virgin Media expects that any such extensions would be limited in number.

There is gap in the current proposal that ComReg needs to address. As currently drafted, for example, there could be a scenario where it will take an operator say a minimum six months to move their customer from deregulated inputs to an alternative solution (i.e., well within the sunset period timescales proposed). However, if a fault developed on the deregulated input products after 1 month, Eircom would be under no regulatory obligation to fix those faults in a timely manner (Eircom could in theory take months if it chose to). Nor would Eircom be under any regulatory obligation to pay any SLG credits while the customer was out of service. This cannot be right – it would lead to direct customer harm and would inevitably (and unfairly) lead to potentially significant reputational damage to the provider that was offering the service to the end customer, potentially to Eircom's benefit. This type of scenario, if allowed, would be akin to Eircom exploiting customers during the transition period by charging excessive prices. ComReg has rightly addressed the latter risk and needs to make the arrangements work by addressing the gap identified. This gap can be addressed quite easily – ComReg can simply extend the repair obligations (including SLAs) that currently prevail to the end of the sunset period. This will not be at all onerous for Eircom to support and would be similar to approaches taken when a regulated product is being withdrawn.

Finally, Virgin Media notes the following with respect to the WLA/WCA markets in which ComReg seeks to withdraw SMP remedies:

As regards both the CG & IA NG WLA Markets, it is noted that the presumption in favour of regulation is already met at EU level by means of the inclusion of the WLA market (as a market susceptible to ex-ante regulation) in the EC 2020 Recommendation and pursuant to Article 67(1) of the EECC. As such, ComReg is free to carry out an SMP assessment of both markets, without necessarily being required to carry-out a 3CT assessment.

**CG WLA Market** – Virgin Media appreciates that ComReg's SMP assessment is carried out on a forward-looking basis and while Virgin Media agrees (generally) with ComReg's proposed approach, existing market conditions dictate that Eircom is the (wholly) dominant operator (enjoying significant advantages of scale and scope), with no competitive constraint currently in the market. Notwithstanding the market's rapid decline, regulatory safeguards should continue to remain in force until such time where the market conditions dictated by ComReg in its forward-looking assessment are established. Given the presence of the 'WLA Market' in the EC's 2020 Recommendation, Virgin Media is of the view that ComReg is required to (re)carry out a full SMP review before proceeding with the de-regulation of this market, to ensure that the market conditions established in its forward-looking assessment materialises (particularly in light of ComReg's deviation from the Commission's paper).

**IA NG WLA Market** – Virgin Media refers to paragraph 6.7 of the consultation document in which it notes that "*market shares in excess of 50%...give rise to a strong presumption of SMP*". Additionally, ComReg is obliged to have due regard to a number of assessment criteria set out in the EC's SMP Guidelines (which extend to *undertaking size, economies of scale/scope, absence of potential competition etc*). As indicated above, it appears odd that ComReg deviates from the SMP Guidelines and grounds its decision not to designate an SMP in the IA NG WLA Market on the basis that NBI (the dominant operator, who holds a share in excess of 50%) is sufficiently constrained by the terms of the NBP contract, such that it is prevented from behaving anti-competitively, or independently of its competitors. Virgin Media would remind ComReg of its duty to take utmost account of the range of assessment criteria included in the EC's SMP Guidelines, and to assess the requirement for SMP based on the settled regulatory framework.

In light of such deviation (particularly given the presence of dominance and lack of efficient competition), it is imperative that ComReg (i) addresses Virgin Media's concerns outlined in our response to Question 4 of this Market Review, and (ii) provides a meaningful statement of reasons (which can be evidenced) as to why SMP remedies ought to be withdrawn. A failure to state (sufficient) reasons is in breach of Virgin Media's (and other operators) due process rights, and contrary to ComReg' statutory objectives.

As regards the **Revised Regional WCA Market**, given its notable absence from the EC's 2020 Recommendation, Virgin Media notes ComReg's statutory requirement (prior to regulatory intervention) to assess how meritorious a market is of ex-ante regulation (and the establishment of SMP) noting that said assessment should be based on the 3CT criteria set out in Article 66(1) of the EEC. As suggested, Virgin Media is concerned that ComReg's 3CT assessment of the Modified Retail Broadband Market ('MRBM') does not accurately reflect the likely future market conditions of the MRBM. It seems questionable having found in its mid-term report (2021) that the market was subject to high barriers to entry (together with the absence of market structures facilitating effective competition), that ComReg can stand over its (new) position that future competition in the MRBM space is likely to be sufficiently effective, without the protections afforded to it by upstream market regulation. Prior to any consideration of the withdrawal of existing SMP obligations, Virgin Media would ask ComReg to reconsider its 3CT assessment, and in any event, to provide a meaningful statement of reasons as to how future MRBM market conditions suggests that the withdrawal of SMP remedies is an appropriate regulatory step at this juncture. As above, a failure to state (sufficient) reasons is in breach of Virgin Media's (and other operators) due process rights, and contrary to ComReg' statutory objectives.

# 6 Regulatory Impact Assessment

## Response to ComReg question

**Q10.** *Do you agree with ComReg’s proposals on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.*

Virgin Media strongly supports the ComReg view that it is right for it not to show forbearance in relation to the Commercial NG WLA market.

As ComReg set out in the consultation document, the Commercial NG WLA market is not effectively competitive, nor is likely to become so within the timescales covered by the Market Review. In chapter 8 ComReg also set out some of the problems arising from the absence of effective competition. In these circumstances, it is appropriate to apply SMP to address the competition problems identified. Showing forbearance at this stage would, in Virgin Media’s view, lead to very poor outcomes for competition and consumers. In particular, it would give rise to serious risks of Eircom being able to undermine the business of those companies, including Virgin Media, intent on providing network based VHCN competition, including the provision of wholesale access on a voluntary basis.

Virgin Media supports ComReg’s selection of ‘Option 4’ – this provides the remedies in the areas that are necessary to support the development of a well-functioning market (which it currently isn’t). This option is in fact the only one that will optimise the chances of competition, including network-based competition, developing, to the long-term benefit of end users.

The obligations associated with Option 4 are not burdensome on Eircom, in fact Virgin Media considers that ComReg has gone too far in watering down some of its proposals (for example in relation to some of the pricing remedies proposed). Eircom is well able to manage this suite of obligations and is already set up organisationally to do so.

## **7 Annex 1 – SPC Network Report on Pricing Remedies in the Commercial Next Generation WLA Market**

Given the importance of this consultation to Virgin Media's new wholesale business Virgin Media engaged the economic experts SPC Network to assist Virgin Media with its response.

SPC Network has provided the attached report, which focuses on the pricing remedies proposed by ComReg in the critical Commercial NG WLA Market.

Virgin Media supports the conclusions and proposals set out in the SPC Network report, which should be dealt with by ComReg as part of the Virgin Media response. See also in particular Virgin Media's response to question 8.







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SPC Network

## **Review of Pricing Remedies in ComReg's WLA and WCA Market Reviews**

**Prepared for Virgin Media Ireland Limited**

**Non-Confidential Version**

March 2023



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### **About SPC Network**

SPC Network was founded in 2003 and has worked for over 50 clients worldwide. We undertake Strategic Policy Development in platform and networked industries, by combining the knowledge of our consultants with specific and valuable skills to ensure rigorous analysis and exceptional advice. Our core consultancy team and network of partners have substantial experience in industry and consulting meaning that we understand the practical issues and challenges facing the market. Through advanced academic training, we have developed the key skills and rigorous approach needed to support our clients in the policy debate.

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## 1 EXECUTIVE SUMMARY

1. In January 2023, ComReg published its market review of wholesale local and wholesale central access markets in Ireland. Virgin Media is currently investing in upgrading its cable TV network to Fibre to the Home (FFTH) and has announced that it plans to enter the wholesale market. It, therefore, has a significant interest in how the proposed regulation of the market will affect investment incentive and its ability to compete with Eircom on fair terms.
2. Virgin Media has asked SPC Network to provide an independent report assessing three specific areas of ComReg's consultation document as they affect the wholesale market:
  - a) Price control remedies;
  - b) Regulatory approval for price decreases, discounts and promotions; and
  - c) The proposed margin squeeze test.

### ***Price Control Remedies***

3. Our overall assessment of ComReg's proposed use of an anchor price based on Fibre to the Cabinet (FTTC) VUA with pricing freedom for FTTH VUA is that this is an effective way of maintaining the investment incentives for builders of fibre networks, and thus the creation of competition at the network level.
4. In particular we think that ComReg is right to set the regulated price of FTTC VUA as a price floor that Eircom cannot price below without approval from ComReg.
5. Our principal concern with the price control remedy is that the regulated price of FTTC VUA until June 2024 will be based on the Access Network Model (ANM). This was developed in 2020 when inflation was very low to negative and no allowance was made for future inflation in the ANM. Things are very different since then with inflation rising to over 10% in 2022, although it is starting to come back now.
6. If past and forecast inflation for the period 2020 – 2024 were allowed for in the monthly rental price of FTTC VUA, then in 2024 the price would be €22.20 per month rather than the €19.08 in the ANM.
7. Our concern is that Virgin Media and other builders of fibre networks will have been affected by inflation through higher contractor and labour costs and higher prices for



materials, such as fibre-optic cable. Unless these higher costs are built into the price floor, investment could be deterred as the regulated price is below cost.

8. We therefore propose that ComReg makes suitable adjustments to the regulated price, potentially through a one-off adjustment.

***Regulatory approval for price decreases, discounts and promotions***

9. We are pleased to see that ComReg will require Eircom to justify any price reductions, discounts and promotions and get permission from ComReg before they are implemented for the Anchor Product and for reducing the FTTH VUA price on a geographically limited basis. Both are essential to prevent Eircom setting exclusionary prices aimed at competitors in the wholesale market.
10. We are also pleased to see that Eircom would have to demonstrate that it is losing market share due to aggressive pricing by competitors. However, we propose that ComReg should be more specific about how it will measure these criteria. We suggest that Eircom must demonstrate it has been losing market share for three consecutive months and that rivals' prices must have been at least 15% below Eircom's for that period with no price rises implemented by Eircom. Stating these criteria would create more certainty in the market.
11. ComReg proposes that when Eircom proposes geographic price reductions of FTTH VUA on a geographic basis, the proposed price in the area concerned is not less than the higher of either (i) an alternative operator's wholesale VUA price or equivalent VUA price (e.g., its retail price minus retail costs and relevant network costs) or (ii) Eircom's full deployment costs for FTTH VUA in the specific geographic area concerned.
12. This is a good proposal in principle, but we think that Eircom could reasonably argue that it would not have the information to calculate point (i) above. We therefore propose that this is replaced with the costs of a Similarly Efficient Operator (SEO) based on Eircom's costs but with a smaller scale of production.
13. Finally, ComReg concludes its discussion amendments to the national the FTTH VUA price by saying that its assessment will be subject to a number of pre-conditions including:
  - a) The reduction to the price for FTTH VUA is not to be a short-term measure;
  - b) The reduction to the price for FTTH VUA is unlikely to dissuade new investment by alternative operators;



- c) The reduction to the price for FTTH VUA should apply to a substantial geographic region and not just to a very select number of exchanges chosen by Eircom; and
  - d) The FTTH VUA price will continue to be the wholesale input used by all FTTH services that are provided in the specific geographic area.” (Para. 9.346)
14. Whilst we welcome the principles set out in this paragraph, we are concerned with the lack of specificity. We would therefore like to see ComReg be more specific about what is meant by these points and suggest the following:
- a) The minimum period for any price reduction should be twelve months.
  - b) Alternative operators will not enjoy the same economies of scale for at least the period of this market review. This should be reflected in any reduced price for FTTH VUA being set at the level of an SEO or REO rather than on the economies of scale enjoyed by Eircom.
  - c) A “*substantial geographic region*” should be specified to include a specific population level. We suggest this should be a minimum of 250,000 households.

### ***The Proposed Margin Squeeze Test***

15. ComReg proposes to remove a margin squeeze test (MST) at the Bitstream level whilst maintaining one at retail level. It argues that a retail MST will be sufficient to protect wholesale competitors from a margin squeeze.
16. We disagree with this argument and demonstrate in this paper that Eircom could impose a margin squeeze at Bitstream level and that this would harm its rivals in the WCA market. Eircom has the ability to move costs between the bitstream and retail elements of the cost stack so as to lower the cost of bitstream without affecting its retail prices. This would favour Retail Service Providers (RSPs) using its Bitstream over its own retail business but would also favour its RSPs over those using a rival’s Bitstream product. Eircom could therefore make up at wholesale level what it loses at retail level and exclude its rivals.
17. For this reason, we consider it vital that ComReg maintains a Bitstream MST to protect competition at this level of the market [REDACTED].



18. ComReg proposes to use the Long Run Incremental Cost (LRIC) cost standard for the product-by-product MST. This excludes, for example, ducts, fibres and equipment used by multiple products and so could set the price unrealistically low. We therefore propose that ComReg uses the LRIC+ standard to include joint and common costs. This will prevent Eircom setting downstream costs at, effectively, Pure LRIC whilst still allowing them some degree of pricing freedom across the portfolio.





## 2 INTRODUCTION

19. In 2020, ComReg described its strategic intent for the broadband market as *“a competitive sector that delivers efficient investment, innovation, and choice”*. Two of the five key indicators of this strategic intent were *“regulatory certainty that allows for efficient investment”* and *“a sector that is attractive to investors”*.<sup>1</sup>
20. National Regulatory Authorities (NRAs) deliver their strategy in part through reviews of relevant markets to determine what regulation of operators with Significant Market Power (SMP) is required. On 9<sup>th</sup> January 2023 ComReg released its consultation document on its review of wholesale local and wholesale central access markets (the Consultation).<sup>2</sup> It also released several associated documents, in particular the two reports by Oxera (Oxera 1 and Oxera 3),<sup>3</sup> that inform the Consultation.
21. Virgin Media is an established player in the Irish broadband market. At present it is upgrading its network from Hybrid Fibre Coax (HFC) to Fibre to the Home (FTTH) and plans to make that network available on a wholesale basis to retail service providers (RSPs) other than its own retail division and has already announced that Vodafone will be an early customer. If successful, these plans will help realise ComReg’s strategic intent. Virgin Media therefore has a strong interest in how ComReg intends to regulate the market and the effect of those regulations on its investment plans and competition in the market.
22. In May 2022, SPC Network prepared a paper for Virgin Media<sup>4</sup> in which we identified that the current regulatory environment supports investment by alternative operators, as evidenced by the investment currently being undertaken by Virgin Media, Eircom and SIRO. We therefore argued that the current market review should ensure that regulation remains supportive of the development of a competitive market at wholesale local access (WLA) market level. We argued that the best way to do this would be through minimum change to the regulations in place in May last year.
23. Virgin Media has now commissioned SPC Network to review the Consultation. In doing so we have been asked to bear in mind [REDACTED]

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<sup>1</sup> ComReg (2020) ‘Electronic Communications Strategy Statement: 2021 – 2023’ Para. 4.2

<sup>2</sup> ComReg (2023) ‘Market Reviews: Wholesale Local Access Provided at a Fixed Location, Wholesale Central Access Provided at a Fixed Location for Mass Market Products’

<sup>3</sup> Oxera (2022) ‘WCA/WLA Market Review Part 1’ & Oxera (2022) ‘WCA/WLA Market Review Part 3’

<sup>4</sup> SPC Network (2022) ‘Wholesale Local Access in Ireland: Deterring Foreclosure and Promoting Investment’



[REDACTED]

24. Virgin Media has asked us to consider three specific remedies proposed by ComReg and, where appropriate, make suggestions for modifications:
- d) Price control remedies for WLA (section 9.3.4 of the Consultations).
  - e) Regulatory approval for price decreases and commercial offers by Eircom (Paras. 9.322 – 9.378).
  - f) The proposed margin squeeze test (MST) (Paras. 9.379 – 9.600).
25. This report is structured as follows:
- a) Section 3 discusses competition problems as set out in Section 8 of the Consultation.
  - b) Section 4 discusses price control remedies in WLA.
  - c) Section 5 discusses price decreases, discounts and promotions.
  - d) Section 5 discusses margin squeeze.
  - e) Section 6 concludes and summarises the various changes to ComReg’s proposed regulations.
  - f) Annex A provides a detailed assessment of ComReg’s proposals and reasoning for the MST.
  - g) Annex B discusses the margin squeeze model and design parameters.
26. The views expressed in this report are those of SPC Network and not necessarily those of Virgin Media.



### 3 COMPETITION PROBLEMS

27. Section 8 of the Consultation sets out the competition problems and impacts that ComReg foresees in the Commercial Next Generation (NG) WLA market as a result of Eircom enjoying a position of SMP in this market.

28. ComReg states that:

*“... the underlying ability and incentive for Eircom to potentially engage in anti-competitive behaviour absent regulation is due to the lack of effective competition in the Commercial NG WLA Market, coupled with Eircom’s position as a vertically-integrated supplier competing with its wholesale customers in downstream markets.” (Para. 8.4)*

29. ComReg then rightly notes that it does not need to demonstrate that Eircom has in any way abused its position in the market as the purpose of *ex ante* regulation is to prevent such abuse arising in the first place (Para. 8.5).

30. ComReg then notes that it has identified three potential abuses: exclusionary practices, leverage and exploitative practices (Para. 8.7).

31. ComReg defines Exclusionary practices as:

*“... where an SMP Service Provider (SP) acts in a manner **which could prevent potential competitors from entering the market**, restrain actual competitors from further growth in the market, or induce them to exit the market.” (Para. 8.7)*  
(Emphasis added)

32. ComReg provides examples of such exclusionary practices in Paragraph 8.10. Of particular relevance are bullets (a) and (c), copied below:

- a) “Imposing a margin squeeze between WLA and downstream services which would reinforce entry/expansion barriers in the Commercial NG WLA Market and related markets and potentially foreclose entry or investment by other SPs, including having regard to the fact that, ultimately, retail SPs look to compete on a national basis.” (Emphasis added)
- b) “Concluding exclusivity contracts with certain Access Seekers, and engaging in exclusionary conduct generally aimed at raising Access Seekers’ or end users’ switching costs, impacting on potential competition.” (Emphasis added)



33. During a discussion on a second type of competition problem, Vertical Leveraging, ComReg states that:

*“Eircom, as a vertically-integrated SP with SMP, likely has both the ability and the incentive to **use its market power to influence the competitive conditions in downstream wholesale and/or retail markets** and, in particular, through its ability to control the key inputs used by Access Seekers which compete against Eircom in the retail broadband market.”* (Emphasis added) (Para. 8.15)

34. This report focusses mainly on exclusionary practices and leveraging. In the Section on margin squeeze we are particularly concerned with Eircom’s ability to leverage its SMP from the WLA market into what ComReg propose will be the unregulated WCA market, where Virgin Media will be active when it first enters the wholesale market. It is important to note that a margin squeeze does not take place between two markets where a vertically integrated firm is dominant, but between an upstream market where the vertically integrated firm is dominant and a downstream market where it is not. It is on this basis that ComReg is able to maintain an obligation of Eircom not to impose a margin squeeze between the WLA and Retail markets. We will argue later that the obligation not to impose a margin squeeze between the WLA and WCA should be retained.



## 4 PRICE CONTROL REMEDIES

35. In this section of our report, we discuss the price control remedies set out by ComReg in Section 9.3.4 of the Consultation. There are five specific matters discussed here:

- a) Anchor Pricing.
- b) Anchor Price and Exclusionary Pricing.
- c) The absence of an FTTH VUA Cost Model.
- d) Inflation in the Access Network Model.

### 4.1 Anchor Pricing

36. ComReg's core proposal is to continue to apply "Anchor Pricing" in which an entry level product acts as an "anchor" constraining the price of superior products. The simple theory of Anchor Pricing is that if the difference between the Anchor Product price and the superior product price is greater than the difference in value, consumers will switch down to the Anchor Product and therefore the Anchor Product places a constraint on the pricing freedom for the superior product. The price of the Anchor Product is set by regulation and there is freedom for Eircom to set prices for superior products based on consumer willingness to pay. Thus, Anchor Pricing prevents Eircom from implementing exploitative practices for superior products.

37. At the WLA level, ComReg proposes that Fibre to the Cabinet (FTTC) VUA is the Anchor Product and that there is pricing freedom for FTTH VUA, which is the superior product. ComReg states:

*"ComReg proposes to continue permitting pricing flexibility for FTTH VUA subject to maintaining a pricing anchor based on a regulated FTTC VUA price."* (Para. 9.234)

38. The price of FTTC VUA has already been set using the Access Network Model (ANM) until 30<sup>th</sup> June 2024, after which ComReg proposes that a price control of CPI-0% should be imposed

*"ComReg proposes to use the cost oriented prices that were determined in the 2021 ANM Decision up to 30<sup>th</sup> June 2024 (€19.12), and thereafter allowing increases of no more than the level of inflation using a 'CPI-0' formula."* (Para. 9.258)

39. We support ComReg's continuation of the use of anchor pricing. We pointed out in our May report that a regulated price floor, effectively an anchor price, set at the right level



gives investors like Virgin Media the confidence to invest in competing infrastructure. Allowing pricing freedom on FTTH VUA allows the market to discover the equilibrium price. We are therefore pleased to see that ComReg intends that anchor pricing remains its principal pricing remedy. However, we do have specific concerns with some of the details proposed by ComReg, discussed below.

