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alternative operators in the communications market

**Consultation: Market Reviews - Markets: RFTS and Wholesale
FACO Ref: 20/46 & 20/71**

Submission By ALTO

Date: August 19th 2020

ALTO is pleased to respond to the Consultation: Market Reviews Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers and Wholesale Fixed Access and Call Origination – Ref: 20/46 and Extended by Notice Ref: 20/71.

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

Preliminary Remarks

ALTO notes with some concern that aspects of consideration of and for the Call Origination market appear to be absent from ComReg's analysis in the consultation paper. We have also noted that while it is a matter of some logic that access technologies will change and modify over time, the fixed access market is not in the position to move to those access points quite yet. ALTO observes that a relatively significant amount of consumers remain on WLR and eir's WLW offerings. We also note that eir's market share appears to be increasing at a modest rate. All the while industry does not have the paraphernalia to properly migrate *en masse* or in a bulk fashion flexibly.

ALTO also notes that in aspects of ComReg's assessment, the Three Criteria Test (3CT) is passed, however evidence exists to the extent that the passing of the 3CT is not the end of the matter based on experience and market behaviours.

ALTO is not in favour of a simple dropping or suspension of SMP obligations in favour of no, or light obligations without first having a serious commitment from eir in relation to bulk migration. Such a commitment and the roll out of an agreed bulk migration product should ideally be coupled with some form of incentive. ALTO suggests that a sunset clause should only be permitted to commence after the

groundwork has been completed to permit for the loosening of restrictions, and even so, those restrictions should be tied to a three (3) year sunset clause or provision.

ALTO makes various remarks concerning RGM experiences and the IOB in this response, and while we know that ComReg are working away in both areas of their responsibility, we are not hearing much by means of update or reports that could or should instil confidence enough to simply accept what ComReg proposes. We also have some concerns over the basis of the assessments carried out, particularly in and around Questions 7 and 8 below.

Response to Consultation Questions:

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

A. 1. ALTO agrees with ComReg that, at the retail layer, the main developments identified in the provision of RFTS are those that are most relevant in assessing the relevant markets. ALTO submits that competition has taken far longer to develop than would ordinarily be expected; and there is a clearly lacking availability of facilities for soft migration and bulk migration from WLR services to VoIP services in the market. ALTO notes that at Clause 3.124 and footnote 156 that 94.4% of the total RFTS subscribers are supplied by only 5 of the 27 service providers active on the market. This is a notable position as competition does not appear to have developed as the market would ordinarily expect.

We also note that eir's White Label Voice offerings are dominating the market to the detriment of WLR services. ALTO submits that ComReg has not fully analysed the Call Origination market. We therefore urge ComReg to conduct separate, additional analysis of the call origination aspects of the market which we consider may pass the 3CT; and where we believe that eir's position remains dominant and growing (see also our response to Q8 below).

Q. 2. Do you agree with ComReg's preliminary conclusions on the product market assessment for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 2. ALTO submits that on the basis that the underlying upstream wholesale supply remains uninterrupted or is not restricted, then we would agree with ComReg's

preliminary conclusions on the product market assessments for RFTS.

We note however that, under ComReg's proposals, the wholesale supply *will* be open to disruption for 20% of an exchange area; raising concerns as to the upstream availability of the remaining 20% of the premises in areas that ComReg propose to determine as competitive for the wholesale market. ALTO submits that further work appears to be required in order to properly assess the impact of the proposed deregulation on the 20% of said premises. We consider that the deregulation proposed will beat the cost of the end customer or consumer, with the risk of some customers being left stranded.

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

A. 3. ALTO tends to agree with ComReg's preliminary conclusions on the product market assessment for the Relevant RFTS Markets. We do so with one caveat, that being that Provided the underlying upstream wholesale supply is not disrupted or restricted in any manner.

ALTO notes that the upstream wholesale supply will be open to disruption for 20% of an Exchange Area raising concerns as to the upstream availability of the remaining 20% of premises in areas where ComReg proposes to determine the wholesale market as competitive. There appears to be little if any analysis within the consultation of the potential impact on this 20% of the deregulated market and again it looks like deregulation at the cost of the end customer.

Q. 4. Do you agree with ComReg's preliminary conclusions on the product market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to

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

A. 4. ALTO submits that we are concerned about the residual 20% of the market base and restrictions or limitations to wholesale access and supply and consequent inhibitions forced on operators endeavouring to service the retail market.

ALTO notes that ComReg has commenced the process of requesting data from operators to review the market for broadband services in Ireland and it is safe to suggest that the current market under review may change over time. We also note that operators who may have invested heavily in VUA services continue to have issues with economic viability in areas of the country. We submit that ComReg may be incorrect to assume that VUA is a valid substitute for continued wholesale supply of services.

Q. 5. Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 5. In light of ComReg's preliminary choice to use an 80% threshold, ALTO conditionally agrees with ComReg's preliminary conclusions on the geographic market assessment for the Relevant FACO Markets. We consider this as correct in light of a comparison between Markets 3a and 3b reviews and decisions as published. That said, ALTO is concerned that the 80% threshold for an exchange area to be considered competitive appears to have been chosen with little justification (see for example paragraphs 5.415-5.416). As discussed above, we have strong concerns about the impact of such a designation will have on the remaining 20% of premises in that area. We urge ComReg to conduct further analysis on the impact on these customers.

We further note that this broad comparison may mask some important features of the market which could have an impact on customers. In particular we note that

ComReg should consider Call Origination more thoroughly in terms of the proposals in this consultation.

ALTO is concerned that bulk migration facilities from WLR to VoIP are not fit-for-purpose, especially in light of the impact of the proposals in this consultation paper. This point is not insignificant considering the development of technology and the requirements for operators to potentially move customers *en masse* onto new platforms to facilitate next generation voice and data services, potentially in a short timescale. We discuss this further in response to Q11 below.

Q. 6. Do you agree with ComReg’s preliminary conclusions on the 3CT for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 6. ALTO agrees with ComReg’s preliminary conclusions on the 3CT for the Relevant RFTS markets, subject to their being ubiquitous upstream supply available to operators.

ALTO notes that there are high non-transitory barriers to entry present in the market, that the market structures in urban areas enables commercial operators to compete for business. We also note that the NBP rollout will mean a wait and see approach should be taken to areas outside of population or urban centres, and *ex post* competition law remedies are cumbersome, expensive and slow.

Q. 7. Do you agree with ComReg’s preliminary conclusions on the market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 7. ALTO broadly agrees with ComReg’s preliminary conclusions on the market assessment for the Relevant FACO Markets. We note however that ComReg’s

assumptions at 7.97 concerning the NG Broadband and we do not agree that sufficient indirect constraints exist in the case of eir in Urban FACO markets.

ALTO submits that ComReg must consider issues that currently impede and hinder bulk migrations in the market, including a lack of a fit for purpose Bulk Migration Product and additional the work of transferring a very large base of residential customers in an organised, non-disruptive manner.

Bulk migrations

ALTO notes that at Table 72, it is stated that other NRAs have relied on a “*stable market share*” of the incumbent as one of the reasons for Criteria 1 and 2 of the 3CT being met. For Ireland, Table 69 in relation to RFTS market shares between Q3 2015 – Q4 2019 shows that eir’s high market share has been very stable, as has most of the market. The market for RFTS has been stagnant in the period of measure and one must question why this is, considering VoIP has been around for some years.

Clauses 5.385 and 7.147 suggest that the reason for this stability is related to the ability of operators to bulk migrate their existing base from WLR to VoIP and footnote says, “*Bulk Migration allows an Access Seeker to have multiple migrations facilitated via a single request*”. However what the consultation fails to say is the eir bulk migration facility is not fit for purpose and if applied in bulk could leave many customers stranded with potentially no service, which is a wholly unsatisfactory outcome.

Despite industry’s best efforts, it has not been successful at persuading eir to bring forward a workable bulk migration solution and the ComReg dispute/complaint process has proven inefficient given the times scales to resolve matters tend to be years.

Furthermore, ALTO submits that Figure 36 suggests two interesting events of moving blocks from WLR to Eircom WLW. This could be explained by the lack of need for number portability and also the clear ability to internally manage events if things go wrong.

ALTO urges ComReg to facilitate a fast review of bulk migration and investigate the

data available in the consultation paper as an urgent matter and in short course. We consider that a specific provision should be included to require Eircom to offer a fit-for-purpose bulk migration product.

NBI

ALTO submits that Table 66, page 376 tends to indicate that eir are going to roll-over NBI, this is a matter of some importance and it is notable that it is published by ComReg here.

ALTO submits that the matters set out at Clause 7.24 are only really sustainable on a fully completion of the NBI rollout.

ALTO submit that in relation to Clause 7.27, the section sets out that the scale of access overwhelmingly tend to be under the direct control of eir.

Mid-term assessment

ALTO submits that in relation to Clause 7.28, any Mid-term assessment proposed is helpful as we believe that competition is not developing at the pace ComReg infer so they should delay de-regulation and review at mid-term.

Other comments

- ALTO submits that at Clause 7.32, ComReg tends to assume and confirm the unlikelihood of another access provider being able to commercially roll out.
- ALTO submits that at Clause 7.186, ComReg says FACO is consistent with a stickiness to eir. However, ComReg do not appear to have assess why this is. We request further analysis on this point.
- ALTO submits that at Clause 7.184, for Urban FACO it is criteria 2 that fails i.e., tending towards competition. ALTO view this issue as the active obstruction to migrating to VoIP. Criteria 2 should not fail during the period of the review.
- ALTO submits that at Clause 7.200, ComReg suggests that a stable incumbent RFTS market share is reason for passing tests, yet we see no real

evidence of what is occurring within eir. This is a problem with regard to the analysis and basis for the assumptions within the paper.

- ALTO submits that at Clause 7.184, ComReg says that it is the failure of criteria 2 that de-regulates the urban areas, i.e., that it is tending towards competition. ALTO is concerned that the bulk migration facility is not fit for purpose and the speed to competition is hindered, hence competition is increasing but not fast enough within the period of this decision.

ALTO would very much welcome further work on the above noted points from ComReg in the later response that ComReg will provide prior to the making of a formal decision on these markets.

Q. 8. Do you agree with ComReg’s preliminary conclusions on the market assessment for the RFTS Markets, absent regulation in the Urban FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 8. ALTO disagrees with ComReg’s preliminary conclusions on the market assessment for the RFTS Markets, absent regulation in the Urban FACO Markets for the following reasons.

Criterion 1: High and non-transitory barriers to entry

ALTO submits that ComReg oversimplifies the assessment of barriers to entry. While we would agree that when customers change service provider there is the alternative of migrating the customer to a broadband based VoIP service as part of the provider change given the need of the service provider to supply a new modem and likely customer visit to alter the connection of the PSTN wiring.

However, the failure by eir to offer a fit for purpose bulk transfer facility combined with the additional work, including the automated management of such a bulk transfer and cost to modify the service at the Customer premises creates a high

barrier for the mass migration of customers to VoIP. Hence this test is a pass and not a fail. We note previously that it took operator complaints and ComReg almost a decade to force Eircom to provide seamless migration from bitstream to LLU services which effectively stymied any chances for growth of LLU in Ireland. ALTO submits that history appears to be repeating itself in this market.

Criterion 2: Is the market tending towards effective competition within the relevant time horizon?

ALTO submits two points to this Criteria as follows:

Linked to point 1 above, ALTO tends to agree that the natural churn of customers will ultimately see a migration to VoIP although some are still churning to traditional services, but migration (or lack of adequate migration facilities and offerings to facilitate competitive migration) is not tending to achieve or facilitate competition quickly enough or within the relevant time horizon, so this test passes rather than fails.

Secondly, Figure 36 on page 211 of the consultation paper provides quite plain evidence to the extent that since 2014 eir has been growing its position in the FACO market rather than reducing it. This begs the question as to what will happen when ComReg suggest that the current hurdles are reduced? The Figure 36 graph indicates that other providers are migrating to eir's White Label product rather than providing their own VoIP which should have been the expected behaviour is ComReg proposes its more competitive. This consultation and in particular this Figure 36 indicates that another element or behaviour is hindering competition. It is unlikely that Eircom will suffer from a bulk migration process that is not fit for purpose, for example, as they will not be porting any numbers and would likely be able to internally manage all of the migration issues without having to pay considerable project management fees. Again we consider the test passes as eir's market share

of wholesale services has been growing and not declining so the market is no moving to competition as implied.

Criterion 3: The insufficiency of competition law alone to adequately address the market failure(s) concerned

Competition Law is an *ex post* remedy that takes far too long to resolve and is limited in its scope to address wider competition matters which are better addresses through regulation. Hence this test also passes.

Q. 9. Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Regional FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 9. ALTO agrees fully with the ComReg assessment of competition problems and the associated impacts on competition end users identified are those that could potentially arise on the Regional FACO Markets. ComReg's own Regulatory Governance Model – RGM, work and the precursor to that RGM work the eir self-admitted Styles Reports lay bare a myriad of issues which industry still experiences from time-to-time despite assurances to the contrary.

ALTO reiterates the point that the lack of a fit for purpose bulk migration product for operators to migrate consumers from WLR to VoIP remains a significant issue.

Q. 10. Do you agree with ComReg's preliminary conclusions on remedies in the Regional FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 10. ALTO agrees with ComReg's preliminary conclusions on remedies in the

Regional FACO Markets and welcome the detailed analysis provided in section 10 of the consultation.

ALTO adds the following comments:

Interconnect:

Voice interconnect for Call Origination and Call Termination will continue to be essential both for the legacy TDM and the modern SIP platform to support end to end voice services in the Urban and Regional areas.

ALTO welcomes the ComReg proposal in Clause 10.96 for a Next Generation (NG) interconnection service to be mandated.

ALTO strongly supports the view that this service should be cost orientated as indicated in table 77 of the consultation. We note open eir has recently published technical details for the launch of their SIP interconnect at the end of August 2020 however, we are concerned that for something that is so important, the prices are not yet available which does not bode well for a smooth launch.

ALTO believes that ComReg urgently need to add a new condition to the proposed regulation so that all operators can chose to use SIP interconnect with Open Eir for both Urban and Regional connectivity to avoid a situation where some operators could be restricted to high cost legacy TDM services.

Eircom Regulatory Governance Model (RGM) and Statements of Compliance (SoCs):

ALTO queries the extent to which the RGM models is actually functional. We also have heard very little from the Independent Oversight Board – IOB. This does not tend to instil confidence in the market or adherence to good and proper behaviours.

Remedies:

ALTO notes the breadth and depth of the remedies proposed in the consultation paper and hopes that adequate resource and focus can be maintained on the said remedies to the benefit of the market in the long run.

Q. 11. Do you agree with ComReg’s preliminary conclusions on the withdrawal of SMP remedies on the Urban FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 11. ALTO does not agree with ComReg’s preliminary conclusions on the withdrawal of SMP remedies on the Urban FACO Markets. ALTO is of the view and submits that the market share data in the ComReg consultation paper indicates that the removal of SMP remedies is premature and should not occur without firm commitments to remedy many of the issues set out in this response.

ALTO believes that in the event that ComReg decides to remove the SMP remedies, that the removal be conditional on a fit for purpose set of bulk migration processes developed on strictly a timed basis and being coupled with a sunset clause of a minimum of three (3) years in duration from the date at which bulk migration offerings can be deemed to be fit for purpose by ComReg and an independent assessor. Eir’s own behaviour previously in the broadband market does not instil industry with confidence that behaviours will have changed. ALTO also submits that roughly 20% of the market may be stranded if the said remedies are simply removed overnight.

ALTO submits that ComReg should endeavour to seek strong, formal and enforceable commitments from eir in advance of modifying SMP remedies in this market.

Q. 12. Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer,

along with all relevant factual evidence supporting your position.

A. 12. ALTO agrees with ComReg's selection of Option 4 of the Impact Statement which as such creates the greatest consumer benefit and minimises the lost efficiencies that occur from endeavouring to resolve intractable and long running disputes designed to address competition issues.

ALTO submits that any sunset clause should be linked in commencement to the offering of fit for purpose bulk migration offerings and once assessed independently as fit for purpose, be linked to a minimum three (3) year sunset clause for the removal of SMP obligations.

ALTO submits that in relation to Urban Areas, challenges exist in dealing with monopoly issues in those areas. ComReg does not appear to properly address the likelihood of such an occurrence with any real solutions, this should be reconsidered fully. We appreciate the logic of the Next General broadband approach adopted; it also has certain limitations.

ALTO

19th August 2020

BT Communications Ireland [“BT”] Response to ComReg’s Consultation:**Market Reviews - Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers - Wholesale Fixed Access and Call Origination**

Issue 1.0 - 19 August 2020

Status- Issued Confidential Version – Red text denotes confidential material.

1.0 Introduction and Executive Summary**1.1 Introduction**

BT welcomes the opportunity to comment to this significant Market review. We welcome the work that has gone into the detailed analysis of the two markets that are Fixed Access (FA) and Call Origination (CO) and referenced as FACO for the purposes of the consultation. However, whilst there are many aspects of the consultation we can recognise and agree, we find there are other aspects where we are significantly in disagreement and disappointed in the approach which we summarise below and provide supporting detail within our responses in Sections 2 and 3 below.

1.2 Executive Summary

In analysing this consultation we observe ComReg is working on the premise that the roll-out of High-Speed Broadband (i.e. FTTC+FTTH) ultimately provides an alternative access to the legacy copper WLR services which traditionally form what is known as the Fixed Access (FA) market. Whilst we may disagree and have concerns with some of the detail in the ComReg FA proposals, we acknowledge this technology change.

However, our main concern with the consultation is that the market changes appear to be largely benefiting Eircom rather than its competitors as we highlight at Section 2.1 of our response using data from the consultation. We are also of the view that the FA Market appears to be masking what is happening in the CO Market and we completely disagree with ComReg’s conclusions with respect to the CO Market. We acknowledge ComReg has provided interesting and informative market data concerning the CO Market, but we consider ComReg should have conducted a separate 3 Criteria Test (3CT) for the CO market to understand why VoIP has not grown more quickly and what maybe hindering its growth.

We consider the following help support our view.

1. Highspeed Broadband Access is of no use to the Call Origination market until customers can be migrated to Voice platforms over highspeed broadband, and the hurdles to move to the VoIP CO market are still high given there is no fit for purpose Eircom bulk migration process to move a large base of existing customers from WLR to VoIP. We believe today’s migration is largely through customer churn and customer requested upgrades so migration will continue to be incredibly slow until an efficient fit-for purpose bulk migration facility is available. The largest base of retail VoIP type services to date is offered by Virgin Media (VM) which has been the case for many years (and prior to the start of Q3 2015 period often quoted by ComReg in the consultation) and it uses its own cable access network with no dependence on the bulk migration facilities from Eircom. We note the VM services are not

available in the wholesale FACO market. The actual growth of VoIP using traditional telephony networks and available through wholesale supply has been modest over the Q32015 to Q4 2019 period of measurement.

2. Figure 36 of the consultation provides evidence suggesting that Eircom is growing wholesale market strength as seen by the transfer of some 100k operator customers from the upstream WLR product towards its downstream White Label Voice services. This type of migration towards Eircom White Label voice normally means operators are using more of the Eircom Voice network services which appears counter to the premise of lower barriers to competition through VoIP. We have not been able to find any detailed analysis within the consultation that explains this counter competition point.
3. As an operator in the market we have been able to review (in an anonymised form) where calls to BT Termination originate from in Ireland and our results do not agree with the ComReg view that the market is competitive, indeed we are of the view from our own data that the Eircom network originates the vast bulk of calls and minutes in the Irish Market.
4. Long memories are sometimes useful in this market and prior to the D10/18 and D11/18 consultation we remember reviewing the published WLR and FTTC Standalone prices to understand the viability to invest in a VoIP platform. We concluded the margin between these two key prices was not enough for a viable VoIP service. ComReg's work, including the consultations for D10/18, D11/10 led to clarity in these prices bringing regulatory certainty and a trading space for VoIP. This consultation now plans to remove this critical linkage between the WLR and VoIP prices which has the potential to destabilise and undermine VoIP investment and even the migration to VoIP in the short to medium term. In effect ComReg is proposing to de-regulate the urban FACO market before competition using VoIP has had a chance of becoming established in the Irish market and this is counterproductive.

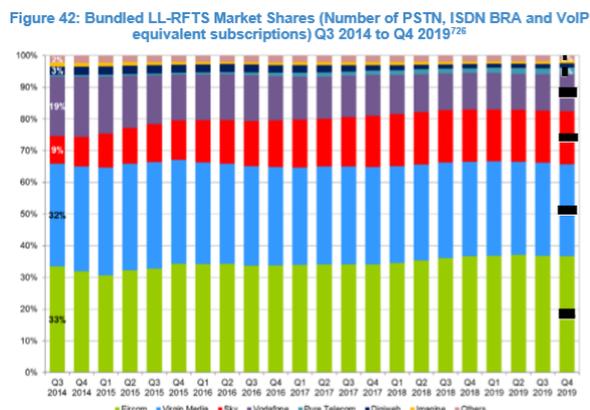
In conclusion whilst we consider more work is still needed for the FA part of the consultation we consider the CO part really needs to be studied in its own right, with its own 3CT test to understand the significant barriers that exist for migration to VoIP; the strong and growing strength of Eircom in the FA & CO market; and the significant incentive and opportunity that could exist (absent regulation in the Urban market) for Eircom to leverage a considerable base of its WLV customers onto its own VoIP platform whilst also having the incentive and opportunity to stall the migration of other operator existing WLR bases to VoIP. I.e. Eircom could internally migrate its WLV base to VoIP whereas others would need to port numbers and the current Eircom bulk migration facility is not fit for purpose. In our view the 3CT tests would pass for the CO market and the urban areas should not be de-regulated at this time.

2.0 Further Analysis

2.1 Analysis of Eircom's Market Share

While it is clear that NGA offers the potential alternative substitute to traditional copper access, it is clear from the ComReg data that this competitive dynamic has not been working – the only operator that has migrated from traditional voice in significant volume is Eircom themselves, and that with the exception of Virgin Media, all of Eircom's main competitors in the RFTS market remain heavily reliant on Eircom wholesale voice inputs (WLR, WLV or VoIP).

BT Figure 1 – Extract of figure 42 from the consultation showing Market shares as below.



Eircom Retail were the market leader in Q3 2014 and has grown share from 33% to 37% over the past five years.

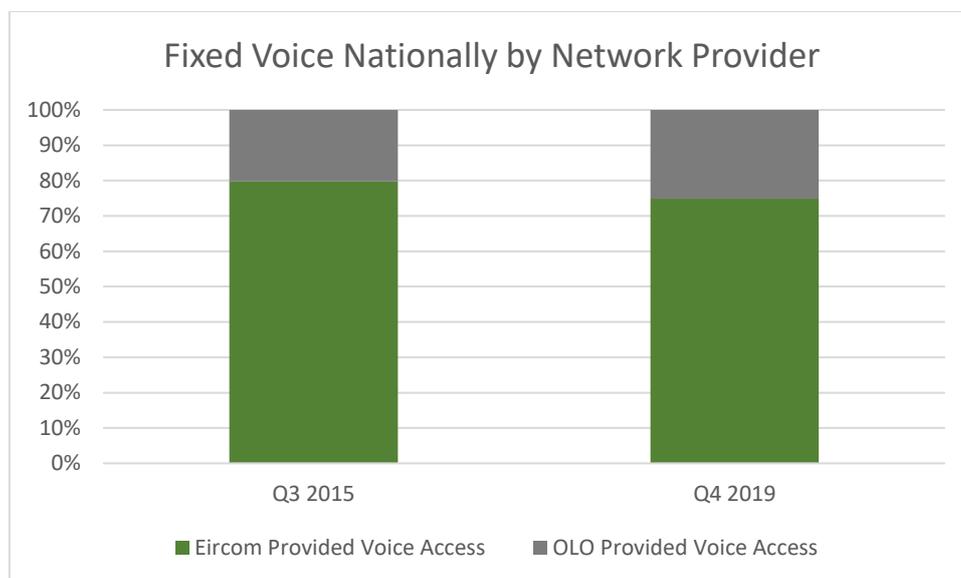
Absent self-supply by Eircom, we believe the consultation data leads to the conclusion that even operators with the own VoIP platforms have/are facing a difficulty bulk migrating their existing WLR bases to VoIP.

ComReg theorise that the existence of an alternative technical platform provides competing operators a ready solution for LL_RFTS subscribers across the NGA footprint. This technical solution has been available since 2014, yet Managed VoIP served by OLOs has only increased share modestly over those five years.

In 5.369 ComReg observe “In respect of the provision of RFTS specifically by means of Managed VoB, ComReg data indicate that, overall, RFTS subscriptions have declined by 3% between Q3 2015 and Q4 2019. Over the same time period, the proportion of RFTS subscriptions accounted for by Managed VoB has risen from 24% to 35%.” It seems rather important to note that fully 6% of that 10% growth in share came from Eircom managed VOIP (see Table 30) – in the five years OLO Managed VoIP only grew from 24% to 29%.

Taking fixed voice metrics provided in Table 70 and comparing by wholesale network provider makes this point rather more starkly

BT Figure 2 – Fixed Voice Nationally by Network Provider



As of Q4 2019, more than 70% of voice access in Ireland is provided by Eircom Retail or by Eircom Wholesale. As per Figure 42 of the consultation, Eircom Retail were the clear market leader in the provision of RFTS in 2015, and their market share has grown since then.

Despite the widespread availability of NGA broadband over this period and the presence of regulated FACO nationally, the percentage of subscribers' dependent on Eircom fixed voice access (self-supply, WLR, WLV, Managed VoB) has remained above 70%.

The decline in the FNA markets described in 3.33 and 3.34 of the consultation are rather less dramatic when assessed along with Managed VoB. Eircom themselves have been the most successful at migrating their FNA base for Managed VoB. The net reduction in fixed voice access is 10% over the five years.

We believe Eircom has dominance in the provision of subscriber voice in Ireland, at over 70% share, is further evidenced by their share of unique numbers calling BT Ranges *** of all callers to BT number ranges originated from callers on the Eircom network.

ComReg do not break down Table 70 data by Urban and Regional. When we assess our call data (see BT Figures 4 & 5) and measure only callers from the Dublin minimum numbering areas (where Eircom's competition is at its highest), Eircom's share of unique CLIs is *** higher than that of their nearest competitor (Virgin Media).

In 5.389 ComReg forecast that removal of regulation would see Eircom's retail market share grow by more than 5% in the Urban area. This assumption depends on the larger OLOs successfully migrating to Managed VoIP within the horizon period. Given the evidence of the past five years – only 5% net OLO migrations to VoIP, that assumption is clearly unsafe.

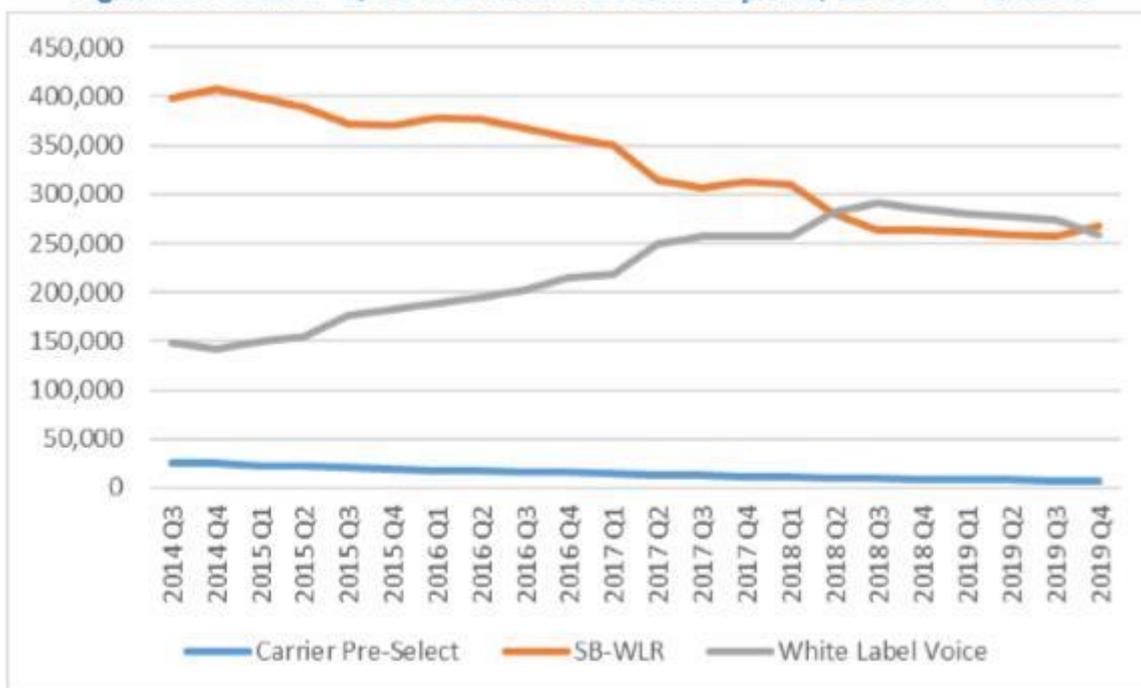
2.2 Call Origination Market

ComReg's review is of two different markets and after reviewing the consultation we consider it would have been better to have consulted these different markets separately as is the case with Ofcom. We are most concerned that the FA analysis appears to be masking the problems with the CO market.

ComReg provide a lot of data for the CO market but in our view the consultation provides a limited analysis of what the data is demonstrating, particularly that Eircom appears to have had a very stable RFTS market share since 2015 and is significantly growing its WLV services. I.e. Eircom's WLV is growing and not declining. ComReg also highlight that the stable market share for RFTS has been a reason for other regulators not de-regulating. We consider more attention is required to understand what is happening in the CO and whether Eircom has the potential to leverage the market to substantially grow its VoIP base whilst also having the opportunity to hinder the growth of other operator VoIP. Figure 3 below (ComReg Fig 36) is extracted from the consultation and clearly highlights the growth of Eircom White Label Voice which mirrors the decline in WLR. Even the steps in the graphs are completely aligned, most likely showing competitor migrations from WLR to Eircom WLV. This is the reverse of infrastructure competition as Eircom increases its network strength and this needs to be considered in the analysis. In our view the questions of what has happened and why need to be addressed. For example as seen in BT Figures 4 and 5 below, we estimate from reverse engineering our own network data for calls that originate in Ireland and Terminate on BT Ireland, we can see that the Eircom network now originates the vast majority of calls nationally and this should be considered in the study.

BT Figure 3 – Extract from the consultation showing the growth of Eircom Wholesale White Label Voice at the expense of Wholesale Line Rental

Figure 36: Total CPS, SB-WLR and WLV access paths, Q3 2014 – Q4 2019



BT Figure 4 – In Confidence – Irish Number Ranges calling BT Ireland Termination

BT Figure 5 – In Confidence – Irish originated minutes to BT Ireland Termination

A major concern for us is Eircom appears to have the opportunity and incentive to leverage its unique position to entrench its dominance in the CO market with a combination of stalling the ability of competitors bulk migrating from WLR to NGB VoIP (problems with the Eircom Bulk Migration facility) whilst internally migrating its WLV base to VoIP.

2.3 Migration from WLR Voice to High Speed BB VoIP

The bulk migration of customers from WLR Voice to VoIP from the Eircom platform to non-Eircom platforms is problematic and is likely to take several years rather than the sunset time period proposed which may or may not exist once this Market Review is complete. It’s abundantly clear the bulk order type mandated by ComReg in D10/18¹ provided by Eircom is not fit for purpose as the ability to use any of Eircom’s automated facilities, for example to report faults if the migration fails,

¹ ComReg Decision D10/18, ComReg document reference 18/94, Appendix 20 - Wholesale Local Access: Decision Instrument, Section 2 Definitions, Migration(s) and Bulk Migrations and Section 7 Obligations to Provide Access.

are not available once the migration happens. This has the impact that if a bulk migration goes wrong the automatic systems will not be able to reverse the transaction and 1000s of customers could be stranded, having to endure a poor experience with no phone or BB for an unknown period without the use of costly and lengthy Eircom project management. Without project management the period could ultimately be extremely long if Eircom wait for enough migrations before deploying an engineer to a street cabinet or exchange MDF to remove the redundant jumper wiring. In conclusion we do not consider a fit for purpose and efficient bulk migration facility is available from Eircom, which is contrary to the views of ComReg, Vodafone and Eircom as described in the extract from D10/18 as below.

Extract from D10/18 (italics added)

ComReg's Assessment of Respondents' Views

7.175 ComReg agrees with Vodafone's view that efficient migration processes are essential to well-functioning and competitive downstream markets.

7.176 ComReg also agrees with Eircom's view that Migrations processes should be efficient, swift and are key to a properly functioning market.

7.177 The proposed Migrations obligation is to support the ability for Access Seekers (and Eircom) to efficiently and swiftly switch between various wholesale access products (including those in other regulated markets such as the WCA Markets). Eircom has a central role in the design and implementation of Migration processes and therefore is ultimately responsible for ensuring their effectiveness and efficiency.

End of Extract

Separately we have found on many occasions over the last 15 years that the ComReg dispute and complaint process to be drawn out (even with the genuine best endeavours of the ComReg team) with timescales for resolution measured in years and not months. This combined with the demonstrable failure (RGM Case²) of the Wholesale enforcement process for ComReg to apply any form of Administrative Fine or win a prosecution limits the effectiveness of ComReg enforcement. A key principle of enforcement is to be dissuasive and, in our view, ComReg's wholesale enforcement powers are seriously deficient. We agree with the findings of the Law Reform Commission³ to align enforcement powers across the regulators and please see our more detailed response to the ComReg penalties consultation. For the avoidance of doubt this is a structural issue for ComReg and beyond the best endeavours of the Wholesale Compliance Team. We ask for ComReg to take advantage of the EECC legislative window and the Gov't work programme to align regulator powers.

For the above reasons we consider the fastest way to resolve the migration barrier is within this Market Review Decision and to provide a new remedy within this regulation both in the Urban and Regional markets to mandate a fit for purpose efficient bulk migration process end-to-end and not

² The RGM is Eircom's Regulatory Governance Model and <https://www.comreg.ie/publication/wholesale-compliance-litigation-update/>

³ 2018 Law Reform Commission - REPORT ON REGULATORY POWERS AND CORPORATE OFFENCES.

just half of the process that has resulted from D10/18. Additionally, the upheaval of migrating the existing customer base from WLR to VoIP is not trivial and requires an update the customers modem and change of the voice wiring.

2.4 Review of ComReg data and the Q3 2015 to Q4 2019 period.

1. Therefore, we consider Voice competition is retrenching towards Eircom rather than opening with the advent of VoIP. We believe the failure of Eircom to offer an efficient fit for purpose bulk migration order type is a huge hurdle to the industry and the slow complaint/dispute process and virtually non-existent wholesale enforcement facility means competition will take a lot longer to establish as it will be based on customer churn rather than operators being able to migrate their existing FACO customers.

2.5 The justification for the 80% De-regulation figure.

We note the Eircom request⁴ for clarification of the 80% figure which appears to be based on the overall national roll-out of high-speed broadband. Our concern is that this number could ultimately be a line in the sand that keeps moving which would create huge regulatory uncertainty as to the outcome in this Decision as some say it's too high and other too low. This number has huge consequences, for example if too low then an even greater number of customers that can't avail of high-speed broadband will experience low competitive supply of existing copper based FACO.

2.6 80:20 Rule for deregulation

The 80:20 approach towards assessing de-regulation in urban is coarse in approach and ComReg largely fail to address what will happen to the large cohort of premises that cannot avail of highspeed broadband and will be at the mercy of low levels of competition. We have already seen evidence of ComReg de-regulation in the broadband market (Decision D10/18) that effectively created significant price increases (through the removal of discounts) in wholesale broadband rates. If regulation were to be removed in the Urban FACO market we consider ComReg needs to do better for the large cohort that is the 20% premises of urban areas to meet the objectives of the Act⁵ including but not limited to the "Objectives of Commission" [In this context Commission means ComReg] Condition "12(1)(a)(iii) to promote the interests of users within the Community," For example, as a minimum there should be the introduction of a fair and reasonable environment condition to protect this group. By any standard the 80:20 creates two communities one where ComReg appear to promote the interests of users and another where this does not appear to be the case. We do not believe this is consistent with the either the intention or the expected implementation of the Act. Notwithstanding our view for regulation in the urban FACO area to

⁴ ComReg document reference 20/65 – ComReg response to Eircom second clarification Request on ComReg Document 20/46 ("the Consultation")

⁵ 2002 Communications Act as amended by the 2007 Amendment Act.

continue, we believe ComReg need to do a lot more for the 20% if this de-regulation is to happen as ComReg clearly demonstrate the hurdles for competition for this group are high

2.7 Eircom Voluntary agreement at page 473 see question 10.

We understand Eircom is seeking for no to minimal regulatory obligations in lieu of a Voluntary Commitment which is largely time bounded to two years. We welcome and agree the view of ComReg concerning the voluntary offer and that it's not cost orientated etc. and that the offer is insufficient to address the competition issues addressed in Section 9. Given the poor RGM experience and even the recent need to change aspects of that agreement, we have no confidence in a self-regulation approach that such an offer proposes.

3.0 Response to the detailed questions

Retail

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

BT Response 1 – Page 93

At the retail layer we agree the main developments identified in the provision of RFTS are important to informing the assessment of the Relevant market and we would like to offer the following comments which we believe impact the RFTS assessment.

1. We agree that the RFTS market is declining as illustrated by the falling number of minutes over the years. However it is interesting at clause 3.21 that 94.4% of the market is shared between only five operators and we also note Table 69 of the consultation indicates that since Q3 2015 to Q4 2019 Eircom has only lost 1.6% market share of the RFTS, and other than Sky, who only entered the market in 2013, the market shares of the others have been stable. This seems somewhat at odds to a market where the upstream barriers are supposedly reducing through the rapid introduction of Next Generation Broadband (NGB) and VoIP technology, yet the growth of VoIP over this period has been very modest.
2. Our comment in 1 above is supported by figure 3 of the consultation that over Q3 2015 to Q4 2019 VOB has not set the market alight as the VoIP base has only grown by circa 133k subscriptions. This is noted in the context that Virgin Media has operated a VoIP solution for many years and prior to Q3 2015 as part of its Cable TV package. Given that FTTC NGA was launched in 2013 and rolled out rapidly, it's surprising VoIP has not grown faster and begs the question as to what is holding VoIP providers back?
3. We take interest in clause 3.123 clause (c) where ComReg suggests that through innovation and development traditional SPs are responding to market changes and are retaining market share. We believe the ComReg comment in the following paragraph, 3.124 "Managed VoIP is an emerging trend in the RFTS" would more accurately define the market. As a player in the market we consider the growth of VoIP is sensitive to the difference "space to trade"

between Eircom's wholesale WLR price and the price of Standalone FTTC + (Cost of VoIP). We believe ComReg D10/18, D11/18 late 2018 (with pricing effective 2019) brought clarity to the trading space with both the WLA BB standalone price and the WLR prices regulated. Hence, we are concerned that ComReg proposals for the Urban de-regulation will re-open the instability in the trading space for VoIP in the short to medium term.

In conclusion we would tend to agree with the top-level technology changes observed by ComReg for the RFTS market, but the transition to VoIP should have grown more quickly. We consider ComReg need to analyse the slow growth of VoIP and its sensitivity to critical upstream issues such as Margin Squeeze, and the lack of an efficient fit for purpose bulk migration facility.

Question 2: Do you agree with ComReg's preliminary conclusions on the product market assessment for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 2 – Page 206

We would like to offer the following comments:

1. A key characteristic of the Irish voice market that differentiates it from other jurisdictions is the significant dependence on WLR, whereas in other jurisdictions the growth of LLU was predominately full unbundling where the operators implemented their own voice platforms and now own the phone number and voice service on their own platform. The disproportionate high price of full LLU unbundling in Ireland was not resolved until court proceedings in 2009 by which time the Irish market had no option but to commit to Line share LLU with WLR. In our view this significantly stunted the growth of voice competition other than through WLR. Hence whilst we understand the ComReg comments in clause 4.1 we consider the Irish Voice Market has unique traits such as a lower level of voice infrastructure competition and a greater dependency on WLR migrations to VoIP. We also note that many other jurisdictions have taken unopposed decisions to continue voice regulation and as ComReg indicate the European Commission provides a route to maintain voice regulation.
2. We agree with ComReg's comment in 4.200 that VoIP over ADSL is not appropriate to this market for the reasons of bandwidth and quality. We investigated this solution prior to the availability of FTTC and came to the same conclusion including concerns around 112/999 services.
3. We generally agree with ComReg's preliminary conclusions on the product market assessment for the Relevant RFTS Markets, however, we are concerned that the technology changes toward VoIP in the upstream market are not flowing through as quickly as we would have expected to the RFTS market and question why Eircom's upstream WLV supply to the RFTS market (figure 36 of the consultation) is growing when the logic of more competitive NGB/VoIP access would suggest it should decline.

