



Commission for
Communications Regulation

Price Regulation of Bundled Offers

Further specification of certain price control obligations in Market 1 and Market 4

Response to Consultation and Decisions

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Chapter 1

1 Introduction

- 1.1 This Response to Consultation and Decisions (the '**Document**', or the '**Decision**') is concerned with two matters. Firstly, it deals with how retail bundles sold / offered by Eircom which include Retail Fixed Narrowband Access ('**RFNA**') (also referred to interchangeably in this Document as '**Line Rental**') are to be monitored from a compliance perspective with the pricing control obligations imposed by ComReg. Secondly, it sets out regulatory principles as to how Eircom can price certain regulated wholesale products relative to each other.
- 1.2 In relation to the first issue, Eircom is currently regulated in the provision of RFNA. Specifically, Eircom has been designated by ComReg as having Significant Market Power ('**SMP**') for Line Rental (Retail Fixed Narrowband Access, in ComReg Decision D07/61).¹ As a consequence, it must comply with certain rules as to how it sets the price of line rental, including where line rental is sold / offered as part of a bundle of other services. This Document is concerned in particular with the pricing of such bundles of retail services.
- 1.3 ComReg previously identified the potential for Eircom to cause unfair harm to its competitors by selling retail bundles at prices which rival operators could not reasonably be expected to match – thereby potentially driving them out of the Irish market. This could happen if Eircom's retail prices for bundles including RFNA were set at a level such that another operator, that is dependent on access to essential Eircom wholesale services, could not resell these services profitably because the gap between Eircom's retail and wholesale prices may be too narrow. This is known as a margin squeeze. The first part of this Document seeks to address the potential anti-competitive effects of likely margin squeeze issues before they occur (i.e., *ex-ante*) rather than after they occur (i.e., *ex-post*).
- 1.4 The second issue dealt with in this Document is to ensure that operators who build their own infrastructure and place the minimum reliance on Eircom's network, for example by using a wholesale service known as Local Loop Unbundling ('**LLU**'), are not squeezed in a similar manner by other Eircom wholesale services which are more in the nature of simple resale services. An example of this is to ensure that there is a sufficient gap between the price of Eircom's Wholesale Line Rental Service ('**WLR**') and the price of LLU.

¹ ComReg, "Market Review: Retail Fixed Narrowband Access", 24 August 2007 ('**ComReg D07/61**').

- 1.5 Both issues were consulted on in detail in ComReg Documents 11/72² and 12/63.³
- 1.6 A third matter, in relation to potential margin squeeze issues in the market for Wholesale Broadband Access ('**WBA**') was also discussed in ComReg 11/72. However, the issues discussed at that time have been held over for future discussion and have not been addressed further in this document.
- 1.7 This Document contains ComReg's decisions in relation to the further specification of certain existing obligations imposed on Eircom in the following markets:
- **Market 1:** Access to the public telephone network at a fixed location for residential and non-residential customers – further specification of the obligation not to unreasonably bundle services under ComReg Decision D07/61; and
 - **Market 4:** Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location ('**WPNIA**') – further specification of the obligation not to cause a margin/price squeeze under ComReg Decision D05/10.
- 1.8 The retail sale of telecommunications services by bundling more than one service together using the same bill has grown in significance for most operators. Bundling can have a number of consumer welfare enhancing benefits and can be an effective means for communication providers to realise various efficiencies and cost savings (which ultimately may be passed on to consumers through lower prices). While bundling can lead to a number of dynamic competitive market outcomes, such as: lower prices; increased choice; lower transaction costs etc., often the regulator has a key role to play to ensure the bundling of services does not lead to anti-competitive effects.
- 1.9 For the purposes of this Document, a '**bundle**' means a package of services, consisting of RFNA (or as it is commonly known, 'Line Rental') and one or more other services, sold or offered by Eircom. Retail bundles that do not include RFNA are not subject to this Decision.

² Consultation and Draft Directions 11/72: "Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access", 10 October 2011 ('**ComReg 11/72**').

³ ComReg 12/63, "Supplementary Consultation to ComReg 11/72, Price regulation of bundles", 15 June 2012 ('**ComReg 12/63**').

1.10 With respect to Next Generation Access (**'NGA'**) broadband services, ComReg has published a Decision⁴ which sets out the regulatory framework for standalone NGA broadband services. However, for clarity, where NGA broadband services are included in a bundle that includes RFNA, the obligation not to unreasonably bundle services as provided for by ComReg D07/61 applies and, accordingly, this current Decision is also applicable insofar as it further specifies that obligation.

1.11 This Document is structured as follows:

- Chapter 2: provides an overview of the consultation process.
- Chapter 3: contains an executive summary of the Decision.
- Chapter 4: discusses the overall framework for regulating bundles and the possible flexibility that may be allowed within the Net Revenue Test (**'NRT'**).
- Chapter 5: discusses the various components of the NRT.
- Chapter 6: contains the notification, pre-clearance, modification / withdrawal procedures relating to bundles that include RFNA.
- Chapter 7: details the further specification of the existing price control obligation in Market 4.
- Chapter 8: contains the Regulatory Impact Assessment (**'RIA'**).

⁴ ComReg, *"Remedies for Next Generation Access Markets: Response to Consultation and Final Decision"*, ComReg Document No. 13/11, Decision D03/13, 31 January 2013, (**'ComReg D03/13'**).

Chapter 2

2 Background

2.1 Overview of Market 1 – Line Rental

- 2.1 As set out in ComReg Decision D07/61, Eircom is designated as having SMP in the markets for higher and lower level retail narrowband access from a fixed location. Retail Fixed Narrowband Access or “RFNA” is sometimes called ‘Market 1’ as it is the first market listed by the European Commission as being prima facie susceptible to regulation — it is also often referred to simply as the market for Retail Line Rental. It should be noted that ComReg has recently carried out an updated market analysis in relation to RFNA and published a consultation paper (ComReg 12/117)⁵ in which it has proposed that Eircom should continue to be designated with SMP in the markets for (i) access to the public telephone network at a fixed location for residential and non-residential customers provided via PSTN, ISDN BRA and managed VOIP (**‘Lower Level Voice Access’** or **‘LLVA’** market); and (ii) access to the public telephone network at a fixed location for residential and non-residential customers provided via ISDN FRA and PRA (**‘Higher Level Voice Access’** or **‘HLVA’** market).
- 2.2 As a result of having SMP in the RFNA Market, ComReg has specified the regulatory controls to govern how Eircom sells bundles of services that include Line Rental. One of the main regulatory controls imposed under ComReg D07/61 is the obligation “not to unreasonably bundle” other related and non related services with RFNA.
- 2.3 As set out in ComReg 12/117, ComReg is of the preliminary view that it is appropriate, proportionate and justified that Eircom should be subject to an obligation not to unreasonably bundle LLVA services with other retail services. Specifically, ComReg proposes that Eircom should be subject to the following retail SMP obligations in the LLVA market:
- A general obligation not to unreasonably bundle services falling within the scope of the LLVA market with other services at the retail level;
 - An obligation to offer Fixed Voice Access (**‘FVA’**) (provided via PSTN and ISDN BRA) on a standalone basis;

⁵ ComReg, “Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers”, ComReg Document No: 12/117 (the ‘Retail Access Consultation’), published on 26 October 2012.

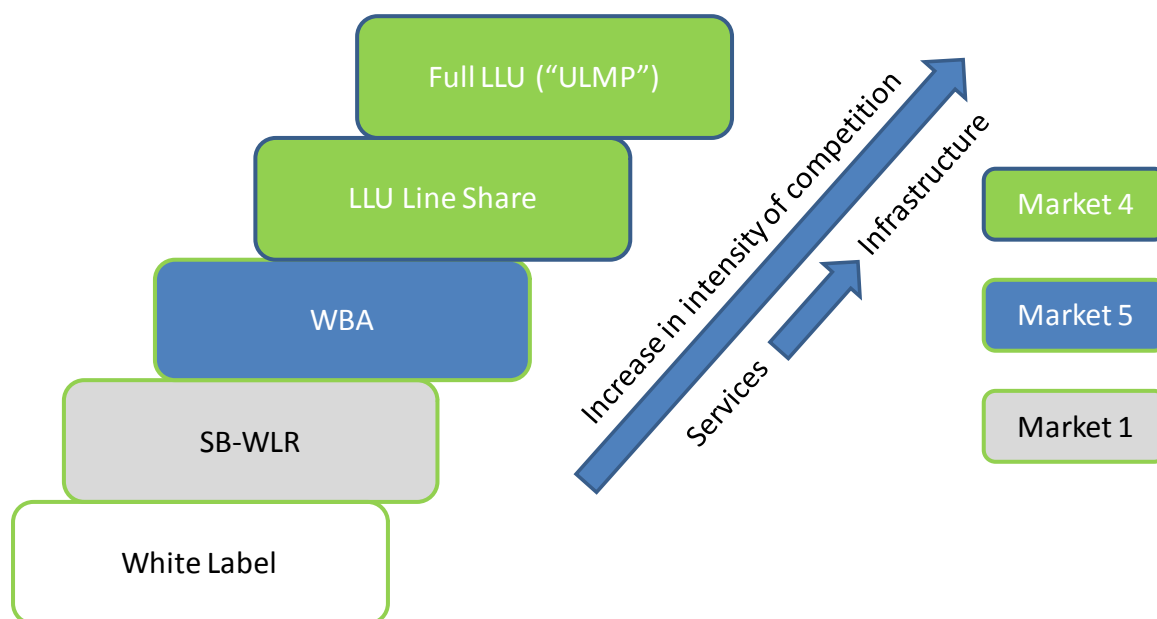
- An obligation to ensure that bundles containing FVA provided via PSTN or ISDN BRA (when bundled with other services) avoid a margin squeeze and comply with a net revenue test.
- 2.4 It is proposed on a preliminary basis in ComReg 12/117 that should SMP be found to continue to exist whether nationally or otherwise, that the current bundles Decision in this document would apply going forward to the subsequent market analysis of the RFNA market in three years' time.
- 2.5 The objective of the obligation not to unreasonably bundle was and is to facilitate the development of effective competition and to militate against the risk of the SMP operator leveraging its dominance from one market into another (e.g., the SMP operator using its positional advantage in one market to dampen competition in other more competitive markets). The outcome of such behaviour can potentially be to reinforce the SMP operator's dominance, in this case in RFNA.
- 2.6 The test that ComReg applies to assess whether or not Eircom is covering its total costs when it sells a bundle of services together and thereby complying with the obligation not to unreasonably bundle services is called a 'net revenue test' (i.e., the NRT).
- 2.7 Without the NRT, there is a significant risk that Eircom could cause a margin squeeze against Other Authorised Operators ('**OAOs**') by pricing its bundles anti-competitively — such that the space between retail prices and the prices of the underlying wholesale inputs that other OAOs rely on to compete could be too narrow for efficient OAOs to operate profitably. If this occurred, it is quite likely that OAOs would not be in a position to match or replicate Eircom's retail pricing offers and compete effectively in the market for Line Rental and possibly other markets as a result. Where such behaviour is ongoing, this could ultimately lead to OAOs' exit and new entrants being deterred from entering — as no matter how efficient they are — their costs may not be covered over the long-term if trying to meet or beat the pricing of the SMP operator where its pricing continually fails the NRT. This would ultimately be to the detriment of consumers and end-users. Absent any competition, Eircom could then raise the prices of its RFNA bundles in most geographic areas and there would also be a significant lack of innovation and options in the market generally. This could re-enforce Eircom's SMP position in large sections of the country where the likelihood of competition expanding would be significantly reduced, which would not be in the interests of consumers in those areas.

2.2 Overview of Market 4 – The Local Loop and Sub Loop

- 2.8 Market 4 is the Market for Wholesale Physical Network Infrastructure (or 'WPNIA'). Essentially this is the wholesale market for Local Loop Unbundling whereby Eircom provides access to its local access network, and related facilities such as ducts and poles, to other operators on a rental basis. This is an important basis for competition as it encourages entrant operators to provide services by maximising the use of their own networks and equipment thereby intensifying competition.
- 2.9 Eircom currently has a regulatory obligation in Market 4 not to cause a margin / price squeeze against operators who have either invested or are planning to invest in their own telecommunications infrastructure while purchasing essential facilities from Eircom wholesale (as mandated in Market 4, known as the WPNIA Market).⁶
- 2.10 ComReg considers that from a regulatory perspective it is important that the appropriate incentives are maintained to encourage OAOs to 'climb the ladder of investment'. In order for these incentives to exist, OAOs must have sufficient margins or 'economic space' between different wholesale products or 'rungs' on the ladder of investment. This should promote the development of effective retail competition which is capable of constraining the integrated incumbent on an ongoing and sustainable basis. As the European Commission has noted: *"Competing network infrastructures are essential for achieving sustainable competition in networks and services in the long run"*.⁷
- 2.11 ComReg believes that in the absence of an appropriate price control on Eircom obliging it to maintain such an economic space, by virtue of its control of the underlying access infrastructure and its presence at both wholesale and retail levels, Eircom would have the ability and incentives to price its wholesale access inputs in such a way as to dampen the competitive constraints it faces at the retail level from OAOs that use Eircom's wholesale products. This ultimately could allow Eircom to extract supra-normal profits through either higher retail prices for consumers or through maintaining a dominant share of the market.
- 2.12 To achieve ComReg's regulatory objective of promoting efficient investment and protecting the interests of end-users, it is important to ensure that there are appropriate protections and incentives in place for OAOs who choose to 'climb the ladder of investment' as opposed to acting as resellers. A simplified illustration of the "Ladder of Investment" is presented graphically in Figure 1.

⁶ Pursuant to s.12.4 of the Decision Instrument contained in Appendix C of ComReg Decision No D05/10. ComReg, "Market Review: Wholesale Physical Network Infrastructure Access (Market 4)", 20 May 2010 ('ComReg D05/10').

⁷ Explanatory note accompanying Recommendation on relevant Product and Service Markets, C(2007) 5406.

Figure 1: Ladder of Investment

- 2.13 The higher up the 'ladder' that a competitor ascends the more investment they must make. It is important that when such investment decisions are taken by competitors that they have a regulatory framework they can rely on to ensure investments are not undermined by anti-competitive behaviour. ComReg has and will continue to ensure that the appropriate protection and incentives are in place to enable OAOs to climb this investment ladder — in particular, by ensuring that Eircom cannot squeeze competitors between the relative prices of its different wholesale products across and within regulated markets. For example, Eircom's price for Single Billing Wholesale Line Rental ('**SB-WLR**') and WBA combined should always be greater than its price for SB-WLR and LLU Line Share ('**LS**') combined, which in turn should always be greater than its price for Full LLU ('**ULMP**').

- 2.14 In addition, the European Regulators' Group ('**ERG**') in its "ERG Report on price consistency in upstream broadband markets",⁸ specifically recognises a possibility for regulatory action where there may be a price squeeze between two wholesale services (e.g., between mandatory WBA and other forms of bitstream access or resale). For example, it notes: *"The need to maintain the coherence of the regulatory scheme may justify intervention with regard to non-regulated WBA offers, if the price unilaterally set by the SMP operator is so attractive that in practice it reduces the incentives of alternative operators to invest in alternative means of access that would enable further differentiation from the incumbent's offers. This will be particularly true in cases where the conduct pertaining to a non-regulated WBA offer has distorting effects over the policy objectives set by the NRA for alternative operators to climb the ladder of investment (including creation of economic spaces between wholesale services)".*⁹
- 2.15 Currently, there is no regulatory floor for either the price of SB-WLR or Naked WBA product ('**NWBA**').¹⁰ ComReg considers that it is appropriate to further specify the obligation under Decision D05/10 not to cause a margin / price squeeze for the WPNIA product, ULMP, to ensure that there is an appropriate relative margin between Eircom's ULMP product and a) its SB-WLR product and b) its NWBA. The purpose of this further specification is to provide assurance to OAOs using Local Loop Unbundling ('**LLUOs**') that neither the pricing of SB-WLR (especially sold in combination with WBA) nor NWBA will be priced at an excessively low level such that LLUOs could be foreclosed.
- 2.16 ComReg considers that infrastructure-based competition from OAOs using LLU (i.e., LLUOs) has the most potential to offer sustainable competition to Eircom in the provision of broadband to the benefit of end-users. In general, LLUOs are better able to offer differentiated retail products and to set prices independently of Eircom as compared to those OAOs using WBA and WLR. Consequently, it could be in Eircom's interests to set, say, WBA prices low enough to discourage investment in LLU / ULMP even where alternative investment is viable. Therefore, it is important that regulation ensures that LLU based competition is encouraged where it is viable.

⁸ 09 (21) dated June 2009.

⁹ 09 (21) dated June 2009, page 25.

¹⁰ Naked WBA DSL is a WBA product sold standalone without SB-WLR.

- 2.17 Going forward if and when LLU is replaced by NGA wholesale products, such as Virtual Unbundling Access ('VUA'),¹¹ the same principle holds to ensure the correct incentives and economic space is available to other operators currently in the market or to potential new entrants. This should ensure that investment is maximised and competition at the highest level of the 'ladder' is promoted to the benefit of end-users.

2.3 Overview of Consultation Process to date

2.3.1 Market 1: Access to the public telephone network at a fixed location for residential and non-residential customers

- 2.18 On 6 January 2010, ComReg published a Consultation and Draft Decision ComReg Document No 10/01¹² ('ComReg 10/01'), regarding Eircom's obligation not to unreasonably bundle.¹³ ComReg 10/01 assessed whether the obligation not to unreasonably bundle should be further specified and in particular whether the NRT, as an ex-ante imputation test to assess whether a bundle that includes RFNA is reasonable, remained appropriate — given the regulatory objectives of the obligation not to unreasonably bundle as set out in ComReg D07/61. ComReg 10/01 also proposed certain pre-notification and pre-clearance requirements in respect of bundles that include RFNA.
- 2.19 In summary, ComReg 10/01 did not propose any material amendment to the ex-ante NRT set out in ComReg D07/61. In other words that the NRT test would continue to use Average Total Costs ('ATC')¹⁴ and be conducted on a bundled product by bundled product basis (i.e., bundle-by-bundle) based on all bundles sold / offered in Ireland (i.e., the NRT is a national assessment whether an individual bundle complies with Eircom's obligation not to unreasonable bundle services).
- 2.20 During the consultation period of ComReg 10/01, ComReg was also in the process of conducting a separate consultation on the market review of the WBA (Market 5). The WBA market analysis found evidence of structural change arising in certain overlapping geographic areas.¹⁵

¹¹ See ComReg Decision 03/13 for more detail in relation to NGA related products and services.

¹² ComReg, Consultation and Draft Decision, "Further specification of the obligation not to unreasonably bundle pursuant to D07/61", 6 January 2010.

¹³ Eircom has an obligation not to unreasonably bundle retail fixed narrowband access with other retail services, see ComReg D07/61.

¹⁴ ATC includes fixed, variable and common costs.

¹⁵ A subsequent decision on the wholesale broadband access market was published on 8 July 2011, ComReg Decision No. 06/11, "Market Review: Wholesale Broadband Access, Response to Consultation and Decision".

- 2.21 Due to certain prospective developments in the market (see paragraph 3.2), ComReg considered that the price control proposed in ComReg 10/01 should be revisited in order to be capable of reflecting changes in the market as they occurred. In October 2011, ComReg published a further consultation paper,¹⁶ which sought the views of interested parties on whether the existing price controls should be further specified in light of the potential structural changes arising in certain overlapping geographic areas.
- 2.22 This further consultation paper, ComReg 11/72, took account of the passage of time and developments which had occurred in the market since ComReg 10/01 was published. In particular, it considered that Eircom together with other fixed operators utilising wholesale inputs, namely WLR and bitstream from Eircom, have faced a growing presence of alternative infrastructure operators — such as from the cable operator UPC and line share co-located operators. ComReg considered that growing presence might prospectively differ by geographic area — subject to the underlying structural characteristics and investment incentives / viability of those areas.¹⁷ In this further consultation, ComReg has considered the views of its expert consultants Oxera Consulting (**Oxera**).¹⁸
- 2.23 ComReg 11/72 proposed to further specify the existing obligation not to unreasonably bundle services by amending the NRT, such that the test would be sufficiently flexible to meet the prospective changes in competitive conditions. ComReg proposed to establish the criteria for identifying a Larger Exchange Area (**LEA**) within which a revised more flexible NRT would be applied.
- 2.24 Following publication of ComReg 11/72, ComReg gathered further data to help it understand better whether different structural conditions of competition were in fact evolving in different locations across Ireland. This information provided ComReg with more up-to-date information on transfers between OAOs, new subscription and cessation profiles in specific geographic locations by retail operator. ComReg considered that this additional analysis supported the proposed revision to the NRT (as proposed in ComReg 11/72, Chapters 4 and 5). In June 2012, ComReg published a Supplementary Consultation Paper¹⁹ which set out ComReg's interpretation of the additional analysis.²⁰

¹⁶ Consultation and Draft Directions 11/72: *“Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access”*, 10 October 2011 (**ComReg 11/72**).

¹⁷ See paragraphs 3.11 – 3.29 of ComReg 11/72.

¹⁸ For information purposes only, their report was published as ComReg Document No. 11/72a. Oxera's views expressed are not necessarily the views of ComReg.

¹⁹ ComReg 12/63, *“Supplementary Consultation to ComReg 11/72, Price regulation of bundles”*, 15 June 2012 (**ComReg 12/63**).

²⁰ See ComReg 12/63, Chapter 2 for further information.

- 2.25 As set out in ComReg 12/63, based on the new data, ComReg considered that Eircom, including OAOs utilising its wholesale inputs are facing increased localised competition from alternative infrastructure-based operators (which includes cable operators). However, ComReg noted that it appeared to be too early to determine whether the increasing competition indicated that conditions in this area are sufficiently unique and stable to merit defining a separate sub-national geographic market²¹ — nonetheless, ComReg considered it important to recognise the changing market conditions by designing remedies such that they would be proportionate to the competition issues identified in different locations. It also appeared that the presence of UPC is affecting all operators using Eircom's network to some extent.²²
- 2.26 Indeed, since consultation of ComReg 12/63, Eircom has recently announced a wholesale price reduction for LLU and Sub-Loop unbundling.²³
- 2.27 ComReg 12/63 consulted on the development of appropriate criteria to determine the extent of the LEA and how it might be taken into account in the proposed revision to the NRT as set out in ComReg 11/72.
- 2.28 While ComReg 11/72 also consulted on the further specification of the obligation not to margin / price squeeze the WBA market²⁴ and any potential future Naked WBA (Bitstream) DSL, no draft decisions were proposed in ComReg 11/72. Consequently, these issues will not be addressed in this paper and as such this Document does not respond to interested parties' views in relation to same. ComReg plans to progress these matters as part of a separate future consultation process. For the avoidance of doubt, where broadband bundles are offered / sold which do not include RFNA, ComReg D01/06²⁵ and ComReg D06/12²⁶ continue to apply. Similarly, and for the avoidance of doubt, where Standalone NGA bundles are offered / sold which do not include RFNA, ComReg 13/11 will apply.
- 2.29 The further specification of the obligation not to unreasonably bundle by means of a revised NRT seeks, in particular, to:

²¹ This is supported by ComReg's preliminary view in the updated Market Analysis in Market 1, ComReg 12/117: "ComReg is of the preliminary view that it appears to be too early to determine that a separate geographic market can be clearly defined based solely on the bundled FVA services offered in particular regions. It is too early to determine whether the increasing competition with regard to the wider bundle of services (in particular voice and broadband) indicates that conditions in this area are sufficiently unique and stable to merit defining a separate sub-geographic market".

²² For further information see Chapter 2 ComReg 12/63.

²³ See ComReg information notice 13/01.

²⁴ As provided by ComReg Document 11/49, "Market Review: Wholesale Broadband Access, Response to Consultation and Decision", Decision No. D06/11, 8 July 2011.

²⁵ ComReg, "Retail minus wholesale price control for the Wholesale Broadband Access market", 13 January 2006, ('ComReg D01/06').

²⁶ ComReg, "Wholesale Broadband Access: Further specification to the price control obligation and an amendment to the transparency obligation", 5 April 2012, ('ComReg D06/12').

- Ensure efficient OAOs using Eircom’s key regulated inputs can compete effectively;
- Ensure appropriate incentives remain for both Eircom and OAOs to invest efficiently in broadband infrastructure;
- Ensure efficient OAOs are not squeezed to the point where they are forced to exit the market, to the ultimate detriment of end-users;
- Ensure that end-users can benefit from competitive bundle options across platforms;
- Ensure Eircom Retail can compete fairly with any emergent infrastructure-based competition to the benefit of end-users; and
- Ensure regulation remains proportionate and practicable over the medium term.

These are discussed further throughout this Document.

2.30 It is important to note that the revisions to the NRT and in particular the weighted average wholesale input²⁷ in this Document are specified in such a way that when full LLU and / or potentially Next Generation broadband services²⁸ based competition actually increases, that the flexibility now being applied by these revisions will flow through into the NRT. Therefore, for the avoidance of doubt, there is an explicit link between increasing competition and increased regulatory flexibility.²⁹

2.3.2 Market 4: Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.

2.31 ComReg proposes to further specify the obligation under ComReg Decision D05/10,³⁰ to ensure that there is an appropriate relative margin between Eircom’s Unbundled Local Metallic Path (i.e., ULMP)³¹ product and: a) its SB-WLR product; and b) its Naked WBA product based on a Reasonable Efficient Operator (‘REO’) cost standard.

²⁷ See Chapters 4 and 5.

²⁸ See also paragraph 1.10.

²⁹ In other words, as the actual use of LLU or virtually unbundling in NGA by OAOs increases, the weighted average wholesale input cost could decrease for Eircom Retail — which should act as an incentive for Eircom Wholesale to encourage OAOs to use LLU or VUA.

³⁰ ComReg D05/10.

³¹ ULMP is the implementation of Full Unbundled Access to the Local Loop.

2.32 Eircom currently has an obligation not to cause a margin / price squeeze in the WPNIA market.³² ComReg 11/72 proposed to further specify that obligation to minimise the risk of Eircom squeezing those operators who have invested in order to avail of ULMP, by setting the relative prices of its other wholesale products at a level which is too low, in particular:

- Setting the price of its SB-WLR product too low relative to the price of its ULMP product;
- Setting the price of its Naked WBA (Bitstream) DSL³³ product too low relative to the price of its ULMP product; and
- Setting the LLU cost stack (see paragraph 7.19) too low in the NRT.

2.4 Consultation with stakeholders

2.33 Submissions to both ComReg 11/72 and ComReg 12/63 were received from:

- Eircom;
- BT Ireland Limited ('**BT**');
- Magnet Networks Limited ('**Magnet**');
- Vodafone Ireland Limited ('**Vodafone**');
- UPC; and
- the industry body representing alternative operators in communications market ('**ALTO**').³⁴

³² Pursuant to s.12.4 of the Decision Instrument contained in Appendix C of ComReg Decision No D05/10.

³³ In the near future, Eircom will offer Naked WBA DSL, as the wholesale equivalent of retail SAB / Naked DSL. Naked WBA DSL is a WBA product sold standalone without SB-WLR.

³⁴ Submissions to ComReg 10/01 were considered in ComReg 11/72.

- 2.34 ComReg notified its draft measures to the European Commission pursuant to Article 7 of the Framework Directive³⁵ on 26 October 2012.³⁶ In response to that notification³⁷ the European Commission noted that: *“The geographic differentiation of remedies may be appropriate in those situations where, for example, the boundary between areas where there are different competitive pressures is variable and likely to change over time, or where significant differences in competitive conditions are observed but the evidence may not be such as to justify the definition of sub-national markets”*.³⁸ *“ComReg appears to justify this differentiation of remedies with the underlying competitive circumstances in the LEA”*.³⁹
- 2.35 In making its final decision, ComReg has carefully considered submissions received from interested parties.⁴⁰ This Document considers those responses and sets out the reasons where ComReg either remains with its preliminary view (as set out in ComReg 11/72 and ComReg 12/63) or has amended its preliminary view on foot of the responses received.⁴¹ In addition, ComReg has considered the views of its expert consultants Oxera.⁴² In accordance with Regulation 14(2) of the Framework Regulations,⁴³ ComReg has also taken utmost account of the comments made by the European Commission in response to ComReg’s notification of the draft measures under Article 7 of the Framework Directive.

³⁵ Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC.

³⁶ Registered by the European Commission as Case IE/2012/1381: Access to the public telephone network at a fixed location and Case IE/2012/1382: Wholesale physical network infrastructure access.

³⁷ [https://circabc.europa.eu/d/d/workspace/SpacesStore/6313a027-7f8e-42c9-91b3-a5635c37443c/ComReg - Article 7 Notification of amendments to existing price control remedies in Market 1 and Market 4.pdf](https://circabc.europa.eu/d/d/workspace/SpacesStore/6313a027-7f8e-42c9-91b3-a5635c37443c/ComReg-Article%207%20Notification%20of%20amendments%20to%20existing%20price%20control%20remedies%20in%20Market%201%20and%20Market%204.pdf)

³⁸ https://circabc.europa.eu/d/d/workspace/SpacesStore/e15c4f43-d146-49cb-84f8-2402ee55b493/IE-2012-1381-1382%20adopted_EN.pdf

³⁹ ComReg is required to notify any proposals to impose new or amended obligations on an SMP operator to the European Commission pursuant to Article 7 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁴⁰ The non-confidential responses to ComReg 11/72 were published by ComReg in ComReg Document No. 12/63a. The non-confidential responses to ComReg 12/63 were published by ComReg in ComReg Document No. 12/113.

⁴¹ For completeness a list of all the consultation questions in ComReg 11/72 and ComReg 12/63 are provided in Annex: 2.

⁴² For information purposes only, their report was published as ComReg Document No. 13/14a. Oxera’s views expressed are not necessarily the views of ComReg.

⁴³ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011).

Chapter 3

3 Executive Summary

3.1 The key regulated services in many Eircom bundles include RFNA, wholesale voice (i.e., fixed origination and fixed termination and mobile termination), WPNIA and WBA services. The delivery of retail bundled services to end-users relies heavily on these key regulated inputs. Consequently, Eircom is currently subject to a number of obligations including a number of price controls, for example:

- In the RFNA market (Market 1), Eircom has an obligation not to unreasonably bundle RFNA with other retail services.⁴⁴ The obligation not to unreasonably bundle services means that Eircom “must ensure that any bundle avoids a margin squeeze and passes a net revenue test”.
- In the WPNIA market (Market 4), Eircom is currently subject to a regulatory obligation not to cause a margin / price squeeze.⁴⁵

3.1 Market 1: To further specify the obligation not to unreasonably bundle services by amending the net revenue test

3.2 The Irish telecommunications sector continues to evolve and infrastructure-based competition provides an alternative competitive platform to that of Eircom (the SMP operator), although this is relatively nascent in respect of LLU and mainly manifests itself through competition from UPC’s cable platform. There have been a number of recent developments in the Irish telecommunications sector, including for example: Vodafone entering into a commercial agreement with BT, as part of an overall commercial relationship, which involved the transfer of BT’s residential customer base to Vodafone. In addition, the cable operator UPC has continued to expand its network coverage — which has had a more noticeable effect on the market in urban areas.

⁴⁴ Pursuant to ComReg D07/61.

⁴⁵ Pursuant to ComReg D05/10.

- 3.3 British Sky Broadcasting Group plc (**'Sky'**) recently announced that it is to enter the Irish market using BT's LLU platform to offer telephony and internet services in 2013. Consequently, it is anticipated that in most areas where BT has co-located at Eircom exchanges, there will be at least two service providers (Sky and Vodafone) offering retail broadband services and bundles using an alternative operator rather than Eircom as their wholesale provider (although still relying on Eircom's WPNIA inputs). Furthermore, ComReg considers that prospectively this could result in further infrastructural investment throughout Ireland — in particular, in high-density populated exchanges that, to date, have not yet been unbundled.
- 3.4 As noted in paragraph 2.1, an updated market analysis for Market 1 has commenced and a Consultation and Draft Decision in relation to that market analysis has been published. ComReg's preliminary view in that consultation is that regulation remains appropriate in the relevant markets, and that Eircom should be designated with SMP in the following markets: (i) the market for access to the public telephone network at a fixed location for residential and non-residential customers provided via PSTN, ISDN BRA and managed VOIP⁴⁶ (LLVA market); and (ii) the market for access to the public telephone network at a fixed location for residential and non-residential customers provided via ISDN FRA and PRA (HLVA market). The proposed LLVA market is broader than the lower level market defined in ComReg D07/61, given that ComReg now proposes in the consultation to include managed VOB in the relevant market. The HLVA market is essentially the same as the higher level market defined in ComReg Decision D07/61. As set out in Chapter 6 of that paper, ComReg considers that competition concerns relating to leveraging still exist and as such ComReg is of the view that a general obligation not to unreasonably bundle services falling within the scope of the LLVA with other services at the retail level remains appropriate. Any designation of SMP and remedies proposed on foot of the current Market 1 consultation process will be published in due course. The present Decision constitutes a further specification of the obligation not to unreasonably bundle services contained in ComReg D07/61. Once ComReg adopts its forthcoming final decision (if any) resulting from the current Market 1 market review, ComReg D07/61 will be revoked and it is proposed that the present Decision will continue in force as if it were a further specification of the obligation not to unreasonably bundle services contained in the forthcoming Market 1 market review decision. Further details in this regard are set out in paragraph 2.4 above.

⁴⁶ VOIP means Voice over Internet Protocol.

- 3.5 ComReg considers that Eircom and OAOs utilising its wholesale inputs are facing increased localised competition from alternative infrastructure-based operators (mainly UPC). It also appears that the presence of UPC is affecting all operators using Eircom's network to some extent including Eircom itself. ComReg considered that with the prospect of more localised competition evolving over time that there may be merit in revising the parameters of the NRT — to ensure that regulation is sufficiently responsive to any such developments. In ComReg 11/72 and ComReg 12/63, ComReg considered that the previous NRT, without revision, may unnecessarily limit Eircom to offer more competitive bundles (see paragraphs 3.11-3.12) going forward.
- 3.6 In overall terms ComReg's response to these developments is to:
- a) encourage Eircom to lower wholesale prices where possible and appropriate;
 - b) encourage investment in NGA in order to improve the competitiveness of the Eircom network;
 - c) encourage Eircom to develop its wholesale business such that as competition based on usage of its network (in particular LLU and Virtual Unbundling) increases, Eircom has increased regulatory flexibility; and
 - d) encourage alternative operators to invest by ensuring any measures taken by Eircom (as set out in a) to c) above) are not contrary to its overriding regulatory obligations and competition law requirements.

The proposed measures contained in this Document are intended to provide certainty as to how this flexibility would develop as competition emerges.

- 3.7 Analysis undertaken during the consultation process indicated that the increased localised competition faced by Eircom and OAOs utilising its wholesale inputs is more evident in urban areas — where LLU footprints and UPC are largely present.⁴⁷ In light of this, ComReg proposed that a revised more flexible NRT would be applied for bundles sold / offered in certain prospectively competitive exchanges. In order to identify those exchanges, ComReg defined a number of criteria. Subject to an assessment of the relative competitive dynamics of such exchanges, a qualifying exchange would form part of the LEA. It is in these qualifying exchanges (i.e., the LEA) where a more flexible NRT would apply.

⁴⁷ See ComReg 12/63.

