



Consultation

**Market Review – Retail and Wholesale  
Payphone Access and Calls Markets**

<b>Document No:</b>	<b>06/40</b>
<b>Date:</b>	<b>17 08 2006</b>

All responses to this consultation should be clearly marked:-  
“Reference: Submission re ComReg YY/NN” as indicated above,  
and sent by post, facsimile, e-mail or on-line at [www.comreg.ie](http://www.comreg.ie)  
(current consultations), to arrive on or before 5.30 pm Friday 29  
September 2006, to:

**Ms. Sonja Owens**  
**Commission for Communications Regulation**  
**Abbey Court**  
**Irish Life Centre**  
**Lower Abbey Street**  
**Freepost**  
**Dublin 1**  
**Ireland**

**Ph: +353-1-8049600 Fax: +353-1-804 9680**

**Email: [Sonja.owens@comreg.ie](mailto:Sonja.owens@comreg.ie)**

Please note ComReg will publish all submissions with the  
Response to Consultation, subject to the standard confidentiality  
procedure.

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## 1 Executive Summary

- 1.1 As part of ComReg's review of the fixed retail access and calls markets<sup>1</sup> (markets 1-6 of the *Relevant Markets Recommendation*)<sup>2</sup> ComReg considered access to the public network via payphones. ComReg was of the view that payphones represent a form of access which is a bundled service for which people pay a single charge for access and calls. The preliminary conclusion outlined in the initial consultation was that payphone services were in a separate market. This preliminary finding was subsequently notified to and accepted by, the European Commission.<sup>3</sup>
- 1.2 ComReg therefore committed to review a retail market for payphone access and calls. As the proposed market was not listed in the *Relevant Markets Recommendation*, it is necessary that ComReg assesses the market under the three criteria referred to in the *Relevant Markets Recommendation*<sup>4</sup> to establish whether the market is susceptible to *ex ante* regulation.
- 1.3 The new communications regulatory framework requires that ComReg defines relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations. In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.
- 1.4 In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Markets Recommendation* and the European Commission's *Guidelines on Market Analysis and Significant Market Power* ("*The Guidelines*").
- 1.5 ComReg would welcome comments from all interested parties on the questions posed in this market review and will accept written comments on or before 5.30 pm Friday 29 September 2006. Under Article 5 of the Framework Regulations and in order to promote further openness and transparency, ComReg will publish the names of all respondents subject to maintaining confidentiality.
- 1.6 ComReg will publish a response to consultation which will review and take account of any comments received. This document will be published and notified to the European Commission. As required by Regulation 20 of the Framework Regulations, it will also be made accessible to the National Regulatory Authorities in other member states of the European Community prior to ComReg taking a final decision.

### ***Preliminary Findings***

- 1.7 ComReg proposes to define two payphone service markets: a retail market for payphone access and calls and an equivalent wholesale market for the provision of

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<sup>1</sup> ComReg Document No. (04/95) – see extraction included in Appendix A.

<sup>2</sup> Retail Access Market Review– National Consultation (04/94) and Notification (05/25) & Retail Calls Market Review - National Consultation (04/95) and Notification (05/26).

<sup>3</sup> Comments pursuant to Article 7(3) of Directive 2002/21/EC. Brussels, 25-04-2005.

<sup>4</sup> The presence of high and non-transitory entry barriers; the state of competition behind the barriers of entry and the application of competition law alone would not adequately address the market failure(s) concerned. If the market passes these criteria, then a market analysis should be conducted.

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access facilities to other authorised operators for the delivery of payphone access and calls to the end user.

- 1.8 A single retail market for public and private payphone services has been identified which does not contain pre paid calling card or mobile services. Furthermore, calls from landlines are not considered to be demand or supply-side substitutes for payphone access and call services. ComReg is of the preliminary view that this market is national in geographical scope.
- 1.9 As already indicated given that this market is not one included in the *Relevant Markets Recommendation* ComReg carried out an assessment of the ‘three criteria’<sup>5</sup>. It was concluded that the retail market does not have barriers to entry (where CPS<sup>6</sup> and SB-WLR<sup>7</sup> are available) and therefore should not be subject to ex-ante obligations. As a consequence all retail regulation pertaining to payphones<sup>8</sup> must be removed.
- 1.10 ComReg also identified a wholesale market for the provision of access facilities to other authorised operators for the delivery of payphone access and calls to the end user. Evidence suggests that the market is subject to high barriers to entry, does not tend towards competition and that competition law is insufficient to address any problems. Therefore, the market may warrant *ex ante* regulation, if any operator is found with SMP. ComReg identified in the wholesale market analysis that eircom is in a position to act independently of its competitors. This includes competitors providing services via self supply, directly or indirectly via resellers. ComReg therefore proposes to designate eircom with SMP.
- 1.11 ComReg has decided the most appropriate remedy to ameliorate SMP in the wholesale payphone access market is to mandate the non discriminatory<sup>9</sup> provision of CPS and SB-WLR. ComReg also proposes to impose an obligation on eircom not to exert a margin squeeze from the wholesale level.
- 1.12 At this point, ComReg suggests that the range of obligations proposed is proportionate and justified and meets ComReg’s objectives in terms of the promotion of competition, the development of the internal market and the promotion of the interests of end-users. The impact of this decision is further analysed in the Regulatory Impact Assessment contained in section eleven of this document.

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<sup>5</sup> See pages 9-12 of the Explanatory Recommendation and analysis contained in Section 4 of this document.

<sup>6</sup> Carrier Pre Select – See Appendix D for further details.

<sup>7</sup> Single Billing-Wholesale Line Rental– See Appendix D for further an explanation of how SB-WLR works.

<sup>8</sup> See Appendix D for an overview of retail regulation pertaining to payphones.

<sup>9</sup> In terms of price and quality.

## 2 Introduction

### Objectives under the Communications Regulation Act, 2002

- 2.1 Section 12 of the Communications Regulation Act, 2002 outlines the objectives of ComReg in exercising its functions. In relation to the provision of electronic communications networks, electronic communications services and associated facilities these objectives are:
- (i) to promote competition;
  - (ii) to contribute to the development of the internal market, and
  - (iii) to promote the interests of users within the European Union.
- 2.2 Measures imposed as a result of this consultation will aim to achieve these objectives. The interests of users can be promoted by protecting them, among other things, from excessive pricing for access to payphone services in Ireland. The focus on remedying current and potential competition problems will promote effective competition leading to operator efficiency thereby providing choice, price and quality to end users.

### Regulatory Framework

- 2.3 Four sets of Regulations,<sup>10</sup> which transpose into Irish law four European Community directives on electronic communications and services,<sup>11</sup> entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the *Privacy and Electronic Communications Directive*, was transposed into Irish law on 6 November 2003.
- 2.4 The new communications regulatory framework requires that ComReg define<sup>12</sup> relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations. Further, the Framework

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<sup>10</sup> Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the *Framework Regulations*"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the *Authorisation Regulations*"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the *Access Regulations*"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the *Universal Service Regulations*").

<sup>11</sup> The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the *Framework Directive*"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the *Specific Directives*"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the *Authorisation Directive*"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the *Access Directive*"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the *Universal Service Directive*"), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the *Privacy and Electronic Communications Directive*"), OJ 2002 L 201/37.

<sup>12</sup> Framework Regulations 26.

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Regulations require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market.

- 2.5 As part of ComReg's review of the retail access and calls<sup>13</sup> markets (markets 1-6 of the *Relevant Markets Recommendation*)<sup>14</sup> ComReg considered access to the public network via payphones and was of the view that payphones represent a form of access which is a bundled service for which people pay a single charge for access and calls. It was concluded in the initial consultation that payphones were in a separate market. This was subsequently accepted by the European Commission.<sup>15</sup>
- 2.6 ComReg therefore committed to review a retail market for payphone access and calls. As the proposed market is not listed in the *Relevant Markets Recommendation* it is necessary that ComReg assess the market under the three criteria<sup>16</sup> to establish whether the market should be subject to *ex ante* regulation.
- 2.7 In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Markets Recommendation* and the European Commission's *Guidelines on Market Analysis and Significant Market Power* ("*The Guidelines*").

## ComReg procedure

- 2.8 ComReg has collected market data from a variety of internal and external sources, including users and providers of electronic communications networks and services ("ECNs<sup>17</sup> and ECSs<sup>18</sup>"), and from consumer surveys commissioned by ComReg, in order to carry out its respective market definition and market analysis procedures based on established economic and legal principles, and taking the utmost account of *The Guidelines*.
- 2.9 The results of ComReg's consumer surveys are referred to throughout this report. In particular, ComReg commissioned amárach to carry out residential consumer research on users regarding their usage of payphone, fixed and mobile services<sup>19</sup>. Also, ComReg has considered the result of the 2003 and 2004 tns MRBI surveys Residential Telecommunications Survey<sup>20</sup>.

## Liaison with Competition Authority

- 2.10 As noted above, there is a requirement on ComReg under Regulation 26 and 27 of the Framework Regulations to carry out an analysis of a relevant market that has been defined. Regulation 27 (1) of the Framework Regulations also requires that, as

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<sup>13</sup> ComReg Document No. (04/95) – see extraction included in Appendix A

<sup>14</sup> Retail Access Market Review– National Consultation (04/94) and Notification (05/25)& Retail Calls Market Review - National Consultation (04/95) and Notification (05/26).

<sup>15</sup> Comments pursuant to Article 7(3) of Directive 2002/21/EC. Brussels, 25-04-2005.

<sup>16</sup> The presence of high and non-transitory entry barriers; the state of competition behind the barriers of entry and that the application of competition law alone would not adequately address the market failure(s) concerned. If the market passes these criteria, then a market analysis should be conducted.