Question 3: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly

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

BT Response 3 – Page 206

We would like to offer the following comments:

1. Provided the underlying upstream wholesale supply is not disrupted or restricted as discussed in our response to question 7, we would agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant RFTS Markets, however we are very aware that the upstream wholesale supply could be disrupted or obstructed for 20% of the Urban Exchange Areas raising serious concerns as to the upstream availability of these services. There appears to be little if any analysis within the consultation of the potential impact on this 20% of the de-regulated market and again it looks like de-regulation at the cost of the end customer – please also see our comments in Section 2.6. We consider that ComReg is answerable to the Ministers policy objective of Communications Act 2002 as Amended 2007 to consider the welfare of the 20% customer group and this should be considered in this study as they could be open to very different conditions compared to customers in the 80% areas. In our view the 3CT test would clearly pass for the 20% area's so what is ComReg going to do to help them?
2. Separately we are concerned as to how margin squeeze will be managed in the urban areas and will the bundle of Voice and Broadband trigger a WLA MST in line with work carried out by Oxa some years ago for conducting an MST on a bundle. To protect competition such an MST is critically required.

FACO Market Definition

Question 4: Do you agree with ComReg's preliminary conclusions on the product market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 4 – Page 322

We would like to offer the following comments:

1. Considering Eircom's introduction of SIP interconnect announced for the 1st October 2020 we consider the ComReg interconnect description in 5.28 needs to be further updated. Please see our response to question 10 for more detail of the changes and the impact on Interconnect.
2. With reference to clause 5.39 we consider the Fixed Access FA market to be quite different to the Call Origination CO market for the following reasons:
 - a. The fixed access market is clearly changing with the increased availability of NGB access in urban areas and ComReg has mapped FA locations to the EAs to align with the BB market.
 - b. The Call Origination market is quite different to the FA market and figure 36 suggests that Eircom is growing its market share of WLW (i.e. FACO plus end-to-end services) and we believe it has both the incentive and opportunity to leverage the migration of its own customers (WLW and Retail) to NGB and its own VoIP platform

whilst obstructing the ability of others to migrate their WLR (and WLV) TDM Voice base of customers to NGB VoIP on the other operators platform. For Example, Eircom does not need to port numbers for such a migration and its clear it has the capability to internally synchronise such a move of customers within its own platform. The Eircom bulk migration order type called “PNS” is not fit for purpose and does not offer a recovery route for operators if the migration does not work properly – operators cannot even use Eircom’s automated system to raise a customer fault for some undefined period after the migration. We consider ComReg need to conduct a far deeper review of this issue and to look more deeply into the CO market. Our view is the FA/NGB market is masking what is happening in the CO market – for example there should be a 3CT for each market rather than just one that is largely based on the FA aspects.

- c. With regards to clause 5.65 of the consultation we consider there is a closeness of the Eircom FACO and WLV products that warrants a deeper review. For example the logic should have been that operators migrate to their own VoIP platforms, but instead operators have given more control of their services to Eircom in migrating from WLR to WLV (ComReg Fog 36) which seems to opposite to what would have been expected. We would ask ComReg to analyse further why the market operators did not take the opportunity to invest in VoIP and instead reduce the level of competition.
- d. ComReg provide a lot of data for the Call Origination market but in our view the consultation needs to further analyse the data as Eircom appears to have had a very stable RFTS market share since 2015 and has significantly grown its white label Voice services (FACO plus). I.e. Eircom’s wholesale voice service is growing and not declining. ComReg also highlight that the stable market share for RFTS has been a reason for other regulators maintaining regulation yet ComReg has taken the opposite view. We consider more attention is required to understand what is happening in the CO and whether Eircom has or potentially can leverage the market to both grow its own VoIP base whilst hindering the growth of other operator VoIP. Figure 3 of our response in Section 2.2 is extracted from the consultation and clearly highlights the growth of Eircom White Label Voice which mirrors the decline in WLR. Even the steps in the graphs are completely aligned which most likely show competitors are migrating their network CO voice services to the Eircom network whilst they focus on RFTS. This is the reverse of competition as Eircom increases its market strength and this needs to be considered in the analysis. For example ComReg need to ask what has happened and why. For example as seen in BT Figures 4 and 5 below in Section 2.2 of our response, we estimate from reverse engineering our own BT Call Termination of calls to analyse Irish originated calls to our network.
- e. A major concern for us is Eircom also has both the clear opportunity and incentive to leverage its unique position to entrench its dominance in voice within the urban market with a combination of margin squeezes (through the lack of a WLR price control in urban area) and stalling the ability of competitors bulk migrating their WLR/WLV customers to their own VoIP platforms.

Question 5: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly

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

BT Response 5 – Page 322

We agree that ComReg in its 3a and 3b Market Review leading to Decisions D10/18 and D11/18 has already split the Next Generation BB market based on an Urban/Regional split. We understand ComReg's logic that if NGA access can support high speeds then it's capable of supporting voice services. However, the broad ComReg FA assumptions mask important detail that has a direct impact on CO customers and requires consideration.

1. Paragraph 5.377 and 5.378 crystallize the problem with ComReg's preliminary conclusion. We believe the evidence indicates that Eircom is dominant in the FACO market in all the geographic markets proposed, the only merit in positing the existence of these geographic markets is the potential for NGA coverage to offer a competitive alternative to Eircom network services. We believe the ComReg's data demonstrates that since 2015, Eircom have successfully increased the percentage of Irish voice subscriber's dependent on its network access for fixed voice access. Please also see Section 2.1 for our analysis.
2. As in Section 2.5 we are concerned the 80:20 ratio could change significantly. Such changes would create huge regulatory uncertainty as to the outcome in this Decision and what happens to competition in locations in the EA's where high speed broadband does not exist. Our concern is heightened by the huge changes that happened with the Leased Lines modelling between the consultation and Decision, similar in BB pricing following the Broadband Decision and now also the WACC notification to the European Commission. Whilst we appreciate the consultations inform ComReg and some changes can happen, we consider it inappropriate for there to be large unpredictable changes without the chance for further comment.
3. Please see our response in Section 2.6.
4. Please refer to the issues concerning bulk migrations we raise in our response to question 7.
3. We note ComReg is already asking operators for data for its mid-term review of the BB market hence is the underlying foundation of regulation in the WLA market likely to change? Such changes could significantly undermine the foundations that ComReg has built into the assumption that the FA market can use regulated BB Wholesale Local Access.
4. We would note that there are still VUA sites that are uneconomic to reach, so ComReg are mistaken that VUA is the answer for continuing wholesale supply.

Question 6: Do you agree with ComReg's preliminary conclusions on the 3CT for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 6 – Page 372

We would like to offer the following Comments to ComReg's preliminary conclusions on the 3CT for the Relevant RFTS Markets.

1. Clause 6.173 – We observe that absent other regulation this ComReg decision is likely to bring about the end of the standalone voice service as the commercial viability of using high speed broadband to simply provide a standalone voice service seems challenging.

2. With the availability of FACO regulation in the regional area we would agree with the removal of RFTS for LL-PSTN but not for HL-RFTS. We acknowledge these HL-RFTS services are in decline but the replacement costs for customers can still be significant and the services should be allowed to retire gracefully over the coming years with customers protected, rather than the potential for fast track closure of these services that de-regulation would allow.
3. We strongly do not agree with the ComReg proposal for de-regulation in the Urban FACO market (please see our response to question 7) and likewise we do not agree with any de-regulation of RFTS in the Urban areas absent FACO regulation in the Urban areas. I.e. We would support point 2 above in the Urban area if FACO regulation in the urban areas were maintained. We genuinely consider there a real risk of supply disruption such as non-supply or higher prices in the 20% portion of the Urban areas if ComReg's proposals were to go ahead.
4. We are strongly concerned at the potential risk of an upstream margin squeeze between WLR prices and WLA+VoIP costs in the FACO upstream market that could create supply issues into the Urban RFTS market and ultimately cause RFTS supply difficulties to the 80% part of the EA.

In conclusion we consider absent the FACO urban regulation there are sufficient regulatory problems for the Urban RFTS market meaning the 3CT passes for regulation to be applied. For the regional RFTS we consider the HL services should continue to be regulated due to high replacement costs.

Consultation Section 7 FACO Competition Analysis – 3CT and SMP

Question 7: Do you agree with ComReg's preliminary conclusions on the market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 7 – Page 442

We welcome the detailed analysis in this section and whilst there is much of the analysis we agree we consider there are significant aspects that are touched on but not followed up in detail, and if that were to happen we consider Criterion 1&2 of the 3CT for Urban areas would have passed and ComReg would have concluded the need for a continuation of existing regulation with some obligations on Eircom to remove certain constraints that we believe are hindering the market from reaching competition in the timescale of that the decision. Please see our comments below which have been split between our views on the Regional Market and then our views on the Urban Market.

Regional Market and the 3 Criteria Test.

1. We welcome the NBP project but also welcome that ComReg has not sought to include the impact of the NBP rollout within its analysis as it would be prudent to assess what will be available to the market when it's rolled out rather than playing a guessing game. In this respect we note Table 66 (page 376) of the consultation shows that Eircom is planning a target rollout of 2.4 Million premises, i.e. 100% of the country by this year. Whilst such a level of rollout in 2020 looks stretched the table appears to show intent for a 100% rollout and such may impact the dynamics of the NBP rollout. Hence for this reason we fully agree with ComReg to base its decision on what is in place rather than what is planned.

2. We would agree with the ComReg statement of clause 7.27 that Eircom is overwhelmingly in control of the Regional FACO market, however whilst we can see the intrinsic availability for other operators to use the Next Generation Broadband for new services as customers churn provider or upgrade, we consider the non-availability of an efficient fit for purpose bulk migration facility from Eircom combined with the additional work in each customers premises prevents operators being able to bulk move to Next Generation BB based VoIP services within the period of this Decision. I.e. the market will be become competitive at a much slower rate than ComReg predicts. This reminds us of LLU which theoretically should have stimulated much faster broadband growth in Ireland but largely failed for many reasons, one of which was the delay in establishing seamless customer migrations (Please see the detail of the issue in our response to question 8).
3. We support the ComReg proposal for a mid-term assessment proposed in Section 11 where ComReg can review the level of migration and whether FACO is ultimately competitive, however there is little point is letting the horse bolt first. Hence, we propose keeping the Urban regulation in place until the bulk migrations of existing provider WLR bases to VoIP have been achieved.
4. With respect to ComReg's comments at clause 7.32 these appear to only address traditional copper access, however we note Table 66 of this consultation and independently we are of the view that the incentives (including to protect market share) and existing infrastructure is sufficiently in place for Eircom to roll its high speed broadband network into the NBP intervention zone. The lack of existing alternative access infrastructure compared to Eircom and customer density appears to make it difficult for other commercial operators to rollout into the Intervention area other than for exceptional one-off cases such as large business customers/data centres.
5. We do not agree with ComReg's view in clause 9.97 that over the lifetime of the review the Next Generation broadband/VoIP competition will grow at a sufficient rate to exercise an indirect constraint on Eircom in the Urban FACO markets. We consider that ComReg needs to further consider issues that hindering bulk migrations including both the lack of an efficient fit for purpose Bulk Migration Product and the work of transferring a very large base of residential customers. We also believe ComReg need to consider the incentive and opportunity for a WLR to WLA (+VoIP costs) margin squeeze to disincentivise competition and that a competition case will take too long to resolve.
6. We agree with clause 7.108 that Eircom supplies some 99% of FACO supply in the Regional FACO markets and we are not surprised that it is also a significant provider of RFTS in the regional footprint. Whilst the public plans for NBP rollout over the next 7 years are in place (we acknowledge 5yrs is now being discussed by Politian's) we believe ComReg should note that Eircom has the incentive, the opportunity and potentially the finance (such as from duct and pole rentals) to protect its lucrative FACO and RFTS customer base in the regional areas through its own NGB rollout. In our view ComReg's conclusion on the Regional Market is correct and in addition ComReg urgently needs to add a new efficient fit for purpose **Bulk Migration Remedy** for operators to migrate existing FACO WLR customers to Regional NGB services as they are rolled out in the regional area such as by the NBP provider and potentially Eircom. We note D10/18 has a bulk migration requirement but given the problems with the Eircom implementation this new Decision should detail an appropriate efficient fit for purpose remedy as such is appropriate to this market. The ComReg complaints disputes process is basically ineffective through delay even with the best will of ComReg so an efficient fit-for-

purpose bulk migration remedy needs to be specified as part of the Decision. This is also needed in the Urban market. Our detailed work has highlighted the D10/18 bulk migration remedy has not achieved an Eircom efficient fit-for-purpose bulk-Migration facility as the order type does not end cleanly and if anything goes wrong customers could be stranded without service. This means the order type cannot be trusted for bulk migrations and is largely unusable.

7. 3CT Regional - We agree with ComReg at 7.135a that the 3 criteria are passed for the Regional market in that the hurdles to roll-out Fixed Access or NG BB are high and to date have not been achieved by operators other than Eircom. Time will tell concerning the State Aid Programme but to date nothing is rolled out so no judgement can be made at this time as a plan is not a roll-out. We consider competition within the period should be reviewed once the NBP is complete and stable, and the status of any Eircom regional rollout at that time. We would also agree with ComReg that competition law is not efficient at dealing with wider issues relating to wider infrastructure competition as such is too specific and too slow.
8. 3CT Urban – We consider ComReg needs to further review the barriers for competitors considering the lack of a fit-for-purpose bulk migration facility to move the existing WLR base to VoIP and that the incentive and opportunity will exist for Eircom to exercise a Margin Squeeze between WLR pricing and WLA(+VoIP) to stall the take up of VoIP by other operators. We already note that operators have been migrating to Eircom’s own WLV product which the low VoIP figures presented by ComReg tend to suggest these are TDM based rather than VoIP based services. We are concerned there is a significant incentive and opportunity for Eircom to leverage infrastructure competition towards Eircom’s downstream white label services rather than operators offering competitive alternatives. We note that for eircom WLV services (traditional or VoIP) number porting is not required as WLR phone numbers also exist on the Eircom platform and presumably the synchronisation issues can be more easily managed internally by Eircom for a migration from WLR to VoIP. This is not the case for WLR migrations to other operator networks which requires a more complex synchronisation of process over a couple of days and the use of temporary numbers. When the additional problems are combined with lack of an efficient fit-for-purpose bulk migration facility the barriers to entry are high and not transitory in the short to medium term.
In terms of the market tending to competition during the period of the review, we would agree that market churn and customer upgrades is supporting a move in this direction, but this is very slow and ultimately will not deliver type of competitive growth that ComReg is concluding in 7.184. Hence in our view both Criteria 1 and Criteria 2 pass as the process to migrate will take many years without bulk migrations. The same comments as for the regional market in 7.7 above apply to the urban market hence in conclusion the Urban market passes the test and should be regulated until such a time as the bulk migration issues are resolved and equivalence is brought to the eircom migration of WLR to the WLV service.
9. We note table 72 – NRA grounds for passing 3CT criteria 1 and 2 that stable market share of the incumbent is one of the reasons for criteria 1 and 2 passing. Table 69 – RFTS market shares, Q3 2015 – Q4 2019 also show that Eircom’s high market share has been very stable as has most of the market with Sky growing the most at +5.1% which may not be surprising as it only entered the Irish market in 2013 and started from zero base. The market for RFTS has been stagnant in the period of measure and one must question why. ComReg at clauses 5.385 and 7.147 suggest that the reason for this stability is related to the ability of operators migrate customers to VoIP, but the data provided by ComReg and our own information at Section 2.4

does not support that bulk migration to VoIP is happening, and our view is the Eircom bulk migration facility from WLR to VoIP is not fit for purpose. If the bulk migration were applied, it could leave many customers in no-man's land with the potential of no service which is an unacceptable outcome.

In conclusion we consider there are serious flaws in the CO market that strongly suggest that in both the regional and urban markets the 3CT tests for both pass and that further regulatory intervention is required over and above the regulation that is already in place. Otherwise we are going to experience a far slower migration to VoIP that ComReg envisages.

Question 8: Do you agree with ComReg's preliminary conclusion on the market assessment for the RFTS Markets, absent regulation in the Urban FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 8 - Page 449

We disagree with ComReg's preliminary conclusions on the market assessment for the RFTS Markets, absent regulation in the Urban FACO Markets and apply the 3CT to help explain our views below:

1. Criterion 1: High and non-transitory barriers to entry.
In our view ComReg makes an overly simplistic assessment of the barriers to entry. We would agree that when customers change service provider or upgrade there is the alternative of migrating the customer to a BB based VoIP service as part of the change given the need of the SP to supply a new modem and likely customer visit to alter the connection of the PSTN wiring. However, the failure of Eircom to offer an efficient fit for purpose WLR to VoIP bulk transfer facility combined with the additional work, including the automated management of such a bulk transfer and cost to modify the service at the Customer premises ultimately creates a high barrier for the mass migration of a providers existing base of WLR customers to VoIP. Please also see Section 2 of our response and our answers to the questions for further details. Hence this test is a pass and not a fail for the duration of the period under review as supply in the urban areas will be stunted and the RFTS market will move to competitiveness at a far slower rate and beyond the period of the review. We note that during the 2000's it took operator complaints and ComReg's action over several years to force a seamless migration from bitstream to LLU (ComReg Decision D05/09 Doc ref 09/77), and even the solution resulted in an untenable high premium price which in our view slowed the initial growth of Broadband in Ireland. We do not want a repeat of this type of issue.
2. Criterion 2: Is the market tending towards effective competition within the relevant time horizon? We would like to make two points to this Criteria as follows:
 - a. As in 1 above we would agree that the natural churn of customers will ultimately see a migration to VoIP although some are still churning to traditional services, but the migration is not tending to competition quickly enough or within the relevant time horizon for this market review, so this test passes rather than fails.
 - b. We are most concerned that ComReg's deregulation of the upstream FACO market with the removal of the vital price control between the regulated price of WLR to the regulated price of WLA NGB (with industry adding VoIP costs). For many years

we considered the VoIP investment non-viable due to the high price of Standalone Broadband and it was only relatively recently that regulation set price controls to sustain a workable margin for investment and trade in VoIP. We are concerned that ComReg's plans to de-regulate the WLR price controls leaves the industry at risk of a margin squeeze where WLR prices fall and the migration of the WLR base to VoIP will not be viable in the short to medium term. Again this will likely limit migration to customer churn/upgrades to FTTH with growth being slow. The knock-on impact to the RFTS market could be significant with the migration of the WLR base to VoIP severely stunted and competition limited.

- c. Figure 36 on page 211 of the consultation highlights that since 2014 Eircom is has been growing its share in the FCAO market (through WLV) rather than losing it which begs the question why this is happening when ComReg are saying the hurdles are reduced. This graph indicates to us that other providers are migrating to Eircom's white label product rather than providing their own VoIP which should have been the expected behaviour with the arrival of VoIP over NGB. This consultation (Figure 36) indicates something else is happening that is hindering the level of competition and we consider ComReg should further review what is happening and why? Please also see Section 2.1 of our response.
3. Criterion 3: Competition Law takes far too long to resolve such matters and wider/multiple issues such as considered in this consultation are better addressed through regulation.

In conclusion we do not agree with ComReg's preliminary conclusion on the market assessment for the RFTS Markets, absent regulation in the Urban FACO Markets. As above we consider there are serious issues to be resolved in the upstream Urban FACO market and unless resolved through FACO regulation (including a new efficient fit for purpose Bulk Migration Remedy) we believe the Urban RFTS market will be distorted creating a slow growth of competition.

Competition Problems

Question 9: Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Regional FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 9 – Page 463

We fully agree with the analysis provided by ComReg in Section 9 of the consultation and consider the concerns are a fair and reasonable reflection of the types of issue that need to be monitored and regulated in Ireland. We fully agree the competition problems identified and the associated impacts on competition are those that could potentially arise in the Regional FACO Markets. As discussed in our other responses to this consultation we are concerned there also exists an opportunity for the migration of WLR customers to NGB VoIP services to be obstructed, and we consider this needs an additional strong remedy given ComReg's attempts to regulate this through the WLA market have not been successful.

We consider competition issues continue to exist for the Urban CO market and ComReg should review this market again to apply appropriate regulation such as the prevention of an MST and for a fit for purpose efficient bulk migration process as discussed in our response to question 4.

Remedies

Question 10: Do you agree with ComReg’s preliminary conclusions on remedies in the Regional FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 10 – Page 546

We generally agree with ComReg’s preliminary conclusions on remedies in the Regional FACO Markets and welcome the detailed analysis provided in section 10 of the consultation. We would like to offer the following comments regarding the ComReg discussion of remedies.

- Bulk Migration – We consider ComReg need to introduce a new detailed remedy to ensure there is an efficient fit-for-purpose Bulk Migration facility to migrate existing Regional and Urban WLR customers to NGB VoIP and such should be made available ASAP given ComReg’s previous attempt through the WLA regulation was not successful.
- Interconnect – We welcome the ComReg proposal in clause 10.96 for a Next Generation (NG) interconnection service to be regulated and this should be for the Urban and Regional Market given Eircom’s 1st October 2020 launch of 4 SIP interconnect points for the whole country. We strongly support that this service should be cost orientated as indicated in table 77 of the consultation and we ask for a new condition that all operators can chose to use SIP interconnect with Open Eircom for both Urban and Regional connectivity to avoid a situation where some operators could be restricted to high cost legacy TDM services.
- Eircom Regulatory Governance Model (RGM) and Statements of Compliance (SoCs) – We believe there is little transparency as to whether the RGM is working which causes us concerns as to the effectiveness of the process. The deafening silence of the Independent Oversight Board (IOB) which we understood would be involved in the monitoring of the RGM further raises our concerns around the RGM. We therefore seek the RGM settlement to be built into regulation for transparency and to ensure it works.
- We would like to acknowledge and welcome both the depth and breadth of the proposed remedies which in our view are tailored to the Irish market and assist the progress of some issues such as negotiating SLAs although we are still to determine whether the process works end-to-end.

Withdrawal of Remedies

Question 11: Do you agree with ComReg’s preliminary conclusions on the withdrawal of SMP remedies on the Urban FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

BT Response 11 Page 549

We are not in agreement with ComReg's preliminary conclusions on the withdrawal of SMP remedies on the Urban FACO Markets for the following reasons:

1. This risk of a margin squeeze between the WLR and WLA NBG VoIP product could undermine the viability of the VoIP market in the short to medium term.
2. The lack of an efficient fit for purpose Eircom bulk migration facility will stall the migration of existing WLR customers to VoIP which we believe will stall competition.
3. Interconnect should be regulated for both the Urban and Regional markets given SIP interconnect will be limited to 4 locations for national coverage.
4. Notwithstanding our view that the de-regulation is not warranted, we consider that the sunset for existing customers should be extended to at least three years given the slow rate of customer migration given item 2 above. In our view the 9 months for new supply could only work for customers that have access to NG broadband.
5. We consider the remaining 20% of customers that can't avail of NGB need to be addressed by ComReg as the decision has the potential to degrade competition and this reduce customer welfare.

Impact Assessment

Question 12: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

BT Response 12 Page 567

We would like to offer the following comments:

- Regional Areas - BT agrees with the selection of Option 4 of the Impact statement as such creates the greatest customer benefit and minimises the lost efficiency through continuous disputes to address competition issues.
- Sunset clauses – Please see our response to question 11.
- Urban Areas – whilst we can see the logic of ComReg NG BB approach we believe this is masking the serious hurdles and issues in the CO market as discussed in our response to question 8.

End

eir

Response to ComReg Consultation and Draft Decision:

Market Reviews - Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers and Wholesale Fixed Access and Call Origination

ComReg Document 20/46



19 August 2020

DOCUMENT CONTROL

Document name	eir response to ComReg 20/46
Document Owner	Eir

Document name	eir response to ComReg 20/46
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Status	Non-Confidential

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

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

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

EXECUTIVE SUMMARY

1. The European Commission has removed FACO (Market 1/2007 & 2/2007) from the list of markets recommended for ex-ante regulation since 2014. ComReg must therefore demonstrate using a three criteria test (3CT) that regulation continues to be necessary. As such, there is a high burden of proof that the Irish market should continue to be regulated in part or in full. After careful consideration of ComReg's consultation it is clear that this burden has not been met.
2. The European Commission's 2014 Explanatory Note carefully mapped out, based on cogent reasoning, why it considered these markets are no longer susceptible to regulatory intervention. That reasoning included a 3CT assessment and recognition that the functionalities of the mobile network and convergence of services such as Wifi Calling and Managed VOB — despite being different technologies — have the same economic and functional characteristics as traditional legacy FACO. Notwithstanding these ear-marked markets developments, already recognised in 2014 by the EC, including competitive pressures from alternative platforms such as cable and fixed wireless access (FWA), ComReg's analysis in 2020 gravely underappreciates their importance in the Irish market.
3. Each of these changes has reduced eir's ability to behave independently of competitors and consumers and these trends are expected to continue and strengthen over the course of the market review period. The extent, to which they have been understated by ComReg in its Consultation or are missing entirely from its analysis, has inevitably resulted in a flawed lens through which it proceeds to view each aspect of the market at both the retail and wholesale level.
4. In particular, ComReg's initial erroneous conclusions with respect to the competitive dynamics at the retail level, stemming from its decision to assess fixed access and fixed calls as one focal product, an incorrect focus on subscriptions rather than usage and a microanalysis of a decreasing subset of RFTS purchasers, has led to continued errors in its assessment of the Relevant FACO markets. As noted above, these exact issues, in determining the extent to which mobile, OTT and fixed broadband access exert a competitive constraint on the fixed voice market, are specifically raised in the Commission's 2014 Explanatory Note.
5. Further, the geographic differences in competition in the FACO market are clearly not appreciably different to the extent that they justify the existence of sub-national markets. By any measure, including premises; access lines; and FACO lines, the sub-geographic "Regional Market" is so small that ComReg's analysis suffers from three fundamental flaws:
 - i. The Regional Market is not an economic market of sufficient size. In classic economic theory "it is simply not a market worth monopolising";

- ii. ComReg’s analysis fails to determine the countervailing buying power arising from the larger and more extensive Urban Market. In an ever declining market, it makes no commercial sense to jeopardise and forego wholesale revenues nationally — put simply eir cannot act independently of its customers and consumers. The FACO market has been regulated for such an extended period of time that ComReg’s “Modified Greenfield approach” fails to recognise the behaviour of market participants absent regulation. In recently deregulated markets, such as Call Transit and in the WCA Urban Market, eir has been able to offer discounts and enter into commercial arrangements with operators. Given the diminutive size of the Regional Market similar commercially agreements would be across eir’s FACO products nationally; and
 - iii. ComReg has failed to step back from its analysis and consider whether the Regional Market is in effect a residual part of a national market in which FACO services are offered and whether the theoretical menu-based rota of potential abuses (where such a one-tailed argument can be claimed notionally in any market) would actually occur.
6. Aside from the error of analysing each exchange as its own individual market — which in itself leads to an incorrect assumption of dominance — a more fundamental error is that even when these exchanges are taken collectively as a “Regional Market” this area is subject to both the commercial roll-out of FTTH and from State-Aid intervention within the relevant review period¹. Therefore, the natural decline of this market (noting that only 4% of Irish households are landline only households) will be expedited to such an appreciable extent that it fails today to pass the three criteria test.
7. The sunset period between moving from a regulated to an unregulated market as proposed by ComReg of 18 months is unjustified and disproportionate and fails to remove regulation — as required by Irish law — in a timely manner. ComReg argues that the initial 9 months of the sunset period is to facilitate operators to develop or purchase a VoIP technology in a wholly competitive market. Aside from the fact that ComReg has identified that all operators already have access to a Managed VOB solution and that VoIP platforms can be readily purchased off-the-shelf, the delay of deregulation to inappropriately facilitate entry into a competitive platform market is beyond ComReg’s statutory objectives and regulatory powers. In respect to ComReg’s latter 9 months of the 18 month sunset period. eir believes that the maximum sunset period that could be justified to allow an orderly transition between regulated and unregulated markets following issuance of the Decision is 3 months.
8. In the Regional Market, (in which ComReg has determined eir’s alleged dominance in error), ComReg has not demonstrated that its proposed set of remedies are appropriate, necessary and the least onerous option available. While ComReg has characterised the proposed remedies as simply a ‘continuation of existing obligations’ this fails to take account of the fact imposing the same regulatory obligations on a market one-quarter the size and

¹ Including the on-going roll-out of enhanced FWA and 5G mobile network coverage.

declining amounts to a substantial increase of the regulatory burden (in terms of the cost and administrative burden) relative to the size of the market regulated. Further, rather than being simply a 'continuation' for this small market ComReg has proposed more regulatory oversight on this diminishing market than it currently has pursuant to the 2015 FACO Decision where ComReg imposed national obligations. ComReg has failed to consider the proportionality of these remedies in light of the size of the market and that these remedies would continue despite continued decline of the remaining regulated market over the review period. This error is further compounded by the fact that eir has made a series of voluntary commitments regarding its behaviour which ComReg has failed to consider or address in this Consultation, despite the fact that it is specifically empowered to do so by the European Electronic Communications Code, which will have become law in Ireland before any final Decision is adopted by ComReg.

9. The continuation of pricing remedies on legacy products (which are in some cases end of life) for geographically dispersed premises in small (largely rural) exchanges without adequate and careful policy consideration could significantly undermine the Irish Government's €3 billion fibre-to-the-home intervention and delay the migration path of Ireland towards a full digital economy.
10. Finally, the removal of retail regulation which will likely occur now some 4 years after the market should have been last reviewed in 2017 (and last reviewed by ComReg in 2014), while significantly later than expected, is welcomed by eir.

RESPONSE TO CONSULTATION

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

11. As per the overall preliminary conclusions on retail trends and developments discussed in Chapter 3, ComReg has identified that the following key trends may be observed;

- While the number of retail SP participants has increased, a gradual decline in FNA RFTS subscriptions, and in RFVC traffic, is evident.
- The purchase of RFTS as part of a bundle is an increasingly popular choice for end users.
- Demand for RFTS is driven by demand for fixed broadband services and broader retail bundles, with RFTS as an add-on, rather than by demand for standalone RFTS.
- There has been significant growth in mobile phone usage relative to RFTS usage.
- The increasing footprint of NG technology has enabled SPs to offer multiple propositions, and move towards convergence, with the barriers between separate markets and a number of separate SPs being slowly eroded:
 - (a) Managed VoIP subscriptions have continued to increase, and a number of SPs are now offering Managed VoIP services;
 - (b) Managed VoB SPs are continuing to provide services, particularly with bundled services over CATV and FTTx;
 - (c) Through innovation and development traditional SPs are responding to market changes and are retaining market share, resulting in the emergence of new services (e.g., WiFi calling);
 - (d) Wholesale and retail SPs (e.g. eir, SIRO, Imagine² and Virgin Media) are moving towards full IP-based infrastructure.

12. While eir agrees that these are some of the main trends and developments that can be observed, we have a number of comments with regard to the manner in which these developments affect the market and the extent to which they have been understated by

² eir notes that ComReg seeks to exclude FWA from consideration of the relevant markets. This appears to be on the basis that ComReg perceives consumption of FWA voice and broadband services to be in decline (para. 3.22) and the technology to be sub-standard (para. 3.96). It is not at all clear why ComReg has chosen to dismiss this technology and the on-going investment by Imagine. Based on ComReg's quarterly data FWA subscriptions have increased by 15.9% in the period Q1 2019 to Q1 2020. ComReg's assertions are not based on the facts.

ComReg in its Consultation or are missing entirely from its analysis. In particular, eir considers that ComReg has failed to adequately consider the following;

- (a) The importance of bundles in the market;
 - (b) The decline of fixed voice usage in the market;
 - (c) Increasing fixed-mobile substitution (FMS); and
 - (d) Increasing use of unmanaged VoIP or over-the-top (OTT) communication services
13. Each of these changes has reduced eir's ability to behave independently of competitors and consumers and these trends are expected to continue and strengthen as FTTx roll-out continues both commercially and through state aid intervention and as ComReg's upcoming spectrum auction is finalised. eir notes that the upcoming spectrum auction in particular, will include a number of coverage obligations for licensees encouraging the deployment of VoLTE and WiFi calling, which will only serve to improve the mobile offering and incentivise increased FMS as a result.

The importance of bundles in the market

14. As noted by ComReg at paragraph 3.58, the purchase of RFTS as part of a bundle is an increasingly popular choice for end users. with 82% of RFTS subscriptions included in bundle (dual, triple or quad play) as at Q4 2019, ComReg further states at paragraph 3.61 that RFTS *"is the third most popular component choice in both standalone and (dual, triple or quad-play) bundled purchases by end users"*. ComReg appears to suggest that the purchase of RFTS, and in particular its widespread inclusion in bundle, is therefore indicative of the importance of RFTS.
15. However, the general trend of RFTS being increasingly sold as part of a bundle, does not alter the changing dynamics of fixed voice usage or indeed demand for fixed voice services. Rather, any continuing demand for RFTS is driven by demand for other telecommunications services with the continued provision of declining fixed voice services linked to the progressive adoption of broadband access.
16. This is evidenced by the 2019 Residential Market Research. Of the respondents who have more than one telecommunications service, 50% purchase a bundle but only 5% overall consider the fixed landline element of the bundle to be important. Looking specifically at those respondents who purchase landlines and in terms of their usage, 89% of active landline users purchase their landline in bundle while 97% of those respondents who have a landline, but don't actively use it, purchase their landline in bundle.
17. However, for both active and non-active users, 64% and 67% respectively indicated that broadband was the most important service in the bundle and even among active landline

users, only 10% indicated that this was the most important element of the bundle. It is of note that the number of non-active users who consider fixed landline to be the most important element of the bundle is so small as to not merit inclusion in the presentation of the Market Research results.

18. In addition, while 52% of respondents to ComReg’s 2019 Mobile Customer Experience (MCE) Survey have both home phone/landline telephone and a mobile phone, 28% indicated that they need landline for their broadband connection/WiFi service, 18% indicated that their internet package includes free landline, 6% indicated that they never thought about or got around to disconnecting their landline and a further 4% indicated that it was too much hassle to disconnect the landline. This suggests that for the majority (56%) of those who have dual access, the retention of a landline is primarily driven by current inertia rather than a preference for fixed telephony.

The decline of fixed voice usage in the market

19. The significance of traditional voice telephony has been diminishing year-on-year as the choice of communications services and methods available to consumers continues to expand. ComReg recognises that Retail Fixed Telephony (RFTS) subscriptions have indeed been declining, noting at paragraph 1.20 that *“since the publication of the 2014 RFVA Decision (in Q3 2014), residential RFTS subscriptions and business RFTS subscriptions have declined by 5% and 6% respectively”*. ComReg also notes that the decline in RFTS subscriptions has been partially offset by the significant increase in the demand for Managed VoIP subscriptions, which has grown by 36% over the same time period.
20. eir therefore disputes the characterisation at paragraph 3.124 of Managed VoIP as *“an emerging trend in the RFTS market”*. Given the increased significance of Managed VoIP and the fact that VoIP subscriptions now account for over one third of all fixed voice subscriptions, the significant decline in Fixed Narrowband Access (FNA) based RFTS specifically cannot be ignored. For context, the number of FNA RFTS subscriptions fell by 19% between Q3 2014 and Q4 2019 (See Table 1). While ComReg does briefly reference this decline in Table 2 of the Consultation and again at paragraph 3.97, it appears that ComReg considers the lower decline in overall RFTS subscriptions, more relevant for the purposes of its analysis with regard to the continuing importance of FNA.

Table 1. Change in fixed voice subscriptions, Q3 2014 – Q4 2019

Fixed Voice subscriptions	Q3 2014	Q4 2019	Change
FNA RFTS Subscriptions	1,109,230	901,508	-19%
VoIP Subscriptions	367,010	499,813	36%
Total RFTS Subscriptions	1,476,240	1,401,321	-5%

Source: ComReg 20/46

21. ComReg attempts to reinforce the impression that the number of RFTS subscriptions is important, by also focusing on the fact that, as indicated in Eurobarometer data³, an, albeit declining, majority of households (55%) continue to have retail voice connections at a fixed location, with 49% of households and 77% of businesses retaining access to fixed telephony. eir notes that even among those end-users that have retained access to landline services, the number of households with a fixed voice connection does not infer that the fixed voice component is important to customers. Given that the purchase of RFTS as part of a bundle has become the norm, eir considers that the relatively stable number of RFTS subscriptions, and in particular dual access households, is likely a function of the demand for other services, with which RFTS is bundled as a low cost add on.
22. Indeed, ComReg recognises this at paragraph 3.41 stating that “*demand for RFTS is somewhat driven by demand for fixed broadband services and broader retail bundles, with RFTS as an add-on, rather than by demand for standalone RFTS*”. eir notes that according to ComReg QKDR data, 17.6% of all RFTS subscriptions were purchased on a standalone basis as at Q4 2019, having declined by 28% since Q1 2016, suggesting that only a small cohort of residential and SME end users show a preference for fixed landline as opposed to other communication methods.
23. In such circumstances, usage rather than subscription volumes is of course the appropriate indicator of consumer preferences. While ComReg notes that RFTS traffic is in persistent decline, with overall RFTS minutes having fallen by **49%** between Q3 2014 to Q4 2019, ComReg has failed to recognise the importance of this decline in the context of overall competition in the market. eir notes that ComReg includes managed VoB⁴ minutes in its figure for fixed voice minutes and as noted by ComReg the proportion of VoB minutes has been steadily increasing over the last number of quarters. In total, Managed VoIP minutes accounted for approximately 20.3% of total RFTS minutes in Q4 2019, up from 11.7% in Q3 2014.
24. Based on ComReg’s QKDR data and the proportion of Managed VoB minutes, this would suggest that a much smaller decline in Managed VoB minutes over the period has offset the aggregate reduction in fixed voice traffic. The decline in traditional fixed voice minutes between Q3 2014 and Q4 2019 was in fact approximately **54%**.

Table 2. Changes in Managed VoB and traditional voice minutes

³ Eurobarometer edition 462: E-Communications and Digital Single Market (July 2018)

⁴ For example VoB minutes from Eir, Virgin Media, Vodafone and others such as Blueface. It does not include unmanaged VoB usage e.g. Skype

Voice traffic	Q3 2014	Q4 2019	Change
Total Fixed voice minutes (000s)	1,164,808	594,387	-49%
Managed VoB minutes (000s)	136,283	120,661	-12%
Traditional fixed voice minutes (000s)	1,028,525	473,727	-54%

Source: ComReg QKDR

25. eir expects that with the further roll-out of eir, SIRO, Virgin Media, Imagine and NBI NG broadband infrastructure, the decline in traditional fixed voice usage will continue at pace over the period of the market review.

Increased fixed-mobile substitution

26. Moreover, while fixed voice services have been declining in terms of subscriptions, revenues and volumes, there has been a concurrent growth in mobile voice call traffic volumes, with mobile originating minutes increasing by 4% between Q3 2014 and Q4 2019. In addition and as noted by ComReg at paragraph 3.80, *“[i]n Q4 2019 mobile originating voice minutes accounted for **84% of all voice minutes** (compared to 71% in Q3 2014) while traffic originating on RFTS accounted for the remaining 16% of all voice minutes (compared to 30% in Q3 2014)”* [emphasis added]. eir agrees with ComReg that this points towards *“increasing substitution away from fixed to mobile call origination”*.
27. ComReg also observes a trend towards increased mobile phone ownership, noting at paragraph 3.83 that as of Q4 2019, *“the mobile penetration rate [in Ireland] was 134.4%, including mobile broadband and M2M, and 103.9%, excluding mobile broadband and M2M.”* In addition and according to 2018 Eurobarometer data⁵, while dual access is still the most common scenario in Ireland, 43% of households have mobile access exclusively, compared to an EU 28 average of 36%, while only 4% of all households in Ireland have fixed telephone access exclusively.
28. When customer preferences are examined in terms of both subscriptions and usage patterns, it is clear that customers are not only using fixed voice services significantly less but they are increasingly switching from fixed to mobile voice. eir is therefore surprised that ComReg has concluded that mobile voice is not an effective substitute for fixed voice, given the evidence presented by ComReg and its own recognition of the increasing substitution between fixed and mobile voice services. This is discussed further in our response to Question 2.