- 3.8 In deriving an appropriate NRT, ComReg acknowledges the need to protect competition which is based on using Eircom's network (i.e., that the obligation not to unreasonably bundle remains relevant — as currently imposed by ComReg D07/61 and as proposed to be re-imposed more recently by ComReg 12/117) — but considers that there must also be appropriate flexibility so that Eircom Retail's pricing is not unduly constrained by regulation. Consequently, ComReg considers that the NRT must have sufficient flexibility going forward.
- 3.9 ComReg considers that it is appropriate in this Decision to further specify the existing obligation not to unreasonably bundle services, under ComReg D07/61, by amending the NRT — such that for bundles sold / offered in the LEA a two-part NRT will apply. For bundles sold / offered outside the LEA a single one-stage NRT will apply. This further specification of the obligation not to unreasonably bundle services is discussed in further detail below.
- 3.10 For bundles sold / offered in the LEA, the two-part NRT is a combinatorial test (i.e., that is to say that both tests must be passed), bundles are assessed on a bundle-by-bundle basis and secondly on a portfolio basis (i.e., the bundles sold / offered in the LEA are aggregated together).
- 3.11 The flexibility in the new NRT resulting from this Decision derives from two sources; the first is that a lower cost standard (Long Run Incremental Cost ('LRIC'))⁴⁸ for retail calls is applied in the bundle-by-bundle approach for bundles sold / offered in the LEA only. ComReg considers that this approach would be more consistent with that produced in competitive markets — as the LRIC cost standard enables incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle. However, if the LRIC cost standard was applied across all bundles the test could result, on an aggregate basis, that the portfolio of bundles would not make an adequate contribution towards common costs, potentially rendering the bundles unprofitable. Consequently, ComReg considers it appropriate that at the portfolio level that the aggregate of all bundles must cover their ATC, which incorporates a share of common costs in addition to the relevant fixed and variable costs. The provision that Eircom must recover its ATC at the portfolio level in the LEA and in the bundle-by-bundle assessment outside the LEA, ensures that nationally (i.e., inside and outside the LEA) Eircom is not unreasonably bundling RFNA with other services.

⁴⁸ For Retail calls this is estimated from Eircom's accounts as Total Cost of Calls less common costs less fixed indirect costs.

- 3.12 The second source of flexibility in the new NRT (within the LEA only) is through the use of a Total Wholesale Access Input Cost also referred to in this Document as a weighted average Wholesale Network Input (the '**WNI**') applied in both the bundle-by-bundle and portfolio assessment. The previous NRT assumed that in order for an OAO to replicate an Eircom bundle it uses SB-WLR and Bitstream exclusively. As such, irrespective of the actual usage of the wholesale inputs by an OAO the previous NRT test would not reflect this change. Consequently, ComReg considers that to recognise the increased investment of OAOs in LLU and NGA, it is appropriate that the revised NRT to take these developments into account. Therefore, the NRT will now be set by reference to the different wholesale Access prices available from Eircom weighted for the relevant usage (or number of customers) of each input that OAOs in the LEA use (i.e., the WNI). Consequently, as infrastructure-based competition increases in the LEA the WNI could decrease for Eircom Retail in the NRT — which, depending on the number of customers OAOs have succeeded in winning, will allow Eircom Retail a lower network input and therefore additional margin to use in their retail pricing strategy for bundles. As such, there is a direct link between increased competition and regulatory flexibility within the NRT (i.e., as OAOs invest in and migrate their customers to LLU+, Eircom can lower its own Retail prices due to the lower WNI in the NRT).
- 3.13 The purpose of the WNI is to reflect the cost components faced by an OAO that it would be required to incur in order to replicate an Eircom individual bundle. Consequently, in order to reflect the emergence of NGA and the fact that legacy wholesale inputs cannot be used by OAOs to replicate an Eircom NGA bundle, ComReg considers that it is appropriate to have a separate WNI for legacy and NGA bundles. Furthermore, without a separate NGA WNI, by virtue of the flexibility within the NRT (in the LEA only), Eircom could potentially price NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. The use of a legacy WNI and separate NGA WNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom Retail is not provided undue pricing flexibility and that the WNIs are reflective of the average wholesale input costs incurred by an “efficient” operator to replicate legacy and NGA bundles in the LEA.

- 3.14 The WNI will be calculated with reference to the average wholesale network inputs of an 'efficient' hypothetical operator and will be guided by the actual usage of the various wholesale inputs used by OAOs in the LEA. For the avoidance of doubt, ComReg is not defining explicitly what the migration path of an '*efficient hypothetical*' operator would be by introducing a glide path. Rather the test reflects the actual use of wholesale inputs. In order to militate against potential perverse incentives and retail price uncertainty, the WNI will be downward adjusting only over time — the ongoing appropriateness of this will be kept under review by ComReg.
- 3.15 As there are currently no NGA bundles in the market and to prevent large fluctuations in the WNI for NGA bundles as migrations initially occur, ComReg considers that the initial weightings assumed for NGA for an 'efficient' hypothetical operator cannot be based on actual usage (at least not initially). Starting from a zero base (i.e., no weightings of NGA wholesale inputs), once an OAO moves its customer base to say POTS-based VUA the WNI will initially be fully weighted to that input. Similarly, if an OAO migrates a portion of its customer base to the highest NGA wholesale input but subsequently another OAO (or that OAO itself) moves a higher portion of customers using the lowest NGA wholesale input, the flexibility of the NRT would allow Eircom Retail a WNI for NGA bundles which would be weighted towards the lower input. This creates a number of issues during the initial NGA launch, in particular, if the take-up of NGA increases periodically and across NGA inputs, such that the WNI could fluctuate from the highest to the lowest input and vice versa creating instability for Eircom Retail pricing (in order to pass the NRT) and could also provide OAOs with uncertainty regarding the potential WNI. Consequently, ComReg considers it appropriate to assume certain weightings across the NGA wholesale inputs to determine a WNI for NGA bundles for the NRT until such time as there is sufficient take-up of NGA or once the migration patterns of OAOs using NGA wholesale inputs becomes more apparent — at which time ComReg considers that it would be appropriate for the NGA WNI to be calculated with reference to the average wholesale network inputs of an 'efficient' hypothetical operator and will be guided by the actual usage of the various NGA wholesale inputs used by OAOs in the LEA.
- 3.16 In order for the WNI to be timely, ComReg considers that Eircom Wholesale is best placed to inform ComReg of the actual number of customers on the various wholesale products such as bitstream, Line Share, LLU etc., at the end of each quarter. However, ComReg also considers that in order for the WNI to be capable of reflecting the likely usage by OAOs of the various platforms over a given period, that in exceptional cases, confirmed future bulk migrations may be included in the relative weighting on a prospective basis, for example large orders from Line Share to LLU or from Line Share to VUA — where it is clear these will happen seamlessly and on a defined date.

- 3.17 ComReg considers that outside the LEA the prospective competitive conditions are not as evident as those within the LEA. The majority of competitors in these non-LEA areas rely on SB-WLR and Bitstream from Eircom. As such, for non-LEA bundles ComReg considers that the flexibility provided by the two-part test is not appropriate. Consequently, ComReg considers that for bundles sold / offered outside the LEA it remains appropriate for the bundles to be assessed on an individual bundle basis. Each bundle must pass its own ATC. As such, the LRIC cost standard for retail calls and the WNI will not be applied in the NRT for non-LEA bundles.
- 3.18 Where unregulated services are included in a bundle including RFNA (both inside and outside the LEA), ComReg considers that these unregulated services must cover their own LRIC. ComReg considers that LRIC is the most appropriate cost standard: *“since it is the lowest price level above which competition would be sustainable”*.⁴⁹ In exceptional circumstances where, in ComReg’s view, the bundling of the unregulated service will not have a significant impact on competition, ComReg has decided that it will consider the use of the Average Avoidable Costs (**‘AAC’**) cost standard in the assessment of unregulated services within a RFNA bundle.
- 3.19 Based on a settlement agreement between Eircom and ComReg in relation to the NRT,⁵⁰ Eircom has not been permitted to launch bundles which include RFNA without ComReg’s prior approval. ComReg considers that this approach continues to remain appropriate in order to minimise the risk of non-compliant bundles entering the market. As such, Eircom must notify and obtain approval for bundles that include RFNA at least five working days before launch. For the avoidance of doubt, approval in this context means that ComReg is of the view (based on the information provided to it by Eircom) that the notified bundle does not appear to breach the NRT. The granting of approval does not amount to a definitive finding by ComReg that a particular bundle is compliant, or will remain compliant in the future, with the NRT — in particular given that the actual outturn of a specific bundle can ultimately be different from that initially envisaged, such that the relevant bundle may not in fact pass the NRT. It should be noted that the granting of approval is strictly without prejudice to ComReg’s right to take action (whether pursuant to this Decision and/or pursuant to any of its relevant statutory enforcement powers) in respect of any bundle that it believes may be non-compliant with Eircom’s regulatory or competition law obligations. It is incumbent on Eircom to ensure that all bundles containing RFNA remain compliant with this Decision at all times.

⁴⁹ Oxera Report: Conceptual framework for the assessment of Eircom’s bundles dated 30 September 2011 (ComReg Document No. 11/72a, 10 October 2011).

⁵⁰ See ComReg Information Notice 09/79, 14 October 2009, http://www.comreg.ie/_fileupload/publications/ComReg0979.pdf

- 3.20 If a bundle fails the NRT,⁵¹ as a proportionate measure, ComReg will undertake a competitive assessment of the bundle and will consider any robust evidence that may be available to support a view that a bundle will pass the NRT going forward. For example, this may potentially occur where known future retail efficiencies or verifiable increased customer lifetimes as a result of bundling can be demonstrated to the satisfaction of ComReg.
- 3.21 Where an existing bundle is determined by ComReg to be unreasonable this will be notified to Eircom. Eircom must not add any customers to that relevant bundle unless and until such a bundle is modified to ComReg's satisfaction. Eircom should notify its intention to ComReg to take this action (i.e., to withdraw or modify) within ten working days of the bundle failing the NRT. Where Eircom fails to confirm its intention to withdraw / modify the bundle or where the proposal remedial action is deemed insufficient by ComReg, ComReg will consider the use of its statutory enforcement powers to ensure that Eircom brings the non-compliance to an end.

3.2 Market 4: To further specify the obligation not to margin / price squeeze

- 3.22 Currently, in addition to its obligation of cost orientation, Eircom has a regulatory obligation not to cause a margin / price squeeze in connection with the WPNIA market. At this time, the main services sold from this market relate to Line Share and to a lesser extent LLU. Line Share refers to the rental of the higher frequency element of the local loop only and is purchased with WLR. It allows an OAO to sell broadband using its own equipment. LLU on the other hand refers to the rental of the entire loop which allows the OAO to provide its own voice without the need to rent wholesale voice from Eircom. As noted in the WPNIA market review, Eircom must ensure that *“the relationship between its wholesale and retail pricing, and between the pricing of its wholesale products, does not constitute a margin squeeze”* (emphasis added).⁵²
- 3.23 ComReg is proposing to further specify the obligation under Decision D05/10 not to cause a margin/price squeeze for the WPNIA product, ULMP, based on a REO, to ensure that there is an appropriate relative margin between Eircom's ULMP product and a) its SB-WLR product and b) its Naked WBA product.
- 3.24 ComReg considers that preserving a sufficient economic space between different wholesale inputs offered by Eircom is necessary so as to promote and foster sustainable and effective competition in the provision of retail services to end-users.

⁵¹ Note that Eircom must at all times ensure it meets its regulatory obligation not to unreasonably bundle. Therefore, Eircom must notify ComReg immediately together with supporting evidence if it believes that any bundle may have become unreasonable.

⁵² ComReg D05/10.

3.25 ComReg considers that it is appropriate that the LLU cost stack for an efficient OAO is used to calculate the appropriate minimum price floor for the ULMP component in a SB-WLR product or a Naked WBA (Bitstream) DSL product, and will be set by reference to a REO by including the following:

- The price of LLU⁵³;
- The average cost of fault clearance per month;
- The cost of ULMP connection fee and ULMP disconnection fees over an average customer lifetime;
- The appropriate cost of a line card (if any);
- Where appropriate a margin for the provision of VOIP (where the line card is no longer the Modern Equivalent Asset for voice);
- Appropriate contribution towards co-location charges;
- The relevant broadband costs as provided for in the minimum price floor model for WBA as set out in ComReg D06/12; and
- A rate of return on the capital equipment of 10.21% where appropriate. This is the Weighted Average Cost of Capital ('WACC') currently allowed by ComReg to Eircom for its regulated services.

3.26 In setting a SB-WLR or NWBA price Eircom should have regard to their obligation not to cause a margin / price squeeze to Market 4 products and services. As such, Eircom in setting SB-WLR or NWBA prices should be cognisant that a REO is likely to incur additional avoidable costs. However, for the avoidance of doubt, these costs are already included as part of the bitstream floors calculation (ComReg D06/12) and consequently are included implicitly in the ULMP cost stack calculation.

3.27 In summary the **main** Decisions contained in this Document are as follows:

Market 1

- To further specify the obligation not to unreasonably bundle services, pursuant to ComReg D07/61, such that for bundles sold / offered within the LEA a two-part NRT will apply.
- For bundles sold / offered within the LEA, in the bundle-by-bundle assessment a LRIC cost standard will be allowable for retail calls.

⁵³ The published price of LLU or as appropriate the relevant / equivalent cost of local loops in the relevant geographic footprint of the service (see paragraph 7.14).

- For bundles sold / offered within the LEA, in the portfolio assessment the aggregate of all bundles in the LEA must pass their ATC.
- For bundles sold / offered within the LEA, the WNI will be calculated based on an 'efficient' hypothetical operator weighted by the use of Eircom wholesale inputs within the LEA (and guided by OAOs actual usage within the LEA).⁵⁴ This will apply in the NRT for both the bundle-by-bundle and portfolio assessment.
- For bundles sold / offered within the LEA, there will be a WNI to assess legacy bundles and a separate WNI for NGA bundles. These will apply in the NRT for the bundle-by-bundle and portfolio assessment.
- To further specify the obligation not to unreasonably bundle services, such that for bundles sold / offered outside the LEA a single NRT will apply. The NRT will be based on a bundle-by-bundle assessment where each bundle must pass its own ATC.
- In order for an exchange to be included in the LEA, it must meet one of the criteria specified in the Decision and be approved for inclusion by ComReg.
- Eircom must notify and obtain approval from ComReg for bundles that include RFNA at least five working days before launch.
- Where a bundle is subsequently found to be non-compliant, Eircom must notify ComReg of it proposed remedial action within ten working days. Eircom must not add any customers to that relevant bundle until and unless such a bundle is modified to ComReg's satisfaction. In addition, where Eircom fail to make such a proposal to amend / withdraw the bundle within that timeframe or where the proposal remedial action is deemed insufficient by ComReg, ComReg may use its statutory enforcement powers to ensure appropriate remedial action is taken.

Market 4

- To further specify the obligation not to cause a margin / price squeeze such that the price at which Eircom sells or offers a Downstream Regulated Wholesale Service⁵⁵ must be greater than the sum of: (i) the ULMP cost stack and (ii) the unavoidable costs of a REO that must be incurred in order to provide a service equivalent to the relevant Downstream Regulated Wholesale Service.

⁵⁴ See also paragraph 3.15.

⁵⁵ Downstream Regulated Wholesale Service means a regulated wholesale service which is sold or offered by Eircom to OAOs downstream from the WPNIA Market and contains a ULMP component (examples of such Downstream Regulated Wholesale Services include, for example, SB-WLR and Naked WBA (Bitstream) DSL).

Chapter 4

4 Market 1: Further specification of the obligation not to unreasonably bundle

4.1 Overview

- 4.1 In ComReg D07/61, ComReg designated Eircom with SMP on the markets for higher and lower level retail narrowband access from a fixed location and, *inter alia*, specified the regulatory controls to govern how Eircom sells bundles of services which include RFNA. In particular, ComReg D07/61 imposed an obligation on Eircom not to unreasonably bundle services.
- 4.2 As noted in paragraph 6.229 of Consultation Document No. 07/26: “...as a vertically integrated undertaking, the SMP operator may have the incentive to leverage its market power. ComReg believes that it is the appropriate body to monitor and if necessary intervene in a timely manner, because of its expertise in the market and the overlap with other retail obligations in the retail narrowband access markets (...)”.
- 4.3 The ERG (now known as ‘BEREC’)⁵⁶ also makes the same point in its report on margin squeeze: “These objectives as laid out in Article 8 of the Framework Directive are to: ‘promote competition (...), contribute to the development of the internal market (...), promote the interests of the citizens of the European Union.’ While competition law is intended to prevent margin squeeze as an exclusionary abuse, ex-ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets”.⁵⁷
- 4.4 As such, ComReg considered at the time of adopting ComReg D07/61 that the ex-post enforcement provided under competition law would be inadequate and consequently considered that the express imposition of ex-ante regulatory obligations, in particular the obligation not to unreasonably bundle services, would be more appropriate. Furthermore, given the identified risk of potential leverage arising from Eircom’s SMP, it was further considered that identifying unreasonable bundling only after it had occurred would not sufficiently protect against possible market foreclosure and the associated consumer harm.

⁵⁶ The Body of European Regulators for Electronic Communications.

⁵⁷ ERG (09) 07 Report On the Discussion of The Application Of Margin Squeeze Tests To Bundles, paragraph 6.

4.5 ComReg Consultation Document No. 07/26 is particularly relevant in the context of the unreasonable bundling obligation. As indicated in footnote 40 of ComReg Decision D07/61, the obligation is to be construed in the light of the reasoning in Consultation Document No. 07/26. Consultation Document No. 07/26 sets out in considerable detail the analysis of the basis for and content of the SMP obligation not to unreasonably bundle. In particular:

- Paragraph 6.218 explains the detailed competition concerns in the case of bundling practices:

“...There may be the potential for operators, notably dominant operators, to leverage strong market and branding positions and to use bundling strategies for anti-competitive reasons. This may allow an operator already dominant in one market to leverage its dominance into closely related markets. Bundling could also be used to potentially protect and indeed enhance a position of dominance in the retail narrowband access markets. The inability of new entrants to compete profitably with the dominant operator’s bundled offerings may increase entry barriers in these markets. For instance, eircom might offer access bundled with a package of free, or heavily discounted, call minutes (including both fixed and mobile calls). In that context, and where alternative suppliers were constrained in offering the same kind of bundles as the incumbent operator, the bundling of retail products could potentially distort competition by leveraging into closely related markets and by distorting pricing in such markets...”

- Paragraph 6.219 sets out the concern about competitors’ ability to profitably replicate Eircom’s bundled pricing:

“There is nonetheless a risk that eircom may induce a margin squeeze through bundled pricing. This occurs when equally, or more, efficient operators are unable to profitably replicate eircom’s bundled offering, and are effectively foreclosed from competing with eircom in respect of its bundled products. For example, if eircom were to apply a margin squeeze in respect of the retail narrowband access element of a bundled offering this may undermine the effectiveness of the mandated wholesale inputs since OAOs may not be able to effectively replicate the access element of that bundle (due to an insufficient margin). Should eircom engage in such behaviour it could have the effect of i) reinforcing its dominance in the retail narrowband access markets and / or ii) leveraging that dominance into related markets due to an inability on the part of OAOs to effectively replicate the access part of the bundle.”

- Paragraph 6.232 then concludes on the core regulatory concern in relation to retail bundling, i.e., reinforcing Eircom's SMP in retail narrowband and leveraging that SMP into other related markets:

“However, there is a need for some obligation to prevent bundling being used for anti-competitive purposes, in particular where it may be used to disguise a possible margin squeeze in respect of the retail narrowband access element of the bundle and thereby potentially reinforce eircom's dominance in the retail narrowband access markets and providing scope for leveraging into related markets.”

- 4.6 ComReg's recent review of the WBA market⁵⁸ found evidence of structural change arising in certain overlapping geographic areas. This was identified as being relatively recent and not yet sufficiently stable to conclude sub-national geographic WBA markets. One of the most fundamental structural changes to the fixed broadband market has been the upgrade of cable networks in urban areas. In addition, as noted in paragraphs 3.2-3.3, prospectively there could be further infrastructural investment throughout Ireland — in particular, in high-density populated exchanges.
- 4.7 In ComReg 11/72, ComReg considered that at the retail level both Eircom and OAOs are prospectively facing an increasing potential for more localised competitive pressures. Analysis undertaken in ComReg 12/63 indicated that these competitive pressures appear to be more evident in urban areas — where LLU and UPC are largely present. However, it appeared to be too early to determine whether the increasing competition indicated that conditions in these areas are sufficiently unique and stable to merit defining a separate sub-geographic market. Nonetheless, ComReg considered that it was important to recognise the changing market conditions within these areas such that the long term competitive dynamics of the market are not distorted and all operators relying on Eircom's network, including Eircom itself, are not unduly hindered in their efforts either by Eircom's dominant position, or in Eircom's case, by regulation.

⁵⁸ ComReg Document 11/49, “Market Review: Wholesale Broadband Access, Response to Consultation and Decision”, Decision No. D06/11, 8 July 2011.

4.2 ComReg's Preliminary View from the Consultation Documents

- 4.8 In ComReg 11/72, ComReg considered that Eircom together with other fixed operators utilising wholesale inputs from Eircom have faced a growing presence of alternative infrastructure operators such as the cable operator UPC. ComReg considered that this may prospectively differ by geographic area — subject to the underlying structural characteristics and investment incentives / viability of those areas. Although relatively nascent, ComReg considered that, Eircom may soon face more competition from LLU. Furthermore, in ComReg 12/63, ComReg considered that prospectively this could also come from VUA-based competition (i.e., NGA). However, these forms of competition are very likely to be restricted to more densely populated areas. This could mean that conditions of competition may prospectively differ across the territory of Ireland.
- 4.9 ComReg was of the preliminary view that the NRT should be sufficiently flexible to meet these prospective changes in competitive conditions. In ComReg 11/72, ComReg proposed to further specify the obligation not to unreasonably bundle under ComReg D07/61 so that there is a two-part NRT for bundles sold / offered within the LEA (i.e., a bundle-by-bundle and a portfolio test). For bundles sold outside of the LEA, ComReg was of the preliminary view that a single bundle-by-bundle NRT would apply.
- 4.10 The cost components within the NRT are intended to reflect those an OAO would be required to incur to replicate an Eircom bundle. Therefore, in order for a bundle including RFNA to be considered reasonable it must cover the costs faced by an OAO seeking to replicate the bundle (the individual cost components within the NRT is discussed in greater detail in Chapter 5).
- 4.11 In ComReg 11/72, ComReg proposed that the flexibility of the proposed NRT, for bundles that are sold / offered by Eircom in the LEA, derive from two specific cost components. The first is through the use of the LRIC cost standard for retail calls in the individual bundle-by-bundle assessment within the LEA. However, at the portfolio level, the aggregate of all bundles sold / offered within the LEA must pass the ATC cost standard. The second is through the use of the wholesale network input (i.e., the WNI) in both the bundle-by-bundle and portfolio assessment of bundles within the LEA. These two sources of flexibility are discussed in turn below.

- 4.12 With respect to the first source of flexibility, ComReg considered, in ComReg 11/72, that the use of a LRIC cost standard for retail calls at the individual bundle level would be more consistent with that produced in competitive markets — where operators make decisions on single and marginal bundles based on the avoidable costs of that bundle / product. Since LRIC includes all costs related to the additional output it enables incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle.
- 4.13 With respect to the second source of flexibility, ComReg considered, in ComReg 11/72, that there is a blend of wholesale access input costs and prices that OAOs incur in replicating or competing with an Eircom bundle. As such, for bundles sold within the LEA, to recognise the increased investment of OAOs in LLU and NGA, it was proposed that the NRT would be set with reference to the prices of network input cost weighted for the relevant usage of each input by OAOs in the area (i.e., the WNI). Consequently, in ComReg 12/63, ComReg proposed that the WNI formula would also take account of VUA. The previous NRT assumed that an OAO used SB-WLR and Bitstream exclusively to replicate an Eircom bundle. Therefore, under the WNI proposal as the actual use of LLU or virtually unbundling in NGA by OAOs increases, the WNI could decrease for Eircom Retail in the NRT — under the previous NRT such a reduction would not occur, irrespective of what wholesale network inputs an OAO actually used.
- 4.14 In ComReg 11/72, ComReg also sought the views of interested parties on whether the proposed WNI approach should be replaced in time by a LLU+ network wholesale input cost and what the possible triggers / indicators would be for ComReg to consider such an approach.
- 4.15 ComReg 12/63 set out the further analysis carried out by ComReg to determine an appropriate LEA. Based on ComReg's quarterly report data, the largest service providers of fixed broadband at a wholesale and retail level: BT, Eircom, Vodafone and UPC were requested, prior to the publication of ComReg 12/63, to provide details of their voice and broadband subscribers. Specifically, Eircom was requested to provide these details for all exchanges in Ireland. The OAOs were requested to provide these details for the exchanges / areas in which they were present or collocated as unbundlers. The information provided by those operators is confidential in nature and therefore no disaggregated numerical operator data was discussed specifically in 12/63. However, based on the information received ComReg found that at the retail level there is a high degree of movement by customers between authorised operators in densely populated urban areas where LLU is largely present and for the most part where UPC is also available.

- 4.16 One of the contributory factors of both cable and unbundlers operating in these exchanges is that the incremental cost of network roll-out per customer is significantly lower in these urban areas, due to customer concentration (i.e., from a commercial and economic perspective these exchanges have attracted structural investment). Based on information received from OAOs, it is evident that once investment has occurred in those exchanges areas, Eircom together with the other fixed operators utilising its wholesale inputs are facing a migration of customers to alternative infrastructure operators such as UPC.
- 4.17 Currently, the provision of bitstream services (with the exception of any future Naked WBA product) requires the purchase of a PSTN wholesale line rental. As these PSTN lines are decreasing, and in contrast the retail connections of cable are increasing, it suggests that customers may be migrating their broadband requirement to other alternative infrastructure operators or ceasing altogether.⁵⁹ However, ComReg considers that it is too early to determine whether the increasing competition indicates that conditions in this area are sufficiently unique and stable to merit defining a separate sub-geographic market — nonetheless, ComReg considered it important to recognise the changing conditions within these areas in the design of remedies.
- 4.18 As a starting point, to recognise the high degree of movement by customers between authorised operators in densely populated urban areas where LLU is largely present and for the most part where UPC is also available, ComReg 12/63 considered that the LEA should comprise of exchanges where UPC is providing telecommunications services at the retail level in that exchange area and at least one other operator is providing telecommunications services from that exchange at the retail level using LLU/ VUA (either directly or through the provision of a wholesale service from an LLU/ VUA operator).
- 4.19 ComReg was cognisant that this criterion alone could create ‘pockets’ or ‘island’ exchanges which would not qualify under this criterion but could be surrounded by exchanges that would. As such, ComReg 12/63 reasoned that in order to avoid inconsistencies with commercial dynamic outcomes of competitive markets — where the same bundle / offering would not be available on equal terms in neighbouring exchanges — that the criteria for the LEA should be appropriately expanded to cater for such circumstances.

⁵⁹ See Chapter 2, ComReg 12/63.

- 4.20 In addition, ComReg 12/63 considered that further criteria may be required to determine the merits of the inclusion of additional exchanges into the LEA. Exchanges may not be within the current LLU or UPC footprint but might become so in the short-medium term. Therefore, an important consideration is whether the structural conditions in these exchanges are homogenous to the adjoining exchange areas but for whatever reason the roll-out by other operators has not yet commenced. ComReg considered that from a supply side perspective that the relative economies of scale and scope should provide a useful indicator of the likelihood of the current and future footprint of LLU/VUA and cable. Consequently, ComReg proposed an additional criterion: Where UPC is providing retail telecommunications services in that exchange area and there are more than 4,000 lines in that exchange and where the exchange area is directly beside exchange(s) which meet criterion 1.
- 4.21 Finally, ComReg considered it appropriate to include contiguous exchanges where at least two LLU / VUA-based operators are operating at the retail level in that exchange (i.e., where at least two OAOs are using LLU / VUA infrastructure, directly or indirectly in the provision of telecommunications services).
- 4.22 In summary, ComReg 12/63 proposed that the LEA be comprised of Category 1 areas only. ComReg was of the preliminary view that Category 1 areas were exchanges that meet the following criteria:
1. Where UPC is providing telecommunications services at the retail level in that exchange area and at least one other operator is providing telecommunications services from that exchange at the retail level using LLU⁶⁰/VUA (either directly or through the provision of a wholesale service from an LLU/VUA operator); or
 2. Where an exchange is surrounded by exchange areas which meet criteria 1, 3 or 4; or
 3. Where UPC is providing retail telecommunications services in that exchange area and there are more than 4,000 lines in that exchange and where the exchange area is directly beside exchange(s) which meet criterion 1; or

⁶⁰ For each of the four criteria, LLU includes either Line Share or GLUMP.

4. Where UPC is not providing telecommunications services at the retail level in that exchange area, but where at least two operators at the retail level are either using LLU/VUA, or purchasing LLU/VUA from an LLU/VUA operator in that exchange, in either case with a combined substantial retail presence⁶¹, and where the exchange is directly beside exchange(s) which meet criterion 1.

4.3 Views of Respondents

- 4.23 ALTO, BT, Magnet and UPC in their respective submissions to ComReg 11/72 and ComReg 12/63 suggested that ComReg should undertake a new market analysis of Market 1. In addition, ALTO, BT, Vodafone and Magnet note in their respective submissions that in their view by defining a LEA, ComReg would be in effect imposing sub-geographic remedies on a national market — as set by ComReg D07/61 — which in their view was inappropriate absent a new market analysis defining a sub-national geographic market. Eircom's submission notes that in countries where sub-national regulation has been introduced, regulators, such as Ofcom,⁶² have generally deregulated areas where structural conditions differ by defining markets at a sub-national level.
- 4.24 In addition, BT notes that in its view: *“ComReg’s proposal is detrimental for Irish rural communities, not only will they have slower broadband services, this proposal will creates the situation where it is highly likely rural communities will also pay higher prices relative to urban areas for the lessor service [sic.]”*⁶³

⁶¹ Indicatively for these purposes, this could be a combined share of at least 30-40% of the retail fixed telecommunications revenues in each such exchange, or group of exchanges.

⁶² The Office of Communications, United Kingdom.

⁶³ BT, *“Response to ComReg’s Supplementary Consultation: Price Regulation of Bundles Offers”*, 29 August 2012, page 5.

- 4.25 ALTO and BT submissions note that they generally agree with ComReg's proposal for a revised NRT. However, ALTO notes that it is concerned that: *"the test ultimately becomes a 'basket' test and such can be manipulated for a key product to create a squeeze whilst still passing the test. It is not fully clear how the 2-stage process avoids the 'basket' problem"*.⁶⁴ A similar concern was raised by BT. Eircom agrees with ComReg's proposed two-stage test, however, they do not agree with the cost standard used.⁶⁵ In addition, Eircom notes that it is disappointed that ComReg did not consider ex-post competition law powers in ComReg 11/72. Vodafone does not agree with ComReg's proposed approach, it notes that: *"[u]nder the new proposals some bundles that would have failed the current net revenue test will pass the revised test. This only provides additional flexibility to eircom if ComReg would previously have blocked those bundles"*.⁶⁶ In addition, Vodafone notes that ComReg previously rejected the use of the portfolio approach in ComReg 10/01. Magnet agrees with the aggregation of bundle assessment based on ATC but does not understand the logic of the second part of the test. UPC does not agree with ComReg's proposed changes, as in its view it is unclear what ComReg's proposal is trying to achieve.
- 4.26 A number of respondents' submissions did not specifically address the use of the LRIC cost standard for retail calls in the bundle-by-bundle assessment in the LEA. Of those submissions that did: Eircom and Magnet agree with ComReg's proposal. Vodafone does not agree with the proposal and notes that in ComReg 10/01 ComReg favoured the use of ATC.
- 4.27 Both ALTO and Magnet agree with the use of the WNI in the NRT and that the WNI formula would take into account VUA. Eircom agrees with the use of the WNI in the NRT but disagrees on how it should be calculated — in particular, it considers that mixing legacy and NGA products together in one WNI could create perverse incentives for OAOs to impact Eircom pricing flexibility. Vodafone notes that to the extent that an appropriate portfolio of bundles is defined it agrees with ComReg's approach — in particular, that NGA services are sufficiently distinct that a separate portfolio of bundles should apply. In addition, Vodafone notes that the actual price of WBA should be used as the input for every LLU and VUA based line. BT notes that it is not in favour of the approach, as in its view this would allow Eircom Retail to reduce its price floors which could squeeze out any margin others gain by investing in infrastructure. UPC's submission did not consider this issue specifically.

⁶⁴ ALTO, *"Consultation and Draft Directions: Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, WPNIA & WBA - Ref: 11/72"*, 16 December 2011, page 8.

⁶⁵ ComReg's Decision on the appropriate cost standard is discussed in Chapter 5.

⁶⁶ Vodafone, *"Vodafone Response to ComReg Document 11/72"*, 16 December 2011, page 7.

- 4.28 With respect to the possible future replacement of the weighted wholesale input proposal by the LLU+ in the NRT. ALTO's and BT's submissions note that they broadly agree but that a timed or 'sunset' approach to move to LLU+ would be wholly inappropriate in Ireland. Eircom considers that ComReg should apply the full LLU input immediately, "*[h]owever, if ComReg elects to use a weighted average approach on an interim basis, it should document and articulate the impediments that must be removed before a move to an LLU measure will be triggered, and the change should occur when those impediments are removed*".⁶⁷ In Eircom's response to ComReg 12/63, Eircom suggests that: "*the best way to remedy this problem [to allow sufficient pricing flexibility] is to include the UPC lines in the LEA areas as part of the weighting factors in the WAWI*".⁶⁸ UPC believes that: "*ComReg is premature in attempting to define the relevant market triggers that would identify alternative network input costs akin to existing 'LLU+' costs*".⁶⁹ Vodafone does not believe the use of any LLU price in the NRT is appropriate at this time. Magnet does not agree with the use of LLU+. Magnet notes that an approach similar to that used in the UK, whereby Eircom would be given a specific number of lines that are required to be unbundled should be used before there is a change in the NRT.
- 4.29 As noted in paragraph 4.23, the majority of respondents consider that in their view a full market analysis should be undertaken by ComReg prior to revising the NRT. However, without prejudice to that view, the majority of respondents engaged in their responses on the development of appropriate criteria for the LEA. A number of respondents (namely: ALTO, BT, Magnet and UPC) note that market share should be considered to determine whether an individual exchange should be included, or not, in the LEA.
- 4.30 With respect to the inclusion of 'island' exchanges, ALTO and Magnet note in their respective submissions that in their view islands should stimulate their own investment and not be included in the LEA by default. Eircom's submission is in favour of the island approach, noting that: "*[i]t is critical that all these locations are included in the LEA to enable cost effective marketing / sales activity and to avoid consumer confusion*".⁷⁰ Vodafone's submission notes that, in its view, there appeared to be good reasons for the inclusion of islands. UPC notes that they consider the LEA and the inclusion of island exchanges to be substantially flawed — however, this view appears to be mainly based on the premise that in its view an updated market analysis is required.

⁶⁷ Eircom, "Response to ComReg Consultation and Draft Directions 11/72", 16 December 2011, page 32.

⁶⁸ Eircom, "Response on behalf of eircom Ltd to ComReg Consultation 12/63: Price Regulation of Bundled Offers", 29 August 2012, page 27.

⁶⁹ UPC, "UPC Ireland submission to the ComReg Consultation and Draft Directions Document 11/72", 16 December 2011, page 3.

⁷⁰ Eircom, "Response on behalf of eircom Ltd to ComReg Consultation 12/63: Price Regulation of Bundled Offers", 29 August 2012, page 23.