## 4.2 Exploitative and Exclusionary Pricing

40. The FTTC price floor is discussed in the Consultation and in Oxera 1 entirely in the context of constraining Eircom from setting an exploitative price for superior products, which would result in consumers paying a price above the competitive level and so a transfer of consumer surplus to supplier surplus.<sup>5</sup> For example, ComReg states:

*“While no direct price control is therefore proposed for FTTH VUA, ComReg considers that the risk of excessive pricing (...) is nevertheless appropriately addressed by the constraint arising from price controlled FTTC VUA (which continues to be a substitutable product for lower bandwidth FTTH).” (Para. 9.235)*

41. ComReg refers to the findings in the Oxera 1 report which says that anchor pricing protects consumers in two ways:
- a) “...offering protection to customers from the risk of excessive prices (due to the fact that FTTC and FTTH services are in the same market and will be substitutable, and hence will act as a constraint on the pricing of FTTH services), and
  - b) providing investors in FTTH networks with an opportunity to earn fair returns by not directly capping FTTH prices too early, which could undermine the investment incentives, especially if there remains uncertainty over the speed of transition from FTTC to FTTH.”<sup>6</sup>
42. We agree with ComReg and Oxera that anchor pricing protects consumers, so long as the Anchor Product is in the same relevant market as the superior product. However, we are concerned that ComReg has not made any mention of anchor pricing protecting Eircom’s rivals from *exclusionary* practices such as predatory pricing or margin squeeze. This would

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<sup>5</sup> Consumer Surplus is the difference between what consumers are willing to pay for a product and the price of the product. Supplier Surplus is the difference between the price and the cost of production, including cost of capital. A transfer from consumers to suppliers means that consumers become worse off and suppliers are better off.

<sup>6</sup> Oxera 1, Para. 4.106



be a significant concern if Eircom were to set the price of FTTH VUA *below* the price of the anchor product.

43. Such behaviour is not just a theoretical possibility. We are potentially seeing exactly such behaviour in the UK where, at the time of writing, Openreach is seeking to reduce wholesale prices of superior products below the price of the Anchor Product in its proposed Equinox 2 offer.
44. The UK Wholesale Fixed Telecoms Market Review (WFTMR) conducted by Ofcom in 2021 determined that Openreach's 40 Mbps WLA product would be the Anchor Product with an initial monthly rental of £13.93 rising to £16.20 on 1<sup>st</sup> April 2023 in line with a CPI-0% price cap. The price of the 80 Mbps and 115 Mbps products were initially set at the price of the Anchor Product plus a premium of £0.82 and £1.57 respectively, with the same absolute margin maintained as the anchor product's price increased in line with inflation.
45. Openreach's Equinox 2 offer, currently under consideration by Ofcom,<sup>7</sup> proposes to reduce the price of 80 Mbps and 115 Mbps to £15.50 and £15.90 respectively, which is £0.30 and £0.70 *below* the anchor product. In future the price of these variations would increase by CPI-0% rather than maintaining the current absolute price differential with the 40 Mbps product.
46. Potentially what we see in the UK is Openreach effectively defining its own Anchor Product without reference to the market review that imposed the original Anchor Product. There is a risk that BT's behaviour is exclusionary and could affect incentives for investment.
47. ComReg has wisely avoided the problem in the UK by setting a price floor which the FTTC VUA price cannot go below (except in exceptional circumstances as discussed in Section 5 below), whereas Ofcom has set a price ceiling, which the price of 40/10 cannot go above. Competitors to Eircom should therefore be better protected against exclusionary pricing than competitors to Openreach.

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<sup>7</sup> The closing date for comments on the Equinox 2 consultation coincides with the closing date for comments on the market review



48. However, we have been told by Virgin Media that Eircom has very recently (27<sup>th</sup> February) notified a review FTTH VUA and Bitstream+ services to lower rental charges, which could indicate Eircom attempting to act in a similar way to BT<sup>8</sup>.
49. The problem discussed above is to some degree dealt with in the section of the Consultation on price reduction, discounts and promotions (Paras 9.322 – 9.378). Nevertheless, we believe that this protection could and should be strengthened by ComReg making a clear statement that it will not allow Eircom to set a price for FTTC or FTTH VUA or any downstream product, such as Bitstream, below the anchor price of FTTC VUA without proper justification and without ComReg declaring a new Anchor Product.
50. Such a statement will provide Eircom’s rivals with some assurance that ComReg will not allow Eircom to undermine the investment case of competitors in the same manner that some competitors to Openreach are concerned is happening in the UK.

#### **4.3 The Absence of an FTTH Cost Model**

51. Effective anchor pricing relies on the Anchor Product being in the same relevant market as the superior products that it is supposed to constrain. In this case, that FTTC VUA and FTTH VUA are in the same relevant market. If FTTC VUA were not an effective pricing constraint on FTTH VUA, then using the FTTC VUA as the Anchor Product would no longer be relevant as a SSNIP<sup>9</sup> on FTTH VUA would be profitable. ComReg, therefore, needs to be sure that FTTC VUA is an adequate constraint on FTTH VUA to act as an anchor preventing Eircom from setting exploitative prices. This will require monitoring throughout the period of this market review.
52. Provided that the two products are constraints on each other then they remain in the same relevant market and FTTC VUA can act as an anchor product, using the ANM to set the regulated price.
53. However, it is possible that FTTC VUA will stop acting as an effective anchor over the lifetime of this market review, and even an FTTH product that emulates FTTC at 100 Mbps may not constrain more superior FTTH products offering download speeds of up to 1 Gbps (absent a chain of substitution between access speeds).

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<sup>8</sup> Eircom Reference CRD-967

<sup>9</sup> Small but Significant Non-transitory Increase in Price.





54. It is also possible that substitution between products may be one-way only, i.e., once consumers have traded up to higher speeds of FTTH they are unwilling to trade down in the event of a SSNIP on FTTH, but they would be willing to trade up to FTTH in response to a SSNIP on FTTC. This behaviour in the retail market will be passed down to the wholesale market where RSPs choose between FTTC VUA and FTTH VUA.
55. Any of these circumstances would mean that an Anchor Product whose regulated price is calculated using the ANM, which does not include FTTH VUA, would no longer be relevant. A specific regulated price for FTTH VUA would then need to be calculated. We are, therefore, pleased to see that ComReg is developing an FTTH cost model (Consultation, Para. 9.240), which will no doubt help with future decisions about the regulated price.
56. It is important that any future FTTH cost model has the full confidence of the market once produced. In particular, it is important that alternative network providers, such as Virgin Media, have confidence that it accurately reflects the costs for a hypothetically efficient operator and that it takes due account of any costs in the Regulatory Asset Base (RAB). This confidence will come from a transparent development process in which other operators are fully involved. A full consultation on the draft model, including availability of a populated version of the model itself, will be an important part of this process.
57. Steps that could be taken by ComReg in this regard include:
  - a) ComReg releases a report/manual to the industry, that goes into some depth on describing the model structure, functionality and calculation flows.
  - b) ComReg provides a version of the model to the industry, that has been populated with actual data where this is non-confidential and with “dummy” but realistic data where there are confidentiality concerns. This would then allow stakeholders to satisfy themselves that the model has indeed been constructed well and contains no obvious flaws (whether intentional or accidental) in its design and calculation flows.
58. Should the above steps not be taken, then the model will remain an unknown black box to the industry and stakeholders will not be able to draw any real confidence that it is producing adequate service cost information for FTTH-based services.

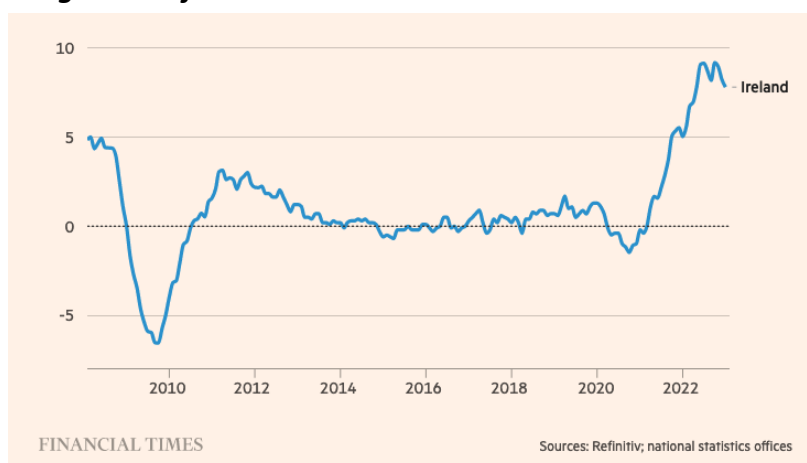


59. Secondly, as ComReg knows, there is rapid development of the broadband market and consumer behaviour. Bundled packages and high definition video streaming require higher bandwidths meaning that slower speed broadband via FTTC is increasingly unpopular.
60. It may be, therefore, that at some stage through the review period ComReg will need to undertake an interim review to ensure that FTTC VUA and FTTH VUA remain in the same relevant market. If they are found not to be, then it will be important for ComReg to change the Anchor Product to FTTH and set price on the basis of the FTTH cost model. As we suggested earlier, Eircom should not be allowed to change the effective Anchor Product through its own pricing behaviour. Rather any such change should be implemented by ComReg following a proper review of evidence.

#### 4.4 Inflation in the Access Network Model

61. The price of the Anchor Product is taken from the Access Network Model (ANM), published in October 2020, for the period until June 2024 after which it will be subject to a price increase of CPI-0%. Prices in the ANM are set in nominal terms and are not subject to any increase in line with CPI, although some expectations of inflation were factored into the model.<sup>10</sup> It should also be noted that in October 2020 inflation was negative (as shown in Figure 1) and there was no expectation that it would rise to the levels seen in 2022 after the invasion of Ukraine.

**Figure 1: Inflation in Ireland**



Source: Financial Times 28/2/23

<sup>10</sup> See ComReg (2020) 'Regulated Wholesale Fixed Access Charges: Review of the Access Network Model and Specification of the Price Control for Public Switched Telephone Network Wholesale Line Rental' Paragraphs 5.115 footnote 94, 5.186 and 6.37



62. In the period since the ANM was published Ireland has been subject to high levels of inflation, in common with many other countries. Table 1 below shows how the monthly rental of FTTC VUA would have risen given the rate of change of the CPI in the past two years and the forecast rate in the next two years compared with the prices set by the ANM. Under the ANM the price of FTTC VUA will increase by 2.5% between 2021 and 2024, whereas the inflation adjusted price would increase by 19%.

**Table 1: FTTC VUA Prices and Inflation**

|                          | 2020-2021                 | 2021-2022 | 2023                   | 2024  |
|--------------------------|---------------------------|-----------|------------------------|-------|
| ANM Price FTTC VUA       | 18.67                     | 18.62     | 18.62                  | 19.08 |
| Inflation adjusted Price |                           | 20.37     | 21.59                  | 22.20 |
| CPI                      | 1.6%                      | 9.1%      | 6.0%                   | 2.8%  |
|                          | Actual June - June        |           | Forecast calendar year |       |
| Source                   | Central Statistics Office |           | European Commission    |       |

63. Our concern here is that the effects of inflation on builders of FTTH networks, including Eircom, could mean that the cost of FTTH VUA is now above the cost-oriented price of FTTC VUA plus any FTTH VUA premium charged by Eircom. Network builders will have noticed the impact of this higher level of inflation in, for example, salary costs/ subcontractor costs and the cost of fibre cable. This could lead to one of two outcomes.
64. First, Eircom could try to recover its inflation affected costs by raising the price of FTTH VUA relative to FTTC VUA, which is subject to a charge control. If this price increase were in the 5% - 10% range of a SSNIP at the retail level and FTTC and FTTH were in the same market, then we would expect to see wholesale demand reverse from FTTH VUA to FTTC VUA as consumers' lack of willingness to pay the FTTH premium is passed down to the wholesale market. The reduced demand of FTTH, at both wholesale and retail level, would have a negative effect on the investment case of builders of fibre networks.
65. Secondly, if Eircom did not try to recover the effects of inflation through a higher price for FTTH VUA, the competing network companies would have to compete with an FTTH price that may be below their own costs. This could be expected to result in fewer customers or a lower, possibly negative, margin, which could also lead to less investment by competing network builders.
66. To prevent inflation having a negative effect on investment in fibre networks in Ireland, we propose that ComReg should reassess prices in the ANM taking inflation into account and



thus potentially raising FTTC VUA prices to allow network builders to set prices taking account of the increase in CPI. This could be done, for example, by making a one-off adjustment at the start of the new price period.

67. ComReg may argue that the price of FTTC VUA using the ANM was set in the 2018 Price Control and so cannot be changed now. However, in the ANM, ComReg made the following statement in relation to its willingness to intervene during the 2018 price control period:

*“ComReg will not intervene during that price control period **unless circumstances are materially different from those envisaged at the time of the pricing decision or exceptional circumstances have otherwise arisen.**”* (Para. 2.14) (Emphasis added)

68. Whilst the prices set for FTTC VUA were for a previous market review period than the current Consultation, it is our view that the new arrangements should properly take into account what has happened since the existing arrangements were originally put in place. ComReg should consider any material changes that have happened since then that had not been foreseen at that time. Thus, the new starting point at June 2024 should reflect not only the end of the existing arrangements but also any necessary adjustments to take account of unforeseen factors, such a substantially higher inflation. This would allow network builders to make a return on their investment and so continue to be incentivised to invest in a competitive FTTH market.



## 5 EIRCOM'S ABILITY TO REDUCE PRICES

69. This Section discusses ComReg's proposals for Eircom to be able to make price decreases for FTTC VUA and FTTH VUA and its ability to introduce wholesale promotions and discounts. It covers Paragraphs 9.322 – 9.378 of the Consultation. We follow the structure of the Consultation and start by discussing the proposed regulatory approval mechanisms for price decreases in relation to price floors set out in paragraphs 9.322 – 9.346 of the Consultation. We then move on to discuss the regulatory approval mechanism for wholesale promotions and discounts in paragraphs 9.347 – 9.378 of the Consultation.

70. ComReg's position on both matters is set out in Para. 9.322:

*“ComReg proposes that Eircom may continue to be allowed, in exceptional circumstances, subject to ComReg's prior approval, to reduce its wholesale FTTC VUA price below the regulated price in specific geographic areas subject to a price floor. ComReg proposes further that the FTTC VUA price acts as a price floor for FTTH VUA, and that the ban as regards wholesale promotions and discounts be relaxed for FTTH VUA.”* (Para. 9.322)

71. As the SMP Service Provider (SP), any ability by Eircom to reduce prices and/or to introduce discounts and promotions must be carefully considered as such behaviour could have the intention or effect of excluding rival networks from the market. We consider the potential exclusionary effects in this Section and make suggestions for how ComReg could improve the approval process to lower this risk.

### 5.1 Regulatory Approval Mechanisms for Price Decreases, Price Floors

72. ComReg states that although no requests to reduce the wholesale price of FTTC VUA below the regulated price have been received since 2018, it plans to continue to allow Eircom to reduce prices *in exceptional circumstances*. Its justification for continuing to allow such price reductions is that network expansion by rival operators could lead to more aggressive price competition in the WLA market. ComReg then states that:

*“Providing Eircom with the necessary flexibility to compete fairly could be to the benefit of Eircom's wholesale customers and ultimately end-users in the form of lower prices.”* (Para.9.326)

73. Specifically in relation to FTTC VUA prices ComReg makes two important statements:



- a) “An approval process for FTTC VUA price reductions gave investors in alternative networks confidence that price reductions would not result in market foreclosure to investors in WLA markets.” (Para. 9.328)
  - b) “ComReg will require Eircom to demonstrate that it is losing market share and to provide evidence of the presence of an aggressive pricing strategy of another operator.” (Para. 9.330)
74. We make two points in response to ComReg’s statements above.
75. Firstly, we fully agree that an approval process for FTTC VUA has given investors’ confidence that price reductions would not foreclose the market. We understand that this confidence has been instrumental in leading to the investment decision by Virgin Media in FTTH networks that will lead to a dynamic competitive market for the benefit of consumers. Maintaining that confidence at a time when investment is continuing is critically important.
76. Secondly, whilst we agree with ComReg’s requirement that Eircom must present evidence that it is losing market share as a result of aggressive competitive pricing, we would like to see ComReg provide more specific guidance concerning the evidence required. We suggest three criteria should be included in ComReg’s assessment:
- a) Eircom should be losing market share for a period of at least three consecutive months.
  - b) During the entirety of that period, the price differential between Eircom’s and its rival’s VUA price should be no less than a given threshold which we suggest should be at least 15%. We propose 15% as this is above the level of a SSNIP and so more than “*small but significant*”.
  - c) Eircom has not raised its own prices during the period of aggressive pricing and so increased the differential with its rivals by its own actions.
77. ComReg may not wish to publish these criteria to prevent Eircom’s competitors gaming the differential, for example by closing the differential to 10% in month three. Even if unpublished, such a threshold should be held confidentially within ComReg and available to each party’s counsel on a confidential basis in case of a dispute.
78. Unless a set of rules are in place, we are concerned that each request by Eircom to reduce its prices will be analysed on a case-by-case basis and this will inevitably lead to



uncertainty amongst investors in alternative infrastructure. This uncertainty may result in investors not having confidence that requests are considered on a consistent basis and could put the extent and/or timing of further investment at risk.

79. ComReg sets out rules for allowing a price reduction in FTTH VUA on a geographically limited basis. It states:

*"... in applying for approval to lower the price floor for FTTH VUA services on a geographically limited basis, Eircom should demonstrate that:*

- a) it is not in the position to compete on the basis of applicable prices, providing evidence of loss of market share in the geographic area concerned; and*
- b) that its proposed price reduction of FTTH VUA price in the area concerned is not less than the higher of either (i) An alternative operator's wholesale VUA price or equivalent VUA price (e.g., its retail price minus retail costs and relevant network costs) or (ii) Eircom's full deployment costs for FTTH VUA in the specific geographic area concerned, calculated on the basis of a BU-LRAIC+ costing methodology and with Eircom's RAB applied to Reusable Assets."* (Para. 9.343)

80. With regard to point a) above, our comments in paragraph 76 are applicable here also.
81. With regard to point b)(i), whilst this seems reasonable in principle, in practice we think that Eircom could reasonably raise the objection that it cannot know its rivals' VUA prices and even more that it cannot estimate its equivalent VUA price by calculating its retail minus price. Eircom could further answer that it would be unfair for it to be expected to set prices based on a guess about its rivals' VUA prices.
82. Exploring these points in more detail, Virgin Media and other builders of FTTH will not be under an obligation to publish prices for FTTH VUA as they do not have SMP. Indeed, Eircom may argue that competitors' prices are commercially confidential and only released to potential customers. Therefore, Eircom cannot be expected to know its rival's prices.
83. Eircom could also make the point that it has no information on which to basis an assessment of its rivals' retail price less its retail and relevant network costs. Here ComReg is asking them to know two things: competitors' retail prices and their retail and relevant network costs.



84. Given that Eircom would not have the necessary information to assess point b)(i) above, any proposed price reduction would have to be based on Eircom's own full deployment cost. As this could, and given relative scale probably would, be lower than a competitor's FTTH VUA cost, ComReg's safeguard of having the reduced price based on the *higher* of (i) and (ii) cannot be realised.
85. These same conditions are placed on Eircom in relation to FTTC VUA in Para. 9.334. Our comments on Para. 9.343 also apply to ComReg's proposal at 9.334.
86. To overcome this problem, we suggest that ComReg removes b)(i) from paragraphs 9.334 and 9.343 and instead uses Eircom's own full deployment cost, adjusted to reflect the smaller scale of its rivals. This would be the Similarly Efficient Operator (SEO) approach used in the economic replicability test described in 2014.<sup>11</sup> It would be for ComReg to determine the smaller scale of competitive operators for the purpose of price setting.
87. The SEO is similar in concept to a Reasonably Efficient Operator (REO), and this is noted in Paragraphs 9.546 and 9.547 of the Consultation. The use of an REO is also referenced in the European Commission's 2013 Recommendation on non-discrimination, albeit in relation to margin squeeze. The Recommendation states:
- "Where specific market circumstances apply, such as where market entry or expansion has been frustrated in the past, NRAs may make adjustments for scale to the SMP operator's costs, in order to ensure that economic replicability is a realistic prospect. In such cases, the reasonably efficient scale identified by the NRA should not go beyond that of a market structure with a sufficient number of qualifying operators to ensure effective competition."*<sup>12</sup>
88. It is our view that adopting an SEO or REO approach to estimating the VUA cost of an alternative operator is fair and transparent. Eircom can simply take its own costs and reduce the size of its network in its model to one agreed with ComReg as representing an

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<sup>11</sup> ComReg (2014) 'Replicability Test Further specification of the price control obligation not to cause a margin squeeze: Market 2 and Market 5' page 41, Footnote 47

<sup>12</sup> COMMISSION RECOMMENDATION of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (2013/466/EU). Para. 65





SEO/REO. It is therefore to be preferred over the wording at point b)(i) in Para. 9.334 of the Consultation.