⁵ Eurobarometer edition 462: E-Communications and Digital Single Market (July 2018)

29. In addition, ComReg suggests at paragraph 3.47 that *“the continued trend for households, and especially businesses, to retain a fixed telephone line (as well as a mobile telephone in many cases) may reflect a perception that mobile telephones are more expensive for making some types of calls.”* In reaching this position, ComReg has solely relied on 2019 Residential Market Research Survey responses, specifically with respect to calls to national fixed landlines, stating that *“54% of respondents to the 2019 Residential Market Research perceived the cost of making a call from a mobile telephone to be more expensive than the cost of a call from a landline (when calling a national fixed landline).”*
30. However, given the convergence of pricing levels for fixed and mobile services, eir considers that this is simply a misconception on the part of a subset of customers and with regard to a particular call type e.g., mobile to fixed. In addition to the fact that RFTS is increasingly bundled with other (more highly valued) telecommunication services, it is therefore unlikely that such a perception is a significant driver for the retention of RFTS subscriptions and in turn is unlikely to impact FMS in any meaningful way.
31. eir further notes that ComReg’s analysis in Table 6 of the Consultation fails to even consider bundles including mobile as well as standalone mobile tariffs. Had ComReg included such offers, it would have discovered that all inclusive call packages are widely available on both fixed and mobile. This failure is particularly relevant in highlighting ComReg’s weakly substantiated basis for its insistence that the Fixed Voice Call Origination (FVCO) and Fixed Access (FA) components must be assessed together. eir considers that ComReg has failed to adequately consider consumers’ ability to act independently and away from fixed call origination and the resulting upstream impact on both calls and fixed access — thereby acting as an indirect retail constraint.

Increasing use of unmanaged VoIP

32. Given the economic importance of digital services, which have profoundly changed the structure of telecommunications and media markets globally, eir considers it strange that it is only at paragraph 3.105 that ComReg remarks on the increase in the use of unmanaged VoIP.
33. In particular, ComReg notes the finding of the 2019 Residential Market Research that *“[t]he reported usage for unmanaged VoIP services was quite substantial compared to other fixed voice services, with 65% of respondents using unmanaged VoIP services more than once a day (compared to 38% for other fixed landline services and 79% for mobile voice telephony)”*.
34. ComReg appears to subsequently dismiss the prevalence of OTT usage on the basis that unmanaged VoIP is currently only a valid substitute for making international calls, although ComReg does note at paragraph 3.107 that *“Standalone Broadband services may contribute*

to changes in end user behaviour, enabling a move away from voice services delivered over FNA, at both wholesale and retail level” and further at paragraph 3.119 that this may at some undefined point in time “enable growth of unmanaged VoIP, particularly offered by Over-the-top (hereafter, ‘OTT’) providers”.

35. eir considers that this ignores the fundamentals of the competitive dynamics already present in the market and customers are not only switching from fixed to mobile voice but also from both fixed and mobile voice to unmanaged VoIP services. ComReg cannot simply dismiss this by suggesting that growth in unmanaged VoIP will only be facilitated by a growth in Standalone Broadband. It is clear that OTT services provide an indirect retail constraint. It is therefore unclear why ComReg has not considered this indirect constraint in its analysis of the relevant FACO markets — in particular, the increased residential and business use of Zoom, Microsoft Teams, Google Hangouts etc. which can all be accessed via broadband and mobile calls.

Question 2: Do you agree with ComReg’s preliminary conclusions on the product market assessment for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

36. ComReg’s overall preliminary conclusion is that there are three distinct markets for RFTS, each of which is national in scope:
- Market 1a: Standalone LL-RFTS including RFTS over PSTN and ISDN BRA and any Managed VoB delivered over NG broadband⁶ on a standalone basis;
 - Market 1b: Bundled LL-RFTS including RFTS over PSTN and ISDN BRA and Managed VoB delivered over (and with) NG broadband on a bundled basis together with any of broadband, television or mobile services; and
 - Market 1c: HL-RFTS including RFTS over ISDN FRA and PRA and any Hosted PBX or SIP Trunking forms of Managed VoIP delivered over NG broadband, including, on a standalone basis or on a bundled basis together with any of broadband, television or mobile services.
37. eir notes that ComReg has maintained similar product market definitions as determined in the 2014 RFVA Market Review except for the move to include Retail Fixed Voice Access (RFVA) and Retail Fixed Voice Calls (RFVC) in the same market as one product (RFTS) and the addition of Managed VoB services to the relevant market.
38. eir does not agree with ComReg’s preliminary conclusions on the product market assessment for the Relevant RFTS Markets. In particular, eir considers that;
- (a) ComReg’s decision to combine RFVA and RFVC as a single product i.e., standalone FNA RFTS provided over eir’s PSTN network and assess this as the appropriate focal product has led to some confusion as to the extent of competitive pressure on the individual access and call elements; and
 - (b) ComReg’s conclusion that mobile telephony does not pose an effective demand-side constraint on the focal product, FNA based RFTS, is flawed.

Assessment of RFVA and RFVC as a single combined focal product

39. In the 2014 RFVA Decision, ComReg concluded that RFVA and RFVC were in separate markets, primarily on the basis that competitive pressures for RFVA and RFVC were likely to

⁶ It is notable that this is a narrower definition of technologies relative to ComReg’s 2014 decision. In the current Consultation NG Broadband is defined as wired access networks which exclude FWA. This means that ComReg has determined that FWA is neither relevant to the (WCA) broadband or the voice markets. How can this be when at least one operator is actively investing in the technology and growing market share?

somewhat differ and had the potential to evolve separately over the course of the market review.

40. However, ComReg has now reversed its position, stating its preliminary view at paragraph 4.26 that *“the appropriate focal product is standalone FNA RFTS, i.e. RFVA and RFVC in a single product offering over Eircom’s PSTN network”* and that *“the evidence available to ComReg suggests that the incidence of end users purchasing RFVA and RFVC from separate SPs is low, at 0.53% of total FNA paths (i.e. PSTN and ISDN) as at Q4 2019.”*
41. ComReg notes that RFVA and RFVC are largely complementary products, in the sense that both access and calls must be purchased in order to make a voice call. RFVA and RFVC may also be economic complements if an increase in the price of access reduces the demand for calls, or vice versa.
42. While eir acknowledges that customers do indeed generally purchase fixed line rental and fixed voice calls together, ComReg’s analysis fails to recognise the competitive pressures on each separate element that have evolved since 2014. In particular, eir notes that customers have already substituted away to broadband on the access side and mobile, OTT services and Managed VoIP on the voice call side.
43. ComReg’s decision to assess FACO as one single product therefore appears to lead to some confusion as to the actual competitive dynamics in the overall retail communications market as well as a focus on the importance of subscriptions as opposed to the more relevant parameter usage.
44. The market for call origination is particularly strongly influenced by the increased usage of mobile services. This appears to be dismissed primarily on the basis of ComReg’s insistence that the access and origination markets are assessed as one and a subsequent failure to assess the impact of price increases in the context of the specific legacy economic complements, namely line rental and traditional fixed voice calls.

Mobile telephony is an effective demand-side constraint for RFTS

45. ComReg’s preliminary view is that mobile telephony does not pose an effective demand-side constraint on the focal products for the following reasons;
 - Despite the high number of mobile subscriptions, end users continue to retain RFTS, suggesting that fixed and mobile telephony are complements rather than substitutes;

- Businesses also continue to retain and rely on RFTS, and ComReg’s 2019 SME Market Research showed that SMEs predominantly use RFTS to make calls to all number types;
 - If mobile telephony were a substitute to RFTS, ComReg would expect to see growth in standalone broadband (SAB) subscriptions and a reduction in RFTS bundles with broadband would be observed;
 - There is no evidence that Managed VoIP is delivered over mobile broadband. Additionally, mobile broadband is generally not considered a substitute for fixed broadband;
 - Coverage issues relating to mobile telephony, particularly indoors, as evidenced by SPs offering WiFi calling; and
 - A general view among SPs that mobile telephony is a complement, rather than a substitute to RFTS.
46. eir does not agree with ComReg’s preliminary conclusions on the product market assessment for the Relevant RFTS Markets. In particular, eir does not agree with ComReg’s conclusion that mobile telephony does not pose an effective demand-side constraint on the focal product, FNA based RFTS, and is of the view that ComReg has failed to provide sufficient evidence to this effect and has incorrectly interpreted a number of issues. In particular, eir considers that ComReg has:
- (a) failed to consider the limitations of the SSNIP test, particularly in the context of a declining market;
 - (b) misinterpreted evidence of the retention of RFTS subscriptions as indicative of levels of substitutability; and
 - (c) failed to adequately justify that the characteristics of MTS are proof of complementarity rather than substitutability.

Limitations of the SSNIP test in a declining market

47. Telecommunications markets exhibit certain features which may complicate a straightforward application of the SSNIP. In particular, there are conceptual concerns as to the robustness of applying a SSNIP test in the context of long-term substitution patterns. Substitution flows have a cumulative impact over time and a forward looking analysis must acknowledge that, even if demand appears inelastic in the short term, the cumulative effect over time of substitution to products outside the market is large. Once a fixed voice consumer or indeed a share of their usage moves to mobile or OTT services, then this affects profitability in the longer term. A SSNIP can therefore fail to capture the impact of this, predominantly asymmetric, longer-term substitution trend.

48. eir notes that in the case of a declining market and asymmetric substitution, the SSNIP assessment is surveying a declining user base, where the most elastic customers are continuously leaving the market. In this regard ComReg's consumer survey, for the purposes of the SSNIP analysis, primarily takes as its base two samples;
- (a) consumers who purchase their calls and line rental from the same provider and do not purchase their landline in a bundle i.e., standalone RFTS users (n=171)
 - (b) consumers who purchase their calls and line rental from the same provider and purchase their landline in a bundle i.e., bundled RFTS users (n=282)
49. Thus, the starting point for ComReg's SSNIP is the current fixed voice subscriber base. The analysis therefore fails to capture those customers who have already substituted away from RFVA and RFVC. These latter consumers who have switched to another platform through the cancellation of their fixed voice service or by decreasing their fixed voice usage constitute the real competitive constraint faced by eir.
50. In essence, ComReg has captured the views of the ever diminishing sample of customers who purchase standalone fixed voice, representing 11% of all respondents and separately those who purchase bundled fixed voice, representing 37% of all respondents. In addition a further subset of both groups are non-active or "inert" users⁷, who pay for but do not use landline and as such have already substituted away from the fixed voice call element but not as of yet, the fixed access element.
51. Therefore, in assessing the effect of a SSNIP on end-users, ComReg is over indexing by relying on the fact that 69% of the subset of standalone users and 74% of the subset of bundled users, indicated that they would not change their behaviour following a SSNIP. In this regard, eir notes that such users in particular clearly constitute a minority with only 4% of the entire Irish population having access to a fixed line only. This small and ever decreasing cohort of customers cannot be used as an appropriate basis for determining the actual parameters of a market.
52. Given the substitution trends described above, this approach inevitably leads to the foregone conclusion of inelastic demand and as such potentially insufficient switching behaviour. This holds even as consumers migrate to alternative platforms.
53. Notwithstanding eir's concerns with regard to the limitations of the SSNIP in a declining market, according to the 2019 Residential market research, in response to a price increase of €4 per month on the total cost of the RFTS bill (10% SSNIP), 31% of those respondents,

⁷ 18% of standalone landline users. ComReg has not provided the equivalent figure for bundled landline users but eir notes that the total number of non-active users (standalone and bundled) is 307. On this basis we estimate that approximately 35% of bundled landline users are non-active.

who purchase standalone RFTS and pay for line rental and calls together, indicated that they would either definitely (20%) or possibly (11%) change their behaviour. This is a significant proportion of end-users. Of this group of respondents, 32% indicated that they would **cancel** their subscription, presumably switching supplier or moving to mobile usage, although it is unclear if ComReg and Red C explored this, given that it is not presented in the market research. A further 28% indicated that while they would keep their subscription, they would make fewer calls on their home phone. The research further indicates that of those that would keep their subscription 41% would use their mobile phone more for both calls and texts, 20% would make more calls on their mobile and 12% would send more texts on their mobile. eir notes that even where the customer maintains their subscription, this change in usage behaviour still exerts a competitive constraint on the overall RFTS product.

54. For those respondents who bundle their landline and pay for line rental and calls together, 26% indicated that they would either definitely (20%) or possibly (6%) change their behaviour in response to a €2 per month increase in the fixed landline component of their bundle. Of this group of respondents, 28% indicated that they look at other providers or alternatives. Again this presumably includes the option of moving to mobile usage. A further 12% indicated that they would cancel their subscription with their fixed supplier, while 31% indicated they would downgrade their bundle. Of those who indicated that they would downgrade, 12% would drop the call service, suggesting that they would potentially move to mobile instead.
55. eir considers that this is clear evidence of the substitutability between RFTS and MTS and that the conclusions that ComReg has reached are therefore inconsistent with the results of the market research.

Retention of RFTS services

56. eir does not consider that the retention of RFTS subscriptions is indicative of complementarity between fixed and mobile services. ComReg's claim is problematic in that it completely ignores actual consumer behaviour and usage patterns. Such mistaken assertions on the matter are also clearly anticipated by the European Commission in its 2014 Explanatory Note⁸, which states that *"with fixed domestic voice calls often being provided in the bundle at little or no additional charge, may mean that the above-mentioned number of customers who retain both fixed and mobile subscriptions overstates the degree of complementarity (as opposed to substitutability) of the respective voice services on those platforms."* The 2014 Explanatory Note further identifies that *"mobile-fixed substitution can already be more clearly established in some markets, notably where fixed penetration has*

⁸ Explanatory Note to the 2014 EC Recommendation

decreased substantially in favour of mobile, and mobile network coverage is close to 100%". In this regard, eir notes that 4G mobile network coverage in Ireland currently stands at 98%.

57. As noted by eir in paragraph 23, usage rather than subscription volumes also need to be considered when examining consumer preferences. In this regard, while fixed voice traffic has declined significantly between Q3 2014 and Q4 2019, mobile traffic has increased over the same period and mobile originating voice minutes now account for 84% of all voice minutes as of Q4 2019. Over the past number of years we have observed a convergence in the pricing levels for fixed and mobile services, technological advances in mobile services and the availability of number portability. This has occurred in conjunction with consistent levels of mobile subscriptions and increasing mobile voice traffic combined with a rapid decrease in fixed usage. It is clear that the substitution of traditional fixed line voice telephony services with mobile telephony is the main driver of this development.
58. In addition, the 2019 Residential Market Research indicates that of the 2,011 respondents surveyed, only 34% **pay for and use** a landline.⁹ ComReg also notes at paragraph 4.108, that according to the research, 54% of respondents indicated mobile as their primary means of making calls to friends and/or family, while 27% use landline and 19% use either landline or mobile. Even for those purchasing standalone landline, the proportion citing fixed landline as their primary method to call friends/family was only 44%. This would suggest that the level of complementarity between fixed and mobile is in fact constrained and that mobile is viewed as a preferred method of communication for the majority of consumers.
59. eir is unclear how the displacement of fixed voice traffic as well as the observable preference for mobile voice services can be simply dismissed by ComReg on the basis that customers are retaining RFTS services. Moreover, it would appear that the retention of RFTS, rather than being driven by a level of complementarity between fixed and mobile voice services, is in fact largely driven by the purchase of bundled services. The fact that fixed voice is being increasingly sold as part of a bundle does not necessarily infer that the fixed voice component is important to customers or indeed that its inclusion in a bundle drives demand in this market, but rather that the bundling of fixed voice with broadband services is an inheritance of the historical configuration of the fixed line market.
60. Historically, multi-play offerings have arisen because consumers who had fixed line voice have progressively adopted fixed broadband, rather than via a conscious decision to adopt a "bundle" of fixed voice and fixed broadband. The Commission has recognised this in its Explanatory Note to the 2014 Recommendation stating that *"in cases of the provision of the fixed voice service with broadband access and/or IPTV, bundling at the retail level is rather a phenomenon of continued provision of a declining fixed voice service alongside broadband*

⁹ 2019 Residential Market Research, Slide 7

access and/or IPTV, rather than an economically significant offer that alters the competitive dynamics over a longer period.”

61. eir notes that the usage pattern was somewhat different for SME respondents, who overall reported a preference for RFTS as the primary means of making calls. While eir recognises that large business and institutional customers are usually more reluctant with regard to FMS because they tend to assign higher importance to remaining fixed network characteristics, such as quality, access to internet and other data services, ComReg has defined separate product markets in relation to low-level and high-level RFTS. ComReg should therefore separately reassess the effect of FMS in each of these markets rather than conducting an overall assessment of FMS in the general RFTS market.

62. ComReg also considers that if mobile telephony were a substitute to RFTS, it would expect to see growth in SAB subscriptions as well as a reduction in RFTS bundles with broadband. On the first point, ComReg states at paragraph 3.118 that its data indicate that, SAB subscriptions, have indeed increased between Q3 2014 and Q4 2019, although for some reason the aggregate market figures have been redacted. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

63. On the second point, although ComReg does not provide the figures for bundled RFTS, it states at paragraph 4.76 that “17.6% (247,627) of RFTS subscriptions are purchased on a standalone basis as at Q4 2019, having declined by 28% since Q1 2016”. It is unclear why ComReg has not used the same period for comparison as the rest of its analysis i.e., Q3 2014 to Q4 2019 but using the information provided by ComReg in the Consultation as well as data from the QKDR, bundled voice subscriptions have increased by 4% between Q1 2016 and Q4 2019. As previously discussed the fact that fixed voice is being increasingly sold as part of a bundle does not necessarily infer that customers are not substituting away from fixed voice usage.

64. Moreover, eir notes that ComReg’s data does not consider the underlying technology over which RFTS is provided and it is likely that the increase in bundled RFTS is at least partially driven by the increase in Managed VoIP. Given that ComReg has identified FNA based RFTS as the focal products, eir does not consider that simply referencing the increase in overall bundled RFTS is meaningful in terms of the analysis.

Characteristics of mobile services as proof of complementarity rather than substitutability

Mobile voice and mobile broadband

65. ComReg puts forward a lack of evidence that Managed VoIP is delivered over mobile broadband to add merit to its claims that mobile is not an effective substitute for RFTS. Additionally, ComReg notes that mobile broadband is generally not considered a substitute for fixed broadband.
66. The general purpose of this argument is unclear and ComReg appears to have conflated the issues of fixed mobile broadband substitution and fixed mobile voice substitution. While eir agrees that there is a lack of evidence that Managed VoIP is delivered over mobile broadband, this would only possibly be relevant to ComReg's assessment of the substitutability between FNA RFTS and Managed VoB based on the underlying technology delivering the service.
67. eir further considers that whether mobile broadband is a substitute for fixed broadband is not relevant to the assessment at hand concerning the level of substitutability between FNA RFTS and mobile telephony services.

Coverage of mobile networks

68. ComReg states at paragraph 4.269 that "*some areas continue to experience mobile coverage issues (including in the home)*" and that "*SPs have sought to ameliorate indoor coverage issues by offering WiFi calling*". However, ComReg does not consider that WiFi calling enhances the case for FMS in Ireland as it would appear that Wi-Fi calling acts as a complement to, rather than a substitute for, traditional mobile connectivity.
69. ComReg appears to consider that this is particularly the case, given that eir's positioning of WiFi calling would suggest that it "*augment[s] an existing mobile telephony, particularly in areas with poor coverage*" rather than being a viable demand-side substitute.
70. ComReg then proceeds at paragraph 4.272 to justify its conclusion that WiFi calling is not a substitute for RFTS. ComReg's view on the matter is best repeated here in full "*...particularly given that access to WiFi calling will only be available in small localised areas where WiFi access is available. In sharp contrast to traditional mobile coverage, WiFi calling does not afford ongoing coverage while a calling or called party is moving, and coverage by means of WiFi will cease once the user exits the (relatively small) footprint of the WiFi network to which they are connected (given it uses WiFi on the fixed broadband connection). In view of the above, ComReg considers the scope for demand-side substitution from RFTS to WiFi calling limited, undermining the case for FMS*".[emphasis added]. Put simply, what ComReg has described here are the exact characteristics of a fixed network call. This is evident by substituting the underlined text above with either "fixed calls" or "fixed network". Wifi Calling or 'Home Zone' as termed by the European Commission was also identified in the 3CT undertaken by the European Commission in the 2014 Explanatory Note.

71. eir notes that ComReg again appears to have confused the issue and the question is not whether WiFi calling as a service itself is a substitute for either RFTS or MTS. From the perspective of the consumer WiFi calling is equivalent to a standard fixed call and the underlying technology is irrelevant. The question therefore is whether the feature augments the existing mobile service to a point where indoor coverage issues are addressed, thus improving the overall substitutability of MTS and RFTS for those specific consumers that experience such coverage issues. eir considers that this is indeed the case and MTS will be further augmented in this manner by ComReg's upcoming Multi-band spectrum award, which will require licensees to deploy and maintain VoLTE and Native Wifi Technology on their network to improve the coverage and quality of voice and text services.

Question 3: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

72. eir agrees with ComReg’s preliminary view that the Relevant RFTS Product Markets are likely to be national in scope and considers that this conclusion is adequately supported by the limited variations in the number and size of potential competitors across Ireland as well as the limited variations in the pricing of RFTS services nationally.
73. eir considers that there may be some differences in supply side characteristics across regions, given the differing economies of network roll-out, which may lead to potential differences in the type of switching behaviour in urban and rural areas. However, eir does not believe that the differences are such as to indicate that sub-national retail markets exist, particularly in the context of on-going NG broadband roll-out and the expected transition to all-IP.
74. In addition, given that any meaningful differences in competitive conditions are generally reflected in the retail pricing strategies of SPs, eir considers that differentiated pricing or marketing strategies are one of the more relevant indicators of the existence or otherwise of sub-national retail markets. In this regard, eir notes that all SPs in the Irish market apply national pricing strategies for their RFTS services.

Question 4: Do you agree with ComReg’s preliminary conclusions on the product market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

75. eir does not agree with ComReg’s preliminary conclusions on the product market assessment for the Relevant FACO Markets. While eir considers that the delineation between low level voice access and high level voice access may remain appropriate, given the differing needs of residential/SME customer and larger business and institutional users, eir considers that:
- (a) the combination of Fixed Access (FA) and Fixed Voice Call Origination (FVCO) as the focal product is problematic in that it fails to assess the direct impacts these complementary wholesale services have on each other; and
 - (b) ComReg’s preliminary conclusion that mobile networks as well as mobile telephony services are unlikely to exert a sufficient competitive constraint is flawed.
76. ComReg’s initial erroneous conclusion with respect to FMS at the retail level, stemming from its decision to assess fixed access and fixed calls as one focal product, an incorrect focus on subscriptions rather than usage and a microanalysis of a decreasing subset of RFTS purchasers, has led to continued errors in its assessment of the Relevant FACO markets. These exact issues in determining the extent to which mobile exerts a competitive constraint on fixed networks, are specifically raised in the Commission’s 2014 Explanatory Note and are discussed further below.

Assessment of fixed access and call origination as a single combined focal product

77. ComReg states at paragraph 5.12 that *“[i]n view of national market circumstances, [it] is of the view that it is not appropriate to designate standalone FVCO as the focal product.”* ComReg’s suggests that the specific national circumstances at play in Ireland are as follows;
- (a) standalone FVCO or Carrier Pre Select (CPS) is in decline and since September 2016, eir has not offered CPS to new wholesale customers, and CPS is now offered on a legacy basis only; and
 - (b) the 2015 FACO Decision has already designated FACO, rather than FVCO, as the focal product and due to the fact that eir “continues to hold a strong position in the supply of FACO”, specifically SB-WLR.
78. eir considers that there are a number of issues with the basis for ComReg’s determination that FVCO and FA can, as a result, only be assessed as a single focal product.

79. The very fact that standalone FVCO is in decline to the point where it is no longer offered to new wholesale customers, and that as of Q4 2019 comprised 1% of all indirect access paths, demonstrates the differing competitive dynamics for FA and FVCO. In addition eir notes that CPS was deregulated by means of the 2015 FACO Decision, which has allowed for timely natural migration and thereby avoided a situation of artificially prolonging the life-cycle of a legacy product.
80. SB-WLR has also been declining and between Q3 2019 and Q4 2019, SB-WLR access paths fell by circa 33%. However, eir notes that SB-WLR is still a regulated product and in the absence of regulation, the decline would likely have been much larger. As such ComReg's conclusion that eir "*continues to hold a strong position in the supply of FACO*" suffers from issues akin to those caused by the reverse cellophane fallacy. That is to say that prevailing regulatory terms, in particular pricing and access obligations, result in other services appearing to be weaker substitutes than they actually are, which leads to improperly narrow market definitions and erroneous inferences of market power. This in turn leads to self-perpetuating regulation, in which NRAs insist on finding that the incumbent lacks market power before deregulating the market, while the regulated nature of the market leads to an erroneous inference of market power.
81. The combination of Fixed Access and Call Origination as one focal product will therefore, as a result of regulatory history, result in a high-market share for the incumbent, thereby dismissing the fact that the market has now evolved and fixed narrowband access is no longer necessary to provide the origination of fixed calls due to Managed VoIP and upstream regulation in the WLA and WCA markets. Therefore, this market share by definition considers only legacy technology which eir, through regulatory remedies, has been required to provide.
82. The EC 2014 Explanatory Note recognises the evolution of the market explaining that "*wholesale call origination **can be relatively easily self-supplied by operators who establish a direct connection to end-customers** (either on the basis of their own infrastructure or through - regulated - wholesale products such as LLU and/or bitstream)* [emphasis added]. As a result the Commission anticipated that the demand for CS/CPS services, and it is assumed (but not explicitly stated) WLR, would "*become less relevant over the review period of this Recommendation, especially in view of the migration to all-IP networks (which do not have the same characteristics concerning quality/resilience as PSTN)*."
83. In addition, ComReg's market power assessment is problematic by definition in that it fails to consider what direct constraints complementary products can have on each other. For example, the countervailing buying power (CBP) of operators in either fixed access and/or fixed calls in the larger Urban market can be leveraged to countervail attempts to price

differentiate in the significantly smaller Regional market and reach acceptable commercial outcomes nationally.

84. Similarly, as the number of fixed calls has been steadily decreasing for the past number of years, if eir were to choose today to refuse to supply wholesale call origination it would also lose a share of the present-day wholesale revenues of both fixed call origination and fixed access. As noted above, eir would therefore sacrifice wholesale revenues not only in the Regional Area but also risk the countervailing market reaction of the same competitors migrating away from FACO in the Urban Area.
85. Finally, ComReg's view that FACO continues to be an appropriate focal product due to the fact that it was determined to be the appropriate focal product in the 2015 FACO Decision, does not negate the requirement for ComReg to consider whether changes in the overall direction of the market in the interim justify a change in approach. ComReg's failure to adequately consider whether it may now be appropriate to assess FA and FVCO separately, particularly in the pursuit of efficient and timely migration to all-IP networks, results in flaws that permeate the its entire analysis leading to an inevitable conclusion that a small and decreasing segment of the market should continue to be subject to regulation.
86. By recognising the full competitive dynamics of the focal products separately (see also eir's response to Question 7), this would lead to a simplification of regulatory remedies, which is also consistent with the 2014 EC Recommendation of listed markets, where ComReg could effectively, at a minimum, remove regulatory remedies on the FVCO Market.

Failure to adequately consider mobile as a competitive constraint

87. ComReg's conclusions with regard to the competitive constraint exercised by mobile networks and MTS are as follows;
 - a. call origination over mobile networks does not represent an effective supply-side substitute for FACO; and
 - b. MTS do not provide an indirect constraint at the wholesale level.

Mobile networks as a direct constraint

88. ComReg's analysis in this regard constitutes a two paragraph assessment and ComReg's conclusion is based on the premise that the level of FMS varies substantially across call types such that, for certain call types, there is little substitution from RFTS to MTS.
89. On this basis alone ComReg considers that *"it is unlikely that call origination provided over mobile networks would meet the expectations of Access Seekers purchasing FACO to satisfy*

demand for RFTS across all call types from their end users” and “[s]elf-supply of call origination on a mobile telephone network is similarly unlikely to exercise an effective direct competitive constraint on FACO.”

90. eir’s views on the substitutability of MTS and RFTS are discussed at length in response to Questions 1 and 2 but the additional fact that ComReg has not defined separate markets for different call types is of particular relevance here. ComReg cannot conclude that MTS is not an effective substitute for RFTS on the basis that for **cert**ain call types, there is little substitution from RFTS to MTS. This fails to capture the interplay between the overall fixed and mobile markets.
91. Rather, the assessment needs to consider the overall level of substitutability between fixed and mobile. In that regard eir notes that ComReg’s MCE Survey demonstrates that a large cohort of end-users already use mobile as their primary means of communication, irrespective of whether they retain their landline service or otherwise. Of the 1,300 respondents who have no landline, 63% had never had a landline, with 80% of these respondents indicating that they use their mobile phone instead. The other 37% indicated that they once had landline but had cancelled their service. 73% of these respondents indicated that the main reason they had done so was because they use their mobile phone instead.
92. Meanwhile of those who retain dual access i.e., both a landline and mobile phone, as discussed at paragraph 18 of this response, the main drivers for the majority (56%) of those with both landline and mobile, were primarily related to broadband access and inertia.
93. This suggests to eir that consumers generally perceive mobile calls to be an effective or better than alternative to landline calls and this has been one of the main drivers of FMS. Indeed the fact that such switching behaviour is not accurately captured in ComReg’s analysis of retail market trends has likely stemmed from ComReg’s flawed approach of assessing the access and origination elements of the market as one.
94. Issues related to accurately determining the extent to which mobile exerts a competitive constraint on fixed networks, are specifically raised in the Commission’s 2014 Explanatory Note, which states that *“where the mobile services **could** be considered to fall within the same relevant retail market for access to telephone network at a fixed location, the (self-supplied) wholesale call origination services in the mobile networks should also be considered to fall within the boundaries of the market for wholesale call origination in the fixed networks”* [emphasis added] and that *“[w]here mobile telephony services can substitute fixed networks on the market for outgoing retail calls, the wholesale call origination services in the fixed networks are subject to direct competitive pressure from (self-supplied) mobile call origination”*.

Mobile telephony services as an indirect constraint

95. ComReg’s preliminary view is that retail MTS is not likely to exert a sufficiently effective indirect constraint, such that it warrants inclusion in the FACO Markets. ComReg’s analysis supporting this conclusion, briefly covered in paragraphs 5.264 to 5.274 of the Consultation, largely constitutes a vague discussion of the fact that ComReg considers RFTS and MTS to be broadly complementary rather than directly substitutable, the differing potential effects of a wholesale SSNIP in FACO on demand for WLR and FVCO, the potential dilution of a SSNIP of FACO when passed through into RFTS price increases, potential switching behaviour of bundled RFTS users and rates of retention of RFTS services.
96. eir considers that ComReg’s overall assessment of indirect constraints is flawed in that it only looks at MTS in a very cursory manner and other than the Critical Loss Analysis (CLA) does not include any quantitative analysis to justify its conclusion that MTS are unlikely to pose an adequate constraint at the retail level. Moreover, eir has a number of comments on the specific issues raised by ComReg.
97. First, ComReg’s assessment of the substitutability of RFTS and MTS is flawed in a number of respects. This is discussed in eir’s response to Questions 1 and 2.
98. On the issue of the potential differing potential effects of a wholesale SSNIP in FACO on demand for WLR and FVCO, ComReg notes at paragraph 5.265 that indirect retail substitution by means of mobile telephony could potentially take either of two forms:
- (a) The end user retains a fixed line – such that there is no impact on demand for retail line rental and, therefore, WLR – but substitutes to mobile telephony for some or all categories of calls — leading to a reduction in demand for RFVC and, therefore, FVCO; or
 - (b) The end user relinquishes their fixed line and fully substitutes MTS for RFTS, leading to reduced demand for both retail line rental and, therefore, WLR, and also RFVC and, therefore, FACO.
99. However, ComReg has not provided any actual quantitative analysis as to the effects of the two forms of indirect retail substitution by means of MTS. ComReg cannot simply present hypothetical scenarios as evidence with regard to the actual effect of the SSNIP. eir also considers this example of flawed analysis is indicative of the need for ComReg to assess access and call origination separately.
100. In addition, ComReg states at paragraph 5.268 that *“a SSNIP of FACO, when passed through into RFTS price increases, as set out at Table 35 above, likely leading to an attenuated response at retail level.”* The fact that a SSNIP of FACO, when passed through into RFTS price increases, will likely be diluted does not negate the need to actually assess the effect of the

wholesale SSNIP at the retail level. If this were the case, there would be no need to even calculate dilution ratios as ComReg has done and as set out at Table 35 of the Consultation.

101. On the issue of the effect of a SSNIP on bundled user specifically and as discussed at paragraph 5.269, while users who purchase RFTS as part of a bundle may exhibit different switching behaviour as opposed to those who purchase RFTS on a standalone basis, eir does not consider that the mere stating of this possibility meets the required threshold for the analysis of indirect constraints. In addition, a wholesale SSNIP of FACO, when passed through into RFTS price increases, would affect demand for all RFTS subscriptions. As such it is not only the individual effect of the SSNIP on either the demand for standalone or bundled RFTS that is relevant but rather the collective effect.
102. In this regard, eir notes that in response to a €4 per month increase in the price of their RFTS subscription, 32% of standalone users, who indicated that they would change their behaviour, would cancel their subscription while 41% of those keeping their subscription would use their mobile phone more frequently to make calls or send text messages. For bundled users, in response to a €2 per month increase in the fixed landline component of their RFTS subscriptions and of the respondents that indicated they would change their behaviour, 15% would cancel their subscription with their current provider while 12% of those choosing to stay with their current supplier would keep their internet service but drop the fixed landline element of the bundle.
103. At paragraph 5,270, ComReg also notes once again that “55% of households retained RFTS, with 94% of households having a MTS”. eir’s position on the importance of this metric is discussed earlier in this response (see paragraphs 18 and 56 to 64). In summary, eir does not consider that the retention of RFTS subscriptions alone is indicative of complementarity between fixed and mobile services. ComReg’s claim is problematic in that it completely ignores actual consumer behaviour and usage patterns.
104. Finally, eir notes that the formulation of the assessment of indirect retail constraints at the wholesale level is as follows;
 - (i) The likely effect of the wholesale SSNIP on the retail market including an estimation of the wholesale/retail price ratio and dilution ratios;
 - (ii) The response in retail demand that would be required to result in a SSNIP being unprofitable calculated using the Critical Loss Test (CLT); and
 - (iii) The extent to which retail end users would switch, to a significant extent, to the retail arm of the integrated HM
105. With regard to second phase of the assessment, the process involved in the critical loss analysis is as follows;

- (i) Estimation of retail prices
- (ii) Estimation of the costs of provision
- (iii) Estimation of the critical loss range
- (iv) Comparison with consumer survey responses on switching behaviour in the case of a SSNIP

106. While ComReg has estimated CLVs associated with SSNIP amounts of 5% and 10% for eir LL-FACO and HL-FACO i.e., the percentage estimate of how many end users who purchase RFTS would have to switch to an alternative platform to make the SSNIP unprofitable, ComReg has not actually completed the analysis through a comparison with the indicated switching behaviour of survey respondents. Instead it has merely concluded at paragraph 5.273 “*that it is **unlikely** that the proportion of end users switching to MTS in response to a SSNIP of FACO would exceed the relevant CLVs*” [emphasis added].
107. While eir notes that the CLT is a general guide for the assessment of constraints rather than determinative in and of itself, the switching behaviour of active and non-active landline purchasers on the basis of subscription cancellation (impacting FACO) or subscription retention and increased usage of MTS (impacting FVCO) has not been adequately considered in light of the CLVs calculated and in combination with other relevant indicators of current switching behaviour in the market.
108. eir is of the view that MTS does provide an indirect constraint at the wholesale level and considers that that the manner in which ComReg has concluded otherwise is not sufficiently robust.

Question 5: Do you agree with ComReg’s preliminary conclusions on the geographic market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

109. eir does not agree with ComReg’s preliminary conclusions on the geographic market assessment for the Relevant FACO Markets. eir has a number of serious concerns in relation to the methodology used by ComReg to conclude on the geographic scope of the market i.e., the Urban and Regional FACO markets. eir does not consider that the geographic differences in competition in the FACO market are appreciably different to the extent as to justify the existence of sub-national markets. This finding is particularly striking, when to eir’s knowledge all other EU NRAs¹⁰ have defined Market 2/2007 as national in scope.
110. eir considers that the geographic scope of the FACO market is in fact national and ComReg’s analysis leading to a conclusion that there is an “uncompetitive” sub-national Regional Market is flawed. In particular, the analysis suffers from the following issues:
- (a) a failure to analyse the geographic markets from a forward looking perspective, given that ComReg has excluded any consideration of NBI’s roll-out plans from its analysis;
 - (b) a flawed approach to the treatment of Virgin Media’s and Imagine’s network infrastructures in its geographic assessment of the LL-FACO market;
 - (c) potential discrepancies with regard to the manner in which ComReg has accounted for overlapping coverage; and
 - (d) a coverage threshold that is overly conservative, which in conjunction with the failure to account for the impact of NBI deployment has exacerbated errors in the delineation of EAs between Urban and Regional Markets.

¹⁰ Those other than the 18 NRAs that no longer regulate FACO.

Failure to analyse the market on a forward looking basis

111. eir has significant concerns with regard to ComReg's failure at this juncture to adequately consider the effect that NBP roll-out will have on the competitive dynamics of the FACO market over the period of the review, which we understand will be subject to the 5 year timeframe stipulated in the EECC.
112. In carrying out a market analysis in accordance with Article 16 of Directive 2002/21/EC, NRAs are required to conduct a **forward-looking**, structural evaluation of the relevant market over the relevant period. The market must be defined in line with the methodology described in the 1997 Notice on Market Definition. Market definition is not a mechanical or abstract process and in particular, a dynamic rather than a static approach is required when carrying out a prospective, or forward-looking, market analysis.¹¹ As such, market definition allows NRAs to take into account **expected or foreseeable** technological or economic developments over a reasonable time horizon linked to the market review.
113. In its reviews of the WLA/WCA and WHQA markets, ComReg determined that due to the on-going lack of certainty in respect of the NBP contract award, the timing of the NBP roll-out and any resulting impact on competition, it was unable to include the NBP in its assessment on a forward-looking basis with sufficient certainty and accuracy. However and as noted by ComReg in its review of the FACO market, the NBP contract has now been awarded by the Department of Communications, Climate Action, and Environment (DCCA), and was signed on 19 November 2019. As such and given that NBI has communicated its deployment plans to ComReg, eir considers that any ambiguity or uncertainty regarding the potential impact of the NBP award has dissipated.
114. And yet, ComReg has not accounted for NBI's roll-out plans in its analysis of current and prospective competition in the FACO market. This omission is never clearly justified but it appears that ComReg's reasoning relies on two aspects, namely the fact that as of May 2020, NBI is engaged in surveying work, but has not yet commenced installing infrastructure and the fact that ComReg proposes to carry out a mid-term assessment 24 months after the publication of the final Decision, given that the roll-out of NG broadband networks by eir, SIRO, Virgin Media and, on a forward-looking basis, NBI, is on-going and is expected to continue over the lifetime of this market review.
115. eir's understanding is that the main objective of the Mid-term assessments, that ComReg has committed to undertake with respect to various markets, is to avoid future delays in its programme of market reviews. While eir welcomes any steps by ComReg to avoid a repeat

¹¹ Joined Cases C-68/94 and C-30/95, France and Others v Commission EU:C:1998:148. See, also, 1997 Notice on Market Definition at paragraph 12.

of the delays that plagued its assessment of all four of the 2014 Recommend Markets, we do not believe that the commitment to undertake such an assessment negates the need for ComReg’s full review of the market to be forward looking over the entire period of the market review itself.