<sup>17</sup> Electronic Communications Networks.

<sup>18</sup> Electronic Communications Services.

<sup>19</sup> ComReg Trends Survey. Wave 3 2005. Survey results September 2005. ComReg Document Number 05/86a; Wave 4 2005, Survey results December 2005. ComReg Document Number 06/08a.

<sup>20</sup> ComReg Document Number 04/30c.

soon as possible after ComReg defines a relevant market, ComReg shall carry out an analysis of such market, in accordance, where appropriate, with an agreement with the Competition Authority under section 34 of the Competition Act 2002<sup>12</sup>. In December 2002, such a co-operation agreement was signed between ComReg and the Competition Authority for a period of three years<sup>13</sup>, which upon completion was automatically extended.

## Consultation

2.11 All comments to this Public Consultation are welcome. However, respondent are requested to provide comments referenced to the relevant question numbers from this document. The consultation period will run from Thursday 17 August to Friday 29 September 2006.

## Structure of this document

2.12 The remainder of this consultation document is structured as follows:

- **Section 3** presents ComReg's preliminary conclusions on the definition of the market for retail payphone services *in the presence of regulation*. This section consists of a review of the market definition procedure and its scope, as well as demand and supply-side assessments;
- **Section 4** presents ComReg's preliminary conclusions on the assessment of the market for retail payphone services under the three criteria and presents ComReg's preliminary view on whether the market should be subject to ex-ante regulation;
- **Section 5** presents ComReg's preliminary conclusions on the definition of the market for retail payphone services *in the absence of regulation* both in the retail and wholesale market;
- **Section 6** presents ComReg's market analysis of the wholesale market for facilities for the provision of retail payphone services. This section consists of a review of the market definition procedure and its scope, as well as demand and supply-side assessments;
- **Section 7** presents ComReg's preliminary conclusions on the assessment of the market for wholesale payphone access under the three criteria and presents ComReg's preliminary view on whether the market should be subject to ex-ante regulation;
- **Section 8** presents ComReg's market analysis for the wholesale payphone access market and presents ComReg's view on whether this market is effectively competitive;
- **Section 9** presents ComReg's preliminary view on those undertakings with significant market power in the wholesale payphone services market;
- **Section 10** provides a discussion of the application of remedies to competition problems. The general principles associated with remedies are outlined. A range of possible remedies is identified, and likely remedies proposed;
- **Section 11** outlines the regulatory impact assessment based on the proposed remedies which needs to be conducted in relation to any proposed regulatory intervention regarding these markets;
- **Section 12** provides details with regard to the submission of comments on this consultation document.



### 3 Retail Market Definition in the Presence of Regulation

#### Market Definition Procedures

- 3.1 The market definition procedures are designed to identify in a systematic way the competitive constraints that providers of ECNs<sup>21</sup> and ECSs<sup>22</sup> encounter. They do so in a way which also facilitates subsequent market analysis procedures. According to the European Court of Justice,<sup>23</sup> a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable with its products, not only in terms of the objective characteristic of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the product in question. In essence, this leads to a definition of the market's boundaries.
- 3.2 ComReg is required to carry out its analysis in the absence of regulation<sup>24</sup>. However, this should be qualified in that ComReg should carry out its analysis in the absence of regulation in the market concerned (in this case the retail market<sup>25</sup>) under this regulatory framework but including regulation which exists outside this market e.g. the wholesale market.
- 3.3 As a starting point ComReg defines the market for retail payphone access and calls in the absence of retail regulation but in the presence of wholesale regulation. This is followed by a review of the retail market in the absence of both retail and wholesale regulation. A review of the wholesale payphone market is then carried out.
- 3.4 In respect to Universal Service Obligations<sup>26</sup>, ComReg previously considered that the definition of a 'public payphone' should relate to those located on the street and in other public areas available to the general public at all times (i.e. unrestricted access)<sup>27</sup>. This did not include payphones located in private areas which have restricted access or are typically covered by commercial arrangements between the premises owner and provider (and where the access to a payphone is dependent on the pre-existence of a commercial relationship), e.g. pubs, hotels, restaurants and shopping malls.
- 3.5 On the other hand, as part of the Payphone Access Charge (PAC) review, payphones subject to regulation were limited to those defined as a 'public pay

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<sup>21</sup> Electronic Communications Networks.

<sup>22</sup> Electronic Communications Services.

<sup>23</sup> See, for example, Case 322/81, Michelin v. Commission [1983] ECR 3461, as well as the Commission Notice on the definition of relevant markets for the purposes of Community competition law ("the Commission Notice on Market Definition"), OJ 1997 C 372/3, and the SMP *Guidelines*.

<sup>24</sup> Recitals 9 and 16 of the Relevant Markets Recommendation.

<sup>25</sup> An overview of relevant regulation pertaining to payphones and the approach ComReg has adopted to address the impact of this regulation is outlined in Appendix D.

<sup>26</sup> According to the Universal Service Directive a "public pay telephone" is defined as a telephone available to the general public for the use of which the means of payment may include coins and/or credit/debit cards and /or pre payment cards, including cards for the use with dialling codes. Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)

<sup>27</sup> See The Future Framework for the Regulation of Universal Service in the Irish Telecommunications Market (ComReg Document 03/68).

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telephone' which was defined as a telephone available to the general public for the use of which includes payment by coins, credit cards, debit cards or pre-payment cards, including cards for use with dialling codes<sup>28</sup>.

- 3.6 The timeframe of this review is approximately two years from the date of publication of the Decision. In accordance with the *SMP Guidelines*<sup>29</sup> ComReg must conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions. Thus, the market definition and SMP analysis takes into consideration both current market conditions and any potential developments over the next two years.

### **Market overview and Scope of Review**

#### How does a payphone work

- 3.7 In order to better understand ComReg's reasoning behind the market definition, below is an explanation of how technically a payphone operator delivers services to end users. This is also illustrated in figure 3.1 below.
- 3.8 A payphone provider can be defined as an operator, which supplies payphone services to end users (i.e. the person making the call) over equipment (telephones) and access lines that do not belong to that end user and are not rented to it by a telecommunications operator. This is a bundled service where the charge covers both access and call provision, compared to ordinary telephony where the customer typically pays separately for access via a monthly rental charge.
- 3.9 The service can be provided directly to the end user via a payphone on the street or indirectly via a payphone installed in a privately owned premise e.g. a pub. To provide payphone services an operator can provide services over its own network (as eircom does). Alternatively, they can purchase wholesale access products from the access provider (typically eircom). To do this the other authorised operator (OAO) installs payphone equipment, and acquires either a narrowband access line and Carrier Pre Select (CPS), or alternatively Single Billing Wholesale Line Rental (SB-WLR) (essentially a bundle of the narrowband line and CPS), from the access provider. SB-WLR, or the narrowband access line, provides the physical connectivity between the payphone and the access provider's primary exchange onto the PSTN. Carrier Pre Select (CPS), which is a form of indirect switched access, is used by the OAO to convey the call from the payphone to the OAO's switch so that the call can then be handled directly by the OAO's own network. Clearly, for many calls, the call will ultimately be handed back to eircom for final termination, though of course it could also be routed to other operators depending on the location of the called party.

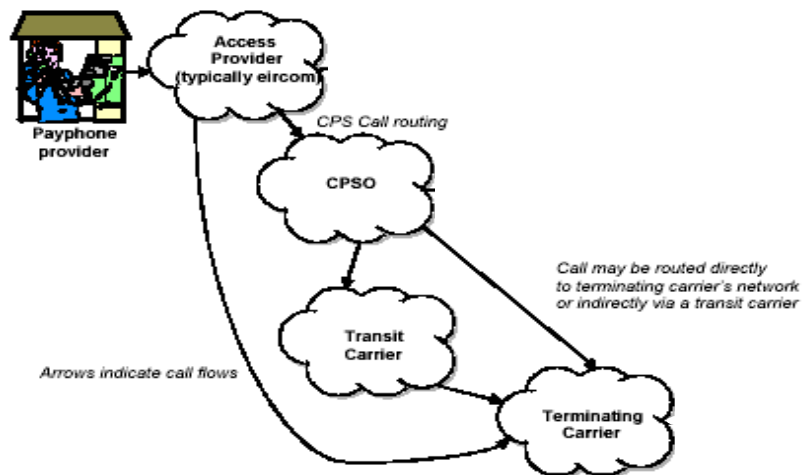
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<sup>28</sup> See Payphone Access Charge; Response to Consultation and Direction (ComReg Document 03/111). ComReg suggested an extended definition of public payphones which included: those located on public highways to which the public has access at all times; in other external locations which may not be public highways but to which the public has unrestricted access at all times; in other external locations which may not be public highways but to which the public has unrestricted access at all times; in public spaces such as airports, railways, hospitals and bus stations; Public payphones excluded (vis-a-vis private payphones): payphones in public houses, restaurant and clubs; private premises (e.g. rented accommodation, hostels and hotels; private buildings (e.g. lobbies, canteens etc.) shopping malls and payphones provided where there is a contractual relationship which involves revenue sharing.

<sup>29</sup> See paragraph 20.

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- 3.10 The end user can pay with coins, a pre paid calling card or credit card. Calls are generally tariffed on a per unit basis, the length of time allowed per unit will vary depending on the call destination.