89. We are very pleased to see that ComReg requires any price reduction sought by Eircom for FTTC VUA cannot be temporary or time-limited and that the area where any price reductions are applied cannot be “cherry picked”, as stated in Para. 9.336.
90. In Para. 9.338, ComReg proposes to formalise FTTC VUA as a price floor for FTTH VUA, meaning that Eircom would not be able to reduce its FTTH VUA prices below the FTTC VUA price. The justification for this is set out in Para. 3.340:

*“Adopting a price floor for FTTH VUA that references FTTC VUA prices, which have formed the basis of build or buy decisions for FTTH investment since the 2018 Pricing Decision, should better support the objective of promoting competition and encouraging investment by commercial operators than would be the case if the price floor was based, in a context of significant uncertainty, on an estimate of future FTTH costs and demand derived from Eircom’s own business case for FTTH.”*

91. Subject to our comments above concerning the effects of inflation on the ANM prices in paragraph 66, we fully support this statement. There has been significant investment by Virgin Media and SIRO in FTTH networks with more planned. Whilst no markets are 100% certain, maintaining the pricing certainty that comes from FTTC VUA as a price floor for FTTH VUA will continue to support “the objective of promoting and encouraging investment by commercial operators”. (Para. 3.340)
92. Notwithstanding our comments about sub-paragraph b)(i), we also agree with ComReg’s statement in Para. 9.343:

*“... other than in the exceptional circumstances that Eircom can demonstrate that a lower FTTH VUA price is necessary to allow Eircom to compete with rival operators, ComReg does not believe that Eircom should be allowed to introduce a FTTH VUA price in a specific geographic area below Eircom’s FTTC VUA price in the specific geographic area concerned.”*

93. Were Eircom to be allowed to reduce prices below the price floor in specific geographic areas as a general rule, then there would be a serious risk that Eircom could undermine the investment being undertaken by Virgin Media and others creating the potential



postponement or even reduction of further investment. At worst the ability of Eircom to set prices of FTTH below the price floor could force rivals to exit the market or limit further expansion.

94. We also agree with ComReg's argument in Para. 9.344 of the Consultation on why an emulated FTTC service on FTTH should not be set below the price of FTTC VUA.
95. ComReg concludes its discussion on amendments to the national FTTH VUA price with the following paragraph:

*"ComReg's assessment of Eircom's proposed amendment to the national FTTH VUA price will be on a case-by-case basis and will be subject to a number of pre-conditions including the following:*

- d) The reduction to the price for FTTH VUA is not to be a short-term measure;
  - a) The reduction to the price for FTTH VUA is unlikely to dissuade new investment by alternative operators;
  - b) The reduction to the price for FTTH VUA should apply to a substantial geographic region and not just to a very select number of exchanges chosen by Eircom; and
  - c) The FTTH VUA price will continue to be the wholesale input used by all FTTH services that are provided in the specific geographic area." (Para. 9.346)
96. Whilst we welcome the principles set out in this paragraph, we are concerned with the lack of specificity in particular in relation to the first three points. We would therefore like to see ComReg be more specific about what is meant by these points and suggest the following:
- a) The minimum period for any price reduction should be twelve months.
  - b) Alternative operators will not enjoy the same economies of scale for at least the period of this market review. This should be reflected in any reduced price for FTTH VUA being set at the level of an SEO or REO rather than on the economies of scale enjoyed by Eircom.
  - c) A "*substantial geographic region*" should be specified to include a specific population level. We suggest this should be a minimum of 250,000 households.



## 5.2 Regulatory Approval Mechanism for Wholesale Promotions and Discounts

97. As noted by ComReg, the 2018 Pricing Decision imposed a ban on all wholesale promotions and discounts on FTTH. The purpose behind this ban was to reduce uncertainty and difficulties in complying with other regulatory obligations, in particular non-discrimination.
98. However, ComReg considers that the current market conditions, in particular the deployment of FTTH by alternative network operators, such as Virgin Media, mean that the outright ban ought to be relaxed. ComReg's overall position with regard to wholesale promotions and discounts is set out in Para. 9.375 of the consultation.
99. To address competitive concerns given Eircom's position of SMP in the market:
- "ComReg proposes to subject wholesale discounts and promotions to its prior approval in order to ensure that they do not enable foreclosure strategies, e.g., a geographic differentiation of FTTH prices that would materially impact existing and/or emerging competition."* (Para. 9.353)
100. ComReg states that it will only grant approval for discounts and promotions where it:
- "is satisfied, **on the basis of the information provided by Eircom**, that the promotions or discounts, individually and in aggregate, are unlikely to have a material impact on economically efficient alternative investment by alternative network operators that are either investing or planning to invest in VHCNs."* (Para. 9.356) (Emphasis Added)
101. Whilst we agree with the overall sentiment of the above paragraph and the conditions under which ComReg would grant approval for discounts and promotions, we are concerned that it appears that ComReg will make its decision only *"on the basis of the information provided by Eircom"*.
102. This implies that ComReg will not seek the views of stakeholders more widely, nor undertake its own analysis of the effects of Eircom's proposed discounts and promotions on competition and investment. It goes without saying that Eircom will provide information that places the Eircom proposal in a very favourable light, whereas ComReg's independent analysis and input from other stakeholders may challenge Eircom's own information.



103. Rather than simply rely on information provided by Eircom, we suggest that ComReg undertakes a public consultation on the proposed discounts and promotions to get a broader set of inputs. This approach has been adopted by Ofcom in the UK under the WFTMR. Where BT has SMP it is required to provide 90 calendar days' notice of change to prices and other commercial terms that are conditional on the volume and/or range of services purchased. During this period Ofcom has undertaken public consultations, usually lasting 30 calendar days to gather evidence from stakeholders about the impact of proposed changes. This ensures that Ofcom receives input from all stakeholders and not just from BT.
104. It is our opinion that ComReg should undertake a similar consultation process where Eircom is proposing discounts and/or promotions for VUA products. However, it may wish to consider whether 90 days is sufficient time for such a process.
105. ComReg notes that "pricing strategies which have a loyalty inducing effect are more likely to undermine the investment case of alternative network operators" (Para. 9.357). ComReg goes on to say that it will pay particular attention to ensure that promotions and discounts are only permitted where they do not prevent new investment by alternative operators or undermine competition (Para. 9.359).
106. ComReg concludes this sub-section by stating that:
- "... for a wholesale promotion or discount offer to be acceptable, it must not favour Eircom's retail arm and must be accessible in practical terms to other Access Seekers. In addition, a wholesale offer should not be predicated on volume thresholds that can only be achieved if the Access Seeker switches all of its demand on to Eircom's network as such offers would make it more difficult for rival networks to compete. ComReg also considers that long-term volume discounts that have the purpose or potential effect of restricting migration between networks risk undermining competition and would not be in the long-term interests of end users."* (Para. 9.361)
107. This paragraph is likely to go a long way towards reducing some of the concerns of alternative networks. However, in our view it could and should be strengthened in two ways.
108. Firstly, where ComReg refers to an Access Seeker switching "*all of its demand on the Eircom's network*", we think this could be strengthened by simply banning any promotion



or discount that is based on volume thresholds. Even if some volume threshold is allowed, then “all” should be changed to “a substantial proportion” or similar. By “a substantial proportion” we would suggest 60%. This proportion would still allow alternative networks to compete for a significant share where Eircom has an FTTH network.

109. Secondly, we suggest a minor change at the end of the paragraph by adding “and will not be permitted” before the full stop. This would make it clear for Eircom and investors that discounts that raise switching costs will not be permitted.
110. Finally, we fully agree that Eircom should not be allowed to introduce wholesale discounts and promotions that differ on the basis of geography to target specific areas (Para. 9.372). If these discounts were permitted Eircom could use them to target rival operators, such as Virgin Media, and would thus be a major barrier to entry and expansion, affecting competition in the long run.



## 6 MARGIN SQUEEZE TEST

### 6.1 Proposed Removal of MST between FTTH VUA and FTTH Bitstream

111. The 2018 Pricing Decision required Eircom not to impose a margin squeeze between FTTH VUA and FTTH Bitstream. The current Consultation proposes to remove this obligation.

ComReg states that it:

*“... is of the view that the proposed FTTH MST would ensure that **Eircom has no incentive to engage in a squeeze between FTTH VUA and FTTH Bitstream.** ComReg proposes accordingly that the wholesale MST between FTTH-based VUA and FTTH-based Bitstream should be removed” (Para. 9.580) (Emphasis added)*

112. From paragraph 9.581, it appears that ComReg’s view is that its competition law powers allowing it to intervene on an *ex post* basis are sufficient should any concerns arise.

113. ComReg also agrees with Oxera that Eircom does not have incentives to engage in a margin squeeze on Bitstream and that the retained MST between VUA FTTP and retail FTTP offers sufficient protection.<sup>13</sup>

114. As we have noted above, [REDACTED]  
[REDACTED]  
[REDACTED]. We also understand that outside of its own network footprint in the Commercial NGA WLA market, Virgin Media will use Eircom FTTH VUA as an input to its retail service where the equivalent service from SIRO is not available. [REDACTED]  
[REDACTED].

115. In this Section, however, we only consider whether the removal of the current Margin Squeeze Test (MST) between FTTH VUA and FTTH Bitstream, as ComReg proposes to maintain the FTTH VUA to Retail MST. Our analysis shows that, contrary to ComReg’s opinion, Eircom will have the incentive and ability to engage in exclusionary behaviour.

[REDACTED]

116. ComReg has recognised the risk of undermining investment by alternative infrastructure providers should Eircom decide to provide FTTH VUA at too low a price. It has therefore

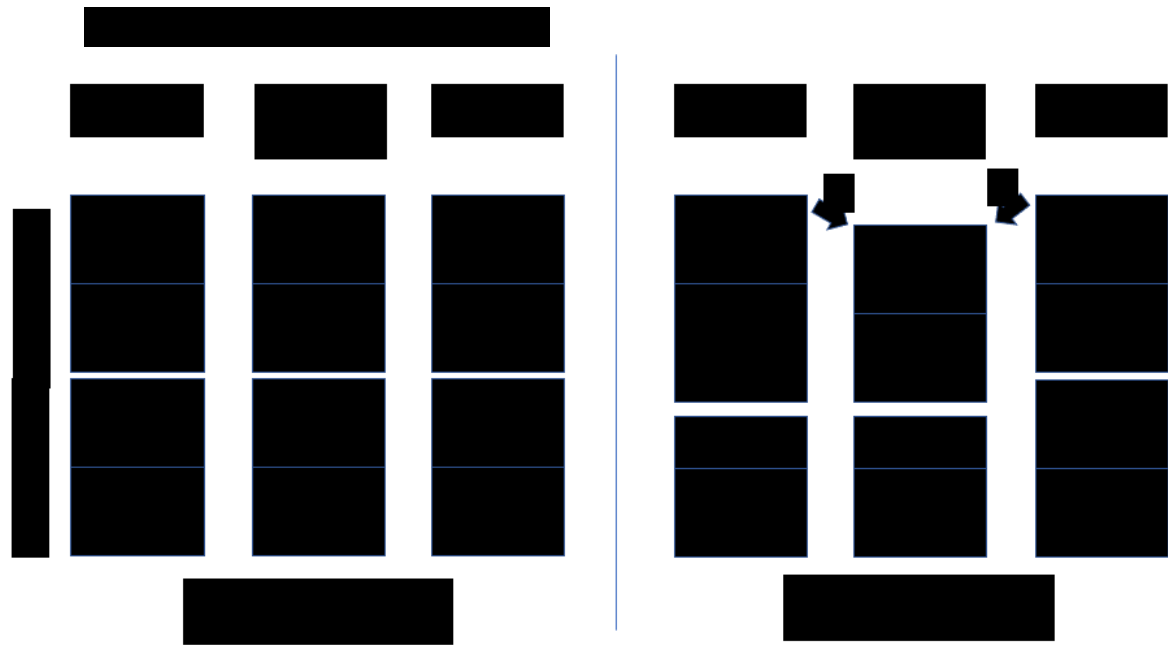
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<sup>13</sup> Oxera 3, Para. 6.102





[Redacted text block]



Source: SPC Network

[Redacted text block]





[REDACTED]

129. Of course, we do not know what would happen, but the possibility that Eircom could behave in the manner illustrated above shows that it still has the incentive to impose a margin squeeze [REDACTED]

130. To help illustrate the potential incentive for Eircom to engage in a margin squeeze, we have examined the revenue losses that it might incur based on two potential outcomes as a result of Eircom's potential decisions. These are all based on the assumptions in [REDACTED] and the following outcomes that depend on Eircom's actions.

[REDACTED]

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<sup>14</sup> [REDACTED] We also understand that Eircom has announced a new FTTH tariff structure that will lower rental charges during this consultation period.



Source: SPC Network

**Outcome 1 – Eircom does nothing** [REDACTED]

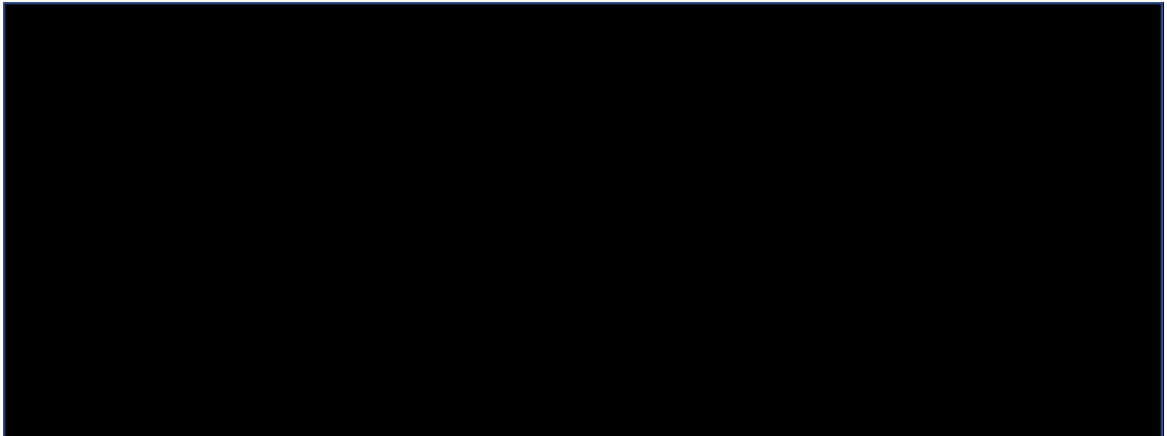
131. In this first outcome, Eircom continues with its pricing as per the left hand side of Figure 2 above [REDACTED]  
[REDACTED]  
[REDACTED]. This results in a revenue loss of €1.5 million per month.

[REDACTED]



Source: SPC Network

[Redacted text block containing multiple lines of obscured content]



Source: SPC Network



136. Most importantly, these scenarios demonstrate that when facing competition in the [REDACTED], the retail MST does not mean that “*Eircom has no incentive to engage in a squeeze between FTTH VUA and FTTH Bitstream*”. In fact, Eircom still has the incentive and, absent appropriate *ex ante* remedies (which includes the MST ComReg proposes to remove), the ability to do so.
137. Based on this evidence we propose that ComReg should reconsider its intention to remove the MST between FTTH VUA and FTTH Bitstream due to the significant threat of a margin squeeze by Eircom.
138. Furthermore, that test should be carried out using the LRAIC+ cost standard (See Section 6.2 of this report for an explanation of the need for LRAIC+ rather than LRIC). Given the multitude of MSTs that Eircom will have to undertake with reference to the flagship retail products, we would not consider the addition of a few tests with FTTH Bitstream to cause a significant increase in workload for Eircom. Anyway, these additional tests are important for the promotion of investment.
139. In Annex A, we have set out a number of proposed changes to text in the Consultation that we consider would address the issue discussed above.



## 6.2 Margin Squeeze Model Design and Main Parameters

140. We have a number of concerns with the design of the margin squeeze model and its associated parameters. These are discussed in detail in Annex B. The most important issue is the relevant cost standards proposed when associated with the level of aggregation proposed. ComReg is currently suggesting that LRIC should be used for product-by-product tests, with LRIC+ reserved solely for the portfolio test.
141. We do not agree that LRIC is suitable for the product-by-product tests, as this is counter to the 2013 EC Recommendation which states that LRIC+ should be used. Our reasoning is contained in Annex B.
142. Furthermore, we consider that the working definition of what constitutes LRIC, as detailed in the consultation document, is incorrect and more suited to describing what are commonly referred to as “overhead” types of cost. A literal definition of LRIC would exclude all fixed costs that span multiple increments. This would, in effect mean that duct, fibre and backhaul/core equipment costs would almost all be excluded from the LRIC in a product-by-product MST. So, for example, the backhaul and core network costs of each retail FTTH service would be virtually zero under LRIC. Again, our reasoning can be found in Annex B.

## 6.3 Margin Squeeze Test Process

143. With regards to the overall process surrounding the obligations on Eircom not to engage in margin squeezes, we have been asked to address two issues:
- a) The restriction on the obligation of Eircom to conduct *ex ante* margin squeeze tests (MSTs) on only a subset of all retail products – referred to as Flagship Products.
  - b) A potential lack of stakeholder transparency on the model to be developed by Eircom for the purpose of the MSTs.

### 6.3.1 ComReg Proposal and Reasoning with SPC Network Commentary

144. ComReg’s proposals around the overall process of the margin squeeze obligation, as opposed to the design of the actual test itself, are detailed in paragraphs 9.514 through 9.600 of Section 9.3.5 of the Consultation document. We have grouped our commentary below into four general themes:



- a) The use of Flagship Products.
- b) The development and ownership of the MST model.
- c) The requirement for pre-launch notification to ComReg.
- d) The retention of an all-products-at-all-times obligation on Eircom not to engage in a margin squeeze.

### Flagship Products

145. ComReg has proposed to follow the current EC recommendation that “the NRA does not need to run an MST for each and every new retail offer but rather should assess the margin earned for the ‘most relevant retail products’ i.e., the ‘flagship products’” (9.514). The rationale is essentially one of not wanting to overburden Eircom with having to undertake a formal MST for “hundreds of retail offerings, with very low volumes” [Para. 9.516]. Such an approach seems sensible in principle, as long as sufficient safeguards are included to prevent, or at least minimise, Eircom taking advantage of this.

146. Of primary concern will be the products that comprise the set of flagship products, how these will be selected, and how the set will be kept sufficiently relevant. With regards to the first two points, in paragraph 9.517, ComReg proposes that:

*“... it is proposed that Eircom identify the **highest volume FTTH retail offerings**, which together account for **at least 75%** of Eircom’s **total** retail FTTH volumes. **In addition**, the flagships must include the **highest volume standalone FTTH retail offering** and the **highest volume bundled FTTH retail offering** if not identified as part of the 75%.”* (Emphasis added)

147. With regards to the third point (sustaining relevance), ComReg proposes a number of safeguards. In particular:

*“... the flagship products be determined on a quarterly basis with the submission by Eircom of its quarterly monitoring statements.”* (Para. 9.518)

*“... ComReg may identify other FTTH retail offerings which should be regarded as flagship products (and existing flagship products which should be excluded from any MST).”* (Para. 9.519)

*“... where complaints have been received from RSPs regarding the compliance with the MSTs.”* (Para. 9.520)



148. As long as the above safeguards are retained and seen by stakeholders to be adequately taken into account, then we support the use of flagship products in regard to the MSTs.

#### **MST Model Development and Ownership**

149. In paragraph 9.577 ComReg proposes that *“the DCF Model be developed by Eircom in consultation with ComReg”*. SPC Network can understand the logic in ComReg wishing Eircom to develop, and therefore take ownership of, the margin squeeze model, and there is certainly nothing intrinsically wrong with such a desire. However, this stance does bring into question issues such as transparency and oversight should other stakeholders (operators) have no visibility of how the model functions and has been populated. These issues would need to be properly addressed by ComReg if the other stakeholders are to have any real level of confidence in the model outputs and subsequent decisions taken.