4.31 Eircom in its response to ComReg 12/63, proposed a number of alternative criteria to determine if an exchange should be included in the LEA. In summary, in Eircom's view, the LEA should comprise:

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

Furthermore Eircom's submission proposes that: *"Additionally and Exceptionally: A limited number of areas that are adjacent to exchanges within the core LEA (1-4 above) which, on a case by case basis, are determined to have a social or trading affinity with a core LEA city or town based on recognised boundaries established by local authorities"*.⁷¹

4.4 ComReg's Assessment of Responses and Final Position

4.4.1 The overall approach

4.32 The market review for Market 1 has commenced and a consultation setting out ComReg's preliminary views has been published.⁷²

4.33 ComReg's preliminary view in that consultation is that regulation remains appropriate in the market, and that Eircom has SMP in the following markets: (i) the market for access to the public telephone network at a fixed location for residential and non-residential customers provided via PSTN, ISDN BRA and managed VOIP (LLVA market); and (ii) the market for access to the public telephone network at a fixed location for residential and non-residential customers provided via ISDN FRA and PRA (HLVA market). The proposed LLVA market is broader than the lower level market defined in ComReg D07/61, given that ComReg now proposes in the consultation to include managed VOB in the relevant market. The HLVA market is essentially the same as the higher level market defined in ComReg Decision D07/61.

⁷¹ Eircom, "Response on behalf of eircom Ltd to ComReg Consultation 12/63: Price Regulation of Bundled Offers", 29 August 2012, page 6.

⁷² ComReg Document No: 12/117.

- 4.34 As part of that market analysis, ComReg considered the appropriate market definition including different geographic dimensions (if any) and has set out its preliminary views in that regard in ComReg 12/117.
- 4.35 In ComReg 12/117, ComReg sets out its preliminary view that the relevant geographic market for both the LLVA and HLVA markets is national in scope (notwithstanding the emergence of some localised competitive pressures, particularly insofar as retail fixed access to the public telephone network is sold as part of a bundle with other services). In the absence of a clearly identifiable break in conditions of competition across geographical areas to justify separate relevant markets for the purposes of Market 1 review, ComReg nonetheless proposes to take such emergent competitive pressures into account when designing relevant and proportionate regulatory remedies. ComReg also proposes to keep any emergent competitive pressures under review and to revisit its analysis if more stable and discrete geographic boundaries can be identified on a forward-looking basis.⁷³
- 4.36 Without prejudice to the outcome of the ongoing Market 1 market analysis, ComReg notes that, consistent with the European Commission's position, a finding through a market review process that the scope of a relevant market is national does not necessarily preclude ComReg from imposing differentiated geographic remedies.⁷⁴ For example, the Austrian regulator, TKK, defined a national market, but proposed to differentiate its remedies geographically on the basis of variations in local competitive conditions. Importantly, in its responses to the TKK (and to the Slovenian regulator on the same issue), the European Commission confirmed that the: *"regulatory framework does not preclude the imposition of different remedies in the same relevant market"*.⁷⁵
- 4.37 ComReg received a similar response from the European Commission to its notification of its proposed decision (the basis of this Decision).⁷⁶ Consequently, ComReg does not agree with the view expressed by those respondents to ComReg 11/72 and 12/63: that ComReg is creating sub-national markets through the proposed NRT; or, that different remedies cannot be imposed on a national market.

⁷³ ComReg, paragraphs 4.239-4.241, *"Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers"*, ComReg Document No: 12/117, 26 October 2012.

⁷⁴ https://circabc.europa.eu/d/d/workspace/SpacesStore/e15c4f43-d146-49cb-84f8-2402ee55b493/IE-2012-1381-1382%20adopted_EN.pdf

⁷⁵ European Commission (2009), 'Telecoms: Commission calls on Slovenian telecoms regulator to review its broadband market analysis', IP/09/1579, October 26th.

⁷⁶ https://circabc.europa.eu/d/d/workspace/SpacesStore/e15c4f43-d146-49cb-84f8-2402ee55b493/IE-2012-1381-1382%20adopted_EN.pdf.

- 4.38 With respect to Eircom’s submission regarding Ofcom’s deregulation of certain areas where structural conditions differ, while this is the case in the UK context, as noted above, National Regulatory Authorities’ (**NRA**) have the option to impose geographically differentiated remedies on a sub-national basis even if markets are defined as being national in scope. ComReg considers that the definition of the appropriate criteria to determine if it is appropriate for an exchange to be included in the LEA needs to strike a balance between practicality and granularity, just as Ofcom’s definition of sub-national geographic markets does. ComReg considers that the conditions of competition are not the same in Ireland as they are in the UK, as the markets are at different stages in their development — in particular, in terms of LLU roll-out. As supported by the current market analysis (which expresses the preliminary view that Eircom has SMP in Market 1), ComReg is not proposing to scale back regulation in full in any area by this Decision, but is proposing to adjust remedies to ensure that, where UPC and LLU are present (or in other such circumstances discussed in section 4.4.4), the competitiveness of Eircom Retail is not undermined.
- 4.39 In respect of ComReg’s notification of its proposed decision the European Commission⁷⁷ notes that: *“the differentiation of remedies for the LEA should be based on a sound analysis of the competitive conditions in the LEA”*.⁷⁸ In that regard, with respect to defining an appropriate LEA, ComReg has undertaken detailed exchange-by-exchange analysis of the structural conditions in the market, and has established a set of principles to apply to the LEA criteria (this is discussed in greater detail in paragraphs 4.80-4.114).

⁷⁷ ComReg is required to notify any proposals to impose new or amended obligations on an SMP operator to the European Commission pursuant to Article 7 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services

⁷⁸ https://circabc.europa.eu/d/d/workspace/SpacesStore/e15c4f43-d146-49cb-84f8-2402ee55b493/IE-2012-1381-1382%20adopted_EN.pdf.

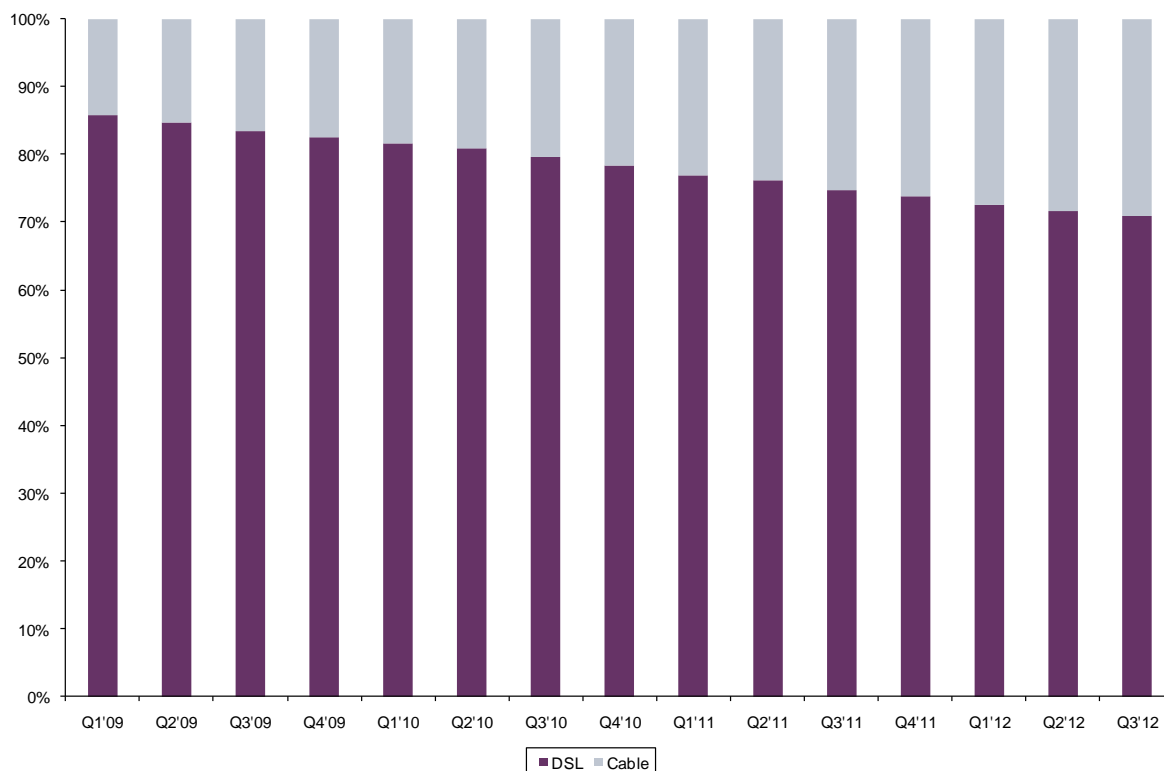
- 4.40 As noted in paragraph 2.25, ComReg considers that Eircom and OAOs utilising its wholesale inputs are facing increased localised competition, centred around demand for broadband from the cable operator UPC and that this prospective competitive pressure appears to differ by geographic area — subject to the underlying structural characteristics and investment incentives / viability of those areas. Furthermore, since the publication of ComReg 12/63, ComReg and its advisors (Oxera Consulting) have undertaken an assessment of retail pricing constraints on Eircom.⁷⁹ This assessment found that consumers are indeed responding to UPC's product offering (where UPC has footprint), notably the superior broadband speeds available via cable at this time, thereby putting pressure on both Eircom and Eircom's wholesale customers to provide competitive offerings to those consumers who have the ability to access the UPC cable network.
- 4.41 Nationally, DSL is the dominant form of broadband access, with just over 70% of fixed-line (i.e., excluding fixed wireless access) broadband subscriptions in 2012.⁸⁰ However, it is losing market share to other platforms, most notably cable. Year-on-year growth rates for cable are greater than 20%, and therefore the highest of all competing fixed-line broadband platforms.⁸¹ Figure 2 illustrates the trend in market shares of the two main platforms on a national basis.

⁷⁹ Oxera Report: "Assessment of retail pricing constraints", January 2013, ComReg 13/11b.

⁸⁰ ComReg (2012), 'Quarterly Key Data Report—Data as of Q3 2012', market report, December 12th.

⁸¹ Ibid. ComReg (2012), 'Quarterly Key Data Report—Data as of Q4 2011', market report, March 13th; and ComReg (2012), 'Quarterly Key Data Report—Data as of Q1 2012', market report, June 14th.

Figure 2 Fixed broadband shares by platform in Ireland (xDSL, cable, %)



Source: ComReg (2012), "Quarterly Key Data Report – Data as of Q3 2012", market report.

- 4.42 At the retail level, Eircom's fixed-line broadband market share decreased from above 47% in early 2011 to around 42% in 2012 Q3.⁸² UPC increased its share from just under 21% in 2011 Q1 to over 27% in 2012 Q3, a greater increase than all other retail providers combined, including LLU unbundlers.⁸³
- 4.43 As these figures are national, they mask the extent of the shifts in market shares occurring within the footprint of UPC's cable network. However, in assessing UPC's footprint and the additional analysis referred to in paragraphs 2.24-2.25 it is evident that this is more apparent in urban areas than the national figures suggest. In conclusion, Oxera's additional analysis suggests that UPC is able to attract churning subscribers from Eircom retail (and wholesale) products, as well as new broadband subscribers, while Eircom is losing subscribers in a growing market.

⁸² See ComReg (2012), 'Quarterly Key Data Report—Data as of Q3 2012', market report, December 12th; ComReg (2012), 'Quarterly Key Data Report—Data as of Q1 2012', market report, June 14th; and ComReg (2011), 'Quarterly Key Data Report—Data as of Q1 2011', market report, June 21st.

⁸³ Ibid.

- 4.44 Additionally, the fixed broadband market share of OAOs using Eircom's network relative to Eircom's market share has increased from ca. 45% in September 2009 to ca. 57% in September 2012. However, in ComReg's view the extent of this relative growth is not such as to render the imposition of the obligation not to unreasonably bundle services unnecessary.
- 4.45 ComReg considers that the principle of its proposed approach is consistent with the OECD's recommendation, which noted:
- "[i]n some countries, competitive conditions may vary within the national market, but not to the extent that warrants a definition of sub-national geographic markets. In this case it may be appropriate to differentiate remedies within the national market".*⁸⁴
- 4.46 ComReg considers that the detailed analysis undertaken as part of ComReg 12/63 (see paragraph 4.15), in addition to the competitive assessment of each Eircom exchange to be included in the LEA (see paragraphs 4.80-4.114) and supported by the outcome of the competitive retail constraints analysis undertaken by Oxera Consulting (see paragraph 4.40) supports ComReg's further specification of NRT with respect to Eircom's obligation not to unreasonably bundle services. Furthermore, ComReg's preliminary view of the competitive conditions and to the emergence of some localised competitive pressures, particularly insofar as retail fixed access to the public telephone network is sold / offered as part of a bundle with other services as discussed in ComReg 12/117, further supports ComReg's Decision.
- 4.47 Furthermore, ComReg considers that its proposed approach is consistent with the EU Regulatory Framework and considers that the proposed remedies which provide appropriate flexibility to Eircom Retail in certain geographic areas is in line with the OECD recommendations. In addition, the revised NRT coupled with the criteria for the inclusion of exchanges in the LEA ensures that all operators relying on Eircom's network, including Eircom itself, are not unduly hindered in their efforts either by Eircom's dominant position, or in Eircom's case, by regulation.

⁸⁴ Organisation for Economic Co-operation and Development (2010), 'Geographically segmented regulation for telecommunications', June 22 2010.

- 4.48 As regards BT's view that consumers outside the LEA are unduly impacted by ComReg's LEA proposal, ComReg does not agree. Consumers outside the LEA footprint will not cross-subsidise competitive areas (to an extent they would be worse off than in the status quo), regardless of the imposition of sub-national geographic remedies or the definition of the LEA. In ComReg's view, sub-national pricing is driven by structural differences in market conditions, and it is reasonable to adjust remedies accordingly. When it comes to societal and distributional concerns, ComReg and the Irish government have other measures at their disposal to ensure that certain services are available to all end-users (such as the universal service obligations imposed pursuant to the Universal Service Regulations⁸⁵).
- 4.49 For the reasons set out in paragraphs 4.32-4.48, ComReg considers that its overall approach is appropriate. As such, the remainder of this Chapter discusses the revised NRT with respect to bundles sold / offered inside and outside of the LEA.
- 4.50 ComReg considers it appropriate to define an LEA (see paragraphs 4.80-4.102) to recognise that, although the relevant market is national in scope, different structural conditions appear to be emerging, such that the possibilities for competitive and behavioural change may also differ prospectively.
- 4.51 In order to provide Eircom Retail appropriate flexibility, such that it is not unduly hindered by regulation, ComReg considers it appropriate to further specify the obligation not to unreasonably bundle services under ComReg D07/61. That further specification involves the application of a two part ex-ante NRT to bundles sold / offered within the LEA, which will provide appropriate flexibility to Eircom Retail in certain geographic areas. For bundles sold / offered outside the LEA (i.e., where it is not appropriate to provide Eircom Retail with increased flexibility), bundles will be assessed on an individual bundle basis (i.e., bundle-by-bundle) only. These are discussed in turn below.

4.4.2 Bundles sold / offered in the LEA

- 4.52 The first part of the NRT is on an individual bundles basis (i.e., a bundle-by-bundle assessment for individual bundles sold / offered in the LEA). An individual bundle may use the lower cost standard for retail calls of LRIC (as opposed to ATC, this is discussed in greater detail in paragraphs 4.59-4.62).

⁸⁵ European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 227 of 2011).

- 4.53 The second part of the NRT test is on an overall portfolio basis, where all bundles on offer or on sale by Eircom to end-users in the LEA are aggregated together and together must pass the ATC cost standard. ComReg will undertake an ex-post portfolio assessment to ensure that the overall portfolio of Eircom bundles is positive. It should also be noted that, Eircom is required to inform ComReg immediately where any individual bundle has a negative margin so that an assessment can be made by ComReg at that time as to whether the bundle is reasonable (pursuant to Eircom's regulatory obligation).
- 4.54 With respect to Vodafone's submission that ComReg previously dismissed the use of the portfolio approach in ComReg 10/01, while ComReg initially rejected the use of the portfolio approach in ComReg 10/01, it is important to note that this was in the context of a single NRT. In ComReg 11/72, ComReg proposed a two-part combinatorial NRT, namely, a bundle-by-bundle test and a portfolio test. As noted in ComReg 11/72a, from an economic perspective, there are a number of efficiency gains that could be achieved through the portfolio assessment approach:
- A welfare-maximising pricing structure of a multi-product firm with market power is one where common costs are recovered such that there is an inverse relationship between prices and elasticities of demand. This would suggest that, as long as the overall portfolio passes the NRT, the portfolio approach would be beneficial for consumer welfare.
 - As an entrant gains market shares, its decision-making process entails an assessment of the profitability of its investment across its entire product range offering in the market, which suggests that the portfolio test should be applied. There is evidence to suggest that the OAOs' current offerings include comparable products and bundles with those sold by Eircom.

Furthermore, while OAOs may not enjoy the same level of economies of scale and scope as Eircom, nonetheless the two factors are reflected in the design of the test in terms of the choice between Similarly Efficient Operator ('**SEO**') and Equally Efficient Operator ('**EEO**') (economies of scale) and cost standard (economies of scope). As such, there are efficiency gains that could be achieved through the portfolio approach, given that it allows more flexible pricing to reflect the willingness to pay of different types of customers, and therefore more efficient recovery of common costs across the services. In addition, there do not seem to be reasons to suggest that entrants could not replicate the portfolios in question, given the regulatory controls and specific remedies on unregulated services. In addition, the use of the combinatorial two-part NRT (i.e., that the bundle-by-bundle test and portfolio assessment must pass their respective NRT) ensures the recovery of the total costs by the portfolio and could provide Eircom with pricing flexibility without distorting entry conditions. The combinatorial test provides a further safeguard in that the bundle-by-bundle test carried out for bundles sold / offered in the LEA and outside the LEA ensures that nationally Eircom does not unreasonably bundle RFNA with other services. Consequently, ComReg considers that its Decision to use a portfolio approach for bundles sold / offered in the LEA (as part of the overall revised NRT) is consistent with ComReg's regulatory objectives — in particular, the objective to promote competition.

- 4.55 With respect to Magnet's and UPC's submission that they consider the reasoning behind ComReg proposal to be unclear (see paragraph 4.25), ComReg does not agree. As noted in paragraph 4.54, the individual bundle test and portfolio test allows Eircom some pricing flexibility but also ensures that OAOs can remain competitive in the provision of bundled services in the LEA. In addition, the design of the NRT ensures, as noted in paragraph 2.30, the main flexibility of the NRT only comes into effect and differentiates from the previous NRT as infrastructure-based competition increases (e.g., LLU).
- 4.56 With respect to Eircom's submission that ComReg should have considered the possibility of ex-post competition law. ComReg 11/72 noted that the possibility of ex-post competition law was considered in ComReg D07/61. ComReg considers that the aim of ex-ante price controls is to prevent competition problems such as leverage and market foreclosure. ComReg considers that competition law would not be sufficient in this case — as it would require an ex-post assessment after any alleged anti-competitive practice has occurred and therefore such an assessment may be too late to prevent competition and efficient infrastructure investment being adversely affected beyond repair.

- 4.57 ComReg considers that currently there is very little difference in the application of both approaches. Reviewing the bundle-by-bundle against the portfolio will only allow a small degree of flexibility to Eircom where there is a lower cost standard for retail calls (i.e., LRIC rather than ATC). However, where alternative operators reach scale via either LLU or NGA access services, the establishment of the WNI in the NTR at the portfolio level will ensure that such increased competition at the retail level is acknowledged but only if these OAOs serve sufficient customers at the retail level.
- 4.58 As noted above, the NRT is based on the replicability of the Eircom bundle and therefore ensures that Eircom's bundles are not unreasonable. In addition, the risk of Eircom selling a particular material bundle significantly below cost (where costs are subsidised by the other higher margin bundles) within the portfolio is minimised by the individual bundle test (see paragraph 4.62) and ComReg's competitive assessment (which is discussed in more detail in section 5.4.5).

4.4.2.1 The LRIC cost standard for retail calls

- 4.59 ComReg considers that for the individual bundle-by-bundle NRT in the LEA, that it is appropriate to allow Eircom to apply the LRIC cost standard to retail calls instead of ATC. ComReg considers that this approach would be more consistent with that produced in competitive markets — where operators make decisions on single and marginal bundles based on the avoidable costs of that bundle / product. Since LRIC includes all costs related to the additional output it enables an analysis of incremental cost recovery and allows operators to make an informed business decision on that additional individual bundle. However, on a global level an operator would not be able to use this incremental cost standard to inform its business decision as the incremental revenue attained from such bundles on an aggregate basis may not make adequate contribution towards fixed and common costs (i.e., an ATC cost standard is more appropriate on a global basis).
- 4.60 With respect to Vodafone's submission that ComReg has previously favoured the use of ATC rather than LRIC in ComReg 10/01, ComReg considers that it is important to recognise that in the context of ComReg 10/01 the proposed NRT was a single test. As noted in paragraph 4.51, ComReg 11/72 proposed a two-part test; namely a bundle-by-bundle test and a portfolio assessment for bundles sold / offered by Eircom in the LEA.

- 4.61 Furthermore, the LRIC for retail calls is only implemented in the bundle-by-bundle assessment. Consequently, ComReg considers that the rationale for the use of ATC at the portfolio level is consistent with the reasoning outlined in ComReg 10/01 in that: *“ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ComReg is of the preliminary view that this is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets”*.⁸⁶ However, ComReg believes that to require the ATC for all bundles may be too restrictive on retail innovation and the ability to test demand etc. and consequently, for reasons outlined above, ComReg considers that the LRIC cost standard for retail calls is the most appropriate cost standard for the bundle-by-bundle NRT, with the safeguard that all bundles when aggregated together pass their ATC (this is further discussed below). This is therefore not a significant change but allows some flexibility. It would be inappropriate to make the same allowance for say an anchor product — such as retail broadband — which may not require the purchase of WLR and where there are significant direct, indirect and common costs associated with the provision of the service.
- 4.62 With respect to ALTO, BT and Vodafone’s concerns (see paragraph 4.25), this flexibility (i.e., the use of the LRIC cost standard for retail call for the bundle-by-bundle NRT) is safeguarded from potential abuse through the second part of the NRT — which involves the assessment of bundles on a portfolio basis. As such, if an individual bundle accounts for most of the sales within an aggregate of the portfolio of the bundles, it must cover its ATC to ensure that the aggregate of the bundles passes ATC. In other words, if an individual bundle is a bundle sold to the majority of Eircom customers within the portfolio it must cover all (or most) of its retail calls’ ATC to ensure that its aggregate portfolio of the bundles passes ATC. If Eircom does not cover these costs then it is likely to incur losses in the medium to long run which is not desirable for either Eircom or the telecommunications sector — where a race to the bottom can lead to damaging consequences. Consequently, the flexibility of the two-part test does not derive from allowing bundles that fail the first part of the NRT to launch on the market (which is a concern raised by Vodafone).

4.4.2.2 The Wholesale Network Input

- 4.63 ComReg notes that a number of respondents agreed with the use of the WNI in the NRT (see paragraph 4.27) for bundles sold / offered by Eircom in the LEA.

⁸⁶ ComReg 10/01, paragraph 3.42.

- 4.64 The cost components within the NRT are intended to reflect those faced by an OAO that would be required to replicate the Eircom's individual bundle.⁸⁷ Consequently, ComReg considers that it is appropriate that the NRT would be set with reference to the prices of network input cost weighted for the relevant usage of each input by OAOs in the area (i.e., the WNI).⁸⁸
- 4.65 Having considered the views raised by respondents and in particular the concerns raised by Eircom and Vodafone regarding the inclusion of VUA in the WNI, ComReg considers that it is more appropriate to determine a WNI for legacy bundles and a separate WNI for NGA bundles. While ComReg does not agree with Vodafone that NGA products are distinctly different such as to require separate portfolios (see also paragraph 4.73), it does however, consider that they are distinctly different in terms of relevant wholesale inputs. As such, to have a single WNI with a blend of legacy and NGA products could result in a perverse outcome in that the price control could allow — by virtue of the WNI — Eircom Retail to price NGA bundles using a weighting of legacy wholesale access input components. As noted, the purpose of the WNI is to replicate the blend of wholesale inputs that an OAO must use in order to replicate an Eircom bundle. Intuitively therefore Eircom Retail should not be allowed undue pricing flexibility based on wholesale inputs that are not capable of supporting NGA retail bundles. Furthermore, ComReg considers that having two WNIs will militate against creating perverse investment incentives for OAOs migrating between NGA and legacy inputs and vice versa — which is one of the concerns raised by Eircom.
- 4.66 Consequently, similar to the legacy WNI, as NGA services are rolled-out and their relative usage increases the relative weighting of that wholesale input will increase.
- 4.67 For the purposes of clarity, having two WNIs will ensure that the bundle-by-bundle assessment will reflect the appropriate wholesale inputs for legacy bundles and NGA bundles separately and will ensure the replicability of Eircom's bundles by an efficient OAO using Eircom wholesale inputs.

⁸⁷ The relevant individual components of the NRT are discussed in Chapter 5.

⁸⁸ For example, WLR, WBA and LLU. ComReg also proposes that the network input cost weighting would take into account NGA network inputs where appropriate. It is anticipated that current generation bitstream, Line Share and LLU may migrate to VUA and Bitstream + in the short to medium term.

- 4.68 ComReg maintains the view that it is appropriate to allow Eircom to use a wholesale access input cost in LEA which reflects OAO usage, as this is the cost structure that a typical efficient OAO would face in the same competitive area. As such, the WNI is calculated based on the average blend of costs a 'typical efficient' OAO would incur as a whole within the LEA — which will be guided by the actual use by OAOs of those wholesale inputs in the LEA (an illustrative example of the WNI is provided in Annex: 1). Therefore, as LLU / Line Share uptake increases in the LEA the relative weighting of that wholesale input will be increased to calculate the WNI.⁸⁹
- 4.69 As there are currently no NGA bundles in the market and to prevent large fluctuations in the WNI for NGA bundles as migrations initially occur, ComReg considers that the initial weightings assumed for NGA for an 'efficient' hypothetical operator cannot be based on actual usage (at least not initially). Starting from a zero base (i.e., no weightings of NGA wholesale inputs) once an OAO moves its customer base to say POTS-based VUA the WNI will initially be fully weighted to that input. Similarly, if that OAO migrates a portion of its customer base to the highest NGA wholesale input but subsequently another OAO (or that OAO itself) moves a higher portion of customers using the lowest NGA wholesale input, the flexibility of the NRT would allow Eircom Retail a WNI for NGA bundles which would be weighted towards the lower input. This creates a number of issues during the initial NGA launch, in particular, if the take-up of NGA increases periodically and across NGA inputs, such that the WNI could fluctuate from the highest to the lowest input and vice versa creating instability for Eircom Retail pricing (in order to pass the NRT) and would also provide OAOs with uncertainty regarding the potential WNI. Consequently, ComReg considers it appropriate to assume certain fixed weightings across the NGA wholesale inputs to determine a WNI for NGA bundles for purposes of the NRT until such time as there is sufficient take-up of NGA or once the migration patterns of OAOs using NGA wholesale inputs becomes more apparent — at which time ComReg considers that it would be appropriate for the NGA WNI to be calculated with reference to the average wholesale network inputs of an 'efficient' hypothetical operator and will be guided by the actual usage of the various wholesale inputs used by OAOs in the LEA. As such, ComReg considers that the weighting of these NGA inputs will be fixed and based on the assumption that those customers currently served via either LLU or Line Share will all migrate to their current nearest equivalent NGA wholesale product. ComReg will continue to keep this under review with a view to moving to a weighting based on the actual usage of NGA inputs by OAOs (per the legacy WNI calculation).

⁸⁹ ComReg notes that a variant of the WNI approach is used in overseas jurisdictions including Austria, Spain and Italy.

- 4.70 As regards Eircom's suggestion that UPC lines should be used in determining the appropriate WNI, as noted above, the NRT is a remedy to ensure replicability of Eircom's bundles using Eircom's network inputs; it should not be confused with UPC or any other platform that may, to some extent, constrain Eircom's pricing at the retail level. Consequently, Eircom's suggestion is not appropriate.
- 4.71 ComReg considers that the WNI will not lead to a margin squeeze as suggested by BT. BT's concern appears to be on the basis that: *"for no investment by Eircom in new technologies or even a simple reduction of its Wholesale prices, the [WNI] allows Eircom Retail to reduce its price floors which could squeeze out any margin others gain by investing"*.⁹⁰ While the WNI could allow Eircom Retail to lower its prices, it is important to note that the relative cost stacks on which the weighting is based would include, as appropriate, a margin for VOIP, such that *"any margins others gain by investing"* is protected. Consequently, BT's concern should not arise. As such, a margin for IP voice will be included, as appropriate, in the cost stack. However, where it becomes clear that OAOs will all migrate to NGA bitstream rather than NGA VUA, then the appropriate WNI will be based on the wholesale price of NGA bitstream.
- 4.72 With respect to Vodafone's submission regarding the use of the minimum price floors. ComReg considers that it is appropriate to use the WBA price floors in the calculating the usage charge for the relevant cost stacks for LLU, Line Share and Standalone Broadband ('**SABB**'). The WBA price floors Decision (ComReg D06/12) is based on the costs that a REO would have to incur in order to effectively replicate Eircom's broadband offering. As such, ComReg considers that using the actual prices of WBA in these circumstances would be inappropriate as it could result in a higher cost stack than that of an 'efficient' hypothetical operator in the LEA selling similar bundles across the country. With respect to Vodafone's view that the actual price for WBA should be used as the input for every VUA-based line. ComReg considers (as recognised by Vodafone) that this would likely put pressure on Eircom's WBA pricing. However, ComReg considers that this would not be consistent with the actual product mix of OAOs and similar to the reasoning provided above could result in a higher cost stack than that which an 'efficient' hypothetical operator would incur in the LEA in order to replicate an Eircom bundle. As such, ComReg does not agree with Vodafone's view.
- 4.73 With respect to Vodafone's submission on an appropriate definition of portfolio and its view that ComReg has not carried out the type of analysis recommended by Oxera, ComReg does not agree. As recognised by Oxera:

⁹⁰ BT, "Response to ComReg's Supplementary Consultation: Price Regulation of Bundles Offers", 29 August 2012, page 9.

“there are practical challenges in undertaking a detailed market definition exercise for every bundle launched (requiring consumer survey information, for example). As a consequence, more practical approaches could be considered, while recognising that the following attributes would be informative.

- *Consumers consider bundles included in the portfolio to be relatively close substitutes (or there is a realistic prospect of a chain of substitution). Historical evidence on the demand of bundles, or the relevant stand-alone components, could inform ComReg’s decision in this respect.*
- *Bundles included in the portfolio are such that the operators can switch to provide any of the bundles within the portfolio without incurring significant costs (eg, the bundles would not rely on different infrastructure and/or wholesale inputs).⁹¹ [emphasis added].*

The Oxera report further provides a number of options in applying the portfolio approach including *“defining the portfolio on the basis of the prospects of competition in a given exchange area”*.⁹² ComReg considers that its approach is consistent with the practical approaches as suggested by Oxera and also that the portfolio of bundles to be aggregated is within the LEA only — which are prospectively more competitive (see paragraphs 4.80-4.114) and captures the supply-side differences (costs, network technology) which in turn define the degree of competition and products offered by Eircom and OAOs.

4.74 With respect to the possible future replacement of the WNI by an LLU+ input cost input. ComReg considers that given the flexibility within the revised NRT, including the use of the WNI, that it may not be appropriate at this time to set any pre-defined parameters for such a revision until the revised NRT including its outcomes are more evolved — in particular given the imminent arrival of NGA — for ComReg to assess what impact this will have. As noted in ComReg 11/72, in any event, such a consideration (i.e., the exclusive use of LLU+ in place of the WNI) would require a future consultation.

4.75 Other considerations of the WNI are discussed in Chapter 5.

⁹¹ Oxera Consulting, “Conceptual framework for the assessment of eircom’s bundles”, 30 September 2011, page 23, ComReg 11/72a.

⁹² *ibid.*

4.4.3 Bundles sold / offered outside the LEA

- 4.76 ComReg considers that outside the LEA the prospective competitive conditions are not as evident as those within the LEA.⁹³ Consequently, any undue flexibility provided to Eircom outside the LEA could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run and would not be consistent with ComReg's regulatory objective of promoting competition.
- 4.77 As such, ComReg considers that the flexibility provided by the two-part test for bundles sold / offered by Eircom in the LEA is not appropriate. Consequently, ComReg considers that for bundles sold / offered outside the LEA it remains appropriate for the bundles to be assessed on an individual bundle basis only. Each bundle must pass its own ATC. As such, the LRIC cost standard for retail calls is not applied to these bundles. As discussed in paragraphs 5.48-5.50, ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand.
- 4.78 Similarly, ComReg maintains the view that it remains appropriate that for areas outside the LEA the SB-WLR and WBA (Bitstream) wholesale access input cost be used in the NRT (i.e., the WNI is not available as the wholesale access input cost component in the NRT). OAOs outside the LEA are currently relying on wholesale inputs (SB-WLR and bitstream) to a notable extent, and their business models are based on the prevailing wholesale prices. As noted in paragraph 4.10, the cost components within the NRT are intended to reflect those an OAO would be required to incur to replicate an Eircom bundle. Consequently, ComReg considers that it is appropriate that the flexibility provided by the WNI is not applied in the bundle-by-bundle assessment outside the LEA.
- 4.79 The individual cost components of the NRT for bundles sold / offered outside the LEA are discussed in Chapter 5.

4.4.4 Identifying the LEA

- 4.80 ComReg considers that the LEA should reflect those areas where uptake of unbundled services, whether LLU and / or virtual unbundling in NGA, is likely to be viable, which prospectively are more likely to permit a greater degree of competition and where regulation should be responsive to any prospective changes.

⁹³ See ComReg 12/63, Chapter 2 for further information.

4.81 ComReg undertook a preliminary assessment, based on the criteria published in ComReg 12/63 on an exchange-by-exchange basis, whether an exchange would be included in the LEA. It became apparent using real-life data that the original criteria could exclude certain exchanges that would otherwise have been included in the *spirit* of developing these criteria. As such, and taking into account respondents' views, ComReg considers that the LEA should be comprised of exchanges where:

4.81.1 UPC is providing telecommunications services at the retail level in that exchange area and at least one other operator is providing telecommunications services from that exchange at the retail level using LLU/VUA (either directly or through the provision of a wholesale service from an LLU/VUA operator).⁹⁴

4.82 ComReg also proposes several additional criteria, which are described below. However, the impact of these is not very material as approximately 759k (87%) premises fall within the criterion outlined in paragraph 4.81.1 out of a total number of 874k premises in the LEA as proposed. The over-riding competitive assessment of each exchange to qualify for inclusion into the LEA (i.e., the reasonable coverage and market share), ensures that the competitive conditions within such exchanges is such that the proposed flexibility within the revised NRT is appropriate.

4.83 ComReg is cognisant that the LEA may create 'islands' or 'pockets' of exchanges that do not meet any of the primary criteria (i.e., criteria 1-4) but are surrounded by exchanges and neighbouring communities that do. ComReg does not agree with the view that to include these exchanges into the LEA by default would be discriminatory. ComReg considers that to exclude such exchanges would be inconsistent with commercial dynamic outcomes of competitive markets where the same bundle / offering would not be available on equal terms in neighbouring exchanges. However, ComReg agrees with respondents' views that these 'islands' should not be included in the LEA by default — as such, the inclusion of these types of exchanges will be considered on a case-by-case basis.⁹⁵

⁹⁴ Subject to UPC and the other operator using LLU/VUA having a reasonable coverage and market share in that exchange (area).