Parties involved in the Provision of Payphone Calls

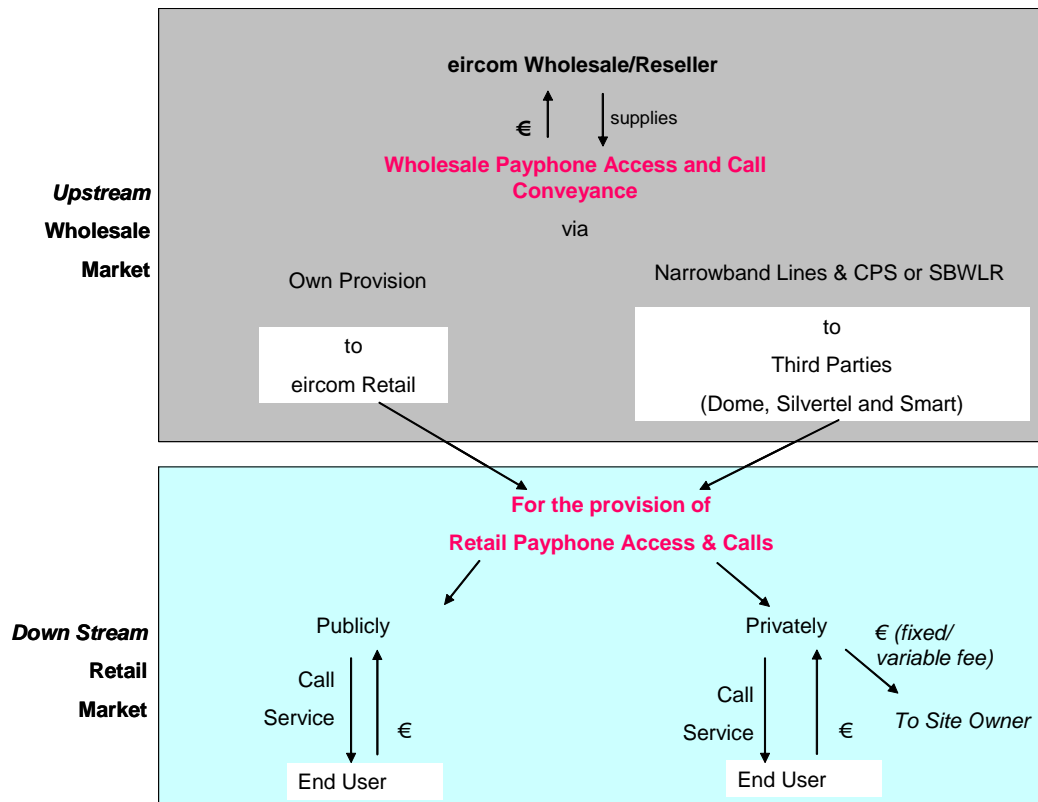
Source: ComReg

**Figure 3.1: Parties involved in the Provision of Payphone Calls<sup>30</sup>**

### Scope of the Market

- 3.11 The market relevant to this review can be distinguished at two vertical levels; retail and wholesale. The interaction between wholesale and retail relationship is presented in the diagram below.

<sup>30</sup> The line connecting the access provider to the terminating carrier reflects the typical call flow of the incumbent.



**Figure 3.2: Relationship between wholesale and retail markets**

- 3.12 ComReg considers that payphone access and calls are products and services provided in markets that exhibit a vertical structure having two basic layers: upstream and downstream. Products and services lying upstream are said to be wholesale products and services, while products lying downstream are retail products. Wholesale operators offer upstream products to OAOs, who may operate as vertically integrated entities or as resellers, and to their own downstream units. Products and services sold directly to final end users (as opposed to those sold to OAOs) are said to be retail products and services.
- 3.13 As a starting point, the retail product market is identified as that for the provision of payphone services to the end user; this service is a bundled service of both access *and* calls. When the end user makes a call from a payphone, the access charge is incorporated into the tariff. Services are provided from payphones located in public and private locations. Typically there is one retail relationship associated with the provision of a public payphone (i.e. with the end user) while two in the provision of private services (i.e. with the end user and with the premises owner). The payment to the premises owner may involve a fixed amount or a percentage of the revenue earned on calls made from the relevant payphone. Generally, all revenue earned from payphones positioned in public locations goes to the services provider; additionally, the public payphone operator may earn income (actual or notional) through advertising own or third party products.
- 3.14 Preliminarily, ComReg has also identified a wholesale payphone market, which constitutes the product and services used for provision of access facilities to other operators for the delivery of payphone access and calls to the end user. Purchase of the wholesale product enables the provision of retail services. Currently, all operators other than eircom provide services via the purchase of wholesale access facilities e.g. CPS or SB-WLR, details of these products are provided below. In some

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cases operators acquire CPS from resellers, who have originally purchased these products from eircom.

- 3.15 The analysis of the retail market definition is logically prior to the definition of the wholesale market, because the demand for the wholesale market is a derived demand i.e. the demand for wholesale services depends on the demand for retail services. The wholesale market for payphone access services is therefore defined by reference to the relevant retail market. ComReg will analyse whether there is a single or a number of retail market(s) for payphone access and calls. Among other issues, ComReg will also examine any impact that increasing mobile penetration and calling card facilities may have on the retail market.

### Overview of Payphone Providers

- 3.16 From the information available to ComReg, there are four payphone operators providing retail payphone services in Ireland, those being (i) Dome; (ii) eircom; (iii) silvertel; and (iv) Smart telecom. eircom and Smart, the larger of the four operators, provide both public and private payphone services, while Dome and silvertel provide services in private locations. See below for an overview of payphone providers. Of eircom's payphones, currently only eircom's *public* payphone services are regulated; this regulation includes price control (Price Cap Order), tariff principles (maintained by Regulation 13 of the Universal Regulations) and Universal Service Obligations. These obligations are detailed in Appendix D.
- 3.17 **Dome telecom** was established in April 2000 and is one of Ireland's largest providers of prepaid telephone and internet services. Dome telecom also owns and operates a nationwide network of private payphones and prepaid internet terminals. The provision of access and calls is facilitated via eircom's wholesale indirect access products (CPS and SB-WLR). Payphones are provided to hospitals, hotels, universities, pubs and retail outlets as a potential revenue earner. Payphones are remotely managed and the site owner receives commission direct into their bank account on a per call basis.
- 3.18 **eircom's** public payphone service consists of providing payphones and related applications and card services in Ireland. eircom also focuses on the maintenance and development of a private payphone business. Services are provided by the retail arm of eircom and carried over eircom's own network infrastructure.
- 3.19 In addition eircom has a regulatory obligation to provide public payphones within Ireland under its Universal Service Obligations<sup>31</sup>. ComReg has imposed price controls on eircom via a price cap mechanism limiting eircom's freedom to increase prices for a group of services notably access (connection and rentals) and calls which include payphone calls (other call types are domestic, operator assisted, and fixed to mobile calls). Regulation only applies to public payphones, the details of which are outlined in Appendix D. More recently eircom has focused on enhancing the attractiveness of existing payphone services via the development of multi media services rather than increasing the number of payphones. On the whole, eircom has decommissioned rather than installed new payphones.

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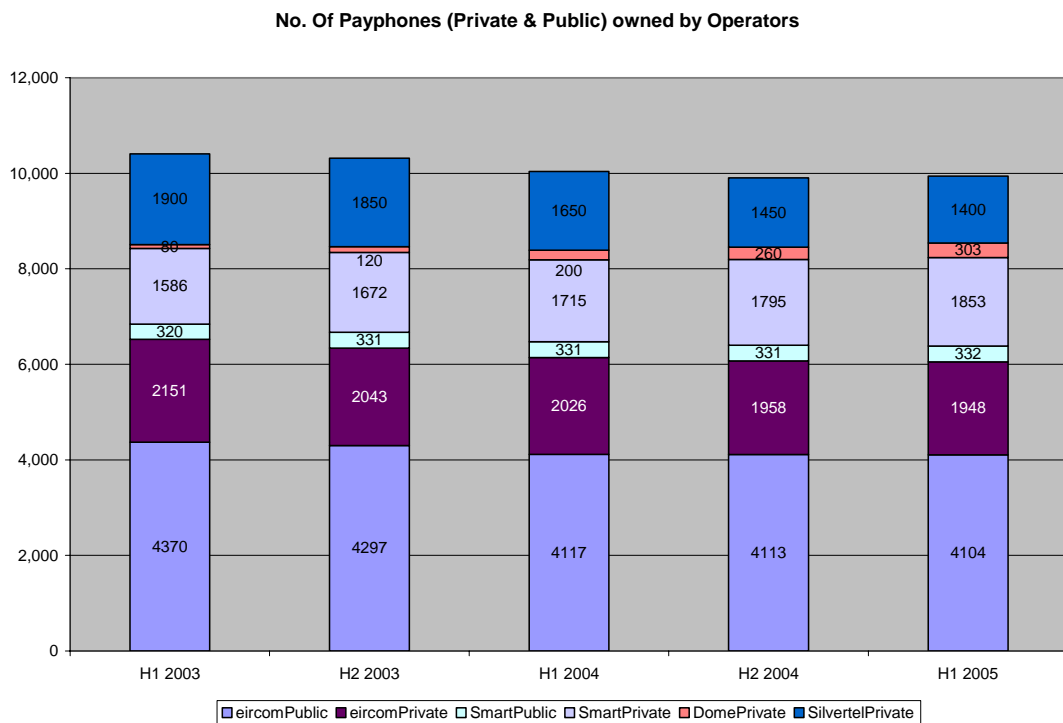
<sup>31</sup> eircom must ensure that pay phones are available in sufficient numbers and accessible to all, including the disabled; that it is possible to make emergency calls from a public pay telephone using the single European emergency call number; and that the users of those telephones have access to a directory inquiry service. Details are outlined in Decision Notice D17/03.

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3.20 **silvertel** offers managed payphone services to third parties via SB-WLR and CPS nationally. Its service consists of installation, payment of call and access charges to eircom, dispute management (over incorrect billing, phone fraud, vandalism and theft) in return for which they pay the premises holder a percentage of the revenue from the payphone.