150. Steps that could be taken by ComReg in this regard include:

- a) Eircom releasing a report/manual to ComReg, and ComReg then to the industry, that goes into some depth on describing the model structure, functionality and calculation flows.
- b) Eircom also releasing to ComReg, and ComReg then to the industry, a model operating manual that carefully details how MSTs are to be performed. This manual should also carefully detail where the various model inputs will be sourced from, and what steps are to be taken with regards to the sufficiency and validity of those inputs.
- c) Eircom provides a version of the model to ComReg, and ComReg then to the industry, that has been populated with *“dummy”* but realistic data. This would then allow the industry to satisfy themselves that the model has indeed been constructed well and contains no obvious flaws (whether intentional or accidental) in its design and calculation flows.
- d) ComReg undertakes occasional detailed audits of specific MSTs (selected by ComReg) that drill down through the relevant MSTs to ensure, amongst other things, that:
  - (i.) The calculation flows through the model are error free and rational.
  - (ii.) The parameters used in the specific model runs are correct.



(iii.) All inputs to the MSTs are traceable back to definitive data sources and have been inputted correctly.

(iv.) Where an input consists of only a portion of a specific cost block, then the method of apportioning that portion stands up to scrutiny and can be fully justified by Eircom.

151. Non-confidential versions of the audit reports should be made available to other operators/stakeholders to provide additional assurance to the industry that the MST process is fit for purpose.
152. Should the above steps not be taken, then the model will remain an unknown black box to the industry and other operators/stakeholders will not be able to draw any real confidence that it is producing adequate results in the MSTs.

#### **Pre-launch Notification**

153. As detailed in paragraph 9.584, in the 2018 Bundles Decision ComReg established a requirement for Eircom *“to notify ComReg of all new and revised bundles at least five working days before launch”*. Furthermore, in the 2018 Pricing Decision a similar requirement was placed on Eircom for standalone offers, covering changes to prices and promotions or discounts.
154. In paragraph 9.589 ComReg considers a more relaxed *“self-certification”* requirement, but in paragraph 9.590 concludes that the existing pre-launch requirement should continue. Regardless of whether the requirement is pre-launch notification or self-certification, Eircom will still have to undergo the necessary work to ensure, and be able to demonstrate, that no margin squeeze will take place.
155. Paragraph 9.596 will require Eircom, in any submission to ComReg, to make full and true disclosure of all material facts. However even with self-certification, although no pre-launch submission to ComReg would be needed, Eircom would still have to undertake the work to gather and check the validity of all material facts (a) to ensure that a margin squeeze would not take place, and (b) to be able to demonstrate this to ComReg should it be required to do so at some later date.





156. With self-certification any subsequent remedies would only be possible on an ex post basis, whereas with pre-launch notification ComReg is provided with a formalised opportunity to undertake ex ante check.
157. On this basis, SPC Network would agree that pre-launch notification remains the better option, especially as the workload on Eircom would be very similar in both cases.

### **Overriding Obligation**

158. ComReg proposes, in paragraph 9.593, to maintain the overriding obligation on Eircom not to undertake a margin squeeze, with this applying to all offers at all times:

*“... Eircom is required to ensure that **all offers** (relating to all FTTH products, standalone and bundled) remain compliant with its obligation **not to cause a margin squeeze at all times.**”* (Emphasis added)

159. With this in mind, in paragraph 9.594, ComReg emphasises that pre-launch approval “*does not amount to a definitive finding by ComReg*”. Further, in paragraph 9.595, ComReg states that initial approval of a pre-launch notification is “*strictly without prejudice*” and that ComReg retains the right to take action at a later date should this prove to be necessary. Thirdly, in paragraph 5.597, ComReg requires that “*Eircom must notify ComReg immediately if it believes an existing offer may be causing a margin squeeze*”.

160. We agree that Eircom must remain under an overriding obligation not to cause a margin squeeze and so support the emphasis given by ComReg in the paragraphs mentioned above.

161. A further safeguard that ComReg proposes to continue in this regard is the obligation on Eircom to provide it with quarterly monitoring statements. However, certain changes to this quarterly reporting are proposed:

- a) In paragraph 9.598, ComReg proposes that the current statement requirements (introduced by the 2018 Bundles Decision) should now be restricted to just the FTTH flagship products.
- b) In addition to this, in paragraph 9.599, ComReg proposes requiring a modified quarterly monitoring report that would cover all FTTH retail products, both standalone and bundled, that would then be used by ComReg to help in determining which products would be deemed flagship products moving forward.



162. The requirements of both the above bullets seem sensible, with the proviso as detailed earlier, that Bitstream needs to be added to, and retained in, the list of flagship products.



## 7 SUMMARY OF PROPOSED CHANGES

163. The table below summarises the concerns set out above our proposed amendments to the Consultation document.

| Problem  | Solution  | Benefit of making proposed change  |
|--|---|--|
| <b><i>Price Control Remedies</i></b>   |   |  |
| Anchor pricing designed to address exploitative rather than exclusionary behaviour.  | ComReg to make a clear statement that it will not allow Eircom to set a price below the anchor price without proper justification and ComReg defining a new anchor product.   | Increased certainty of investors that Eircom will not be able to use pricing as an exclusionary practice.  |
| FTTH VUA cost model potentially unacceptable to market.  | ComReg to be completely transparent when developing the model, including a public consultation.   | Increased acceptance of cost model.  |
| ANM based price in June 2024 not adjusted for higher than expected inflation meaning Anchor Price likely to be below post inflation cost.                | Adjust ANM costs by CPI.  | Unforeseen increase in cost due to inflation will mean ANM prices will not act as a deterrence to investment.  |
| <b><i>Eircom's ability to reduce VUA price and introduce promotions and discounts</i></b>  |   |  |
| ComReg tests for allowing Eircom to reduce prices of FTTC/H VUA price below the regulated price on a national or regional basis are not specific enough. | ComReg to set out clearly the values they will use in these tests: Eircom losing market share for three months; wholesale competitor's prices at least 15% below Eircom's; Eircom has not raised its prices.<br><br>Rather than Eircom not being allowed to reduce price below the level of an alternative network's VUA, use a Similarly Efficient Operator basis. | Increased certainty for investors about conditions under which Eircom will be allowed to reduce prices.<br><br>Eircom could claim it cannot know rivals' VUA prices so default would be Eircom's own costs where it would benefit from economies of scale. |
| ComReg will give regulatory approval discounts and promotions based on   | ComReg to undertake public consultations to gain view from  | ComReg will get a wide set of views and understand the implications of a   |



| Problem  | Solution   | Benefit of making proposed change  |
|--|--|--|
| information provided by Eircom.  | other stakeholders such as alternative network builders.   | promotion/discount on the market as a whole.   |
| Promotion or discount based on volume could be allowed if anything less than all an Access Seeker’s demand has to be on Eircom.                          | Reduce “all” to a significant proportion, e.g., 60%.   | Reduction would allow space for alternative networks to gain customers.  |
| <b>Margin Squeeze</b>  |  |  |
| MST removed at Bitstream level.  | Reinstate MST at Bitstream level.  | [REDACTED]   |
| Cost standard for product-by-product MST set to LRIC. This excludes, for example, ducts, fibres and equipment used by multiple products.                 | Set cost standard to LRAIC+ but excluding specified central overheads.   | Will prevent Eircom setting downstream costs at, effectively, Pure LRIC whilst still allowing them some degree of pricing freedom across the portfolio.  |
| Very little transparency proposed for new MST model to be developed by Eircom.   | Eircom to provide ComReg formal documentation on the model and how the tests are to be run, and also a copy of the model populated with realistic data. ComReg to then release the above to the other operators. | Will prevent the model remaining an unknown black box to the industry and other operators/ stakeholders. Will allow the industry to have confidence that the model is producing adequate results in the MSTs |
| Unclear how the MSTs will operate with the proposed 42 month ACL in the context of 12 or 24 month contracts and also in the context of retention offers. | ComReg to provide a set of detailed worked examples to clarify.  | Will provide transparency to the industry on how the ACL is used within the MSTs, and thus confidence in the overall process.  |



### **Annex A: ComReg Proposal and Reasoning with SPC Network Commentary**

164. In **Section 9.3.5** of the Consultation, ComReg discusses its proposals with regards to Margin Squeeze tests in some detail. However, right from the start of this section, ComReg only considers a potential Margin Squeeze between FTTH VUA and FTTH Retail Services. A good example of this is paragraph 9.383 which states:

*“A margin squeeze occurs when an SMP operator, active in both the wholesale and retail markets, sets prices in such a way as to prevent an RSP from replicating the retail service provided by the SMP operator at the same price (which covers their downstream costs and generates a profit).”*

165. Given that up to this point ComReg has acknowledged that there is a risk of a margin squeeze between FTTH VUA and FTTH Bitstream, the above paragraph would be much better written as follows:

*“A margin squeeze occurs when an SMP operator, active in both the wholesale and retail **or downstream wholesale** markets, sets prices in such a way as to prevent an RSP from replicating the retail **or downstream wholesale** service provided by the SMP operator at the same price (which covers their downstream costs and generates a profit).”*

166. In a similar manner, paragraph 9.384 currently states that:

*“A margin squeeze can flow not only from the setting of the wholesale price, but it can also result from the retail price set by the SMP operator. The concern is not with the absolute wholesale or retail price but rather with the difference created by an SMP operator between such prices, i.e., the price or margin squeeze.”*

167. This would be better written as:

*“A margin squeeze can flow not only from the setting of the wholesale price, but it can also result from the retail **or downstream wholesale** price set by the SMP operator. The concern is not with the absolute wholesale or retail (**or downstream wholesale**) price but rather with the difference created by an SMP operator between such prices, i.e., the price or margin squeeze.”*

168. Again, in paragraph 9.394, ComReg states that:



*“In circumstances where a wholesale price control exists (such as cost orientation) but there is no requirement to ensure replicability in the downstream market by means of a MST, a margin squeeze may be brought about through a reduction in retail prices by the SMP operator – see Figure 32 below.”*

169. A more comprehensive version of this would be:

*“In circumstances where a wholesale price control exists (such as cost orientation) but there is no requirement to ensure replicability in the downstream market by means of a MST, a margin squeeze may be brought about through a reduction in retail **or downstream wholesale** prices by the SMP operator – see Figure 32 below.”*

170. Oxera themselves show a similar lack of consideration of alternative infrastructure providers wishing to compete in the WCA Market, as quoted in paragraph 9.397 of the ComReg consultation document:

*“Eircom could in theory sustain a margin squeeze by pricing down to the level of its variable costs, as it continues to earn profits (or, at a minimum, recover its variable costs) during the squeeze. Translating this to the LRIC+ price control, this means that Eircom could set its retail price below its LRIC+ (and even below its LRIC) plus its incremental downstream costs, and continue to earn end-to-end (short-run) profits on each and every sale.”*

171. A more comprehensive version of the above would read:

*“Eircom could in theory sustain a margin squeeze by pricing down to the level of its variable costs, as it continues to earn profits (or, at a minimum, recover its variable costs) during the squeeze. Translating this to the LRIC+ price control, this means that Eircom could set its retail **or downstream wholesale** price below its LRIC+ (and even below its LRIC) plus its incremental downstream costs, and continue to earn end-to-end (short-run) profits on each and every sale.”*

172. In paragraphs 9.399 through 9.406, ComReg does discuss *“The existence of competing NGA networks”*. However, these paragraphs again only really consider the potential for a margin squeeze between FTTH VUA and retail services. A good example of this is paragraph 9.400, which states:



*“In circumstances where there are alternative network infrastructure providers present, the incentive of the SMP operator to engage in a margin squeeze at the wholesale and **retail** level may be weakened. The way in which the presence of alternative network infrastructure operators affects the SMP operator will be dependent on whether they are wholesale providers of access services or whether they are providers of an end-to-end service (including a retail service) and also on the margin squeeze strategy employed by the SMP operator, i.e., whether it is through an increase in wholesale access charges or a decrease in the **retail** prices (of standalone and bundled products).”* (Emphasis added)

173. Later on in this section, ComReg provide examples of a risk of a margin squeeze, but again only with retail services. These examples are:
- a) For retail services using FTTC VUA.
  - b) For retail services using FTTH VUA.
174. No consideration is given by ComReg for **downstream wholesale services** using FTTH VUA. Interestingly, in paragraph 9.441, ComReg acknowledges that:
- “... there are no end-to-end operators offering wholesale access at a material scale other than Eircom.”*
175. ComReg thus seems to be taking the view that the absence of other operators in the wholesale access market (whether WLA or WCA) is not something that should be of concern.
176. In its concluding remarks on the risks of a margin squeeze ComReg again only considers an MST with retail FTTH services, even though:
- a) In paragraph 9.444 ComReg states that it is “... of the view that an *ex post* competition law enforcement will be insufficient as it will be limited to protecting remaining competition ...”.
  - b) In paragraph 9.445 ComReg quotes Oxera’s opinion that “... the SMP operator could already have secured an entrenched position before any resolution can be imposed ...”
  - c) In paragraph 9.446 ComReg quotes recital 61 of the EC Recommendation that suggests “to establish whether alternative access seekers can **economically replicate**



- a downstream offer provided by the SMP operator** with the regulated wholesale input available, in cases where wholesale price regulation should not be imposed, an NRA should undertake an ERT.” (ComReg emphasis)
- d) In paragraph 9.447 ComReg states that “BEREC Guidance also sees *ex ante* MSTs as a safeguard for competition, **allowing efficient market entry and promoting efficient investment** in NGA networks.” (Emphasis added)
- e) In paragraph 9.448 ComReg quotes Oxera’s opinion that “The consequences of errors from choosing not to impose an MST and later observing a squeeze compared to imposing an MST and finding it may not have been necessary would suggest that, **on balance, it would be proportionate to impose margin squeeze obligations, given the risks of not doing so.**” (Emphasis added)
177. We note that all of the above bullets could be used to support the use of an *ex ante* MST between FTTH VUA and downstream wholesale services such as WCA Bitstream.
178. ComReg does provide a few final comments on the use of an MST on Bitstream prices towards the end of Section 9.3.5, in paragraphs 9.579 through 9.582.
179. In paragraph 9.579 ComReg acknowledges that in 2018 it saw the need for an MST with Wholesale FTTH-based Bitstream in WCA markets. However, in paragraph 9.580 ComReg simply states that it “*is of the view that... .. Eircom has no incentive to engage in a squeeze between FTTH VUA and FTTH Bitstream*” without providing any substantial evidence to support such a view. This is despite the fact that ComReg has seen a need to implement a price floor on FTTH VUA to support alternative infrastructure investments by other operators.
180. In paragraph 9.581 ComReg goes on to state that the proposed FTTH MST “*will in ComReg’s view provide sufficient room for the provision of FTTH Bitstream services by other network operators*”. Assuming that Eircom continues to provide a wholesale Bitstream service, then this fundamentally cannot be the case both where “*the other operator*” uses Eircom’s FTTH VUA service and in cases where it is using its own local fibre infrastructure (VM Ireland being an example of the latter should it enter the wholesale Bitstream market). If ComReg totally deregulates WCA, then there will be nothing, for example, to stop Eircom reducing the price of FTTH Bitstream down to the same level as





FTTH VUA – and to target such a reduction so as to attack the ongoing viability of specific competing providers of Bitstream.

181. In paragraph 9.582, ComReg notes Oxera’s assertion that “Eircom would not however be in a position to respond (by reducing its retail prices) given the proposed FTTH MST prohibits this and may lose customers who divert to the lower priced bitstream services offered by RSPs”. This may indeed be the case. However, we would point out that if WCA is unregulated then Eircom would be free to target lower Bitstream prices to specific RSPs, and not make it generally available to all. Eircom could thus target RSPs using Bitstream providers based on Eircom’s FTTH VUA, [REDACTED]. Eircom could thus seek to “encourage” both types of Bitstream provider to withdraw from the market, and also prevent loss of valuable FTTH VUA revenue to Virgin Media.



### ***Annex B: Margin Squeeze Model Design and Main Parameters***

182. With regards to the design of the margin squeeze model, and the key parameters to be used in the tests, Virgin Media Ireland has expressed concern in four areas, these being:

- a) Relevant cost standard(s).
- b) Level of aggregation.
- c) Relevant time period.
- d) Out of bundle revenues.

### ***ComReg Proposal and Reasoning with SPC Network Commentary***

#### **Relevant Cost Standard and Level of Aggregation**

183. ComReg discusses the issue of the relevant cost standard to use in the MST in paragraphs 9.469 through 9.488. Included within these paragraphs are “*definitions*” of the various cost standards considered. However, we disagree with ComReg regarding the definitions for LRIC and LRIC+.

184. In paragraph 9.472, ComReg states that:

*“A Long Run Incremental Cost (‘LRIC’) approach measures the costs that can be avoided in the long run if a given increment (e.g., fibre broadband) is not produced. It includes all fixed costs associated with the increment, **as all costs are assumed to be variable in the long run.**” (Emphasis added)*

185. The first sentence is correct. However, the second sentence is not. In the Long Run although the method of supply can be changed, there can still be fixed costs associated with whatever method of supply is relevant. Thus, although the LRIC does include fixed costs associated with the increment, this is not because they become “*variable*” in the long run, it is simply that they can be avoided if the increment is no longer produced.

186. The definition also neglects to state that the LRIC also includes all variable costs associated with cost blocks that span other increments in addition to the increment in question. Indeed, if all costs were “*assumed to be variable in the long run*”, then there would be no difference between LRIC and LRIC+ as both would result in the same cost.

187. In paragraph 9.473, ComReg states that:



*“A ‘LRIC+’ approach comprises **LRIC plus an allowance for the recovery of common costs** (LRIC+ is a proxy for ATC/FAC) and allocates costs to a given increment (e.g., a product) based on whether such costs are directly caused by the provision of that increment in question. Top-down models can be used to calculate LRIC+.” (Emphasis added)*

188. The phrase in bold above should more accurately read *“plus an allowance for the recovery of **fixed** common costs”*, since variable common costs already form part of the LRIC. The final sentence about Top-Down models might well be true, but only to the extent that it is also true for calculating LRIC.
189. ComReg states in paragraph 9.480 that LRIC *“... is more consistent with that applied in competitive markets ...”*. Whilst this might be true, it also means that operators are then allowed to arbitrarily decide which products can afford to bear more (or indeed all) of the fixed common costs, and which need to be priced close to (or indeed at) LRIC. SPC Network would, however, point out that the reason for the MST in the first place is that the market is not deemed sufficiently competitive. Furthermore, one could also rationally argue that actually LRIC is more consistent with that applied in non-competitive markets, as operators are then free to price products in a way that will maximise revenues – essentially taking full advantage of demand-price elasticities.
190. Paragraph 9.482 states that LRIC+ in addition to the LRIC cost *“includes a mark-up for common costs”*. This, taken with paragraph 9.465 where it states that *“Equi-proportionate mark-up (EPMU) is generally the approach used to calculate the ratio of total costs to total incremental costs”*, is also quite dangerous. Whilst EPMU is useful for taking account of relatively small amounts of general overheads, it could easily result in very odd results if used to recover common costs that are multiples of magnitude larger than the pure incremental costs.
191. In paragraph 9.486, ComReg quotes the 2013 EC Recommendation in relation to the economic replicability test in that:

*“The incremental cost of providing the relevant downstream service is the appropriate standard. A LRIC+ model should be used to calculate the incremental cost (including sunk costs) and to add a mark-up for common costs related to the downstream activities.”*



192. However, in 9.487, ComReg goes on to state that “*the 2013 EC Recommendation does not specify the aggregation level of the MSTs*”. We are of the opinion that this is incorrect. In Annex II of that recommendation, it states that:

*“(ii) Relevant cost standard*

*The incremental cost of providing the relevant downstream service is the appropriate standard. A LRIC+ model should be used to calculate the incremental cost (including sunk costs) and to add a mark-up for common costs related to the downstream activities.”*

193. This clearly states “*the relevant downstream service*” in the singular, not plural, and also that LRIC+ should be used, with a mark-up included for common costs related to the downstream activities.

194. Later in Annex II of the 2013 Recommendation, it states that:

*“In addition, where justified, in particular when a retail product referred to in point (iv) is launched based on a different input than the one previously identified, or when there is a substantial demand for access at a new NGA-based wholesale layer, **NRAs should also assess the margin earned between the retail product and the new NGA-based regulated wholesale input.**”* (Emphasis added)

195. Again, there is a clear statement that NRAs should consider each retail product on its own, and not as part of a portfolio.

196. Further emphasis is provided in point 56 (c) of the Recommendation in which it states that:

*“Where the NRA considers that a retail offer which is not economically replicable would significantly harm competition, it should make use of its powers under Article 10 of Directive 2002/20/EC to request the SMP operator to cease or delay the provision of **the relevant retail offer** pending compliance with the requirement for economic replicability.”* (Emphasis added)

197. Once again, the emphasis is on a single retail offer. Should the MST be carried out on a portfolio of products, then it would not be possible to identify just one of them as being the cause of the margin squeeze.



198. Finally, in recital 64 of the Recommendation, it again refers to “*the retail price*” in the singular:

*“NRAs should ensure that the margin between **the retail price** of the SMP operator and the price of the NGA wholesale input covers the incremental downstream costs and a reasonable percentage of common costs.”* (Emphasis added)

199. For the avoidance of doubt, SPC Network stresses that the above line of reasoning should also be applied to the cost standard for non-regulated services included in bundles.