116. Moreover, ComReg has communicated that it does not intend to publish its final Decision in relation to this market until Q2 2021, approximately 1 year after publishing the initial Consultation in Q2 2020. While, NBI had not commenced installing infrastructure as of May 2020, [REDACTED]

[REDACTED]

117. In addition, given that ComReg’s final Decision is due to be published in Q2 2021, it is anticipated that the Mid-term assessment will be carried out by Q2 2023, although eir notes that ComReg has merely stated that it will carry out the assessment by this date and has not communicated when it intends to adopt a final Decision. [REDACTED]

[REDACTED]

118. eir does not consider that any forward looking assessment by ComReg can legitimately ignore the effect that NBI roll-out will have on the FACO market over the time period under review and in particular over the shorter term in advance of the Mid-term assessment being carried out.

119. Finally, ComReg explains that the scope of the proposed Mid-term Assessment at paragraph 7.28 is *“to carry out a mid-term assessment by re-applying the criterion used to designate EAs to either of the Urban or Regional FACO Markets and whether, accordingly, SMP remedies should be applied in those EAs”*. Given the dynamic nature of network roll-out activity anticipated during the period of this review, eir believes that the review of the geographic assessment should be performed annually. As this is simply a re-application of the criterion it should not be burdensome on operators to provide annual updates of premises passed, nor should it be burdensome for ComReg to apply the criterion. We therefore request that ComReg commits to undertake annual assessments of the geographic scope of the Regional markets.

Flawed approach to the assessment of Virgin Media and Imagine

120. eir is of the view that ComReg's consideration of Virgin Media, or indeed lack thereof, for the purposes of the geographic assessment is flawed. ComReg states at paragraph 5.419 that *"Virgin Media presence at an EA is, on its own or in the absence of 80% wholesale NG broadband coverage, unlikely to generate sufficiently different competitive conditions in the provision of LL-FACO. This is because, in a scenario where, for example, only Eircom FNA and Virgin Media were present at an EA, there would be no possibility of an Access Seeker offering Managed VoIP on the basis of wholesale inputs at that EA. In an MGA scenario, this EA would effectively be akin to a duopoly."*
121. It would appear that ComReg is prejudging the outcome of the market review exercise in that it is assumed that Virgin Media presence is unlikely to generate a sufficient competitive constraint in the market without conducting any analysis to demonstrate same. eir considers that ComReg cannot simply have reference to a hypothetical scenario where an entire EA is only served by eir FNA and Virgin Media and extrapolate this scenario to an assumed duopoly. ComReg has not conducted the requisite analysis to prove that this would be the case. The same principles apply in respect of Imagine's FWA network investment on a forward looking basis.
122. The more likely scenario is that after removing overlapping coverage in an EA, the competitive constraint provided by Virgin Media would be particularly relevant for individual households and those EAs, which almost meet the coverage threshold proposed. While ComReg states that *"given the networks of both Eircom and SIRO are likely to collectively largely overlap Virgin Media's network coverage, it does not materially impact the 80% wholesale NG broadband coverage condition"*, it does not provide any evidence to this effect. In addition, eir notes that whether the effect of including Virgin Media in the analysis is material or otherwise is irrelevant and if products falling into the relevant product markets are capable of being delivered over Virgin Media's network infrastructure, that same network should be included in the assessment. It is inappropriate for ComReg to presume the outcome of the assessment in this manner.
123. ComReg itself has determined that Virgin Media poses an indirect retail constraint on the LL-FACO Market and states at paragraph 5.423 that it therefore *"includes Virgin Media's presence in the geographic market assessment"*. However, this does not appear to be the case, given that ComReg goes on to state that it *"is not included for the purpose of the assessment of wholesale NG broadband coverage, given that Access Seekers cannot buy wholesale services from Virgin Media"*. ComReg's reasoning in this regard is seriously flawed and eir considers that this needs to be addressed in the final Decision.

124. Finally, combined with the 80% wholesale NG broadband coverage criterion, the exclusion of Virgin Media from the assessment of NG Broadband availability, over-simplifies the competitive conditions within an EA. First, where premises are already passed by NG broadband services, those consumers automatically face different competitive choices through the availability of Managed VoIP – this is irrespective of further coverage of NG broadband services in those exchanges. This means that a tranche of competitors (up to 79% of consumers as defined by ComReg) in each exchange can already act independently of any action taken by eir’s at the wholesale level in the FACO market.
125. Second, by excluding Virgin Media, the assessment then fails to assess whether the actual dynamics of the retail market are such that eir could offset the losses from any exclusionary conduct at the wholesale level. Similarly, for ComReg’s duopoly (and it is worth noting here that the average exchange size considered in the Regional FACO Market is 816 premises) concern to hold between eir and Virgin Media there must currently be no or very limited NG broadband services available and the current NG broadband coverage equilibrium would also need to remain fixed over the market review period. This cannot of course be the case, given that roll-out by eir through its publicly announced IFN and NBI through its contractual obligations under the publicly funded NBP have already undermined such a remote possibility within the next five years.

Discrepancies in the assessment of overlapping coverage

126. eir considers that there may also be potential issues with regard to the manner in which ComReg has accounted for overlapping coverage. ComReg states that *“[w]here the coverage of NG broadband networks overlaps, the analysis avoids double-counting premises.”* This is done by looking at *“the number of unique premises with NG broadband availability, as there is some overlap between Eircom VDSL and FTTP networks, and SIRO’s FTTP network, such that adding together all the networks may represent double counting if a premises is connected to more than one NG broadband network.”*
127. ComReg states at A9.38 that it has calculated the percentage coverage per EA by dividing the total available lines in an EA by the total number of premises in an EA. However, given that ComReg’s assessment is intended to avoid double counting, the implication is that the percentage coverage per EA formula is as follows;

$$NG\ Broadband\ availability = \frac{Unique\ NG\ Broadband\ Premises\ within\ an\ EA}{Total\ premises\ in\ an\ EA}$$

128. eir therefore sought further clarification from ComReg with regard to the manner in which the coverage threshold may be satisfied, either on a single- or multi-network basis. ComReg confirmed that *“the coverage threshold test is calculated as the unique NG broadband premises coverage within an EA divided by total premises in that EA”* and that unique NG

broadband network coverage is “calculated by first calculating the NG broadband network coverage across all networks in an EA and then by removing any overlapping coverage, to avoid double-counting of premises. This then allows an EA to be classified as passing or failing the 80% coverage threshold.” While eir understands that the underlying inputs used in this calculation cannot be provided to operators, given the commercially sensitive nature of the data, the absence of even hypothetical examples of ComReg’s workings make it difficult to fully examine ComReg’s approach. The following comments are therefore based on our assumptions on the methodology and the information that has actually been provided by ComReg.

129. Our understanding is that in order to calculate unique NG broadband premises, ComReg has identified the network coverage at each individual premise and where a premise has overlapping coverage from eir’s FTTC network, eir’s FTTH network and/or SIRO’s FTTH network, the second (and possibly third) instance of network coverage is removed so that the premise is only counted once as having been passed by any NG broadband network. We therefore assume that ComReg has not calculated net premises by simply removing the total premises passed figure for each subsequent network presence in an EA from the largest premises passed figure or indeed by removing all overlapped premises from the premises passed figure. These approaches would logically lead to a lower premises passed figure than is the case in reality.

130. To investigate any such discrepancies, eir conducted analysis of its network coverage by EA taking a sample of those EAs, as set out in Table 3, where it has no overlapping FTTC and FTTH coverage. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]

131. [REDACTED]

132. Although this is a small sample, given the constraints in conducting analysis based on knowledge of its network alone, eir considers that it may point to issues with the manner in which ComReg has calculated overlapping coverage. This would likely result in a number of EAs being mistakenly classified as Regional.

133. In addition, eir has separately looked at issues related to the number of premises within an EA. This analysis identified two further issues. eir found only 3 EAs out of the entire set of 744 Regional EAs that had an address count greater than 3,500 premises. In each case the address count is significantly above 3,500 premises. Given the number of premises in these EAs in contrast to the average EA in the Regional FACO market, eir considers that EAs may have been erroneously designated.

Table 4. Regional EAs identified as outliers in terms of address count

Exchange area	Name	ComReg Address count
BLP	BELCAMP	21,612

CRA	CROWN ALLEY	16,060
LCN	BALLYDOWD	11,716

Source: eir

134. The second issue identified relates to potential discrepancies between the way in which ComReg determines the total premises in each EA and the method used by operators. This is particularly relevant, where there are a low number of total premises in an EA and any small variations could have an immediate effect on whether the EA in question passes or fails the coverage criterion. [REDACTED]

[REDACTED]

135. eir seriously questions the accuracy of a methodology, which results in these kinds of discrepancies. ComReg should therefore further clarify how total premises are determined and how overlapping coverage is treated to avoid undercounting the number of premises passed. ComReg should also consider a multi-stage process to identify and rectify any potential issues by EA e.g., separate calculations with regard to single network NG broadband coverage and a subsequent check of cumulative NG broadband coverage (less any overlap) if a single network does not meet the coverage criterion.

Overly conservative coverage threshold

136. eir also considers that the 80% coverage criterion proposed by ComReg is overly conservative and is likely to lead to numerous EAs being incorrectly classified as “non-competitive”. This is particularly true when one considers the nature of the competitive differences identified by ComReg between the Urban and Regional markets, which are driven by differences in the roll-out of NG broadband networks, which in turn are heavily contingent on the size of the population within an EA as well as the premises density.

137. ComReg states at paragraph 5.416 that it considers that “a (cumulative) coverage level of 80% is likely to offer a sufficient level of scale for an operator to be capable of providing service to a customer base which is large enough to generate a competitive constraint at an Exchange Area. At coverage levels below 80%, it is ComReg’s preliminary view that a large enough cohort of premises in an Exchange Area would be unable to access Managed VoIP over Next Generation broadband, such that competitive conditions at that Exchange Area

would be insufficiently different from a scenario where Next Generation broadband was not present.”

138. ComReg further clarified that in selecting the coverage threshold, it aimed to strike a balance between:

- setting a lower coverage level, which would lead to Exchange Areas being designated as exhibiting different competitive conditions, even where a non-trivial level of premises at those Exchange Areas were not passed by Next Generation broadband; and
- requiring coverage levels at 100%, or close to 100%, which would fail to take account of the differences in conditions of competition arising from the presence at high, but not ubiquitous, levels at an Exchange Area of Next Generation broadband coverage.

139. eir does not agree that the proposed coverage level has managed to strike this balance. Looking at the approach taken by other European NRAs, it would also appear that the threshold proposed is an outlier. According to BEREC’s Report on the application of the Common Position on geographic aspects of market analysis the application of the common position on geographic aspects of market analysis (BoR (18) 213), the coverage thresholds chosen by NRAs range from 20% to 75% (the latter only being used by Denmark and referring to cumulative coverage).

Table 5. Coverage thresholds applied by European NRAs

Country	Market 3a	Market 3b	Market 4
Spain	20%		
Hungary	60%	60%	
Denmark	75% (cumulative)	75% (cumulative)	
Portugal		50%	50%
Slovenia		65%	

Source: BEREC

140. In fact, the Commission has previously commented on ComReg’s conservative approach to defining separate sub-national geographical markets. In its comments on ComReg’s notified measures for the WHQA market (Case IE/2019/2214), the Commission specifically noted the proposed coverage threshold of 75% and urged ComReg “in its next market review, to review the methodological approach to the choice of criteria and thresholds, to better reflect NRAs’ regulatory practice, the common position of BEREC, and technological and market developments” in order to “ensure the timely, **accurate** and relevant delineation of sub-national markets (i.e., competitive and uncompetitive areas)” [emphasis added].

141. ComReg assertion that 80% is appropriate is based on ensuring there is sufficient competition within an Exchange. This fails to consider the national retail market and that wholesale competitive forces nationally provide far greater leverage, negotiation and CBP than could ever be exerted successfully at the wholesale level in small individual exchanges. In effect, ComReg is treating each exchange as an individual market which in itself creates a market so small that it lends itself to (incorrectly determining) dominance and thus a de facto SMP designation.
142. eir therefore considers that ComReg should more accurately represent the CBP in the FACO market on small individual “markets” / exchanges. In addition, ComReg should reduce the 80% threshold to 60% of NG broadband coverage including those premises capable of being served by Virgin Media and Imagine¹² within EA. As a complementary criterion, to recognise that individual premises within EA once served by NG broadband can already be served by alternative substitute technology, namely Managed VOB, individual households that are served by NG broadband should be removed from regulatory remedies.¹³

Proposed adjustments to the approach to geographic assessment

143. Given the issues identified with ComReg’s analysis, in particular with regard to those EAs that have a lower number of premises, eir considers that ComReg should separately assess such EAs on a household-by-household basis, thus determining if differentiation of remedies on a geographic basis is required to address any minor differences in competitive conditions and thereby allowing for timelier deregulation in line with further NG broadband roll-out.
144. eir notes that the 2018 SMP guidelines¹⁴, specifically point to the possibility of geographical differentiation at the remedies stage if regional differences are found but are not considered sufficient to support different geographic markets or SMP findings. In particular, the Guidelines underline the fact that the stability of the differentiation is the key to distinguishing between a geographical segmentation at market-definition level and remedy segmentation.
145. The accompanying Explanatory Note to the Guidelines further explains that *“where NRAs could not identify substantially and objectively different conditions stable over time, which are sufficiently clear in order to define sub-national markets, the existence of geographically differentiated constraints on a SMP operator who operates nationally, such as different levels of infrastructure competition in different parts of the territory, are unlikely to be*

¹² We note ComReg’s statements regarding contention. The assessment can be based on a view of the reasonable number of premises that can be effectively served in a reasonable timeframe.

¹³ In particular, as identified to ComReg in February 2020, eir’s billing is done at an exchange level not at an individual household level and therefore any pricing behaviour concerns cannot occur.

¹⁴ SMP guidelines 2018, para. 50.

strong enough to justify the finding of distinct markets. If, however, an operator is found to have SMP in a relevant market, such geographically differing constraints are more appropriately taken into account at the remedies stage by imposing a geographically differentiated set of obligations.”

146. eir notes that due to the roll-out of NBP the differing competitive conditions in the Regional Market cannot be considered to be stable over the period of the market review. ComReg’s proposal that a Mid-term Assessment will be carried within 24 months¹⁵ of the effective Decision date, in order to reapply the geographic criterion and determine the continuing appropriateness of SMP remedies in EAs in the Regional Market, demonstrates this is recognised by ComReg.
147. eir is of the view that ComReg could address the issue of further NG broadband roll-out in rural areas, particularly by NBI, as well as issues related to rates based on small populations by separately assessing EAs with lower than 60% NG broadband coverage on a household-by-household basis. While eir recognises that this unit of assessment may not be suitable for the market as a whole, as a complementary criterion it provides a more granular approach, which has the advantage of better distinguishing different competitive options and is particularly relevant where areas have a small count of overall premises.
148. eir considers that a minimum 60% NG broadband coverage also recognises the size of the individual EA/“markets” and that traditionally even on an individual market assessment a market position (in this case copper) below 40% is not considered dominant.
149. In addition, larger units of measurement (even when combined with a 60% coverage threshold) do not perform as well as more granular methods in accurately measuring network presence in partially covered exchange areas. While eir recognises that the choice of geographic unit and issues of granularity must be balanced with practicality and manageability, as ComReg already has coverage data at the premise level, we consider that it would be relatively simple to determine whether a household is competitive or non-competitive on the basis of NG broadband availability.
150. eir notes that there is precedent for a more granular assessment of geographic units as well as a dual approach to geographic assessment in the EU. For example, in its comments on the Slovenian NRA’s notified measures for Market 3b (Case SI/2017/2005), the EC noted that some of the geographic units chosen by AKOS may be characterised by possibly heterogeneous competitive developments within the settlement area, meaning that competitive conditions may not be stable over time. It invited AKOS to closely monitor the evolution of market conditions at both the retail and wholesale levels and to revisit its

¹⁵ As noted previously these can and should be conducted annually.

analysis before the end of the upcoming regulatory period, as well as to carry out a more **granular** assessment of the appropriate geographic units, where appropriate.

151. In addition, in its analysis of Market 3a the Spanish NRA (CNMC) considered both municipalities and the MDF as the geographic units chosen for analysis and subsequently imposed differentiated geographic remedies on a number of municipalities that were chosen according to an analysis at the level of the incumbent operator's MDF exchanges. The French NRA, ARCEP, also followed a dual approach in its review of Market 4, using MDFs when imposing differentiated remedies on the copper network and municipalities when imposing access remedies in relation to the incumbents NGA network.
152. A differentiated approach to geographic assessment in Ireland would also support a smooth and timely transition from the legacy copper network to new fibre networks as well as modern FWA networks. This is similar to the approach being proposed by ARCEP in its current review of the WLA market. One of ARCEP's main strategic objectives is to incentivise and speed up copper-switch off, ensuring that wholesale access obligations on legacy products are not maintained for an undue period. The process proposed by ARCEP is as follows;
 - as soon as a premise or all units within an MDU are passed, Orange will provide a two month notification to operators that all new requests in relation to those premises can no longer be served over the copper network but rather will be served over the new fibre network
 - subject to a 6 month notification period, Orange can modify the SLA for copper products in fibre ready areas (home passed) in order to incentivise migration to fibre.
153. Investment in fibre is part of a wider transformation of Ireland's telecommunications infrastructure, comprised of both the migration of voice services to IP technology and the overall withdrawal of copper-based services. eir is of the view that as part of this review and in the context of its upcoming review of the WLA/WCA market, ComReg should therefore consider its proposals to promote fibre investment by shifting the focus of regulation from copper to fibre and thus supporting migration and copper retirement. This can be facilitated by recognising the potential for differentiated remedies (including their removal), a lower criterion of NG broadband coverage of EA and a complementary criterion of removing undue regulatory obligations on individual premises, which are already subject to different competitive conditions¹⁶.

¹⁶ This is particularly relevant where FTTH roll-out (such as eir's 300k, Siro or NBI) follows a ribbon development not confined to an exchange area boundary. Those individual premises passed automatically face different competitive options to switch to Managed VoB and away from FA. Regulation should recognise and remove such premises from

regulatory remedies without undue delay – noting in particular, that eir’s voluntary commitments also addressed this issue.

Question 6: Do you agree with ComReg’s preliminary conclusions on the 3CT for the Relevant RFTS Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

154. eir agrees with ComReg’s preliminary conclusions on the 3CT for the Relevant RFTS Markets, namely that the 3CT is not met and as such none of the three Relevant RFTS Markets continue to warrant ex ante regulation.
155. However, eir is disappointed that it has taken until this point in time to reach this inevitable conclusion. This market was last reviewed six years ago and has subsequently been removed from the Commission’s list of markets susceptible to ex ante regulation. eir also notes that prior to the publication of D12/14, the Commission, in its comments on the notified measures, urged ComReg to *“complete the assessment of the (upstream) market for call origination as soon as possible”* and *“reassess whether the presently notified markets still warrant ex ante regulation without any undue delay”*.
156. ComReg subsequently published its Review of FACO market in 2015. In its comments on the notified measures, the Commission again called on ComReg to *“proceed with the review of the retail access market without undue delay”*. However, such a review did not materialise.
157. While eir notes that an extension request under Article 16 of the Framework Directive was submitted to the Commission with respect to the FACO market in 2018, the proposed extension did not cover the RFTS market, the review of which was already late given ComReg’s legal obligation to review markets every 3 years. The Commission once again specifically called out the retail market as *“urgently”* requiring review in its comments on ComReg’s notified measures for the WLA/WCA market later that year. It is therefore unclear why ComReg has waited to complete this review or indeed the rationale as to why the RFTS and FACO markets had to be reviewed in parallel.
158. eir considers that had the review been completed in a timely manner or indeed at any stage when it was highlighted by the Commission that the review was overdue and of an urgent nature, the market would have been deemed effectively competitive and unjustified regulation would already have been removed. Instead eir has remained subject to SMP obligations in a market where it no longer has a position of market power and as a result is at a competitive disadvantage in comparison to other operators.
159. Over the last number of years, the increasing importance of bundles and the broadband/pay TV elements contained therein, the decline of fixed voice usage, increasing FMS and the increasing importance of OTT services have cumulatively reduced eir’s ability to behave independently of competitors and consumers and these trends are expected to continue

and strengthen as FTTx roll-out continues and as ComReg's upcoming spectrum auction is finalised. eir notes that the upcoming auction, in particular, will include a number of coverage obligations for licensees in terms of the availability of VoLTE and WiFi Calling, which will only serve to further improve the mobile offering relative to traditional fixed voice and incentivise increased FMS as a result.

160. In summary, the degree of differentiation between products within the relevant market and outside (mobile, VoIP) is limited and the market dynamics are favourable, with expansion by existing competitors a clear possibility (e.g. via bundled offers). For these reasons, eir considers that there is no SMP in the retail market and it is clear that this has been the case for a while.
161. eir therefore welcomes ComReg's view that it is not necessary to provide a sunset (withdrawal) period and as such proposes to at least withdraw existing regulatory SMP obligations on eir in the Relevant RFTS Markets on the date at which ComReg's final Decision takes effect.

Question 7: Do you agree with ComReg’s preliminary conclusions on the market assessment for the Relevant FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

162. eir does not agree with ComReg’s preliminary conclusions on the market assessment for the Relevant FACO Markets. eir considers that both the assessment of the 3CT and the assessment of SMP for the relevant FACO markets are flawed. This largely stems from ComReg’s initial erroneous decision to assess fixed access and fixed calls as one focal product, which has led to continued errors in its assessment of the Relevant FACO markets. The effects of this particular issue, as well as the effects of a number of additional issues, on both the 3CT and SMP assessment are discussed below.

Issues related to the 3CT for the Relevant FACO markets

163. Under the regulatory framework, in considering whether it is appropriate to impose regulation in electronic communications markets, NRAs must begin by defining relevant markets appropriate to national circumstances in accordance with the principles of competition law and taking utmost account of the 2014 EC Recommendation. This Recommendation lists a number of markets in which it is presumed that ex ante regulatory obligations may be warranted, taking into account the particular features of those markets. However, the 2014 EC Recommendation also sets out the following three criteria, which must be applied if NRAs wish to identify markets other than those listed (in this instance FACO):

- the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature;
- a market structure which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers to entry; and
- the insufficiency of competition law alone to adequately address the market failure(s) concerned.

164. eir considers that ComReg’s assessment of the 3CT criteria, to determine whether it is, in fact, appropriate to continue to regulate the Relevant FACO Markets is flawed. In particular;

- a. the combination of FA and FCO as a single focal product appears to obscure the actual competitive dynamics at play in the market, thereby reducing the ability to reduce and simplify regulation;
- b. ComReg has failed to consider pertinent developments over the review period; and

- c. ComReg has failed to consider the longer term appropriateness of continuing to regulate this market, particularly in light of EU level precedent

The effect of the focal product on the 3CT assessment

165. ComReg has combined Fixed Access and Fixed Access Call Origination into a singular focal product. eir's view as why this is problematic are discussed in our response to Question 4 but apart from the effect that this has on accurately determining the boundaries of competition, this also represents a significant deficiency in ComReg's assessment of the 3CT as it focuses on barriers to entry in relation to both elements as one. This leads to an invalid extrapolation that while Managed VOB is a direct constraint that it is unlikely that it would allow sufficient scale/incentive for operators to climb the ladder of investment to invest in legacy infrastructure or network infrastructure capable of delivering Managed VOB. This entirely misses the context of the EC Framework to minimise regulation where possible by focussing on the actual bottleneck, which in this case is FA and not FCO.
166. In fact, the EC 2014 Explanatory Note recognises the competitive nature of FCO and in particular the ability of both mobile and fixed operators to overcome barriers to entry. For mobile operators, the Commission notes that on the basis of (self-supplied) wholesale call origination services *"it can be concluded that the Mobile Network Operators (MNOs) have already overcome the barriers to entry"* and that *"the wholesale call origination services in the fixed networks are subject to direct competitive pressure from (self-supplied) mobile call origination."* While the Commission acknowledges that *"it can be observed that the substitution from mobile telephony is much more intensive on the calls market than on the access market itself"* it also explains in relation to fixed access and calls that *"besides the competitive constraints coming from mobile services, wholesale call origination can be relatively easily self-supplied by operators who establish a direct connection to end-customers (either on the basis of their own infrastructure or through - regulated - wholesale products such as LLU and/or bitstream)." Furthermore, it notes that "demand for CS/CPS services, for the purpose of offering retail services to customers who rely on PSTN for quality and resilience reasons, will become less relevant over the review period of this Recommendation, especially in view of the migration to all-IP networks (which do not have the same characteristics concerning quality/resilience as PSTN). As explained above, the entry in the market for access to the fixed telephone network is no longer characterised by high and non-transitory barriers to entry."*
167. ComReg's incorrect conclusion that FVCO and FA constitute one market (FACO) has led to an inevitable conclusion that barriers to entry potentially remain in a declining subset of the FACO market - fixed access for 25% of premises in the state. This error is then extrapolated to the FVCO market, which leads to the false impression that competition bottlenecks remain. It is clear that the two elements of ComReg's focal product are subject to differing

competitive constraints and that the strength of these constraints will vary. As ComReg has only considered FACO as a single focal product, its assessment fails to capture this.

168. Consequently, as discussed in paragraph 77-86, where the competitive constraints of complementary products and a valid countervailing buyer power assessment are considered, it is clear that, at a minimum, the market for FCO fails the 3CT in that the market is not characterised by high and non-transitory barriers to entry. In addition, when considering the prospective roll-out of NBI within the market review period it is even more apparent that the fixed access component of FACO will tend towards competitive outcome even if small exchanges are considered individual markets. This would correctly allow ComReg to determine that FCO and FA fails at least 1 of the 3CT at the National, Urban or Regional level– meaning that the markets are not susceptible to regulation.

Failure to consider pertinent developments over the review period

169. ComReg has formed the view, on a preliminary basis, that in respect of the candidate Regional FACO Markets, all three of the 3CT criteria are passed and that there is insufficient evidence to conclude that the Regional FACO Markets are characterised by sufficient levels of competition to immediately withdraw ex ante regulation.
170. On the issue of whether the market tends towards effective competition within the relevant time horizon (Criterion 2), ComReg, having regard to any observable trends towards effective competition, whether alternative SPs are in a position to roll out infrastructure and any expected technological and economic developments, states at paragraph 7.180 *“that it is not clear at this stage that there is evidence of a tendency towards effective competition in the footprint of the Regional FACO Markets, however, this may change in due course, pending roll-out of NBI in the IA.”*
171. However, eir notes that the second criterion requires an assessment of whether the market tends towards effective competition, **within the relevant time horizon**, which is 5 years from the publication of the Decision (assuming a ComReg decision will be published after the European Code is transposed). ComReg’s approach completely fails to conduct the assessment with the required forward looking perspective, given that ComReg has excluded any consideration of NBI’s roll-out plans from its analysis and has sought to dismiss the credibility of FWA and Imagine’s roll-out activities.
172. The roll-out by NBI is an entirely foreseeable development over the time horizon linked to the market review. As noted by ComReg in its review of the FACO market, the NBP contract has been awarded by the DCCAIE, and was signed on 19 November 2019. In addition, NBI has communicated its deployment plans to ComReg and the granular effect of the roll-out at an EA level over the next number of years is known to ComReg. We understand that a sizeable team has been employed by the Department to monitor NBI’s compliance with the NBP contract commitments and targets. As such there should be a reasonable level of confidence that substantial roll-out will occur during the lifetime of this review.
173. In this regard, eir notes that in its comments on the Dutch NRA’s notified measures for the FACO market in 2017 (Case NL/2017/1958-1959), the Commission considered that *“the existence of any market developments that might increase a likelihood of the relevant market tending towards effective competition, such as access agreements between operators, should have been duly considered in ACM’s analysis”*.
174. While the expected impact of NBI roll-out on the Regional FACO market is discussed further in paragraphs 111-119, in relation to ComReg’s geographic assessment, it is unclear to eir why ComReg has also failed to adequately consider NBI roll-out in its assessment of the

second criterion and has merely stated that evidence of a tendency towards effective competition “*may change in due course, pending roll-out of NBI in the IA.*” eir considers that this statement by its very nature is contradictory with the purpose of the assessment given that the very thing ComReg should be analysing is whether the competitive dynamics may change in due course and over the period of the review.

175. eir notes that the SMP Guidelines specifically call out the fact that market power can be constrained by the existence of potential competitors, stating at point 54 that “[w]hen considering the market power of an undertaking it is important to consider the market share of the undertaking and its competitors as well as **constraints exercised by potential competitors in the medium term**” [emphasis added]. In this respect, eir points to the fact that the FACO market is a declining one and that the NBP contract has been finalised. However, ComReg has again failed to adequately consider the constraint that will be exercised by NBI in the medium term.

EU precedent for the continuing regulation of Market 2/2007

176. In addition, eir notes that ComReg has referenced the approach of 8 other NRAs to the 3CT in an apparent attempt to justify its position as being in line with EU precedent.

Table 6. Continued EU regulation of FACO

Country	Incumbent operator	NRA	Most recent FACO review	Geographic scope of market
Croatia	HT	HAKOM	2018	National
France	Orange	ARCEP	2017	National (plus French overseas territories)
Germany	DT	BNetzA	2016	National
Greece	OTE	EETT	Ongoing	National
Italy	TIM	AGCOM	2016	National
Netherlands	KPN	ACM	2017	National
Spain	Telefónica	CNMC	2016	National
United Kingdom	BT KCOM (Hull)	Ofcom	Ongoing	UK excluding Hull and Hull

177. eir notes of the 8 EU NRAs who continue to regulate the FACO market, two are in fact currently in the process of reviewing the market. In December 2019, EETT launched a public

consultation on market analysis of the Interconnection Markets (Market 1/2014 and Market 2/2007), which ran until 9 March 2020. eir understands that EETT is planning to notify the Interconnection Markets in Q3 2020 and according to the draft measures, EETT proposes to deregulate Market 2/2007.

178. In January 2020, Ofcom launched a consultation on its Wholesale Fixed Telecoms Market Review (2021-2026). The review sets out Ofcom’s plans for regulation of the fixed telecoms markets from April 2021, with the existing charge controls expiring in March 2021. Ofcom intends to publish its decision statement before the new regulation takes effect in April 2021. In its review, Ofcom noted that since the 2017 Narrowband Market Review (NMR) Statement, Openreach has consulted on its plans to withdraw WLR products and transition to IP voice services by the end of 2025. This will mean that Openreach will no longer provide voice services in this market and that from 2025 BT will no longer be in a position to assert market power in this market. Ofcom is also reviewing the WLA market and noted that any regulation arising in this market ensures that there is no barrier to the provision of broadband lines. It therefore considers that there no longer remain specific barriers to the provision of voice services that it needs to address with regulation in this market and as such proposes to remove all regulation of the Narrowband market.
179. Of the six remaining NRAs that continue to regulate the FACO market, eir notes that five of these reviews were due to already have been completed or should be reviewed by the end of this year. Either way, the reviews of these markets are imminent and given the comments provided by the Commission on the previously notified measures, it is likely that ComReg, with its proposal to continue to regulate a narrow subset of the FACO market in some form until 2026, will be an outlier among its European regulatory counterparts. This is particularly pertinent bearing in mind 18 NRAs have already ceased to regulate the FACO market.

Table 7. Commission comments on NRA’s notified measures for Market 2/2007

Country	Commission comments on most recent FACO review
Croatia	The Commission urged HAKOM to further substantiate and strengthen its SMP finding, and in particular to address the alleged lack of substitution from mobile services
France	The Commission noted that competitive constraints coming from IP-based and mobile services are on the rise and are likely to become effective substitutes particularly in the context of Orange’s PSTN phase out. The Commission also considered it likely that the justifications for continued regulation of the markets under review would become much weaker over the upcoming period, to a point where at the occasion of the next market review full deregulation would very likely be justified and noted the possibility for ARCEP to carry out a review even before the end of the regulatory review period with a view to fully deregulate the FACO market.
Germany	The Commission considered that barriers to entry have been eroded due to the availability of cable networks, regulated access to LLU and bitstream and the increase in investments in NGA networks. In addition, the Commission noted that even if fixed and mobile calls are not

	considered to be (perfect) substitutes, mobile services are likely to exercise a significant constraint on wholesale call origination services and asked BNetzA to closely monitor the market and to carry out a new review prior to the (standard) review period of three years, if deemed necessary.
Italy	The Commission noted the increase in the uptake of LLU and bitstream and expected further NGA roll-out that indicate a trend towards self-supply and thus a trend towards competition. In addition, the Commission noted that even if fixed and mobile calls are not considered to be perfect substitutes, mobile services would still exercise a significant constraint on wholesale call origination. Against this background the Commission asked AGCOM to closely monitor the market and to carry out a new review prior to the (standard) review period of three years, if deemed necessary.
Netherlands	The Commission pointed to the fact that the dual calls market was a declining one, in particular its ISDN2 segment and considered that the existence of any market developments that might increase a likelihood of the relevant market tending towards effective competition should have been duly considered in ACM's analysis. It urged ACM to closely monitor market developments on the dual calls market taking account of the above said, with a view to deregulate the market, if appropriate, even before the end of the three-year regulatory period.
Spain	The Commission pointed out that CNMC's analysis did not provide a comprehensive assessment of the extent to which users of stand-alone fixed telephony services may have access to communications providers other than Telefónica (either currently or within the timeframe of this market review through the expected roll-out of NGA networks), through self-supply or through wholesale access products other than WLR. It asked CNMC to closely monitor the market, particularly, future developments that may accentuate fixed to mobile substitutability in Spain, as well as NGA roll-outs that may increase the competitive constraints on fixed telephony services. If deemed necessary in view of those developments, a new review should be carried out prior to the standard period of three years.

Issues related to the SMP Assessment for the Relevant FACO markets

180. ComReg has formed the preliminary view that eir would not be sufficiently constrained by existing competition, potential competition and/or CBP, such that it would be prevented from behaving, to an appreciable extent, independently of its competitors and customers in the Regional Market. eir considers that there are a number of issues in relation to ComReg's assessment of each of these aspects as follows;
- a. ComReg's analysis of effective competition is flawed in that it fails to adequately consider the effect that existing regulation has had on the perceived boundaries of competition — as well as on eir's ability to price competitively;
 - b. ComReg's assessment of potential competition is flawed in that it fails to adequately consider the roll-out of NBI over the market review period;
 - c. ComReg's assessment of CBP is flawed in that it erroneously assumed that limited network coverage limits an SPs ability to credibly exert CBP;

- d. ComReg has over-relied on a theoretical possibility of foreclosure to justify continued regulation; and
- e. ComReg has failed to adequately consider the voluntary commitments offered by eir.

The analysis of effective competition in the presence of existing regulation

- 181. ComReg has determined that absent regulation in the Regional FACO Markets, it is unlikely that Eircom would be sufficiently constrained by existing competition. This is primarily on the basis of eir's "*persistently high market shares*" and the absence of notable evidence of competition materially impacting eir's pricing behaviour.
- 182. ComReg has failed to consider that this analysis may be liable to issues related to the assumption that the prevailing prices and conditions are akin to those that would exist in the absence of regulation. eir considers that this is unlikely to be the case given the long-standing regulation of this market and the nature of the price control. ComReg's assessment is based on present choices and pricing behaviour as evidence of insufficient competitive constraints on eir.

eir's "persistently high market share"

- 183. eir notes that SB-WLR is a regulated legacy product and it is therefore difficult to estimate the hypothetical market shares under an MGA approach. While purchases of SB-WLR have already declined, in the absence of regulation, the decline would likely have been much larger. eir considers that this has led to overly narrow market definitions and thereby erroneous inferences of market power.
- 184. In addition, the combination of FA and FVCO as one focal product will, as a result of previously and currently imposed regulatory remedies, result in a high-market share for the incumbent, thereby dismissing the fact that the market has now evolved and fixed narrowband access is no longer necessary to provide the origination of fixed calls. We would also note that narrowly defined markets may give rise to a perception of high market share by the nature of their definition. eir notes that this approach has been criticised by the EC in the past.

Wholesale pricing

- 185. ComReg considers that as WLR has followed the regulated price path since 2016 there is no existing competitive pressures, stating at paragraph 7.297, "*that the regulated prices which Eircom is obliged to charge are price ceilings, and Eircom is free, if it wishes – or if in response to CBP – to charge at levels below that price ceiling*". This has miscategorised the

price control for WLR. Pursuant to ComReg D03/16, WLR is clearly a price point and not a maximum price.

186. Similarly, D03/16 removes the ability to provide promotions or discounts on WLR, which eir had historically offered prior to ComReg D03/16 coming into force. Furthermore, in order to reduce the regulated price of WLR eir must, through a convoluted “Regulatory Approval Mechanism”, apply to ComReg using a margin squeeze test to demonstrate that eir or its wholesale customers cannot compete at the retail level (at the current regulated price of WLR) against rival platform technologies — therefore, it is a complete falsehood to present the matter as eir having whimsical pricing freedom.
187. In addition, eir is constrained by regulation to respond to CBP as eir cannot negotiate with individual customers. The correct lens therefore through which ComReg should view this would be to assess is the fact that prior to D03/16 eir offered promotions and discounts to its wholesale customers on WLR. Similarly, absent regulation eir has been able to offer and negotiate discounts with customers in respect to services in the Urban WCA market and the Call Transit market. Absent regulation eir has the incentive to enter into commercially negotiated deals on call origination and fixed access either separately or sold together — this is particularly the case where the market itself has viable substitutes and is in continual decline.
188. Similarly, noting that ISDN WLR has not changed since 2008 is misrepresenting the facts of the issue. ComReg undertook a pricing review in 2016 (through ComReg D03/16) and concluded that *“there is also a risk that setting wholesale prices that undervalue the active assets would discourage migration from a declining wholesale FRA and PRA service to newer and more efficient replacements (e.g., IP-based solutions). Setting prices below the efficient level of costs may also undermine investment incentives in newer technologies that are capable of providing similar services. This risk is compounded if the resulting prices are so low that they result in the stranded investments by other wholesale operators trying to compete with Eir in this market.”* As such there are good commercial and for ComReg policy reasons for maintaining the existing wholesale prices — as it encourages customers to migrate to more efficient networks that are not end of life.
189. In addition, ComReg has also failed to consider that the current fixed call origination rates are also regulated therefore eir is not in a position to negotiate. As such, ComReg’s conclusion that *“No such instances were provided to ComReg”* is an outcome that should already have been self-evident. However, a more accurate evaluation is the Call Transit market where eir has entered into commercial negotiations with customers. Similarly, that *“ComReg’s preliminary view is that Eircom would not be likely to have retained the price of the FVCO”* is simply wrong (see for example paragraph 199). Finally, as ComReg are aware, eir’s fixed call market has been incurring significant losses year-on-year, due to the fact that

call origination and call termination revenue and volumes continue to decline due to the impact of fixed mobile substitution, alternative technologies, and competition on both the total number of call minutes supplied and the proportion of those minutes originating on fixed lines.

Potential competition in the Regional FACO market

190. Overall, ComReg's preliminary view is that, absent regulation, it is unlikely that eir would be sufficiently constrained by potential competition in the Regional FACO Markets.
191. However, this completely ignores the effect that NBI roll-out will have on the FACO market over the time period under review. This is discussed at length throughout this response.

Limited network coverage in the Regional Market

192. By focusing on the market boundary definition only on the basis of count of competitive premises (even at 80% coverage), ComReg produces a number of small exchanges classified as Regional Markets. This eclipses a full and proper consideration of other competitive factors that evidence the strength of CBP constraints from the Urban Market into the Regional Market. There is a good case for removing the finding of separate geographic markets in the FACO market review, as separate relevant economic markets only exist if the competitive conditions in each are "appreciably different".
193. The EC 2014 Explanatory Notes recognises that *"The fact that competitors have a supply area which is not national does not suffice to conclude that there are distinct geographic markets."* ComReg's shortfall in analysis has already been pre-empted in the EC's Explanatory Note *"Regional competitors can indeed exercise a competitive pressure reaching beyond the area in which they are present when the potential SMP operator applies uniform tariffs and the regional competitor is too large to ignore."*
194. ComReg has failed to consider that the "regional competitors" in the Urban Market are so large (75% of all WLR lines) that the ability of eir to act independently in the much smaller Regional Market — given that ComReg has in effect assumed that each EA is its own individual market — is not a regulatory risk.
195. ComReg has in effect defined a geographic market that is so small that it leads incorrectly to the presumption of dominance and SMP regulation.

Over-reliance on a theoretical possibility to justify regulation

196. eir considers that ComReg has put too much weight on the theoretical economic abuse of foreclosure and has not adequately considered whether eir actually has sufficient market

power at the wholesale level to follow such a pricing strategy, and has failed to adequately consider the dynamics at the retail level to make such a strategy a commercial success.