3.21 **Smart telecom** offers public and private payphone services on a national basis. Generally they have a strong presence in the major cities and towns around the country, with street sites in all major cities and towns. Smart telecom provides both public and private managed payphones. Payphone services are provided primarily via CPS and SB-WLR. The company’s traditional business is primarily the residential telephony, payphone and prepaid card activities via SB-WLR.

3.22 The Figure below presents the number of public/private payphones owned and operated by each of the payphone operators in Ireland.



**Figure 3.3: No. of Payphones/Operator**

**Q. 1. Do you agree with the market overview and scope of review? Please elaborate in your response.**

**Retail Market Definition Absent Retail Regulation (in the presence of Wholesale Regulation)**

3.23 As noted above, ComReg will first analyse the retail market for payphone access and calls in the presence of wholesale regulation. In defining the relevant market the key factors which should be considered are whether:

- Payphone access and payphone calls are in the same retail market?

## Payphone Market Review

- Payphones in public locations are in the same market as payphones in private locations?
- Calls from pre paid calling cards are included in the payphone market?
- Payphone services are in the same market as calls made from landlines?
- Payphone services are a substitute for mobile phone services?
- The scope of the relevant geographic market is national or narrower in scope?

### **Are Payphone Access and Payphone Calls in the same market?**

#### *Introduction*

3.24 To begin with ComReg carried out an assessment of whether there are separate markets for payphone access and calls at the retail level. In the case of making a call from a payphone, the access charge is reflected in the overall call charges and is not separately identified. ComReg is therefore of the view that access does not appear at present to be sufficiently unbundled from other payphone retail services so as to constitute a separate product market.

#### Demand-side

3.25 From the demand-side, consumers do not purchase access and calls separately but rather acquire a bundled access and calls service. Calls are generally tariffed on a per unit basis, which encompasses an access charge and a number of call seconds which is variable depending on the call type.

#### Supply-side

3.26 All payphone operators provide both access and calls as a single product. This would indicate that there is a single market for access and calls rather than two separate narrow markets.

#### *Conclusion*

3.27 ComReg suggests that payphone access and calls are sufficiently complementary to be purchased as a single product and thus it is appropriate to define a broad market of access and calls.

### **Are Public and Private Payphone Services in the same relevant market?**

#### *Introduction*

3.28 ComReg must assess whether access and calls provided from payphones located in public areas are substitutes for services provided from those positioned in private areas.

3.29 From the demand and supply-side, ComReg examines whether these products are substitutes for each other and should this justify their inclusion in a single market.

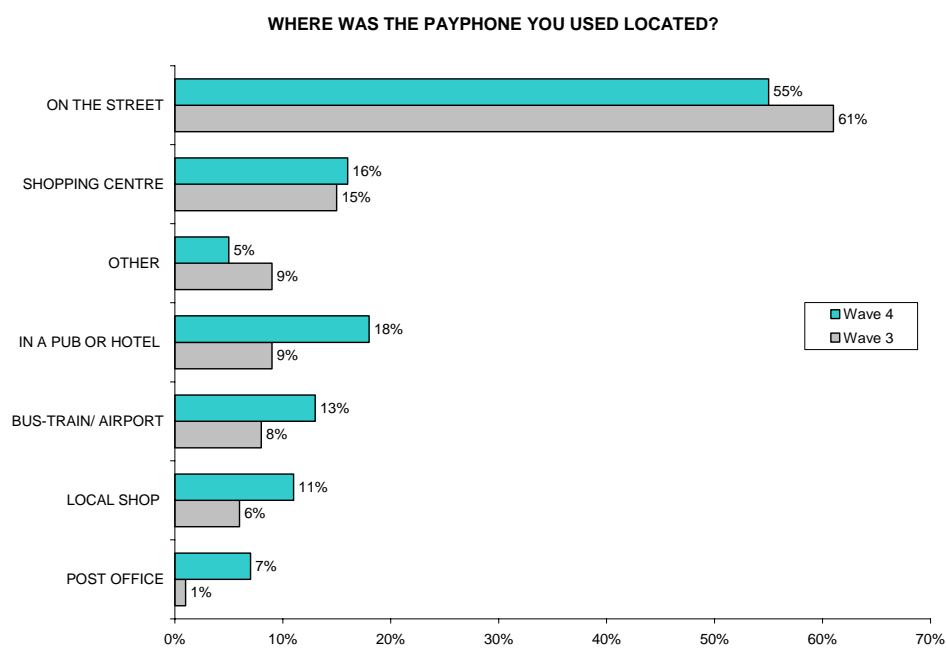
#### Demand

3.30 As noted in *The Guidelines*, demand substitutability focuses on the interchangeable character of products or services from the buyer's point of view. *The Guidelines* note that proper delineation of the product market may, however, require further consideration of potential substitutability from the supply-side. ComReg preliminarily proposes that from the demand-side, consumers do not differentiate a payphone on the basis of whether it is positioned in a public or private location, but rather convenience is the major determining factor. The analysis supporting this proposal is considered below.

*Usage Pattern*

3.31 Figure 3.4 presents the results from a consumer survey<sup>32</sup> commissioned by ComReg, which identified that of those who had made a call from a payphone within the previous three months there was a 55%:45% split between public and private services. The percentages were 61%:39% in an earlier survey.

3.32 At the end of the first half of 2005 there were 4,436 public and 5,449 private payphones operating in Ireland, representing 45% and 55% respectively of total payphones. It is likely that the higher proportion of calls made from payphones situated on the street is because they are positioned in busier areas and thus were convenient to a larger proportion of respondents, and not likely to product preference.



**Figure 3.4: Location of payphones used.**

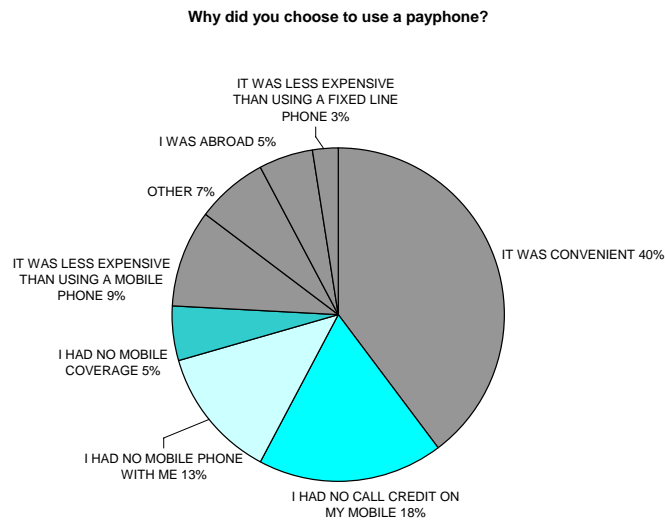
3.33 Additionally, consumer survey findings identified that the primary reason why respondents had used a payphone was that it was convenient. Other explanations provided were; that they either could not use their mobile (e.g. they had no call credit or no mobile coverage etc) or that it was less expensive. All responses are presented in Figure 3.5 below. These findings support the view that consumers will choose a payphone based on whether it is convenient or proximate and that it is less significant that the payphone is based in a public or private location. ComReg preliminarily proposes that from the demand-side the public/private differentiation is artificial and does not affect consumer preference.

3.34 This is further supported by a survey of consumer’s attitudes which found that only 7% of respondents preferred payphones located on the street while 12% would

<sup>32</sup> amárach Wave 3 2005.



rather make a call from a payphone positioned in a building. A total of 27% of respondents did not have a preference either way.<sup>33</sup>



**Figure 3.5: Reasons why consumers choose to use a payphone.**

*Functional Substitutability*

3.35 Evidence suggests that there is no functional difference between services offered by payphones located in private and public locations, and that the quality of call is equivalent.

3.36 ComReg proposes, from the information available, that public and private payphones are used for the same functional purpose and notes that the method of payment available and used, is also similar for both public and private payphones. From the information received by ComReg as part of this market review, most publicly and privately located payphones can facilitate a number of payment options, however all payphones are coin enabled which is the most common means of payment for calls from payphones. This is supported by a consumer survey which indicated that 80% of respondents who had made a call from a payphone in the past three months had paid for it with coins (as opposed to 17% using a pre paid calling card, 2% using a credit card and 1 % using another form of payment). Payphones are primarily used for voice services and all payphones, public and private, can facilitate this service<sup>34</sup>.

3.37 ComReg suggests that payphone services provided from public locations are functional substitutes for services from payphones located in private locations.