200. SPC Network suspects that the intention of ComReg was to provide Eircom with a relatively small degree of flexibility in the pricing of its FTTH retail services by allowing the company to choose how and where to recover its broad overhead costs. Certainly, this seems to be the intention given the examples of common costs provided in paragraph 9.463:

*“e.g., general finance function costs, personnel and administration costs, general corporate services costs, CEO salary, regulatory licence fees, redundancy costs/cost of voluntary leaving programmes.”*

201. If this is indeed the intention of ComReg, then SPC Network would suggest addressing this in the final decision so as to make this distinction unambiguous. Perhaps one way of achieving this would be to remove references to the use of the LRIC cost standard for product-by-product MSTs and replacing it with something like “*LRIC+, but excluding general overheads such as those listed in ...*”.

202. An associated issue regarding the relevant cost standard that is not addressed in the consultation document is how shared costs should be allocated across products – essentially, what units of allocation should be used. This can have a huge impact in situations where large amounts of shared cost (duct, fibre, central equipment, etc.) have to be allocated across multiple products. Examples of allocation units include: peak hour traffic, average traffic, customers, cables (for ducts), fibres (for cables), wavelengths (for fibres), or even (perceived) demand-price elasticity. If left to its own devices, Eircom could simply select the allocation methods that best suit its own desired outcomes – to the detriment of the other operators. SPC Network would suggest that the final decision stresses the need for non-discrimination in how the units of allocation are chosen, and



requires Eircom to include what units have been utilised where and why in the MST documentation it submits to ComReg.

### Relevant Time Period

203. In paragraph 9.524, ComReg states that in its 2018 Bundles Decision it determined that the Average Customer Lifetime (ACL) should not reflect how long a customer stays with a particular operator but *“the length of time a customer remains on a specific retail offering”*.
204. In paragraph 9.525, ComReg then proposes that the ACL be set at 42 months. This, it states, *“is consistent with the WLA/WCA Market Research which identified that customers stay an average of 3.68 years with the Eircom broadband provider (equating to 44 months)”*. The latter figure will tend to overestimate the ACL definition being adopted by ComReg in paragraph 9.524 since some customers will stay with the Eircom existing provider but change retail offering.
205. SPC Network does consider the 42 months to be a not unreasonable time period to use for the NPV aspect of the MST, although it would suggest that ComReg does keep the period under review during the period up to the next market review. However, there are two ambiguities that remain which are not specifically addressed in the consultation document:
- a) Eircom’s basic broadband offers (which incidentally actually include fixed telephony, so do not constitute standalone products) are either on 12 or 24 month minimum term contracts. This raises the question as to what retail price should be included in the MST from the end of the minimum term up to the end of the ACL. Due to the price rising by EUR 40 a month (including vat), the NPV could still be negative at the 12 or 24 month point and only become positive by the end of the ACL due to the huge rise in price. If customers are allowed to re-contract for a further fixed period, then the remainder of the 42 months would be at a considerably smaller price, and this could easily result in a different MST outcome.
  - b) Eircom imposes annual price rises of inflation plus 3% in April of each year to the non-discounted (out of contract) price. With inflation currently at around 8% (December 2022), this means that the price of the cheapest FTTH bundle during the contract period will rise from EUR 34.99 up to EUR 43.35 for those signing up prior to



April this year. This represents a price rise of nearly 24%. Assuming that the advertised price does not change in April, this means that the NPV of a customer joining in February (Eircom does not apply the first rise to those joining in March) will be very different to one joining in March or April.

206. In paragraph 9.526, ComReg discusses how retention offers should be addressed with regards to the MST ACL. The paragraph states that the ACL:

*“... should **reflect the re-contracting period or the expected remaining ACL of customers on the relevant standalone or bundled product) at the time of the retention promotion.**”* (Emphasis added)

207. This is clearly also ambiguous as it offers two options but does not state which one should be used under which circumstances. Furthermore, the 42 month ACL could now have multiple MSTs associated with it. For example:

- a) A customer joins for a minimum 12 months, and then reverts to the standard price for the remaining 30 months. This requires passing an MST covering the full 42 month period.
- b) A customer joins for a minimum 12 months, but at the end of that period re-contracts for a further minimum of 12 months and then reverts to the standard price for the remaining 18 months. This requires passing a second MST for the retention covering either 12 or 30 months.
- c) A customer joins for a minimum 12 months, re-contracts at the end of this for a further 12 months, and then re-contracts again for a third 12 month period, then reverts to the standard price for the remaining 6 months. This requires passing a third MST for the second retention covering either 12 or 18 months.

208. An ability to re-contract at the end of the minimum period would render an MST that *“assumes”* the customer reverts to the non-discounted price thereafter not relevant. This is since the retail price paid will not change (or only by the annual price rise – though even here that could be avoided if the customer joins in March one year and then re-contracts in March the following year).

209. SPC Network does support ComReg’s view that an NPV-based MST is the best way to reflect the time value of money. However, the WACC-based discount rate will not have



amounted to that much by the end of the minimum contract period, and thus revenues in the latter stages of the ACL will be important, and quite possibly crucial if the MST is to pass. SPC Network would therefore urge ComReg in its final decision to lay out clearly (under various realistic scenarios) how all of the above should be addressed within the MSTs.

#### **Out of Bundle Revenues and Costs**

210. In paragraphs 9.555 and 9.556 ComReg states that the MST can include revenues created by out of bundle usage. A simple example of such revenue would be for telephone calls that fall outside of any monthly “free” allowance, which currently would include all telephone calls made to mobile phones.
211. Depending on the level of such revenues in practice, and the associated costs (and importantly the relevant cost standard used for those costs) they could significantly impact the outcome of an MST. If the only way to pass an MST is to include these revenues, then it brings into question whether this really is sending the right signals to the market. It would seem strange to SPC Network if users of a particular bundle that do not generate out of bundle revenues are in effect subsidised by those that do. This could, for example, significantly disadvantage operators that are only in a position to offer standalone broadband services or are not in a position to attract significant out of bundle revenues from their own customer bases.
212. We suggest that the MST outputs presented to ComReg should be very transparent about the impact of such revenues on the MST result. This would then assist ComReg in coming to an informed view on whether it was having a significant impact on (potential) competition.





## Vodafone Response to Consultation

### Market Review

Wholesale Local Access (WLA) provided at a fixed location

Wholesale Central Access (WCA) provided at a fixed location  
for mass-market products

### Public Consultation

Reference: ComReg Doc 23/03

Version: Non-Confidential

Date: 03/03/23

## Introduction

Vodafone welcomes the opportunity to respond to the Commission for Communications Regulation (ComReg)'s consultation on the Wholesale Local Access ('WLA') and the Wholesale Central Access ('WCA') markets.

There are now 463,000<sup>1</sup> FTTH customers live in the market. As at Q3 2022 Vodafone had 35% market share of the FTTH retail market share. Vodafone share the national ambition to fully modernise Irish infrastructure. Vodafone support the need to ensure incentives remain for operators investing in infrastructure in Ireland. There are ambitious connectivity targets in Ireland and Vodafone recognises its role in achieving the target to have every Irish home fibre enabled by 2028. Moreover, at the retail level Vodafone are investing to ensure that Irish consumers and business with a fibre enabled premises take up access to the highest quality broadband available.

It is clear that in areas where there are competing wholesale networks the market may tend to operate competitively and effectively and a low level of regulatory intervention (in the form of access or SMP regulation) is appropriate. In more regional areas (typically outside our urban areas) there is often only one network and here ComReg will need to play a greater role in ensuring competition. Vodafone has persistently highlighted the requirement for regulatory certainty. This is critical to Ireland achieving its fibre targets.

To drive take up of broadband a retailer requires certainty on access, price and service. In our view a number of proposals in this review fail to deliver any certainty for the retail provider investing to develop the platforms, sales channels and CPE that will deliver the benefits of connectivity to Irish consumers and business.

Our points for consideration are detailed in response to the consultation questions below. It is also worth noting some key concerns:

- **Regulation in the 340K:** Vodafone disagree with the proposal to define a single geographic market for NG WLA services covering the whole of the Commercial Area. Vodafone would expect ComReg's geographic market definition, and proposed remedies within these markets, to take into account the current and expected future material differences in competitive conditions across different areas within the Commercial area. In particular a different approach is required for the Rural parts the Commercial area currently covered by Eircom's Rural Fibre-to-the-Home (FTTH) network deployment, representing approximately 340,000 premises. In these areas Eircom is currently the only provider of NG WLA services via this FTTH network. Eircom has already deployed its FTTH network (so ComReg does not need to provide further incentives for Eircom to invest) and where Eircom already holds a monopoly position (meaning the absence of any pricing constraints), a pricing flexibility approach would not be appropriate for FTTH services. Pricing flexibility could enable Eircom to set excessive (monopoly) prices in this area, and leverage its market power in this area into the downstream retail broadband market and into the wholesale market in more competitive areas.

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<sup>1</sup> ComReg- 22101 Q3 2022 Quarterly data

- **ComReg has not demonstrated how pricing continuity will achieve the objective of promoting investment**, or how this approach is superior to alternative options of setting cost-based pricing such as on the basis of an updated cost model. It is unclear to Vodafone why ComReg considers setting these prices based on cost models is now inappropriate, given it has used such an approach in all previous FTTC pricing reviews when setting cost-oriented prices, and the fact that many other NRAs in the EU have continued to use cost models to set cost-based FTTC prices in recent pricing reviews.
- **In relation to service experience**, it is no longer accepted to simply ‘put up’ with whatever quality service the wholesale provider chooses to offer. Poor quality access products – for example slow and unpredictable installation, or slow and unpredictable repair times – will hinder challengers and favour the incumbent. Intervention measures need to be specified as part of this market review.

The detail of this response is set out below.

## Consultation Questions

**Question 1: Do you agree that the main developments identified in the provision of retail broadband are those which are most relevant in informing the assessment of the Relevant Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual/empirical evidence supporting your views.**

Vodafone broadly agree that the main developments identified in the provision of retail services are the most relevant for the assessment of the Relevant Wholesale Market.

Vodafone agree on the trend towards fibre broadband and migration away from copper. When the last market review commenced in Q4 2016 there were few FTTP services active. In Q1 2017 there was approximately 12k active FTTP subscriptions. Moving forward to Q3 2022 there was 463k<sup>1</sup> active subscriptions. This growth is driven through the investment in network rollout combined with very significant investment at the retail level. The retail market develops the compelling propositions that encourage Irish consumers and business to move from existing copper-based broadband to fibre.

However, Ireland could be performing better at migrating customers to fibre. We will need to improve if we are to achieve the national target that *'All Irish households and businesses will be covered by a Gigabit network no later than 2028'*. To achieve this target investing retailers require certainty in access, service levels and pricing. This will provide the right signal to retailers to develop the platforms, sales channels and CPE that will deliver the benefits of connectivity to Irish consumers and business.

The accelerated trend to fibre while significant has been constrained by high levels of non-standard orders and orders that require remediation on the Eircom network. The high numbers of non-standard are not experienced at a comparable level on other wholesale networks as the networks are surveyed in advance. The high numbers of non-standard drives cost as retailers incur all the costs of acquisition only to find the order cannot complete after one (or many) appointment(s) to the customer premises

Vodafone note the requirement that Eircom commence submission of quarterly KPI information to ComReg Q1 2023 and it is our expectation that the KPI information should inform the outcomes of this market review. This issue is commented on further below in answer to Question 8 on remedies.

**Question 2: Do you agree with ComReg's proposed definition of the Relevant Retail Broadband Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Vodafone agree with ComReg's overall preliminary conclusions on the Relevant Retail Broadband market assessment.

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<sup>1</sup> Source ComReg data portal

**Question 3: Do you agree with ComReg’s product market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Vodafone agrees with ComReg’s overall preliminary conclusions on the product market assessment for the relevant WLA market.

**Question 4: Do you agree with ComReg’s geographic market assessment for the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Vodafone agrees with ComReg’s proposal to define a single national market for CG WLA services, and a separate geographic market for NG WLA services in the Intervention Area (IA).

However, we disagree with the proposal to define a single geographic market for NG WLA services covering the whole of the Commercial Area, as this is not consistent with the relevant EU regulatory and legal framework regarding geographical market definition, taking into account the degree of variation in current and likely future competition across areas within the Commercial Area.

**Relevant regulatory guidelines require geographic market definition to take account of differences in prospectively competitive conditions across different areas**

The appropriate approach for defining geographic markets in the electronic communications sector is set out in the European Commissions (EC) Recommendation on Relevant Markets and associated Staff Working document<sup>1</sup>, which are then reflected in the Framework Regulations<sup>2</sup>, the EC’s proposed Gigabit Recommendations<sup>3</sup>, and European Electronic Communications Code (EECC) which is currently being transposed into Irish law.<sup>4</sup>

The EC Staff Working Document highlights the importance of taking into account differences in competitive conditions when defining geographic markets, and the importance of reflecting these differences in the resulting SMP assessment and, in turn, remedies imposed on SMP operators:

<sup>1</sup><https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets>, Section 2.5

<sup>2</sup> S.I. No. 333/2011 - European Communities (Electronic Communications Networks and Services) (Framework) Regulations: <https://www.irishstatutebook.ie/eli/2011/si/333/made/en/print> . Regulation 26(1)

<sup>3</sup> EC Recommendation on the regulatory promotion of Gigabit connectivity, <https://digital-strategy.ec.europa.eu/en/library/gigabit-connectivity-recommendation>

<sup>4</sup> Communications Regulation and Digital Hub Development Agency (Amendment) Bill 2022: <https://www.oireachtas.ie/en/bills/bill/2022/86/>. Article 64

- “the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different. On the contrary, areas in which the conditions of competition are heterogeneous do not constitute a uniform market”<sup>1</sup> [Emphasis added]
- “Significant variations of competitive conditions between different areas of a same country - for instance, but not limited to, differences between urban and rural areas - might therefore require the definition of separate relevant markets and eventually lead to different designations of SMP and regulatory treatment of the SMP undertakings.”<sup>2</sup> [Emphasis added]

This is also reflected in the Gigabit Recommendations, which states that “NRAs should take geographic differences in competitive conditions into account even at the level of market definitions”<sup>3</sup>

The EC Staff Working Document also sets out the specific approach that should be followed by NRAs when conducting the market definition exercise. This document recommends a “bottom-up” approach for defining geographic markets<sup>4</sup>, and encourages NRAs to conduct the assessment on a forward-looking basis, in order to ensure that the definitions are robust over the relevant market review period.<sup>5</sup> In particular, the document recommends that:

- The starting point for the assessment should be the identification of “geographic units”, defined such that competitive conditions within each unit do not vary significantly and will be sufficiently stable over time
- NRA’s should then analyse each unit and define geographic markets by aggregating units which have the same competitive conditions. This aggregation should be done based on a number of different factors, including: (a) the number of competing networks, (b) their distribution of market shares, (c) a preliminary analysis of pricing and price differences at regional level, and (d) behavioural patterns.

With regards to pricing differences, the EC notes that uniform pricing across different geographic areas could be indicative of similar competitive conditions, but that NRAs should be cautious in using price levels to define geographic markets, as there are a number of reasons why an operator may choose to set uniform prices across areas which have significantly different competitive conditions. This could be the case, for example, if the majority of the operator’s services are provided in uncompetitive as opposed to competitive areas<sup>6</sup>.

Reflecting its proposed approach, the EC notes that there has been a trend in recent years towards NRAs defining local/regional markets, with NRA’s usually defining two types of geographic markets: competitive

<sup>1</sup> EC Staff Working Document, section 2.5, page 16.

<sup>2</sup> EC Staff Working Document, section 2.5, page 16/17.

<sup>3</sup> EC Recommendation on the regulatory promotion of Gigabit connectivity, paragraph 8.

<sup>4</sup> EC Staff Working Document, section 2.5, page 22.

<sup>5</sup> EC Staff Working Document, section 2.5, page 21.

<sup>6</sup> If this is the case, a monopoly operator will place more weight on its pricing in the uncompetitive area, and therefore choose to set monopoly prices across both uncompetitive and competitive areas. See BEREC Common Position on geographical aspects of market analysis (definition and remedies) [https://www.berec.europa.eu/sites/default/files/files/document\\_register\\_store/2014/6/BoR\\_%2814%29\\_73\\_BEREC\\_CP\\_geographical\\_aspects\\_of\\_market\\_analysis\\_f.pdf](https://www.berec.europa.eu/sites/default/files/files/document_register_store/2014/6/BoR_%2814%29_73_BEREC_CP_geographical_aspects_of_market_analysis_f.pdf) , paragraph 113-114.

and non-competitive areas. It considers that this trend is likely to increase in future, as the deployment of fibre networks by various operators and the switch-off of copper networks in certain areas meaning that competitive conditions are likely to become heterogeneous within many Member States.<sup>1</sup> This has been reiterated by the EC in its proposed Gigabit Recommendation, which states that “*As the deployment of alternative networks progresses, in particular at local/regional level, competitive conditions will increasingly vary between different areas of the same Member State (for instance between urban and rural areas).*”<sup>2</sup>

Table 1 –NRAs applying geographical segmentation of markets and/or remedies (by 31-04-2020)

|  | <b>Market 3a</b> | <b>Market 3b</b>                     | <b>Market 4</b> |
|--|------------------|--------------------------------------|-----------------|
| <b>Geographic segmentation of markets</b>  | FI, HU, IT, PL   | FI, DE, HU, IE, LT<br>PL, PT, ES, UK | AT, HR, FI, IE  |
| <b>Geographic segmentation of remedies</b> | CY, BE, DK, ES   | DK, FR                               | FR              |
| <b>Mix</b>                                 | IT               | BE, IT                               | PT              |

Source: EC Staff Wording Document, Table 1<sup>3</sup>

Finally, the EC states that geographic segmentation of markets and of remedies are not mutually exclusive, in that NRAs may define markets and differentiate remedies within these based on the differences in competitive conditions, as has been done by a number of EU NRAs (see table above). This includes AGCOM in Italy<sup>4</sup>, who defined a single market for NG WLA services (excluding Milan<sup>5</sup>), but separately identified competitive and non-competitive locations within this based on the number and coverage of alternative networks and market shares, and defined different remedies within each.<sup>6</sup>

This is reflected by the EC’s NGA Recommendations, which states that: “*In situations where it cannot be concluded that the different competition conditions would justify the definition of sub-national geographic markets, it could nevertheless be appropriate for NRAs to respond to diverging competitive conditions between different areas within a geographically defined market, for instance due to the presence of several alternative infrastructures or infrastructure-based operators, by imposing differentiated remedies and access products.*”

<sup>1</sup> EC Staff Wording Document, section 2.5, page 17.

<sup>2</sup> EC Recommendation on the regulatory promotion of Gigabit connectivity, paragraph 8

<sup>3</sup> <https://digital-strategy.ec.europa.eu/en/news/commission-updated-recommendation-relevant-markets>,

<sup>4</sup> AGCOM, Wholesale local access market provided at a fixed location and wholesale central access provided at a fixed location for mass-market products, 2019.

<sup>5</sup> A separate geographic market was defined for the Milan area, given the significant development of alternative networks in this area and the low market share of the incumbent TIM. Specifically,

<sup>6</sup> AGCOM imposed cost orientation on TIM based on BU-LRIC model but allowed TIM more pricing flexibility when setting VULA prices in more competitive locations. In particular, TIM is allowed to reduce or increase its price relative to the BU-LRIC prices if the change is justified (e.g. in reaction to lower costs or lower prices of offers from alternative network operators).

<sup>7</sup> Commission recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), paragraph 9.

It does however state that differentiating across areas only at the level of remedies should be limited to less significant or less stable variations in competitive conditions, and that *“Geographic differences of competitive conditions that are significant and sufficiently stable over time are in principle to be treated at the level of market definition”*. The requirement to ensure appropriate segmentation of remedies by NRAs has also been highlighted in the proposed Gigabit Recommendation: *“Where geographic differences in the conditions of competition are insufficient, or not stable enough, to lead to the definition of separate geographic markets, NRAs should impose, where justified, differentiated remedies by geographic area within a given geographic market”*<sup>2</sup>

Given the above, Vodafone would expect ComReg’s geographic market definition, and proposed remedies within these markets, to take into account the current and expected future material differences in competitive conditions across different areas within the Commercial area.

**Competitive conditions for NG WLA services are expected to vary significantly across the Commercial area, which does not support the definition of a single NG WLA market in this area**

Contrary to the approach set out by the EC, ComReg has chosen to define a single market for NG WLA in the Commercial area, despite there being significant differences in both the current and expected future competitive conditions for NG WLA services within this area.