197. In order for a foreclosure strategy to be “commercial” the wholesale firm imposing the refusal to supply must somehow be able to recoup their profit sacrifice at the retail level. This profit sacrifice must include the wholesale revenue foregone (i.e., the revenues lost as a result of operators leaving the market due to the margin squeeze) through the recoupment of downstream margins.
198. First, the incentive to discriminate in the Regional Market — a small residual market — is very weak, even when assuming that eir retail would gain all services on a like for like basis. The risk of operators withdrawing business in Urban Market in retaliation more than outweighs this risk. Coupled with the availability of Virgin Media and Imagine it is highly unlikely that all consumers in Regional Market would take service from eir at the retail market. Furthermore, a share of these customers may turn to mobile or use Managed VOB over other available NG broadband service should they desire (which by ComReg’s definition could be as high as 79% of the premises in each EA).
199. Second, if eir were to choose today to refuse to supply it would lose a share of the present-day wholesale revenues. It could only have the incentive to do so only if it hoped to gain over time a greater share and revenues in the retail market. As explained above this is already unlikely. However, assuming that eir was able to gain such a retail share it would take considerable time to do so and is against a backdrop of a declining retail market for the importance of calls in retail offers and the lower available margins for standalone customers. At the same time, NG broadband services network infrastructure continues to roll-out commercially and through State Aid Intervention which provide for a viable substitute to legacy Fixed Access and legacy Fixed Call Origination. Consequently, the loss of wholesale revenues is ill-advised in the time frame of the relevant market review period as the exclusionary conduct would not be commercially sound and would be unsuccessful. In applying a cogent effects-based analysis to ComReg’s regulatory concern, eir can demonstrate that such a regulatory fear is unfounded and illogical. Even theoretically eir cannot expect likely recoupment of the wholesale revenues sacrificed under the refusal to deal scenario.
200. Even assuming hypothetically that the refusal to supply is successful on the legacy network, the EC 2014 Explanatory Note recognises that such a strategy would only be transient, *“In the medium-term it will not be profitable for an operator to keep the PSTN network running in parallel with its all-IP network, even if the operator could price above the competitive level for a limited period of time to a dwindling group of captive users. Simultaneously, technological solutions, particularly offered by VoIP and mobile operators, will further*

reduce PSTN user captivity by offering increased reliability and security at similar levels as PSTN networks.”

Failure to consider voluntary commitments

201. Absent regulation eir has provided ComReg details of a voluntary commitment which ComReg has failed to consider.
202. eir's voluntary commitments are considered by ComReg in a cursory manner in that it explains that it cannot rely on such commitments until the Code is transposed in December 2020 and that *"in any event, the Commitments offered by Eircom on their own would have been insufficient to address all of the competition problems identified in Section 9 of this Consultation"*.
203. With the exception of ComReg's single sentence on eir's pricing proposal no other consideration or justification is provided by ComReg as to how those voluntary commitments are "insufficient".
204. As the Code is due to become law in Ireland before a final decision is adopted, and is within the market review period (we understand ComReg is taking a 5 year view of the market in this consultation consistent with the Code), it is unclear as to why ComReg has not considered any of the voluntary commitments in detail. Similarly, in separate correspondence received from ComReg as to the matter of market review periods, ComReg appears satisfied to rely on the future transposition of the Code to negate the requirements under the current regulatory Framework. It is unclear to eir the benefits of ignoring the voluntary commitments entirely when ComReg in reaching its final decision will presumably be beyond the date the Code is transposed. Instead, ComReg has chosen to "consult" with operators on the Code with the unjustified position it has presented to interested parties that they are "insufficient". In addition, it has provided no guidance to eir as to why those voluntary commitments are considered "insufficient" and therefore provides eir no opportunity to provide further submission on the matter which could address those deficits.

Question 8: Do you agree with ComReg’s preliminary conclusions on the market assessment for the RFTS Markets, absent regulation in the Urban FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

205. eir agrees with ComReg’s preliminary conclusions on the market assessment for the RFTS Markets, in that the 3CT of the Modified RFTS Markets fails even in the presence of the sub-national Urban and Regional FACO Markets.
206. eir notes that ComReg has not concluded on the geographic scope of the Modified RFTS market, but rather recognised the *“possibility that there may be separate geographic markets for the Modified Relevant RFTS Market on the basis of sub-geographic Relevant FACO Markets”*. However, eir considers it unlikely that the presence of a Regional FACO market alone would create this ‘possibility’ of separate RFTS markets.
207. eir considers that the conditions of competition across the State are sufficiently homogenous as to prove that a national market exists at the retail level even in the presence of the sub-national wholesale markets.
208. Given that any meaningful differences in competitive conditions are generally reflected in the retail pricing strategies of SPs, eir considers that differentiated pricing or marketing strategies are one of the more relevant indicators of the existence or otherwise of sub-national retail markets. As such any misguided suggestion of differing competitive conditions across Ireland, are outweighed by the uniformity of retail pricing and similarity in product functionality.
209. As noted at paragraph 4.366 of the Consultation, ComReg’s review of RFTS packages in the market does not indicate any variation in prices by geographic region. In addition, ComReg has not observed any evidence that standalone RFTS products have been priced differently to areas where bundled offerings (and thus greater NG broadband availability) are not available.
210. Finally, eir considers that the wholesale FACO market is also national in scope but even if it were to accept that sub-national markets exist, the wholesale market is effectively competitive. This is discussed in eir’s response to Questions 4 and 5.

Question 9: Do you agree that the competition problems and the associated impacts on competition end users identified are those that could potentially arise in the Regional FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

211. eir does not agree that the competition problems and the associated impacts on competition and end users identified are those that could potentially arise in the Regional FACO Markets. This is on the basis that ComReg has failed to delineate the geographic market in the correct manner or appropriately assess the level of competition that eir faces in terms of both direct and indirect constraints.
212. ComReg is of the preliminary view that, absent regulation, eir has the ability and incentive to engage in exclusionary practices, leveraging behaviour, and exploitative practices, which is likely to negatively impact on competition and end users in related retail and/or wholesale markets, as well as having the potential to reinforce its SMP in the Regional FACO Markets over time. However, eir considers that ComReg has not produced any concrete evidence that the examples of anti-competitive effects and concerns submitted by ComReg in this Consultation are actually likely to occur in this market. In particular, eir considers that ComReg has over-relied on the theoretical economic abuse of foreclosure and has not adequately considered whether eir actually has sufficient market power at the wholesale level to follow such a pricing strategy. This is discussed further in paragraphs 196-200.
213. ComReg has set out a number of simplified general anti-competitive concerns in Chapter 9 of the Consultation, which a vertically integrated firm could theoretically undertake if found to have SMP at the wholesale level. eir notes that the arguments made by ComReg are identical to those provided by it in markets recognised by the European Commission as requiring SMP regulation. However, the FACO market is no longer listed by the European Commission and therefore the burden of proof is correctly higher. There is insufficient economic assessment undertaken in ComReg's market analysis to allow ComReg to suitably determine whether the theoretical competition problems identified, arising from hypothetical pricing behaviours, are in reality likely to occur in practice. Consequently, the potential impact of eir distorting competition is overstated. This results in ComReg proposing complex and disproportionate regulatory pricing remedies to "address" potential market failures well beyond any market outcomes that are actually likely to occur in a vanishing and small part of the market.
214. For example, ComReg states at paragraph 9.9 that eir *"is likely to have both the ability and incentive to behave in a manner that would delay or deter network investment [and] entry into the FACO markets"*. ComReg further states at paragraph 9.10 that *"[t]he SMP SP may also decide to withhold investment in related markets to delay or impede the development*

of competition in those markets". ComReg also states at paragraph 9.11, that the type of exclusionary practices that could occur in the Regional Market could include "[e]ngaging in predatory pricing of FACO to discourage entry by other potential FACO suppliers".

215. First, this rationale is flawed with respect to eir's ability or indeed desire to deter network investment. In the Urban FACO markets, barriers to entry have, according to ComReg, already been eroded. In addition, while eir does not agree with the manner in which ComReg has assessed the Regional FACO market from a product, geographic or competition perspective, NBI has reached an agreement to roll-out FTTH in the IA, which largely overlaps the Regional FACO market. Moreover, eir notes that it was the sole merchant market provider of FACO until January 2019 and given that FACO is a legacy product, it is unlikely that there will be additional investment in FACO infrastructure per se. Therefore, the relevant network investment now is in NG broadband services, which facilitates Managed VOB which is coming from commercial operators like eir, Siro and through State Aid intervention therefore it is unclear what eir's ability is to deter such network investment from independent wholesale operators.
216. Second, on the issue of predatory pricing, eir notes that there are already a number of large well-resourced companies with differing commercial strategies operating in the Irish market and therefore it is highly unlikely that any exclusionary predatory pricing strategy to foreclose the market would be successful. In addition, the fact that any transient financial gains would be more than off-set by competition law penalties means that pursuit of such a pricing strategy would not be commercially sound or indeed successful. In addition, as recognised by the EC 2014 Explanatory note even if eir could price above the competitive levels on the legacy network the current and progressing competitive pressure from Managed VOB makes such gains short-lived. Finally, in terms of predatory pricing this is already considered under separate regulation upstream in the WCA market through the imposition of a retail bundle margin squeeze test. The only remaining margin squeeze therefore that ComReg could reasonably be referring to is between standalone retail line rental and wholesale line rental, which ComReg has already identified as a small and declining market nationally and only two other retail operators offer standalone retail line rental or RFVA as noted at paragraph 4.40 of the Consultation. This demonstrates that this menu-based rota of regulatory concerns has no bearing on the actual market under consideration or the actual competition concerns therein.
217. ComReg also raises the issue of potential leveraging concerns, noting for example at paragraph 9.14 that "[g]iven the close relationship between the Regional FACO Markets, other horizontally related markets (e.g. WLA, WCA, transit, and FVCT) and vertically related products and services (e.g. RFTS and WLV), absent regulation, there is likely potential for both means of leveraging to occur." However, a key assumption here is that such a firm is not subject to any regulatory remedies in any of the markets concerned.

200. ComReg cannot simply have regard to an extensive hypothetical list of abusive conduct. ComReg has failed to adequately consider the current and prospective competitive conditions in the market. Fixed voice usage has been declining and where it remains a relevant service for consumers, FNA based provision will be replaced by Managed VoIP. Further, if ComReg takes a forward looking view, as it is required to do, NBI roll-out must be given due consideration as it will have a material impact on the market. NBI's network will provide alternatives to eir's legacy FACO service and render eir's copper network in the intervention area obsolete. As a rational commercial entity, eir has every incentive to maintain existing demand over the remaining short years from its access network in the intervention area and as such it would be irrational for eir to deny access or act in an exclusionary manner.
218. In addition, in a scenario where eir was determined not to have SMP in a particular market, it would be subject to the behavioural constraints imposed by ex post competition law. All of eir's main competitors e.g., Sky, BT, Vodafone and Virgin Media, operate as part of large international corporations who take advantage of substantial economies of scale in terms of network deployment, product development at both the wholesale and retail levels, and content purchasing power and would readily make a complaint in the event of an abuse of dominance. All evidence points to increased competition in the FACO markets and as such ComReg must do more than present a list of hypothetical of abusive conduct.
219. Finally, given the average number of premises in each EA in the Regional Market coupled with the impending roll-out of competing network infrastructure both commercially and through State Aid intervention it is surprising and alarming (given the scrutiny this Market review will be given by the European Commission) that ComReg did not step back at the end of the process to ask what eir could realistically do with its notional SMP in the now tiny (and ever declining) separate Regional Market. eir submits that if ComReg had undertaken a further (and more accurate) analysis that the it would be apparent that the Regional Market would not qualify as a separate relevant economic market.

Question 10: Do you agree with ComReg’s preliminary conclusions on remedies in the Regional FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

220. The following is without prejudice to eir’s view that continued regulation of the FACO market is unwarranted in light of the flaws in ComReg’s analysis and subsequent preliminary conclusions as set out in this response. Even if it was accepted that some geographic subset should continue to be regulated eir does not agree with ComReg’s preliminary conclusions on the proposed remedies.
221. In the first instance, they are unnecessary in an environment where eir is willing to enter into voluntary commitments in respect of the SMP area. ComReg has offered no valid reason as to why the proposed commitments are not acceptable, merely asserting in paragraph 10.40 that they *‘would have been insufficient to address all of the competition problems identified’* but without setting out any assessment of the proposed commitments to support this claim. Instead ComReg seeks to rely on a process point in terms of the timing of the implementation of the European Code in stating that *‘there is no basis in legislation to accept voluntary commitments’* as the Code will not become law in Ireland until December 2020. However this point does not stand up to scrutiny; ComReg itself states that it will not be making a final Decision until Q2 2021, while the Code comes into effect from December 2020, meaning that ComReg will have a legal basis upon which to have regard to eir’s proposed commitments well before it makes any final Decision. Further as ComReg itself states in the consultation *“it is appropriate that, on a forward-looking basis, any such changes [arising from the implementation of the Code] are acknowledged in this Consultation”*. ComReg states that it will *‘consider interested parties views on this matter’* (namely that eir’s commitments *‘would not be sufficient to address the competition problems identified.’*) However, as noted above, ComReg has not actually set out any reasons as to why it considers eir’s proposals do not meet its competition concerns, meaning that it is not possible for eir to address them in this response. ComReg should properly consider the proposed voluntary commitments.
222. Further and without prejudice to its view that remedies are not required in light of its proposed commitments, eir also considers that ComReg has not properly assessed whether, in the absence of specific remedies, ComReg could effectively address issues such as refusal to supply by means of its general dispute resolution and compliance functions, together with its existing ex post competition law powers. It is notable that the only reasons given by ComReg (in paragraphs 10.52-10.55) are entirely generic statements about features that are inherent in any ex-post enforcement (namely that they take time and relate to the individual case investigation). Applying this reasoning, there is no situation in which ComReg’s dispute resolution, compliance and competition law powers will ever be

sufficient, meaning that ex ante regulation will always be required; this cannot be a legitimate position for a regulatory authority to take.

201. In the SMP area ComReg proposes to impose remedies that it characterises (para. 1.63) as *“largely a continuation of existing obligations, save for bringing some obligations up to modern regulatory standards”*. Maintaining existing obligations and upgrading some of these is disproportionate in a market that is a small subset of the previously regulated market (less than 25% by any measure) and in decline due to changes in end user demand and technological advancement. Indeed imposing the exact same regulatory obligations on a market that is four times smaller and declining in fact amounts to imposing a significantly greater regulatory burden (including in terms of cost of administration) relative to the size of the market regulated. As noted by ComReg, the Access Regulations require that any obligations imposed must be based on the nature of the problem identified and be proportionate. Further (as with the identification of SMP), in proposing to impose remedies on a market no longer listed by the Commission, the burden of proof in justifying that they are necessary, proportionate and fair is higher. Simply ‘cut and pasting’ historic remedies developed for a far larger market with quite different conditions, without any analysis of whether this is proportionate and justified in the specific circumstances of the proposed newly defined market, does not meet this requirement. With this in mind ComReg should be proposing the minimum necessary set of obligations to facilitate an orderly market transition. Further, ComReg’s stated aim of promoting the development of effective competition is not appropriate in a declining market where the prospects for new market entry are non-existent. It should also be noted that ComReg is not in fact simply continuing existing obligations, but, as it acknowledges itself later in Chapter 10, is actually increasing some of those obligations, particularly in relation to the preparation and submission of Statements of Compliance. Again, to be increasing the regulatory burden in respect of a regulated market that is reducing to one-quarter of its original size cannot be considered to be acting proportionately.

Access Obligations

202. eir does not believe that an obligation to provide access is necessary or proportionate. If ComReg takes a forward looking view, as it is required to do, due account must be given to the Government’s NBP. The NBP network will provide alternatives to eir’s legacy FACO service and render eir’s copper network in the intervention area obsolete. As a rationale commercial entity, eir has every incentive to maintain existing access over the remaining short years from its access network in the intervention area and as such it would be irrational for eir to deny access. eir notes that other measures such as obligations in respect of non-discrimination and transparency could be operated to give Access Seekers comfort. eir further notes that while ComReg acknowledges that under Regulation 12(1) of the Access Regulations it may only impose access obligations where it considers (a) that the

denial of such access would hinder the emergence of a sustainable competitive retail market, (b) would not be in the interests of end-users or (c) would otherwise hinder the objectives in Section 12 of the Communications Act or Section 16 of the Framework Regulations. However, ComReg carries out no assessment of criteria (a) or (b) focussing only on the objectives in Section 12 referred to in (c). Further its reasoning is unclear in relation to these sections. For example, in relation to the technical and economic viability of using or installing competing facilities, ComReg specifically acknowledges that NBP is capable of altering the conditions of competition in the Regional FACO markets – *‘the rollout of the NBP in the IA is capable, in ComReg’s preliminary view, of materially altering the conditions of competition in the Regional FACO Markets within – and beyond – the period of this review’*. This would appear to support the view that an access remedy is not required. Further, in relation to the need to safeguard competition in the long term, ComReg’s entire focus is on potential impacts on downstream competition (which eir has already noted are entirely theoretical) and ignores the fact that the objective in question directs ComReg to pay *‘particular attention to economically efficient infrastructure based competition’*, which it does not consider at all. In the circumstances it is not clear that ComReg has set out any basis on which it can claim that the preliminary requirement for the imposition any access condition, namely that at least one of the criteria in Regulation 12(1) be met, has been established.

223. eir notes ComReg’s proposal, consistent with its position in 2015, not to impose obligations in respect of access to NGA FACO. Given that all players in the market have access to self-supplied NGA FACO or white label VOIP we agree there is no justification to impose an obligation in respect of access to NGA FACO. To do otherwise would undermine incentives for technological advancement. We note ComReg’s intention to maintain the NG Interconnection obligation which may be considered unnecessary given that open eir is in the final stages of launching its NG Interconnection service and the obligations that apply to all operators under Regulation 5 of the Access Regulations 2011.

224. eir does not agree with ComReg’s proposed interpretation of ‘access’ in respect of CGA FACO as set out in footnote 854, *“For the avoidance of doubt, a request for access refers both to a request for provisioning of an existing product, service or facility and a request for a development to either provide a new product, service or facility or change an existing one”*. ComReg’s interpretation is too granular extending to individual provisioning requests. ComReg has the power, subject to meeting its other statutory duties, to mandate access to services such as SB-WLR on reasonable terms. The terms for access are set out in the reference offer and related documentation. These include the circumstance when it may not be reasonable / possible to meet a provisioning request. However, ComReg proposes to impose a new reporting obligation (para 10.82) *“either concurrently to the notification to the Undertaking in paragraph 10.81, or on a monthly basis, Eircom shall provide information to ComReg regarding the objective reasons for such refusal or partial grant of Access, including*

the products, services or facilities requested, order details, and the identity of each Undertaking. Eircom shall provide the information to ComReg in the format and detail specified by ComReg". The detailed specification is set out in footnote 863. Such a granular approach is burdensome and the imposition of the new report is surprising when such a diminutive portion of the market is being regulated and the legacy product is in natural decline. ComReg is obliged to only impose obligations which are "*based on the nature of the problem identified*". ComReg has failed to do this in respect of the proposed intrusive reporting requirement and we believe this requirement should not be imposed and section 10.6 of the draft Decision deleted.

225. eir agrees with ComReg's proposed approach to limit the circumstances when open eir must accept requests for RAP development as described in par. 10.63. This is appropriate given the declining nature of the market in terms of both demand for the product and the geographic scope of the regulated space.
226. eir agrees with ComReg's preliminary conclusion (para. 10.83) that the obligation to provide access to wholesale low-value CPE rental should be removed. Alternative CPE has been widely available for purchase for many years and it is questionable why this obligation was not removed in 2015.
227. ComReg proposes to maintain the obligation on eir to provide access to wholesale ISDN BRA in the regulated market despite having received a request from eir to withdraw the service under D05/15 in 27 May 2020. The proposed retention of the ISDN BRA access obligation is on the basis of assertions that "*The ISDN DDI feature appears to be a key service feature utilised by businesses*" and "*that multiple PSTN lines are not an effective substitute for ISDN BRAs*" (para. 10.84). It is not clear what evidence ComReg has based these assertions on or the validity of comparing the lack of substitutability of multiple legacy PSTN lines for legacy (end of life) ISDN BRAs when such business needs can be met using SIP Trunking and Hosted PBX services. Irrespective of perceptions of demand for the legacy service, ComReg has not properly considered the key point of technical obsolescence.
228. The driver behind eir's network modernisation programme is to de-risk the technical failure of legacy services in the absence of vendor support. eir is not so much extending the life of the fixed voice services in scope but rather providing a sound technical platform for their orderly decline and withdrawal. ComReg proposes to require eir to maintain legacy network equipment and customer premise equipment for the ISDN BRA service which absent effective vendor support has a higher risk of technical failure. This is a reckless approach proposed by ComReg and is one in which eir has no possibility to mitigate or control.
229. ComReg recognises the risks associated with legacy equipment in the context of other operators (para. 10.106) "*The availability of the NG Interconnection Service will also facilitate Access Seekers in the retirement of legacy TDM equipment which was installed to*

implement the CG Interconnection Service. Generally, this legacy switching equipment is end of life, of an antiquated nature and has limited support from vendors of the equipment. There can be difficulties in sourcing spare parts (cards, etc.) for this equipment and staff with knowledge of CG technology are limited both in the SP's workforce and the equipment vendor's workforce." The same factors apply in respect of ISDN BRA and the technical risk must be properly considered by ComReg.

230. We also note ComReg's suggestion that eir can cannibalise terminal adapters as existing lines cease. This does not de-risk the technical provision of the service and will likely increase the cost of providing the service. The proposed approach also does not address the fact that all elements in the provision of the service in the network (not just at the customer end) are end of life. We urge ComReg to reconsider its position on this matter (as per the request already submitted by eir), and to facilitate an orderly withdrawal of the service recognising the technological risk that must be managed.
231. We note ComReg's intention to maintain SLA obligations in the regional market. This will necessitate a de-averaging of the current national SLAs. eir notes that the draft Decision Instrument in section 10.3(ii) contains an obligation to negotiate SLAs in good faith, which mirrors existing obligations. However, in paragraphs 10.107-10.108 ComReg appear to suggest that the obligation to negotiate in good faith also applies to requests for Access. For the avoidance of any doubt, the obligation in respect of Access requests is to meet all 'reasonable requests', while the obligation to negotiate in good faith relates solely to SLA negotiation. This is clear in the terms of the draft Decision Instrument. ComReg also purport to set out quite specific criteria upon which it will investigate and assess whether a negotiation is conducted in good faith, and that this will include assessing what internal controls eir has in place. eir notes that negotiation in 'good faith' is a contract law concept whose parameters are established in case-law, and eir does not agree that it is possible for ComReg to unilaterally supplant these by setting out its own far more prescriptive criteria for assessing when a negotiation is in good faith. While ComReg asserts that these new criteria (which do not form part of the Decision Instrument) do not impose any significant additional burden, it is clear that they do, in terms of the record keeping that ComReg is now seeking to impose in relation to any negotiations, in case of future disputes. Further, with regard to the proposed requirement on eir not to withdraw access to facilities already granted (Section 9.4(ii) of the draft Decision Instrument) eir wishes to query the example given in paragraph 10.113, where it gives as an example of a justified withdrawal being '*the unjustified non-payment of wholesale charges*'. The implication of this example is that 'withdrawal' actually applies to the termination of individual contracts as permitted by their terms, rather than the general withdrawal of Access to a particular a facility. This is not what is provided for in the draft Decision Instrument, and is not how eir understands the relevant obligation.

232. eir agrees with ComReg's view (para. 10.155) *"Given the low value of the existing PAC Service payments, and declining payphone market, ComReg's preliminary view is that it is no longer proportionate to maintain the PAC Service remedy on Eircom. ComReg therefore proposes to withdraw this remedy."*

Non-Discrimination

233. As previously noted eir has no objection to the maintenance of non-discrimination obligations in the Regional Market as part of a minimum package of obligations also including transparency measures. In light of the declining nature of the market we agree with ComReg's proposal to maintain the applicable standards of equivalence as per current obligations.

Transparency

203. As previously noted eir has no objection to the maintenance of transparency obligations in the Regional Market as part of a minimum package of obligations also including non-discrimination measures. In light of the declining nature of the market we agree with ComReg's proposal to maintain the transparency requirements largely in line with current practice. eir notes however that there appears to be some inconsistency between the relevant sections of Chapter 10 and the provisions on disclosure of sensitive information under NDA in section 12.16 of the draft Decision Instrument. Section 10.218 provides that where an Access Seeker has signed an NDA, eir *'shall make the information or, as agreed with ComReg, extracts of such information available to an Access Seeker'*. However, section 12.16 does not refer to the possibility of only providing extracts of the information to the Access Seeker, merely stating that eir *'shall make it available'*. The draft Decision Instrument is not consistent with what is proposed by ComReg in paragraph 10.218.

Accounting Separation

234. We note and welcome ComReg's proposals (para. 10.307 to 10.310) to rationalise some of the reporting requirements and reduce the administrative burden on eir. However this does not appear to be reflected in Section 13.1 of the Decision Instrument which states *"[a]ll of the obligations in relation to accounting separation, set out at in the Decision Instrument contained in Appendix II of ComReg Decision D08/10, applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, and relating to products, services and facilities falling within the scope of Sections 9 and 10 of this Decision Instrument shall be maintained in their entirety."* The de-regulatory proposals should be clarified in the text of the Decision Instrument.

Price Control and Cost Accounting

235. eir is concerned that ComReg is seeking to depart from the established practice of dealing with all aspects concurrently in market reviews. ComReg states (para. 10.232) *“The Separate ANM Pricing Consultation will consider the most appropriate form of price control for PSTN WLR. It is ComReg’s intention that the decisions to be made on foot of this Consultation and the Separate ANM Pricing Consultation will be adopted together. However, in the event that this is not the case, ComReg proposes that the existing price control obligation of cost orientation for PSTN WLR as per the 2015 FACO Decision (as amended by the 2016 Pricing Decision) should be maintained for a short transitional period, which ComReg expects to be between 4 to 6 months from the effective date of the Decision arising from this Consultation. This transitional price control obligation will enable the matters subject to this Consultation to be decided upon while at the same time providing for the additional time to facilitate the final price control obligations (post transition period) to be adopted.”* eir must have a holistic view of the outcome of market reviews. This has been the case in the WLA/WCA 2018 market reviews and the WHQA 2020 market reviews. In all cases eir was presented with the full suite of proposed remedies so that it could properly evaluate its position. It is concerning that ComReg is now seeking to step away from established good practice. If at the conclusion of the FACO review ComReg is able to demonstrate that price regulation can be justified then its measures must be included at the same time as any other obligations. Otherwise eir may have no option but to Appeal the first Decision which contains broad pricing principles to preserve its position until the detailed measures are presented. This is not administratively efficient or fair on the regulated entity. ComReg should not be planning for a delay in the conclusion of its ANM review but should in fact be revisiting its plans with a view to accelerating the conclusion of the ANM review so as to not add any further delay to the conclusion of the RAFL and FACO reviews.
236. ComReg proposes to maintain a margin squeeze obligation on eir for White Label Voice it sells or offers for sale in the Regional FACO Markets. As identified by eir, the Regional Market is not a separate economic market. White Label services are offered on a national basis and as such similar to the reasoning identified by ComReg for why a margin squeeze test was not required in the leased line market pursuant to ComReg D03/20 *“it is may be possible for an operator to competitively bid for an overall tender [in this case, pricing consistent with the principles of competition law] by meeting the cost orientation of those products provided in the [Regional Market], while optimising prices for the products in the [Urban Market]. This is likely to undermine the effectiveness of such a [margin squeeze] test. As such, ComReg’s decision is that a Margin Squeeze Test is not appropriate”*.
237. Finally, in the context of pricing a legacy network with a disperse geographic (largely rural) Regional Market, coupled with the challenges of any remaining and declining demand year-on-year, to ensure that migration incentives are not jeopardised requires sound modelling assumptions and economic/regulatory policy. The risk of unnecessary, disproportionate and

over-enforcement by ComReg in this small market increases the risk of regulatory failure and could significantly undermine the Irish Government's state aid intervention and commercial roll-out incentives and delay and/or derail Ireland's transition to a full digital economy through FTTH.

Statement of Compliance

238. As a preliminary point, eir notes that while ComReg refers to Regulations 9-13 of the Access Regulations as the legal basis for requiring the provision of Statements of Compliance (SoC), none of these Regulations actually prescribe the provision of such a Statement, in particular with the level of granularity set out in the draft Decision Instrument. It is not clear therefore whether ComReg has any legal basis for the imposition of this requirement. eir requests that ComReg identify the provision that specifically entitles it to impose this obligation.
239. As set out in paragraph 10.314, ComReg intends to require eir to submit a new Statement of Compliance within six months of the Effective Date of its final decision. It justifies this requirement by stating that the information is required to ensure effective monitoring and enforcement of all regulatory obligations. However ComReg is aware that in May 2020 eir provided it with a comprehensive report on compliance with its obligations in relation to Confidential Regulated Information in all markets, including the FACO market. Further, it will be receiving a report detailing its compliance with all of its regulatory obligations in all markets, including FACO, at the end of September. It is therefore not correct to state that ComReg needs eir to submit a new Statement of Compliance detailing compliance in the Regional FACO market in order to effectively monitor compliance in that market. In light of the very detailed and up to date compliance information eir has already committed to providing in September 2020, imposing such a requirement is neither proportionate nor justified.
240. While ComReg states in paragraph 1.63 that its proposed remedies are *'largely a continuation of existing obligations, save for bringing some obligations up to modern regulatory standards'* this is not the case in respect of the proposed Statement of Compliance obligations. Rather, ComReg is proposing to significantly increase both the amount of information required, and the frequency with which the statements must be provided, as compared to other, existing Decisions such as D10/18 and D03/20. In effect, ComReg is adding significantly to the regulatory burden imposed in respect of the proposed market without giving any consideration to the declining size of this market or the operational or cost impacts of this. There is simply no rational justification for seeking to impose the form of increased reporting obligations proposed by ComReg in the proposed Regional FACO market. Indeed in the context of a narrowly defined geographic market that is expected to reduce further in size during the period of this review ComReg should be looking to reduce the regulatory burden rather than significantly increasing it. As previously noted, such an approach lacks all proportionality.
241. In particular ComReg states *'the SoC obligation requires Eircom to explain the regulatory governance measures and arrangements that it has put in place in order to identify and manage risks of non-compliance with its SMP obligations, thereby providing reasonable*

assurances to ComReg that Eircom effectively manages risks of non-compliance with its SMP obligations.' However this statement takes no account of the very detailed information ComReg already receives relating to eir's '*regulatory governance measures and arrangements*' on foot of the Settlement Agreement entered into between ComReg and eir in 2018. In imposing remedies, in order to act proportionately and fairly ComReg is required to take into account eir's existing reporting obligations and structures under the Settlement Agreement, and it should not duplicate existing reporting requirements. In particular, as ComReg is aware, eir operates a Regulatory Governance Model ('RGM') which it has enhanced on foot of the Settlement Agreement. Part of the RGM includes carrying out business unit process compliance reviews (BUPCR) for the purpose of identifying regulatory risks and designing controls to mitigate these risks. eir has documented its methodology for carrying out these BUPCRs. eir also has implemented a Three lines of Defence model which has a separation of governance, operational and assurance roles to ensure operation of the Regulatory model including the risks and controls identified from internal reviews and published in statements of compliance. As noted above, eir is already providing very detailed reports on its compliance with its regulatory obligations across all markets, including FACO, under the Settlement Agreement, by carrying out BUPCRs under the enhanced RGM.

242. ComReg has also failed to take into account the very detailed reporting on regulatory compliance that eir is already providing to the Independent Oversight Board ('IOB') established on foot of the Settlement Agreement. As ComReg is aware, the role of the IOB role is "*to provide assurance to eir and ComReg that there is in place a clear and unambiguous set of measure, arrangements, structures and internal controls that will ensure compliance with the eir's Regulatory obligations*" (Annex 3 to Settlement Agreement date 10/12/2018 IOB charter).
243. In stating that ComReg requires more detailed Statements of Compliance in order for eir to '*explain the regulatory governance measures and arrangements it has put in place*' ComReg is completely disregarding the role it has agreed for the IOB. The IOB "*is responsible for the oversight of the Group's Regulatory Governance Model*". ComReg appears to be increasing the requirements on eir absent reasonable consideration of the existence of the IOB, and of the very detailed range of reports eir is required to provide to it, and which ComReg also has access to.
244. With regard to the specific additional information requirements proposed in the draft Decision Instrument, eir notes that ComReg is seeking that eir is "*required to outline the consideration given to the potential regulatory issues identified during the analysis and the reasons why it concluded that issues identified do or do not give rise to regulatory risk.*"(Para. 10.326) One of the reasons why ComReg is requiring eir to provide this level of

information is “to increase [ComReg’s] confidence in the scope and comprehensiveness of Eircom’s regulatory governance and oversight in the Regional FACO Markets.” (Para. 10.327)

245. eir is of the view that this requirement is excessive. eir believes the requirement to provide its analysis should not be mandated. The adequacy of how eir carries out its risk assessments and control design is a matter for eir and not for ComReg to decide upon. eir is agreeable to providing ComReg with the list of new risks or controls identified, but not the analysis of how it arrived at its decision. It is the responsibility of the Director of Eircom Ltd to be satisfied that the governance arrangements including risk analysis and control development within eir is appropriate. Further ComReg has provided no justification (such as for example, greater concerns about non-compliance) as to why it is imposing these significantly more onerous requirements specifically in respect of the Regional FACO market.
246. It must be noted that the FACO market has greatly reduced in number of premises that are included in it. Removal of the Urban market reduces the regulated space by 74% (1,652,480 premises) leaving the regional FACO market (586,907 premises) which is also in decline due to changing consumer demand away from a fixed voice service and migration to new technologies for those who continue to desire a fixed voice service. As NBI rolls out its fibre infrastructure (even in the first two years) it is expected that the number of FACO paths in these regions will fall dramatically. For a regulator to be significantly increasing the level of regulatory burden in these circumstances without providing any objective justification is disproportionate. Indeed it would seem more reasonable for ComReg to consider removing the SOC requirement in this narrow market rather than increasing it. This would be consistent with ComReg’s proposals on other matters such as relaxing the obligation on open eir to accept all RAP development requests in the Regional markets (Section 9.1 of the draft Decision).
247. eir also questions the reasonableness and practical application of ComReg’s proposed requirement that “(ii) Where a material change or material changes are made to the description of the regulatory risks and the description of the controls required to address the regulatory risks referred to respectively in Section 15.1(iv) and Section 15.1(v) above, to include any material change to the documentation and information relied on for the purpose of the Statement of Compliance, within one (1) month of such change or changes being made;” Changes to controls are made on a regular basis. This might be due to Control Owner updating their processes, Regulatory Risk Group identifying control improvement observations, IA (Internal Audit) identifying control improvement observations or following the outcome of BUPCRs etc. Were ComReg to implement its proposals as drafted, notifications along with the associated documents and version controls are likely to be required to be sent to ComReg a number of times each month. There is simply no parallel, as claimed by ComReg, with an annual reporting requirement under companies legislation.

248. As ComReg will be aware, eir has for some time been flagging the practical implementation issues associated with the existing statement of compliance obligations under previous Decisions. In particular eir has highlighted the practical difficulty of complying with the requirement to provide an updated statement of compliance with every notification since the publication of D10/18. Rather than engaging with eir on this issue, ComReg added further detail to the statement of compliance obligation without any clarification in D03/20. The present draft decision further compounds the issue.
249. While eir accepts that *“a product notification (including amendment) could only be considered to be complete if it includes the updated SoC”*, this requirement should take account of the fact that each notification should only be accompanied with a signed SoC, not necessarily along with the associated documents or Annexes to the SoC, which have not changed since they were initially published. eir would like to discuss how best to operationalise the process of submitting SoCs to ComReg and to fully understand what is the minimum, proportionate amount of information that is required in order to satisfy these new requirements.
250. In eir’s view it would be more practical to require eir to provide an updated RACM on a six monthly basis to incorporate any such changes. If there are new risks or controls following BUPCRs for new products or amendments to existing products then these can be provided separate to the complete RACM. This way eir can better manage the production and updating the RACM along with its version control and version history.
251. It must be noted that eir has been managing regulatory risks for a number of years now. The processes implemented are continuously being enhanced as it evolves. Through the careful application of the RGM, eir’s on-going compliance in the FACO (and the regulated markets more broadly) is further safeguarded. eir is of the view that existing processes in place within eir are fit for purpose and ComReg’s proposal to impose a more onerous SoC obligation is unwarranted and disproportionate.

Question 11: Do you agree with ComReg’s preliminary conclusions on the withdrawal of SMP remedies on the Urban FACO Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

252. eir does not agree with ComReg’s preliminary conclusions on the withdrawal of SMP remedies on the Urban FACO Markets. In particular, eir strongly objects to the relevant sunset periods that ComReg has proposed for the withdrawal of existing regulation in the Urban FACO markets. ComReg has determined that *“an 18-month sunset period would apply, by means of which Eircom would be effectively required to maintain existing supply of access to FACO products, services and facilities (for example, SB-WLR orders already supplied to Access Seekers) at no more than existing prices. With respect to new supply of FACO products, services and facilities (for example, SB-WLR orders received) a separate 9-month sunset period is proposed (which will run in parallel with the 18-month sunset period described above).”*
253. ComReg has separately proposed that any deregulation resulting from its Mid-term assessment of the Regional FACO markets, due to be carried out 24 months after the Final Decision comes into effect (not accounting for the time period after ComReg’s Mid-term assessment and decision date), will be subject to a shorter sunset period. It is proposed that eir would be required not to withdraw access to any existing FNA FACO products, services, or facilities on further deregulated EAs for a period of 9 months from the effective Decision date and that during the first three 3 months of this sunset period, eir would be required to provide access to new orders for the relevant products, services and facilities.
254. eir considers that the proposed sunset periods are unnecessary, unreasonable, disproportionate and contrary to the interests of consumers. ComReg’s proposal is flawed for the following reasons;
- a. the market review delay means that it is entirely inappropriate on the part of ComReg to further extend the period for deregulation with respect to effectively competitive Urban FACO markets or indeed any EAs identified as competitive in the subsequent Mid-term Assessment;
 - b. this Consultation, for which a final Decision is anticipated in 10-12 months, effectively serves as appropriate notice for the withdrawal of regulation;
 - c. the proposed transitional periods are not in line with EU regulatory precedent;
 - d. ComReg has not provided sufficient justification as to why the chosen length can be considered appropriate under Article 16(3) of the Framework Directive or how an eventual faster lifting of SMP obligations could cause harm to consumers in a market that is considered effectively competitive;

- e. the precise nature of the initial 9 month sunset period, running in parallel to the 18 month sunset period is unclear but based on our understanding of the obligation the imposition of a parallel 9 month sunset period for new orders is illogical. The same issues apply in respect of the 3 month sunset period applicable to any withdrawal of remedies resulting from the Mid-term Assessment; and
- f. the voluntary commitments proposed by eir negate the need for any transitional periods with regard to the Mid-term Assessments¹⁷.

Market review delays

255. eir considers that the proposed sunset periods are incredibly excessive and that sufficient justification has not been provided by ComReg as to why sunset periods of these lengths are appropriate, proportionate or justified.
256. The extant FACO Market Review Decision (D05/15) was adopted on 24 July 2015, five years ago. Pursuant to Article 16(6)(a) of the Framework Directive, National Regulatory Authorities (NRAs) are required to *“carry out an analysis of the relevant market and notify the corresponding draft measure...within three years from the adoption of a previous measure relating to that market”*. On 25 April, **3 months** before the 24 July 2018 deadline for the notification of the new draft measures, ComReg notified the Commission of a proposed 2 year extension to the 3 year market review period. ComReg stated at that time that *“it will likely be July 2020 before ComReg will be in a position to have completed an updated market analysis”*.
257. In seeking the two year extension, ComReg stated that there were “exceptional” circumstances in this case, including the on-going reviews of all five of the 2014 Recommended markets, the EC’s infringement proceedings with respect to three of these five markets, the review of the Fixed Voice Call Termination (FVCT) and Mobile Voice Call Termination (MVCT) markets and the potential for further infringement proceedings in this regard, potential legal challenges to the related decisions on these markets, the level of complexity involved in the market analysis process, the historic inadequacy of resources allocated to market analysis activities and the diversion of resources to support the Department of Communications, Climate Action and Energy (DCCA) with respect to the National Broadband Plan (NBP).
258. eir notes that these “exceptional” issues have subsequently been resolved in some form or other, in particular with the completion of the on-going reviews of all of the 2014 Recommended markets, the closing of the EC’s infringement proceedings, the hiring of additional staff by ComReg and the awarding of the NBP contract to the final bidder. When

¹⁷ eir is strongly of the view that the proposed assessment should be conducted annually as it is a straightforward mechanical exercise.