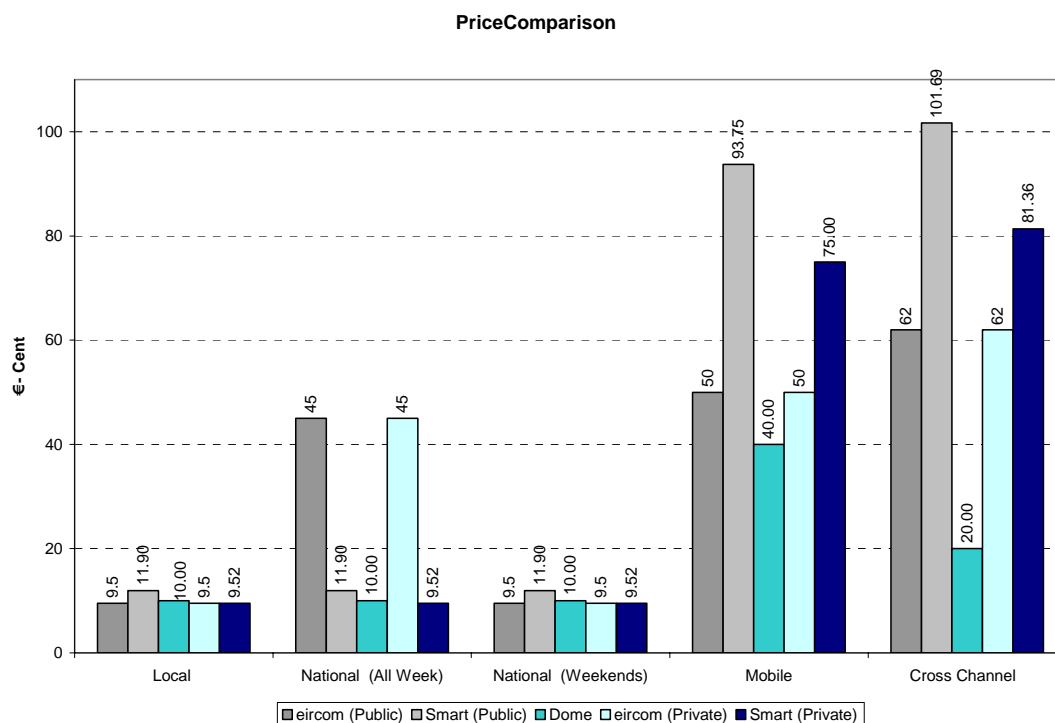
*Price Comparison*

3.38 Of the two operators which provide public services, one does not differentiate prices based on location, while the other generally charges 25% more for calls

<sup>33</sup> amárach Wave 4 The remainder did not use a payphone or did not know.

<sup>34</sup> amárach Wave 4 survey only 1% of respondents had used a payphone to access the Internet or e-mail. Other multimedia payphone are also available albeit to a more limited extent. In terms of the accessibility to these services, ComReg holds that these are equally available on payphones located in private and public locations.

made from payphones located publicly<sup>35</sup>. This is justified by the operator on the basis of higher maintenance cost of payphones located in public locations. The method of how tariffs are metered is standard. Additionally, rates charged by private only operators were comparable to public/private operators. This is evidenced by the graph below. It should be noted that while eircom's public payphone services are price controlled, eircom chooses not to differentiate its prices for private payphone calls. ComReg suggests from this that public payphone rates, while regulated, constrain the price of private payphone rates, thus indicating potential substitutability.



**Figure 3.6: Comparison – eircom (public/private) and Dome (private only) tariff Rate<sup>36</sup>**

3.39 Among consumers, there does not seem to be a perception that public/private prices are differentiated. When asked in a recent consumer survey, 86% of respondents either did not know or thought there to be no difference in cost between payphones located on the street or those located in buildings such as a shopping centre<sup>37</sup>.

3.40 ComReg preliminarily proposes that public and private services are demand-side substitutes as they offer the same services. There is similar pricing and in the event of a SSNIP (small but significant non transitory increase in price)<sup>3839</sup> from a

<sup>35</sup> Source: submissions received by ComReg as part of this market review in response to payphone data direction (26/07/05).

<sup>36</sup> Dome provides only private payphone services, while eircom provides public and private payphone services.

<sup>37</sup> Wave 4 amárach Survey. 2% felt that payphones on the street were more expensive, while 13% believed that those located inside private buildings were dearer.

<sup>38</sup> See the Commission Notice on Market Definition, The SMP Guidelines and ComReg's Market Data Information Notice for additional guidance. Applying the SSNIP test, one tries to ascertain if there is demand-side substitution or supply-side substitution. Demand-side substitution occurs where customers purchasing a particular product or service would switch

## Payphone Market Review

hypothetical monopolist for services from a payphone located in a public area, ComReg considers that consumers would be likely to switch and choose to make a call from a payphone in a private area.

### Supply

- 3.41 To determine whether public and private payphone services are supply-side substitutes, it is appropriate to assess whether in the event of a SSNIP by a hypothetical monopolist of public payphone services, a private payphone operator (not currently operating in the public payphone market) would react within a reasonable timeframe and decide to enter the public market and vice versa.
- 3.42 As part of the data collection process for this market review all operators agreed that the definition proposed by ComReg (as discussed above) was appropriate subject to some minor deviations<sup>40</sup>.
- 3.43 Furthermore, some operators noted<sup>41</sup> that the cost of switching from the provision of private payphone services to public payphone services (and vice versa) is not significant. In terms of timelines, it was suggested by one operator (which provided both public and private services) that it takes approximately one month to install a private payphone and three months to install one located in a public place.
- 3.44 The information available to ComReg would indicate that the cost associated with the supply of private payphone service is similar in many respects to the cost of supplying services via public payphones. The entry costs for the provision of payphone services depends on the level of infrastructure associated with the site of the phone, which will be different for each site and is not as simple at the public/private split. Although the cost of provision from a private site is often lower than a public site (due to protection from the weather and vandalism and greater accessibility to electrical power) it can cost much the same to install and operate as those in public places – this is examined below.
- 3.45 To install a *public* payphone the operator must obtain the site. This is generally at the initiative of the relevant local authority and includes an application for planning permission to the local authority; the operator must get wayleave access and comply with health and safety rules. An operator wishing to provide services from a *private* location must, typically upon winning a tender, enter into an agreement with the owner of the premises, who will allow the payphone to be placed in their premises (e.g. pub, hotel etc.). In return they will receive a fixed sum/commission on calls made from the phone. With these factors taken into account, the total costs of supply of service from public and private locations become broadly comparable. Other costs which are common to public and private sites include the acquisition of an access line from the wholesale arm of eircom and CPS or the bundled product,

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to readily available substitutes if there is a small but significant, non-transitory price increase (in the range of 5% to 10%). Supply-side substitution occurs where if a hypothetical monopoly supplier were to impose a small (in the range of 5% to 10%) but significant, non-transitory price increase above the competitive level, substitution occurs between suppliers thereby rendering such a rise in prices as being unprofitable. It is important to emphasise that the SSNIP test is but one example of methods applied to define a relevant market.

<sup>39</sup> See: Competition Authority Discussion paper No. 11 "Market Power and Market Definition in Competition Analysis: Some Practical Issues", Patrick Massey, October 2000.

<sup>40</sup> Bus stations are considered by one respondent to be public payphones and operators may not always pay a fee for private payphone contracts.

<sup>41</sup> Source: submissions received by ComReg as part of this market review in response to payphone data direction (26/07/05).

SB-WLR, and the allocation of administrative labour resources which will be similar regardless of location<sup>42</sup>.

- 3.46 While costs are broadly similar, ComReg acknowledges that there are examples of differences in the set up costs of payphones located in public versus private areas. An extreme example would be the difference in cost associated with the provision of payphones on the street in an urban area (which requires investment in robust boxes, protection of and repair from vandalism etc) to the lower installation cost for the provision private payphones in e.g. a small residential apartment block (which may simply require the attachment of a specific handset to a telephone line). However, ComReg notes that the cost of providing a payphone located in an airport (a private payphone) would be more similar to the cost of installing a payphone located on a street.
- 3.47 ComReg suggests that the entry costs for the provision of payphone services depends on the level of infrastructure associated with the site of the phone. These differences are not exclusive to the public/private split.
- 3.48 In reaching this conclusion ComReg has considered the different payment flows associated with the provision of public/private payphone services e.g. typically there is one retail relationship in the provision of a public payphone (i.e. with the end user) while there are two in the provision of private services (with (i) the end user and (ii) the premise's owner). The payment to the premise owner may involve a fixed amount or a percentage of the revenue earned on calls made from the relevant payphone. In contrast, all revenue earned from public payphones generally goes to the services provider; additionally, the public payphone operator may earn income (actual or notional) through advertising own or third party products. Advertising space is more lucrative on public payphones as they are generally exposed to a greater number of potential consumers. But again, this can also be said for some private payphones e.g. those located in an airport and the differentiation is not as simple as the public/private split. ComReg therefore concludes that the different payment flows are not sufficient to define a separate market.
- 3.49 A further factor, which is relevant to supply-side considerations, is that only eircom has an obligation as the Universal Service Provider<sup>43</sup> to ensure that public payphones are provided to meet the reasonable needs of end users. As a result, eircom has an existing network which currently is likely to meet most, if not all, demand in some (typically more rural) locations and therefore there is not as much incentive for operators to enter the market to provide public payphones. Additionally, in some locations it may be the situation that eircom is providing services as a result of its regulatory obligations (which are justified on social grounds) as opposed to on its own initiative for economic gain. As a consequence, the number of payphones actually being provided and the size of the market may be greater in the presence of regulation (USO regulation in particular), however a greater number of payphones does not necessarily mean a greater volume of calls being made.
- 3.50 The percentage of total payphones provided by eircom and OAOs in public/private locations is presented in Figure 3.7 below. As can be seen, eircom provides over 90% of public payphones. ComReg is of the view that it is likely, as a consequence

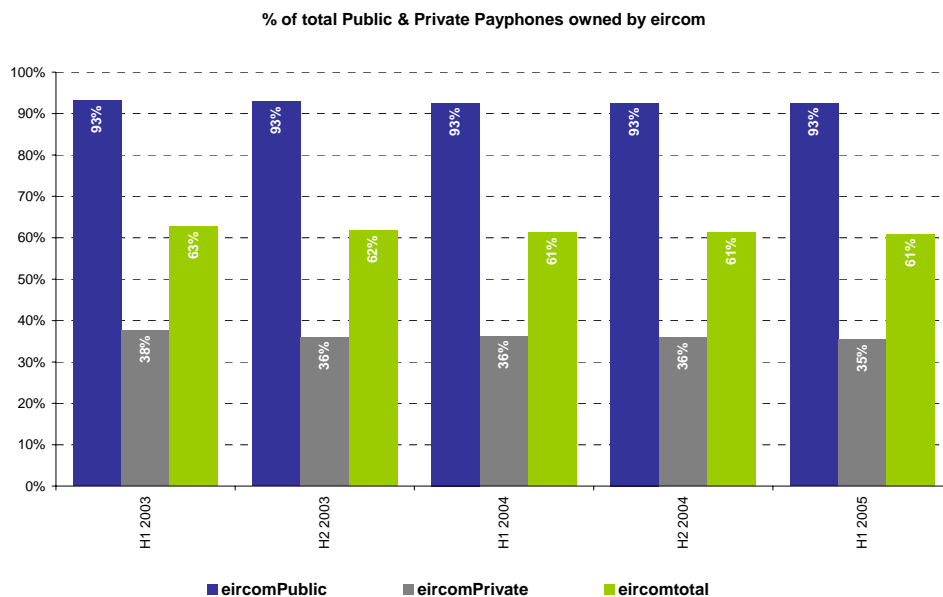
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<sup>42</sup>Currently eircom is obliged to provide CPS and SB-WLR in a non discriminatory way and where costs of provision are reasonable. Where the payphone is situated away from easy access to eircom's copper the OAO is expected to pay the additional price.