In particular, the Commercial area covers a large geographic footprint, including high population density cities and towns as well as lower-density rural areas. This has resulted in two distinct sets of premises which differ significantly in terms of competition conditions, with this difference expected to continue over ComReg’s market review period:

1. **Prospectively monopoly areas (i.e. the Rural parts the Commercial area currently covered by Eircom’s Rural Fibre-to-the-Home (FTTH) network deployment)**, representing approximately 340,000 premises. In these areas Eircom is currently the only provider of NG WLA services via this FTTH network. This competitive situation is not expected to change over the next price control period, as the lower-density nature of these areas means there is unlikely to be a business case for alternative NGA network roll-out, and the stated roll-out plans of alternative NGA network operators in Ireland (i.e. SIRO and Virgin Media) do not include plans to extend their networks into this area. Vodafone also notes that this area was previously a part of the footprint of the National Broadband Plan, with Eircom not offering FTTC and no operator planning FTTH roll-out before Eircom’s deployment in response to the NBP. Vodafone therefore considers that scope for overbuild of Eircom’s FTTH network is extremely limited.
2. **Prospectively competitive areas (i.e. the remaining urban and sub-urban parts of the Commercial area)** covering c.1.55m premises. Given the roll-out of NGA network to date and the stated roll-out plans of existing network operators in Ireland, there is expected to be at least two providers of NG WLA services across most of this area over the price control period. This includes:
  - **Eircom**, who currently provide NG WLA services to c1.2m premises in this area via its FTTC network, and will provide these services to all premises via the FTTH network it is currently deploying.

<sup>1</sup> EC Staff Wording Document, section 2.5, page 21.

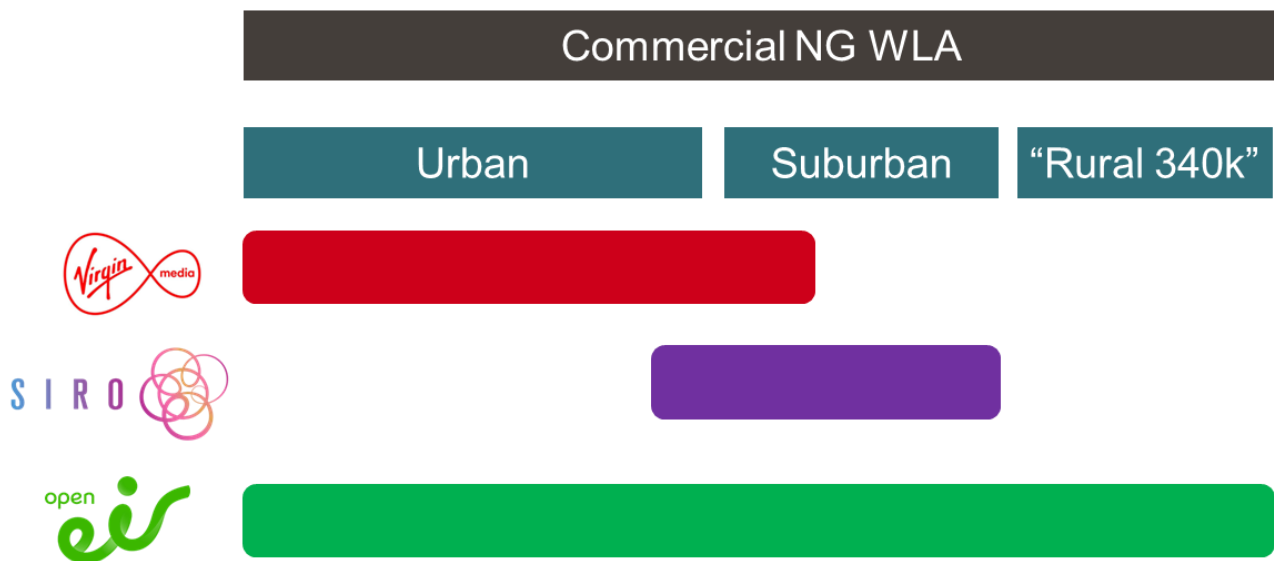
<sup>2</sup> EC Recommendation on the regulatory promotion of Gigabit connectivity, paragraph 9



Approximately 1,000,000 premises were covered by its FTTH network as of February 2023<sup>1</sup>, with all premises to be covered by the end of 2026 according to the Eircom’s current roll-out plans.<sup>2</sup>

- **Virgin Media**, who currently operates a cable (DOCSIS) network covering c.1m premises across largely urban parts of the Commercial area. Virgin Media is in the process of upgrading this network to FTTH, with the upgrade due to be completed by 2025.<sup>3</sup> Virgin is expected to provide NG wholesale services across its whole network footprint, with it recently announcing a wholesale deal with Vodafone to offer these services over its FTTH network.<sup>4</sup>
- **SIRO**, who provides NG wholesale services over its FTTH network, focussing on smaller towns and cities. This network covered approximately 450,000 premises as of the end of 2022, with plans to extend this to an additional 320,000 premises in additional towns and cities by the end of 2026.<sup>5</sup>

Taken together, there is expected to be at least two providers of NG services across this part of the Commercial area by the end of the price control period (generally Eircom and Virgin Media in more urban areas; Eircom and SIRO in more suburban areas), and there are likely to also be some areas where the networks of all three providers (Eircom, Virgin, and SIRO networks) will overlap (see illustrative diagram below).



Vodafone notes that Eircom currently sets uniform pricing on its FTTC and FTTH-based NG WLA services across the Commercial Area, which would be consistent with a single geographic market. However as noted

<sup>1</sup> <https://myeir.ie/pressroom/Ireland-now-one-of-best-countries-in-Europe-for-broadband-as-eir-fibre-passes-1-million-homes/>

<sup>2</sup> <https://www.openeir.ie/gigabit-fibre-network-now-available-to-more-than-800000-homes-and-businesses-across-ireland/#:~:text=By%202026%20eir%20will%20have,to%20340%2C000%20homes%20and%20businesses.>

<sup>3</sup> <https://www.virginmedia.ie/about-us/press/2021/virgin-media-ireland-announces-national-fibre-network-upgrade/>

<sup>4</sup> <https://www.virginmedia.ie/about-us/press/2022/virgin-media-announces-wholesale-deal-with-vodafone-ireland/>

<sup>5</sup> <https://siro.ie/news-and-insights/launching-10gb-for-galway-enterprises/>

by the EC, uniform pricing is not a necessary nor sufficient condition for defining a single geographic market, given there are a number of reasons why uniform pricing can happen across separate markets, which is the case in the Irish context:

- Eircom’s uniform pricing on FTTC is a product of ComReg’s market reviews and SMP pricing remedies to date, where ComReg has defined a national market for NG WLA services and imposed a national cost-oriented price for Eircom’s FTTC WLA services. However, Eircom does not offer FTTC services in the “Rural 340k” area.
- Eircom’s uniform pricing of FTTH WLA services to date can also be explained by the fact that the majority of its FTTH wholesale base is currently located in the “Rural 340k” area, where it holds a monopoly position. This could therefore provide the rationale for Eircom to set national FTTH WLA prices despite facing stronger competitive constraints on its FTTH services in other areas. This could further be explained by Eircom’s desire to have uniform pricing across areas in the downstream retail market for marketing reasons.

**Not reflecting these differences in competitive conditions is likely to result in ComReg imposing inappropriate remedies on Eircom, particularly in the prospectively monopoly “Rural 340k” area**

ComReg proposing a single geographic market across this area, and not reflecting these significant differences in competition in its proposed remedies, could lead to a risk that the imposed remedies do not address appropriately the key competition problems in the market. For example, as explained in more detail in Vodafone’s response to Q8:

- In the prospectively competitive parts of the Commercial Area, ComReg’s proposed pricing flexibility for Eircom’s FTTH WLA services may be appropriate. Pricing flexibility could protect the incentives of Eircom, Virgin Media, and SIRO to continue to expand their FTTH networks in these areas. The presence of indirect pricing constraints (such as ComReg’s proposed FTTC price “anchor” and competitive constraints from alternative operators) could be sufficient to limit Eircom’s ability to charge excessive prices in these areas, which as set out in the EC Directive is a necessary condition for a pricing flexibility approach to be applied.
- In the “Rural 340k” area, where Eircom has already deployed its FTTH network (so ComReg does not need to provide further incentives for Eircom to invest) and where Eircom already holds a monopoly position (meaning the absence of any pricing constraints), a pricing flexibility approach would not be appropriate for FTTH services. Pricing flexibility could enable Eircom to set excessive (monopoly) prices in this area, and leverage its market power in this area into the downstream retail broadband market and into the wholesale market in more competitive areas.

Given the clear differences in competitive conditions, Vodafone considers that it is necessary for ComReg to define two separate geographic markets for NG WLA services within the Commercial Area; the first being the “Rural 340k” covered by Eircom’s rural FTTH network, and the second being the remaining parts of the Commercial Area. Such an approach is consistent with the EC’s guidance and in line with approach applied by NRAs in many other countries where they have identified differences in competitive conditions between areas. Defining the markets in this way would also be implementable in practice, given the two areas could be distinguished based on the set of premises in each area i.e. by identifying the set of premises covered by Eircom’s Rural FTTH deployment. ComReg has defined separate markets for the IA and the Commercial area

on this basis, so Vodafone sees no reason why the same approach can't be taken to define two separate markets within the Commercial area.

At a minimum, even if it chooses to continue defining a single market for the Commercial Area, ComReg must differentiate its proposed remedies in this market between the prospectively monopoly and competitive areas to ensure these meet ComReg's stated objectives.

**Question 5: Do you agree with ComReg's assessment of SMP on the Relevant WLA Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Vodafone notes that ComReg, based on its proposed geographic market definition, has found Eircom to have SMP in the National CG WLA and Commercial NG WLA markets, and that no operator holds SMP in the IA NG WLA market.

Vodafone notes that ComReg's SMP assessment in the National CG WLA and Commercial NG WLA markets considered all relevant conditions set out in the EC guidelines ("SMP Guidelines", "Horizontal Merger Guidelines", and "2009 Enforcement Priorities"), including an assessment of existing competition in the markets (based on an assessment of market shares, indirect constraints, and pricing behaviour)<sup>1</sup>, potential competition over the market review period (based on barriers to entry and expansion)<sup>2</sup>, and a detailed assessment of countervailing buyer power<sup>3</sup>. ComReg has also provided evidence and analysis to support its conclusions, including the use of internal data to assess current and expected future market shares<sup>4</sup>, surveys to determine the degree of switching due to indirect constraints<sup>5</sup>, and rollout plans of operators to determine any barriers to entry and expansion<sup>6</sup>.

As noted above for Question 4, Vodafone considers that ComReg should define two separate geographic markets for NG WLA services within the Commercial Area (covering "prospectively competitive" and "prospectively monopoly" areas), and should therefore conduct separate SMP assessments in each of these two areas. However, Vodafone considers that the outcome of the SMP assessment will remain the same for both geographic areas (i.e. that Eircom has SMP in both area) due to the following reasons:

- Eircom currently holds a monopoly position within the "prospectively monopoly" area, and is likely to continue holding this position over ComReg's market review period; and
- Eircom will likely continue to hold SMP in "prospectively competitive" areas, as the removal of prospectively monopoly areas from the Commercial Area footprint is would not materially impact ComReg's SMP assessment, because these areas represent a relatively small proportion of total premises in the Commercial Area (c.18% i.e. 340,000 premises out of c.1.9m).

<sup>1</sup> ComReg-2303 WLA-WCA Consultation, section 6.4

<sup>2</sup> ComReg-2303 WLA-WCA Consultation, section 6.5

<sup>3</sup> ComReg-2303 WLA-WCA Consultation, section 6.6

<sup>4</sup> ComReg-2303 WLA-WCA Consultation, section 6.4.1

<sup>5</sup> ComReg-2303 WLA-WCA Consultation, section 6.4.2

<sup>6</sup> ComReg-2303 WLA-WCA Consultation, section 6.5.1

**Question 6: Do you agree with ComReg’s market assessment for the Modified Retail Broadband Market, absent WCA regulation? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

WCA is currently only regulated in the 2021 Revised Regional Market and absent regulation Eircom will be entitled to withdraw access in the regional WCA market. The ComReg view in paragraph 7.20 is that absent regulation in WCA *‘there is likely to be limited variation in retail broadband SP market shares in the footprints of the IA NG WLA market’*. This may well be the case however a jeopardy still exists for those end-users awaiting progression on the NBI rollout.

As ComReg will be aware Vodafone did not agree with the ComReg approach on geographic deregulation in 2017 and retained that position in the 2021 mid-term review. The impact of deregulation may not be what ComReg intended. The price for Bitstream Plus Standalone Regional FTTC access is currently €22.48<sup>1</sup> whereas for Bitstream Plus Standalone Urban FTTC Access is € €28.84<sup>2</sup> meaning wholesale Bitstream access is €6.36 more expensive in areas that have been deregulated. The wholesale price is also close to 19% more expensive deregulated areas for ADSL, which is more prevalent in the Intervention Area.

Absent regulation and pending rollout of NBI which is currently deployed to 120K of 560K premises there will be little alternative supply in the IA. Access seekers will not be able to avail of alternative networks. The Vodafone position is clear that the evidence exists, from the previous decisions by ComReg to remove regulation, that Eircom will have significantly higher prices in deregulated areas.

Assuming a November 2023 decision this will mean a sunset on obligations in CGA, IA NG WLA and Regional WCA markets by the end of 2024. Vodafone would urge ComReg to reconsider the sunset duration and hold some flexibility to review as the NBI rollout advances.

**Question 7: Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Commercial NG WLA Market (and related markets)? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Vodafone agrees that the competition problems and the associated impacts on competition identified.

**Question 8: Do you agree with ComReg’s proposals in respect of remedies in the Commercial**

<sup>1</sup> Openeir Broadband Service Price List v.34

<sup>2</sup> Openeir Commercial Interconnected Price List v54

**NG WLA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Vodafone agree with most of the proposals regarding remedies. While we support many of the remedies proposed there are specific concerns and adaptations are, in our opinion, necessary which if not implemented risk competition, investment, innovation, and desired customer outcomes in the WLA market.

We now outline our specific comments on ComReg's proposed remedies, under the following headings:

- a) Access;
- b) Non-discrimination;
- c) Transparency
- d) Price control;

#### **(a) Proposed Access Remedies**

Vodafone agrees that there needs to be a requirement to meet reasonable requests for access to WLA and associated facilities.

Firstly, in relation to access withdrawal ComReg should consult with impacted relevant parties as a matter of process. This should not be discretionary.

It is a feature of access regulation in communications markets, that regulators place obligations, intended to remedy the adverse features that result from incumbent SMP, but that the protracted process of negotiations that follow mean significant delays. This sometimes results in access seekers ultimately accepting products and specifications that are below an acceptable standard because the alternative of still further delay has even more adverse consequences. The evolution of access regulation, in Ireland, is characterised by incremental improvements adapting already cumbersome process to try and improve the Access Seeker and end customer experience. Moving towards full fibre Ireland this is no longer acceptable. The legacy provisioning and support model for SMP fixed services must improve. A protracted engagement on improvements to SLAs to drive better service will not work. The services delivered by Eircom should be benchmarked against other wholesale providers in the market and best in class service from other fibre providers globally. There are challenges around data, around timelines to first appointments, around the high number of reschedules, around remediation work and high numbers of non-standard orders.

We urge ComReg to actively enforce this obligation to negotiate in good faith vigorously as it is pivotal to achieving the outcomes that the access remedies are intended to deliver.

In paragraph 9.62 ComReg propose that Eircom continues to be required to allow Access Seekers to interconnect their co-located equipment in exchange buildings or similar buildings. On co-location Vodafone is not clear whether access products for co-location rack interconnect are actually available and whether further product development is required. We would request clarification in this respect.

Additional co-location products are also required. For example, Vodafone considers it reasonable to allow two separate fibres to be connected to the same co-location whether routed into the footprint via separate

sub-ducts or from the same OAO chamber or diversely from different OAO chambers. We believe this needs to be in scope for the co-location remedy.

In relation to provision of access on fair and reasonable terms the product development process requires overhaul. The product development process, as noted by ComReg in paragraph 9.107 is unnecessarily complex. This is also the case for SLA negotiation which is complex and drawn out.

An example arises in relation to the appointments SLA. This is clearly not a fit for purpose SLA.

- **Getting an Appointment:** The SLA commits to offering an appointment from the stock of appointments for an FTTH order, once the order is accepted by eircom, no more than 9 working days from the date of acceptance.
- **Delivery:** The SLA commits that 90% of orders completed in a measuring period will be post-completed no more than 41 working days plus parked time from the order being recorded on the UG

These are unacceptable commitments and do not work for any retail organisation nor do they compare with the SLA available from other wholesale operators in the market. No offer has been made to update this SLA despite the levels of FTTH penetration and the lack of change to the SLA since 2018. Furthermore, it is not acceptable to require an Access Seeker to enter a cumbersome and complex negotiation where the starting point from which negotiation starts is the existing unworkable appointments SLA. This would not apply in any other business relationship where the customer is seeking justified service enhancements. It is evident there are no improvements volunteered on SLAs in since 2018. Eircom does not have an incentive to produce adequate Service Level Agreements (SLAs) that will ensure access that is fair, reasonable, and timely.

During the market review any progress in this area will be visible as Vodafone will submit a Statement of Requirements seeking

- A change to appointments available from 95% in 41 working days to 95% in 5 and 100% in 7;
- A requirements that 99% of appointments are met;
- 99% of AM and PM appointments meet the AM and PM slot;
- 90% of orders to delivery in 1 physical appointment and 100% in 2;
- <2% of orders will be categorised non-standard.

It may be useful to track the progress of this request.

Also, it is a requirement that Eircom commence submission of quarterly KPI information to ComReg Q1 2023 and it is our expectation that the KPI information should inform the outcomes of this market review. ComReg intervention may be needed to ensure the customer experience for broadband delivery and repair is improved. This goes over and above the retail operator entitlement to request a fit for purpose SLA improvement as part of the access remedy.

**Non-standard and Remediation:** The State national target is clear that *'All Irish households and businesses will be covered by a Gigabit network no later than 2028'*. Vodafone are supporting these targets which demand a more streamlined delivery and repair customer experience.

This can be backed strong SLAs but the SLA negotiation will not be the sole driver of service improvement. Ireland will not achieve its national target unless the service experience is completely overhauled. ComReg Intervention is required.

**1. The high number of undeliverable and non-standard orders must be addressed.**

Incorrect line information and classification of non-standard orders post -sale creates significant customer dissatisfaction, imposes significant delay and inconvenience driving complaints and associated administrative costs. Since April 2022 Openeir had an average of [REDACTED] Vodafone orders a week that were delayed or unfulfilled. In relation to non-standard orders there was an average of [REDACTED] per week. Many of these non-standards are on the new FTTH network where it was available for sale but additional work was required at site. This imposed direct cost on Vodafone including acquisition costs, delivery costs, breakage in sales and requirements to credit customers.

**2. In many cases Vodafone bear the cost of remediation**

Another level of cost imposed that is not considered by the regulator is that in many cases Vodafone will contract directly with the installation company to complete delivery, when blockage and collapsed duct issues arise. This means there is a direct payment from Vodafone to the installation company, which in effect makes ready the Eircom network at the cost of the Access seeker. This cost is in addition to the connection cost payable to Eircom. The cost to Vodafone is between [REDACTED] and [REDACTED] per month trending upwards.

The inefficiency and imposition of cost on Access Seekers requires action. As stated, Vodafone expect the collection of KPIs starting in Q1 2023 should provide cross industry evidence of the issues arising. We would expect ComReg may take action if KPIs highlight issues such as issues on number of non-standards, appointments, local arrangements, EE orders that subsequently require appointment, early life failures, NFF and repeat faults.

In addition, ComReg's Retail team are aware of non-standard challenges for industry, most of which are not within the control of the Retail operator to resolve. It should be stated also that some non-standard will not be within the control of the Wholesale provider – but where they are, clear processes for resolution on fair and reasonable terms need to be in place.

ComReg also plan to consult on Customer Charter requirements in Q1 2023. The dependence of Retail operators on the regulated wholesale operator should not be overlooked as part of this consultation when prescribing measures to take effect at the retail level.

Vodafone believe ComReg intervention may be required to develop a clear roadmap to address systemic inefficient processes impacting rollout, especially as we move towards full copper switch off.

**(b) Proposed Non-Discrimination Remedies**

Vodafone supports the non-discrimination obligation for WLA.