ComReg published its original Annual Action Plan for the year to 30 June 2020, it indicated that it would consult on its review of the RFVA and FACO markets in Q1 2020, which could have allowed for a Final Decision to be published this year. However, it was only at the very end of Q2 2020 that ComReg eventually launched its public consultation and according to ComReg's latest Annual Action plan, it will now be Q2 2021 before we can expect the review process to be completed.

259. eir considers that this delay was an entirely foreseeable outcome and in fact wrote to ComReg in March 2019, to highlight concerns with regard to on-going serious delays in ComReg's market review programme and that such delays were having a significant effect on eir's ability to compete effectively. At that time, eir highlighted that it had yet to receive any FACO specific data collection requests from ComReg and was still awaiting the initial call for inputs in relation to the RFVA and FACO market reviews. eir also noted that ComReg's action plan did not make any reference to the FACO workstream and that ComReg's Draft ECS Strategy Statement 2019-2021 (ComReg 19/09) merely alluded to ComReg's intention to commence and advance a number of market reviews, including that of the FACO market. We can only conclude that ComReg was, at that point, yet to begin its review of the relevant markets, although nearly 12 months had passed since its extension request was submitted to the Commission. This would appear very much contrary to ComReg's submission in that request that it would "*endeavour to proceed with the market analysis in respect of the FACO Markets without undue delay.*"
260. If ComReg had conducted the review in a timely manner, deregulation would have already occurred, and this delay on the part of ComReg has resulted in eir continuing to suffer unwarranted regulatory restraints in a competitive market. Any imposition by ComReg of a sunset period would serve simply to exacerbate this situation and lead to further distortion of an effectively competitive market. It would be entirely inappropriate on the part of ComReg to further extend the delays in deregulation through the imposition of lengthy sunset periods and thus allow other market players to enjoy a continued regulatory advantage at eir's expense.

Sufficient notice of deregulation

261. ComReg states that the sunset period "*is designed to afford Access Seekers a reasonable and sufficient period of time to migrate away from the purchase of FACO from Eircom, to the purchase of other wholesale inputs capable of delivering FACO or RFTS (including self-supply), should they so wish.*" eir believes that Access Seekers have been granted more than a sufficient period of time to migrate away from the purchase of FACO, should they so wish and does not agree that it is appropriate to maintain any obligations in the Urban FACO markets beyond the effective Decision date. Access seekers are well aware of the changes in the market place over the last number of years, in particular the substantial increase in the

footprint of NG broadband, the increases in Managed VoIP subscriptions and the move towards full IP-based infrastructure. The market is well prepared for this move and eir would expect that Access Seekers have anticipated deregulation to occur since 2018, when the review was originally due to be completed. Furthermore ComReg's position appears to presume that open eir would behave unreasonably and therefore Access Seekers would need to flee to alternatives. As we have explained elsewhere in this response such a strategy could not be sustained. eir has every incentive not to push its wholesale customers away.

262. Moreover, Article 16(3) of the Framework Directive states that;

*Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An **appropriate** period of notice shall be given to parties affected by such a withdrawal of obligations [emphasis added].*

263. eir does not consider that the sunset periods proposed are "appropriate". In any event this Consultation, for which a final Decision is anticipated in 10-12 months' time, has effectively served notice of the withdrawal of regulation from the relevant markets and as such additional time beyond the effective date of the Decision is not justified. eir's competitors have benefited from the over-regulation of eir in recent years and it would be inappropriate and punitive on eir to perpetuate an uneven playing field.

264. We urge ComReg to reconsider the transition periods as proposed. Given ComReg's intention to publish its Final Decision in Q2 2021, subject to there being no further delays, this would effectively result in the competitive urban markets being subject to ex-ante regulation until January and October 2022, circa **4 years** after the review should initially have been finalised.

EU regulatory precedent

265. eir's research into this issue at the EU level, suggests that the length of the sunset periods proposed by ComReg is not in line with regulatory precedent. We understand that of the 19 other EU member states that have already deregulated the FACO market, only one other regulator (ANACOM) has proposed an 18 month sunset period, while UKE is the only regulator that has proposed a longer period at 24 months, which it was able to justify only on the basis that the 2 year period corresponded to the maximum duration of contracts concluded by access seekers with their retail customers. Instances of 12 month sunset

periods are also rare. The Commission has regularly commented on the longer sunset periods proposed for FACO deregulation.

266. In the case of the 18 month transitional period for existing access agreements proposed by ANACOM (Case PT/2018/2104), the NRA argued that an immediate withdrawal could, inter alia, (i) cause a disruption of supply under medium-term contractual commitments of access seekers with non-residential and public authorities and, (ii) cause possible dissatisfaction among end-users. ANACOM further noted that such a transitory period was necessary to implement alternative solutions and ensure a sustainable transition. The Commission in its comments recalled that, pursuant to Article 16(3), any period of notice given to the parties affected by such a withdrawal of regulatory obligations in place must be **appropriate**. The Commission also noted that *“ANACOM only provided very general reasons to justify the proposed duration of the transitional period”* and that *“the notification does not contain more specific elements showing how an eventual faster lifting of SMP obligations on MEO could cause harm to consumers in a market that is considered effectively competitive.”* On this basis the Commission called on ANACOM to *“reconsider the length of the transitional period and to provide further and more specific justifications in its final measure as to why the chosen length can be considered appropriate under Article 16(3) of the Framework Directive.”*
267. This sentiment was echoed in the Commissions comments with regard to Case LV/2016/1872. In its notified measures, SPRK proposed a transitional period of 12 months following the publication of the Final Decision. It justified this period on the basis that it would enable operators to adapt to the new circumstances and that the call origination service provided by the incumbent, although offered at a small scale, was very difficult to replace and the few remaining operators that still used the service needed time to either reorganise their business model to continue offering voice call services or to inform their remaining customers about the discontinuation of certain voice telecommunication services. Again the Commission recalled Article 16(3) of the Framework Directive and noted that the NRA did not provide *“any specific information as to how an eventual faster lifting of SMP obligations on Lattelecom could cause harm to consumers”* or *“any reasoning as to why companies which rely on Lattelecom's origination service need ongoing SMP regulation for an additional twelve months in a market declared to be effectively competitive.”* The Commission therefore invited SPRK to provide further reasoning and to reconsider the length of the transitional period.
268. In Case BG/2016/1863, the Commission even went so far as to note the possibility of potential infringement proceedings, reserving its right *“to consider further action under Article 258 TFEU”* in the case that CRC extended the transitional period unduly. CRC had proposed to withdraw all regulatory obligations imposed on the former SMP operator as of the day of adoption of an upcoming decision on the related fixed retail markets. While the

Commission acknowledged the need to provide for an **appropriate** period of notice to parties affected by the withdrawal of remedies, it urged CRC to *“effectively deregulate the market without unnecessary delay.”*

Insufficient justification of the proposed measures

269. While ComReg appears to consider that the act of removing obligations in the Urban FACO markets, in and of itself, justifies that a sunset period is appropriate, eir is of the view that this does not provide sufficient justification for the proposal nor does it negate the need for ComReg to justify that the length of the sunset period is also appropriate. As previously discussed, the appropriateness of the length of the transitional period has been raised on numerous occasions by the Commission. eir considers that this is a clear instance where the proposed measures simply rely on general rather than specific reasons to justify the proposed duration and where the NRA has failed to demonstrate how an eventual faster lifting of SMP obligations could cause harm to consumers in a market that has been deemed effectively competitive.
270. ComReg has simply stated in the Consultation that it is of the view that these sunset periods will enable an *“orderly transition to deregulation”* by allowing Access Seekers sufficient time in which to make any necessary preparations for the new market environment, arising from deregulation, thereby preserving continuity in the supply of both wholesale and retail services, were eir to withdraw SB-WLR, or significantly alter its SB-WLR terms and conditions, following deregulation. Although ComReg does go on to note that it *“would not expect Eircom to significantly alter its terms and conditions given the presence of competition.”*
271. Upon seeking further clarity from ComReg with regard to the proposed duration, this justification was repeated in that the sunset periods are essentially designed to provide time for migration to VoIP. specifically noting that;
- The initial 9 month sunset period *“seeks to ensure that an Access Seeker has sufficient time to (further) develop or procure a Voice over Internet Protocol (‘VoIP’) platform and associated operational/support systems in order to enable the provision of Managed VoIP to Retail Fixed Telephony Service (‘RFTS’) end users”* and also allow sufficient time to for an Access Seeker to *“initiate a communication programme with its end users regarding the replacement of its existing SB-WLR based RFTS service by Managed VoIP delivered via Next Generation (‘NG’) broadband access.”*
 - The subsequent 9 month period *“seeks to ensure that Access Seekers have sufficient time to migrate their end users from POTS-based NG broadband to standalone NG broadband with Managed VoIP”* and was *“determined having regard to the volume of FACO lines in the Urban FACO Markets and Eircom’s published product migration*

processes, which have a maximum throughput of 1,000 migrations per operator per day.”

272. eir considers that the further clarification provided by ComReg has also failed to provide any specific information as to how an eventual faster lifting of SMP obligations could cause harm to consumers or any reasoning as to why access seekers that currently purchase eir’s wholesale FACO products need on-going SMP regulation for an additional 18 months in a market that ComReg has declared to be effectively competitive.
273. On the initial 9 month sunset period, eir notes that ComReg has identified that all bar one of SPs listed in Table 44 of the Consultation, already offer VoIP to their retail customers and as such would not require time to either develop or procure a VoIP platform and associated operational/support systems. Furthermore, BT’s submission referenced in paragraph 5.92 leads ComReg to conclude that *“the option of acquiring a VoIP platform from a third party may be more appropriate for small new entrants, who do not need to migrate across existing customer bases, whereas Access Seekers with existing customer bases may find it more beneficial to develop a bespoke VoIP platform in-house”*. Therefore, the initial 9 month sunset period serves no basis and is excessive and disproportionate. ComReg is over-extending its regulatory powers into a competitive market and allowing inefficient operators a regulatory buffer to enter a market which is not regulated and which ComReg quite clearly signalled in its 2015 FACO Decision that it expected operators to likely invest in.
274. Similarly, it does not make sense to fulfil new orders during the sunset period if that access will be subject to competitive conditions following deregulation shortly afterwards and if the ultimate aim is migration and to move towards an all-IP network.
275. On the issue of the subsequent 9 month period envisaged for migration, eir notes that such a period would only be necessary in the case where it could be legitimately expected that all of the remaining 360,899 FACO SB-WLR/WLV lines in the Urban FACO market would be migrated over the shorter term. ComReg has found the Urban FACO market to be effectively competitive and effective competition ensures that no market player, including eir, can exercise a position of market power. eir and its customers would therefore commercially negotiate continued access. This is in fact a point recognised by ComReg when it states that it *“would not expect Eircom to significantly alter its terms and conditions given the presence of competition”* and that the *“dynamics also facilitate a reduction in Eircom’s regulatory burden and, given the current market dynamics, can operate effectively absent regulation.”*
276. In any event, while increased migration in this market following deregulation is likely, this is indicative of the declining nature of the market and the move towards all-IP, which is of course desirable from an efficiency and investment perspective. Given that PSTN switch-off will become more relevant over the medium term, bulk migrations would of course need to

be programme managed to ensure that they happen in the most efficient manner possible. Importantly, the limit of 1,000 migrations per day, used by ComReg in determining the appropriate sunset period, is an IT systems limitation only and does not reflect the programme managed migration that is possible at an operator's request. eir notes that the maximum rate that would be achievable in this regard would be dependent on the level of organisation and planning the migrating Operator could in turn commit to. This will also be exacerbated by the initial 9 month period, where eir understands it is required to provide access with respect to new SB-WLR orders. This is discussed further below.

Sunset period for 'new orders'

277. ComReg has stated in the Consultation that the proposed 18-month sunset period will apply with respect only to the Access Obligations imposed on eir, pursuant to the 2015 FACO Decision, requiring that eir will not withdraw access to any products, services, facilities or Associated Facilities in the Relevant Urban FACO Markets to which access was previously granted. ComReg then states at paragraph 12.60 that a 9-month sunset period is proposed for *"the removal of all other existing regulatory obligations imposed on Eircom in the Urban FACO Markets, again, pursuant to the 2015 FACO Decision."* ComReg further states at paragraph 12.61 that *"from the effective date of the Response to Consultation and final Decision arising from this Consultation, Eircom will no longer be obliged by means of regulation to meet new requests for access in the Urban FACO Markets (although is free to do so commercially)."*
278. The text of the Decision instrument itself states that *"[t]he obligations imposed by Section 7 of the Decision Instrument contained in Appendix H to ComReg Decision D05/15 shall apply to, and continue in force for a period of nine (9) months from the Effective Date of this Decision Instrument in respect of requests for the provision of Access to any existing products, services, facilities or Associated Facilities in respect of FNA FACO in the Relevant Urban FACO Markets including Associated Facilities."*
279. eir understands this to mean that it will in fact be obliged to meet new requests for access in the Urban FACO markets for a period of 9 months although this is contrary to ComReg's proposal at paragraph 12.61. Having sought further clarity, ComReg confirmed that it *"proposes to require Eircom to provide access with respect to new SB-WLR orders in this 9 month period, given that an Access Seeker may require continuity in the supply of SB-WLR while it develops or procures a VoIP platform (along with, for example, all ancillary systems integration for in-life management of the Managed VoIP product(s))."* As stated in paragraphs 273 to 274, eir considers that the rationale of the initial 9 month sunset period to allow the development or procurement of a VoIP platform is unnecessary, disproportionate and over-enforcement in its entirety — as ComReg has already identified that operators already have an ability to provide Managed VoIP. In circumstances of any

small outliers where an operator currently does not have a VoIP platform ComReg cannot by law provide a regulatory buffer through the back-door for such operators into a competitive market.

280. Furthermore, eir considers that such an approach is illogical and that there is little rationale for the proposal given that Access Seekers may ultimately choose to migrate customers following full deregulation after the latter 9 months of the sunset period. Indeed ComReg appears to recognise this itself when it submits that its initial proposal at paragraph 12.61, that eir would no longer be obliged by means of regulation to meet new requests for access in the Urban FACO Markets, is *“appropriate, given that it would be illogical to maintain this requirement for a short period which, having expired, would then be subject to commercial negotiation”* and that *“regulatory certainty would be better preserved for all parties by not requiring access pursuant to regulation during the sunset period.”*
281. eir is unsure as to why ComReg appears to have changed its mind between drafting its proposals and subsequently drafting these in legal terms but we consider that the initial approach is undoubtedly correct, particularly in the context of a legacy network product.
282. Taking all of the above into account there is no justification for a 9 month sunset period on the basis of Access Seekers needing to prepare VOB capabilities. Nor is there justification for a further 9 month sunset period during which all SB-WLR could be migrated to VOB. This is because all the major players already have VOB capability and could start migrating today. We appreciate that some operators may require a short time to adjust to working in a competitive environment but we do believe that a period any longer than 3 months can be justified — as the anticipated 10-12 months before ComReg reaches a decision effectively serves as appropriate notice for the withdrawal of regulation.
283. With regard to EAs being de-regulated following interim assessments, the sunset period should be no longer than 3 months. This is because a ‘concerned’ operator could be migrating customers as NGA is rolled out in the area in advance of the periodic assessment. Furthermore the number of lines in scope will be significantly lower and could be processed quickly irrespective of one’s view of the system limitation on daily operators.

Voluntary commitments

284. Finally, eir notes that it has already put forward a number of voluntary commitments with respect to the FACO markets, as follows;
- eir proposed that it would commit to a Pricing, Access, Transparency and Non-Discrimination for WLR as well as current market rates for ISDN BRA, ISDN FRA, ISDN PRA and Current Generation FVCO.

285. ComReg concludes (without further cogent assessment of the merits of the voluntary commitments), that there is currently no basis in legislation to accept voluntary commitments from Authorised Undertakings and that the commitments offered “*would have been insufficient to address all of the competition problems identified.*” While eir does not agree with ComReg’s position in this regard, it remains unclear to us why ComReg has not at least considered the commitments in light of the proposed transitional period for deregulation.
286. eir acknowledges that there can be a number of potential concerns in relation to the transition from ex ante to ex post regulation regulatory regime, namely;
- short term concerns from alternative operators that the removal of regulatory obligations on the (former) SMP undertaking will introduce some level of uncertainty; and
 - concerns that competitive conditions may be more uncertain for some customer groups than for others in the short term i.e., captive consumers
287. Where these concerns can be adequately justified, it may be appropriate for an NRA to consider any voluntary commitments made by the former SMP undertaking, where it has been found that a previously regulated market has become effectively competitive. eir notes that Ofcom, for example, has taken voluntary commitments into account in both the 2008 Review of the WHQA market and the 2017 review of the narrowband market. In the former case Ofcom determined that no operator had SMP for two relevant wholesale markets in a particular geographic area and remedies applying in these markets were to be immediately removed. In the latter case, Ofcom decided not to introduce a new cap on retail prices for customers who use landline-only telephone services, as proposed in its original consultation. This was on the basis of a commitment from BT that it would cut line rental prices for voice-only consumers and to introduce some consumer engagement measures.
288. More recently, in its consultation on its review of Wholesale fixed telecoms market review, which was published earlier this year, Ofcom noted that while the Wholesale Fixed Analogue Exchange Line (WFAEL) market was no longer suitable for ex ante regulation, it was conscious that there would remain a substantial number of WLR customers through the early years of the market review period. It therefore considered whether transitional regulation was required to support those customers but ultimately proposed that on the basis of voluntary commitments made by Openreach, it was not necessary to impose a sunset period.

289. eir considers that the voluntary commitments proposed by eir also negate the need for any transitional periods with regard to the Mid-term Assessment.

Question 12: Do you agree with ComReg’s preliminary conclusions on the Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

290. The Regulatory Impact Assessment (RIA) contained in Section 12 of the Draft Decision document 20/46 is not fit for purpose and is deficient in a number of important areas.
291. The ultimate aim of a RIA is to ensure that all measures being proposed by ComReg are appropriate, proportionate and justified. As such they should include a detailed and accurate examination of costs, benefits and impacts on stakeholders as well as consideration of the use of alternatives to regulation. RIAs should seek to identify any negative impacts of regulation and therefore seek to minimise unintended consequences, such as promotion of the continuing use of legacy technologies at the expense of the uptake of Next Generation Services. Real market impacts should therefore be assessed.
292. eir has provided comments on steps 1, 3 and 5 identified by ComReg as being necessary for assessing the various regulatory options it has considered. Each is discussed in turn below.

Step 1: Describe the policy issue and identify the objectives

293. ComReg states at paragraph 12.15, in setting out its analysis of the Relevant FACO Markets and the Relevant RFTS Markets, *“its policy objectives are to identify whether or not any SP operating on each of those Relevant Markets has SMP, whether competition concerns arise and, if so, how best to address these.”*
294. It appears that ComReg is in fact pursuing a policy objective of defining an ever smaller subset of the market in order to warrant continued regulation. This is particularly stark given that this market has been deemed by the European Commission as no longer susceptible to ex ante regulation 6 years ago.
295. The analysis in this Consultation therefore seems to stem from a desire to prove a specific predetermined outcome i.e., that regulation is still warranted to some extent in the market rather than assessing the existing evidence on its own merits to determine the actual realities of competition. This is evident by ComReg’s unwillingness to take into account NBI’s detailed roll-out plans and its dismissive approach towards mobile and FWA and Imagine’s on-going investment. In 2019 eir also made the European Commission aware of its concerns that ComReg’s work programme was indicative of a continued presumption of regulation being warranted in the market.
296. eir considers that ComReg’s impact assessment already fails at this first stage in that it has;

- a. incorrectly defined the relevant FACO and RFTS and FACO markets, thus incorrectly determining the parameters within which competition is assessed;
- b. incorrectly concluded that the 3CT passes for the Regional FACO market; and
- c. incorrectly assessed the ability and incentives of eir to engage in anti-competitive behaviour.

The relevant RFTS and FACO markets

297. ComReg’s conclusion that mobile telephony does not pose an effective demand-side constraint on the focal product, FNA based RFTS, is flawed. ComReg has failed to provide sufficient evidence to this effect and has incorrectly interpreted a number of issues. This is discussed in eir’s response to Questions 1, 2 and 4 but in particular, eir considers that;
- i. ComReg’s decision to combine RFVA and RFVC as a single product i.e., standalone FNA RFTS provided over eir’s PSTN network and assess this as the appropriate focal product has led to some confusion as to the extent of competitive pressure on the individual elements;
 - ii. ComReg’s conclusion that mobile telephony does not pose an effective demand-side constraint on the focal product, FNA based RFTS is flawed given, the limitations of the SSNIP test in the context of a declining market, the misinterpretation of the retention of RFTS subscriptions as indicative of levels of substitutability and the failure to adequately justify that the characteristics of MTS are proof of complementarity rather than substitutability;
 - iii. ComReg’s initial erroneous conclusion with respect to FMS at the retail level, stemming from its decision to assess fixed access and fixed calls as one focal product, an incorrect focus on subscriptions rather than usage and a microanalysis of a decreasing subset of RFTS purchasers, has led to continued errors in its assessment of the Relevant FACO markets. In particular, this has led to incorrect conclusions with regard to direct and indirect constraints posed by mobile at the wholesale level; and
 - iv. the geographic scope of the competitive FACO market is in fact national and ComReg’s analysis leading to a conclusion that there is an “uncompetitive” sub-national Regional Market is flawed. In particular, the analysis fails to be adequately forward looking, the exclusion of Virgin Media’s network from the assessment of availability of NG Broadband services is not reflective of existing competitive conditions, there are potential discrepancies with regard to overlapping coverage and the coverage threshold is overly conservative.

Competitive conditions in the Regional FACO Market

298. ComReg has formed the view, on a preliminary basis, that in respect of the candidate Regional FACO Markets, all three of the 3CT criteria are passed and that there is insufficient evidence to conclude that the Regional FACO Markets are characterised by sufficient levels

of competition to immediately withdraw ex ante regulation. However, eir considers that ComReg's assessment is flawed. This is discussed in eir's response to Question 7 but in particular;

- i. ComReg's incorrect conclusion that FVCO and FA constitute one market (FACO) has led to potential remaining barriers to entry in a declining subset of the FACO market — fixed access for 25% of premises in the state — being extrapolated to the FVCO market, which leads to the false impression that competition bottlenecks remain; and
- ii. ComReg has failed to consider pertinent developments over the review period, which leads it to the conclusion that the Regional FACO market does not tend towards effective competition within the relevant time horizon.

299. Absent an appropriate assessment of the competitive conditions in the FACO market, it is simply impossible for ComReg to demonstrate that continuing regulation of a declining market is a proportionate intervention in the specific circumstances of the market.

Ability and incentive of eir to engage in anti-competitive behaviour

300. ComReg's concerns are theoretical in nature and rely on a number of conditions to hold in order for such outcomes to potentially manifest. ComReg has not adequately considered whether eir actually has sufficient market power at the wholesale level to follow such a strategy, and has failed to adequately consider the dynamics at the retail level to make such a strategy a commercial success.

301. In order for a foreclosure strategy to be "commercial" the wholesale firm imposing the refusal to supply must somehow be able to recoup their profit sacrifice at the retail level. This profit sacrifice must include the wholesale revenue foregone (i.e., the revenues lost as a result of operators leaving the market due to the margin squeeze) through the recoupment of downstream margins.

302. The Regional Market is in effect a residual part of a national market in which FACO services are offered. In the absence of regulation, the prices of the services at both retail and wholesale levels would be driven by Urban Market conditions. In addition and given the finding of full dependencies in prices and the relative size of the Regional Market as defined by ComReg, the Regional Market is no longer an economic market of sufficient size that is considered separately by market players, and consequently it should not be considered separately by ComReg. It is simply not large enough to justify micro-analysis and undue regulation.

Step 3: Likely impact on stakeholders

Option 1: Impose Transparency, Non-Discrimination, and Statement of Compliance obligations

303. ComReg considers that under Option 1, there is a risk of exploitative and exclusionary practices such as excessive pricing for SB-WLR, effective denial of access, which could contribute to raising entry barriers for newer or smaller RFTS participants and a reduction in regulatory certainty.
304. eir does not consider that there is a risk of such behaviour in the Regional FACO Market. This is discussed further in our response to Questions 7 and 9 but also paragraphs 300 to 302.
305. In addition, ComReg considers that *“[w]ith the introduction of an SoC obligation, there would be a greater onus on Eircom to demonstrate compliance with the obligations imposed under the proposed Decision.”*
306. However, ComReg does not attempt to weigh the benefits of the introduction of this obligation against the costs to eir of complying. eir notes the significant change in the SOC obligations in this draft decision compared to D10/18 and D03/20, which adds a significant burden without due consideration to the declining size of this market or the operational impact. The proposed obligations also fail to reflect the enhancements that have already been made to the design and operation of eir’s Regulatory Governance Model (RGM).

Option 2: Impose Transparency, Non-Discrimination, Statement of Compliance, and Access obligations

307. ComReg considers that under Option 2, effective FACO may still be undermined through high or inefficient FACO pricing and there remains a risk of exploitative or exclusionary terms, raising barriers to entry and expansion.
308. Again eir does not consider that there is a risk of such behaviour in the Regional FACO Market. This is discussed further in our response to Questions 7 and 9 but also paragraphs 300 to 302.

Option 3: Impose Transparency, Non-Discrimination, Statement of Compliance, Access and Price Control & Cost Accounting obligations; or

309. ComReg considers that under Option 3, regulating FACO prices will reduce the risk of competitive distortions or restrictions (including foreclosure) in downstream RFTS or adjacent markets, and potentially lowering barriers to entry / expansion for smaller SPs and existing participants.

310. As previously discussed, eir considers that the risk of competitive distortions or restrictions (including foreclosure) have been overstated by ComReg on the basis of theoretical possibilities, which are not reflective of market conditions.
311. The market is not characterised by high barriers to entry. In addition, when considering the prospective roll-out of NBI within the market review period, the market will become even more competitive. NBI has reached an agreement to roll-out FTTH in the IA, which largely overlaps the Regional FACO market. Moreover, eir notes that it was the sole merchant market provider of FACO until January 2019 and given that FACO is a legacy product, it is unlikely that there will be additional investment in FACO infrastructure per se. Therefore, market entry is only relevant in the respect of investment in NG broadband services and infrastructure.
312. ComReg considers that as eir is currently subject to price control and cost accounting obligations, the incremental burden of such obligations is not likely to be significant. However, ComReg makes no attempt to quantify the impact and proportionate cost of retaining regulation in a subset of the overall market.

Option 4: Impose Transparency, Non-Discrimination, Statement of Compliance, Access, Price Control & Cost Accounting, and Accounting Separation obligations

313. ComReg considers that the existing regulatory burden on Eircom (per 2015 FACO Decision) would remain. However this is not the case given that eir will need to comply with separate regimes in each of the markets and differing sunset periods depending on whether an EA has been determined competitive as this final Decision or as of the Mid-Term Assessment Decision. This adds complexity to the overall regulatory burden.
314. In addition, Maintaining existing obligations and upgrading some of these is disproportionate in a market that is a small subset of the previously regulated market (less than 25% by any measure) and in decline due to changes in end user demand and technological advancement. ComReg is not only maintaining obligations but also increasing the relative cost on eir for meeting those obligations.

Step 5: Assess the impacts and choose the best option

315. ComReg states at paragraph 12.53 that *“absent regulation, Eircom, as the proposed SMP SP, has the ability and incentive to engage in exploitative and exclusionary behaviours which would impact on competition and consumers”* and that it has *“provided examples of potential competition problems and their impact on competition and, ultimately, end users.”*
316. On this basis and having considered the impacts on stakeholders and competition, it is ComReg’s preliminary view that Option 4 represents the most justified, reasonable and proportionate of the approaches to regulation of the Regional FACO Markets.
317. However, ComReg has not produced any concrete evidence that the examples of anti-competitive effects and concerns submitted by ComReg in this Consultation are actually likely to occur in this market. Instead, ComReg has relied on the theoretical possibility of exclusionary behaviour. These one-tailed arguments do not represent the market reality and the behaviour that will actually occur absent regulation. See paragraphs 213-219.
318. Even if eir were to accept that some geographic subset of the market should continue to be regulated, which it does not, eir does not agree with ComReg’s preliminary conclusions on the proposed remedies. They are disproportionate in the context of a declining legacy market and in any event unnecessary in an environment where eir is willing to enter into voluntary commitments in respect of the SMP area.
319. Further on the issue of the RFTS Markets and the Urban FACO market ComReg states that its regulatory options in each of these markets are limited to the timing of the withdrawal of existing obligations. However, while ComReg has briefly discussed the imposition of a transition period in paragraphs 12.58 to 12.62, ComReg has not undertaken any assessment on the impact of varying sunset periods or provided any justification as to why the chosen length can be considered appropriate or how an eventual faster lifting of SMP obligations could cause harm to consumers in a market that is considered effectively competitive.

IS THERE A CASE FOR EX ANTE REGULATION IN THE IRISH FACO MARKET?

A Review of ComReg's Consultation and Draft Decision

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PREFACE

Is there a case for ex ante regulation in the Irish FACO market?

In June 2020, the Commission for Communications Regulation (ComReg) published a draft decision concerning the wholesale markets for the provision of Fixed Access and Call Origination (FACO), and retail markets for the provision of Retail Fixed Telephony Services (RFTS). According to ComReg's provisional findings, the FACO market continues to be susceptible to ex ante regulation, and eir continues to possess significant market power (SMP) in around 25% of the market. eir has asked Copenhagen Economics to comment on the rationale for ex ante regulation, and to review the evidence and arguments put forward on key market developments affecting eir's market power with a close focus on the barriers to entry and the tendency of the market to move towards effective competition.

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INTRODUCTION AND SUMMARY

In its Consultation and Draft Decision¹, the Commission for Communications Regulation (ComReg) has provisionally concluded that the market of Fixed Access and Call Origination (FACO) continues to be susceptible to ex ante regulation and that eir continues to possess significant market power (SMP) in parts of Ireland. Based on its finding of SMP, ComReg provisionally re-imposes the full suite of regulatory remedies, including pricing remedies, and further reinforces regulation through additional compliance measures in areas where eir is deemed to possess SMP.

eir has responded to ComReg's consultation identifying a range of concerns both in relation to the proportionality of the regulator's overall approach, and with respect to specific methodological issues. eir is particularly concerned that ComReg may not have adequately considered many ongoing and upcoming market developments. Against the backdrop of ComReg's proposals, eir has asked Copenhagen Economics to review the Consultation and eir's response to it with a close focus on the central premise of ex ante regulation, namely the application of the "*Three Criteria Test*" (3CT).

ComReg and eir have already put forward a substantial amount of arguments. We sought to focus on key fundamentals and assess whether the principal foundations of ex ante regulation are in place within the meaning of the first two elements of the 3CT: barriers to entry; and the tendency of the market to develop towards competitive outcomes. To help inform ComReg's view with regard to the final Decision on FACO regulation, we:

- set out our understanding of the conceptual economic rationale for ex ante regulation, and the role that ex ante regulation of legacy products plays in shaping market outcomes and investments in new, competing technologies; and
- reviewed the evidence and arguments put forward on some of the key market developments with implications for barriers to entry and the tendency of the market to move towards effective competition – identifying elements that we believe to be most important for an effective regulatory outcome.

We found that – while ComReg has carried out significant analysis on a range of detailed aspects of FACO regulation – the regulator's final decision will materially benefit from a closer investigation of the presence of any market failure that would prevail in the absence of regulation. In our view, the draft decision does not build on a sufficiently fleshed out understanding of what the market would look like absent regulation and to what extent the existing and proposed remedies shape the take up of and investments in alternatives to eir's legacy products. More specifically, a broad range of market developments would appear to constrain eir from exploiting its market power over the coming regulatory period.

First, **mobile operators appear to have already overcome the barriers to entry**. Aside from the uncertainties associated with ComReg's market definition (the 'critical loss' test), the available evidence suggests that mobile is already an established alternative to fixed voice services. Further, the *tendency* of the market is towards an increased take up of mobile services with the usage of fixed relative to mobile call origination particularly indicative of strong fixed-to-mobile substitution. This development has been a central reason for deregulation across most EU Member

¹ ComReg (2020)

States, notwithstanding the fact that traditional fixed line voice services continue to be used amongst a sub-set of customers in each country. We are not aware of any evidence to suggest that the countries that have deregulated these markets would exhibit worse market outcomes; nor is it clear that the Irish market developments would be materially different (in fact, mobile usage and take up in Ireland are at levels close to average levels across EU Member States).

Second, **the state-backed National Broadband Ireland (NBI) will, by design, materially alleviate any market failures associated with the deployment of NG network to rural premises.** While ComReg purportedly acknowledges the emergence of NBI, limited weight is given to its role as a competitive constraint. In our view, further to the apparent impact NBI will have on the market over the course of the coming years, ComReg ought to assess how the planned roll-out will affect eir's incentives to increase retail prices or foreclose wholesale customers. This applies also for periods directly prior to each of the premises in the Intervention Area (IA) being passed, given that these customers will gradually (and certainly) have an alternative in the near future and, more importantly, over the market review period.

Third, where customers prefer to keep a fixed line connection, **ComReg seems to have underestimated the role of alternative operators providing Managed voice over broadband (VoB).** Alternative service providers will continue to have access to regulated wholesale inputs for broadband access, which provides them (and therefore consumers) choice to take up VoB services – which is true even at an individual premises level if that premise is served by Next Generation Access (NGA) network. We find that ComReg's assumptions (based on limited or non-transparent substantiation) appear to contradict other available evidence on the coverage of NGA in Ireland, which includes eir's network as well as alternative networks.

Fourth, **the market exhibits national-level competition, which is likely to undermine eir's market power with respect to the (very small) sub-set of FACO-reliant customers.** All operators, including eir, apply national pricing at the retail level and ComReg is inconclusive in its assessment of national pricing in the provision of FACO. Insofar as the retail market is indeed national in scope, the smaller the size of the market with no alternatives, the less profitable it would be for eir to raise its prices (both wholesale and retail) to the detriment of consumers. In other words, the presence of a vast majority of Irish consumers can act as a safeguard against theoretical exploitative practices aimed at a smaller minority. Where effective, national level competitive constraints are an important market-driven safeguard (unless evidence of actual exploitative abuse would prove the contrary – and even if this were the case, ComReg would then have the tools to intervene quickly).

Finally, should ComReg's theories of harm pertain to a sub-set of 'captive' customers with no viable alternatives, **eir's voluntary commitments and the USO will likely provide additional protection to wholesale and retail customers.** Notably, eir has made voluntary commitments to maintain the current market rates for ISDN² and all current generation FVCO and has also made price commitments for wholesale line rental (WLR). Further, eir's legacy retail RFTS products are subject to universal service obligations, which include requirements for eir, where requested, to provide standalone RFTS at a geographically averaged price. This means that eir is not allowed to charge more to end users who live in remote rural areas. These factors, coupled with competition

² ISDN BRA, ISDN FRA and ISDN.

law and ongoing regulatory monitoring, would appear to further constrain eir from exploiting its position absent regulation.

Taking the evidence on these market developments, each individually and a fortiori taken collectively, it appears that there is a strong and reasonable case that the ComReg decision should be reconsidered. Ultimately, it is key – when making this judgment call in this specific yet important market – that the regulator assesses carefully the plausibility of any material consumer harm resulting from deregulation, relative to the costs associated with regulation and possible unintended consequences.

The remainder of the report is structured as follows:

- Chapter 1 sets out the rationale for regulation and, conversely, why the European framework envisages that stringent regulatory remedies need scaling back as competition develops.
- Chapter 2 discusses the evidence put forward on the recent and upcoming market developments with a close focus on entry barriers and trends in competition.
- Chapter 3 concludes by reviewing eir's voluntary commitments and other measures to protect vulnerable consumers.

CHAPTER 1

THE ECONOMIC CASE FOR REGULATION

In this section, we briefly lay out the economic rationale for ex ante regulation, discuss the risks associated with any overly prolonged imposition of regulation, and place the present case of FACO regulation in the relevant international context.

1.1 THE ECONOMIC CASE FOR REGULATION BUILDS ON THE FINDING OF MARKET FAILURE

The economic case for ex ante regulation builds on a finding of market failures that need to be addressed through regulatory remedies. This is the premise of the European Commission's Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation. The three criteria test (3CT) provides a framework for selecting the markets as well as a list of pre-selected suggested markets (this list has been significantly reduced since the first iteration of the Recommendation and currently consists of four markets and is likely to be reduced even further in the new Recommendation to be adopted later this year). More specifically, the Recommendation states that:

“When identifying markets other than those set out in the Annex, national regulatory authorities should demonstrate, and the Commission will verify, that the following three criteria are cumulatively met (a) the presence of high and non-transitory structural, legal or regulatory barriers to entry; (b) a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; (c) competition law alone is insufficient to adequately address the identified market failure(s).”³

These criteria provide a clear conceptual indication of the drivers that make a market problematic, or unproblematic. The three criteria perform an important filtering role and national regulatory authorities (NRAs) are always expected to extend regulatory oversight only in markets that – following a detailed assessment against the criteria – pass the test. To do so, it is necessary to complete (and update) an appraisal of the current market situation, identifying fundamental industry trends and potential impediments to the competitive process that could not be solved by competition enforcement alone. **The premise of identifying whether a market lends itself to ex ante regulation should always be (a) forward-looking in nature, and (b) build on a sound understanding of the counterfactual – i.e. what the market would look like absent regulation.** Wholesale-level regulation (such as that of FACO) is not an objective in and of itself but rather a means to address competition problems to the extent that they would result in customer harm in the retail market.

Finally, we note that the fact that the market is declining is not in itself a sufficient condition to conclude that eir's incentives and ability would be constrained absent regulation. However, as we explain in Chapter 2 below, what matters for a competitive assessment is that the declining use of

³ European Commission (2018)

fixed legacy services stems from technological evolution and the increasingly significant role of alternative networks and services.

1.2 DISPROPORTIONATE EX ANTE REGULATION CAN HAVE UNINTENDED CONSEQUENCES

Imposing stringent regulations on markets where it is not warranted may have adverse effects on incentives for investment and innovation and may thereby result in sub-optimal outcomes.⁴ To prevent such outcomes, the EU Telecommunications Regulatory Framework contains a number of checks and balances, or safeguards, to avoid over-regulation. The 3CT provides a framework for the filtering of relevant markets that may be susceptible to ex ante regulation. Further, when considering a specific market, NRAs should take into account regulations in adjacent markets and, where relevant, any additional safeguards imposed to protect consumers. Under the EU Framework, neither regulatory nor deregulatory measures are irreversible. This implies that regulators can re-intervene if there is sound evidence to suggest that any removal of remedies had resulted in consumer detriment.

There are both conceptual and empirical reasons why the regulation of telecoms services market is inherently linked to the side effect of a likely reduction in *dynamic efficiency*. Intuitively, regulation reduces incentives to invest and compete via own infrastructure assets because it supports service provision business models based on advantageous mandated or regulatory-underpinned access options. The approach to regulating legacy and newer/prospective infrastructure assets must hold a balance in order to avoid the long-term detriment (harm to future consumers) which is caused when incorrectly specified regulation leads to suboptimal investment.⁵

In the context of the Irish market for legacy retail and wholesale products (FACO, RFTS and their variants), an overdue phase-out of remedies could run the risk of delaying the take-up of, and investments in, alternative technologies. Where the barriers to entry can be overcome by alternative means, regulating legacy access products at notionally cost-reflective rates is conducive to (wholesale and retail) customers continuing to use legacy inputs rather than investing in own infrastructure, or moving to alternative platforms. As we explain in further detail below, ComReg has not yet thoroughly assessed the prospects of the market to develop in the absence of stringent regulation.