⁹⁵ See paragraphs 4.96-4.99.

- 4.84 ComReg assessed in detail the status of competition across all of Eircom's exchanges, against the LEA criteria published in ComReg 12/63 on an exchange-by-exchange basis. ComReg assessed each exchange for the presence of alternative infrastructure and taking into account respondents' views, ComReg has made certain refinements to the criteria proposed in ComReg 12/63. In particular, the criteria which stipulate the presence of alternative infrastructure now acknowledge the requirement of reasonable coverage and market share of competition. The revised wording of the criteria is provided in paragraph 4.86.
- 4.85 In addition, to recognise the potential for future other alternative infrastructure providers of high-speed broadband at a fixed location ('AIP'), which is currently only UPC, ComReg considers that it is appropriate that the criterion which previously specified UPC as such a provider that the respective criterion are updated to be neutral regarding such actual operator(s). Consequently, ComReg considers that it is more appropriate to use the term AIP rather than UPC in the respective criteria.
- 4.86 Consequently, ComReg now proposes that the LEA should be comprised of Qualifying Exchanges, which are defined/categorised as:
- (i) Criterion 1: An exchange area in which:
 - (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA),subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;
 - (ii) Criterion 2: An exchange area in which at least two OAOs (not being AIPs) are providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by those OAO(s) to End-Users or via a wholesale service provided to those OAO(s) by another OAO by means of LLU or VUA),
- subject to the condition that the said OAOs using LLU or VUA must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

- (iii) Criterion 3: An exchange area in which:
- (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) Eircom (and OAOs (not being AIPs) relying on wholesale inputs provided by Eircom) are providing retail fixed broadband services to less than 20 per cent of the premises in that exchange area,
- subject to the condition that the said AIP(s) must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;
- (iv) Criterion 4: An exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available Wholesale website (in accordance with Section 9.13(i) of the Decision Instrument contained in Annex 1 of ComReg Decision D03/13 and/or Section 9.13(i) of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13) regarding the launch of NGA services by Eircom in cabinets in the relevant exchange area,
- subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that exchange area;
- (v) Criterion 5: exceptionally, and subject to case-by-case assessment by ComReg, an exchange area in which the relevant exchange:
- (a) Is surrounded by Qualifying Exchanges; or
 - (b) Serves fewer than 500 residential premises and is located either adjacent to, or in reasonable proximity to, Qualifying Exchange(s); or
 - (c) Is determined, to the satisfaction of ComReg, to have an economic affinity with adjacent Qualifying Exchange(s), subject to the total residential premises served by Qualifying Exchanges under this sub-criterion 5(c) not exceeding 5% of the total residential premises in the Larger Exchange Area (excluding those residential premises which are served by Qualifying Exchanges under sub-criterion 5(b) above).

4.87 In determining whether an exchange is a Qualifying Exchange (i.e., whether it will be included in the LEA) ComReg has the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange.

- 4.88 ComReg considers that criterion 1; criterion 2 and criterion 3 take into account the different prospective structural conditions of certain exchanges. In addition, each of these criteria recognises the addressable market of specific exchanges and thus the competitive structural conditions of a specific exchange (which also addresses the issues raised by a number of interested parties, see paragraph 4.29, to the original criteria). As such, in determining whether an exchange qualifies for inclusion into the LEA under criterion 1-3, ComReg shall as part of its determination consider: the exchange size, the addressable market in the exchange (e.g., PSTN and DSL penetration), the competitive structural presence of OAOs and their relative market share of the addressable market. As such, for an exchange to be included in the LEA under criterion 1-3, an OAO must have a reasonable coverage (i.e., it must be capable of serving a reasonable number of premises in that exchange area) and must have a reasonable market share of those customers (i.e., the OAO is simply not just present in that exchange but has a reasonable number of customers relative to the addressable market in that exchange). Consequently, ComReg considers that Eircom's proposed criteria 1-2 (see paragraph 4.31) are not appropriate as they do not take into account the addressable market of these exchanges and only consider the physical presence of prospective competitors as opposed to their actual impact on that exchange.
- 4.89 Indicatively for criterion 1, ComReg considers that as part of its determination (as described in paragraph 4.88) whether an exchange should be included in the LEA, that the minimum combined market share of the AIP and the LLU / VUA provider of all broadband customers in that exchange should be at least ca. 25% - 30%. As RFNA is typically sold / offered with broadband by Eircom (which would constitute a bundle) this criterion provides that at least ca. 25% - 30% of all customers that have fixed or high-speed broadband are with an OAO. ComReg considers it appropriate that as this criterion requires the physical presence of competitive infrastructure that their market shares are combined. ComReg considers that to require a separate specified market share of individual OAOs could mask the competitive dynamics evident in the exchange — in particular where one OAO is significantly gaining market share at the expense of the other. Based on the results of the LEA (see paragraphs 4.103-4.114) the average combined market share in those exchanges qualifying under criterion 1 is significantly above the minimum indicative level, meaning that of all broadband customers in those exchanges they are predominantly customers of an OAO.
- 4.90 Criterion 2 recognises that where at least two operators are present in an exchange with reasonable coverage and market presence that the prospective competitive conditions in that exchange would not be dissimilar to that evident in Qualifying Exchanges under criterion 1.

- 4.91 Indicatively for criterion 2, ComReg considers that as part of its determination (as described in paragraph 4.88) whether an exchange should be included in the LEA, that LS as a percentage of broadband customers on Eircom's DSL platform should at least be ca. 20%. As LS is provided over Eircom's DSL platform it ensures that at least ca. 20% of all customers that have fixed-broadband are with an OAO. Based on the results of the LEA (see paragraphs 4.103-4.114) in those exchanges qualifying under criterion 2 is above the indicative level, meaning that a large proportion of all broadband customers in those exchanges are customers of an OAO.
- 4.92 In particular, criterion 3 seeks to provide Eircom with appropriate flexibility in those exchanges where it is likely that AIP (i.e., currently UPC) has a significant presence. Assuming a reasonable national average broadband penetration of 60% in exchanges, this criterion provides that for an Eircom exchange to be included in the LEA its DSL market share is 33% or less (i.e., Eircom wholesale supports broadband to fewer than 20% of the premises served in that exchange).
- 4.93 Indicatively for criterion 3, ComReg considers that as part of its determination (as described in paragraph 4.88) whether an exchange should be included in the LEA, in addition to that outlined in paragraph 4.92, that the market share of the AIP (currently only UPC) as a percentage of all broadband customers in that exchange should be at least ca. 25% - 30%. As RFNA is typically sold / offered with broadband by Eircom (which would constitute a bundle) this criterion provides that at least ca. 25% - 30% of all customers that have fixed or high-speed broadband⁹⁶ are with an OAO. At present, this criterion only applies to the presence of UPC providing retail telecommunications services in that exchange area. In the future, similar to criterion 1, where there is an alternative AIP in addition to UPC (or another AIP) that market share will be the minimum combined market share. Where there is only UPC or just an AIP, ComReg considers that it is appropriate that the minimum market share that the OAO would have is ca. 25% - 30%, so as not to provide Eircom undue pricing flexibility in exchanges where the competitive pressure from OAOs is only relatively nascent. Based on the results of the LEA (see paragraphs 4.103-4.114) in those exchanges qualifying under criterion 3 the average market share is significantly above the minimum indicative level.

⁹⁶ With regard to what constitutes high-speed broadband, ComReg will be guided by the speeds on offer in the market generally and public documents from local Government and Europe such as the Digital Agenda for Europe (<http://ec.europa.eu/digital-agenda/>) and the national broadband strategy (<http://www.dcenr.gov.ie/Communications/Communications+Policy/Next+Generation+Broadband/>)

- 4.94 With respect to criterion 4, ComReg considers that the relative competitive dynamics of these exchanges would prospectively not be dissimilar to those evident in Qualifying Exchanges under criterion 1, 2 or 3. Namely, that they generally have high population densities, that typically AIP (i.e., currently UPC) provides telecommunications services at the retail level in those exchange areas (as Eircom's NGA proposed footprint overlaps a number of UPC exchange areas) and represent exchanges which have already been unbundled. In addition, NGA products and processes will be in place at least six months⁹⁷ in advance to ensure OAOs are in a position to replicate the services of Eircom. Furthermore, ComReg considers, as noted by Eircom's submission, *"that where NGA and VUA are deployed in a given exchange, there will be strong prospect of competitive OAO entry, which will act as a constraint on eircom's retail pricing"*.⁹⁸ As such, ComReg considers that it is appropriate to include such exchanges in the LEA to reflect those areas which prospectively are more likely to permit a greater degree of competition. In addition, as noted in paragraph 4.68, it is only when the actual use of LLU or virtually unbundling in NGA by OAOs increases, that the WNI could decrease for Eircom Retail — which should act as an incentive for Eircom Wholesale to encourage OAOs to use LLU or VUA. Consequently, ComReg considers that the inclusion of NGA exchanges into the LEA is consistent with ComReg's regulatory objectives. ComReg will continue to monitor the competitive conditions within such exchanges as the use of NGA services evolves over time.
- 4.95 Indicatively, for criterion 4 ComReg considers that for an exchange to qualify under this criterion, that the six months notification pertaining to the cabinets that will be NGA-enabled in that relevant exchange, that those cabinets must cover a reasonable number of all lines in that exchange. ComReg considers that for this purpose that it is appropriate that ca. two-thirds of all lines in that exchange should be served by those proposed NGA-enabled cabinets before that exchange is included in the LEA under this criterion.

⁹⁷ See ComReg Decision 03/13.

⁹⁸ Eircom. *"Response on behalf of eircom Ltd to ComReg Consultation 12/63: Price Regulation of Bundled Offers"*, 29 August 2012, page 10.

- 4.96 ComReg considers that it is appropriate to consider on a case-by-case basis the inclusion of a limited number of additional exchanges which would not meet any of the criteria above. ComReg is cognisant that ‘islands’ or ‘pockets’ of exchanges could be created where exchanges are completely surrounded by Qualifying Exchanges. Consequently, ComReg considers it appropriate that ‘island’ or ‘pocket’ exchanges (per criterion 5 (a)) be included in the LEA on a case-by-case basis. Island or pocket exchanges can occur particularly in inner-city or suburban areas due to the network architecture. ComReg considers that it would be inconsistent to have a ‘pocket’ of customers where a bundle offering / price may not be available but is available in neighbouring housing estates or streets.
- 4.97 Eircom notes in its submission that it is in favour of the ‘island’ proposal. Furthermore, Vodafone note that: *“there are good reasons for the inclusion of “island” exchanges”*.⁹⁹ ComReg considers that from a practical commercial perspective (to avoid marketing black-spots), and to avoid the social exclusion of consumers (in particular as the infrastructure is already in place to provide these bundles to these ‘pocket’ exchanges); it would be appropriate to include those exchanges that are completely surrounded by Qualifying Exchanges in the LEA. In addition, ComReg considers that due to the benefits of a contiguous network, the fact that these ‘pocket’ exchanges are surrounded by Qualifying Exchanges may increase the future roll-out of infrastructure-based investment in those exchanges. With respect to Magnet’s concern that this approach could include exchanges that may never be unbundled, as noted in paragraph 4.84, in determining the actual exchanges which qualify, ComReg will assess in detail the status of competition across all of Eircom’s exchanges on an exchange-by-exchange basis to assess the appropriateness of their inclusion in the LEA. As such, ComReg considers that while there are appropriate reasons for including certain exchanges which are ‘islands’ in the LEA (e.g., it would ultimately be consumer welfare enhancing, see also paragraph 4.83), these must be assessed on a case-by-case basis. Consequently, ComReg will consider, amongst others, the actual number of homes and premises in that exchange (area), the actual number of customers connected on the Eircom wholesale platform to mitigate against the inclusion of inappropriate exchanges into the LEA — as such exchanges will not be included by default, which is the concern raised by a number of respondents.

⁹⁹ Vodafone, “Vodafone Response to ComReg Document 12/63”, 20 August 2012, page 4.

- 4.98 Similarly, ComReg considers that criterion 5 (b) (i.e., the exchange has fewer than 500 residential homes and is located either adjacent to, or, in reasonable proximity to, Qualifying Exchange(s)), which is in addition to the original criteria proposed in ComReg 12/63, would prevent inappropriate regulatory outcomes, i.e., where a bundle offering / price may not be available in neighbouring estates. ComReg considers that the inclusion of such exchanges in the LEA is consumer welfare enhancing and that the competitive dynamics of these exchanges would not be unduly impacted. In addition, the relative addressable market of these exchanges may be too small to justify commercial investments by OAOs, although the barriers to unbundling such exchanges are likely to be low.
- 4.99 Furthermore, ComReg considers that it is appropriate for it to determine on a case-by-case basis the inclusion of a limited number of additional exchanges which would not meet any of the criterion above but for economic affinity reasons should be included in the LEA (i.e., criterion 5 (c)). Eircom will be required to demonstrate to the satisfaction of ComReg that the inclusion of such an exchange will not impact the competitive dynamics of that exchange and through cogent reasoning demonstrate that it is appropriate that the additional exchange should be included in the LEA.
- 4.100 ComReg considers that it is appropriate to cap the number of Qualifying Exchanges under criterion 5 (c) so that appropriate incentives are maintained on Eircom Wholesale to encourage infrastructure-based competition in non-LEA exchanges or incentivise NGA roll-out.
- 4.101 For the avoidance of doubt, as noted in paragraph 4.87, ComReg shall have the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange. Where the inclusion of any particular exchange in the LEA is likely to lead to anti-competitive outcomes and where long-term benefits of consumers is likely to be negatively impacted ComReg will not allow that exchange into the LEA. As such, currently there are a number of exchanges / areas where LLU and / or UPC are present but have not been included in the current LEA — as to date, competition from these OAOs has not achieved a reasonable coverage or market share in those exchanges / areas (see paragraphs 4.84 and 4.103).
- 4.102 In addition, in order to provide retail certainty for all operators including Eircom Retail, once an exchange is included in the LEA it will remain so. However, Eircom's retail market share in those Qualifying Exchanges will continue to be monitored by ComReg and should it indicate that OAOs are being squeezed (for example if their retail market share on Eircom's platform is declining or has reached an excessively low level) then ComReg will review the appropriateness for the continued inclusion of that exchange in the LEA.

4.4.5 Overview of current exchanges in LEA

- 4.103 Based on the criteria of the LEA (see paragraph 4.86), ComReg assessed in detail the status of competition across all of Eircom's exchanges on an exchange-by-exchange basis to assess the appropriateness of their inclusion in the LEA. In determining the actual exchanges which qualify under each criterion, a detailed database has been constructed which allows ComReg to assess the actual number of homes and premises in that exchange (area); the actual number of customers connected on the Eircom wholesale platform; the relative share of OAO customers on the Eircom platform (i.e., through Line Share or LLU); the cable operators' (UPC) footprint; and the number of broadband customers in that exchange area. Detailed information (which is commercially sensitive) has been received from the cable company (UPC) to enable this analysis.
- 4.104 In constructing the database on exchange-by-exchange basis the number of homes and premises is reconciled to an An Post postal address database. This was then adjusted for unoccupied premises based on information from the latest available census data — which provided household and business premises data. Consequently, the database is the most reasonably accurate available source of data available to ComReg and will be updated accordingly over-time to reflect additional information as it becomes available.
- 4.105 As noted in paragraph 4.87, ComReg shall have the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange.

4.106 A snapshot of the current LEA¹⁰⁰ is provided below:

	Exchanges	Premises	Homes	Business	PSTN	DSL	LS	DSL % of premises	% of LS on DSL platform	% of UPC BB customers relative to all BB customers in criterion
Criterion 1	67	759,082	683,146	75,936	✂	✂	✂	✂	✂	✂
Criterion 2	7	55,769	49,481	6,288	✂	✂	✂	✂	✂	✂
Criterion 3	2	3,090	2,659	431	✂	✂	✂	✂	✂	✂
Criterion 4	-	-	-	-	-	-	-	-	-	-
Criterion 5 a	8	12,378	11,622	756	✂	✂	✂	✂	✂	✂
Criterion 5 b	34	7,890	4,680	3,208	✂	✂	✂	✂	✂	✂
Criterion 5 c	8	36,372	34,119	2,253	✂	✂	✂	✂	✂	✂
LEA	126	874,581	785,707	88,872	✂	✂	✂	✂	✂	✂
Outside LEA	1,078	1,136,396	923,669	212,578	✂	✂	✂	✂	✂	✂
Total	1,204	2,010,977	1,709,376	301,450	✂	✂	✂	✂	✂	✂

4.107 Of the 67 exchanges in criterion 1 on average each exchange has over 10,000 premises, consisting predominantly of residential homes. On average ✂% of all broadband customers in those exchanges are OAO customers. In ca. 16 of those Qualifying Exchanges, it is clear that Eircom and OAOs using Eircom's wholesale platform have been significantly impacted by the presence of UPC — so much so that a number of these exchanges could equally qualify under criterion 3 (i.e., where Eircom Wholesale supports broadband to fewer than 20% of the premises served in that exchange area). ComReg considers that this information is consistent with the information received from OAOs and the interpretation of same in Chapter 2 ComReg 12/63.

4.108 Of the 7 exchanges in criterion 2 on average each exchange has over 7,000 premises, consisting predominantly of residential homes. Under this criterion, ca. ✂% of broadband subscribers are OAO customers. As noted in paragraph 4.90, under this criterion at least two operators are present in an exchange with reasonable coverage and market presence that the prospective competitive conditions in that exchange would not be dissimilar to that evident in Qualifying Exchanges under criterion 1.

¹⁰⁰ The list of exchanges determined by ComReg to constitute Qualifying Exchanges will be set out by ComReg in a schedule which will be made available upon request to interested parties.

- 4.109 Of the 2 exchanges in criterion 3 on average each exchange has over 1,000 premises, consisting predominantly of residential homes. Under this criterion, average Eircom DSL penetration is ca. 30%, indicating that the majority of broadband customers are not Eircom Retail customers or OAO customers. The majority of broadband customers in these exchanges are on the UPC platform.
- 4.110 There are currently no exchanges qualifying on the basis of criterion 4.
- 4.111 Of the 9 exchanges in criterion 5(a) 4 exchanges have fewer than 500 residential homes, on average each exchange has over 1,000 premises and consist predominantly of residential homes. There is currently no LLU presence in any of these exchanges; however, in those exchanges footprints where UPC is currently present they have a reasonable market share of broadband customers in those exchanges.
- 4.112 Of the 34 exchanges in criterion 5(b) on average each exchange has over 200 premises, consisting predominantly of residential homes. There is currently no LLU presence in any of these exchanges and UPC provides broadband services in a very limited number of these exchange footprints.
- 4.113 Of the 8 exchanges in criterion 5(c) on average each exchange has over 4,000 premises, consisting predominantly of residential homes. There is currently no LLU presence in any of these exchanges; however, in those exchange footprints where UPC is currently present they have a reasonable market share of broadband customers in those exchanges.
- 4.114 As noted in paragraph 4.101, there are a number of exchanges where LLU are present and / or where UPC has a footprint but these exchanges have not been included in the current LEA — as to date, competition from these OAOs has not achieved a reasonable coverage or market share in those exchanges / areas (see paragraphs 4.89, 4.91 and 4.93).

Chapter 5

5 Components of the Net Revenue Test

5.1 Overview

- 5.1 The purpose of the NRT is to ensure that Eircom complies with the obligation not to unreasonably bundle services under ComReg D07/61. The NRT is intended to ensure, where practicable, the economic replicability of a given bundle of services by competitors, when such competitors are relying on key access products from the SMP provider in order to provide the relevant bundle to the underlying fixed location, i.e., the replicability, at the specific fixed location, of a bundle which is sold / offered by Eircom (including to those who act as intermediaries¹⁰¹). In summary, the appropriate retail revenue to take into account in the NRT for the bundle is the Eircom Retail headline monthly published price (for that bundle including any discount and / or promotions) together with any out of bundle revenue or associated revenues directly attributable to the bundle sold / offered at that fixed location. For the avoidance of doubt, 'out of bundle revenue' includes those revenues that are incremental to the bundle and would not have been generated had it not been for the provision of the bundle being sold / offered at that fixed location.¹⁰²
- 5.2 As noted in Chapter 4, ComReg considers that the NRT continues to be required in order to protect competition which is based on using Eircom's network. However, ComReg considers that there must also be appropriate flexibility so that Eircom Retail is not unduly hindered by regulation. In ComReg 11/72 and ComReg 12/63, ComReg proposed a revised NRT intended to provide certainty as to how this flexibility would develop as competition emerges. For bundles sold / offered in the LEA, ComReg considers that a combinatorial two-part NRT is appropriate. For bundles sold / offered outside the LEA ComReg considers that a single NRT remains appropriate.
- 5.3 As noted in paragraph 2.30, there is an explicit link in the NRT between increasing competition and increased regulatory flexibility — and in particular the WNI.¹⁰³

¹⁰¹ Where such an intermediary is not an authorised operator, i.e. an operator that is not Eircom, providing an electronic communications network or an electronic communications service authorised under Regulation 4 of the Authorisation Regulations, as may be amended from time to time.

¹⁰² Further details in relation to the specific components of the NRT are contained in Table 1 and Table 2 in Section 5.5.

¹⁰³ The WNI is discussed in greater detail in paragraphs 4.63-4.75 and 5.51-5.66.

- 5.4 If a bundle fails the NRT, ComReg as a proportionate measure considers any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling in order to determine whether the bundle complies with the obligation under Decision D07/61 not to unreasonably bundle services. ComReg also considers the impact on competition and the ability of operators to enter / remain in the market and promote sustainable competition in the medium to long term. ComReg 11/72 sought the views of interested parties on the continuance of this approach.

5.2 ComReg's Preliminary View from the Consultation Documents

5.2.1 Components of the NRT

- 5.5 ComReg 11/72 consulted on the various components of the proposed NRT for bundles sold / offered within and outside the LEA.
- 5.6 The cost components within the NRT are intended to reflect those faced by an OAO that would be required to replicate Eircom's individual bundle. The costs of the SMP operator (i.e., Eircom) are used and for certain services these costs are adjusted for the hypothetical market share of a SEO (i.e., adjusted for scale and scope).
- 5.7 For the sake of brevity, ComReg's proposals with respect to the various components of the NRT (both inside and outside the LEA) are summarised in tabular format below:

Component	Preliminary view ComReg 11/72
Revenue: Component 1 – Package price and call revenue	The calculation of revenue in the NRT to remain unchanged. This applies to both the individual bundle and portfolio test.
Costs: Component 2 – wholesale network input	This is discussed separately. See paragraphs 5.11-5.14.
Costs: Component 3 (a) – Associated retail cost of narrowband	Narrowband retail costs in the NRT will remain calculated by reference to the retail-minus price control for SB-WLR — where the SB-WLR remains at the maximum price allowed i.e., 14% of retail price for retail line rental. This applies to the individual bundle and portfolio test.
Costs: Component 3 (b) –	Broadband retail costs will remain

Component	Preliminary view ComReg 11/72
Associated retail cost of broadband wholesale inputs	calculated by reference to the SEO under D01/06. This applies to the individual bundle and portfolio test.
Costs: Component 4 – Wholesale and retail costs associated with retail calls	Subject to robust and appropriate information, the NRT may be adjusted to reflect known future changes in wholesale and / or retail cost over the average customer lifetime. This will be monitored retrospectively. This applies to the individual bundle and portfolio test. See also paragraphs 4.59-4.62.
Costs: Component 5 – unregulated products that do not rely on RFNA	See paragraphs 5.15-5.17.
Costs: Component 6 – Mailbox	No change proposed to treatment of mailbox costs (where included). This applies to both the individual bundle and portfolio test.

5.2.2 Cost Standard

- 5.8 ComReg proposed that for each bundle sold / offered in the LEA, each bundle must pass its own ATC, with a LRIC cost standard for retail calls.¹⁰⁴ In addition, those bundles (i.e., in the LEA) would be aggregated together into a portfolio and together must pass the portfolio's ATC.
- 5.9 ComReg proposed that for bundles sold / offered outside the LEA, the bundles would be assessed on an individual bundle basis only. Each bundle must pass its own ATC and that the LRIC cost standard for retail calls would not apply to these bundles.
- 5.10 Bundles including unregulated services and the appropriate cost standard applicable to such unregulated services is discussed in paragraphs 5.15-5.17.

¹⁰⁴ The LRIC is estimated by ComReg in this instance from Eircom's accounts as ATC less common costs and fixed indirect costs.

5.2.3 WNI

- 5.11 As noted in paragraph 4.10, the weighted average of the different inputs will be calculated based on a 'typical efficient' OAO market usage as a whole within the LEA. ComReg's decision on the appropriateness of the WNI is discussed in paragraphs 4.63-4.74.
- 5.12 In ComReg 12/63, ComReg noted that the WNI formula could over time result, should OAOs (for whatever reason) use a different mix of the current wholesale inputs in the LEA, in an increase in the WNI for Eircom. Potentially, this could give rise to Eircom being required to increase retail prices in the LEA in order to pass the required NRT. In addition, ComReg considered that this could create perverse incentives for industry to influence Eircom wholesale and retail prices to the potential detriment of long-term interests of consumers and create outcomes inconsistent with competitive market conditions — as prices could fluctuate year-on-year due to the regulatory controls (and may result in increasing Eircom retail prices).
- 5.13 Consequently, ComReg was of the preliminary view that the resulting WNI must be less than or equal to the previous applicable WNI. In circumstances where the WNI is greater than the previous applicable WNI, ComReg was of the preliminary view that the previously lower applicable WNI must be used for the current period — with the exception of the circumstance resulting from a higher cost of VUA (i.e., if all OAOs migrated to VUA and VUA had a higher cost stack than the current WNI this would result in the WNI increasing).
- 5.14 In ComReg 12/63, ComReg proposed that in order to derive the applicable weighted average of all the applicable wholesale inputs (i.e., the WNI) the actual percentage usage of each applicable wholesale input by OAOs in the LEA would be used – it was proposed that this would be updated quarterly. ComReg was of the preliminary view that OAOs' usage of wholesale inputs in the LEA would be provided by Eircom Wholesale to ComReg. The relevant weightings would be provided to ComReg as part of the notification and preclearance requirements with respect to the launch of bundles.

5.2.4 Unregulated products

- 5.15 In ComReg 11/72, for unregulated services in a bundle (irrespective of whether it is sold / offered within or outside the LEA), ComReg proposed that these services must cover their own LRIC.
- 5.16 In the case of mobile services (an unregulated service at the retail level), ComReg was of the preliminary view that these services must cover their own Long Run Average Incremental Cost plus a mark-up for common costs ('LRAIC+').

- 5.17 ComReg proposed that for unregulated services, in exceptional circumstances the AAC cost standard might be used, but only in circumstances where it is clear that competition in the market generally would not be harmed and that this measure would not create material distortions to competition through anti-competitive practices stemming from SMP products and services, for example where it is proposed to test new bundles on a small number of customers for a short period of time.

5.2.5 Case-by-case assessment of a bundles reasonableness

- 5.18 If a bundle fails the NRT and contains RFNA that is being sold / offered below cost it does not automatically lead to that bundle being considered unreasonable. In ComReg 11/72, ComReg set out a non-exhaustive list of other factors that ComReg would consider in making its assessment. For the sake of brevity, ComReg's proposals are summarised in tabular format below:

Consideration	Preliminary view ComReg 11/72
Retail Efficiencies	ComReg proposed no change to the NRT. Retail efficiencies once supported by robust evidence could be considered in determining whether a bundle, which fails the NRT, is nonetheless compliant with the obligation not to unreasonably bundle services.
Increased customer lifetimes	ComReg proposed no change to the NRT. Increased customer lifetimes once supported by robust evidence could be considered in determining whether a bundle, which fails the NRT, is nonetheless compliant with the obligation not to unreasonably bundle services.
Competitive assessment	ComReg proposed no change to the NRT. A competitive assessment is undertaken before a bundle is found to be in breach of the obligation not to unreasonably bundle services.

5.2.6 Other possible options for revisions to the NRT

5.19 ComReg 11/72 considered a number of potential scenarios and sought respondents' views whether the NRT should be revised in those circumstances. For the sake of brevity, each of these scenarios / circumstances are summarised in tabular format below, including ComReg's preliminary views on each:

Scenario	Preliminary view ComReg 11/72
When the bundle is a response to a competitor's bundle	<p>ComReg proposed no change to the NRT. ComReg proposed that the NRT would not change when a bundle is claimed to be a response to a competitor's bundle.</p> <p>However, as is currently the case, ComReg proposed that the complementary competitive assessment would investigate the competitive context of the bundle.</p>
A different test for when a bundle is found unreasonable post launch?	ComReg proposed no change to the NRT. ComReg proposed that there would be no different test for bundles after launch.
Should Eircom be allowed 'bank' / carry forward past margins	ComReg proposed no change to the NRT. ComReg proposed that past margins could not be banked / carried forward.
Promotions and promotional discounts	No changed position — a bundle must be reasonable at all times and a promotional discount would be considered reasonable if the cost of the promotional discount covered over the average customer lifetime.
Discretionary promotions / opt-ins	ComReg proposed no change to the NRT. ComReg proposed that discretionary promotions / opt-ins would be assumed to have 100% take-up.

5.3 Views of Respondents

5.3.1 Components of the NRT

5.20 A number of respondents' submissions did not specifically consider the individual components of the NRT. For ease of reference, responses are summarised in tabular format.

Component	Summary of Respondents' views
Revenue: Component 1 – Package price and call revenue	<ul style="list-style-type: none"> Eircom and Magnet agree with the approach for the calculation of revenue in the NRT.
Costs: Component 2 – wholesale network input	<ul style="list-style-type: none"> This is discussed separately. See paragraphs 5.24-5.25.
Costs: Component 3 (a) – Associated retail cost of narrowband	<ul style="list-style-type: none"> Eircom considers the retail-minus price control to be outdated. Furthermore, Eircom notes that in its view the actual avoidable costs of an EEO should be used for Line Rental. Magnet agrees with the approach proposed by ComReg.
Costs: Component 3 (b) – Associated retail cost of broadband wholesale inputs	<ul style="list-style-type: none"> Eircom considers the retail costs of broadband should be amended to EEO. Vodafone and Magnet consider that the retail cost of broadband should remain as SEO.
Costs: Component 4 – Wholesale and retail costs associated with retail calls	<ul style="list-style-type: none"> ALTO and BT note that they accept the principle of future price changes to be included in the pricing model — provided that they are publicised openly at the same time. Eircom agrees with the use of forward looking price changes, but notes that robust evidence may not always be available and that Eircom should be allowed to make reasonable assumptions about future trends in certain key

Component	Summary of Respondents' views
	<p>unit costs.</p> <ul style="list-style-type: none"> • Vodafone considers that if Eircom puts through future cost reductions, in the event that those reductions did not materialise Eircom would not be able to recoup the difference. • Magnet agrees with the use of known future changes in the NRT. • Eircom considers that LRIC should apply to all retail costs. • See also paragraph 4.26.
Costs: Component 5 – unregulated products that do not rely on RFNA	<ul style="list-style-type: none"> • See paragraphs 5.26-5.28.
Costs: Component 6 – Mailbox	<ul style="list-style-type: none"> • Eircom consider that the mailbox facility can be provided by OAOs using their own platform, as such in Eircom's view the 14% retail minus margin is not appropriate. However, Eircom agrees that if 70% of customers take the voicemail facility that the average cost in the NRT should be 70% of the unit price. • Vodafone notes that ComReg should re-visit the retail minus price control on ancillary services that do not have upstream substitutes. • Magnet considers that the current treatment of the mailbox cost is appropriate.

5.3.2 Cost Standard

- 5.21 ALTO, BT, Vodafone and Magnet all agree with the continued use of ATC as the overall cost standard to assess bundles.
- 5.22 Eircom states that the cost standard for all individual products in a bundle should be incremental or avoidable cost as this is a more reasonable and proportionate standard. In Eircom's view: *"as more than ten years after market opening, a regulatory focus on promoting 'entry' is misplaced"*,¹⁰⁵ as such *"sunk costs that have already been incurred should not be included"* in the NRT at the portfolio level.¹⁰⁶
- 5.23 UPC's submission to ComReg 11/72 did not consider this issue specifically. However, UPC did note that in its view the suggestion that ATC should be or could be disaggregated between LEA and outside the LEA is premature in the absence of ComReg defining what it means by the LEA. ComReg notes in that regard that ComReg 11/72 did not define what ComReg considered to be an LEA — to which UPC's submission relates — but discussed the concept of setting a LEA and the various considerations involved in implementing such a proposal in a revised NRT.

5.3.3 WNI

- 5.24 ALTO considers that: *"ComReg should at least build a safety clause into the model to address the case where the computed weighted average wholesale cost rises, e.g. two to three consecutive rises should lead to corrective action"*.¹⁰⁷ BT notes that: *"The market is at a major evolution point with the introduction of NGA solutions and the prudent approach would be for ComReg to keep its options open to market conditions during this time of change"*¹⁰⁸ and as suggested by ALTO that two to three consecutive rises should lead to corrective action. Vodafone does not agree with ComReg's proposal and notes that: *"[i]f eircom retail were active in this segment of the market one would expect the prices of its own portfolio of retail bundles to be rising in line with the general retail market activity [sic.]"*.¹⁰⁹ Magnet considers that the WNI should be allowed fluctuate. Eircom's submission proposes a remedy to avoid a fluctuating WNI. Eircom suggest an interim calculation of the WNI and thereafter moving to a glide-path of a 'target' WNI. UPC re-stated its view that it was pre-mature to discuss this issue.

¹⁰⁵ Eircom, "Response to ComReg Consultation and Draft Directions 11/72", 16 December 2011, page 12.

¹⁰⁶ Eircom, "Response to ComReg Consultation and Draft Directions 11/72", 16 December 2011, page 12.

¹⁰⁷ ALTO, "Response to Supplemental Consultation – Supplementary Consultation - Price Regulation of Bundled Offers Ref:12/63", 29 August 2012, Page 7.

¹⁰⁸ BT, "Response to ComReg's Supplementary Consultation: Price Regulation of Bundles Offers", 29 August 2012, page 10.

¹⁰⁹ Vodafone, "Vodafone Response to ComReg Document 12/63", 20 August 2012, page 5.

5.25 Vodafone agrees with ComReg's proposal that information provided by Eircom provides a useful means of calculating the WNI. Magnet agrees with ComReg's proposal of the WNI being updated quarterly. Eircom's submission broadly agrees with ComReg's proposal but suggested a slight alternation. In summary, Eircom suggests that Eircom Wholesale would provide ComReg with a report which includes the usage of the individual wholesale products for the most recent month available and details of any known migration plans being implemented by operators over the coming months. Eircom suggest that this information would allow ComReg to derive the appropriate WNI and that ComReg provide Eircom Retail the derived WNI within one month of receiving the information from Eircom Wholesale — thereby allowing Eircom to utilise that input in pricing submissions from then onwards. UPC re-stated its view that it was pre-mature to discuss this issue.

5.3.4 Unregulated products

5.26 Eircom's submission notes that it welcomes ComReg's proposal to apply LRIC for unregulated products and on a case-by-case basis AAC. However, Eircom notes that in its view it is more appropriate to consider using AAC at the product level and pure LRAIC at the portfolio level. In addition, Eircom notes that the use of standalone retail prices as the cost input would significantly undermine Eircom's ability to market "*bundle and save*" offers.