**(c) Proposed Transparency Remedies**

Vodafone supports the transparency obligation for WLA. We note the ARO and associated documentation including Price Lists, SLA, IPM and other documents require review to ensure all information is up to date and made available in one location

**(d) Pricing Remedies**

ComReg proposes to impose a package of pricing remedies on Eircom’s services in the Commercial NG WLA market, including:

1. Cost-orientation on FTTC VUA rental prices, implemented using a “price continuity” approach whereby this price is allowed to increase by CPI-0 every year from its current level.
2. Pricing flexibility on FTTH VUA rental prices, with the cost-oriented FTTC VUA price acting as an “anchor” for these prices. This anchor is achieved throughout the Commercial Area by requiring Eircom to introduce an “FTTC-like” FTTH product in areas where FTTC is not available, priced at the same level as its FTTC VUA price.
3. Continued “equalisation” of FTTH VUA connection and migration charges, with a price cap of €100 per connection/migration.
4. Flexibility for Eircom to offer volume-based discounts on FTTC and FTTH VUA prices, subject to pre-approval by ComReg based on a set of principles.
5. A continued obligation not to cause margin squeeze on FTTH VUA products, limited to Eircom’s “flagship” FTTC product variants.

ComReg supports these proposals by arguing that these ensure the promotion of investment in NGA networks by Eircom and alternative operators, which it considers should be prioritised in relation to other regulatory objectives.<sup>1</sup> Its proposals on FTTC and FTTH VUA rental prices also mirror the remedies imposed by Ofcom on Openreach’s WLA services as part of its 2021 WFTMR review, and ComReg makes specific reference to Ofcom’s remedies as a relevant precedent to support its proposals.<sup>2</sup>

However, Vodafone has significant concerns with the specifics of the proposed remedies, considering that these are either inappropriate given the characteristics of the NG WLA market in Ireland and that the rationale for the proposed remedies are not supported by sufficient evidence and analysis. In particular:

- Vodafone agrees with ComReg’s proposal to set Eircom’s FTTC VUA rental prices on a cost-oriented basis, but ComReg has not demonstrated how pricing continuity will achieve the objective of promoting investment, or how this approach is superior to alternative options of setting cost-based pricing such as on the basis of an updated cost model.

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<sup>1</sup> ComReg-2303 WCA-WLA Consultation, paragraphs 9.199 – 9.202

<sup>2</sup> ComReg-2303 WCA-WLA Consultation, paragraphs 9.260



- ComReg’s proposed FTTH VUA rental pricing remedies do not appear to account for the significant differences in competitive conditions and the degree of existing FTTH investment across the Commercial Area, stemming from its incorrect geographical market definition in this area (see Vodafone’s response to Q4 above). In particular:
  - Whilst pricing flexibility may be an appropriate remedy in the prospectively competitive parts of the Commercial Area, given FTTH roll is still ongoing ComReg has not provided sufficient evidence or analysis to justify this.
  - Pricing flexibility is not appropriate in the prospectively monopoly “Rural 340k” areas of the Commercial Area where FTTH roll out is complete, as there is no need to incentivise further investment and price flexibility would risk Eircom setting excessive (monopoly) prices in this area, and leveraging its market power in this area into the downstream retail broadband market.
- Vodafone welcomes the ability of Eircom to offer discounts on FTTC and FTTH VUA prices, but ComReg should provide more detail on the principles to be considered by ComReg when assessing the proposed discount schemes, to ensure that these discounts incentivise investment while protecting against any competition concerns that could arise from them.
- The scope and specific implementation ComReg’s proposed Margin Squeeze Test on FTTH needs to be amended to ensure these protect retailers from manipulation of the margin squeeze text.

These points are set out in more detail below.

**Pricing remedies need to be tailored to the specific characteristics of a market, to ensure these reflect the appropriate balance of regulatory objectives**

ComReg set out four main objectives that it considered when informing its proposed pricing remedies.<sup>1</sup> This is consistent with its statutory objectives and the objectives the EC which says that NRAs should consider the following when setting pricing remedies for NGA access services<sup>2</sup>:

- Incentivising efficient network investment by Eircom and other operators;
- Ensuring Eircom cannot foreclose other operators from the market;
- Ensuring that Eircom cannot price excessively; and
- Ensure Eircom recovers its actual efficient investment together with an appropriate rate of return.

There may be a trade-off between these objectives: for example, allowing flexibility on wholesale prices can provide greater incentives for the SMP operator and other operators to invest, but in the absence of an indirect constraint could risk SMP operators setting excessive wholesale prices.

To determine the appropriate remedies, NRAs must therefore tailor remedies to the market in question.<sup>3</sup> In particular:

- NRA’s should identify the most important potential competition problems in the relevant market, based on the characteristics of that market, including current and expected future competitive conditions;

<sup>1</sup> ComReg-2303 WCA-WLA Consultation , para 9.194

<sup>2</sup> European Commission, European Electronic Communications Code, Article 3

<sup>3</sup> In particular, under Regulation 8(6) of the Irish Access Regulations & Article 68 of the EECC, obligations imposed by NRAs during market reviews must be based on the nature of the problem.

- They should then consider available options for pricing remedies and identify the option that is likely to best address these competition problems, supported by accompanying evidence and analysis. As noted in response to Q4 above, this may be achieved by implementing different remedies within the same geographic market, where the NRA considers there to be differences in competitive conditions within that market.

This requirement is highlighted by the EECC and the EC's NGA Recommendation and proposed Gigabit Recommendation. In particular, the EECC acknowledges that a degree of pricing flexibility, in terms of price level and structure, can help to incentivise investment by allowing the regulated operator to adjust prices to reflect demand characteristics during the period of roll out and migration. It however notes that this needs to be balanced with the associated risks, and specifically notes that this flexibility should only be allowed where there is an effective indirect constraint on pricing.<sup>1</sup>

This is echoed in the proposed Gigabit Recommendation, where the EC states that *“With respect to VHCNs, NRAs should consider not imposing or lifting price control obligations pursuant to Article 74 of Directive (EU) 2018/1972, provided that sufficient competitive safeguards are in place. Such competitive safeguards are necessary to prevent such pricing flexibility leading to excessive prices in markets where SMP has been found, or to practices undermining competition, or both.”*<sup>2</sup>

Vodafone considers that ComReg's proposed pricing remedies do not protect against the competition problems that are likely to arise across different parts of the Commercial Area, and has not supported its proposals with sufficient evidence or analysis.

**ComReg has not demonstrated how pricing continuity on FTTC VUA rental prices will result in cost-oriented pricing, or how this approach is superior to alternative options that could achieve this**

ComReg acknowledges that it is appropriate to set FTTC VUA rental prices on a cost-oriented basis, stating that *“only cost based FTTC VUA prices might adequately restrict Eircom's ability to exploit its SMP in the Commercial NG WLA market to make excessive returns on its wholesale services and in turn protect consumers from potential excessive FTTC pricing emerging at the retail level.”*<sup>3</sup>

Vodafone agrees with ComReg's position – as explained in more detail in the next sub-sections below, setting FTTC prices on a cost-oriented basis will help to provide an indirect constraint on Eircom's FTTH pricing in the period of roll out and migration where it is appropriate to allow Eircom pricing flexibility. This should act to reduce the risk of Eircom setting FTTH prices at an excessive level in this scenario.

However, ComReg argues that cost-oriented pricing will be achieved through its proposal of allowing Eircom to raise prices by CPI-0% each year from current prices, and considers this to be a more appropriate approach than setting cost-based prices directly, based on updating its FTTC cost model.<sup>4</sup>

Vodafone considers that ComReg's arguments to support its proposed CPI-0 control are flawed, and that its proposal is not supported by sufficient evidence.

<sup>1</sup> European Commission, European Electronic Communications Code, Recital 193

<sup>2</sup> EC Recommendation on the regulatory promotion of Gigabit connectivity, paragraph 26

<sup>3</sup> ComReg-2303 WCA-WLA Consultation, paragraph 9.245

<sup>4</sup> ComReg notes that a similar CPI-0 approach to the pricing of NGA services has been adopted by Ofcom in its 2021 WFTMR review. However, this decision was taken in the very different market context of the UK with limited FTTH roll out and from a much lower starting wholesale FTTC price level.

First, ComReg claims that determining cost-oriented prices based on updating its existing FTTC cost model is not appropriate, due to the potential for errors (given uncertainty over costs and demand)<sup>1</sup>, and that the existing FTTC VUA prices based on its cost model developed in 2018 are still reflective of costs.<sup>2</sup> However:

- It is unclear to Vodafone why ComReg considers setting these prices based on cost models is now inappropriate, given it has used such an approach in all previous FTTC pricing reviews when setting cost-oriented prices, and the fact that many other NRAs in the EU have continued to use cost models to set cost-based FTTC prices in recent pricing reviews.<sup>3</sup> Vodafone also considers that there is now in fact less uncertainty over costs and demand than at the time of ComReg's 2018 Pricing Decision, given the FTTH roll-out plans of all network operators in Ireland are now known, and therefore FTTC demand can be predicted with greater certainty.
- ComReg has also provided no evidence or analysis to support its view that FTTC prices based on a cost model developed in 2018 are reflective of the current and expected future level of costs, which is particularly important given the significant developments in the market in recent years that would be expected to impact on FTTC costs (such as roll-out of new technologies). In fact, evidence from Eircom's HCA accounts indicates that Eircom has achieved large reductions in costs since ComReg's 2018 pricing review, which could indicate that cost-based FTTC prices are lower than the current level of prices. For example, these accounts show that Eircom's spend on Repair and Maintenance fell from €62.3m in 2018<sup>4</sup> to €55.8m<sup>5</sup> in 2020, despite the deployment of its additional FTTH network over this period, and the fact that the fixed broadband base on its networks continuing to increase (total CGA and NGA rental volumes increased from 1.54m<sup>6</sup> to 1.62m<sup>7</sup> over this period). Eircom's Return on Capital Employed (ROCE) on Wholesale Broadband Access services in its latest accounts was also significantly above its relevant cost of capital (19.26% in the 18 months to December 2021, versus relevant cost of capital of 9.25%), with its average revenue on NGA Rental services 50% larger than the associated average fully allocated cost (€19.08 versus €12.74).<sup>8</sup>
- In summary, by using the results of the 2018 model, extrapolated forwards, ComReg is effectively discarding at least 5 years' worth of information on market developments and costs compared to the alternative of producing an updated cost model. It is difficult to see how this results in a more accurate cost-oriented price.

Second, ComReg argues that it's reasonable to assume no future efficiency gains within its price control (i.e. set X within its CPI-X control to zero), given that efficiencies were already accounted by the fact that its cost modelling exercise in 2018 reflected the cost of a Hypothetical Efficient Operator (HEO). However, Vodafone notes that ComReg's NGA cost model used to set FTTC prices relied to a large extent on Eircom's actual cost data, particularly in relation to operating costs, meaning that potential scope for savings in these costs

<sup>1</sup> ComReg-2303 WCA-WLA Consultation, paragraphs 9.248 – 9.257

<sup>2</sup> ComReg-2303 WCA-WLA Consultation, paragraph 9.220

<sup>3</sup> For example, AGCOM in Italy set cost-based VULA FFTTC prices in its 2019 review based on updating its LU-LRIC+ model (AGCOM, Modello di costo BU-LRIC per la valutazione dei prezzi dei servizi di accesso alla rete in rame e alla rete NGA di Telecom Italia, 2019 : Paragraphs 80 – 89),

<sup>4</sup> Eir's Historical Cost Separated Accounts For the year ended 30 June 2019 (with 2018 figures restated), p10

<sup>5</sup> Eir's Historical Cost Separated Accounts For the year ended 30 June 2020, p11

<sup>6</sup> Eir's Historical Cost Separated Accounts For the year ended 30 June 2019 (with 2018 figures restated), p15

<sup>7</sup> Eir's Historical Cost Separated Accounts For the year ended 30 June 2020, p16

<sup>8</sup> Eir's Historical Cost Separated Accounts For the year ended 31 December 2021, p16

should be reflected in ComReg’s pricing proposals. ComReg has not provided any analysis to indicate whether it is reasonable to assume that Eircom was at the efficiency frontier in 2018; that there has been no movement in the efficiency frontier since 2018 and; there is no scope for future cost efficiencies. As noted above recent trends in Eircom’s operating costs in its HCA accounts suggest these assumptions are not consistent with the evidence available to ComReg.

Third, ComReg claims that a CPI-O control will result in pricing stability and improve the predictability, and as part of this, states that “*market players would expect that ... future FTTC VUA prices would continue to increase to some extent*”.<sup>1</sup> However, ComReg has not demonstrated how its CPI-O control would be the superior option in achieving pricing stability and predictability. In fact, Vodafone considers that this approach does not increase predictability versus setting a multi-year price cap on the basis of a cost model, as cost models can calculate the unit cost for services in the future, and can therefore be used to determine the price cap to be set in each year of the next price control period. It is also unclear why market players should expect price increases at the rate of inflation, given that FTTC VUA rental price has decreased following ComReg’s previous pricing reviews, including following its 2018 Pricing Decision.<sup>2</sup>

Taken together, Vodafone considers that it would be appropriate to set FTTC VUA rental prices on the basis of an updated FTTC cost model.

At a minimum, ComReg should conduct analysis to show that the current level of prices is reflective of costs. This would follow the approach taken by Ofcom when choosing its CPI-O control, where it used a cost model to check prices under this approach were not significantly above costs.<sup>3</sup>

**ComReg’s proposal to allow pricing flexibility on Eircom’s FTTH VUA rental prices may be an appropriate remedy in the prospectively competitive parts of the Commercial Area, but ComReg has not provided sufficient evidence or analysis to justify this**

As noted above, allowing some degree of pricing flexibility would be appropriate in areas where there is a need to incentivise additional investment in NGA network which would not occur under cost oriented prices, and where there exists indirect pricing constraints that constrain Eircom’s ability to price excessively.

In principle, this could be the case in the prospectively competitive parts of the Commercial Area that Vodafone outlined in response to Q4:

- In these areas Eircom, SIRO, and Virgin Media are currently in the process of expanding their FTTH networks, so allowing some degree of pricing flexibility may help to underpin the business case for those investments.
- In addition, the combination of cost-based FTTC prices and competitive constraints imposed on Eircom by rival network operators in these areas could limit the risk of Eircom setting excessive prices over the price control period.
  - As ComReg explains, a cost-based FTTC price could act as a “competitive anchor” for Eircom’s FTTH price in the short-run, given Eircom has the incentive to migrate customers from its FTTC to FTTH network as it rolls-out, and setting its FTTH prices significantly above FTTC prices limit that migration.

<sup>1</sup> ComReg-2303 WCA-WLA Consultation, paragraph 9.262

<sup>2</sup> The FTTC VUA rental price fell from €23 to €19.54 following the 2018 Pricing Decision. [https://www.openeir.ie/wp-content/uploads/2020/05/Broadband-Price-List-V16\\_2-marked-20042020.pdf](https://www.openeir.ie/wp-content/uploads/2020/05/Broadband-Price-List-V16_2-marked-20042020.pdf)

<sup>3</sup> Ofcom, Wholesale fixed telecom market review; Volume 4,

- Vodafone considers that the FTTC price will provide a weak constraint in the medium to long term once customers have migrated to FTTH, as once customers have migrated to FTTH, these are unlikely to switch back to FTTC – this is because there is a cost of switching back to FTTC (for example, due to the need for an engineer to attend the premise to switch the service back to FTTC), but also demand side factors (“loss aversion” means that customers are unwilling to trade down once they have experiences higher speeds, which is shown by the fact that the majority of FTTH customers now take the 500 Mbit/s package). This is also supported by Vodafone’s own data, which shows that there are only limited cases where a customer has moved back to an FTTC service after switching to FTTH, and in most cases for reasons other than price. Vodafone has looked at [REDACTED] orders and out of that total only [REDACTED] were downgrades from FTTH to FTTC and the vast majority of these are orders for customers moving from a premises with FTTH to one without.

However again, ComReg has not provided sufficient evidence or analysis to demonstrate that pricing flexibility is a superior pricing option for FTTH given the market context, relative to other options such as setting FTTH prices on a cost-oriented basis.

In practice, Vodafone would have expected ComReg to conduct a cost-benefit analysis, in which it assesses any benefits from pricing flexibility in terms of promoting additional network investment, versus the cost to consumers from allowing prices to be set above the cost-based level. However,

- ComReg has provided no evidence to indicate that continued pricing flexibility is required to ensure Eircom, Virgin Media, and SIRO deliver on its FTTH roll-out plans, versus other forms of price control. In practice, ComReg could have done this by assessing the business case for FTTH roll-out for each operator, and considered whether this remained positive under the expected price level with pricing flexibility, and under cost-based FTTH prices. This would reflect the approach taken by Ofcom as part of its 2021 WFTMR review, where it developed a detailed BU-LRIC FTTH cost model for both Openreach and alternative operators, and used this to estimate the incremental investment that would be achieved under pricing flexibility versus setting cost-oriented pricing.<sup>1</sup>
- Second, ComReg does not provide any evidence to assess the constraints provided by FTTC pricing an alternative network operators would be effective in stopping Eircom setting excessive FTTH prices. ComReg could have assessed this directly by calculating the cost-based price using a cost model, and compared this to current and expected future FTTH prices under pricing flexibility. This assessment could be performed by ComReg with limited additional effort, given Vodafone understands that ComReg is already developing a BU-LRIC FTTH cost model with its consultants Axon Consulting.<sup>2</sup> It would also reflect the approach taken by NRA’s in other European countries, such as Ofcom (who used its BU-LRIC costing model for Openreach to check whether the prices level resulting from pricing flexibility would be significantly above cost<sup>3</sup>), and FICORA in its 2019 market review in Finland.<sup>4</sup>

Taken together, Vodafone considers that ComReg has not provided sufficient evidence to show that its proposed FTTH pricing flexibility will result in material additional investment in the competitive parts of the Commercial Area, or prevent Eircom from setting excessive prices, and therefore whether this is a superior pricing option to alternatives such as cost-based pricing in these areas.

<sup>1</sup> Ofcom, Wholesale fixed telecom market review, 2021 Volume 4 paragraphs 1.36 – 1.38

<sup>2</sup> ComReg-2303 WCA-WLA Consultation, paragraph 9.240

<sup>3</sup> Ofcom, Wholesale fixed telecom market review, 2021: Volume 4, Paragraphs 1.89 – 1.97

<sup>4</sup> FICORA, Decision on significant market power in the local loop and bitstream markets, 2018.

**Pricing flexibility is an inappropriate remedy for FTTH VUA rental prices in the monopoly “Rural 340k” part of the Commercial Area.**

Unlike the competitive parts of the Commercial Area, ComReg’s proposed pricing flexibility approach is not appropriate in the “Rural 340k” part of this area.

First, as noted in Vodafone’s response to Q4, Eircom has already deployed its FTTH network in this area, and it is highly unlikely that there is a business case for competing network build by a rival operator in any part of that area. Thus there is no need to allow pricing flexibility to incentivise investment in this area.

Second, Eircom does not face strong indirect pricing constraints in this area, meaning pricing flexibility is unlikely to constrain Eircom’s ability to set excessive prices.

- Given its current and expected future monopoly position in the area, Eircom does not face pricing constraints from rival network operators.
- ComReg’s proposal to require Eircom to introduce a lower-speed “FTTC-like” FTTH product in this area is unlikely to provide a competitive constraint. This is because Eircom’s FTTH deployment in this area was completed a number of years ago, meaning a large number of customers in that area have already migrated to FTTH, and are on products with speeds of at least 500Mbps. Indeed, Vodafone notes that 66% of FTTH customers within the State are using broadband connections over 500Mbps and that Eircom is only offering 500Mbps and above for its residential FTTH broadband services.<sup>1</sup> This means that there are barriers to customers switching the FTTC-like product even if priced at a discount on higher-speed product variants, given the factors such as “loss aversion” outlined above.

Given the above, Vodafone considers that the appropriate pricing remedy in the monopoly “Rural 340k” part of the Commercial Area is to set Eircom’s FTTH prices on a cost-oriented basis.

This approach would be consistent with the EC’s NGA Recommendations, which states that in areas where duplication of NGA networks is not feasible or efficient, NRAs should prioritise creating a level playing field between the downstream arm of the SMP operator and alternative operators, which is best achieved through cost-oriented pricing:

*“NRAs should consider whether duplication of the relevant NGA access infrastructure is economically feasible and efficient. Where this is not the case, the overriding aim is to create a genuine level playing field between the downstream arm of the SMP operator and alternative network operators”<sup>2</sup> and where an operator holds SMP in that area, “The price of access to the unbundled fibre loop should be cost-oriented”<sup>3</sup>*

This approach would also reflect the approach taken by many other NRAs in the EU, with a report from BEREC showing that NRAs in 8 other EU countries currently set the price of incumbents FTTH VUA rental prices on a cost-oriented basis, including those in Finland, Hungary, Italy, and Croatia.<sup>4</sup>

<sup>1</sup> ComReg-2303 WCA-WLA Consultation, Figure 13. <https://www.eir.ie/broadband/>

<sup>2</sup> The EC recommendation on consistent non-discrimination and costing methodologies to promote competition and enhance the broadband investment environment 2013, paragraph 35.