1.3 IRELAND IS ONE OF THE FEW COUNTRIES TO PRICE REGULATE FACO SERVICES

The FACO markets were removed from the European Commission's list of markets susceptible to ex ante regulation in 2014. A central reason for removing these services from the Commission's list was the prevalence of EU-wide fixed-mobile substitution, where mobile services could be considered to fall within the same relevant retail market for access to the telephone network at a fixed location and the (self-supplied) wholesale call origination services in the mobile networks could also be considered to fall within the boundaries of the market for wholesale fixed call origination.

⁴ See for example European Commission (2017a) and Streef (2008)

⁵ For example, studies by Plum (2016) and CRA (2015) respectively support the view that under the counterfactual scenario of less stringent regulation or deregulation there would have been more investment in independent infrastructures.

Therefore, it could be concluded that Mobile Network Operators (MNOs) have already overcome the barriers to entry, unless there are a strong country-specific reasons to conclude otherwise. Ireland is one of the few countries to still impose stringent remedies on the FACO market (Figure 1).

Figure 1
Status of fixed access and call origination regulation across EU Member States

	Fixed Access ¹	Call origination ²	Comment
Austria	Partial ex ante regulation	No ex ante regulation	Last reviewed in 2017. Regulation only maintained for non-residential services in the market for Fixed Access.
Belgium	No ex ante regulation	No ex ante regulation	
Bulgaria	No ex ante regulation	No ex ante regulation	
Croatia	Full ex ante regulation	Full ex ante regulation	Last reviewed in 2018.
Cyprus	No ex ante regulation	No ex ante regulation	
Czech Republic	No ex ante regulation	No ex ante regulation	
Denmark	No ex ante regulation	No ex ante regulation	
Estonia	No ex ante regulation	No ex ante regulation	
Finland	No ex ante regulation	No ex ante regulation	
France	Partial ex ante regulation	Full ex ante regulation	Last reviewed in 2017. Regulation is only maintained for non-residential services in the market for Fixed Access.
Germany	No ex ante regulation	Full ex ante regulation	In our understanding last reviewed in 2016.
Greece	No ex ante regulation	Partial ex ante regulation	Currently under review (deregulation proposed).
Hungary	No ex ante regulation	No ex ante regulation	
Ireland	Full ex ante regulation	Full ex ante regulation	Retail (wholesale) last reviewed in 2014 (2015). Continued regulation proposed in 2020.
Italy	No ex ante regulation	Full ex ante regulation	Last reviewed in 2016.
Latvia	No ex ante regulation	No ex ante regulation	
Lithuania	No ex ante regulation	No ex ante regulation	
Luxemburg	No ex ante regulation	No ex ante regulation	
Malta	No ex ante regulation	No ex ante regulation	
Netherlands	No ex ante regulation	Partial ex ante regulation	In our understanding last reviewed in 2017.
Poland	No ex ante regulation	No ex ante regulation	
Portugal	No ex ante regulation	No ex ante regulation	
Romania	No ex ante regulation	No ex ante regulation	
Slovakia	No ex ante regulation	No ex ante regulation	
Slovenia	No ex ante regulation	No ex ante regulation	
Spain	No ex ante regulation	Full ex ante regulation	In our understanding last reviewed in 2016.
Sweden	No ex ante regulation	No ex ante regulation	
United Kingdom	Partial ex ante regulation	Partial ex ante regulation	Currently under review (deregulation proposed).

Note: 1. Access to the public telephone network at a fixed location (Market 1 in the 2007 Recommendation).
2. Call origination on the public telephone network provided at a fixed location (Market 2 in the 2007 Recommendation).
Source: European Commission (2020a), European Commission (2020c), European Commission (2019a), European Commission (2017b), European Commission (2017c), European Commission (2016), Ofcom (2020a) and Ofcom (2020b).

In the international context, Ireland stands out through the stringent regulations imposed both on fixed access and call origination. Moreover, some of the countries that currently impose ex ante regulation on the FACO markets performed their latest market review a number of years ago, which means that they will soon need to reassess the need for regulation. Consequently, it is possible that some of these countries will join the clear majority of EU countries in phasing out remedies from fixed access and/or call origination. As explained below in Chapter 2, Ireland's stringent regulations seems questionable in the light of ongoing and upcoming national market developments.

CHAPTER 2

ASSESSMENT OF MARKET DEVELOPMENTS

In this section, we assess relevant market developments in the context of the Three Criteria Test. Table 1 sets out a structural framework for assessing market trends and summarizes our findings.

Table 1
Case for regulation: expected and actual market developments

	EXPECTED PICTURE WHEN REGULATION WARRANTED	OUR OBSERVATIONS IN THE CONTEXT OF THE IRISH FACO MARKET
Take up of eir's fixed voice services relative to competitors	<ul style="list-style-type: none"> Steady take up of fixed access and call origination services Limited take up / usage of alternative technologies 	<ul style="list-style-type: none"> Fixed take up and usage declining Established and increasing use of mobile Alternative technologies (notably VoB, OTT) growing
Pricing	<ul style="list-style-type: none"> Absent regulation, eir would price at excessive levels substantially and persistently above competitive levels 	<ul style="list-style-type: none"> No sound evidence put forward by ComReg on the likelihood of any price increases / decreases Not clear eir would have an incentive to significantly increase prices, given competition from other providers/networks, the roll-out of NBI (likely affecting eir's incentives already in the short term) and national-level pricing dynamics National-level dynamics in competition constraining pricing eir's voluntary commitments and the USO provide additional protection to vulnerable consumers
Investments	<ul style="list-style-type: none"> Limited investments in new technologies by eir and competitors (over and above maintenance) No new emerging technologies enabling substitutable retail services 	<ul style="list-style-type: none"> eir has commenced a network modernization program which will result in gradual phase out of legacy copper. eir is continuing to invest in FTTH rollout. CATV and wireless operators rolling out NG capable networks Market failure in the context of broadband provision in rural areas addressed through state funded NBI deployment
International comparison	<ul style="list-style-type: none"> Competition indicators appear significantly worse in Ireland than other EU countries without regulation 	<ul style="list-style-type: none"> Ireland does not stand out as a laggard and it is not clear why market circumstances (including technological developments) would be materially different.

Source: Copenhagen Economics

Below we expand on the findings set out in Table 1. We focus on what we believe are the salient market developments: (i) the role of fixed-mobile substitution; (ii) the upcoming roll-out of state backed National Broadband Ireland; (iii) the role and coverage of voice over broadband (VoB); and (iv) national-level dynamics in the market and likely implications for eir's market power.

2.1 MOBILE NETWORK OPERATORS APPEAR TO HAVE ALREADY OVERCOME THE BARRIERS TO ENTRY

The FACO markets were removed from the list of markets susceptible to ex ante regulation in 2014, partly due to the competitive pressure exerted by mobile network operators who had overcome the barriers to entry.⁶

2.1.1 ComReg's preliminary assessment

ComReg acknowledges that there is some substitutability between RFTS and MTS, but that end users still consider the services to be complements rather than substitutes. ComReg notes that the rise in mobile voice traffic and the commensurate fall in fixed voice traffic could imply that mobile telephony is a growing constraint on RFTS. However, ComReg's preliminary view is that MTS are unlikely to exert enough of a direct or an indirect constraint to warrant inclusion in the FACO markets.

ComReg conducts a SSNIP test and finds that a price increase in the FACO market will likely be diluted, when passed through to the RFTS market, and therefore lead to an attenuated response at the retail level. Moreover, the fact that the level of fixed-mobile substitution varies between call types leads ComReg to conclude that it is unlikely that mobile call origination would meet the expectations of access seekers purchasing FACO to satisfy demand for RFTS across all call types from their end users. ComReg's preliminary assessment is that MTS is unlikely to exert a sufficiently effective indirect constraint to be included in the FACO markets. ComReg also argues that end users who purchase RFTS as part of a bundle, where the RFTS component is based on FACO inputs, may hesitate to switch to MTS if they cannot stop purchasing the RFTS component of their bundle.

2.1.2 eir's response

In its response to ComReg, eir considers that ComReg has failed to adequately consider the decline of fixed voice usage in the market and increasing fixed-mobile substitution (FMS). According to eir, each of these changes has reduced its ability to behave independently of competitors and consumers. eir further notes that the upcoming spectrum auction will include a number of coverage obligations for licensees encouraging the deployment of VoLTE and WiFi calling, which will result in improved mobile offerings and increased incentives for fixed-mobile substitution. Further, eir notes that the general trend of RFTS being increasingly sold as part of a bundle does not alter the changing dynamics of fixed voice usage or demand for fixed voice services. Rather, any continuing demand for RFTS is driven by demand for other telecommunications services with the continued provision of declining fixed voice services linked to the progressive adoption of broadband access. eir disputes ComReg's provisional conclusion that MTS is not an effective substitute to RFTS because there is little substitution between them for certain call types since this fails to capture the interplay between overall fixed and mobile markets. According to eir, ComReg should focus on the overall substitutability between fixed and mobile.

2.1.3 CE assessment

We reviewed the evidence that ComReg and eir have put forward, and – to put the debate into perspective – compared the developments in the Irish market to other countries. We did not collect new evidence to inform, for example, the critical loss test. Rather we focused on the role of mobile in overcoming the **barriers to entry**, and the general **tendency of mixed-mobile substitution**. As noted by the Commission:

⁶ European Commission (2014)

“Moreover, even if fixed and mobile calls would not be considered to be perfect substitutes, mobile services would still exercise a significant constraint on wholesale call origination services as services over mobile and fixed networks do compete with each other to a certain extent.”⁷

Thus, these factors should be reflected in (a) the application of the 3CT, (b) the assessment of SMP and plausibility of theories of harm, and (c) in the design of remedies. In our view, ComReg’s review places too limited weight on the role of mobile at each of these stages of the market review.

Evidence on market trends is indicative of an increased fixed mobile substitution

The population coverage of (2G/3G) mobile networks in Ireland is around 99%. ComReg’s MCE survey indicates that 98% of all adults 18+ in Ireland have a mobile phone. The proportion of households with fixed line telephone access has decreased from 63 % in 2012 to 55 % in 2018.⁸ Conversely, the ownership of mobile phones has now outstripped that of fixed landlines and more than a third of Irish households may rely solely on a mobile phone for voice services.⁹ Only 4 % of Irish households have fixed telephone access exclusively.¹⁰ The remaining 96 % of the population is already using alternatives to fixed services. Moreover, RFTS subscriptions purchased on a standalone basis have declined by 28 % since the first quarter of 2016.¹¹ Further to fixed and mobile subscriptions, the usage of the fixed and mobile voice traffic is indicative of clear substitution between the two. In particular, relative to 2014 levels when the market was reviewed last time, fixed voice traffic has dropped by more than 40% with mobile traffic increasing during the same period. We are not aware of evidence on the likely substitution effect arising from the use of WhatsApp, FaceTime and other mobile applications enabling voice and video calls.

Figure 2 depicts how the use of Retail Fixed Telephone Services (RFTS) has declined while the use of Mobile Telephone Services (MTS) has increased over the past few years.

⁷ European Commission (2014)

⁸ European Commission (2012)

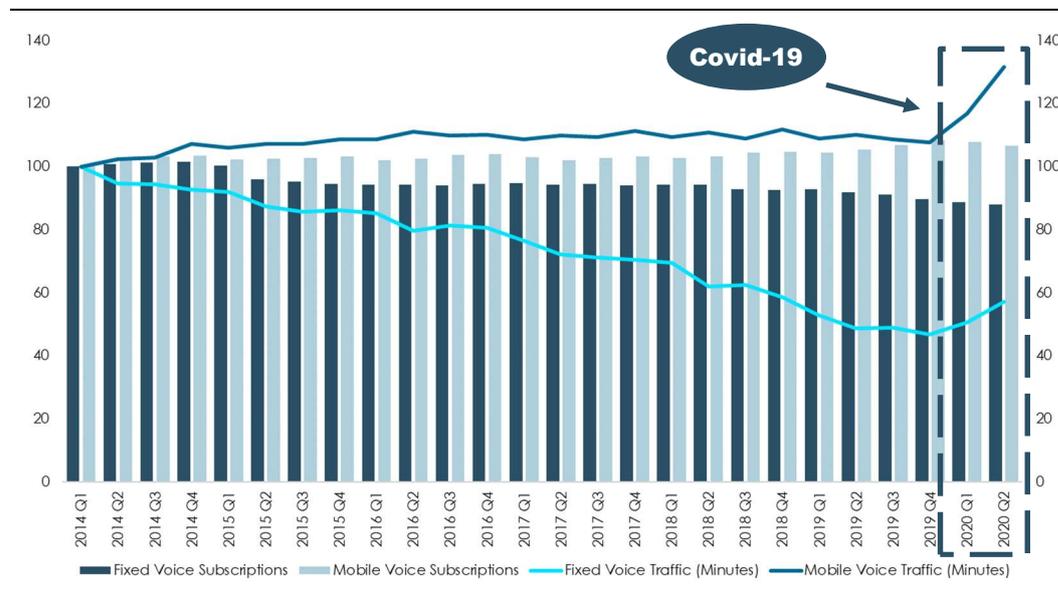
⁹ ComReg (2020)

¹⁰ European Commission (2018)

¹¹ ComReg (2020)

Figure 2
The use of mobile telephone services is increasing at the expense of fixed telephone services

Index, subscriptions and minutes in year 2014 = 100



Note: We understand the figures exclude voice and video traffic conveyed over data networks.
Source: Copenhagen Economics based on ComReg quarterly reports

The trend is most evident for voice traffic in minutes, where fixed voice traffic has decreased by more than 40 percent (even the recent increase during the Covid-19 outbreak is considered) while mobile voice traffic has continued to increase. This is an indication of substitutability between fixed and mobile telephone services.

The trend for fixed and mobile subscriptions is similar although less strong. This is consistent with ComReg's survey results which indicate that while some end users may keep their landline, they still increasingly rely on their mobile phone for making or receiving calls, even when they are at home. Notably, out of those end users who have a landline, around 14 percent have not even plugged in the phone and another 14 percent have the phone plugged it in but do not use it.¹²

Consumers use fixed and mobile services for similar types of purpose

Consumers mostly use their mobile phone to make and receive calls in their home. This indicates substitutability between fixed and mobile and also suggests that any price differences between the two have increasingly limited impact on usage patterns. Moreover, the pricing plans seem increasingly similar with most users of both mobile and fixed having inclusive minutes, which comprise unlimited calls to mobile and fixed (although fixed line packages can have more limits on calls to mobile).

ComReg's survey finds that, for example:

¹² RED C (2020)

- Around 80 % of users make and receive mobile calls from their home daily.¹³ Among users with both a landline and a mobile phone, 52% use the mobile phone more than the fixed line to make and receive calls;
- 47 % of mobile users have unlimited calls to fixed landlines, 58 % have unlimited calls to other mobile phones.¹⁴
- Among those who do not have a landline, 68 % said the reason was that there is no need when they have a mobile phone.
- Out of those users that continue to use both landline and mobile for voice calls, 52% say they primarily use their mobile phone.¹⁵

On the whole, while there are some differences in usage patterns, fixed and mobile are increasingly used for the same purposes and the majority of customers have either fully abandoned fixed line or use it to a limited extent.

ComReg's SSNIP-test should be interpreted with caution

ComReg appears to conduct much qualitative and quantitative analysis to substantiate its market definition concluding that mobile does not exert a sufficiently strong constraint on RFTS or FACO. Market definition is never in itself the objective of a regulatory exercise, rather it is a means to identify the market participants in the area of effective competition.¹⁶ As such, the market definition analysis should not lose sight of the overarching question as to whether any entry barriers have been overcome by mobile and other means of providing retail services.

While ComReg's conclusions on market definitions do not rely solely on the quantitative SSNIP test, the regulator places a considerable emphasis on the SSNIP / critical loss test performed for the FACO market (not RFTS). The key assumptions underlying the test are not disclosed and it is not in the remit of this report to perform an alternative critical loss analysis (CLA). That said, we make the following observations, which help put the CLA in the context of the wider market developments:

- **ComReg does not perform a quantitative critical loss analysis in the RFTS market to conclude that mobile is not an effective substitute.** In our view, ComReg's conclusions to exclude mobile from the relevant retail market should be based on an analysis of pricing constraints exerted by mobile, not just product characteristics. If anything, the critical loss test can be performed with better accuracy in the retail (RFTS) than the wholesale (FACO) market without having to determine, for example, pass-through rates.
- **ComReg's survey finds large numbers of fixed-line consumers responding to price changes despite focusing on the most inelastic part of demand.** For most products, there is a small group of loyal customers that would accept high price increases before switching to the closest substitute. The existence of such a group does not in itself imply that a separate product market should be defined. ComReg's survey questions do not lend themselves to disentangling the effect of the SSNIP from the autonomous decline in the FACO/RFTS markets. Even within this small remaining group with the most inelastic demand, the survey suggests that 31 percent of end users with a standalone landline would

¹³ RED C (2020)

¹⁴ RED C (2020)

¹⁵ RED C (2020), p. 65.

¹⁶ OECD (2014)

“definitely” or “maybe” change their behavior in response to a 10 percent price increase of RFTS services and the corresponding number for end users with a bundle including a fixed line is 26 percent.

- **ComReg’s approach to indirect constraints is subject to uncertain assumptions conducive to a narrow market definition.** ComReg’s analysis of indirect pricing constraints in the FACO market appears to be based on internationally well-established building blocks. However, ComReg does not disclose all the assumptions or calculations underlying its critical loss analysis (CLA).¹⁷ Therefore, we cannot fully assess the robustness of the CLA. We note, however, that especially the LL-FACO price constitutes only a relatively small fraction of the retail price of packages and bundles, and a large part of the SSNIP is diluted. The assumption on dilution rate (price-cost-ratio) is itself subject to a degree of uncertainty, given that it is not straightforward to determine an appropriate average retail price that captures the wide variety of retail packages purchased by different types of customer with varying price sensitivities.¹⁸ A high dilution also means that the result of the CLA is sensitive to other assumptions embedded in the calculation (e.g. pass-through and demand elasticity need to be higher for a SSNIP to be unprofitable). In the present case, there are significant uncertainties associated with margin assumptions (which should capture prices and marginal costs), pass-through and elasticity estimates derived from ComReg’s survey. There is thus a considerable risk that the profitability of a diluted SSNIP cannot be estimated accurately enough, and ComReg will arrive at a narrow market definition irrespective of the actual competitive conditions in the retail market. Thus, the premise of carrying out a SSNIP test with FACO as a focal product becomes increasingly questionable when barriers to entry have been overcome and the retail market shows an increasing tendency towards effective competition.

The starting point for any regulatory market definition should be a concern of a persistent competition problem in the retail market in the absence of wholesale regulation. ComReg correctly recognizes that the CLA is “by no means determinative in and of itself”¹⁹. Indeed, the above uncertainties and conceptual concerns suggest that the results of the CLA (in its current form) should be interpreted with significant caution and in the broader context of the evidence of fixed-mobile substitution. It is therefore unclear why ComReg nevertheless places significant weight on the results of the SSNIP test.

ComReg’s approach to combine access and call origination together may not be consistent with market developments and is by design conducive to prolonged regulation. eir’s consultation response contains several arguments against treating the FVCO and FA markets as a single focal product. In particular, eir’s view is that ComReg’s approach of combining the two services as a single focal product results in a high eir market share and “self-perpetuating” position as an SMP supplier of FACO while, in reality, fixed call volumes are declining at pace with consumers substituting to mobile (and other services like VoB and OTT).

¹⁷ ComReg (2020), Annex 7.

¹⁸ Assumptions are necessary also with regard to determining the wholesale cost component. While the WLR elements of FACO are relatively straightforward, the “weighted average” price for call origination is based on a set of assumptions regarding, for example, call duration, the allocation of call set-up charge and whether wholesale customers purchase call origination at primary, tandem or double-tandem exchanges. ComReg (2020), footnote 566.

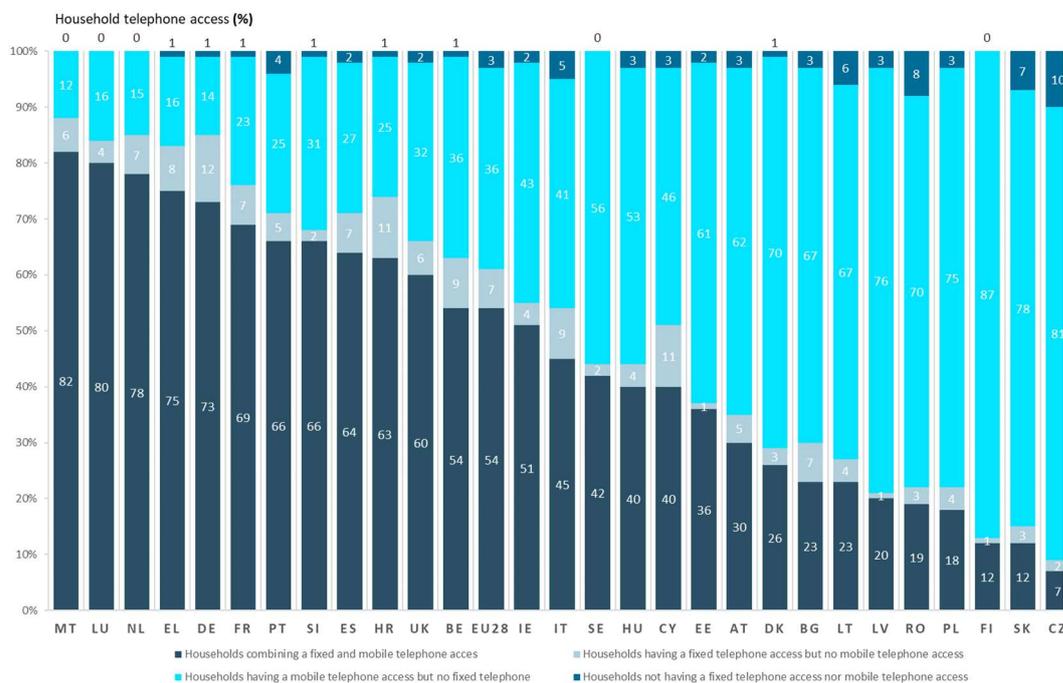
¹⁹ ComReg (2020) Annex 7.

In our view, there is no clear-cut economic answer to whether FA should be the focal product or whether access and calls should be treated separately (these questions were discussed in length already in 2013 in a report by ComReg’s economic advisor²⁰). ComReg is correct in stating that the two services are purchased together as a bundle. **However, the competitive conditions between access and calls appear to be materially different.** This was a key reason to treat the two services separately in the 2014 review. The evidence on the decline in fixed usage is strongly indicative of a tendency towards increased substitution since then. In light of these developments, eir’s request that “ComReg could effectively, at a minimum, remove regulatory remedies on the FVCO Market” seems reasonable.

Ireland is not exceptional in international comparisons

Competitive pressure from MNOs was a key reason for removing the FACO markets from the list in 2014. Some EU Member States have phased out the corresponding regulations already. There are no apparent reasons why Ireland would be remarkably different to other countries in terms of MNOs’ ability to offer competitive services to end-users. As ComReg notes, some countries have concluded that mobile access belongs to the same relevant market with fixed access.²¹ In fact, Ireland is close to the EU average in terms of fixed-mobile take up, as depicted in Figure 3 below.

Figure 3
Take up and usage of fixed and mobile subscriptions in EU member states



Source: European Commission (2018b)

²⁰ Oxera (2013)

²¹ ComReg (2020), para. 4.244.

2.2 NATIONAL BROADBAND IRELAND HAS BEEN CONFIRMED TO EXPAND THE RURAL COVERAGE OF NGA NETWORKS

The National Broadband Plan (NBP) is an initiative from the Irish government to deliver high speed broadband services to all premises in Ireland. The aim is to ensure service to all premises where commercial operators do not and do not plan to provide this service. After winning the contract, Granahan McCourt incorporated a new Irish registered company, National Broadband Ireland, to build, operate and maintain the new high-speed fibre broadband network in the intervention area (IA).²² The government's contract with NBI entails rolling out an FTTP network in the IA extending to 540,000 premises, which amounts to 23 % of the premises. SIRO has indicated that, over the course of this market review period, its FTTP network will eventually pass 450,000 premises.²³ The NBI will overlap, to some extent, with the existing fixed NG network and the FWA network.²⁴

2.2.1 ComReg's preliminary assessment

NBI has an explicit focus on areas that are not commercially attractive due to low premises density and prospectively poor returns on investment. ComReg states that NBI would in principle be capable of entering the relevant FACO markets since it is allowed to supply additional wholesale offerings, including leased line and voice access services.

ComReg's preliminary view is that further entry into the Regional FACO Markets based on new network build is unlikely to effectively constrain eir over the lifetime of this market review, while noting that, in areas where it has rolled out, NBI has the potential to generate such a constraint at the local level. ComReg goes on to say that a wholesale-only FTTP network could not be held to fall within the Relevant FACO Markets by means of supply-side substitution since the provision of FA is only part of the candidate FACO product. However, ComReg recognises that the wholesale NG broadband access sold by these SPs can be used as inputs to wholesale Managed VoIP-based FACO products.²⁵

2.2.2 eir's response

eir disputes ComReg's reasoning that since NBI has not yet (as of May 2020) commenced installing infrastructure its entry does not necessarily indicate lower entry barriers within the lifetime of the market review. NBI has communicated its deployment plans to ComReg and eir therefore considers that any ambiguity or uncertainty regarding the potential impact of the NBP award has dissipated. eir is therefore also critical of ComReg's proposal to carry out a mid-term assessment 24 months after the publication of the final Decision. According to eir, the market review should be forward-looking and it is clear that the market for FCO fails the 3CT in that the market is not characterised by high and non-transitory barriers to entry. In addition, when considering the prospective roll-out of NBI within the market review period eir argues that it is even more apparent that the fixed access component of FACO will tend towards competitive outcomes.

²² www.gov.ie (2020)

²³ ComReg (2020), p. 296.

²⁴ Imagine has deployed and will continue to roll out FWA using 5G 3.6GHz spectrum in parts of the IA.

²⁵ ComReg (2020)

2.2.3 CE assessment

In our view, ComReg's analysis appears to take an overly cautious approach in assessing the role of NBI in constraining eir's ability to behave independently of its customers. We based our assessment on three questions which appear central to the competitive constraint exerted by NBI over the coming regulatory period:

1. Is there enough certainty over the planned roll-out of NBI?
2. To what extent will NBI exert a competitive constraint on eir's FACO products?
3. How likely is the gradual roll-out to constrain eir's ability to exploit market power over the upcoming regulatory period?

There is no ambiguity about the deployment of NBI

Regulators and competition authorities tend to be cautious about the role of '*potential competition*' in market power assessments. In the light of the evidence available to us, it appears that such concerns do not apply in the context of NBI. The NBP contract has been awarded by the Department of Communications, Climate Action, and Environment (DCCAE), and was signed on 19 November 2019. The European Commission has approved the (2.6bn EUR) state backing of the roll out under the EU state aid rules.²⁶ According to DCCAE, work will now begin to bring high speed broadband services to 1.1 million people. 115 000 premises will be covered just in the first year. DCCAE will have significant oversight of the project to monitor costs and progress, and to ensure efficient delivery of broadband services.²⁷ We understand that the roll out period may be shortened from seven to five years, which would bring forward the competitive impact of the new network.

As such, it seems that the NBI roll out over the period of the market review will take place with a relative amount certainty based on its deployment plans, and consumers, businesses and, notably, eir will be likely to take it into account in their decisions. Thus, the NBI roll out does not, in our view, represent just 'potential competition'.

The NBI will exert a direct competitive constraint on eir

As recognised by ComReg, the roll-out of NBI is premised on overcoming any entry barriers that would otherwise prevail:

*[...] although ComReg acknowledges that the FTTP network to be rolled out by NBI in the IA on a non-commercial basis will, over time, assist in eroding such barriers.*²⁸

NBI, by design, targets those markets where customers benefit most from alternative means of accessing NG broadband network. According to eir's forecast, 876 Exchanges accounting for 90 % of premises should be competitive by 2023, on the basis of forecasted NBI rollout alone (2023 would be the mid-point of the review period, assuming a five-year span). It is not within the scope of our review to assess the validity of eir's forecast. We note however that ComReg should set out its own expectations and the underlying assumptions. Further, we note that geographic units should have clear and stable boundaries over time according to the 2014 Explanatory Note. Importantly, this is not fulfilled given the NBI roll-out plans.

²⁶ European Commission (2019b)

²⁷ www.dccae.gov.ie (2020)

²⁸ ComReg (2020)

The NBI roll-out is likely to constrain eir's behaviour even before all premises are passed by the new network

ComReg's premise for SMP remedies stems from a theory harm whereby eir will engage in exclusionary conduct in the FACO market, and ultimately increase prices charged to end-users. ComReg has not yet significantly considered eir's commercial incentives to do so in the advent of NBI roll-out. More specifically:

1. The potential profit from increasing prices in the short run, before an alternative is in place, for eir is likely outweighed by the risk of losing these customers in the long run once the alternative is in place. We note that ComReg's consumer survey is indicative of somewhat elastic demand (31% of end users with a standalone landline and 26% of end users with a bundle say they would change their behaviour in response to a 10% price increase). While this is indicative of attractive substitutes available to retail customers at present, it also indicates that any price increase can trigger wholesale customers switching to NBI rather than staying with eir. ComReg has not considered eir's pricing incentives on such a forward-looking basis.
2. Since NBI is gradually rolling out, eir would continuously have to adjust its (wholesale and retail) pricing accordingly. FACO (and associated retail products) is a small and decreasing market; thus, insofar as eir's pricing is national in scope, it is not clear that eir would have an incentive or the ability to profitably adjust its local-level prices in line with the gradual roll-out.²⁹ We note that NBI is obliged to offer wholesale products for sale at a uniform price.

In summary, ComReg correctly acknowledges NBI as a direct competitive force that will erode the entry barriers that would otherwise prevail in areas where NG deployment is not commercially viable. In our view, ComReg's Final Decision would however benefit from a closer examination of the impact the NBI will have over the course of the deployment on a forward-looking basis, and in advance of a particular premise being passed by the network. This would be consistent with the 3CT assessment that ComReg is required to undertake.

2.3 COMREG APPEARS TO HAVE UNDERESTIMATED THE ROLE OF MANAGED VOICE OVER BROADBAND (VOB)

Managed VoIP subscriptions have increased by 28 % over 2015-2019 and account for 35 % of RFTS subscriptions. The majority is delivered over cable TV networks (CATV), but an increasing share is delivered based on wholesale NG broadband inputs. If a service provider invests in a VoIP platform, it can buy these inputs from eir, SIRO and, in the future, NBI and thus provide RFTS via Managed VoIP.³⁰ Insofar as service providers can access NG-capable wholesale inputs (which are subject to a different set of regulations through WLA/WCA) they can provide fixed voice services and effectively bypass the need to purchase FACO services. There appears to be little dispute about the competitive constraint that managed VoIP exerts on legacy voice services. A direct constraint arises from the fact that wholesale broadband inputs offered over these networks are or could be used by wholesale Access Seekers to provide bundles of broadband and managed VoB. There is, however, a

²⁹ ComReg found insufficient evidence of price differentiation between different geographic areas.

³⁰ ComReg (2020)

considerable discrepancy between ComReg and eir in terms of *where* this competitive constraint affects eir's market power.

2.3.1 ComReg's assessment

ComReg's assessment is that these services are likely to act as an indirect retail constraint on FACO. However, wholesale NG broadband inputs are only available where eir and SIRO have rolled out and NBI will roll out. ComReg finds that 96% of active lines have wholesale NG broadband available in the urban areas. ComReg considers that Managed VoIP RFTS delivered over wholesale NG broadband inputs, and Managed VoB RFTS delivered over CATV, are likely to exert sufficiently immediate and effective indirect constraints to warrant inclusion in the LL-FACO Markets where they are present.

ComReg considers that the Relevant FACO Product Markets include Virgin Media FACO self-supply (on the LL-FACO Product Market only), and Managed VoIP RFTS delivered using eir FTTx, SIRO and, prospectively, NBI wholesale NG broadband inputs. However, at an Exchange Area (EA) level, market shares can only be assigned to FACO products delivered over these NG broadband networks, where they are present. Consequently, with respect to regional (rural) markets, ComReg provisionally concludes that the level of sunk costs which a new entrant would be required to incur is likely to act as a high and non-transitory barrier to entry on the Regional FACO Markets.

2.3.2 eir's response

eir challenges ComReg's findings regarding sub-national markets. Notably, according to eir, the NGA coverage in Ireland is much higher than implied by ComReg's approach, which results in around 26% of the market staying under strict regulation. Hence, the size of the market where service providers cannot provide retail fixed line services by means of purchasing alternative wholesale inputs is very small. The small size of the market where wholesale (and hence retail) customers do not have choice means that any attempt to increase prices or foreclose competitors would be "retaliated" through (wholesale and retail) customers switching away in other, more competitive, areas.

2.3.3 CE assessment

Where customers prefer to keep a fixed line connection, it appears that **ComReg may have underestimated the role of managed voice over broadband (VoB)**. This finding hinges on:

- Options available to consumers and wholesale customers alike across Ireland – i.e. the coverage of the NGA network
- The tendency of the market to move towards effective competition in areas where, absent regulation and voluntary wholesale access, just two providers would prevail.

The clear majority of customers can choose from alternative VoB providers

We understand that WCA/WLA will continue to be regulated, at least until another market review is concluded, giving alternative operators (and therefore consumers) an option to take up VoB services from alternative providers. ComReg partially recognizes this in what it calls urban areas, which, according to ComReg covers around 74% of Irish premises. There are reasons to suggest that this conclusion may not reflect the relevant market developments and thus the tendency of the market to develop towards effective competition:

First, the market is not stagnant but rather characterised by significant investments in new competing networks across large parts of the country. Even aside from the non-commercial rollout of the NBI (discussed separately above), commercial operators have invested over €2.75 billion in upgrading and modernising their networks over the past 5 years, with further investment planned. Market players, including eir, SIRO and Virgin Media, invest heavily in very high capacity networks.³¹ Virgin Media operates a CATV network, and is providing RFTS by means of Managed VoB to approximately 939,900 premises. As of Q4 2019, Virgin Media had 335,100 RFTS subscribers. Virgin Media offers almost all of its RFTS on a self-supply basis on its own CATV network.

Second, ComReg’s conclusions about the size of the competitive area are not based on transparent assumptions and not consistent with the available evidence on NGA coverage in Ireland. According to the DESI report from 2020, NGA coverage in Ireland is currently at around 96%³². This is in stark contrast compared to ComReg’s provisional view to limit the deregulated area to 74% of the market. Box 1 below sheds light on this discrepancy.

Box 1 ComReg’s approach to determine competitive areas does not correspond with NGA coverage

In ComReg’s view, the key factor distinguishing competitive conditions between EAs is the presence or absence of NGA broadband capable of providing Managed VoIP for an appreciable number of premises in an EA. ComReg proposes to apply a single criterion: a coverage threshold of 80 % - i.e. the EAs with at least 80% NGA broadband availability, which covers altogether 74% of premises. This coverage level is assumed to offer SPs sufficient scale. In EAs with lower coverage, competitive conditions are not sufficiently different from EAs without NG broadband.

eir argues that the FACO market is national. Moreover, it claims that the 80 % threshold is overly conservative and refers to other NRAs that have chosen coverage levels of 20-75 %. eir has asked ComReg to reduce the coverage level to 60 % and to include premises that can be served by Virgin Media or Imagine. eir also proposes a complementary assessment at a premises passed level to recognise that once NG broadband services are available those premises can be served by Managed VoB.

The DESI report finds that NGA coverage in Ireland was 96% in 2019 (the EU average was 86%). The DESI estimate includes FttX (including VDSL), Cable-based Docsis 3.0 and any other super-fast broadband that delivers at least 30 Mbps download speeds.

Source: ComReg (2020), eir (2020), European Commission (2020b).

It is not within the scope of this report to determine the precise number of premises that have a viable VoB option to eir’s legacy services, or an appropriate coverage threshold. That said, there are reasons to suggest that ComReg would need to revisit its approach to define sub-national markets. Notably:

³¹ European Commission (2020c)

³² European Commission (2020c)

- eir's own fibre network already passes over 2 million premises which corresponds to around 90% of Irish premises. **This, in and of itself, demonstrates that SPs can overcome any barriers to entry via alternative (broadband) wholesale access products to serve a much larger share of customers than implied by ComReg.** We note ComReg's position that the Urban FACO market may include a number of premises within an Exchange that are not passed by NG broadband (as per ComReg's definition). However, ComReg's approach does not recognise that the reverse is possible in the Regional market. Given the level of NGA coverage in Ireland, it is likely that a significant number of premises that are already passed by NG broadband will continue to be regulated under ComReg's proposals.
- ComReg has not articulated the economic basis with regard to the coverage threshold of 80%, nor does the Consultation include a clear sensitivity analysis with respect to this assumption. As such, it is not possible for us to thoroughly assess the appropriateness of this important assumption. As noted by eir, other countries have applied markedly different (lower) thresholds, and it would thus be beneficial for ComReg to investigate the approaches employed by other NRAs. Conceptually, should ComReg wish to assess markets on an individual exchange basis (which in itself can be problematic from a market definition perspective), ComReg would need to determine the minimum efficient scale, which will continuously change over time with changing costs and customer demand (and willingness to pay) for NG-based VoB. This seems impractical and burdensome, if not virtually impossible to determine accurately. In our view, a coverage threshold should be forward-looking in nature and ComReg should consider how the threshold assumption will affect alternative operators' incentives to invest and upgrade customers to VoB (or any alternative technologies). The higher the threshold percentage, the larger the share of the market that remains under strict regulation and, hence, the more attractive it is to continue using regulated legacy products. In a market where entry barriers can be and have been overcome, too high a threshold carries the risk of discouraging migration to more advanced technologies.

At the minimum, it would seem advisable to revisit and disclose the assumptions underlying sub-national markets. At present, ComReg's assumption results in a markedly lower number of households in the deregulated area than the actual number of premises passed by NGA.

ComReg has not presented evidence of competition problems in EAs with just eir and Virgin Media

ComReg defines regional FACO markets, which are characterised by "less competitive conditions", and therefore require ex ante regulation. ComReg preliminarily considers that Virgin Media's presence at an EA, on its own or in absence of 80 % NG broadband coverage, is unlikely to generate sufficiently competitive conditions – an EA would be akin to a duopoly. This scenario is likely to apply only to a small subset of EAs, or even a subset of premises, given that (as explained above) the vast majority of premises are passed by NGA and can be served via eir's broadband access products (VUA/bitstream), and Virgin Media's networks covers primarily the same areas.

The SMP Guidelines do not address market structures with a limited number of market players where the criteria of joint dominance are not met, nor is it clear-cut as a matter of economics that a duopolistic market would necessarily result in collusive market outcomes (we return to this

below).³³ Further, ComReg concludes that the market is duopolistic at a level of a geographical unit rather than at the market level. This approach would appear to overlook the competitive pressure exerted from outside a geographic unit (an EA). Therefore, it does not appear appropriate to motivate regulating certain geographic regions merely because there are only two operators present in a particular (very small) area.

For regulation to be warranted, ComReg would have to prove that there is risk of joint dominance. Joint dominance exists where each member of the dominant oligopoly considers it possible and preferable to adopt a common policy for their market conduct, with the aim of selling at above competitive prices, without having to enter into an agreement. Consequently, imposing ex ante regulatory obligations (in this case even on just one party) ought to be premised on an analysis of likely market developments and consider whether market conditions are conducive to tacit collusion.³⁴

While ComReg does not make the claim that eir and Virgin Media are collectively dominant, it simply states that Virgin Media's operations do not exert enough of a competitive constraint for it to be included in the coverage calculations forming the basis for ex ante regulation. However, the presence of a duopoly does not in itself justify the imposition of regulation. ComReg argues that the exclusion of Virgin Media does not make a significant difference. We note that ComReg has not provided any evidence to support this claim and, even if true, the small impact is not a reason to exclude Virgin Media. By doing so, ComReg would set a precedent on the treatment of alternative networks in its SMP reviews. Given this possible (unintended) regulatory signal to FACO and other markets, we believe ComReg should not draw definitive conclusions without a detailed analysis.