<sup>43</sup> See Appendix D for an outline of this obligation.

## Payphone Market Review

of USO, that there has been less entry by OAOs. This is not as a result of high barriers to switching but rather this is a market where there are limited entry costs (in the presence of regulation), plus a static/declining market demand (due to increasing mobile penetration as discussed under the assessment of mobile substitution below) which, taken with the high level of coverage already, makes future entry less attractive. The likelihood of entry will be considered in further detail in assessment of the three criteria, specifically barriers to entry<sup>44</sup> – see section four.



**Figure: 3.7; Percentage of Total Public and Private Payphones owed by eircom.**

- 3.51 ComReg takes the view that payphone operators will choose the location of where to install a payphone based on concentration of demand, flow of people and the presence (or lack) of competitors rather than on the basis of whether it is located on privately or publicly owned land.
- 3.52 ComReg preliminarily concludes that in the consideration of substitution the public/private split is not reflective of market realities. This is supported by the fact that operators were not in a position to provide separate data (revenue and minutes) for public/private payphone services.

### *Preliminary Conclusion*

- 3.53 ComReg concludes that from the demand-side and supply-side, calls made from payphones in private locations are in the same market as those made from payphones in public locations.

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<sup>44</sup> The presence of high and non-transitory entry barriers; the state of competition behind the barriers of entry and that the application of competition law alone would not adequately address the market failure(s) concerned. If the market passes these criteria, then a market analysis should be conducted.

**Are payphone calls made with prepaid calling cards in same market as payphone calls made with other payment means?**

*Introduction*

- 3.54 A number of providers (e.g. eircom, Smart, Dome, Alpha telecom) provide calling card services via freephone (1800/1540) numbers, however ComReg does not consider that these are actual payphone services.
- 3.55 With a pre-paid calling card consumers pay a fixed amount up front, and when they make a call, the total cost of the call is accumulated and the remaining value on the card is reduced by the cost of the call. Making a call using a calling card is essentially a two step process. Typically, a calling card user will pick up a phone<sup>45</sup> anywhere and dial an access number (usually freephone<sup>46</sup> or local) – the first element of the service. The phone card user is then prompted for a PIN before dialling a second number, the destination number they require<sup>47</sup> - the second element of the service.
- 3.56 A consumer survey indicated that of all respondents who had used a payphone within the past three months, only 17% had used a pre paid card to pay for a call<sup>48</sup>.

Demand-side substitution

- 3.57 Prepaid calling cards do not entail the provision of direct access by the provider of such services. Rather, callers using such calling cards do so using an indirect access code, while continuing to acquire direct access from the underlying ECN operator. In particular, the user of the calling card might choose to make a call via a fixed phone one day, a payphone the next day and via a mobile phone the day after. The use of a calling card thus does not require any one specific form of network access, just that one of the various forms is available when required by the user. Indeed, this is one of the prime benefits of the calling card service.
- 3.58 ComReg preliminarily concludes that the end to end call made from a payphone using prepaid calling cards is not a functional substitute for retail payphone access and calls, rather only the first element of the call (the call to the access number) should be included in the market. ComReg is of the view that pre-paid calling card services constitute a call completion service with access sometimes via a payphone call.
- 3.59 The calling card itself should be considered as a form of credit service/facility rather than an electronic communications service or network. In particular, the supply of such cards does not require ComReg's prior authorisation to supply to the Irish market. Therefore the relevant payphone access and calls market does not include the second element of a call made from a payphone using a pre-paid calling card. ComReg however does consider it correct to include the first element, the initial local/ free phonecall, to the indirect access provider within the market.

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<sup>45</sup> A mobile, fixed line or payphone.

<sup>46</sup> 1800 or 1540.

<sup>47</sup> The call flow at the wholesale level is described in further detail in Appendix B under the explanation of the PAC mechanism.

<sup>48</sup> Wave 3 of the amárach 2005.

## Payphone Market Review

### Supply-side substitution

- 3.60 When considering supply-side substitution ComReg notes that if there was a price increase in the market price of (bundled) calls and access by 5-10% by a hypothetical monopolist a calling card provider could not respond as they do not have access to actual phones and local loop infrastructure. This contrasts with a competing payphone provider who could hold their prices level and thus hope to gain market share.
- 3.61 Thus, if a monopolist owned every payphone in Ireland, they could profitably raise prices and preclude pre-paid call operators from using the payphone (note this is absent PAC<sup>49</sup> regulation). Calling card providers would need to build their own set of payphones in order to respond to the monopolist's actions. This could only be done in the presence of wholesale regulation. However, this would constitute new entry, and thus the response could not be considered as supply substitution but rather potential competition and accordingly, such providers should not be part of the defined market .
- 3.62 From the supply-side, calling card calls can be considered to be a service ancillary to providing direct-dialled payphone access and calls, just as it is ancillary to providing fixed and/or mobile access and calls.

### Preliminary Conclusion

- 3.63 Calls facilitated by calling card providers - indirect access providers - are not included in the relevant market; however, they are considered below in section four of this document under the assessment of the three criteria.

## **Are payphone services in the same market as other landline calls made from a fixed location?**

### Introduction

- 3.64 As part of ComReg's review of the retail access and calls<sup>50</sup> markets (markets 1-6 of the *Relevant Markets Recommendation*)<sup>51</sup> ComReg considered access to the public network via payphones and was of the view that payphones offer a form of access which is a bundled service for which people pay a single charge for access and calls and thus have to be excluded from the relevant retail access and calls markets. Below, ComReg considers whether the reverse is also true, that is whether calls and access provided from landlines are a substitute for calls made from payphones?

### Demand-side substitution

- 3.65 ComReg considered whether calls from landlines were in the same market as payphones. The demand-side analysis below, would not suggest that these calls are in the same market, due to the varying levels of functionality and pricing.

### *Usage Pattern*

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<sup>49</sup> Payphone Access Charge – See Appendix C for more details.

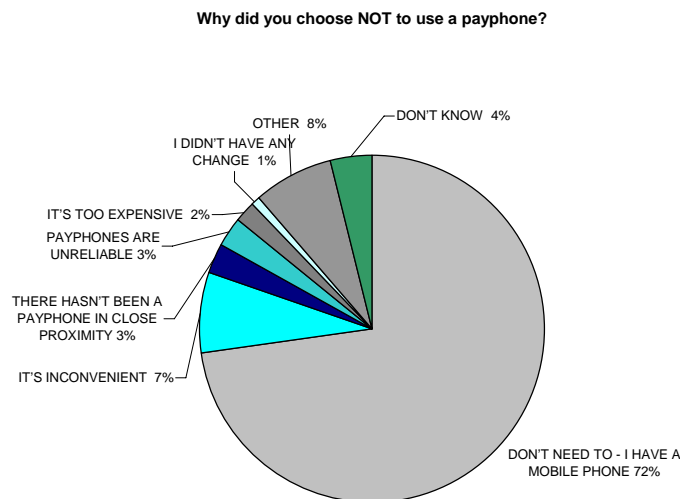
<sup>50</sup> ComReg Document Number (04/95) – see extraction included in Appendix A

<sup>51</sup> Retail Access Market Review– National Consultation (04/94) and Notification (05/25)& Retail Calls Market Review - National Consultation (04/95) and Notification (05/26). Two access markets were defined, lower level access which includes access via analogue exchange lines over copper and FWA and ISDN BRA, also including 'hi-speed', higher level access (which includes access via ISDN FRA and PRA). Two calls markets were defined, Domestic calls (which includes local and national calls and calls to mobiles and to the Internet), International calls (which includes all calls to destinations located outside of Ireland).



3.66 ComReg considers that there may be two types of relevant demand for making calls from a payphone – (i) from users who make no calls from a landline or mobile and use a payphone to wholly substitute for a landline or mobile; and (ii) from users who have their own landline or mobile but use a payphone either for convenience or where they have no alternative means of making a call. ComReg considers that most payphone usage is likely to be of the latter type, implying that calls from payphones tend to complement calls from landlines and mobile rather than be substitutes for them. This is supported by the finding from a recent consumer survey<sup>52</sup> commissioned by ComReg which established that of the people who had used a payphone in the last three months, 71% also had a landline phone and 84% had a mobile phone<sup>53</sup>.