<sup>3</sup> Commission recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), Annex I.1

<sup>4</sup> BEREC, Regulatory Accounting in Practice 2022, page 31. [BEREC Report Regulatory Accounting in Practice 2018 \(europa.eu\)](https://www.berec.europa.eu/berec-report-regulatory-accounting-in-practice-2018)

Vodafone again reiterates that ComReg could set cost-oriented pricing in this area whilst continuing with its proposed pricing flexibility approach in the competitive parts of the Commercial Area, both under its currently proposed single geographic market for the Commercial Area, or when taking the more appropriate approach to define separate geographic markets for the competitive and monopoly parts of this area,

### **ComReg should ensure that the cap on Eircom’s FTTH connection/migration charges is reflective of costs**

Vodafone agrees with ComReg’s proposal to impose a cap on Eircom’s FTTH connection/migration charges, given this would provide price certainty for retailers.

Irrespective of whether ComReg consider pricing flexibility, or an alternative pricing option is appropriate on FTTH VUA rental prices, Vodafone considers that the cap on connection / migration charge should be set on a cost-oriented basis i.e. equal to the “average cost” of a connection/migration, consistent with its approach in its 2018 Pricing Decision. This would ensure Eircom does not price these charges at an excessive level whilst ensuring that Eircom can recover its costs. Although not stated explicitly by ComReg, Vodafone understand that ComReg considers the proposed €100 cost cap to be reflective of current costs, given it states that “a price cap of €100 per connection/migration event would allow Eircom to recover all FTTH connection costs over the lifetime of the connection asset”<sup>1</sup>

If ComReg do intend to set the cap on a cost-oriented basis, it should ensure that the cap reflects the costs that Eircom will actually incur in providing connections and migration on a forward-looking basis over the price control period, taking into account the latest available information.

Vodafone considers this to be important, as it is possible that the average cost of a connection / migration may decline over this period i.e. below the current €100 level:

- ComReg itself states that Eircom’s average cost of FTTH connections has declined over recent years, due in part to a higher share of connection being in urban areas where the average connection cost has been lower. It is possible that this trend will continue as Eircom continues to roll-out its Urban FTTH network and take-up on its Rural FTTH network begins to reach saturation.
- In areas where Eircom has already deployed its FTTH network, you would expect that the percentage of connections and migrations represented by migrations to increase. Given the cost of migrations is significantly lower than new connections, this would act to reduce the “average connection/migration cost”.

As part of its assessment, ComReg must exclude any part of the connection costs that are funded by the retailers as opposed to Eircom. As already indicated above Vodafone will contract directly with the installation company to complete delivery when blockage and collapsed duct issues arise.

### **Vodafone agrees in principle with allowing Eircom to offer discounts on FTTC and FTTH VUA prices, but the proposed “pre-conditions” on the nature of allowed discounts should be adjusted to better meet ComReg’s objectives**

ComReg is proposing to allow Eircom to offer discounts on FTTC and FTTH VUA prices, subject to prior approval by ComReg. As part of that approval process ComReg will assess the proposed discounts on a case-by-case basis, based on a set of proposed “pre-conditions” principles, which include:

<sup>1</sup> ComReg-23/03 WCA-WLA Consultation, paragraph 9.309

- The reduction to the price is not to be a short-term measure;
- The reduction to the price is unlikely to dissuade new investment by alternative operators;
- The volume-based conditions within the discount proposals cannot only be achievable by eir Retail.<sup>1</sup>

Vodafone agrees with the principle of allowing Eircom to offer discounts in areas where ComReg allows pricing flexibility. This is because these discounts can help to ensure Eircom has incentive to complete its planned expansion of its FTTH network, as if implemented appropriately, this can encourage faster migration of customers to FTTH, and provide Eircom with greater certainty over demand on this network. This is also in line with EC's Gigabit Recommendation which mentions that "*Volume discounts and/or long-term access-pricing agreements are an important tool to foster VHCN investment*"<sup>2</sup>

However, Vodafone highlights the importance of ComReg to carefully assess the implications of the discount scheme on competition, as there is a clear risk that Eir could structure prices in such a way that undermines competition in both wholesale and retail markets.

In particular, Eircom could use volume-based discounts to foreclose competition at the wholesale level, for example, by setting discounts that can only be achieved by retailers purchasing wholesale services throughout the commercial area, in both the "Rural 340k" area where Eircom has a monopoly and in the urban/suburban areas covered by alternative network operators. This could lead to effective 'customer foreclosure' of alternative wholesalers due to Eircom being the only wholesaler with a network across the commercial area.

Eircom could also leverage its market power at the wholesale level to distort competition at the retail level, by introducing discount schemes that advantage its own downstream arm over other retail providers.

Given this, ComReg should carefully balance the need of providing greater investment incentives to Eir (e.g. via demand certainty) and the need to mitigate any risk that can undermine competition.

In light of this, Vodafone also agrees that the discount schemes should be pre-approved by ComReg, and with the proposed pre-conditions as discussed above.

However, Vodafone considers that ComReg should provide further details on how it proposes to assess each of these conditions in practice, in particular:

- ComReg should set out how it proposes to define a "short-term measure". ComReg should favour long term volume-based discount schemes as this provides greater certainty on price levels for the access seekers and greater certainty on demand for Eircom. Vodafone considers that the discounts should be in place for a minimum of 5 years. This would be consistent with the length of a ComReg price control period, and with the structure of details offered by alternative operators in the market.
- More detail should be provided on how ComReg will assess whether discounts will dissuade investment by or foreclose alternative operators, and the types of discount schemes that could result in this foreclosure occurring.

In addition, the pre-condition that discount proposals cannot only be achievable by eir Retail should also be extended, such that similar discounts can be achieved by all material retailers. This will ensure that

<sup>1</sup> ComReg-2303 WCA-WLA Consultation, para 9.346, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>2</sup> EC Gigabit Recommendation, para 59



competition at the retail level is protected, as it will avoid creating a “two-tier” system where smaller operators are unable to access discounts and therefore compete effectively with larger players.

Finally, ComReg should provide more detail on the specifics of its pre-approval process, including its proposed timelines for reviewing each discount scheme. This should balance the need for ComReg to have confidence that the discount schemes are fit-for-purpose, with ensuring the process is not overly bureaucratic and time-consuming.

**The scope and specific implementation ComReg’s proposed Margin Squeeze Test on FTTH needs to be amended to ensure these protect retailers from manipulation of the margin squeeze text.**

Vodafone agree that an obligation to meet an ex-ante MST for FTTH offerings sold standalone or in a bundle is required. ComReg will be aware of Vodafone views on the effectiveness of existing MSTs imposed in the 2018 market review. The fact that “*ComReg has not found any margin squeeze infringements in respect of FTTH products since the previous market review*” should not be regarded as definitive proof that the existing MSTs on FTTH are fit for purpose.

In paragraph 9.409 ComReg take relatively stable market share over 2018-2022 as an indicator that operators such as Vodafone “*have been able to replicate Eircom’s retail offerings in the presence of existing MSTs*”. This is not in fact the case. In paragraph 9.450 ComReg state that the margin squeeze obligations aim to ensure a sufficient gap between retail and wholesale prices to allow Access Seekers to compete at the downstream market. Vodafone has raised concerns with ComReg during the last market review around the adequacy of the MST and the inability to replicate the Eircom retail offering. The proposition in question is set out in the table below

|  | Eir Retail                 | Wholesale Price |
|--|----------------------------|-----------------|
| Monthly Price for 12 months on 150MB fibre | €24.48<br>(€29.99 inc VAT) | €23.50          |
| Minimum Contract term                      | 12 months                  | -               |

The Eir retail offer also included

- €50 back off the customer’s first bill;
- flexibility on application of a connection charge;
- a free Eir sport pack;
- unlimited off peak calls; and
- free Amazon Prime for 12 months.

After 12 months the price on the €29.99 Eircom plan increased to €65.99 including VAT.

The MST assumes the customer would still complete their Average Customer Life of 42 months when

1. The price of their monthly charge more than doubles; and
2. When the customer is outside the minimum term for their contract, at the exact time the price doubles, they will not be subject to any penalty if they switch.

<sup>1</sup> Oxera report part 3 para 5.18

To replicate the Eircom retail offer on the standalone broadband alone Vodafone would need (at that time) to have paid €170 connection to Eircom, a monthly fee of €23.50 (just 98c below the Eircom Retail price) and to have funded all marketing, acquisition, CPE and billing costs. This is without all the add in features that were loaded into the plan. The price point was still available well over a year and half later so was not a short term offer and was generally available to customers so therefore its assumed had no restriction on the number of customers who could avail of the offer.

Going forward, ComReg now propose to maintain the Average Customer Life (ACL) at 42 months. However, it is clear to Vodafone that the current MST is not fit for purpose and the MST assessment ComReg must be adapted to take account that is a sufficient gap must exist between retail and wholesale prices to allow Access Seekers to compete in the downstream market at the point when a competitive response is required. Based on its real wholesale cost an Access Seeker, could not risk competing at negative margins, on an economic assumption that the customer is likely to stay for 42 months, even when the price of their service doubles and the customer is free to move when that price increase takes effect.

Vodafone agree that the MST should apply to standalone and bundled FTTH offerings. In relation to the proposal to limit the MST assessment only to those products that account for 75% of Eircom's total retail volumes Vodafone share the concerns of Oxera on exclusion of products. Oxera state *"Excluding certain FTTH products from the MST today, on the basis of small volumes would leave these products at risk of being subject to a margin squeeze by Eircom"*. The concern arising is that this approach creates space to cause margin squeeze and gain unfair competitive advantage if new product releases are not subject to MST assessment. ComReg adopt the position that they "may" identify other flagship products such as new retail products or plans however it is not clear why any new offering would be excluded. This limits the effectiveness of the ex-ante test.

**Question 9: Do you agree with ComReg's proposals on the withdrawal of SMP remedies on the CG WLA Market, the IA NG WLA Market, and the Revised Regional WCA Market? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.**

Vodafone considers that ComReg has failed to demonstrate the existence of sufficient safeguards to support its proposed withdrawal of SMP remedies despite the EC's recommendation that *"NRAs should consider not imposing or lifting price control obligations pursuant to Article 74 of Directive (EU) 2018/1972, provided that sufficient competitive safeguards are in place"*<sup>2</sup> and that *"A prerequisite for the relaxation of certain access obligations is that the end-users and access seekers on which the relaxation will have an impact should have effective access to products on VHCNs constituting relevant alternatives to products delivered over the legacy network"*<sup>3</sup>

<sup>1</sup> Oxera report part 3 para 6.24

<sup>2</sup> EC Gigabit Recommendation, para 26

<sup>3</sup> EC Gigabit Recommendation, para 69

## The removal of price regulation for CG WLA services does not provide sufficient safeguards for CG customers, particularly vulnerable customers

ComReg is proposing to withdraw regulations from the CG WLA Market. It justifies this by arguing that the CG WLA Market is no longer susceptible to ex-ante regulation due to the presence of NG broadband networks – it specifically argues that NG services are a substitute for CG services, and the ability of customers to switch to NG services will be sufficient to constrain Eircom’s ability to raise CG prices.<sup>1</sup> To support the orderly transition of deregulation, ComReg is further proposing to introduce a 12 month sunset period, where existing CG WLA prices will be maintained at no higher than the prevailing prices before the regulations are withdrawn.<sup>2</sup>

Vodafone does not agree with ComReg’s proposals to withdraw SMP remedies in the CG WLA Market, as these does not provide sufficient safeguards to CG consumers, particularly vulnerable customers.

First, ComReg has failed to recognise that a number of areas will not be covered by NG networks until well into the charge control period (i.e. far beyond the 12 month sunset period). For example in the IA, NBI has currently passed only passed approximately 120,000 of the c.550,000 premises in this area, with its roll-out not due for completion until 2027.<sup>3</sup> As such, there is a material risk that CG consumers will have no choice but to stay on CG services and pay higher deregulated prices for CG services due to a lack of constraint from the presence of NG networks.

Second, even in areas that are covered by NG services, these services may not provide a sufficient constraint on CG prices if CG customers have a lower propensity to switch, which is particularly the case for vulnerable customers. ComReg should be aware that there is a range of evidence to suggest that vulnerable consumers are less likely to shop around and switch to another broadband service. This is in particular reflected in Annex 2: 2022 Residential Market Research provided by ComReg as part of this consultation, which finds that in rural regions 85%/75% of bundle/standalone consumers would keep their provider if the price increased by €4, and which highlights that customers in Region 1 (the most rural) are *“the most likely to do nothing”*. This was also observed in a recent UK survey commissioned by Ofcom which found that 49% of broadband customers aged 65+ have never changed their broadband provider, versus 40% of those under 65.<sup>4</sup> The same survey suggested that the most financially vulnerable consumers were more likely to never change their broadband provider than those that are least financially vulnerable (38% vs 44%).

Vodafone notes that other NRAs have implemented approaches with stronger safeguards for CG customers and access seekers. Ofcom<sup>5</sup> and Arcep<sup>6</sup> have introduced a process that removes CG regulation a number of years after ultrafast broadband has been completely rolled out within an exchange area. Ofcom’s proposed implementation is for example done in three stages:

<sup>1</sup> ComReg-2303 WCA-WLA Consultation, para 10.3, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>2</sup> ComReg-2303 WCA-WLA Consultation, para 10.4, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>3</sup> Reference to be added.

<sup>4</sup> Ofcom, Switching tracker 2022 data tables, Q28.

[https://www.ofcom.org.uk/data/assets/pdf\\_file/0022/246307/switching-tracker-2022-data-tables.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0022/246307/switching-tracker-2022-data-tables.pdf)

<sup>5</sup> Ofcom, Wholesale fixed telecom market review, Volume 3, para 2.12 – 2.16, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/216087/wftmr-statement-volume-3-non-pricing-remedies.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/216087/wftmr-statement-volume-3-non-pricing-remedies.pdf)

<sup>6</sup> Projet de décision d’analyse du marché 1 de fourniture en gros d’accès local en position déterminée, section 4.2.3

- Stage 1 – The incumbent (Openreach) is allowed to stop sell copper services for any new requests once ultrafast coverage reaches 75% of the exchange area. However, the incumbent must notify 12 months in advance of reaching the threshold of 75%.
- Stage 2 – A transition period of 2 years is then introduced where a charge control would apply to a wholesale 40/10 service either on FTTC or FTTP (charge control for FTTP will include a premium).
- Stage 3 – This charge control is then lifted once: (i) ultrafast rollout is complete in an exchange area, (ii) take-up of CG services is below 10%, (iii) the incumbent has published a notice to confirm the criteria before has been met; and (iii) two years have passed since the incumbent has published that notice.

### The removal of regulation for the WCA Market would allow Eircom to abuse its monopoly position in smaller exchanges

ComReg is proposing to withdraw regulations from the Revised Regional WCA Market, and justifies this by (i) arguing that the Revised WCA Market is no longer susceptible to ex-ante regulation due to the presence of upstream regulation for the Commercial NG WLA Market and the presence of the NBP Contract for the IA NG WLA Market<sup>1</sup>, and by (ii) stating that it “*considers it unlikely that Eircom would completely cease provision of merchant market WCA in the footprint of the Revised Regional WCA Market.*”<sup>2</sup> ComReg is only proposing to introduce a 12 month sunset period, where existing WCA prices will be maintained at no higher than the prevailing prices before the regulations are withdrawn.<sup>3</sup>

Vodafone does not agree with ComReg’s proposals to deregulate the Revised Regional WCA Market, as ComReg has failed to recognise that the competitive conditions for WCA services will differ throughout the State, with WLA not being an effective constraint in some geographies.

Vodafone notes that market 3(b) is not included EC’s list of relevant markets that should be considered subject to ex-ante regulation in Recommendation 2014/710/EU7. However, the EC clearly set out in the EECC<sup>4</sup> and in its proposed Gigabit Recommendation<sup>5</sup> that market 3(b) can still be subject to ex ante regulation if the conditions of the market requires it.

Also, as noted in response to Question 8 above, the proposed Gigabit Recommendation and other relevant EC guidelines require NRA’s to take reflect differences in competitive conditions between areas within its definition of relevant geographic markets and in the imposition of remedies within those markets. This specifically includes when considering decisions to lift regulation, where the recommendations suggest this should only be done when there are necessary competition safeguards in place: “*NRA’s should consider responding to these diverging competitive conditions by applying differentiated remedies. Such differentiated remedies could include, by lifting wholesale price regulation only in those areas where the necessary competition safeguards apply*”<sup>6</sup>

However, as in its market definition and proposed remedies for NG WLA services in the Commercial Area, ComReg has not reflected the significant differences in competitive conditions for WCA services in its proposed remedies. In particular, there are a large number of smaller (largely rural) exchanges where Eircom

<sup>1</sup> ComReg-2303 WCA-WLA Consultation, para 10.3, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>2</sup> ComReg-2303 WCA-WLA Consultation, para 7.25, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>3</sup> ComReg-2303 WCA-WLA Consultation, para 10.4, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>4</sup> Article 67(1), second subparagraph of Directive (EU) 2018/1972

<sup>5</sup> EC Gigabit Recommendation, para 5

<sup>6</sup> EC Gigabit Recommendation, para 38

is currently the only provider that offers WCA services, as it is not commercially viable for other providers to unbundle and offer WCA services to these exchanges. This is because there are a relatively smaller number of lines connected to these exchanges, making it more difficult for operators to achieve sufficient scale to cover the (largely fixed) cost of unbundling an exchange.

This issue does not appear to have been recognised by ComReg in its analysis of the Modified Retail Broadband market shares absent WCA regulation<sup>1</sup>, as its assessment was carried out only at a national level, which “hides” the variations in the footprint of the Revised Regional WCA Market.

As a result of this, Eircom has and will continue to have a monopoly position for WCA services in these exchanges, and regulation on WLA services will not provide a competitive safeguard for WCA services in these exchanges. This means that absent continued regulation on WCA services, Eircom could abuse its monopoly position in these areas e.g. by setting WCA prices at an excessive level, and/or discriminating in favour of its own retail arm.

This is in itself acknowledged by ComReg in para 7.6 of its consultation, where it highlights that removing WCA regulation could have negative impacts on the market if alternative wholesale inputs are not available: *“Absent WCA regulation scenario, Eircom would be entitled to withdraw merchant market provision of WCA in the 2021 Revised Regional WCA Market, and Access Seekers providing retail broadband to end users on that basis would, in those circumstances, be unable to retain their end users unless alternative wholesale inputs were available”* and where ComReg observes that *“Vodafone and Sky [would] see the biggest drop in market shares absent Eircom WCA inputs”*<sup>2</sup>

In addition, Vodafone understands that the competitive situation in the Revised Regional WCA Market has not changed since its previous review, where ComReg chose to continue imposing pricing and other remedies on Eircom’s WCA areas. It is thus not clear why ComReg has now proposed to deregulate WCA services in these areas now, despite the market situation remaining the same. Vodafone therefore considers that the removal of regulation is contradictory to another objective of the EECC, reiterated in the EC’s Gigabit Recommendation, which is to *“provide the necessary predictability over a longer time period”*.

Given this, ComReg should re-visit its market definition assessment for WCA market, and define a separate market for exchanges where it considers competition for WCA will be limited and WLA will not be an effective constraint e.g. the exchanges where Eircom will continue to hold a monopoly position on WCA services. In these areas, ComReg should continue to impose remedies to restrict Eircom’s ability to abuse its dominant position, including access and price regulation.

This is in-line with the approaches taken by other EU NRA’s, such as Arcep in its market 3(b) market review for 2024-28<sup>3</sup>, where it proposes to keep WCA price controls rural areas due to the competitive conditions in these areas. In particular, Arcep’s reasoning relies on (i) the finding that *“unbundling is insufficiently developed in the footprint of the rural areas due to the topography and low density of the rural areas, which could make it more difficult to invest in local access and/or backhaul”* and (ii) on the insufficient competition from alternative bitstream providers.

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<sup>1</sup> ComReg-2303 WCA-WLA Consultation, Table 46, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>2</sup> ComReg-2303 WCA-WLA Consultation, para 7.24, <https://www.comreg.ie/media/2023/01/ComReg-2303.pdf>

<sup>3</sup> Projet de décision d’analyse du marché 3b de fourniture en gros d’accès central en position déterminée à destination du marché de masse, Arcep, February 2023

Finally, ComReg has provided no details on the impact of its proposed WCA price deregulation on the WCA prices charged by NBI. This is relevant, as Vodafone understands that under NBI's Contract for the National Broadband Plan, NBI's WCA prices are current benchmarked to the regulated prices of Eircom – it is therefore unclear how this would change, if these prices are deregulated. ComReg should provide clarity on this, if it continues to (incorrectly) remove WCA regulation across all areas.

**Question 10: Do you agree with ComReg's proposals on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.**

Vodafone has no additional comment in relation to the Regulatory Impact Assessment (RIA) other than it captures the benefits and risks of different options for remedies where there is SMP, and concludes correctly that it is justifiable to maintain Access, Transparency, Non-Discrimination, Price Control and Cost Accounting and Accounting Separation obligations in the WLA market.

ENDS