2.4 THE MARKET EXHIBITS FEATURES OF NATIONAL-LEVEL COMPETITION

In light of the above evidence, it appears clear that the market is becoming increasingly competitive with a number of fixed network options (in addition to the apparent option to use mobile). The parties disagree about the size (with respect to VoB) and pace (NBI) of the market to develop towards effective competition. Irrespective of the specific timeframe of the market developments, and what proportion of customers these developments will cover, eir's ability to exploit the minority of FACO-reliant customers left with fewer options are likely to be limited insofar as the market exhibits national-level competitive constraints.

2.4.1 ComReg's assessment

ComReg's preliminary view is that the Relevant RFTS Product Markets are likely to be national in scope. RFTS is provided by eir on a national basis and eir's pricing of standalone RFTS is uniform across the country, although this is in the presence of regulation.³⁵ The only geographic difference in pricing arises based on the availability of the various RFTS products. This differentiated pricing is not driven by competitive conditions, but rather by availability of specific RFTS products. FACO, in turn, is provided by eir on a national basis, albeit in the presence of regulation, and is priced on a uniform basis nationwide. ComReg has insufficient evidence to conclude, on a preliminary basis,

³³ European Commission (2018a)

³⁴ Ibid.

³⁵ Regulatory obligation stipulating national pricing applies for standalone RFTS. Headline prices of bundles are also national, although not due to regulation.

that the provision of FACO is characterised by differentiated pricing or marketing strategies across different sub-national geographic areas.

2.4.2 eir's response

eir agrees with ComReg's preliminary view that the Relevant RFTS Product Markets are likely to be national in scope. According to eir, the geographic differences in competition in the FACO market are clearly not appreciably different to the extent that they justify the existence of sub-national markets. eir considers that the geographic scope of the FACO market is in fact national. eir states that the countervailing buying power of operators in either fixed access and/or fixed calls in the larger "Urban" market can be leveraged to countervail attempts to price differentiate in the significantly smaller Regional market and reach acceptable commercial outcomes nationally. eir further notes that all countries (representing a minority of Member States) that still regulate fixed access have defined the market to be national in scope.

2.4.3 CE assessment

We assessed whether there are national level dynamics in competition that would undermine eir's market power with respect to the sub-set of FACO-reliant customers.

From an economic perspective, the geographic definition of the relevant wholesale market should take into account the conditions prevailing in the corresponding retail market. ComReg concludes that the retail market is national in scope since there are limited variations in the number and size of potential competitors geographically, no evidence of differentiated pricing or marketing strategies on a sub-national basis and limited differences in demand characteristics across regions. ComReg's conclusions seem reasonable. In general, operators set prices nationally. eir, SIRO and Virgin Media price their products (wholesale NG broadband access in the case of SIRO and eir, and RFTS in the case of Virgin Media) on a national basis, in those areas where their networks have rolled out. Neither SIRO nor Virgin Media vary product offerings or prices by geographic area. Also, NBI is obliged to offer wholesale products for sale at a uniform price across the IA.

Thus, insofar as eir's pricing is national in scope, any profits that could be gained through a price increase in the regional EAs is constrained by national competition. Furthermore, even if eir were to attempt to set higher prices in regional areas, it is constrained by countervailing buyer power at the wholesale level. Negotiations between eir and other operators do not take place separately for each EA, but at a national level. The operators have plausible alternatives for the clear majority of Irish premises and can leverage this to reach acceptable commercial outcomes nationally.³⁶ Countervailing Buyer Power cannot, in our view, be assessed for small regional EAs in a vacuum since competition and negotiations take place at a national level.

Furthermore, even if eir were to wish to start differentiating prices by increasing prices in regional EAs and was successful in doing so, this would only be for a limited period of time since NBI's roll out targets the same areas. Moreover, as NBI will roll out its network gradually, eir would continuously have to update its prices as NBI enables competition from Managed VoB in an increasing number of regional EAs. FACO pricing is monthly and we understand from eir that there is no minimum contract duration which would prevent eir's wholesale customers from responding to any price changes swiftly.

³⁶ ComReg estimates this area to cover around three quarters of Irish premises. As discussed above, this significantly underestimates the number of premises passed by NG network.

The EC Explanatory note also recognises these conditions:

“Indeed, with a decreasing overall number of users (as those who can easily switch increasingly do so), there is a potential risk that remaining captive users will face unfavourable conditions, including prices above the competitive level. However, where the competitive constraints are strong enough to result in a deregulation of the market, they should in principle be able to counteract such price increases, also with regard to users that do remain on the PSTN network.”³⁷

An additional factor that prevents eir from charging prices above the competitive level is the universal service obligation. According to the 2016 USO Decision, eir is required, where requested, to provide RFTS at a geographically averaged price (GAP). This implies that eir cannot charge more to end users who live in remote rural areas. Regulation 8 of the Universal Service Regulations also gives ComReg the power to monitor retail tariffs and impose tariff options.³⁸ This provides an additional safeguard preventing eir from implementing excessive price increases for standalone RFTS.

³⁷ European Commission (2014), p. 21.

³⁸ ComReg (2020), p. 353 and p. 372.

CHAPTER 3

VOLUNTARY COMMITMENTS, THE USO AND COMPETITION LAW PROTECT CONSUMERS

According to ComReg's residential market research survey, around 12 percent of end users have a standalone landline.³⁹ Only four percent of end users do not have a mobile phone and among these end users, 68 percent are 65 years or older. There may thus be some groups that are more reliant on RFTS services and can thereby be considered more vulnerable. However, in addition to the market developments that contribute to making excessive prices for such groups unlikely, there are several safeguards in place to protect such groups:

First, eir has offered voluntary commitments. If the market was not developing towards effective competition, eir would not have incentives to provide access or price its retail services at reasonable levels. We would not expect to see voluntary offers that price wholesale and retail products in fair and reasonable manner. eir has made voluntary commitments regarding:

1. ISDN BRA, ISDN FRA and ISDN PRA to be charged at respective current markets rates,
2. All Current Generation FVCO to be charged at current market rates, and
3. Price commitments for WLR.⁴⁰

ComReg has not shown evidence or analysis regarding whether the voluntary commitments offered by eir are: (a) insufficient in addressing any prospect of harm to retail or wholesale customers, and/or (b) are impractical or otherwise impossible to monitor. In our view, ComReg's provisional decision not to accept eir's offered commitments ought to demonstrate how they fail to address the competition concerns identified. This would necessitate a significantly more rigorous analysis of the theories of harm and the effects that would prevail absent regulation and the benefits of regulation over and above eir's commitments. Given that ComReg's analysis of the *effects* is conceptual and no analysis on the effectiveness of eir's commitments is disclosed, it is not clear why the proposed commitments are rejected.

Second, eir's legacy retail standalone RFTS products are subject to universal service obligations. These include requirements for eir, where requested, to provide RFTS at a geographically averaged price. This means that eir is not allowed to charge more to end users who live in remote rural areas. For example, an expert report advising the European Commission regarding the 2014 review of the recommendation on electronic communications markets subject to ex-ante regulation, that even though the 3CT is not passed, there can still be some end users that are particularly vulnerable (e.g. people of old age).⁴¹ The presence of more vulnerable groups does not in itself warrant ex ante regulation. However, national governments may choose to protect such users by implementing alternative policies such as the USO.

Third, SMP regulations or deregulations are not irreversible and competition law provides a further safeguard to pre-empt any exploitative or exclusionary conducts.

³⁹ RED C (2020)

⁴⁰ WLR to be charged at €16.82 (or equivalent POTs-based pricing when bundled with Broadband per published price path to June '24 in Urban (CISPL) and Regional WCA areas (per D11/18)).

⁴¹ Ecorys (2013)

ComReg is of the preliminary view that “competition law is unlikely to be sufficient to adequately address market failures on the Relevant FACO Markets”. ComReg’s considers that the Regional FACO market is a market “where it can be predicted, with a high level of probability, that competition problems are likely to occur” and where there is evidence of “repeated patterns of behavior” leading to persistent harm to consumers. In some cases, competition law can indeed be inadequate (compared to regulation) to address structural and persistent barriers to effective competition in some telecoms and other network markets. That said, in the light of the market developments presented in this report, it seems questionable whether any such barriers would persist in the legacy FACO market.

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Sky Response to RFTS/FACO Consultation – Document 20/46

1. Sky welcomes the opportunity to respond to this ComReg consultation. Our response is focused on Question 11 of Annex 13 (Consultation Questions) of ComReg Document 20/46.
2. ComReg’s proposal to significantly deregulate the FACO market by withdrawing the SMP obligations (**Question 11**) from imposed on Eircom in the Urban FACO Market must be accompanied by the immediate cessation of Urban FTTC customers cross subsidising Eircom’s “*loss making*” FACO services. The practice of cross subsidisation that currently exists in these markets is, in Sky’s view, contrary to European law. Such cross-subsidisation by the SMP operator in the Irish market should never have been permitted by ComReg under the competition framework. It is even more important that this practice not been allowed to continue in light of the proposed deregulation of the Urban FACO Market.
3. ComReg has inextricably linked the cross-subsidisation of Eircom’s copper lines beyond 3Km (the majority of which provide services that fall squarely within the FACO market) with Eircom’s existing FACO cost orientation obligation. This is because ComReg put a significant premium on FTTC prices via D11/18 that is used to recover the incremental cost of all Eircom’s lines beyond 3km including capital and operating costs.
4. While Sky considers the cross-subsidisation policy instituted in D11/18 is wholly inappropriate and contrary to European law (and in particular the competition framework) in its own right, that transgression would be exacerbated by maintaining such a policy for any period of time following the deregulation of the Urban FACO market.
5. In this regard, FTTC pricing (and to a lesser extent CGA broadband) **is being used as a “backdoor” Universal Service Fund** to maintain Eircom’s fixed access network outside the Urban FACO Market. Such a policy was never consulted on by ComReg. It appears to have been determined between Consultation 17/26 and Decision D11/18 and after Eircom raised concerns in its response to consultation that an efficient cost oriented



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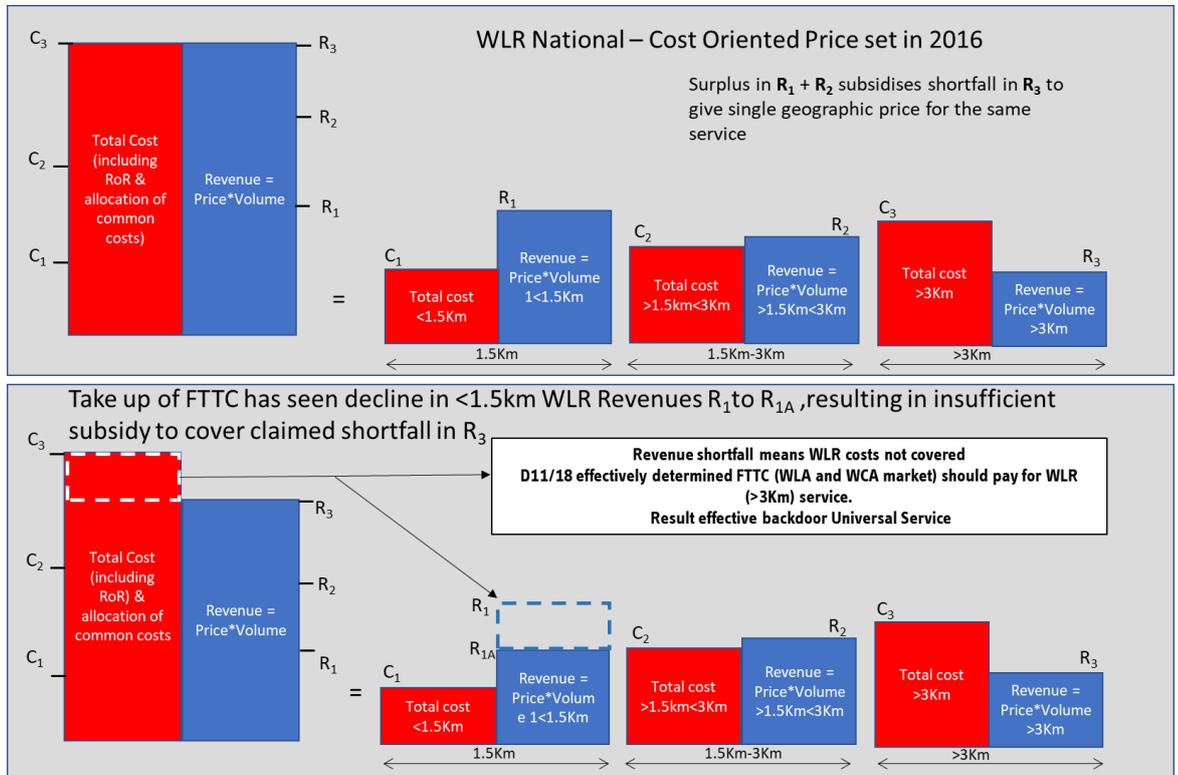


FTTC price would mean the existing cost-oriented SB-WLR price (nationally averaged) would no longer ensure recovery of costs.

6. ComReg agreed with Eircom's view that as customers moved from SB-WLR to Standalone NGA FTTC, the lower cost SB-WLR line revenues that were used to subsidise higher cost SB-WLR lines in the nationally averaged price would be in decline. If there was any merit in this argument (and returns observed in the Regulatory accounts suggest there is not) then SB-WLR prices should have been increased, rather than requiring FTTC customers to subsidise the shortfall. The result of that decision is that ComReg has sanctioned a subsidy from the FTTC WLA market, where Eircom has SMP, to support the FACO market, where Eircom also has SMP.
7. ComReg justified the position it took by making reference to "*commercial*" versus "*non-commercial*" footprints in terms of cost recovery but at no stage in the consultation process or in the decision that followed (including what was notified to the European Commission) did ComReg clearly acknowledge that it was approving cross subsidisation from the WLA to the FACO markets. In taking this approach, Sky is of the view that ComReg imposed a condition that deprives European competition rules of their effectiveness and in so doing imposed rules "*contrary to the rules contained in the Treaties*" contrary to Article 106 of TFEU¹.
8. Ireland is now a country where a dominant operator is being permitted to use revenues in one economic market to cross subsidise a "*loss-making*" service in another market where it also has dominance (yet faces some competition, e.g. mobile voice). It also means that Ireland is permitting a dominant operator with a cost orientation obligation on FTTC in the WLA market to cross-subsidise loss making CGA broadband services in the same WLA market. In this footprint, Eircom competes with Wireless Service Providers (WISPs) and mobile broadband providers. It would be problematic were ComReg to permit the distortion of competition by failing to intervene if evidence were found that Eircom were subsidising such loss-making services against its competitors. It is all the more concerning from a competition law perspective where ComReg are tasked with the enforcement of competition law in the Irish telecoms market.
9. A graphic representation of the logic behind ComReg's decision is presented here:

¹ See Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. – Case 66/86, 1989





The area depicted by R_1 to R_{1A} from Chart 1 presents the premium paid by FTTC consumers to subsidise Eircom’s FACO services beyond 3Km. This premium can be estimated to equate to **€3.97** per FTTC subscriber per month as per Table 10 presented by ComReg in D11/18.

10. Notwithstanding, ComReg noted in D11/18 that:

“A national average cost approach is only appropriate for a national service such as SB-WLR and not the FTTC/EVDSL services, which, due to line length constraints, are not capable of serving the entire national customer base” [para 6.212]

And

“Including additional margin to help cross subsidise the more expensive customers that might be served on longer lines in the access network beyond



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that footprint would distort these [Build or Buy] investment signals” [para 6.213]

Adding on that additional margin is precisely what ComReg did albeit approaching the problem from a different angle than that proposed by Eircom. In this regard, it simply assumed that FTTC was Eircom’s network “anchor product” and any incremental costs beyond 3Km would be added to the price of that anchor product.

11. It is self-evident that an efficient FTTC network with a capability constraint of up to 1.5km does not require capital expenditure on ducts beyond that distance. It does not require telegraphs poles deployed at 2km, 3km or beyond 5km. An efficient FTTC network will avoid significant joint and operating costs associated with maintaining lines beyond 1.5km. ComReg justified loading all joint and common costs into the FTTC price as “long lines” could not contribute to these costs by virtue of the “uneconomic²” nature of these lines. The joint and common costs driven by those uneconomic lines however are entirely avoidable for an efficient FTTC network and any suggestion they would be at the same level even if the network was constrained to 1.5Km drops is simply false.
12. The majority of the uneconomic lines sit in the FACO market and are being cross-subsidised by FTTC (WLA market) prices.
13. So, while ComReg’s decision suggests it did not agree that “including an additional margin” to cross subsidise those loss-making SB-WLR lines was appropriate, that is precisely the effect of what it did. In its decision, as already referenced, ComReg gave the impression that those additional costs related only to joint and common costs³ but the submission made on ComReg’s behalf during court proceedings in 2019 made clear that the “incremental costs”, i.e. including incremental capital expenditure on lines beyond 3km, was being recovered by FTTC prices. It is difficult to reconcile that fact with ComReg’s suggestion that including “additional margin” in the FTTC price would be inappropriate as it would distort investment signals – which clearly it does.
14. Sky will expand on these issues in response to the Access Network Review. However, given that the FACO cost orientation obligation (on SB-WLR) is what gave rise to the premium/subsidy being placed on FTTC prices so that Eircom could recover its costs

² It is telling that the use of the classification of “uneconomic lines” is typically used in Universal Service assessments. It is also notable that Eircom has not made any application for Universal Service Funding following on from this decision. It clearly has no grounds for such a claim when FTTC customers are effectively covering the costs of all “uneconomic” customers.

³ E.g. see paragraph 6.221 of D11/18 and footnote 159





on SB-WLR, **the issue of that subsidy must form part of any decision to withdraw the FACO cost orientation obligation in the Urban FACO Market.** If Eircom is no longer constrained on pricing in the Urban FACO Market, there is simply no justification for FTTC consumers in that area being forced to fund the Rural FACO market and withdrawal of that funding must form part of the review. This is because Eircom **can raise any alleged losses in rural areas from the de-regulated Urban FACO market given that nationally averaged prices will no longer be mandated.** Indeed the pricing Eircom has proposed on a voluntary basis which oddly forms part of this consultation, appears to be considerably above cost and as such would likely go a long way to covering this allegedly required subsidy that should not longer (nor indeed ever) sit with FTTC customers.

15. Crucially, as per **Figure 34** of ComReg 20/46, Eircom retail is benefitting disproportionately from the WLA – FACO cross subsidisation policy with as much as 76% of the Residential Standalone Market Share in rural areas. This exacerbates the unfairness of the current regulatory regime whereby the FTTC customers of retail competitors such as Sky and Vodafone are not required to subsidise the rural SB-WLR customers of Sky and Vodafone, but rather are required to subsidise those customers of Eircom retail.

Greater transparency in consultation process needed going forward

16. Sky is calling on ComReg to provide greater transparency during the consultation process than has occurred in the past. While we note that ComReg has indicated that it will not consider submissions to this consultation beyond 12 August 2020, Sky does not consider this to be realistic based on past experience. For example, ComReg has consistently given consideration to submissions received right up until the publication of a final decision. In fact, there is a growing body of evidence that suggests the bulk of Eircom’s substantive submissions are made to many consultations after the closing date to such consultations.
17. It should be noted that Sky has also made submissions to various consultations after the signalled closing timelines. For better or worse there is now an expectation among stakeholders that submissions well beyond the closing of consultations will be considered. While ComReg may be required to take account of post “closing date” submissions made by interested parties depending on the substance and relevance of those submissions, in Sky’s view, greater transparency is required in how that process is handled.
18. In this regard ComReg recognise that it is important to published non-confidential versions of submissions received to consultation shortly after those are received as



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acknowledged in 13.5 of the consultation. However, submissions made by interested parties subsequent to that initial round only appear as annexes⁴ to the final decisions. There is a clear disconnect between ComReg's approach to transparency on submissions received as part of a response to consultation, which are published long before a decision is issued, and the submissions that are made subsequently.

19. Sky consider a transparent consultation process should ensure that all interested parties are made aware of all submissions made to consultations prior to a final decision. Facilitating this would simply require maintaining a tracked document with links to submissions from interested parties.
20. For example, Sky would note in the context of the WACC review (consultation 19/54) Eircom made a lengthy presentation to ComReg in October 2019, none of which was deemed to be confidential yet was not made available until ComReg notified its draft Decision to the European Commission under the Article 7 procedure. Eircom also sent an email to ComReg just two weeks prior to the final decision being issued. Both the presentation and the email in question made substantive points as to why ComReg should not update existing prices with the new WACC. Ultimately that is what ComReg proposed in its draft Decision which represented a change in the position it had outlined in the consultation⁵. It is also a position the European Commission does not agree with. Whether or not ComReg was swayed by arguments presented by Eircom is immaterial to the point at issue, what is critical is that transparency in relation to these submissions is maintained.
21. In the run up to the final decision on D11/18, a Freedom of Information request by Sky revealed a significant degree of engagement between ComReg and Eircom in relation to the NGA cost model. ComReg shared a new version of the NGA cost model (the "*model of 29th of March*"⁶) with Eircom which it provided "*initial*" and "*detailed*" views on back to ComReg. Sky consider it was entirely inappropriate for ComReg to be seeking Eircom's views in this bi-lateral manner, including via meetings/calls. Eircom had an opportunity to comment on the original NGA model in response to consultation 17/26 just as all other stakeholders had. It is clear that ComReg's engagement was not a simple data request but rather seeking substantive comments from Eircom on a new iteration of the model. The fact that the model altered significantly between consultation and final decision, highlighted by the material increase in the proposed FTTC price amongst others, made transparency on these

⁴ For example see Annex 8 of D11/18.

⁵ The European Commission ultimately disagreed with ComReg's view and unequivocally recommended that existing prices should be updated with the new WACC.

⁶ As referenced in email from ComReg to Eircom on 8 May, 2018





issues all the more important. It is a source of concern that the comments received back from Eircom and minutes of meetings/calls in relation the NGA cost model do not appear in Annex 8 to the Decision and that other stakeholders were not given the opportunity to comment on the amended NGA cost model as part of the public consultation.

22. To be clear, Sky is not suggesting any impropriety (beyond a lack of transparency) on ComReg's part in bringing attention to these past occurrences. Sky is seeking only to highlight the need for, and to advance proposals for, greater transparency in the public consultation process going forward.
23. Sky considers that all engagements/submissions like the ones outlined above ought to be clearly communicated to all stakeholders. Where meetings or email engagements on substantive issues occur during the consultation process the correspondence should be published subject to standard confidentiality procedures, with a description of the purpose of the engagement. Such a process can be facilitated through the aforementioned submission/engagement tracker document.

Withdrawal of obligations on FACO must not be permitted until Eircom comply with soft migrations obligations under D10/18

24. One of the key supply side substitution options identified by ComReg is VOIP over FTTC and FTTH NGA. In order that this is a viable alternative for operators currently consuming Eircom's POTs based element of FTTC, which would be deregulated as part of the Urban FACO Market under ComReg's current proposals, Eircom must facilitate soft migrations from POTS based VUA to Standalone NGA.
25. Both Sky and Vodafone raised concerns about this issue in response to consultation that lead to ComReg D10/18⁷. Eircom claimed it was not technically possible to facilitate soft migrations in this manner. ComReg rejected Eircom's claim in this regard⁸.
26. ComReg justified the need for a Migrations obligation on Eircom, the purpose of which was *"to avoid the requirement for a technician visit to the exchange....when an SB-WLR and VUA service is being migrated to SA VUA, as this is likely to unnecessarily restrict the volume of migration orders that can be processed at any one time"*. ComReg further noted that *"this would have the impact of reducing customer*

⁷ See 7.184 of D10/18

⁸ See 7.185 of D10/18





switching which could have a negative impact on competition". ComReg noted that the soft migration process was *"straightforward to implement"*⁹.

27. Eircom's obligation to facilitate soft Migrations, including "VUA soft migrations" is covered by 7.2 (X) of the Decision Instruments attached to D10/18. Eircom has not complied with this obligation almost two years after D10/18 was published. Sky understand that its wholesale partner, BT Ireland, recently provided evidence to ComReg that there is currently no fit for purpose soft migration solution in place. Sky consider ComReg ought to take enforcement proceedings against Eircom to ensure it complies with this obligation.

28. There can be no justification for withdrawal of FACO obligations until Eircom comply with its obligations under D10/18 given ComReg's conclusion that failing to provide for VUA Soft Migrations will have a detrimental impact on competition. ComReg must be satisfied that a fit for purpose soft migration process is established before it permits withdrawal of any FACO obligations

Sky 19 August, 2020

⁹ See 7.189 of D10/18





Non Confidential Version

**Market Review
Response to Consultation and Draft Decision**

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

ComReg Document 20/46
Vodafone Response to Consultation

Introduction:

We appreciate the opportunity to comment on this consultation and trust that our comments are helpful to ComReg. We remain at your disposal to discuss our submission to the consultation, or any other aspect relevant in the context of the consultation. We may also engage ComReg further following submission for issues that may be considered relevant to this consultation document.

To enquire about our response please contact:

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At a high level, Vodafone can see the rationale for ComReg's proposal to remove obligations on eir in the RFTS market subject. However there are serious underlying concerns which need to be addressed by ComReg.

1. ComReg's proposal is to set a wholesale NGA roll-out target of 80% which Vodafone believes is too low. In our view there is a potential for competitive issues to arise in the remaining 20% with the potential for leaving a large cohort of customers with limited access to competitive offers.
2. Sunset periods require review and must be extended.
3. It is a concern that customers who cannot avail of VoB RFTS (for genuine reasons) can, in effect, be forced to take an eircom Retail RFTS service based on the eircom FNA network.
4. We have a concern around the removal the obligation to provide low value CPE rental.
5. There is a concern around our ability to compete for multi-site business across urban and regional FACO areas and a higher risk of margin squeeze in such offers.
6. There is also concern that the market for BRA lines is heavily concentrated in urban areas and access obligations will be removed for this key customer group.
7. Migration issues will need to be resolved.

Our responses to the questions raised are set out in detail below.

Response to Consultation Questions

Question 1: Do you agree that the main developments identified in the provision of RFTS are those which are most relevant in informing the assessment of the Relevant Markets?

Vodafone broadly agrees that the main developments identified in the provision of RFTS (whether in the upstream or downstream markets) are relevant in informing the assessment of the retail and wholesale markets (Relevant Markets). Vodafone notes the retail trends and developments identified by ComReg and is in broad agreement with same.

Question 2: Do you agree with ComReg's preliminary conclusions on the product market assessment for the Relevant RFTS Markets?

Vodafone broadly agrees with ComReg's preliminary conclusions on the product market assessment for the Relevant RFTS Markets - namely the existence of 3 product markets - i) LL RVCT standalone over PSTN/BRA & Managed VOB over NGA, ii) LL RVCT in a bundle over PSTN/BRA & Managed VOB over NGA and iii) HL RVCT over FRA and PRA and Managed VOIP over NGA standalone or in a bundle. Though Vodafone does have serious concerns as to the prevalence of BRAs in the Urban FACO market (85% of BRAs exist in Urban FACO areas) and the potential for withdrawal of upstream service options for up to 20% of premises in deregulated areas as outlined in our response to Question 11 below.

Question 3: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant RFTS Markets?

Vodafone broadly agrees with ComReg's preliminary conclusion on the geographic market assessment for the Relevant RFTS Markets - namely the existence of a single national market for each product market.

Question 4: Do you agree with ComReg's preliminary conclusions on the product market assessment for the Relevant FACO Markets?

Vodafone broadly agrees with ComReg's conclusion in relation to the product markets and its assessment of direct demand-side and supply-side and indirect retail constraints and agrees with paragraphs 5.324 to 5.329 but in the context of geographic differences due to the existence of NG broadband networks in the succeeding paragraphs in Section 5 (particularly as ComReg states itself in 5.262 "that it is finely balanced as to whether RFTS provided by means of CATV by

Virgin Media would likely exert a sufficiently immediate and effective indirect constraint in either of the FACO markets, such that they warrant inclusion in those markets").

Question 5: Do you agree with ComReg's preliminary conclusions on the geographic market assessment for the Relevant FACO Markets?

In 5.339, ComReg states that it "considers that NG Broadband network presence is likely to be a key determinant of differences in competitive conditions between EAs" - Vodafone agrees broadly with this assertion.

Vodafone also agrees that the relevant geographic unit should be the Exchange Area as outlined in 5.342.

Vodafone agrees with ComReg's comment in 5.353 that there are "likely to be clear difference in geographic entry and expansion condition in the geographic scope of the FACO markets" due to rollout of the various FTTx/CATV network(s) in different EAs and capability to provide FACO or RFTS over same. This in Vodafone's view is the key driver of different competitive conditions in relevant EAs (more so than sub-national market shares and to a certain extent sub-national pricing.).

In 5.401, ComReg considers that demand from AS for FACO is likely to be national in scope - Vodafone agrees with this and it is **key** to our subsequent comments below.

Ultimately Vodafone agrees with 5.403 that competitive conditions are moving "to a situation of differentiation across the State" driven the by the roll-out of NG broadband.

Vodafone also agrees with 5.414 that the number of premises served in an EA by NG broadband is the "necessary condition to distinguish the differences in competitive conditions between EAs" (note: it acknowledges 5.421 where the 80% coverage represents wholesale NG coverage). However, Vodafone has serious concerns with a cumulative coverage level of 80% in 5.416 as being too low (though strictly speaking it can be argued that it is large enough to generate a "competitive constraint") and seems to be a somewhat arbitrary threshold mechanism (particularly in light of Vodafone's concerns in relation to the de-regulation of Urban FACO EAs as further outlined in some of comments in our answers to Question 11 below). Vodafone accepts theoretically that 100% NG coverage may be unlikely to be achieved in an all EAs for various reasons. It would therefore, suggest that 95% should be the criteria.

In relation to the 80% metric, and to confirm it's understanding as to what is being proposed is correct, Vodafone would ask in A.950, page 632, that ComReg confirms that the number of non-contestable lines estimated at 15,130 represents the total number of existing Urban FACO lines that cannot be served by an Access Seeker that purchases WLA/WCA from eircom (i.e. it does not indicate whether or not they can be served by Virgin Media; the use of "NG Broadband" and "NGA Broadband" is causing confusion even though Vodafone believes it understands the difference). Vodafone is also trying to relate it (15,130) to

figures in Table A9.8, page 629 - 20% of 1,117,426 is approximately 234,885 representing the maximum (i.e. 20%) of FACO lines that theoretically could be non-contestable if all Urban FACO EAs had exactly 80% NGA broadband coverage.

Question 6: Do you agree with ComReg's preliminary conclusions on the 3CT for the Relevant RFTS Markets?

Vodafone does not have a detailed position on ComReg's preliminary conclusion on the 3CT for the Relevant RFTS Markets. Though in broad terms it believes i) barriers to entry are not unduly high, ii) the market structure tends towards being competitive and iii) competition law alone is not sufficient to address market failure implying regulation can be withdrawn from Relevant RFTS Markets - namely cost accounting obligations in relation to bundled LLVA and HLVA markets and price control in standalone LLVA markets given concerns in relation to withdrawal of price control is likely to be addressed by GAP (geographically averaged price) obligations in the 2016 USO decision.

Vodafone, however, does have concerns on whether removal of existing RFTS pricing and cost accounting obligations does not provide an opportunity to cause a margin-squeeze in Urban and Regional FACO areas vis-à-vis the prices eircom can levy at the retail level (e.g. in multi-site tenders for fixed voice services across multiple EAs). Vodafone has made clear its concerns around margin squeeze tests. ComReg are likely of the view that these concerns have been addressed in the 2015 FACO Decision, the 2016 Access Pricing Decision, the 2018 WLA/WCA Decision and the 2018 Bundles Decision. We would request ComReg to set out in more detail the impact of their proposals on margin squeeze assessment moving forward to ensure operators can compete effectively in urban areas and for multisite tenders across Urban and Regional FACO locations.

Question 7: Do you agree with ComReg's preliminary conclusions on the market assessment for the Relevant FACO Markets?

Vodafone broadly agrees with ComReg's "Preliminary conclusions on barriers to entry" on Criterion 1 of the 3CT as summarised in 7.135 to 7.138.

Vodafone broadly agrees with ComReg's "Overall Preliminary Conclusions on Tendency of relevant FACO Markets toward Effective Competition" on Criterion 2 of the 3CT as summarised in 7.181 to 7.188.

Vodafone agrees with ComReg's "Preliminary Conclusions on insufficiency of Competition Law" on Criterion 3 of the 3CT as summarised in 7.195.

Vodafone agrees with ComReg's "Preliminary Conclusion on Existing Competition" - of the SMP assessment in 7.237 to 7.239.

Vodafone agrees with ComReg's "Preliminary Conclusion on Potential Competition in Regional FACO Markets" of the SMP assessment in 7.249

Vodafone agrees with ComReg's "Preliminary Conclusion on CBP Assessment" of the SMP assessment in 7.298 to 7.299

Consequently, as a result the above, Vodafone agrees that eircom has SMP in the HL & LL Regional FACO Markets as per 7.305. Vodafone also broadly agrees at a conceptual level that eircom does not have SMP in the LL & HL Urban FACO Markets (however this is very much subject to concerns expressed above and below).

Question 8: Do you agree with ComReg's preliminary conclusions on the market assessment for the RFTS Markets, absent regulation in the Urban FACO Markets?

Vodafone wishes to raise a question in relation to points mentioned in 8.22 (in relation to a concern that may not be clarified elsewhere within the consultation) in relation to the degree of overlap between Urban WCA and Urban FACO areas. Can ComReg confirm whether there is some or full overlap between such areas? If there is only "some overlap", then it would imply that alternative SPs would need to deploy VUA in such areas where Urban WCA coverage coincides with Urban FACO (or avail of WCA on a commercial basis) such that RFTS could be provided. Vodafone notes ComReg's comment in 8.25 that relates to this question - "In the footprint of the Urban FACO Markets, Access Seekers are likely to be able to offer RFTS to end users on the basis of the presence of wholesale NGA broadband networks, even in an MGA where Eircom withdraws supply of SB-WLR." - which does not seem to fully answer our question (as it refers to "likely to be able to offer RFTS").

Question 9: Do you agree that the competition problems and the associated impacts on competition and end users identified are those that could potentially arise in the Regional FACO Markets?

Vodafone agrees that the competition problems and associated impacts on competition and end users identified by ComReg are those that could potentially arise in the Regional FACO Markets.

Question 10: Do you agree with ComReg's preliminary conclusions on remedies in the Regional FACO Markets?

Vodafone has serious concerns about ComReg's proposal in 10.83 to remove eircom's obligation to provide access to wholesale Low Value CPE rental particularly where there may be an incentive for eircom Retail to require return of such CPE in the event that the customer transfers to an alternative SP from eircom retail. Vodafone would accept such a proposal provided it was "end-user" led.

Vodafone supports ComReg's proposal in 10.84 requiring eircom to continue to have an obligation in providing BRA in Regional LL FACO market. We refer again to our concerns in Urban areas on BRA.

Vodafone agrees with ComReg's proposal to obliging eircom to provide a NG Interconnection service as outlined in 10.96 though it would comment that eircom is already currently developing such a product.

In relation to 10.101, Vodafone would request that such an obligation to transport to Primary exchanges should also apply (though Vodafone notes ComReg's comments in 10.104 regarding removal of Primary and Secondary Interconnection Layers due to introduction of MSANs). Either way SPs should not be disadvantaged commercially by migration from CG Interconnection to NG Interconnection.

Vodafone notes ComReg proposal to withdraw eircom's obligation to provide the PAC Service in 10.155.

Vodafone welcomes ComReg's proposals to maintain cost-orientation obligations on WLR (PSTN, BRA, FRA and PRA) - albeit BRA/FRA/PRA subject to maximum pricing not subject to Separate ANM Pricing Consultation , Ancillary, Interconnection and Colocation Services.

Otherwise, Vodafone generally agrees with ComReg's preliminary conclusions on remedies in the Regional FACO Markets.

Question 11: Do you agree with ComReg's preliminary conclusions on the withdrawal of SMP remedies on the Urban FACO Markets?

Vodafone (aside from concerns about removal of regulatory obligations below) would urge that sunset periods of 12 months and 24 months at minimum shall apply for "new provide orders" and "existing lines" given most RFTS contracts are at least 12 months and investment will be required in platforms.

Vodafone has **serious** concerns about removal of regulatory obligations in the Urban FACO markets:

- i) **Bulk migration/migration from WLR-based FACO:** In the event, Vodafone, is unable to agree a commercial contract for continued provision of WLR-based services in Urban FACO Markets, Vodafone will be obliged to migrate significant volumes of customers to alternative solutions (Including Managed VOB) to continue to provide RFTS services to such customers. Vodafone requires efficient and cost-effective individual and bulk migration processes to support such migrations - i.e. migration to open eir NG broadband, number porting and associated reverse paths. Vodafone does not believe the reverse process in particular is sufficiently robust and should be made available without requiring dispatch of field

technician. Vodafone also requires a timely response to whether individual addresses can support Urban versus Rural FACO based on eircode - currently the LE process is too slow.

- ii) **Migration Costs and Orders:** Costs effective/zero cost single and batch migrations are a pre-requisite. Migrations must not consume existing order slots and migration support shall be available for a period after expiry of sunset clauses. Migration orders must be capable of linking to combined in home services orders which may be necessary to support re-wiring for existing challenges in relation to alarms etc.
- iii) **Avoid restriction of competitive offers to customers who cannot move:** In the event Vodafone is unable to agree contract for continued provision there are situations where customers refuse or may be limited in their ability to migrate to VOIP based services due to, for example, a stated preference for "basic telephony services" and/or concerns about impacts on alarms, health monitoring services etc.. Vodafone would suggest that eircom's downstream arm could seek to take advantage of such situations. Vodafone would request that in such cases involving end-customers that are genuinely concerned and such concerns are communicated by Vodafone to eircom in good faith, then eircom would continue to provide WLR at same the price level as currently exists in the market (i.e. August 2020) until such time as eircom retires it's equivalent retail offering.
- iv) **80% threshold is too low:** Vodafone believes that the 80% NG broadband coverage criteria used to determine an EA as being competitive is too low. Given that NG broadband available as WLA/WCA is seen as a key enabler of competition in the Urban FACO, Vodafone would strongly suggest a figure of 95% or something approaching 100% is more suitable. In the event that NG broadband is not available in the "up to" remaining 20% of premises in an EA, SPs that normally avail of WLA/WCA inputs to provide RFTS services have no alternative means of providing RFTS where these inputs are not available other than LLU. Given that LLU take-up is continuing to decline and are at a very low level, it is unlikely to provide an efficient, low cost, volume-based alternative to NGA for provision of RFTS.
- v) **Support on CPE:** Vodafone requires that eircom does not mandate return of low-value CPE to be used as an incentive by eircom's downstream arm to prevent transferring services to another SP.
- vi) **BRA market:** Vodafone has serious concerns about removal of eircom's obligation to provide BRA in Urban FACO EAs given that ComReg has indicated that 85% of BRAs exist in Urban FACO areas (particularly where customers wish to continue to avail of BRA services). Whilst Vodafone was initially of the view that it is in the same product market as PSTN access,

the level of BRAs in Urban FACO areas and the advantages it gives eircom in the case of "customer inertia" could potentially create a real concern for Access Seekers.

- vii) **Purpose of 2 year assessment:** Vodafone suggests that the 2 year "Mid-Term Assessment" takes place not only with a view to easing regulation in newly identified "Urban FACO Market" EAs following further NG broadband network roll-out but also as a mechanism to review eircom's behaviour in the existing Urban FACO markets - e.g. unreasonable behaviour in negotiating commercial contracts for continued procurement of WLR-based services. Though Vodafone does note ComReg's statement in 12.60 below.
- viii) **Voluntary offer:** Vodafone acknowledges eircom's voluntary offer and would suggest that it provides a useful starting point for commercial negotiations (subject to the outcome of the Separate ANM Pricing Consultation) on the basis that it attempts to provide certainty in terms of access and pricing for a minimum of 2 years.

Question 12: Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment?

Vodafone agrees with ComReg's statement in 12.54 "that Option 4 represents the most justified, reasonable and proportionate of the approaches to regulation of the Regional FACO Markets".

Vodafone agrees with ComReg's statement in 12.60 - i.e. "ComReg also proposes to continue to monitor the effectiveness of competition within the Urban FACO Markets and Relevant RFTS Markets, notwithstanding the proposed removal of regulation. In this respect, ComReg reserves its right to re-examine competitive conditions within these markets and, if appropriate, to intervene accordingly." However, as stated above Vodafone would request 24 month and 12 month sunset periods.

ENDS