5.27 Vodafone considers that the approach proposed by ComReg in ComReg 10/01 (i.e., the ATC cost standard) is more favourable than the use of LRIC cost standard proposed in ComReg 11/72. In addition, Vodafone notes that if ComReg favours the LRIC cost standard that ComReg should consult on the LRIC costs and the model for unregulated products that will underpin the test.

5.28 Magnet considers that: "*LRAIC or LRAIC+ should be used in relation to unregulated products. Magnet Networks is unsure of the usefulness of the AAC to the tests*".¹¹⁰

¹¹⁰ Magnet, "*Magnet Networks response to ComReg 11/72*", 16 December 2011, page 2.

5.3.5 Case-by-case assessment of a bundles reasonableness

5.29 A number of respondents' submissions did not specifically consider this issue. For ease of reference, responses are summarised in tabular format.

Consideration	Summary of Respondents' views
Retail Efficiencies	<ul style="list-style-type: none"> • Eircom considers that this issue would be of less importance if an EEO cost standard was used. However, Eircom notes that in the absence of this ComReg should allow reasonable estimates of efficiencies that are associated with bundling but which may not be quantified precisely. • Magnet does not agree with the case-by-case assessment.
Increased customer lifetimes	<ul style="list-style-type: none"> • Vodafone notes that in its view the average customer lifetime is somewhere in the region of 30 months. • Eircom agrees with the existing average customer lifetime assumed in the NRT. • Magnet does not agree with the case-by-case assessment and notes that potentially the average customer lifetime may be different in the LEA.
Competitive assessment	<ul style="list-style-type: none"> • In addition, Eircom believes that ComReg should consider if there are casual factors resulting in the NRT being failed e.g., have heavy-users moved all at once, are billing costs being incurred twice for a transitionary period on migration of a customer etc. • Magnet does not agree with the case-by-case assessment.

5.3.6 Other possible options for revisions to the NRT

5.30 A number of respondents' submissions did not specifically consider this issue. For ease of reference, responses are summarised in tabular format.

Scenario	Summary of Respondents' views
When the bundle is a response to a competitor's bundle	<ul style="list-style-type: none"> • Eircom considers it appropriate to make an adjustment to the NRT in such circumstances. In Eircom's view: <i>"[t]here are several operators with sunk costs, and potential entrants can frequently buy existing competitors more cheaply than building their own infrastructure"</i>.¹¹¹ • Eircom notes it welcomes ComReg's proposal regarding the complementary competitive assessment of the competitive context of a bundle. • Magnet agrees with ComReg's proposal.
A different test for when a bundle is found unreasonable post launch?	<ul style="list-style-type: none"> • Eircom considers that the tests after launch should not apply the same ATC as before launch as sunk costs should be disregarded. • Magnet agrees with ComReg's proposal but suggests that bundles should be monitored quarterly.
Should Eircom be allowed 'bank' / carry forward past margins	<ul style="list-style-type: none"> • Eircom considers that OAOs would have the ability to 'bank' wholesale rebates and therefore sees no reason why it should not benefit from the

¹¹¹ Eircom, "Response to ComReg Consultation and Draft Directions 11/72", 16 December 2011, page 25.

Scenario	Summary of Respondents' views
	<p>same practice.</p> <ul style="list-style-type: none"> • Magnet agrees with ComReg's proposal.
Promotions and promotional discounts	<ul style="list-style-type: none"> • Eircom agrees with ComReg's proposed approach. • Magnet considers that as competition is greater in the LEA that there may be a different average customer lifetime in those areas.
Discretionary promotions / opt-ins	<ul style="list-style-type: none"> • Eircom considers that if only a percentage of users are likely to avail of the offer then its diluted impact and not an assumed 100% up-take should be used in the NRT. • Magnet agrees with ComReg's proposal.

5.4 ComReg's Assessment of Responses and Final Position

5.4.1 Components of the NRT

Revenue:

5.31 ComReg considers that it remains appropriate for '**Total Monthly Bundle Revenue**' used for the purposes of the NRT (both for LEA and non-LEA bundles) to be based on the Eircom Retail's package price (i.e., headline price) of the individual bundle in effect in the market at the time and the revenue earned on average on components that are outside the bundle allowance e.g., calls in excess of free call allowance, broadband usage in excess of download allowance, usage above mobile add-on, all other directly attributable revenue earned by Eircom which is incremental (and thus would not otherwise have been earned) had the service not been provided at a fixed location.

- 5.32 For the '**Total Monthly LEA Portfolio Revenue**', the revenues are simply calculated as the weighted average of those Total Monthly Bundle Revenue based on the actual customers on the individual bundles within the LEA. As noted above, for bundles sold / offered outside the LEA the NRT is based on a bundle-by-bundle assessment, consequently there is no portfolio assessment for outside the LEA.

Costs:

- 5.33 ComReg considers it appropriate that the components of the costs reflect those faced by an OAO to replicate Eircom Retail's individual bundle. The sum of these costs is referred to as the as the '**Total Monthly Bundle Cost**'.
- 5.34 For bundles sold / offered in the LEA, there is a '**Total Monthly Adjusted LEA Bundle Cost**', for the bundle-by-bundle test to take into account that the LRIC cost standard can be used for retail calls.
- 5.35 For the portfolio test a '**Total Monthly LEA Portfolio Cost**' is derived using the weighted average by volume of '**Total Monthly Bundle Cost**' based on the actual monthly volume of customers (in the case of post-launch assessment) for each Bundle in the LEA in aggregate or the forecast monthly volume (in the case of pre-launch assessment) for each Bundle in the LEA in aggregate.
- 5.36 The individual cost components and ComReg's position on each are discussed in turn below:

Wholesale Access Input cost:

- 5.37 The wholesale access input cost for bundles sold / offered inside the LEA is referred to as the WNI (see paragraphs 4.63-4.75 and paragraphs 5.51-5.66). For bundles sold / offered outside the LEA, the Wholesale Access Input cost assumes that the OAOs use WLR and WBA exclusively. See also paragraphs 4.63-4.75 and 5.51-5.66.

Retail costs of narrowband and broadband wholesale inputs:

- 5.38 Some interested parties noted that, in their view, the retail-minus price control needs to be re-visited. ComReg intends to consult on the appropriateness of the retail-minus price control in 2013. ComReg considers that it remains appropriate at this time, pending the outcome of that consultation, that the retail narrowband costs be based on a retail-minus 14% (i.e., the retail price of the SMP operator (i.e., Eircom) minus 14%).

- 5.39 Broadband retail costs are calculated with reference to a Discounted Cash Flow model using the hypothetical costs of a SEO with a 25% market share, where the Eircom's audited costs are used as a starting point for OAO cost estimation and adjusted for scale and scope. As noted in paragraph 1.6, this Decision does not include any adjustment to ComReg D01/06. ComReg plans to progress these matters as part of a separate future consultation process.
- 5.40 As noted in ComReg D03/13, where Eircom Retail sells / offers broadband over NGA services the retail cost stack will be a mixture of SEO and EEO costs as appropriate.

Wholesale and retail costs associated with retail calls:

- 5.41 The NRT reflects all applicable wholesale input costs (e.g., Mobile Termination Rates ('MTRs')) and the ATC of retail costs. The costs are based on Eircom's historic retail costs to derive an ATC cost and adjusted (where appropriate) to reflect known future changes in those costs where these can be adequately verified (e.g., reduction in MTRs etc.).
- 5.42 ComReg considers it appropriate to allow known future changes to be used in the NRT. ComReg considers that to not allow this approach could result in an artificially higher cost stack than an SEO would incur in replicating the Eircom bundle. ComReg notes that this proposal in ComReg 11/72 was supported by the majority of interested parties. With respect to ALTO and BT's submission that future changes could be used in the model provided that they were publicised at the same time, ComReg considers that as these changes are based on 'known' future changes all OAOs should be aware of these changes and therefore publicising the change is unnecessary. ComReg believes that this is an equitable approach and ensures that end-users immediately benefit from known future reductions to input costs. This would require retrospective monitoring to ensure that the cost reductions did, in fact, occur (which ComReg considers addresses the concern raised by Vodafone).
- 5.43 In the case of bundles sold / offered inside the LEA, the LRIC of retail calls is considered in place of the ATC cost standard (for retail calls only). This is estimated from Eircom's accounts as Total Cost of Calls less common overheads and common fixed costs (NOTE: the LRIC is used as the cost standard for retail calls in the LEA only). See also paragraphs 4.59-4.62.
- 5.44 With respect to Eircom's submission that the LRIC cost standard should be applied to all retail costs, ComReg considers that it is not appropriate. As noted in paragraph 4.61, the calculus faced by any operator when deciding to enter or expand is to price at levels that include appropriate amounts of variable, fixed and common costs — consequently the LRIC cost standard for all retail costs is not appropriate as operators have yet not achieved the same scale or scope that would justify such an approach.

Mailbox costs:

- 5.45 ComReg considers that, as applicable, it is appropriate to include the cost associated with the mailbox service. It is not yet clear to ComReg whether OAOs can replicate the relevant ancillary services available with the Eircom WLR product, however as technology evolves this will be kept under review and where there is evidence that OAOs can replicate these voice services to a sufficient scale, ComReg may revise the cost stack to include the Modern Equivalent costs of the new technology.
- 5.46 Where the bundle includes free mailbox, the wholesale monthly price of the mailbox as per the regulated retail minus price control as published in Eircom's Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer.
- 5.47 Consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control will also be considered here. As noted in paragraph 5.38, ComReg intends to consult on the retail minus price control in 2013.

5.4.2 Cost Standard

- 5.48 ComReg considers that ATC is the most appropriate ex-ante cost basis to adopt as it enables a potential entrant to recover all its efficiently incurred costs.
- 5.49 ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. For example, an operator will consider the current and future potential competitive environment (including price) when formulating its business plan in the context of deciding to enter or expand in the market. ComReg considers that this is the most appropriate way to promote competition under regulation.
- 5.50 With respect to Eircom's view that sunk costs should not be included, ComReg considers that as long as sunk costs are necessary for entry it would not be appropriate to exclude them when considering the medium to long term evolution of the market.

5.4.3 WNI

- 5.51 The underlying methodology and reasoning for the WNI is discussed in paragraphs 4.63-4.75.

- 5.52 ComReg considers that it is appropriate for the weighted average wholesale input formula to be updated — such that it will take account of potential changes in wholesale inputs used by OAOs. For bundles sold / offered within the LEA, to recognise the increased investment of OAOs in LLU and NGA, it is proposed that the NRT would be set with reference to the prices of network input cost weighted for the relevant usage of each input by OAOs in the area (i.e., the WNI).
- 5.53 As set out in paragraph 4.64, in order to ensure replicability of Eircom bundles, ComReg considers that two WNIs will be computed for the NRT for the purposes of LEA bundles. The first WNI will be based on legacy wholesale access inputs and that WNI will be used in both the bundle-by-bundle assessment of individual legacy bundles. The second WNI will be computed based on NGA wholesale access inputs and that WNI will be used in the bundle-by-bundle assessment of individual NGA bundles. At the portfolio level, the WNI will be based on the weighted average of all bundles sold / offered in the LEA.
- 5.54 The appropriate margin squeeze test for standalone VUA is subject to a separate Decision (see ComReg D03/13). ComReg is cognisant that the SB-WLR-VUA cost stack may need to be adjusted for costs that are counted twice within the SB-WLR and VUA cost stack (e.g., faults, migration charges etc.).
- 5.55 For the avoidance of doubt, the respective WNIs for bundles sold / offered within the LEA is an input to the NRT for the LEA only and is not a change to any published price.
- 5.56 The wholesale input for WBA in LEA exchanges will be based on the WBA prices on offer. However, in the case of LLU services, Line Share and SABB, the WBA prices will be based on the underlying financial floors model for WBA (ComReg D06/12).¹¹² Similarly, for the appropriate NGA costs stacks for Standalone VUA and POTS based VUA the wholesale inputs will be based on the underlying floors for WBA. In all cases the underlying traffic speeds will need to be continuously monitored and updated as appropriate to ensure their reasonableness and that the underlying traffic is reflective of the costs faced by a SEO.
- 5.57 Outside of the LEA, the NRT is based on the wholesale prices faced by an OAO to replicate the SMP's bundle — and is based in the assumption that all OAOs use WLR and WBA exclusively.

¹¹² See paragraph 4.72.

5.58 In respect of the wholesale input for WBA, in particular the underlying usage charge in the bundle-by-bundle assessment both inside and outside the LEA, Eircom currently is unable to measure or apportion with a reasonable degree of comfort the wholesale bandwidth at peak hour for different individual retail bundles. As such, the usage charge is only quantifiable on an aggregate / portfolio basis. While this is not ideal, similar to OAOs with an efficient profile mix of broadband peak hour usage the overall profitability of bundles is typically determined in aggregate. ComReg will continue to keep the appropriateness of this current remedial measure under review. In particular, given the potential draw-backs of this approach on a bundle-by-bundle assessment basis, Eircom will be required as part of its notification procedure to provide ComReg information and business case forecasts on whether consumers on the individual bundles will on aggregate impact the wholesale bandwidth at peak hour — such that the usage charge at the aggregate level will require to be updated. As a sense check, ComReg as part of its individual bundle assessment will apply the aggregate usage charge to individual bundles — while the margin (as a result of this calculation) on an individual bundle basis if negative will not cause a bundle to fail the NRT, it may indicate to ComReg which bundles may require further analysis on an ongoing basis.

- 5.59 ComReg maintains the view that the WNI should generally be downward adjusting only. As set out in ComReg 11/72, ComReg considers that there may be perverse incentives for OAOs to migrate customers such that the flexibility of the NRT provided by the WNI does not occur. Eircom's submission notes a similar concern: *"the incentives of OAOs to migrate customers could be affected by the effect that this will have on regulation"*.¹¹³ This is of particular concern should OAOs migrate customers from LLU to WLR / Line Share, which would otherwise cause the WNI to increase in the NRT. ComReg considers that this anomaly would not be beneficial for end-users i.e., to potentially have fluctuating retail prices — which may also be difficult to implement due to fixed contract terms or for consistent Eircom Retail marketing campaigns. Furthermore, OAOs' incentives to invest in their own infrastructure could be diluted. Consequently, ComReg maintains the view that where actual movements would have caused the WNI to increase, the WNI for the forthcoming period will be equal to that of the previous period. As set out in ComReg 12/63, if the derived WNI should have been greater than the previous applicable WNI for three consecutive periods, ComReg will review its causation and if appropriate may revise the downward only adjustments for the WNI in LEA exchanges. However, if the cause of an increase in the WNI were caused by Eircom itself by means of poor wholesale provision there could be a case to allow an upwards adjustment — ComReg would decide at the time what precisely to do in these circumstances.
- 5.60 A number of respondents have raised concerns stating that in their view this approach (i.e., the downward adjusting only approach) would allow Eircom Retail a lower price in the NRT than actually incurred by OAOs in the LEA (due to the wholesale inputs they are actually using). As noted in paragraph 4.64, the WNI is intended to reflect the wholesale input cost inputs faced by an OAO in the LEA. Where it is evident that OAOs' behaviour is consistent with that of an 'efficient' hypothetical operator (i.e., that moving to WLR / Line Share is consistent with the commercial decisions of an efficient operator) and where the actual usage by OAOs would persistently have caused the WNI to increase, the onus is on Eircom to respect its non-discrimination and equivalence obligations (i.e., Eircom would be required to increase the appropriate retail prices or lower the corresponding wholesale prices). ComReg will continue to review the causality of movements within the WNI and from time-to-time may seek input from OAOs regarding their actual wholesale input usage in the LEA and their underlying commercial reasoning for such usage.

¹¹³ Eircom, "Response on behalf of eircom Ltd to ComReg Consultation 12/63: Price Regulation of Bundled Offers", 29 August 2012, page 31.

- 5.61 Similarly, ComReg considers that in a scenario where as a result of OAOs acting as resellers losing significant customers in the LEA that would ordinarily cause the WNI to significantly decrease it may not be appropriate to allow such an adjustment to the WNI. As a simplified example, say in the LEA the 'efficient' hypothetical operator is determined to be based on a 50:50 weighting on SB-WLR & BMB (assume a cost stack for illustrative purposes of €20) and LLU+ (assume a cost stack for illustrative purposes of €10). The resulting WNI in this example would be €15 (i.e., $50\% \times 20 + 50\% \times 10$). Now assume that OAOs acting as resellers lose all their customers in the LEA, this would result in the weighting being skewed totally against LLU+ (i.e., SB-WLR and BMB is no longer purchased as a wholesale input due to market exit). In this scenario, the WNI would decrease to €10 (i.e., 100% LLU+). As such, ComReg considers that in determining an appropriate WNI that should it indicate that OAOs are being squeezed (for example if their retail market share on Eircom's platform is declining or has reached an excessively low level) then ComReg will review the appropriateness of the further specification of the pricing control as contained in this Decision.
- 5.62 With respect to Eircom's proposal of a glide path towards a 'target' average wholesale input, ComReg considers that such an approach would not be appropriate at this time. In particular, given the imminent arrival of NGA ComReg considers that it would be too early to determine what an appropriate future 'target' mix would be. Consequently, in order to provide regulatory certainty ComReg considers it appropriate to determine the WNI with reference to the prices of network input cost weighted for the relevant usage of each input by OAOs in the area (as discussed in paragraphs 4.63-4.74).
- 5.63 With respect to how the applicable weighted average of all the wholesale inputs to determine the WNI will be calculated, ComReg considers that it is important for this information to be timely. Therefore, for ComReg to await the publication of the quarterly reports would result in a significant time lag for prices to be introduced to the market which reflect OAOs actual usage. Similarly, ComReg considers that this could be an issue for known migrations in the forthcoming period, which if not appropriately taken into account would result in the WNI (and resulting prices) lagging behind actual OAOs usage in a particular month. ComReg notes a number of interested parties agreed with the proposal in ComReg 12/63 — that Eircom Wholesale would be a good source of that data. As noted above, the actual use by OAOs of the various wholesale inputs will be used as a guide to determine the various applicable weightings. As such, ComReg considers that Eircom Wholesale would be ideally positioned to give timely data to ComReg on OAOs' wholesale input usage.

- 5.64 Furthermore, in exceptional cases ComReg may take into account known future bulk migrations for the forthcoming period where Eircom Wholesale can demonstrate to ComReg's satisfaction that those migrations will occur in the forthcoming period — the actual usage of the various wholesale inputs can reflect these changes. This situation is only likely to arise where there is a significant migration from Line Share to Full Unbundling or to NGA services and where those migrations can take place seamlessly for the OAO concerned. ComReg may bilaterally discuss certain migrations with OAOs to determine their reasonableness and ensure the timing of any orders is correct. Other one-off migrations or business as usual migrations will be taken into account immediately after the quarter in which they occurred and where Eircom Wholesale confirms that the successful migrations actually occurred. In addition, ComReg will continue to monitor actual migrations and in circumstances where future bulk migrations persistently do not actually occur as envisaged, ComReg will review the appropriateness of allowing known future bulk migrations to be permitted in the WNI calculation.
- 5.65 It will be essential that any detailed information available to Eircom Wholesale with regard to the number of OAO customers on the various platforms is not made available to Eircom Retail prior to such information being available to the market generally — which is normally via the ComReg quarterly report. However, the outcome of this quarterly update for the OAO connections/migration and cessation information from Eircom Wholesale to ComReg may give rise to a change to the WNI and Eircom Retail will therefore be notified only in respect of the WNI monetary value (and not the underlying information) for the purposes of complying with the NRT.
- 5.66 ComReg does not believe it is appropriate or necessary to publish the WNI monetary value as this could lead to unintended pricing behaviour from competitors in response to a change to the WNI.

5.4.4 Unregulated services

- 5.67 For unregulated services in a bundle (irrespective of whether the bundle is sold / offered within or outside the LEA), ComReg maintains the view that such services must cover their own LRIC.

- 5.68 As noted in ComReg 11/72a, the application of a cost standard could reflect the competitiveness of the service. As such, ComReg considered in ComReg 11/72 that a lighter regulatory stance would be more appropriate when considering unregulated services. ComReg considers that as these unregulated services represent markets where competition has evolved sufficiently that an approach analogous to competition law is warranted. Consequently, ComReg considers that LRIC is the most appropriate cost standard: *“since it is the lowest price level above which competition would be sustainable”*.¹¹⁴
- 5.69 Similarly, in the case of mobile services (an unregulated service at the retail level), ComReg has revised its preliminary view. Instead of requiring these services to cover their own LRAIC+ (as proposed in ComReg 11/72). ComReg has now decided that to require that such services cover their own LRIC. ComReg considers that the LRIC cost standard is appropriate given that Eircom’s position may not be strong with respect to new services such as mobile voice, where Eircom’s market share of mobile subscribers is less than 20%. As stated in ComReg 11/72a:

“LRIC is the change in total costs resulting from the production of an increment in the quantity of output, which can be the whole output of the product in question or just the incremental output associated with the conduct under investigation. LRIC includes all product-specific fixed costs, even if those costs were sunk before the period of exclusionary conduct. Although pricing below LRIC might be due to exclusionary conduct, it might also be economically rational. This is because the firm could still be covering variable costs and sunk fixed costs with a positive cash flow. LRIC serves in most cases as a price floor, above which concerns about exclusionary below-cost pricing are unlikely to materialise”.

Where the only mobile service offered in a bundle is voice, the LRIC cost standard is based on the assumption that the increment in the mobile service is voice only, assuming the network was built for voice, i.e., that the mobile bundle includes voice only and no data access. Where additional mobile services are offered within the bundle that includes mobile voice, ComReg will consider the relevant increment of the additional service when applying the LRIC cost standard.

¹¹⁴ Oxera Report: Conceptual framework for the assessment of Eircom’s bundles dated 30 September 2011 (ComReg Document No. 11/72a, 10 October 2011).

- 5.70 ComReg considers that Eircom's proposal to use AAC at the product level is not appropriate for unregulated services on an ongoing basis. As noted in ComReg 11/72a, AAC includes all per-unit costs (variable costs and product-specific fixed costs) that could have been avoided if the firm had not produced a discrete amount of additional output — i.e., the amount avoided by not participating in a specific activity. In the context of predatory pricing, unlike LRIC, AAC omits all fixed costs that were already sunk before the time of infringement. Furthermore, the European Commission's guidance on Article 102 proposes that prices below AAC indicate that the dominant company is sacrificing profits in the short term and that an equally efficient competitor cannot serve the targeted customers without incurring a loss. As such, the AAC establishes the price floor for the provision of a good or service to a "*targeted group of customers for a limited period of time*".¹¹⁵ Consequently, ComReg considers that the use of AAC as the applicable default cost standard in the NRT for unregulated services could result in uncompetitive outcomes.
- 5.71 However, ComReg considers that, on a case-by-case basis, it could consider the use of AAC for unregulated products and services where it is clear that competition in the market generally would not be harmed and that this measure would not create material distortions to competition through anti-competitive practices stemming from SMP products and services. However, for the reasons outlined in paragraph 5.70, ComReg's Decision is that the use of this cost standard would only occur in exceptional circumstances.
- 5.72 For the avoidance of doubt, in all cases, the onus would be on Eircom to ensure that it is compliant with the required cost standard based on information available to it. Currently, ComReg does not have any cost models for these unregulated products and services. However, ComReg would be able to request from Eircom Additional Financial Statements ('**AFS**') where required to cover unregulated products and services. ComReg currently receives separated accounts for Meteor and E-Mobile respectively. In addition, in applying the NRT, ComReg will have due regard to various benchmark information available to it.¹¹⁶ Where necessary ComReg will use available information to build cost models to ensure the NRT remains robust. For example, it is likely that ComReg in the near future will have a cost model for an efficient mobile network in Ireland. Such a model may be useful for use in the NRT for mobile add-ons. Relevant costs for other services such as IPTV may also be possible to model.

¹¹⁵ Niels G., Jenkins H. Kavanagh J. (2011), 'Economics for competition lawyers', Oxford University Press, pp. 192-193.

¹¹⁶ For example, <http://www.opta.nl/nl/actueel/alle-publicaties/publicatie/?id=3180>.

5.4.5 Case-by-case assessment of a bundles reasonableness

- 5.73 Where a bundle does not pass the relevant test, ComReg considers it proportionate to undertake a case-by-case assessment of the bundle to determine the cause of the bundle failing the NRT. In undertaking this assessment, ComReg considers that it is appropriate to continue to consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling in order to determine whether the bundle complies with the obligation under ComReg D07/61 not to unreasonably bundle services.
- 5.74 ComReg does not agree with Magnet's view that the case-by-case assessment is merely circumventing the initial test. While failing the NRT provides a useful measure to highlight which bundles require further investigation. ComReg considers that it is more proportionate to consider the causality of that bundle failing the NRT and whether there are additional considerations which need to be taken into account before a bundle is considered not to comply with Eircom's obligation not to unreasonably bundle.
- 5.75 To clarify, ComReg has the power to intervene in all cases, but might not if the impact is immaterial. ComReg believes that it might be excessive to prohibit all offers in all circumstances and that some flexibility is needed — and it is in this context the case-by-case assessment is carried out.

Retail efficiencies

- 5.76 With respect Eircom's submission that retail costs should be considered on an EEO basis, as noted in paragraph 1.6, ComReg intends to consult on the relevant cost standard for retail costs in the near future. Until such time and subject to the outcome of that consultation, the SEO cost standard will continue to apply to determine the retail cost stack used in the NRT.
- 5.77 It is important to note that the underlying discounted cash flow ('**DCF**') of ComReg D01/06 uses Eircom costs (as the basis for establishing those of an SEO) which are then projected (and discounted) over a five year period. The DCF is updated annually and therefore over time reflects those costs experienced in the market. However, at a particular point in time (i.e., in between updates) the DCF may not reflect certain retail efficiencies. Consequently, in circumstances where a bundle fails the NRT, ComReg considers that as a proportionate measure it is appropriate to consider any retail efficiencies that may have occurred — as the failing bundle may in effect pass once the model is updated — to take account of the lower costs experienced in the market (e.g., the reduction of billing costs due to electronic mailing or change in bill cycles).

- 5.78 As noted previously, with regard to retail broadband services sold / offered using NGA related services, ComReg's D03/13, takes this into account by using a combination of SEO and EEO costs for relevant retail costs.
- 5.79 ComReg maintains its view that it is appropriate that retail efficiencies be considered in determining whether a bundle, which fails the NRT, once supported by robust evidence, to determine if it is nonetheless compliant with Eircom's obligation not to unreasonably bundle. ComReg considers that it would not be appropriate simply to rely on a view that certain costs have decreased due to efficiencies without adequate reasoning (and supporting evidence) provided to ComReg to justify that certain efficiencies have been achieved.

Increase customer lifetimes

- 5.80 ComReg notes concerns expressed by Vodafone and Magnet and will continue to monitor the average customer lifetime — in particular, whether a different average customer lifetime is appropriate in the LEA. As appropriate, ComReg may seek information from OAOs and Eircom from time-to-time to determine whether the average customer lifetime used in the NRT remains reasonable. At this time, ComReg considers that the average customer lifetime of 42 months used to date in the NRT remains appropriate.
- 5.81 In circumstances where a bundle fails the NRT ComReg will consider, amongst others, once supported by robust evidence, whether as a result of increased customer lifetimes such a bundle is nonetheless compliant with Eircom's obligation not to unreasonably bundle.

Competitive assessment

- 5.82 ComReg maintains the view that it is proportionate to undertake a competitive assessment before a bundle is found to be in breach of the obligation not to unreasonably bundle.
- 5.83 As part of that competitive assessment, ComReg will consider the number of customers on the bundle and the importance of that bundle to the market. In addition, ComReg will consider all available information to hand to consider the impact of the below cost selling of RFNA in a bundle on competing operators and the ability of entrants to enter / remain in the market(s) and promote sustainable competition in the medium to long term.

- 5.84 With respect to Eircom's view that ComReg should consider a number of factors in undertaking its competitive assessment such as whether heavy-users moved all at once, whether billing costs are being incurred twice for a transition period on migration of a customer etc., ComReg does not consider it appropriate to pre-determine a position in relation to these scenarios and considers it more proportionate to assess such bundles on a case-by-case basis and determine a position after taking into account in full all determining factors.

5.4.6 Other possible options for revisions to the NRT

- 5.85 ComReg considered a number of potential scenarios and consulted on whether the NRT needs to be revised in those circumstances. ComReg's Decision in respect of each scenario is set out in turn below:

When the bundle is in response to a competitor's bundle

- 5.86 With respect to Eircom's view that the NRT should be adjusted in such circumstances, as noted in ComReg 11/72, ComReg believes that if entrants knew that Eircom could respond to entry by dropping prices below efficient cost, this would increase the risk that the entrant would not be able to recover its fixed costs, and might therefore preclude or deter efficient entry. Furthermore, as noted in paragraph 5.50, ComReg does not consider it appropriate to exclude sunk costs from the NRT.
- 5.87 The NRT has a clear underlying logic: if Eircom's pricing does not cover its ATC (at the portfolio level in the LEA and at the bundle-by-bundle level outside the LEA) it is reasonable to assume, subject to the outcome of the complementary competitive assessment, that an efficient rival would also not be covering its full costs — since Eircom has economies of scale and scope within the fixed sector that others are unlikely to be able to match. Other operators' ability to compete with Eircom would therefore be constrained, their incentives to enter would be weakened, and their ability to establish themselves as sustainable retail competitors in the longer term could also be hampered.
- 5.88 Consequently, ComReg considers that the NRT should not change when a bundle is claimed to be a response to a competitor's bundle. However, as has been the case to date, the complementary competitive assessment would investigate the competitive context of the bundle.

A different test for when a bundle is found unreasonable post launch

- 5.89 With respect to Eircom's view that a different test should apply when a bundle is found to be unreasonable post launch, in particular that sunk costs should be disregarded, as noted in paragraph 5.50, ComReg does not consider it appropriate to exclude sunk costs from the NRT.

- 5.90 ComReg maintains its view that a different test should not apply post-launch if a bundle is found to be unreasonable. ComReg considers it more proportionate to undertake a case-by-case assessment of the bundle to determine the cause of the bundle failing the NRT (see paragraphs 5.73-5.84). As such, ComReg considers that a competitive assessment is more reasonable than a revised NRT (see also paragraph 5.86). If it is believed following this competitive assessment that no competitive harm will come from allowing Eircom to continue to offer the bundle, e.g., if consumer demand for the bundled offer is particularly weak relative to the standalone components, ComReg would likely not find the bundle to be unreasonable even though it is below cost.
- 5.91 With respect to Magnet's view that bundles should be monitored quarterly, ComReg notes that where bundles are cleared for launch, Eircom is typically required to provide ComReg a monthly progress report on those bundles — in particular regarding up-take and resulting margins — so that ComReg can continue to monitor the bundles' reasonableness.¹¹⁷

The ability to 'bank' / carry forward past margins to use as future discounts

- 5.92 ComReg does not consider it appropriate that Eircom be allowed to carry forward past margins on bundles, such that future bundles could avail of a discount using those 'banked' margins.
- 5.93 As noted in ComReg 11/72, ComReg considers that to allow Eircom to do so could distort competition in the market. Eircom could build a defensive bank of available margins for a bundle which Eircom could then use when a competing operator tried to make a competing offer to that bundle. ComReg considers that the bundle should be reasonable at all times.
- 5.94 ComReg proposes that the assessment of bundles should be on a case-by-case basis and consider the likely future impact; consequently, taking into account past performance and profitability may not be a useful indicator of likely anti-competitive effects. ComReg notes that its approach is consistent with ex-post competition law where previously "banked" margins would not be considered as part of an assessment for a given specific financial period.

Promotions and promotional discounts

- 5.95 ComReg believes that a bundle should be reasonable at all times. As noted in ComReg 11/72, ComReg believes that it would not make sense for promotions not to be subject to full regulatory controls. ComReg believes just because a bundle is offered for a promotional period only does not automatically demonstrate that there is no potential harm to efficient competitors.

¹¹⁷ See also paragraphs 5.73-5.75 and paragraph 6.12.

- 5.96 ComReg considers that the obligation not to unreasonably bundle services and all its facets still apply even if a bundle is only planned to be offered for a limited promotional period. ComReg notes that those interested parties that provided a response to this issue agreed with ComReg's approach (see paragraph 5.30).
- 5.97 ComReg currently regards a promotional discount to be reasonable if the cost of the promotional discount is covered over the average customer lifetime, which ComReg currently estimates to be 42 months based on the modelling of the SEO in the current Decision D01/06 WBA price control. With respect to Magnet's view that the average customer lifetime may be shorter in the LEA, as noted in paragraph 5.80, ComReg will continue to monitor the appropriateness of the average customer lifetime used in the NRT. However, ComReg exercises caution in the use of average customer lifetimes where it believes the 42 month assumption of D01/06 may not be appropriate for the particular circumstance of the bundle under review.

Discretionary promotions / opt-ins

- 5.98 In relation to a bundle that allows new customers to avail of a discretionary / opt-in offer / discount, ComReg has revised its preliminary view that the cost of this opt-in used in the NRT should be as if all customers on the bundle availed of it. ComReg now considers that it is more proportionate to take into account the expected take-up of such bundles in the NRT.
- 5.99 ComReg now considers that it may be more proportionate and reflective of the underlying replicability of the bundle — where it is anticipated that only a small percentage of new customers would actually avail of the offer — that the NRT reflect the proportionate cost of that opt-in promotion. ComReg considers that this approach is consistent with that of a commercial operator, where a cost assessment of discretionary promotions may be offered to end-users which may have various degrees of take-up and therefore may not impact the overall profitability of that type of bundle.
- 5.100 However, it should be noted that the onus is on Eircom to ensure that a bundle remains reasonable at all times and therefore Eircom should be mindful of its requirement not to unreasonably bundle where the actual opt-in of customers is higher than anticipated (i.e., that the bundle after the actual cost of promotion is taken into account remains positive).

5.5 ComReg Decision

5.101 For bundles sold / offered within the Larger Exchange Area, in order to pass the Net Revenue Test:

1. as regards every Portfolio, the Total Monthly LEA Portfolio Revenue (Reference R5) shall be equal to or exceed the Total Monthly LEA Portfolio Cost (Reference C9);
2. as regards each individual Bundle, the Total Monthly LEA Bundle Revenue (Reference R4) shall be equal to or exceed the Total Monthly Adjusted LEA Bundle Cost (Reference C8);
3. when a given Bundle includes unregulated retail services, compliance with the Net Revenue Test (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled “Unregulated Retail Services Assessment”.

Note: The component references R4, R5, C8 and C9 including their computation is detail detailed in Table 1 below.

5.102 For bundles sold / offered outside of the Larger Exchange Area, in order to pass the Net Revenue Test:

1. as regards each individual Bundle, the Total Monthly non-LEA Bundle Revenue (Reference R(iv)) shall be equal to or exceed the Total Monthly non-LEA Bundle Cost (C(vi));

when a given Bundle includes unregulated retail services, compliance with the Net Revenue Test (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled “Unregulated Retail Services Assessment”.

Note: The component references R(iv), C(vi), including their computation is detail detailed in Table 2 below.

Table 1: Bundles sold / offered within the LEA

REF	ITEM (all ex VAT)	Description
	Revenue:	
R1	Monthly Bundle Price	This is the headline monthly price of a bundle.