3.67 Furthermore, for those who *had not used* a payphone, the primary reason for not doing so was because *‘they didn’t need to as they had a mobile’*. However, as can be seen from the analysis below, mobile and payphone services are not in the same relevant market. Conversely, as can be seen from Figure 3.8 below the main reason for those who *had used* a payphone in the last three months was either because it was convenient or they were not able to use their mobile, only 3% cited that *‘it was less expensive than using a fixed line phone’*.<sup>54</sup> It would therefore seem that the primary reason consumers use a payphone rather than a landline is that payphones offer an element of convenience over a landline. ComReg notes that the survey respondents were residential users only and therefore did not include visitors to Ireland. For such users payphones offer the possibility of making a one off phone call without any prior contractual relationship.



**Figure 3.8: Reasons why consumers choose not to use a payphone.**

<sup>52</sup> amárach September 14 2005. Wave 3.

<sup>53</sup> ComReg considers that a certain proportion of payphone users, may have been tourists who would not have been captured in the (residential) survey and who would be unlikely to have the option of to substitute to a landline in the event of a price increase.

<sup>54</sup> See Figure 3.5 above for some more detail.



## Payphone Market Review

### *Price Comparison*

- 3.68 In the case of payphones, it is difficult to separate calls from access, since payphone call prices are a bundle of access and calls and include an element of both, similar to the pricing of mobile access and calls. Customers who do substitute payphone usage for landline usage are likely to be taking a decision based on assessing the combined costs of access and calls, which will depend on both the volume of calls made and the types of call made.
- 3.69 For those customers who rent a landline, the bundled pricing for calls and access means that calls from payphones are more expensive at the margin than calls from a landline. For example, even if there is a 5-10% price increase by a hypothetical monopolist, for a call from a payphone; it is unlikely that a sufficient numbers of consumers would switch to using landlines. Not only are prices for calls from payphones typically higher, but the functionality and intended use of calls from a payphone are different.
- 3.70 The amarách consumer survey would suggest that price was not the determining factor in consumers choosing to use a payphone (see Figure 3.5); it was identified that only 3% had used a payphone rather than a fixed line telephone because they perceived it to be less expensive. ComReg concludes that the price of calls from landlines do not constrain calls from payphones.

### *Preliminarily Conclusion*

- 3.71 The demand-side analysis would not suggest that these calls are in the same market, due to the varying levels of functionality and pricing.

### Supply-side substitution

- 3.72 Supply-side analysis suggests that calls from a payphone and calls from a land line are not in the same market.
- 3.73 It is useful to consider the SSNIP test where practicable in terms of supply-side substitution. On this basis, the pertinent question is if a hypothetical monopolist supplier of payphones were to raise its prices by 5-10%, would this result in entry from suppliers of fixed calls to/from land lines. In order to enter the market for the supply of calls from payphones, a supplier of calls from landlines would need to build their own set of payphones. As argued above, this is possible due to relatively low entry barriers (in the presence of wholesale regulation), but it would constitute new entry, and thus the response could not be considered as supply substitution but rather potential competition and accordingly, such providers should not be included in the market definition.

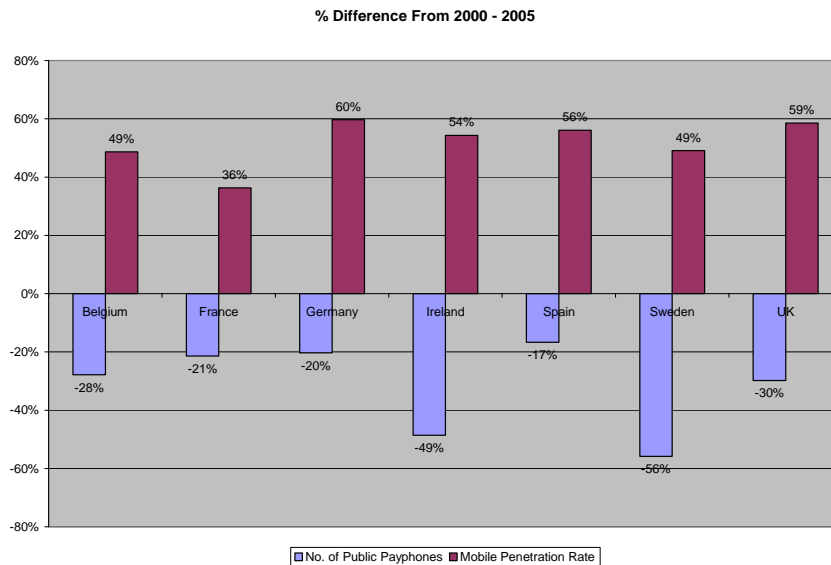
### Preliminary conclusion

- 3.74 At this point, ComReg therefore considers that, based primarily on demand-side substitution, a separate market for payphones, for both access and calls, is appropriate.

## Are payphone services a substitute for mobile phone services?

### Introduction

3.75 As a starting point ComReg notes the general view that mobile phone ownership has affected payphone usage in a number of ways<sup>55</sup>. This is evidenced from the Figure 3.9 below which shows the fall in the number of public payphones across certain European countries<sup>56</sup>. The figure presents the percentage difference between the number of public payphones and mobile penetration rate in the period between the years 2000 to 2005. This shows that in many countries, where there has been an increase in mobile penetration (between the year 2000 and 2005) there has been a corresponding decrease in the number of public payphones.



**Figure: 3.9: Percentage Difference between the Number of Public Payphones and Mobile Penetration Rate from 2000 – 2005<sup>57</sup>.**

3.76 Furthermore, the total number of payphone minutes from payphones has decreased by nearly 20% since the start of 2004. However, a declining level of demand for payphone services and increasing demand for mobile services is not necessarily indicative of them being in the same market. This is examined below in detail.

### Demand-side

#### *Usage Pattern*

3.77 It would seem from consumer survey findings (which are presented in paragraphs 3.68 and 3.69 above) that the primary reason consumers use a payphone is that payphones offer an element of convenience. ComReg notes that the survey respondents were residential users only and therefore did not include visitors to Ireland. For such users, payphones offer the possibility of making a one off phone call without any prior contractual relationship. This may be attractive as mobile roaming tariffs are substantially higher than payphone rates.

<sup>55</sup> Sunday Tribune, Sunday, August 21 2005, eircom won't hang up on phone boxes.

<sup>56</sup> Belgium, France, Germany, Ireland, Spain, Sweden and the UK. To note this is likely to be influenced by the NRA, and linked to their regulatory obligations in terms of Universal Service Obligations.

<sup>57</sup> Source: Cullen International 2005.

*Functional Substitutability*

- 3.78 The European Commission has, in a number of decisions, found that there is a market for mobile communications services that cannot be seen as being substitutable for fixed communications services. The European Commission notes that the key difference between mobile and fixed services is the mobility inherent in all mobile services (i.e. mobile numbers are associated with individuals on the move, rather than a fixed location).<sup>58</sup>
- 3.79 In a number of other market reviews ComReg has concluded that it would be inappropriate to define a single market for fixed and mobile services (access and calls)<sup>59</sup>.
- 3.80 ComReg has concluded that payphone access and call services are not sufficiently close functional substitutes for mobile access and calls. While payphone access is accessible to the public at large and is attached to a place, mobile services are attached to the person and can transfer with that person. This added functionality resulting from the convenience of being able to make and receive calls on the move, suggests that payphone services are unlikely to act as a substitute for mobiles.
- 3.81 Mobile phones can be considered to be a functional substitutable for payphone services since they have the same function as a payphone but with a mobility element. However the price differential associated with mobile services precludes the definition of a single market. This is considered in further detail below.

*Price Comparison*

- 3.82 It is difficult to carry out a price comparison between payphone and mobile calls. Calls from payphones are generally charged on a seconds per unit fee, where each unit is charged at a fixed rate<sup>60</sup>. Thus there is generally a minimum fee for each payphone call for which the customer receives one or two units. The time allocated for one unit varies from a few seconds for an intercontinental call to several minutes for a local call. Tariff packages for calls made from mobile phones can vary significantly depending on whether the caller is pre-paid/post-paid and what pricing package has been subscribed to.
- 3.83 At a high level ComReg has compared pre-paid mobile and payphone rates for certain calls types. ComReg has calculated a cent/minute rate for a sample of call types with specified call duration and time of the day.<sup>61</sup> The results are presented below. It can be seen that there are clear price differentials between payphone and mobile services, which would indicate that they do not constrain each other, and are in separate markets.

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<sup>58</sup> See, for example, Commission Decision of 10 July 2002, Case No. COMP/M.2803 – TeliaSonera, Commission Decision of 20 September 2001, Case No. COMP/M.2574 – Pirelli/Edizione/Olivetti/Telecom Italia, Commission Decision of 20 September 2001, Case No. COMP/M.1439 – Telia/Telenor and Commission Decision of 12 April 2000, Case No. COMP/M.1795 – Vodafone Airtouch/Mannesmann

<sup>59</sup> Market Analysis: Retail Fixed Narrowband Access (ComReg Document No. 05/25), Market Analysis: Retail Calls Market (ComReg Document No. 05/26). Mobile Access and Call Origination (05/04) Decision 04/05.