R2	Monthly Out of Bundle Calls Revenue	<p>This is a weighted average of the total calls revenue earned on average outside the bundle per month based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre-launch assessment).</p> <p>This is calculated for each component call that is charged separately outside the bundle by: (i) taking the total number of calls for that component that are outside by bundle allowance and multiplying that by the call set up fee; and (ii) taking the total minutes for that component that are outside bundle allowance and multiplying that by the retail price per minute. This total revenue for the component outside bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component used outside of bundle allowance.</p>
R3	Monthly Out of Bundle Other Revenue	This is the average of any other monthly out of bundle revenue.
R4	Total Monthly LEA Bundle Revenue	This is the sum of the Monthly Bundle Price (R1) plus Monthly Out of Bundle Calls Revenue (R2) plus Monthly Out of Bundle Other Revenue (R3).
R5	Total Monthly LEA Portfolio Revenue	This is a weighted average of Total Monthly LEA Bundle Revenue (R4) based on the actual volumes of each Bundle sold / offered in the Larger Exchange Area (in the case of post-launch assessment) or the forecast volumes for each Bundle sold / offered in the Larger Exchange Area (in the case of pre-launch assessment)

	Costs:	
C1	Total Wholesale Access Input Cost	<p>For legacy services this is the applicable monthly prices plus all relevant wholesale costs of: ULMP; WLR/LS; WLR/Bitstream; and SABB in effect in the Larger Exchange Area weighted by the use of those wholesale inputs by a hypothetical efficient OAO in the Larger Exchange Area (which will be guided by the actual use of OAOs of those wholesale inputs in the LEA).</p> <p>For NGA services this is the applicable monthly prices plus all relevant wholesale costs of: POTS based VUA; NGA Bitstream+; Standalone VUA; and Standalone VUA + Voice network input cost in effect in the Larger Exchange Area. Initially, the weighting of these NGA inputs will be fixed and based on the assumption that those customers currently served via either LLU or Line Share will all migrate to their current nearest equivalent NGA wholesale product. ComReg will continue to keep this under review with a view to moving to a weighting based on the actual usage of NGA inputs by OAOs (per the legacy WNI calculation).</p> <p>In this context “all relevant wholesale costs” means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life¹¹⁸ plus b) other unavoidable non-retail costs which are necessary to provide a retail service¹¹⁹. All costs are converted to a monthly average.</p>
C2	Retail Costs Associated with Retail Line Rental	These are the monthly operating costs as derived from the SB-WLR regulated retail minus price control.

¹¹⁸ For example, connection fees or co-location charges.

¹¹⁹ For example, the cost of a line card, amortised over the relevant customer life.

C3	Mailbox cost	<p>Where the bundle packages include free mailbox, the wholesale monthly price of the mailbox as per the regulated retail minus price control as published in Eircom's Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer.</p> <p>However, consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control will also be considered here.</p>
C4	Total Cost of Calls	<p>These are the monthly weighted average of the wholesale and retail costs as calculated for each retail call including all common cost.</p> <p>Costs are based on wholesale prices and Eircom's retail costs according to its latest regulatory accounts to derive an average total cost and will reflect known future changes in those costs where these can be adequately verified.</p>
C5	Total Adjusted Cost of Calls	<p>This is estimated from Eircom's accounts as Total Cost of Calls less common costs less fixed indirect costs (i.e., the LRIC of retail calls).</p>
C6	Retail Costs Associated with Retail Broadband	<p>These are the monthly operating costs as derived from the WBA regulated retail minus price control (ComReg D06/12), or ComReg D03/13 as appropriate.</p>
C7	Total LEA Bundle Cost	<p>This is the Total Wholesale Access Input Cost (C1) plus Retail Costs Associated with Retail Line Rental (C2) plus Retail Costs Associated with Retail Broadband (C6) plus Total Cost of Calls (C4) plus the LRIC of unregulated retail services plus Mailbox Cost (C3) where applicable</p>
C8	Total Monthly LEA Adjusted Bundle Cost	<p>This is the Total Wholesale Access Input Cost (C1) plus Retail Costs Associated with Retail Line Rental (C2) plus Retail Costs Associated with Retail Broadband (C6) plus Total Adjusted Cost of Calls (C5) plus the LRIC of unregulated retail services plus Mailbox Cost (C3) where applicable</p>

C9	Total Monthly LEA Portfolio Cost	This is the weighted average by volume of Total LEA Bundle Cost (C7) based on actual monthly volume for each Bundle in the Larger Exchange Area (in the case of post-launch assessment) or the forecast monthly volume for each Bundle in the Larger Exchange Area (in the case of pre-launch assessment).
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Unregulated Retail Services Assessment

This applies to those retail services that are unregulated and do not rely on retail fixed narrowband access.

The incremental revenues over the average customer lifetime (which can be different for different unregulated products) of any unregulated product in a Bundle must cover its own long-run incremental costs ('LRIC') including applicable avoidable retail costs.

There must be no cross-subsidisation between regulated services and unregulated services.

On a case-by-case basis where the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider allowing that unregulated service only cover its own avoidable costs ('AAC') instead of its LRIC.

Unreasonable Bundle Assessment/Complementary Competitive Assessment

If a Bundle does not pass the Net Revenue Test, as outlined in Section 4.3 of the Direction, ComReg will carry out a general assessment of the reasonableness of the Bundle and may conclude that, notwithstanding the fact that the Bundle fails the Net Revenue Test, the offer for sale by Eircom of that Bundle does not constitute a breach of the obligation under ComReg Decision D07/61 not to unreasonably bundle services.

For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle. ComReg will also consider the impact of the Bundle on competition, including by reference to the promotion of sustainable competition in the medium to long term and the likelihood of any potential foreclosure and associated consumer harm.

Table 2: Bundles sold / offered outside the LEA

REF	ITEM (all ex VAT)	Description
	Revenue:	
R(i)	Monthly Bundle Price	This is the headline monthly price of a bundle.
R(ii)	Monthly Out of Bundle Calls Revenue	<p>This is a weighted average of the total calls revenue earned on average outside the bundle per month based on actual revenues and volumes (post-launch assessment) or forecast revenues and volumes (pre-launch assessment).</p> <p>This is calculated for each component call that is charged separately outside the bundle by: (i) taking the total number of calls for that component that are outside by bundle allowance and multiplying that by the call set up fee; and (ii) taking the total minutes for that component that are outside bundle allowance and multiplying that by the retail price per minute. This total revenue for the component outside bundle allowance is then divided by the total number of customers to get an average revenue per customer for that component used outside of bundle allowance.</p>
R(iii)	Monthly Out of Bundle Other Revenue	This is the average of any other monthly out of bundle revenue.
R(iv)	Total Monthly non-LEA Bundle Revenue	This is the sum of the Monthly Bundle Price (R(i)) plus Monthly Out of Bundle Calls Revenue (R(ii)) plus Monthly Out of Bundle Other Revenue (R(iii)).

	Costs:	
C(i)	Total Wholesale Access Input Cost	<p>This is the sum of the monthly prices of SB-WLR and WBA plus the monthly average of all relevant wholesale costs levied by Eircom.</p> <p>In this context “all relevant wholesale costs” means a) ancillary charges levied by Eircom in respect of a particular service amortised, where appropriate, over the relevant assumed customer life¹²⁰ plus b) other unavoidable non-retail costs which are necessary to provide a retail service¹²¹. All costs are converted to a monthly average.</p>
C(ii)	Retail Costs Associated with Retail Line Rental	These are the monthly operating costs as derived from the SB-WLR regulated retail minus price control.
C(iii)	Mailbox cost	Where the bundle packages include free mailbox, the wholesale monthly price of the mailbox as per the regulated retail minus price control as published in Eircom’s Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer. However, consideration will be taken of the applicable average take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control will also be considered here.
C(iv)	Total Cost of Calls	<p>These are the monthly weighted average of the wholesale and retail costs as calculated for each retail call including all common cost.</p> <p>Costs are based on wholesale prices and Eircom’s retail costs according to its latest regulatory accounts to derive an average total cost and will reflect known future changes in those costs where these can be adequately verified.</p>
C(v)	Retail Costs Associated	These are the monthly operating costs as derived from the WBA regulated retail minus price control (ComReg

¹²⁰ For example, connection fees or co-location charges

¹²¹ For example, the cost of a line card, amortised over the relevant customer life

	with Retail Broadband	D06/12).
C(vi)	Total non- LEA Bundle Cost	This is the Total Wholesale Access Input Cost (C(i)) plus Retail Costs Associated with Retail Line Rental (C(ii)) plus Retail Costs Associated with Retail Broadband (C(v)) plus Total Cost of Calls (C(iv)) plus the LRIC of unregulated retail services plus Mailbox Cost (C(iii)) where applicable.

Unregulated Retail Services Assessment

This applies to those retail services that are unregulated and do not rely on retail fixed narrowband access.

The incremental revenues over the average customer lifetime (which can be different for different unregulated products) of any unregulated product in a Bundle must cover its own long-run incremental costs ('LRIC') including applicable avoidable retail costs.

There must be no cross-subsidisation between regulated services and unregulated services.

On a case-by-case basis where the bundling of the unregulated service will not have a significant impact on competition, ComReg will consider allowing that unregulated service only cover its own avoidable costs ('AAC') instead of its LRIC.

Unreasonable Bundle Assessment/Complementary Competitive Assessment

If a Bundle does not pass the Net Revenue Test, as outlined in Section 4.3 of the Direction, ComReg will carry out a general assessment of the reasonableness of the Bundle and may conclude that, notwithstanding the fact that the Bundle fails the Net Revenue Test, the offer for sale by Eircom of that Bundle does not constitute a breach of the obligation under ComReg Decision D07/61 not to unreasonably bundle services.

For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle. ComReg will also consider the impact of the Bundle on competition, including by reference to the promotion of sustainable competition in the medium to long term and the likelihood of any potential foreclosure and associated consumer harm.

Chapter 6

6 Notification, pre-clearance, modification / withdrawal of retail bundles that include RFNA

6.1 Overview

- 6.1 Under the regime in force prior to the adoption of this Decision, which was based in part on a settlement agreement¹²² between Eircom and ComReg, Eircom was not permitted to launch bundles which included RFNA without ComReg's prior approval — which could not be unreasonably withheld or delayed by ComReg.
- 6.2 Furthermore, also based on the settlement agreement, in the event that two consecutive data sets showed that a bundle was not compliant with the NRT applied to date, Eircom has been required to modify / withdraw such bundles within two months.
- 6.3 ComReg 11/72 sought the views of interested parties regarding the appropriate time period for the pre-notification of a proposed new or revised Eircom bundle and the appropriate time period for the withdrawal / modification of an existing bundle in the market which is found by ComReg to be non-compliant with the obligation not to unreasonably bundle.

6.2 ComReg's Preliminary View from the Consultation Documents

- 6.4 ComReg was of the preliminary view that Eircom must notify and obtain prior approval for the launch of new or revised bundles that include RFNA at least five working days before launch.
- 6.5 ComReg was of the preliminary view that Eircom must withdraw / modify any existing bundle containing RFNA that is found to be non-compliant within twelve weeks. Within that period, it was proposed that Eircom would be prohibited from adding any customers to the relevant bundle unless and until such bundle was modified to ComReg's satisfaction.

¹²² See ComReg Information Notice 09/79, 14 October 2009, http://www.comreg.ie/_fileupload/publications/ComReg0979.pdf

6.3 Views of Respondents

- 6.6 As regards proposed new or revised Eircom bundles containing RFNA, ALTO, BT, Vodafone and Magnet agree with the proposed pre-notification and pre-clearance requirements. ALTO notes that: “*pre-notification and pre-clearance is essential*”.¹²³ Eircom “*strongly objects to the pre-notification and pre-clearance requirements proposed by ComReg*” and contends that Decision D07/61 may not be used as a legal basis for imposing such requirements.¹²⁴ With respect to the pre-notification process, Eircom considers that it is an unfair and disproportionate remedy which is not suited to existing market conditions. However, Eircom notes that, without prejudice to its fundamental objection to the proposed pre-notification and pre-approval requirements proposed, ComReg should request any additional information it considers relevant as soon as possible so that the five day approval period is not unduly jeopardised. In addition, Eircom notes that ComReg should allow Eircom to move to a self-certification regime which would be subject to inspection by ComReg. Vodafone considers that if the unregulated products are to be included in the NRT at the LRIC cost standard that ComReg may require additional time for the pre-notification period.
- 6.7 As regards existing Eircom bundles containing RFNA which are already in the market, ALTO, BT and Magnet agree with the modification / withdrawal proposals set out in ComReg 11/72. In addition, both ALTO and BT suggest that the NRT should be conducted on a scheduled basis throughout the year to ensure ongoing compliance. Eircom strongly objects to the withdrawal / modification requirements. Eircom does not accept that ComReg has the powers to enforce compliance in the manner proposed. It contends that the process proposed by ComReg is: “*clearly ultra vires its powers and unenforceable*”, in particular because Eircom claims that the process “*circumvents the provisions of Regulation 31 of the Universal Service Regulations*”.¹²⁵ Vodafone considers that the withdrawal / modification period should remain at ten weeks.

¹²³ ALTO, “*Consultation and Draft Directions: Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, WPNIA & WBA - Ref: 11/72*”, 16 December 2011, page 13.

¹²⁴ Eircom, “*Response to ComReg Consultation and Draft Directions 11/72*”, 16 December 2011, page 36.

¹²⁵ Eircom, “*Response to ComReg Consultation and Draft Directions 11/72*”, 16 December 2011, page 38.

6.4 ComReg's Assessment of Responses and Final Position

- 6.8 In this Decision, ComReg has decided that pre-notification and pre-clearance requirements remain appropriate as regards new or revised bundles containing RFNA. ComReg does not accept Eircom's contention that ComReg Decision D07/61 may not be used as a legal basis for imposing such requirements. In ComReg's view, the imposition of these requirements is consistent with ComReg D07/61 and with ComReg's statutory powers, including those set out in the Universal Service Regulations. ComReg considers that the imposition of these requirements is a proportionate and appropriate means of ensuring compliance with the obligation not to unreasonably bundle services as set out in ComReg D07/61.
- 6.9 As noted in ComReg 11/72, ComReg believes that the requirement on Eircom to obtain pre-clearance from ComReg prior to launching any new or revised bundles containing RFNA is necessary in order to minimise the risk of non-compliant bundles entering the market. ComReg notes in this regard that certain October 2008 bundles were launched by Eircom despite concerns raised by ComReg pre-launch in relation to the assumptions made by Eircom in relation to free calls to Meteor. ComReg believes that the market was damaged as a result of Eircom launching the bundles in question and, in particular, as a result of the period of time it took to remedy the non-compliant bundles due to a legal challenge from Eircom. ComReg does not consider it appropriate that Eircom be allowed to self-certify and launch on the basis of same. ComReg does not believe that the pre-clearance regime provided for in the present Decision is onerous on Eircom. ComReg notes that the regime provided for in this Decision is very similar to the position that prevailed prior to the adoption of this Decision (i.e., the regime that resulted from the settlement agreement between ComReg and Eircom following High Court proceedings in 2009).

- 6.10 Consequently, ComReg has now decided that, prior to making a new or revised bundle that includes RFNA available for offer or sale, Eircom must furnish ComReg with a detailed written submission demonstrating the bundle's compliance with the obligation not to unreasonably bundle (including passing the NRT). The submission must make full and true disclosure of all material facts for the purpose of demonstrating compliance with the obligation not to unreasonably bundle. In the submission, all assumptions must be clearly set out together with the rationale and supporting evidence for such an assumption and the likely effect if an assumption is not met. The NRT workbook presented by Eircom in its submission must be capable of running scenarios for changed key assumptions and this must be kept up to date by Eircom. Any claims for retail efficiencies / increased customer lifetimes must be supported by robust evidence. Upon receipt of the submission, ComReg will review the submission and within five working days communicate to Eircom its decision whether to give or withhold approval for launch of the proposed new or revised bundle — such approval will not be unreasonably withheld by ComReg. Eircom will not be permitted to launch any new or revised bundle without having received such prior approval from ComReg. For the avoidance of doubt, it should be noted that the making available of a promotion or discount to end-users which affects an existing bundle, or any other change to the price or components of an existing bundle, shall be deemed to constitute the making available of a “revised” bundle within the meaning of this present Decision.
- 6.11 Within the five working day period referred to in the preceding paragraph, ComReg may seek further information from Eircom in order to inform its decision whether approval to launch should be given or withheld — if the further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, approval to launch the proposed new or revised bundle will be withheld pending the required information being available to ComReg for review and consideration. For the avoidance of doubt, approval in this context means that ComReg is of the view (based on the information provided to it by Eircom) that the notified bundle does not appear to breach the NRT. The granting of approval does not amount to a definitive finding by ComReg that a particular bundle is compliant, or will remain compliant in the future, with the NRT — in particular given that the actual outturn of a specific bundle can ultimately be different from that initially envisaged, such that the relevant bundle may not in fact pass the NRT. It should be noted that the granting of approval is strictly without prejudice to ComReg's right to take action (whether pursuant to this Decision and/or pursuant to any of its relevant statutory enforcement powers) in respect of any bundle that it believes may be non-compliant with Eircom's regulatory or competition law obligations. It is incumbent on Eircom to ensure that all bundles containing RFNA remain compliant with this Decision at all times.

- 6.12 As regards bundles containing RFNA that have already been launched and are in the market, it should be noted for the avoidance of doubt that Eircom is under an ongoing obligation to ensure at all times that it meets its regulatory obligation not to unreasonably bundle services. Eircom must notify ComReg immediately, together with supporting evidence, if it believes that an existing bundle in the market may have become unreasonable (i.e., non-compliant with ComReg Decision D07/61, as further specified by this Decision). Also, if requested by ComReg at any time, Eircom must provide such data as may be requested by ComReg for the purposes of verifying Eircom's ongoing compliance with the obligation not to unreasonably bundle services. In this submission, Eircom should also provide any other relevant information it believes is required so that ComReg can make an informed decision as to whether the bundle is compliant with Eircom's regulatory obligations, in particular its obligation not to unreasonably bundle.
- 6.13 If on the basis of ComReg's review of not less than two consecutive net revenue test data sets, complemented by an assessment of the competitive context of the bundle in question, ComReg considers that a bundle that includes RFNA is non-compliant with the obligation not to unreasonably bundle services, ComReg will inform Eircom in writing of such a view. Upon receipt of that view Eircom must immediately refrain from selling or offering the relevant bundle to new retail customers until further notice by ComReg.
- 6.14 Having considered the views raised by respondents to the consultation, and without prejudice to ComReg's view that the proposals in respect of existing bundles contained in ComReg 11/72 were *intra vires*, ComReg has decided on balance not to include provisions in the Decision Instrument in Annex 3 which would oblige Eircom to withdraw existing bundles that are regarded by ComReg as being non-compliant. Consequently, ComReg has revised its preliminary view which would have required Eircom to withdraw or amend a non-compliant bundle within twelve weeks. Instead, where ComReg is of the preliminary view that a particular existing bundle is non-compliant, it will inform Eircom in writing of this preliminary view. Eircom will then have a period of ten working days within which to inform ComReg in writing as to whether it intends to modify or withdraw the relevant bundle. It should be noted that, once Eircom receives ComReg's preliminary view that a particular bundle is non-compliant, it must not add any new customers to the relevant bundle until further notify by ComReg (i.e., until the bundle is modified to ComReg's satisfaction).

- 6.15 In cases where Eircom has informed ComReg that it proposes to modify the relevant bundle, ComReg will inform Eircom in writing of its view as to whether the proposed modified bundle complies with the obligation under ComReg Decision D07/61 not to unreasonably bundle services. Prior to informing Eircom of its view, ComReg may seek further information from Eircom to inform its assessment of the proposed modified bundle. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, ComReg will not provide Eircom with its assessment of the proposed modified bundle pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed with its assessment of the proposed modified bundle.
- 6.16 Where Eircom fails to notify ComReg of proposals to modify or withdraw the relevant bundle(s) within the stipulated ten-day period, or where proposals submitted are considered by ComReg to be insufficient to remedy the non-compliance, ComReg may decide to use its existing statutory enforcement powers (or other relevant statutory powers) for the purposes of ensuring compliance with the obligation not to unreasonably bundle services. For example, and without prejudice to ComReg's power to use whatever approach it deems appropriate in a particular case, this could potentially involve civil enforcement under Regulation 31 of the Universal Service Regulations, criminal enforcement under Regulations 13(9) / 35(2) of the same Regulations, and/or the issuing of urgent directions under Regulation 30 of the Universal Service Regulations (in conjunction with Regulations 12(2) and 13(8) of the Framework Regulations).

6.5 ComReg Decision

- 6.17 Eircom must notify and obtain approval for all new and revised bundles that include RFNA at least five working days before launch.
- 6.18 Where a bundle fails the NRT and where ComReg considers that bundle to be non-compliant with the obligation not to unreasonably bundle services (as further specified in the present Decision), Eircom must notify ComReg within ten working days as to whether it proposes to withdraw / modify that bundle. Once it is informed of ComReg's preliminary view that a particular bundle is non-compliant, Eircom must not add any customers to the relevant bundle until further notice by ComReg. Where Eircom fails to notify ComReg of proposals to modify or withdraw the relevant bundle(s) within the stipulated ten-day period, or where proposals submitted are considered by ComReg to be insufficient to remedy the non-compliance, ComReg may decide to use its existing statutory enforcement powers for the purposes of enforcing compliance with the obligation not to unreasonably bundle services.

Chapter 7

7 Market 4: Further specification of obligation not to margin squeeze

7.1 Overview

- 7.1 As noted in the WPNIA market review, Eircom must ensure that *“the relationship between its wholesale and retail pricing, and between the pricing of its wholesale products, does not constitute a margin squeeze”* (emphasis added). In this regard, section 12.4 of the Decision Instrument annexed to Decision D05/10 states that: *“Eircom shall have an obligation not to cause a margin/price squeeze”*.
- 7.2 ComReg considers that preserving a sufficient economic space between different wholesale inputs offered by Eircom is necessary so as to promote and foster sustainable and effective competition in the provision of retail services to end-users.
- 7.3 ComReg believes that in the absence of an appropriate price control maintaining such an economic space, Eircom, by virtue of its control of the underlying access infrastructure and its presence at both wholesale and retail levels, would have the ability and incentives to price its wholesale access inputs in such a way as to dampen the competitive constraints it faces at the retail level and ultimately potentially to extract supra-normal profits through higher retail prices for end-users.

7.2 ComReg’s Preliminary View from the Consultation Document

- 7.4 Currently there is no regulatory floor for either the price of SB-WLR or NWBA. In ComReg 11/72, ComReg proposed to further specify the obligation under Decision D05/10 not to cause a margin/price squeeze for the WPNIA product, ULMP, to ensure that there is an appropriate relative margin between Eircom’s ULMP product and a) its SB-WLR product and b) its NWBA. The purpose of this further specification is to provide assurance to OAOs using LLUOs that neither the pricing of SB-WLR (especially sold in combination with WBA) nor NWBA will be priced at an excessively low level such that LLUOs could be foreclosed.

- 7.5 ComReg proposed that the LLU cost stack for an OAO would be used to calculate the appropriate minimum price floor for the ULMP component in a SB-WLR product or a Naked WBA (Bitstream) DSL product, and would be set by reference to a REO. In addition, ComReg 11/72 noted that the cost of DSLAM related costs and transport costs would be informed by the minimum price floor for WBA.¹²⁶

7.3 Views of Respondents

- 7.6 ALTO, BT, Vodafone and Magnet note in their respective submissions that they agree with ComReg's proposal to minimise the risk of a margin / price squeeze. However, ALTO and BT note that in their view ULMP should not be used as a reference point for the WPNIA margin/price squeeze test until such time as ULMP is widely used. ALTO's submission notes that: *"while ALTO acknowledges the logic of ComReg's proposal there is a fundamental problem ... that is the majority of LLU lines don't use ULMP as a service today...If ComReg is to apply a test against a product not widely used will in our view seriously margin squeeze Line Share and potentially foreclose the market"*.¹²⁷ Eircom *"agree that the approach for setting a cost floor for NWBA is broadly correct"*, however, they suggest that the EEO cost standard should be used (see paragraph 7.7). Eircom notes that it cannot agree or disagree with ComReg's proposal of the margin squeeze between ULMP and SB-WLR as in its view the proposal is unclear.
- 7.7 The majority of respondents agreed with the use of the REO cost standard. In addition, ALTO and BT in their respective submissions suggest that the REO should be based on the actual products used by LLU access seekers and *"should include the cost of migration and out of tariff repair etc"*. Magnet notes that: *"the REO test is the most appropriate test has OAO's and new entrants will not be able to be as equally efficient as the incumbent [sic]"*.¹²⁸ In addition, Magnet believes that the LLU cost stack should include: LLU Cost; Fault repair; ULMP connection / disconnection charge; IP transit; Backhaul costs; Exchange Licence; Engineering Costs; and Air-conditioning/light and heat costs. Eircom considered that the cost stack should be calculated on an EEO cost standard and not a REO as in its view: *"a reasonable efficient operator [REO] test is inappropriate except where there is a real prospect that entrants will enter and achieve scale"*.¹²⁹

¹²⁶ The minimum price floor for WBA was published in ComReg D06/12, "Wholesale Broadband Access: Further specification to the price control obligation and an amendment to the transparency obligation", 5 April 2012.

¹²⁷ ALTO, "Consultation and Draft Directions: Review of the appropriate price controls in the markets of Retail Fixed Narrowband Access, WPNIA & WBA - Ref: 11/72", 16 December 2011, page 14.

¹²⁸ Magnet, "Magnet Networks response to ComReg 11/72", 16 December 2011, page 5.

¹²⁹ Eircom, "Response to ComReg Consultation and Draft Directions 11/72", 16 December 2011, page 41.

- 7.8 ALTO, BT, Vodafone and Magnet were in favour of using a cost stack approach to evaluate the wholesale network input for the proposed WPNIA margin / price squeeze to minimise the risk of a squeeze on the services used by the LLU access seekers. Eircom proposes that: *“the correct and proportionate WNI in a margin test between ULMP and the downstream wholesale products such as NWBA is the national ULMP price”*. Vodafone notes that in its view: *“it is inappropriate to consider a standalone price floor for SB-WLR to protect against a price squeeze of full LLU. This is because it is extremely unlikely that an operator that has invested in LLU would seek to offer only narrowband services. Clearly, an operator investing in LLU will be offering both narrowband and broadband services. In consequence, the key issue is to ensure that the combined price of SB-WLR and WBA are not so low as to squeeze LLU investment”*.¹³⁰ Furthermore, Vodafone notes that: *“ComReg needs to consider whether the price floor for NWBA is appropriate not just with respect to LLU, but also with respect to the combination of WLR and WBA”*.¹³¹
- 7.9 UPC’s submission did not consider this issue specifically.

7.4 ComReg’s Assessment of Responses and Final Position

- 7.10 ComReg notes that the majority of respondents agreed with ComReg’s proposed approach. With respect to ALTO’s and BT’s view that the majority of LLU lines do not use ULMP today, ComReg agrees with this fact. However, the purpose of basing the margin / squeeze test against ULMP is to ensure that SB-WLR or NWBA pricing now and in the future is sufficient so as not to cause a margin squeeze to ULMP and foreclose this market. As noted in paragraph 7.4, currently there is no regulatory floor for either the price of SB-WLR or NWBA, consequently, without this minimum price floor being implemented ULMP could be undermined or foreclosed.
- 7.11 ComReg considers that from a regulatory perspective it is important that the economic space between these different wholesale products or ‘rungs’ on the ladder of investment is sufficient to promote the development of effective competition capable of constraining the integrated incumbent (i.e., Eircom) on an ongoing and sustainable basis.

¹³⁰ Vodafone, “Vodafone Response to ComReg Document 11/72”, 16 December 2011, page 29.

¹³¹ Vodafone, “Vodafone Response to ComReg Document 11/72”, 16 December 2011, page 29.

- 7.12 ComReg's aim, in setting this WPNIA margin / price squeeze test (the '**WPNIA Margin Squeeze Test**'), is to promote competition by ensuring that operators have appropriate incentives to invest efficiently in infrastructure so that they become less reliant on the incumbent's network. Without an appropriate price floor to minimise the risk of squeezing WPNIA, operators may not invest / increase their investment in WPNIA and may stay on resale wholesale products from Eircom. This would benefit Eircom, since operators that remain on resale wholesale products have less potential to offer differentiated retail products, possibly at lower prices, and must continue to pay higher wholesale charges to Eircom. In this case, the key concerns are that Eircom could cause a margin squeeze at the wholesale level and charge excessive wholesale prices.
- 7.13 With respect to Eircom's view that the appropriate network input in the WPNIA Margin Squeeze Test is the national ULMP price, in 2008 and 2009, ComReg built a cost model based on a Bottom-Up Long Run Average Incremental Cost ("BU-LRAIC") basis in order to derive a price for LLU. In ComReg Decision D01/10, a national maximum price of €12.41 per month per line was established. This was on the assumption that only 149 of the largest exchanges (i.e., those with more than 2,500 connections) would ever be unbundled. As noted in paragraph 2.26, Eircom recently announced a price reduction for LLU and SLU.¹³²
- 7.14 With respect to Vodafone's view that in its view the key issue is to ensure that SB-WLR and WBA are not as low so as to act as a disincentive for LLU investment, ComReg agrees with this view. In addition, with respect to Vodafone's view that the price floor for NWBA is appropriate not just with regard to LLU but also with WLR and WBA, ComReg agrees with this view. Currently, Eircom has not launched NWBA. Should it do so, it would be subject to a margin squeeze test under Market 5 (i.e., WBA). In addition, ComReg will review where NWBA is being made available to ensure that it coincides with the underlying assumption used to determine the price of LLU¹³³ (which in turn is used in the cost stack to determine the appropriate cost stack for ULMP).
- 7.15 ComReg maintains its view that it is appropriate that the WPNIA Margin Squeeze Test will be used to calculate the appropriate minimum price floor for the ULMP component in a SB-WLR product or a Naked WBA (Bitstream) DSL product.
- 7.16 Accordingly, ComReg considers it appropriate to further specify the obligation under Decision D05/10 not to cause a margin/price squeeze for the WPNIA product, ULMP, based on a REO. This is consistent with the approach of ComReg in relation to WBA (Decision D06/12).

¹³² ComReg 13/01.

¹³³ The price of LLU is cost-oriented and therefore where NWBA is being made available the underlying assumptions will need to be reviewed to ensure the cost stack is appropriate .

- 7.17 The REO approach recognises that even in the long-run, alternative operators may not be able to compete with the SMP operator due to structural diseconomies of scale and scope, and the nature of the market. However, the level of price floors will change as the operator increases this scale and eventually this cost standard may not be required as competition in the sector increases.
- 7.18 As noted in ComReg D06/12, both the REO and SEO standard reflect the fact that OAOs in the market have not achieved the same economies of scope and scale as the SMP operator and this difference in scale and scope needs to be reflected in the WPNIA Margin Squeeze Test. In principle, ComReg believes that OAOs' costs should be used in the test. In practice, accurate verifiable OAO data is difficult to obtain. Consequently, ComReg has estimated the appropriate costs by taking Eircom's costs as the starting point and has adjusted these to reflect what costs an OAO would incur. ComReg believes that there is no material difference between the value of cost inputs based on REO and SEO (i.e., the REO and SEO are both variants of the same test). ComReg uses the term SEO and REO to simply signal the exact source of the costs used in the WPNIA Margin Squeeze Test model — before these costs are adjusted appropriately for scale and scope for the WPNIA Margin Squeeze Test. The use of the REO signals that the OAO costs are mainly taken — usually from Eircom's wholesale price list charged to other operators. The use of the term SEO simply means that Eircom's audited costs are used as a starting point for OAO cost estimation in the absence of any robust (and audited) cost data from other operators.
- 7.19 ComReg considers that the LLU cost stack for an OAO will be used to calculate the appropriate minimum price floor for the ULMP component in a SB-WLR product or a Naked WBA (Bitstream) DSL product, and will be set by reference to a REO by including the following:
- The price of LLU;¹³⁴
 - The average efficient cost of fault clearance per month;
 - The cost of ULMP connection fee and ULMP disconnection fees over an average customer lifetime;
 - The appropriate cost of a line card (if any);
 - Where appropriate a margin for the provision of VOIP (where the line card is irrelevant);
 - Contribution towards co-location charges;

¹³⁴ The published price of LLU or as appropriate the relevant / equivalent cost of local loops in the relevant geographic footprint of the service (see paragraph 7.14).

- The minimum price floor model for WBA as provided by ComReg D06/12; and
- A rate of return on the capital equipment of 10.21%, the Weighted Average Cost of Capital ('WACC') currently applied to Eircom.

7.20 While Sub Loop Unbundling ('SLU') has seen very little take-up to date, the same principle applies as that set out for LLU, except the relevant costs are from the cabinet and not the exchange.

7.21 In setting a price for SB-WLR and NWBA, Eircom should also be cognisant of the unavoidable costs of a REO that must be incurred in order to provide a service equivalent to the relevant Downstream Regulated Wholesale Service.¹³⁵ However, for the avoidance of doubt, these costs are included as part of the bitstream floors calculation (ComReg D06/12) and consequently are included implicitly in the ULMP cost stack calculation. As such, the list of costs Magnet considers should be included in the cost stack (see paragraph 7.7) are already included implicitly in the model.

7.5 ComReg Decision

7.22 In this Decision, ComReg is further specifying the obligation imposed on Eircom under Decision D05/10 not to cause a margin/price squeeze, in the manner set out in this Chapter 7 and in the Decision Instrument contained in Annex 4.

7.23 In summary, in order to comply with the WPNIA Margin/Price Squeeze Test, the price at which Eircom sells or offers a Downstream Regulated Wholesale Service must be greater than the sum of: (i) ULMP cost stack and (ii) the unavoidable costs of a Reasonably Efficient Operator that must be incurred in order to provide a service equivalent to the relevant Downstream Regulated Wholesale Service. Further details of the test are set out in the Decision Instrument contained in Annex 4.

¹³⁵ As stated in the Decision Instrument contained in Annex 4, "Downstream Regulated Wholesale Service" means a regulated wholesale service which is sold or offered by Eircom to OAOs downstream from the WPNIA Market and contains a ULMP component (examples of such Downstream Regulated Wholesale Services include, for example, SB-WLR and Naked WBA (Bitstream) DSL);

Chapter 8

8 Regulatory Impact Assessment

8.1 Overview

- 8.1 Regulatory Impact Assessment ('**RIA**') is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- 8.2 ComReg's approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 & 07/56a. In conducting the RIA, ComReg takes into account the RIA Guidelines,¹³⁶ adopted under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002, as amended requires ComReg to comply with Ministerial directions issued. Policy Direction 6 of February 2003¹³⁷ requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.
- 8.3 In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions, e.g., revising obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. ComReg's ultimate aim in conducting a RIA is to ensure that all proposed measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact; ComReg may carry out a lighter RIA in respect of those decisions.

¹³⁶ See 'REVISED RIA GUIDELINES: How to conduct a Regulatory Impact Analysis' dated June 2009 @ http://www.betterregulation.ie/eng/Publications/Revised_RIA_Guidelines.pdf

¹³⁷ Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

8.2 Steps for assessing regulatory options

8.4 ComReg wishes to point out that since it is not imposing a new regulatory obligation on an undertaking, it is not mandatory for it to conduct a RIA. In relation to the current directions, ComReg has nonetheless decided to carry out a RIA in order to demonstrate that it has considered and evaluated the regulatory options available, with due regard to necessity, effectiveness, proportionality, transparency, accountability and consistency.

8.5 In assessing the available regulatory options, ComReg's approach to RIA follows five steps as follows:

Step 1: Describe the policy issue and identify the objectives

Step 2: Identify and describe the regulatory options

Step 3: Determine the likely impacts on stakeholders

Step 4: Determine the likely impacts on competition

Step 5: Assess the likely impacts and choose the best option

8.2.1 Describe the policy issue and identify the objectives

8.6 The first Decision Instrument further specifies the obligation not to unreasonably bundle services which currently pertains to the markets for higher and lower level retail narrowband access from a fixed location. As noted in the supporting consultations to ComReg Decision D07/61, while bundling can be welfare-enhancing for retail customers, it can also have negative consequences, in particular that the operator may use the retail prices of bundles to leverage its significant market power in retail fixed narrowband access into other retail markets – this is known as horizontal leverage. The regulatory objective of the obligation not to unreasonably bundle is to prevent or mitigate the possibility of anti-competitive behaviour such as horizontal leveraging from retail fixed narrowband access into other retail markets and/or to prevent the strengthening of entry barriers in the retail fixed narrowband access markets.

- 8.7 The obligation not to unreasonably bundle includes that Eircom “*must ensure that any bundle avoids a margin squeeze and passes a net revenue test.*”¹³⁸ The net revenue test mitigates the risk that Eircom sells retail fixed narrowband access below cost in a bundle. However, failure to pass the net revenue test does not automatically lead to a bundle being unreasonable. As a proportionate measure, ComReg considers any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the loss of the bundle. ComReg also considers the likely impact on competition and the ability of entrants to enter/remain in the market and promote sustainable competition in the medium to long term. Therefore, it is possible for a bundle that fails the net revenue test and therefore does not cover its costs to be considered reasonable where there is substantive evidence to demonstrate no competitive harm may occur. In this Decision, ComReg has further specified the obligation not to unreasonably bundle by amending the net revenue test.
- 8.8 In this Decision, ComReg has further specified the pre-notification and pre-clearance requirements of bundles that include RFNA to support the obligation not to unreasonably bundle. This is because significant issues can arise where bundles are launched which subsequently do not comply with the regulatory obligation not to unreasonably bundle. Significant consumer and competitive disruption can be caused by non-compliant bundles in the market which reinforces the need for robust *ex-ante* monitoring of bundles that include retail line rental prior to entering the market, therefore ComReg is further specifying the pre-notification and pre-clearance requirements of bundles that include retail fixed narrowband access.
- 8.9 In relation to the second Decision Instrument, this specifies that the existing obligation not to margin (price) squeeze in the market of Wholesale Physical Network Infrastructure Access (‘WPNIA’) will be based by reference to a Reasonably Efficient Operator (‘REO’).
- 8.10 In making its Decisions, ComReg has had regard to its relevant statutory functions, objectives and obligations, as set out in (*inter alia*) section 12 of the Communications Regulation Acts 2002 to 2011 (the ‘Act’)¹³⁹, Regulation 16 of the Framework Regulations, Regulations 6, 8 and 13 of the Access Regulations, and Regulation 13 of the Universal Service Regulations. Under section 12 of the Act, ComReg’s relevant statutory objectives include to::

- Promote competition;

¹³⁸ Paragraph 6.234, ComReg document No. 07/26, “Market Analysis: – Retail Fixed Narrowband Access Markets (Response to Consultation 06/39 and Consultation on Draft Decision)”, 4 May 2007.

¹³⁹ Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

- Promote the interests of users within the Community;
- Ensure that there is no distortion or restriction of competition in the electronic communications sector;
- Encourage efficient investment in infrastructure and promote innovation; and
- Encourage access to the internet at a reasonable cost to end-users.

8.2.2 Identify and describe the regulatory options

- 8.11 In relation to the first Decision Instrument, as the existing obligation not to unreasonably bundle in the retail narrowband access markets already includes reference to the avoidance of a margin squeeze and the passing of a net revenue test, the available regulatory options in the current RIA relate to specifying any revision to the detail of that net revenue test and further specifying pre-notification, pre-clearance and modification / withdrawal obligations.
- 8.12 ComReg 11/72 proposed a revised net revenue test and considered that this approach should be applied in the Larger Exchange Area. However, in ComReg 11/72 the Larger Exchange Area was discussed as a concept and not yet defined (which was subsequently done in ComReg 12/63). As such, while the RIA in ComReg 11/72 remains largely appropriate and unchanged, in the context of the revised net revenue test the RIA now reflects the development of the LEA.
- 8.13 In addition, where ComReg has revised its preliminary views, namely: that unregulated mobile services when bundled with Retail Fixed Narrowband Access that the mobile element cover their LRIC; that there will be a separate WNI for legacy bundles and NGA bundles, and that the requirement for Eircom to notify ComReg of its intentions to modify or withdraw a non-compliant bundle rather than the requirement to modify / withdraw within twelve weeks.
- 8.14 In relation to the first Decision, the possible specification options for the net revenue test, as an ex-ante imputation test include the following:
- Option 1: The net revenue test is removed.
 - Option 2: The net revenue test remains unchanged.
 - Option 3: The net revenue test is revised to take account that Eircom including OAOs using its wholesale platform are prospectively facing more competition in certain areas.
 - Option 3a: The net revenue test is conducted on a combinatorial two-part test (i.e., a bundle-by-bundle and portfolio test).

- Option 3b: A lower cost standard for retail calls and the overall appropriate cost standard for the revised net revenue test.
- Option 3c: The net revenue test reflects a weighted average cost of the applicable wholesale input.
- Option 3d: The net revenue test uses LLU+ exclusively as the wholesale input in the LEA.
- Option 4 The ATC cost standard, on a case-by-case basis allows reflection of known future reductions in cost e.g., Mobile Termination Rates.
- Option 5 That the net revenue test continues to use SEO for retail costs for broadband.
- Option 6 Unregulated products and services that do not rely on retail fixed narrowband access / wholesale broadband access will be included at LRIC cost standard subject to there being no cross subsidisation with retail fixed narrowband access.
- Option 7 Should bundles that include retail fixed narrowband access be pre-notified and pre-cleared with ComReg?
- Option 8 Should bundles that include retail fixed narrowband access be pre-cleared with ComReg?
- Option 9 Should unreasonable bundles be modified / withdrawn?

8.15 In relation to the second Decision Instrument, this specifies that the existing obligation not to margin (price) squeeze in the WPNIA market will be based by reference to a Reasonably Efficient Operator ('REO'). Options here could have included use of an Equally Efficient Operator ('EEO') but as the WPNIA market is at the early stages of development, the use of EEO would not be appropriate at this time as no operator has achieved the same economy of scale and scope as Eircom. ComReg believes a REO approach is reasonable as at this time no OAO has achieved the same economies of scale or scope as Eircom.

8.2.3 Likely Impacts on Stakeholders

Market 1

Option 1: The net revenue test is removed

8.16 Impact on Incumbent:

- The incumbent would be subject to the obligation not to margin / price squeeze only under competition law.
- Withdrawal of net revenue test implies weaker mechanism for Eircom to demonstrate compliance with its regulatory obligations, namely that it is providing OAOs with effective and non-discriminatory wholesale access.

8.17 Impact on OAOs:

- Removal of the net revenue test would require an ex-post assessment after any alleged anti-competitive practice has occurred and therefore such an assessment may be too late to prevent competition and efficient infrastructure investment being adversely affected beyond repair.

8.18 Impact on Consumers:

- Consumers may benefit initially from lower priced bundles from incumbent in certain areas.
- Where those low priced bundles are priced anti-competitively, consumers will lose over medium to long term due to potentially higher prices and reduced innovation following OAO exit.

Option 2: The net revenue test remains unchanged

8.19 Impact on Incumbent:

- No additional impact on the incumbent.
- However, the net revenue test prior to this Decision may unnecessarily limit the incumbent to offer more competitive bundles.

8.20 Impact on OAOs:

- No additional impact on OAOs.

- The net revenue test aims to ensure OAOs offering intra-platform competition are protected against possible horizontal leverage by the incumbent and that the SMP incumbent cannot sell retail fixed narrowband access below cost to the detriment of competition.¹⁴⁰

8.21 Impact on Consumers:

- Given the structure of the previous net revenue test, consumers may not be getting lower priced bundles from the incumbent which could be prospectively feasible at this stage of market development in certain exchanges while still promoting sustainable competition and choice over the medium to longer term nationally. See Option 3 below.

Option 3: The net revenue test is revised to take account that Eircom including OAOs using its wholesale platform are prospectively facing more competition in certain areas

8.22 Impact on Incumbent:

- Subject to the components of a revised net revenue test (as discussed below) it could allow Eircom more pricing flexibility in certain qualifying exchanges (i.e., the LEA) to recognise that Eircom may be facing greater competition in those areas. See paragraphs 2.20-2.29 and paragraphs 4.80-4.114.
- Outside the LEA where prospective competition from OAOs and in particular from infrastructural-based competition is not as prevalent compared to that in the LEA.¹⁴¹ The flexibility provided by the net revenue test (if it were to be allowed outside the LEA) could allow Eircom Retail lower prices in those areas — potentially due to the relative weighting and margins from bundles sold / offered in the LEA. This could result in Eircom foreclosing competition from OAOs in those areas and leveraging its dominance unduly in those areas.
- However, outside the LEA the net revenue test is conducted on a bundle-by-bundle basis and the flexibility (see paragraphs 4.52-4.74) is not available in the net revenue test. Consequently, no impact on Eircom as the previous net revenue test was also conducted on a bundle-by-bundle basis.

8.23 Impact on OAOs:

- The LEA predominantly reflects those areas where OAOs infrastructural investment has occurred (see paragraphs 4.80-4.114).

¹⁴⁰ See Chapter 2 for further discussion on this point.

¹⁴¹ See Chapter 2 ComReg 12/63.

- Eircom could have more price flexibility within the LEA. However, the greater flexibility within the net revenue test is directly linked to increased competition — as such, under the status quo there is little impact on OAOs. As competition increases in the LEA the greater the pricing flexibility for Eircom Retail which is weighted (see paragraphs 4.63-4.74) relative to OAOs development / progression in those areas.
- Outside the LEA, the flexibility for Eircom Retail provided by the net revenue test (if it were to be allowed outside the LEA) could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraph 4.77.
- However, outside the LEA as the previous net revenue test is similar to the revised net revenue test there is no additional impact to OAOs (see discussion under Option 2 paragraph 8.20).

8.24 Impact on Consumers:

- Defining the LEA should allow Eircom to offer cheaper bundles to consumers in that area (see paragraphs 4.52-4.74).
- If the flexibility within the net revenue test was allowed for bundles sold / offered outside the LEA, consumers may benefit initially from lower priced bundles from incumbent in certain areas — potentially due to the relative weighting and flexibility from bundles sold / offered in the LEA. However, consumers will lose over medium to long term due to potentially higher prices and reduced innovation following OAO exit. Furthermore, as competition outside the LEA from OAOs is relatively limited the likelihood is that Eircom Retail in any event would have no incentive to lower prices and in fact (absent a net revenue test) may have the incentive to raise prices in those areas.
- However, outside the LEA where the existence of alternative infrastructural-based competition from OAOs is weaker, consumers continue to be protected from any potential anti-competitive pricing by the incumbent by the continuance of a net revenue test (see discussion under Option 1). In addition, the net revenue test allows the promotion of sustainable competition by OAOs / entrants to the benefit of consumers in terms of price, choice and quality of services available over medium to longer term. Consequently, in summary, consumers outside the LEA are not unduly impacted financially by the flexibility provided by the net revenue test and continue to be protected by the continuance of the net revenue test. See also paragraph 4.48.

Option 3a: The net revenue test is conducted on a combinatorial two-part test (i.e., a bundle-by-bundle and portfolio test)

8.25 Impact on Incumbent:

- Inside the LEA, the combinatorial test allows the incumbent flexibility to price differentiate individual bundles within the aggregate of the bundles which ultimately should benefit consumers (see paragraphs 4.52-4.58).
- Outside the LEA, no impact on Eircom as the previous net revenue test was also conducted on a bundle-by-bundle basis (see also paragraph 8.22 second bullet point).
- Additional regulatory compliance due to different tests in LEA and non-LEA exchanges. However, the revised approach creates a balance between allowing the incumbent certain pricing flexibility and that the net revenue test (as noted above in Option 1) remains a vital regulatory requirement to ensure competition and efficient infrastructure investment is protected.

8.26 Impact on OAOs:

- Inside the LEA, the portfolio approach promotes intra-platform competition by OAOs / entrants by recognising that OAOs have a similar range of retail services and bundles as the incumbent. In addition, the overall bundle-by-bundle approach ensures that at the bundle level Eircom is recovering ATC (See also paragraph 8.29).
- Outside the LEA, the flexibility of the portfolio approach (if it were to be allowed outside the LEA) could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraphs 4.76-4.78.
- However, outside the LEA as the previous net revenue test is similar to the revised net revenue test (i.e., there is no flexibility in the net revenue test outside the LEA) there is no additional impact to OAOs (see discussion under Option 2 paragraph 8.20).

8.27 Impact on Consumers:

- In the LEA, provides ability to realise scope economies and cost savings in consumers' interests. In addition, allows the promotion of competition by OAOs / entrants which may have a smaller / different range of retail services and bundles as the incumbent to the benefit of consumers.
- Outside the LEA, see bullets 2 and 3 paragraph 8.24.

Option 3b: A lower cost standard for retail calls and the overall appropriate cost standard for the revised net revenue test

8.28 Impact on Incumbent:

- The LRIC cost standard for retail calls (see paragraph 4.61) allows flexibility to the incumbent to offer an individual bundle that does not recover common costs in the LEA.
- As noted in paragraph 4.61, on a global level an operator would not be able to use this cost standard to inform its business decision as the incremental revenue attained from such bundles on an aggregate basis may not make adequate contribution towards fixed and common costs (i.e., an ATC cost standard is more appropriate on a global basis). Consequently, the flexibility of the lower cost standard of LRIC is subject to the proviso that the aggregate of bundles in the LEA pass ATC.
- ATC remains as the appropriate measure of cost in net revenue test at the portfolio level in the LEA and at the bundle-by-bundle level outside the LEA. The use of ATC ensures that the incumbent recovers all efficiently incurred costs (see paragraphs 5.48-5.50). Consequently, there is no additional impact on the incumbent as the previous net revenue test is based on an ATC cost standard. As such, the net revenue test ensures that nationally Eircom pass the ATC cost standard.
- The LRIC cost standard for retail calls (if allowed in the net revenue test outside the LEA) would allow flexibility to the incumbent to offer an individual bundle that does not recover common costs.
- However, outside the LEA the LRIC cost standard is not implemented. As the previous net revenue test is similar to the revised net revenue test there is no additional impact to OAOs (see discussion under Option 2 paragraph 8.20).

8.29 Impact on OAOs:

- Inside the LEA, OAOs who are as efficient as the incumbent and who offer similar bundles to the incumbent should be in a position to launch an individual bundle that does not recover common costs in the LEA. OAOs have some comfort that Eircom's aggregate of bundles in a portfolio must cover its ATC thereby providing opportunity to recover common costs.
- Inside the LEA the over-riding proviso of the ATC cost standard at the portfolio level and outside the LEA on a bundle-by-bundle test, allows the promotion of competition by OAOs as ATC includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand.

- Outside the LEA, (if it were to be allowed outside the LEA) the flexibility of the portfolio approach could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraphs 4.76-4.78.
- However, outside the LEA as the previous net revenue test is similar to the revised net revenue test there is no additional impact to OAOs (see discussion under Option 2 paragraph 8.20).

8.30 Impact on Consumers:

- The use of LRIC cost standard for retail calls at the bundle-by-bundle test in the LEA allows the promotion of efficient competition (as competition is prospectively greater for bundles sold / offered inside the LEA) to the benefit of consumers.
- Outside the LEA, see bullets 2 and 3 paragraph 8.24.

Option 3c The net revenue test reflects a weighted average cost of the applicable wholesale input

8.31 Impact on Incumbent:

- Inside the LEA the approach reflecting actual use by OAOs of Eircom's wholesale inputs (i.e., the WNI) in the LEA could allow Eircom to use a lower cost wholesale input in order to offer cheaper bundles to the benefit of end-users. This in turn should encourage Eircom to promote the use of LLU by OAOs in order to further reduce the weighted average wholesale input.
- Inside the LEA, without a separate NGA WNI by virtue of the flexibility within the NRT (in the LEA only), Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. See paragraphs 4.65-4.67. However, the use of a legacy WNI and separate NGA WNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom Retail is not provided undue pricing flexibility and ensures that the WNI is reflective of the average wholesale input costs incurred by an "efficient" operator to replicate legacy and NGA bundles in the LEA.
- Outside the LEA if the WNI was implemented the flexibility for Eircom Retail provided by the net revenue test (if it were to be allowed outside the LEA) could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraphs 4.76-4.78.

- Outside the LEA the net revenue test remains based on SB-WLR / legacy WBA products — it is assumed that in order for a bundle to be replicable by an OAO that all OAOs use WLR and WBA exclusively (i.e., the methodology of the previous net revenue test) — in order to reflect emergent use of LLU. No additional impact on the incumbent as reflects previous approach for net revenue test.

8.32 Impact on OAOs:

- The LEA predominantly reflects those areas where OAOs infrastructural investment has occurred (see paragraphs 4.80-4.114).
- Reflects the weighted average use of actual wholesale inputs by OAOs in the LEA. Those OAOs who remain on resale wholesale inputs only will find it harder to be competitive as LLU uptake grows. This approach should encourage OAOs to invest in infrastructure to avail of LLU inputs in order to be able to beat the weighted average input.
- Eircom could have more price flexibility within the LEA. However, the greater flexibility within the net revenue test is directly linked to increased competition — as such, under the status quo there is little impact on OAOs. As competition increases in the LEA the greater the pricing flexibility for Eircom Retail which is weighted (see paragraphs 4.63-4.74) relative to OAOs development / progression in those areas.
- Inside the LEA, without a separate NGA WNI by virtue of the flexibility within the NRT (in the LEA only), Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. See paragraphs 4.65-4.67. This could have resulted in undue flexibility to Eircom and could force OAOs onto a loss-making price trajectory that is not sustainable in the long-run. However, the use of a legacy WNI and separate NGA WNI acknowledges that different retail products are supported by a different underlying wholesale network and ensures that Eircom Retail is not provided undue pricing flexibility and ensures that the WNIs are reflective of the average wholesale input costs incurred by an “efficient” operator to replicate legacy and NGA bundles in the LEA.
- Outside the LEA, the flexibility for Eircom Retail provided by the net revenue test (if it were to be allowed outside the LEA) could mean that competition from OAOs is foreclosed or Eircom Retail pricing could prevent those OAOs that have invested in infrastructure from achieving a reasonable market share or presence. See paragraph 4.78.

- However, outside the LEA as the previous net revenue test is similar to the revised net revenue test there is no additional impact to OAOs i.e., there is no flexibility in the net revenue test outside the LEA as SB-WLR and legacy WBA is predominant wholesale input used by OAOs (see also discussion under Option 2 paragraph 8.20).

8.33 Impact on Consumers:

- Inside the LEA, customers should benefit from lower priced bundles and product innovation/differentiation in those areas where LLU competition is encouraged. OAOs that use Eircom's LLU product may be able to offer a more sustainable source of infrastructure-based competition in addition to any alternative platform competitors, e.g., Cable / WiMax which may further contribute potential competitive constraints to the benefit of consumers.
- Inside the LEA, without a separate NGA WNI by virtue of the flexibility within the NRT (in the LEA only), Eircom could have potentially priced NGA bundles based on the wholesale access prices and costs of legacy wholesale access inputs used by OAOs. See paragraphs 4.65-4.67. Consumers may benefit initially from lower priced bundles from incumbent in certain areas. Where those low priced bundles are priced anti-competitively, consumers will lose over medium to long term due to potentially higher prices and reduced innovation following OAO exit.
- Outside the LEA, no additional impact on customers as bundles currently offered to customers in these areas reflects that OAOs can offer competing bundles in those areas based on different WBA inputs provided by Eircom (i.e., there is no flexibility in the net revenue test outside the LEA).
- Outside the LEA, see also bullets 2 and 3 paragraph 8.24.

Option 3 d The net revenue test uses LLU+ exclusively as the wholesale input in the LEA

8.34 Impact on Incumbent:

- Allows Eircom to use lower priced LLU inputs offer cheaper bundles to the benefit of end-users

8.35 Impact on OAOs:

- Not many OAOs currently on LLU based wholesale inputs – they will find it harder to be competitive and may be squeezed. This will either lead to exit or encourage investment in LLU in order to compete.

8.36 Impact on Consumers:

- If OAOs cannot get a fit for purpose LLU product at certain exchanges, this option may result in their exit to the ultimate detriment of consumers. Eircom's customers may benefit from lower priced bundles initially but following market exit may be subject to increased prices and reduced service choice depending on strength of any residual competitive constraints from OAOs that continue to use Eircom's LLU product and/or alternative platform competitors e.g., Cable / WiMax.

Option 4 The ATC cost standard, on a case-by-case basis, allows reflection of known future reductions in cost e.g., Mobile Termination Rates

8.37 Impact on Incumbent:

- Allows the incumbent to reflect in its pricing known future changes in prices / costs which are supported by robust evidence which should ultimately be to the benefit of the consumer.

8.38 Impact on OAOs:

- OAOs / entrants should also be able to factor known future changes in prices into their pricing decisions which will be to the benefit of end-users. Eircom will be required to reconcile this ATC available from the audited regulatory accounts the following year. This should provide some assurance to OAOs that Eircom is covering its costs.

8.39 Impact on Consumers:

- Allows pricing to reflect known future reductions in prices / costs which will be to the benefit of consumers now as opposed to waiting for the known cost reductions to come into effect.

Option 5 That the net revenue test continues to use SEO for retail costs for broadband

8.40 Impact on Incumbent:

- There is no additional impact on incumbent as continuing existing position, however it does not allow Eircom to possibly pass on lower retail costs onto customers as cheaper bundles where they may have greater efficiencies than its nearest competitors.

8.41 Impact on OAOs:

- No OAO is currently as efficient as Eircom or as efficient as the SEO which assumed 25% share of broadband market.
- Therefore, continued use of SEO promotes entry/expansion and protects existing competition. In addition, if EEO was utilised instead of SEO at this time, intra-platform competition would likely be adversely affected with possible exit from the market over the medium to long term.

8.42 Impact on Consumers:

- Customers benefit from continued competition from OAOs using wholesale inputs provided by Eircom. Customers may not benefit from lower priced bundles from Eircom which could have been achieved by virtue of its lower retail costs but will benefit from the ongoing promotion of competition from OAOs relying on Eircom's wholesale inputs which, as identified in the market analysis, is still an important source of competitive impetus at this stage of retail market development.

Option 6 Unregulated products and services that do not rely on retail fixed narrowband access / wholesale broadband access will be included at LRIC cost standard subject to there being no cross subsidisation with retail fixed narrowband access

8.43 Impact on Incumbent:

- Will enable incumbent to include unregulated products and services in bundles at a competitive price while minimising the risk of any leverage.

8.44 Impact on OAOs:

- Should minimise the risk of horizontal leverage to the detriment of competition as Eircom cannot cross subsidise with retail fixed narrowband access and must recover the long-term costs associated with the unregulated product.

8.45 Impact on Consumers:

- Enables flexibility for all products to be included in bundles to the benefit of consumers thus promoting product innovation while also protecting against possible anti-competitive practices which could negatively impact on service price, choice and quality

Option 7 That bundles including retail fixed narrowband access must be pre-notified by Eircom to ComReg**8.46 Impact on Incumbent:**

- Eircom is currently subject to a pre-notification requirement. The pre-notification requirement is further specified; however ComReg believes that the information sought in that pre-notification is not increased from the information currently provided by Eircom. ComReg believes that the pre-notification timing of five working days is not onerous or burdensome on Eircom.

8.47 Impact on OAOs:

- Will give OAOs legal certainty that there will be regulatory monitoring of bundles provided by the SMP operator that include retail fixed narrowband access prior to their launch.

8.48 Impact on Consumers:

- Ensures a transparent regulatory environment which monitors bundles at risk of being anti-competitive and which may have long-term negative impacts for consumer choice.

Option 8 That bundles including retail fixed narrowband access must be pre-cleared by ComReg**8.49 Impact on Incumbent:**

- Eircom is subject to a pre-clearance requirement. The pre-clearance requirement is a further specification. This pre-clearance should give Eircom and ComReg some comfort that bundles will not cause a margin squeeze before they are launched. This should minimise the likelihood of bundles needing to be withdrawn as they are causing a margin squeeze, however, this can still occur for example if actual usage of the “free” allowance within a bundle is much greater than the forecast usage.

8.50 Impact on OAOs:

- Will give OAOs some comfort that bundles launched should not cause a margin/price squeeze as they should meet the net revenue test – this will be confirmed based on actual results provided to ComReg. Such reassurance may support further market entry/expansion. Should minimise the risk of OAOs being adversely affected by bundles that are launched causing a margin squeeze – however such risk is not eliminated completely.

8.51 Impact on Consumers:

- Less risk (but risk is not eliminated) that a launched bundle is found to be unreasonable and therefore consumers must be moved off the non-compliant bundle.
- Enhanced OAO confidence may also translate into more competitive offers and greater service choice.

Option 9 For bundles causing a margin squeeze, Eircom should withdraw / modify such bundles**8.52 Impact on Incumbent:**

- Where a bundle is found to be non-compliant Eircom should modify or withdraw the bundle as soon as possible, otherwise ComReg will be left with no option but to intervene pursuant to any of its relevant statutory enforcement powers. It is also likely that other operators impacted by the non-compliant bundle may also act. As previously experienced the continuation of non-compliant bundles can have very significant consequences on Eircom, OAOs and consumers and should be avoided.

8.53 Impact on OAOs:

- OAOs have assurances that Eircom will be subject to regular and rigorous review of significant bundles in the market to ensure they comply. Where bundles are found to be non-compliant OAOs can be confident that they will be dealt with in a timely manner to mitigate any negative effects.

8.54 Impact on Consumers:

- Non-compliant bundles cannot be allowed in the market for a prolonged period of time. The longer the non-compliant bundle remains in the market the more customers are likely to have signed up for that bundle. These customers could be faced with changes to the bundle they signed up to which can cause confusion and undue annoyance. Therefore this should be mitigated by swift and timely action by Eircom to ensure such difficulties are minimised.

Market 4

Option 1 Specify the margin (price) squeeze control in WPNIA, using REO cost standard

8.55 Impact on Incumbent:

- Allows Eircom to minimise the risk of a margin (price) squeeze to WPNIA.

8.56 Impact on OAOs:

- Allows the promotion of competition by OAOs / entrants which have a different cost base as the incumbent and which do not yet enjoy the same economies of scale.

8.57 Impact on Consumers:

- Allows the promotion of competition by OAOs / entrants which are reasonably efficient to the incumbent to the benefit of consumers.

8.2.4 Likely impact on competition

Market 1

8.58 In assessing the impacts of the net revenue test for competition, there are a number of reasons why the proposed revision to the net revenue test in Retail Fixed Narrowband Access would be considered consistent with ComReg's statutory objectives under Section 12 of the Act:

a. Promoting the interests of users within the community

Safeguarding efficient competitors from possible below cost selling by an SMP operator in respect of bundles that include retail fixed narrowband access helps to facilitate greater regulatory certainty for longer-term competitive entry and expansion, with positive implications for the price, choice and quality of services ultimately delivered to end-users.

b. Ensuring that there is no distortion or restriction of competition

By seeking to pre-empt the possibility for anti-competitive bundling practices by an SMP operator to induce strategic barriers to entry in markets, the net revenue test would thus ensure that competitors can enter and sustain competition in the markets for retail fixed narrowband access and in adjacent markets.

c. Encouraging efficient investment in infrastructure and promoting competition

The net revenue test, in taking account of the current state of competition in certain areas, should encourage entry initially and expansion by competitors wishing to invest in their own infrastructure over time. At the same time, the net

revenue test should facilitate entry by competitors as efficient as the SMP operator which is consistent with encouraging efficient investment.

8.59 See also Chapters 2 and 4 for further information.

Market 4

8.60 In assessing the impacts of the proposed further specification of the current obligation not to margin squeeze in the WPNIA market, there are a number of reasons why the proposal would be considered consistent with ComReg's statutory objectives under Section 12 of the Act:

a. Promoting the interests of users within the community

Safeguarding efficient LLU based competitors from possible squeeze, either by an offer of Naked WBA or SB-WLR at too low a price, helps to facilitate greater regulatory certainty for longer-term competitive entry and expansion, with positive implications for the price, choice and quality of services ultimately delivered to end-users.

b. Ensuring that there is no distortion or restriction of competition

By seeking to pre-empt the possibility for anti-competitive practices by an SMP operator to induce strategic barriers for entry in the WPNIA market, the specified obligation not to margin (price) squeeze would thus ensure that competitors can enter and sustain competition in the WPNIA market and thus the promotion of infrastructure based competition at the retail level.

c. Encouraging efficient investment in infrastructure and promoting competition

Protecting WPNIA from possible margin (price) squeeze by either Eircom's offer of Naked WBA or SB-WLR being priced too low, should ensure that entry and expansion by LLU based competitors wishing to invest in their own infrastructure over time is maintained.

8.61 See also Chapters 2 and 7 for further information.

8.2.5 Assess the impacts and choose the best option

8.62 Having reviewed the options above, ComReg proposes that:

1. It is legitimate and appropriate to apply the net revenue test as a two-part approach. For bundles sold / offered in the LEA, there will be a two-part ex-ante NRT test. The test is combinatorial and the tests are evaluated simultaneously. That is to say that both tests must be passed. For bundles sold / offered outside the LEA the bundles are assessed on an individual bundle basis (i.e., bundle-by-bundle) only (i.e., there is no portfolio approach for bundles sold / offered outside the LEA).

2. It is legitimate and appropriate to apply the more flexible net revenue test inside the LEA only. ComReg considers that the LEA should reflect those areas where uptake of unbundled services, whether LLU and / or virtual unbundling in NGA, is likely to be viable, which prospectively are more likely to permit a greater degree of competition and where regulation should be responsive to any prospective changes.
3. For the time being, it is legitimate and appropriate for ComReg to continue to use the existing retail-minus price controls for narrowband and broadband as the retail costs in the net revenue test as to do otherwise would result in a different treatment within bundles. Notwithstanding this, there is some flexibility in that ComReg recognises that there may be some potential for double-count of certain retail costs when narrowband and broadband are bundled together e.g., billing costs. In the future, it may be appropriate to allow Eircom use retail costs for broadband based on EEO as opposed to the current SEO costs calculated by the D01/06 retail-minus price control. However, ComReg does not believe that competition is sufficiently developed at this time to consider the use of EEO for the retail costs of broadband but will reconsider the issue when reviewing the maximum ceiling price control for WBA.

4. ATC as the appropriate basis of cost in an ex-ante context for the portfolio of bundles sold in the LEA and the bundle-by-bundle test outside the LEA. ATC is the correct cost input for the net revenue test in light of ComReg's statutory objectives under Section 12 of the Act to promote competition and protect the interests of end-users. In the context of an ex-ante regulatory tool to be applied by ComReg, ATC is the appropriate ex-ante cost basis to adopt as it should enable a potential entrant to recover all its efficiently incurred costs. ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ComReg believes that, under the present market conditions in Ireland, this cost measure is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets. However, ComReg proposes to allow the pricing below ATC for retail costs for calls in an individual bundle (with common and fixed indirect costs excluded for retail calls) for bundles sold / offered inside the LEA only (subject to the proviso that the portfolio of bundles inside the LEA passes its ATC). Furthermore, ComReg is now proposing to allow ATC reflect known future reductions in costs (e.g., Mobile Termination Rates) where these can be supported. ComReg believes that this allowance will allow end-customers to benefit from future known reductions in costs now. In addition, on a case-by-case basis if supported by robust evidence of retail efficiencies as a result of bundling and that the bundle is not having a negative impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term
5. Outside the LEA, ComReg considers it legitimate and appropriate to propose that the applicable wholesale inputs in the net revenue test remains at SB-WLR and legacy WBA. For the LEA, ComReg considers it legitimate and appropriate to propose a weighted average wholesale input of the applicable wholesale inputs used by OAOs in the area is taken as this reflects the actual usage of different wholesale inputs by OAOs in that area. ComReg believes that otherwise consumers may not be in a position to avail of lower prices for high speed broadband in that area, in particular where this is as a result of high unit costs driven by the national average cost of the copper access network. Thus the proposed approach recognises the importance of facilitating the development of efficient competition and the delivery of relevant competitive benefits to consumers.

6. ComReg believes that LLU competition is not sufficiently developed at this time to consider the use of LLU+ as the sole applicable wholesale inputs in the net revenue test in certain areas, unless it otherwise occurs in the market under the weighting approach (i.e., all OAOs actually move to LLU).
7. In relation to unregulated products and services bundled with retail fixed narrowband access, ComReg's concern is leverage. Therefore, it is legitimate and appropriate for ComReg to ensure that there will be no cross subsidisation between regulated products and unregulated products and that these unregulated products/services, when bundled, must cover their LRIC. On a case-by-case basis, where there is unlikely to be medium to long term harm on competition, ComReg will consider AAC.
8. It is legitimate and appropriate for ComReg to set out the notification process for new bundles or amendments to existing bundles and the process for the modification / withdrawal of bundles that are found to be causing a margin squeeze. ComReg has to date and will continue to be practical with its approach to reviews to ensure Eircom Retail is not unduly held back from launching legitimate bundles by unnecessary regulatory delays.
9. ComReg believes that revising the net revenue test and further specifying the notification and pre-clearance requirements for bundles that include retail fixed narrowband access, is for the reasons set out in this Decision justified and should foster OAO and entrant competition in the retail fixed narrowband access and adjacent markets. It is therefore consistent with ComReg's statutory objectives under section 12 of the Act.
10. It is legitimate and appropriate for ComReg to further specifying the margin (price) squeeze obligation in WPNIA by reference to a REO. This approach recognises that no operator in WPNIA has achieved the same economies of scale and scope as Eircom at this time. In addition, the this decision will provide a regulatory floor for the price of SB-WLR and NWBA.

8.63 ComReg is of the view that the proposed further specifications meet the six principles of "Better Regulation" as follows:

- i. ComReg has clearly outlined why it is **necessary** to make these directions. ComReg believes the net revenue test requires some refinements to ensure that it remains appropriate and to ensure that it is ultimately to the benefit of end customers. The further specification of the pre-notification and pre-clearance of bundles that include retail fixed narrowband access is necessary as it should minimise the risk of unreasonable bundles being launched by the SMP operator. The direction in the WPNIA market will minimise the risk of margin (price)

- squeeze in that market and promote competition and entry into that market and thereby promote infrastructure based competition at the retail level.
- ii. ComReg considers that it has been **effective** in addressing the potential for anti-competitive behaviour by virtue of Eircom's SMP position in the markets for retail fixed narrowband access and WPNIA and its integrated position in relevant associated retail markets and is providing clear guidance to help guard against such potential anti-competitive behaviour;
 - iii. ComReg considers that it has been **proportionate** in its review. ComReg believes the proposed further specifications are not overly burdensome or onerous on Eircom and are in part aimed at introducing greater pricing flexibility for Eircom where this is proportionate to the observed structural conditions and prospects for future competitive developments;
 - iv. Having considered possible regulatory options and impacts for all stakeholders, ComReg considers its approach offers complete **transparency** in reaching the view that the net revenue test should be revised and that the obligation not to cause a margin (price) squeeze in WPNIA is further specified;
 - v. ComReg considers that it has been **accountable** in its review and that it has provided all of the detail, reasoning and information necessary to demonstrate how it reached the view that the net revenue test should be revised and that the obligation not to cause a margin (price) squeeze in WPNIA should be further specified;
 - vi. ComReg considers that its reasoning is **consistent** with previous ComReg views and in particular those expressed in the supporting market analyses.

Annex: 1 Illustrative calculation of WNI

Cost Stack		Non-NGA exchanges		
		NGB Products		
		WLR+Bitstream Stack	WLR+LS Stack	ULMP Stack
WLR Rental	Monthly €	18.02	18.02	
ULUMP Rental	Monthly €			9.91
Line Share Rental	Monthly €		0.77	
ULMP Faults	Monthly €			✂
LS Faults	Monthly €		✂	
DSLAMs	Monthly €		✂	✂
Connection / disconnection fees not in DCF				
Connection Charge ULMP	Monthly €			✂
Connection Charge LS	Monthly €		✂	
Conn chg SB_WLR transfer	Monthly €	✂	✂	
Disconnection charge ULMP	Monthly €			✂
Disconnection charge LS	Monthly €		✂	
Bitstream Port	Monthly €	✂		
Voice MEA	Monthly €			✂
Total (excluding usage)		23.11	23.25	15.85

A 1.1 Using the illustrative cost stack information above and assuming for this example that OAOs actual usage of the various wholesale access inputs in the LEA indicates that the average 'typical efficient' OAO would use a blend of 50% WLR+Bitstream, 40% WLR+LS and 10% ULMP, this would result in a WNI for legacy bundles in the NRT for the bundle-by-bundle assessment and portfolio assessment of €22.45 (50% WLR+Bitstream @ €23.11, 40% WLR+LS @ €23.25 and 10% ULMP @ €15.85).

A 1.2 As set out in paragraph 5.58, the WBA usage charge is applied at the portfolio level in the NRT.

Annex: 2 List of Consultation Questions from ComReg Documents 11/72 and 12/63

A 2.1 Consultation Questions ComReg 11/72

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

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

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

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

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

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

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

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

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

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

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

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

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

A 2.2 Consultation Questions ComReg 12/63

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

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

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

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

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

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

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

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

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

Annex: 3 Decision Instrument: Market 1

Decision Instrument in relation to ComReg Decision D07/61

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Direction and Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to a further specification of the obligation not to unreasonably bundle services imposed by ComReg on Eircom under ComReg Decision D07/61.

1.2 This Decision Instrument is made:

- (i) Pursuant to Regulations 13, 30 and 38 of the Universal Service Regulations;
- (ii) Pursuant to and having regard to the Significant Market Power (“SMP”) designation on Eircom in the markets for higher and lower level retail narrowband access from a fixed location as provided for in Section 3.1 of the Decision Instrument annexed to ComReg Decision D07/61;
- (iii) Pursuant to and having regard to the obligation not to unreasonably bundle services imposed on Eircom by Section 7.8 of the Decision Instrument annexed to ComReg Decision D07/61;
- (iv) Pursuant to and having regard to the functions and objectives of ComReg as set out in Sections 10 and 12 of the Communications Regulation Acts 2002 to 2011¹⁴² and in Regulation 16 of the Framework Regulations;
- (v) Having, where appropriate, pursuant to Section 13 of the Communications Regulation Acts 2002 to 2011 complied with policy directions made by the Minister for Communications, Marine and Natural Resources;¹⁴³

¹⁴² Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

¹⁴³ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

- (vi) Having had regard to the analysis and reasoning set out in ComReg Document No. 07/26 and ComReg Decision D07/61, which shall both, where appropriate, be construed together with this Decision Instrument;
 - (vii) Having had regard to the analysis and reasoning set out in ComReg Document No. 11/72 and in ComReg Document No. 12/63;
 - (viii) Having taken account of the submissions received from interested parties in relation to ComReg Document No. 11/72 and ComReg Document No. 12/63 following public consultations pursuant to Regulation 12 of the Framework Regulations;
 - (ix) Having had regard to the analysis and reasoning set out in the response to consultation and final decisions document entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4” (ComReg Decision D04/13, Document No. 13/14).
 - (x) Having made the draft measure and the reasoning on which the measure is based accessible to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken account of any comments made by these parties.
- 1.3 The provisions of the response to consultation and final decisions document entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4” (ComReg Decision D04/13, Document No. 13/14), ComReg Document No. 11/72 and ComReg Document No. 12/63 shall, where appropriate, be construed together with this Decision Instrument.

2. DEFINITIONS

2.1 In this Decision Instrument, unless the context otherwise suggests:

“Alternative Infrastructure Provider (AIP)” means an Undertaking providing high-speed retail broadband services to End-Users at a fixed location by means of alternative infrastructure. For the purposes of this definition, services are deemed to be provided by means of “alternative infrastructure” when the relevant AIP does not rely on any wholesale access inputs from Eircom in respect of the Local Loop (e.g. including Wholesale Line Rental (WLR), Bitstream, VUA or LLU) in order to provide services to End-Users in a particular exchange area;

“Average Total Cost (ATC)” means a cost standard which reflects all costs incurred in the provision of a product or service including variable, fixed, common and joint costs;

“Authorisation Regulations” means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), as may be amended from time to time;

“Authorised Undertaking(s)” shall have the same meaning as under Regulation 2 of the Authorisation Regulations, as may be amended from time to time

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“Bitstream” means a wholesale broadband product provided in the market for wholesale broadband access, which market is more particularly described in Section 4 of ComReg Decision D06/11;

“Bundle” means a package of services, consisting of Retail Fixed Narrowband Access and one or more other services, which is on offer or on sale by Eircom to End-Users;

“ComReg” means the Commission for Communications Regulation, established under Section 6 of the Communications Regulation Acts 2002 to 2011, as may be amended from time to time;

“ComReg Decision D07/61” means ComReg Document No. 07/61 entitled “Decision Notice and Decision Instrument – Designation of SMP and SMP Obligations – Market Analysis: Retail Fixed Narrowband Access Markets” dated 24 August 2007;

“ComReg Decision D06/11” means ComReg Document No. 11/49 entitled “Response to Consultation and Decision - Market Review: Wholesale Broadband Access (Market 5)” dated 8 July 2011;

“ComReg Decision D03/13” means ComReg Document No. 13/11 entitled “Next Generation Access (‘NGA’): Remedies for Next Generation Access Markets” dated 31 January 2013;

“ComReg Decision D04/13” means ComReg Document No. 13/14 entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4” dated 8 February 2013;

“ComReg Document No. 11/72” means ComReg Document No. 11/72 entitled “Consultation and Draft Directions – Review of the appropriate price controls in the

markets of Retail Fixed Narrowband Access, Wholesale Physical Network Infrastructure Access and Wholesale Broadband Access: Further specification of certain price control obligations in the markets of Retail Fixed Narrowband Access and Wholesale Physical Network Infrastructure Access” dated 10 October 2011;

“**ComReg Document No. 12/63**” means ComReg Document No. 12/63 entitled “Supplementary Consultation to ComReg 11/72” dated 15 June 2012;

“**Effective Date**” means the date set out in Section 7.1 of this Decision Instrument;

“**Eircom**” means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls, and any undertaking which owns or controls Eircom Limited and its successors and assigns;

“**End-User(s)**” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time. For the avoidance of doubt, End-User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End-Users and who is not acting as an Authorised Undertaking;

“**Framework Regulations**” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time;

“**Larger Exchange Area**” means the total geographic area comprising individual exchange areas each of which satisfies at least one of the following criteria:

- (i) Criterion 1: An exchange area in which:
 - (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
 - (b) at least one OAO (not being an AIP) is providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct provision by that OAO to End-Users or via a wholesale service provided to that OAO by another OAO by means of LLU or VUA),

subject to the condition that the said AIP(s) and the said OAO(s) using LLU or VUA must, all taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;
- (ii) Criterion 2: An exchange area in which at least two OAOs (not being AIPs) are providing telecommunications services at the retail level to End-Users from the relevant exchange using LLU or VUA (either by means of direct

provision by those OAO(s) to End-Users or via a wholesale service provided to those OAO(s) by another OAO by means of LLU or VUA) - subject to the condition that the said OAOs using LLU or VUA must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

(iii) Criterion 3: An exchange area in which:

- (a) at least one AIP is providing telecommunications services at the retail level to End-Users; and
- (b) Eircom (and OAOs (not being AIPs) relying on wholesale inputs provided by Eircom) are providing retail fixed broadband services to less than 20 per cent of the premises in that exchange area,

subject to the condition that the said AIP(s) must, taken collectively, have a reasonable market share and reasonable market coverage in the relevant exchange area;

(iv) Criterion 4: An exchange area in respect of which Eircom has provided at least six months prior notification (or such shorter period as may be agreed by ComReg) on its publicly available Wholesale website (in accordance with Section 9.13(i) of the Decision Instrument contained in Annex 1 of ComReg Decision D03/13 and/or Section 9.13(i) of the Decision Instrument contained in Annex 2 of ComReg Decision D03/13) regarding the launch of NGA services by Eircom in cabinets in the relevant exchange area, subject to the condition that those proposed NGA-enabled cabinets must serve at least a reasonable number of lines in that exchange area;

(v) Criterion 5: exceptionally, and subject to case-by-case assessment by ComReg, an exchange area in which the relevant exchange:

- (a) Is surrounded by Qualifying Exchanges; or
- (b) Serves fewer than 500 residential premises and is located either adjacent to, or in reasonable proximity to, Qualifying Exchange(s); or
- (c) Is determined, to the satisfaction of ComReg, to have an economic affinity with adjacent Qualifying Exchange(s), subject to the total residential premises served by Qualifying Exchanges under this sub-criterion 5(c) not exceeding 5% of the total residential premises in the Larger Exchange Area (excluding those residential premises which are served by Qualifying Exchanges under sub-criterion 5(b) above).

For the purposes of this definition of “Larger Exchange Area”, ComReg will construe “reasonable market share and reasonable market coverage” and “reasonable number of lines” in accordance with the relevant factors identified in Chapter 4 (and, in particular, section 4.4.4) of ComReg Decision D04/13;

“**Local Loop**” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“**Local Loop Unbundling (LLU)**” means local loop unbundling. The local loop is the final section of Eircom’s access network that provides access into premises (whether residential, business or other premises). It runs between the local exchange and the relevant customer premises. LLU occurs where an OAO rents access to the local loop and uses it to supply services to its customers either on a wholesale or retail basis;

“**Net Revenue Test**” means the net revenue test set out in Section 4.3 of this Decision Instrument;

“**Net Revenue Test Model**” is the model approved by ComReg and used by Eircom to demonstrate whether a particular Bundle complies with the Net Revenue Test;

“**Next Generation Access (NGA)**” means wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over exclusively copper access;

“**Other Authorised Operators (OAOs)**” means operators other than Eircom who are deemed to be authorised undertakings under Regulation 4 of the Authorisation Regulations;

“**Portfolio**” means the aggregation of Bundles on offer or on sale by Eircom to End-Users in the Larger Exchange Area;

“**Qualifying Exchange**” means an exchange that has been determined by ComReg to satisfy at least one of the criteria contained in the definition of the Larger Exchange Area. ComReg shall have the sole and absolute discretion to determine whether an exchange constitutes a Qualifying Exchange for the purposes of this Decision Instrument. The list of exchanges determined by ComReg to constitute Qualifying Exchanges will be set out by ComReg in a schedule which will be made available to interested parties upon request (which schedule may be amended by ComReg from time to time);

“**Retail Fixed Narrowband Access**” means higher and lower level retail narrowband access from a fixed location and shall be construed in accordance with ComReg Decision D07/61;

“Retail Fixed Narrowband Access Markets” means the markets for higher and lower level retail narrowband access from a fixed location as defined in ComReg Decision D07/61;

“SB-WLR” means Single Billing Wholesale Line Rental;

“Total Monthly Non-LEA Bundle Cost” shall be construed in accordance with Reference C(vi) in Table 2 in Chapter 5 of ComReg Decision D04/13;

“Total Monthly Non-LEA Bundle Revenue” shall be construed in accordance with Reference R(iv) in Table 2 in Chapter 5 of ComReg Decision D04/13;

“Total Monthly LEA Adjusted Bundle Cost” shall be construed in accordance with Reference C8 in Table 1 in Chapter 5 of ComReg Decision D04/13;

“Total Monthly LEA Bundle Revenue” shall be construed in accordance with Reference R4 in Table 1 in Chapter 5 of ComReg Decision D04/13;

“Total Monthly LEA Portfolio Cost” shall be construed in accordance with Reference C9 in Table 1 in Chapter 5 of ComReg Decision D04/13;

“Total Monthly LEA Portfolio Revenue” shall be construed in accordance with Reference R5 in Table 1 in Chapter 5 of ComReg Decision D04/13;

“Undertaking” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time.

“Universal Service Regulations” means the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2011 (S.I. No. 337 of 2011), as may be amended from time to time;

“Virtual Unbundled Access (VUA)” means the wholesale active access product proposed by Eircom. It is an enhanced Layer 2 product which allows the handover or interconnection of aggregate End Users’ connections at the local exchange. It allows a level of control to the access seeker similar to that afforded by the access seeker connecting their own equipment to a full(y) unbundled Local Loop.

3. SCOPE AND APPLICATION

3.1 This Decision Instrument applies to Eircom.

3.2 This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.

- 3.3 This Decision Instrument relates to a further specification of the obligation not to unreasonably bundle services imposed by ComReg on Eircom under ComReg Decision D07/61.

4. FURTHER SPECIFICATION OF THE OBLIGATION NOT TO UNREASONABLY BUNDLE SERVICES

- 4.1 Pursuant to Section 7.8 of the Decision Instrument annexed to ComReg Decision D07/61, Eircom is subject to an obligation not to unreasonably bundle services. For the avoidance of doubt, this obligation includes that any Bundle offered by Eircom must avoid a margin squeeze and pass a net revenue test.

- 4.2 For the purpose of further specifying requirements to be complied with relating to Eircom's obligation not to unreasonably bundle services under ComReg Decision D07/61, and pursuant to Regulation 30 of the Universal Service Regulations, Eircom is hereby directed to comply with the Net Revenue Test as set out in this Decision Instrument. Eircom shall use the Net Revenue Test Model to demonstrate whether a particular Bundle complies with the Net Revenue Test. Eircom will keep the Net Revenue Test Model up to date and updates by Eircom are subject to ComReg approval.

- 4.3 In order to comply with the Net Revenue Test:

- 4.3.1. Insofar as Bundles sold or offered within the Larger Exchange Area are concerned:

- (i) as regards every Portfolio, the Total Monthly LEA Portfolio Revenue (Reference R5) shall be equal to or exceed the Total Monthly LEA Portfolio Cost (Reference C9); and
- (ii) as regards each individual Bundle, the Total Monthly LEA Bundle Revenue (Reference R4) shall be equal to or exceed the Total Monthly LEA Adjusted Bundle Cost (Reference C8); and
- (iii) when a given Bundle includes unregulated retail services, compliance with the Net Revenue Test (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled "Unregulated Retail Services Assessment" which is below Table 1 in Chapter 5 of ComReg Decision D04/13

4.3.2. Insofar as Bundles sold or offered outside of the Larger Exchange Area are concerned:

- (i) as regards each individual Bundle, the Total Monthly Non-LEA Bundle Revenue (Reference R(iv)) shall be equal to or exceed the Total Monthly Non-LEA Bundle Cost (Reference C(vi));
- (ii) when a given Bundle includes unregulated retail services, compliance with the Net Revenue Test (as regards such unregulated retail services) shall be evaluated in accordance with the basis of assessment outlined in the section entitled “Unregulated Retail Services Assessment” which is below Table 2 in Chapter 5 of ComReg Decision D04/13.

4.4 If a Bundle complies with the relevant Net Revenue Test, as outlined in Section 4.3 above, it will be deemed to comply with the obligation under ComReg Decision D07/61 not to unreasonably bundle services. If a Bundle does not comply with the relevant Net Revenue Test, as outlined in Section 4.3 above, ComReg will carry out a general assessment of the reasonableness of the Bundle and may conclude that, notwithstanding the fact that the Bundle fails the Net Revenue Test, the offer or sale by Eircom of that Bundle does not constitute a breach of the obligation under ComReg Decision D07/61 not to unreasonably bundle services. For the purposes of such assessment, ComReg may, in particular, have regard to any robust evidence of retail efficiencies or increased customer lifetimes resulting from the relevant Bundle. ComReg will also consider the impact of the Bundle on competition in the Retail Fixed Narrowband Access Markets or in other relevant markets, including by reference to the promotion of sustainable competition in the medium to long term and the ability of entrants to enter and/or remain in the market(s) in question.

4.5 For the purposes of the relevant Net Revenue Test, Eircom shall reconcile, where possible, its ATC for the relevant Bundles to its audited separated (regulatory) accounts.¹⁴⁴

Pre-launch assessment of Bundles

4.6 Prior to making a proposed new or revised Bundle available for offer or sale to End-Users, Eircom shall furnish ComReg with a detailed written submission demonstrating that the proposed new or revised Bundle complies with the obligation under ComReg Decision D07/61 not to unreasonably bundle services and, in particular, with the Net Revenue Test set out in this Decision

¹⁴⁴ Eircom’s current accounting separation and cost accounting obligations are set out in Response to Consultation Document No. 09/75 and Final Direction and Decision: Accounting Separation and Cost Accounting Review of Eircom Limited (Decision No. D08/10, Document No. 10/67, 31 August 2010).

Instrument. The submission shall make full and true disclosure of all material facts for the purpose of demonstrating that the proposed new or revised Bundle complies with the obligation not to unreasonably bundle services and, in particular, with the Net Revenue Test set out in this Decision Instrument. In the submission, all assumptions should be clearly set out together with the rationale and supporting evidence for such assumptions and the likely effect if any such assumptions are not met. The Net Revenue Test Model presented by Eircom in its submission should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. For the avoidance of doubt, the making available of a promotion or discount to End-Users which affects an existing Bundle, or any other change to the price or components of an existing Bundle, shall constitute the making available of a revised Bundle within the meaning of this Decision Instrument.

- 4.7 Upon receipt of the submission, ComReg shall review the submission and, within five working days, communicate to Eircom its decision whether to give or withhold approval for launch of the proposed new or revised Bundle. Such approval will not be unreasonably withheld by ComReg. Eircom shall not launch any new or revised Bundle without having received such approval from ComReg. Prior to the expiry of the five working day period, ComReg may seek further information from Eircom to inform its decision as to whether approval to launch should be given or withheld. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, approval to launch the proposed new or revised Bundle shall be withheld pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed to make a decision as to whether approval for launch of the new or revised Bundle should be granted or withheld.

Post-launch assessment of Bundles / assessment of existing Bundles

- 4.8 Once a new or revised Bundle is made available for offer or for sale to End-Users, Eircom must at all times ensure it meets its obligation under ComReg Decision D07/61 not to unreasonably bundle services and, in particular, that it complies with the relevant Net Revenue Test set out in this Decision Instrument. Eircom shall notify ComReg immediately if it believes that any Bundle may not be so compliant.
- 4.9 If requested by ComReg, Eircom shall provide such data as may be required by ComReg to verify Eircom's ongoing compliance with the obligation under ComReg Decision D07/61 not to unreasonably bundle services and, in particular, Eircom's compliance with the relevant Net Revenue Test as set out in this Decision Instrument. Eircom shall also provide any other relevant

information required so that ComReg can make an informed decision as to whether Eircom is meeting its regulatory obligations including, in particular, its obligation not to unreasonably bundle services.

- 4.10 As regards the monitoring of ongoing compliance, if on the basis of its review of not less than two consecutive Net Revenue Test monthly data sets, complemented by its general assessment of the reasonableness of the Bundle (as provided for in Section 4.4 above), ComReg is of the preliminary view that the Bundle is non-compliant with the obligation under ComReg Decision D07/61 not to unreasonably bundle services, ComReg will inform Eircom in writing of its preliminary view. Upon receipt of such view, Eircom shall immediately refrain from selling or offering the relevant Bundle to new customers until further notice by ComReg.
- 4.11 Within two weeks of ComReg informing Eircom in writing of its preliminary view under Section 4.10 of this Decision Instrument, Eircom shall inform ComReg in writing as to whether it proposes to modify or withdraw the relevant Bundle (including details of any proposed modification). In making any proposal to modify the relevant Bundle, Eircom shall be cognisant of any other regulatory notification requirements it may have, including its regulatory obligation to notify OAOs of any proposed change to the price of SB-WLR (as provided for under ComReg Decision D07/61). In particular, in the case of any proposed modification, Eircom shall provide assurances to ComReg that the Bundle considered by ComReg to be non-compliant will be withdrawn and that the proposed modified Bundle will become available to End-Users within the shortest possible time-frame, having regard to Eircom's relevant regulatory notification requirements. ComReg shall inform Eircom in writing of its view as to whether the proposed modified Bundle complies with the obligation under ComReg Decision D07/61 not to unreasonably bundle services. Prior to so informing Eircom of its view, ComReg may seek further information from Eircom to inform its assessment of the proposed modified Bundle. If such further information is not provided by Eircom within ComReg's timeline or to the standard required by ComReg, ComReg shall not provide Eircom with its assessment of the proposed modified Bundle pending the required information being made available to ComReg for review and consideration. Upon receipt of the requested information, ComReg will proceed with its assessment of the proposed modified Bundle.
- 4.12 ComReg's powers in respect of Bundles as set out in this Decision Instrument shall be without prejudice to its statutory powers provided for under, *inter alia*, the Communications Regulation Acts 2002 to 2011, as may be amended from time to time, the Universal Service Regulations, the Framework Regulations and the Authorisation Regulations.

5. MAINTENANCE OF OBLIGATIONS

- 5.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices, Decision Instruments and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and Eircom shall comply with same.
- 5.2 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

6. STATUTORY POWERS NOT AFFECTED

- 6.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument).

7. EFFECTIVE DATE

- 7.1 The Effective Date of this Decision Instrument shall be, unless expressly stated otherwise in this Decision Instrument, the date of its publication and notification to Eircom and it shall remain in force until further notice by ComReg.

ALEX CHISHOLM

CHAIRPERSON

COMMISSION FOR COMMUNICATIONS REGULATION

THE 8TH DAY OF FEBRUARY 2013

Annex: 4 **Decision Instrument: Market 4**

Decision Instrument in relation to ComReg Decision D05/10

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1. This Direction and Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to a further specification of the obligation not to cause a margin/price squeeze imposed by ComReg on Eircom under Section 12.4 of the Decision Instrument annexed to ComReg Decision D05/10.

1.2. This Decision Instrument is made:

- (i) Pursuant to Regulations 13, 18 and 24 of the Access Regulations;
- (ii) Pursuant to and having regard to the Significant Market Power (“SMP”) designation on Eircom in the market for wholesale physical network infrastructure access contained in ComReg Decision D05/10;
- (iii) Pursuant to and having regard to the obligation imposed on Eircom by Section 12.4 of the Decision Instrument annexed to ComReg Decision D05/10 not to cause a margin/price squeeze;
- (iv) Pursuant to and having regard to the functions and objectives of ComReg as set out in Sections 10 and 12 of the Communications Regulation Acts 2002 to 2011, in Regulation 6 of the Access Regulations and in Regulation 16 of the Framework Regulations;
- (v) Having, where appropriate, pursuant to Section 13 of the Communications Regulation Acts 2002 to 2011 complied with policy directions made by the Minister for Communications, Marine and Natural Resources;¹⁴⁵
- (vi) Having had regard to the analysis and reasoning set out in ComReg Decision D05/10, which shall, where appropriate, be construed together with this Decision Instrument;

¹⁴⁵ Policy Directions made by the Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004.

- (vii) Having had regard to the reasoning set out in ComReg Document No. 11/72 and having taken account of submissions received from interested parties in relation to ComReg Document No. 11/72 following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
 - (viii) Having notified the draft measure and the reasoning on which the measure is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States pursuant to Regulation 13 and Regulation 14 of the Framework Regulations and having taken account of any comments made by these parties.
- 1.3. The provisions of the response to consultation and final decisions document entitled “Price Regulation of Bundled Offers: Further specification of certain price control obligations in Market 1 and Market 4” (ComReg Decision D04/13, Document No. 13/14) and ComReg Document No. 11/72 shall, where appropriate, be construed together with this Decision Instrument.

2. DEFINITIONS

2.1. In this Decision Instrument, unless the context otherwise suggests:

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), as may be amended from time to time;

“ComReg Decision D01/10” means ComReg Document No. 10/10 entitled Response to Consultations and Final Decision - Response to Consultation Documents No. 09/39 and 09/62 – Local Loop Unbundling (“LLU”) and Sub Loop Unbundling (“SLU”) Maximum Monthly Rental Charges” dated 9 February 2010;

“ComReg Decision D05/10” means ComReg Document No. 10/39 entitled “Response to Consultations and Decision – Market Review: Wholesale (Physical) Network Infrastructure Access (Market 4) – Further Response to ComReg Document No. 08/104, Response to ComReg Document No. 09/42 and Decision” dated 20 May 2010;

“Downstream Regulated Wholesale Service” means a regulated wholesale service which is on offer or on sale by Eircom to OAOs downstream from the WPNIA Market and contains a ULMP component (examples of such Downstream Regulated Wholesale Services include, for example, SB-WLR and Naked WBA (Bitstream) DSL);

“Effective Date” means the date set out in Section 7.1 of this Decision Instrument;

“Eircom” means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls, and any undertaking which owns or controls Eircom Limited and its successors and assigns;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time;

“Full Unbundled Access to the Local Loop” shall have the same meaning as in the Schedule to the Access Regulations, as may be amended from time to time;

“Local Loop” shall have the same meaning as under Regulation 2(2) of the Access Regulations, as may be amended from time to time;

“Margin/Price Squeeze Test” means the margin/price squeeze test set out in Section 4.2 of this Decision Instrument;

“Naked WBA (Bitstream) DSL” means any wholesale equivalent of Naked DSL;

“Naked DSL” means a digital subscriber line (“DSL”) without a Public Switched Telephone Network (“PSTN”) service, i.e. only a standalone DSL broadband service is provided on the Local Loop;

“Other Authorised Operators (OAOs)” means operators other than Eircom who are deemed to be authorised undertakings under Regulation 4 of the Authorisation Regulations;

“Reasonably Efficient Operator” means a reasonably efficient operator which has a different basic cost function to Eircom and does not yet enjoy the same economies of scale and scope as Eircom;

“SB-WLR” means Eircom’s Single Billing Wholesale Line Rental product;

“Unbundled Local Metallic Path (ULMP)” is the implementation of Full Unbundled Access to the Local Loop;

“ULMP Cost Stack” means the appropriate monthly cost of the ULMP component, as calculated by ComReg having regard to the ULMP Price Control Model;

“ULMP Price Control Model” means the model referred to in ComReg Decision D01/10 which is used by ComReg to calculate the maximum monthly rental price of ULMP;

“WPNIA Market” means the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location provided over

Current Generation WPNIA and over Next Generation WPNIA; the term “WPNIA Market” shall be construed in accordance with ComReg Decision D05/10.

3. SCOPE AND APPLICATION

- 3.1. This Decision Instrument applies to Eircom.
- 3.2. This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.

4. OBLIGATION NOT TO CAUSE A MARGIN/PRICE SQUEEZE

- 4.1. Section 12.4 of the Decision Instrument annexed to ComReg Decision D05/10 imposed an obligation on Eircom not to cause a margin/price squeeze. For the purpose of further specifying requirements to be complied with relating to that obligation, and pursuant to Regulation 18 of the Access Regulations, Eircom is hereby directed to comply with the Margin/Price Squeeze Test (as set out in Section 4.2 of this Decision Instrument).
- 4.2. In order to comply with the Margin/Price Squeeze Test, the price at which Eircom sells or offers a Downstream Regulated Wholesale Service must be greater than the sum of: (i) the ULMP Cost Stack and (ii) the unavoidable costs of a Reasonably Efficient Operator that must be incurred in order to provide a service equivalent to the relevant Downstream Regulated Wholesale Service.

5. MAINTENANCE OF OBLIGATIONS

- 5.1. Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices, Decision Instruments and Directions made by ComReg applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and Eircom shall comply with same.
- 5.2. If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other

law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

6. STATUTORY POWERS NOT AFFECTED

6.1. Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the Effective Date of this Decision Instrument).

7. EFFECTIVE DATE

7.1. The Effective Date of this Decision Instrument shall be the date of its publication and notification to Eircom and it shall remain in force until further notice by ComReg.

ALEX CHISHOLM

CHAIRPERSON

COMMISSION FOR COMMUNICATIONS REGULATION

THE 8TH DAY OF FEBRUARY 2013

Annex: 5 Legal Basis

Market 1 (RFNA): Obligation not to unreasonably bundle

A 5.1 By Decision D07/61¹⁴⁶, and pursuant to Regulations 25 and 26(4) of the 2003 Framework Regulations¹⁴⁷, ComReg designated Eircom with significant market power (“SMP”) on the markets for higher and lower level retail narrowband access from a fixed location. Under Sections 7.8 and 7.9 of the Decision Instrument annexed to Decision D07/61, and pursuant to Regulation 14 of the 2003 Universal Service Regulations¹⁴⁸, ComReg imposed an obligation on Eircom not to unreasonably bundle services.

A 5.2 The issue of “unreasonable bundling” was discussed in paragraphs 6.216 to 6.234 of ComReg Document No. 07/26.¹⁴⁹ By way of example, paragraph 6.233 provided two specific instances of what can constitute “unreasonable bundling” for the purposes of Eircom’s obligation under Decision D07/61 not to unreasonably bundle. In addition, paragraph 6.234 stated: “The SMP operator must ensure that any bundle avoids a margin squeeze and passes a net revenue test”. ComReg Document No. 07/26 and Decision D07/61 are to be construed together for the purpose of Eircom’s obligation not to unreasonably bundle. This is provided for in Section 1.1 of the Decision Instrument annexed to Decision D07/61, which provides inter alia as follows:

“1.1 This Decision Instrument relates to the markets for higher and lower level retail narrowband access from a fixed location and is made by the Commission for Communications Regulation (“ComReg”):

[...]

- v. Having had regard to the market definition, market analysis and reasoning set out in Document No. 07/26 and the reasoning and individual decisions set out therein and in the preceding parts of this Decision Notice and Decision Instrument, both of which shall where necessary, be construed with this Decision Instrument;...”*

¹⁴⁶ Decision D07/61 – Decision Notice and Decision Instrument - Designation of SMP and SMP Obligations - Market Analysis: Retail Fixed Narrowband Access Markets (24 August 2007).

¹⁴⁷ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), as amended (the “**2003 Framework Regulations**”).

¹⁴⁸ European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003 (S.I. No. 308 of 2003), as amended (the “**2003 Universal Service Regulations**”).

¹⁴⁹ Response to Consultation and Consultation on Draft Decision: Retail Fixed Narrowband Access Markets (Document No. 07/26, 4 May 2007).

- A 5.3 Regulation 14(1) of the 2003 Universal Service Regulations (which has now been replaced by Regulation 13(1) of the 2011 Universal Service Regulations¹⁵⁰) provided that where ComReg determined, as a result of a market analysis carried out in accordance with Regulation 27 of the 2003 Framework Regulations, that a given retail market was not effectively competitive and concluded that obligations imposed under the 2003 Access Regulations¹⁵¹ or Regulation 16 of the 2003 Universal Service Regulations would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act 2002 (the “Act”), it could impose such obligations as it considered appropriate to achieve those objectives on an undertaking identified as having SMP on a given retail market.
- A 5.4 The obligation not to unreasonably bundle was imposed on Eircom in Decision D07/61 because ComReg considered that the obligations imposed on Eircom under the 2003 Access Regulations and under Regulation 16 of the 2003 Universal Service Regulations would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act 2002. The imposition of the obligation was based on the nature of the problem identified in ComReg Document No. 07/26, was imposed pursuant to the market analysis in Decision D07/61 and was proportionate and justified in light of the objectives set out in section 12 of the Act.
- A 5.5 Regulation 14(2)(d) of the 2003 Universal Service Regulations provided the legal basis for the imposition under Decision D07/61 of the obligation not to unreasonably bundle. Regulation 14(2)(d) of the 2003 Universal Service Regulations has now been replaced by Regulation 13(2)(d) of the 2011 Universal Service Regulations. By virtue of the transitional provisions in Regulation 38 of the 2011 Universal Service Regulations, the obligation under Decision D07/61 not to unreasonably bundle is deemed to continue in force as if it was imposed under Regulation 13 of the 2011 Universal Service Regulations.
- A 5.6 Regulation 30 of the 2011 Universal Service Regulations states that ComReg may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under those Regulations, issue directions to an undertaking to do or refrain from doing anything which ComReg specifies in the direction. In this Decision, ComReg is further specifying the obligation not to unreasonably bundle services contained in Decision D07/61 – and is doing so pursuant to Regulation 30, in conjunction with Regulation 13, of the 2011 Universal Service Regulations.

¹⁵⁰ European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulation 2011 (S.I. No. 337 of 2011) (the “**2011 Universal Service Regulations**”).

¹⁵¹ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (S.I. No. 305 of 2003), as amended (the “**2003 Access Regulations**”).

Market 4 (WPNIA): Obligation not to cause a margin/price squeeze

- A 5.7 By Decision D05/10¹⁵², and pursuant to Regulations 25 to 27 of the 2003 Framework Regulations and Regulations 9 to 14 of the 2003 Access Regulations, ComReg designated Eircom as having SMP on the WPNIA market and imposed a number of SMP obligations. In particular, Section 12.4 of the Decision Instrument annexed to Decision D05/10 states that Eircom shall have an obligation not to cause a margin/price squeeze.
- A 5.8 The effect of the transitional provisions contained in Regulation 40 of the 2011 Framework Regulations¹⁵³ and Regulation 24 of the 2011 Access Regulations¹⁵⁴ is that Decision D05/10 is deemed to continue in force as if it was made pursuant to the 2011 Framework Regulations and the 2011 Access Regulations.
- A 5.9 Regulation 18 of the 2011 Access Regulations provides a legal basis for ComReg to issue a direction further specifying the obligation not to cause a margin/price squeeze set out in Section 12.4 of the Decision Instrument annexed to Decision D05/10.

Consultation Requirements

- A 5.10 Regulation 12(3) of the 2011 Framework Regulations provides that, except in cases falling within Regulation 13(8) (i.e., exceptional cases involving urgency), before taking a measure which has a significant impact on a relevant market, ComReg must publish the text of the proposed measure, give the reasons for it, including information as to which of ComReg's statutory powers gives rise to the measure, and specify the period within which submissions relating to the proposal may be made by interested parties. Regulation 12(4) states that ComReg, having considered any representations received under Regulation 12(3), may take the measure with or without amendment. Regulation 12 of the 2011 Framework Regulations implements Article 6 of the Framework Directive.

¹⁵² Response to Consultation and Decision - Market Review: Wholesale (Physical) Network Infrastructure Access (Market 4) (Decision No. D05/10, Document No. 10/39, 20 May 2010).

¹⁵³ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the "**2011 Framework Regulations**").

¹⁵⁴ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the "**2011 Access Regulations**").

A 5.11 Regulation 13(3) of the 2011 Framework Regulations provides that, upon completion of the consultation provided for in Regulation 12, where ComReg intends to take a measure which falls within the scope of Regulation 26 or 27 of the 2011 Framework Regulations, or Regulation 6 or 8 of the 2011 Access Regulations, and which would affect trade between Member States, it shall make the draft measure accessible to the European Commission, BEREC and the NRAs in other Member States at the same time, together with the reasoning on which the measure is based. Regulation 13 of the 2011 Framework Regulations implements Article 7 of the Framework Directive.