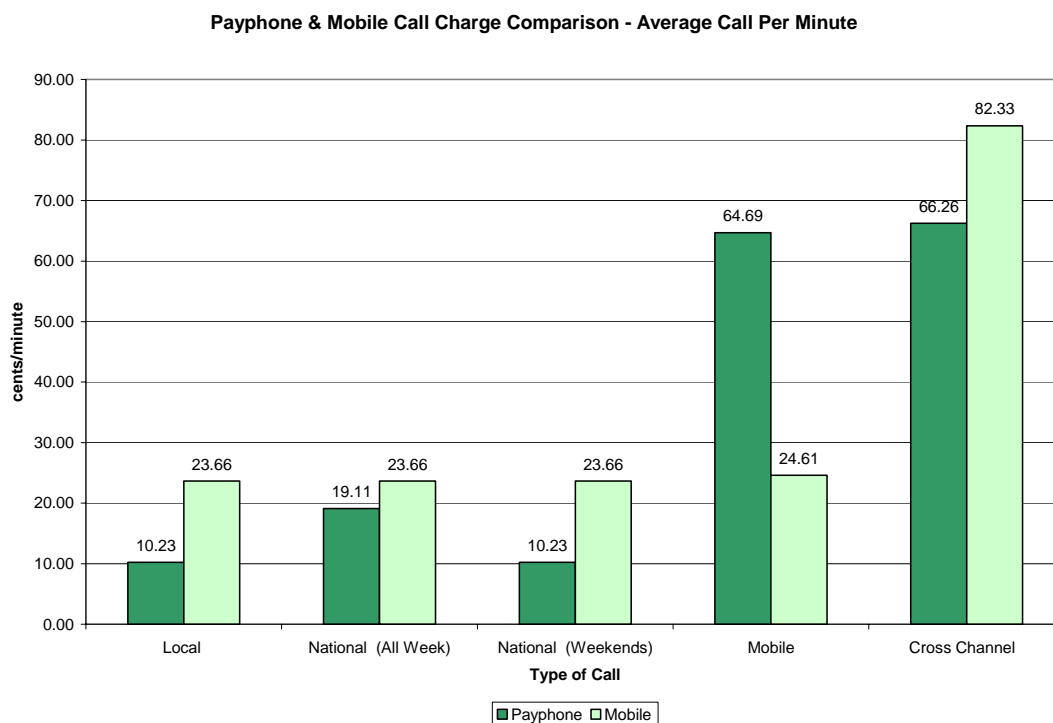
<sup>61</sup> It should be noted that these rates are the average charge per minute, and do not consider the minimum charge for a payphone call.

## Payphone Market Review

3.84 While it was recognised that for some calls, mobile tariffs were lower (on-net mobile calls) generally payphone tariffs are cheaper. Although there is some evidence that mobile and payphone tariffs are converging, there is still a premium attached to the extra functionality of mobile phones for most types of calls. As was indicated above, ComReg considers that payphones are generally used by consumers when their mobile is not available to them, despite the lower tariffs associated with payphones. It is thought that higher mobile prices (which result from the continuing premium for functionality) does not deter mobile use nor encourage consumers to switch to the cheaper payphone service. In this respect, ComReg concludes preliminarily that consumers are relatively price insensitive for some types of calls.

3.85 From the amárach consumer survey it was identified that only 9% of respondents had chosen to use a payphone as it was less expensive than using a mobile. ComReg suggests that switching is most likely for international calls, where the mobile/payphone price ratio is the highest. Where an individual does not have access to a fixed line telephone, an international call will generally cost significantly less when made from a payphone rather than a mobile. ComReg suggests that while consumers are price sensitive for international calls, this may not be the case for all call types.

3.86 On the whole, ComReg considers that if there was a long lasting 5-10% price increase of a payphone call, which would change in the ratio between mobile and payphones rates, there is nothing to indicate that more users would switch to increased use of mobiles or vice versa in sufficiently great numbers to justify the definition of a single market. ComReg concludes that payphone users are not price sensitive to mobile prices and mobile users are not sensitive to payphone rates.



**Figure 3.10: Average Mobile and Payphone Charge by Call Type.<sup>62</sup>**

<sup>62</sup> Payphone rates shown are those set for calls made directly from payphones. Generally calls made from indirect access via pre paid calling cards will have lower tariffs for all calls except for international calls. Mobile call rates are 'on net'.

Supply-side

- 3.87 *The Guidelines* suggest that ComReg may also take into account the likelihood that undertakings not currently active in the payphone market may decide to enter the market, within a reasonable time frame, following a relative price increase. In circumstances where the overall costs of switching production to the product in question are relatively negligible, then that product may be incorporated into the product market definition.
- 3.88 ComReg considers that it is unlikely that a payphone service provider would respond to a price increase of mobile services. Supply-side substitution is not likely due to the need to establish an entirely new mobile network, not least because of the regulated access to spectrum and the cost and time involved.<sup>63</sup>
- 3.89 Additionally, it is unlikely that a mobile operator would enter the payphone market; this is due to a number of factors, including static/declining demand and a different strategic direction. A mobile provider seeking to enter the payphone access market would need to provide a product which matched the quality of a payphone line, at a competitive price. This would require either the construction of a new greenfield access network or the development of a mobile (or other wireless) product which more closely resembled the fixed access product in terms of price and quality<sup>64</sup>. ComReg is not aware of any mobile operator actually considering such a move, nor has a mobile operator entered in the past. As noted in *The Guidelines*, supply-side substitution must be real, mere hypothetical substitution is not sufficient for the purposes of market definition<sup>65</sup>.

*Preliminary conclusion*

- 3.90 From demand-side considerations, such as functionality, price comparisons and end user calling patterns and the supply-side ComReg draws the preliminary conclusion that payphone services are not a substitute for mobile phone services.

**Preliminary conclusion: Relevant Product Market**

- 3.91 The relevant retail market therefore is a market for: retail payphone access and calls, made from public or private locations, which does not include:
- calls made from payphones via calling cards;
  - calls made from landlines; and
  - mobile access and calls.

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<sup>63</sup> Alternatively, an operator could acquire a MVNO arrangement however this process is lengthy and it is unlikely that the operator could sign up sufficient number of subscribers to have a constraining effect on a payphone operator.

<sup>64</sup> In ComReg's view, 3G offers the possibility of higher quality of service on mobile, as high speed data can be delivered through a mobile handset. Four licences were granted to 3G operators (Vodafone, O2, 3 in 2002 and Smart in 2005). All of the former three networks have launched commercially but the product is at a very early stage of development in Ireland. Experience from the introduction of 3G in other countries has shown that the price differential between mobile and fixed is increased, at least in the early stages of the product's life. This suggests that while 3G may compare well with fixed on a functional level, it is unlikely, in the short term, to compare favourably on price.

<sup>65</sup> See paragraph 52 of *The SMP Guidelines*.

**Q. 2. Do you agree with the retail market definition? Please detail your response.**

**What is the geographic scope of the market(s)?**

Introduction

- 3.92 Once the relevant product market is identified, the next step to be undertaken is the definition of the geographical dimension of the market. According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different<sup>66</sup>.
- 3.93 Accordingly, with regard to demand-side substitution ComReg should assess mainly consumers' preferences as well as their current geographic patterns of purchase.
- 3.94 As far as supply-side substitution is concerned, where it can be established that operators are not currently engaged or present in the relevant market, but will, however, decide to enter that market in the short term in the event of a relative price increase, then the market definition should be expanded to incorporate those 'outside' operators.
- 3.95 ComReg is of the preliminary view that the market is national in scope. The analysis is outlined below.

Demand side substitution

- 3.96 From information received by ComReg in relation to this market review, prices and tariff structure for payphone access and calls are homogeneous nationally. All OAOs set tariffs on a national basis<sup>67</sup>. Prices are standardised nationally and are based on destination rather than geographic location of call origination. Additionally, functionality and quality of the relevant product offered is standard.
- 3.97 ComReg therefore concludes that there is no reason to believe that there are sufficiently different consumer preferences or patterns of purchase among consumers throughout Ireland to justify separate geographic markets.

Supply-side substitution

- 3.98 Under the Universal Service Regulations<sup>68</sup> eircom, as the universal service provider, is obliged to ensure that public pay phones are provided in sufficient numbers to meet the reasonable needs of end users.
- 3.99 ComReg recognises that on a general basis there is higher payphone penetration in more urban areas due to a greater concentration of demand. This is supported by submissions received from operators as part of the data collection for this review,

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<sup>66</sup> As quoted from *The Guidelines* United Brands, op. cit., paragraph 44, Michelin, op. cit., paragraph 26, Case 247/86 Alsatel v Novasam [1988] ECR5987, paragraph 15; Tiercé Ladbroke v Commission, op. cit., paragraph 102.

<sup>67</sup> It should be recognised that eircom's public payphone charges are regulated.

<sup>68</sup> Regulations 5 (1) – (6) of the Universal Service Regulations. A designated undertaking shall ensure that public pay telephones are provided to meet the reasonable needs of end-users in terms of the geographical coverage, the number of telephones, the accessibility of such telephones to disabled users and the quality of services.

## Payphone Market Review

where operators indicated those factors such as (i) customer footfall; (ii) potential revenue; (iii) population density and (iv) potential level of cost exposure to anticipated vandalism.

- 3.100 ComReg notes that in areas within Dublin city centre there is a greater concentration of payphones. It would be inappropriate to state that the whole of Dublin has homogeneous competitive conditions, as there are areas within Dublin where it is likely that there is a lower penetration of payphones. ComReg further notes that even if multiple geographic markets were defined based on demand, this would be unlikely to affect the conclusion in relation to the assessment of the market under the three criteria established in section four.
- 3.101 ComReg notes that all OAO payphone providers use indirect access wholesale products for the provision of payphone access and calls, rather than using own infrastructure. eircom's network is national in scope and OAOs have the ability to install a payphone on a national basis, based on reasonable request. Therefore they can respond to a price increase wherever necessary. This indicates that the market is national in scope. ComReg considers (from the information available to it) that other factors such as the acquisition of sites or planning permission are not sufficiently heterogeneous to indicate narrower geographic markets. All operators provide payphone services on a national basis.
- 3.102 Finally, ComReg considers the scenario of potentially narrower geographic markets and is of the preliminary view that it is likely that an undertaking providing services in a narrower geographic market (e.g. Cork) which was not currently active in another market (e.g. Dublin) could enter the market, within a reasonable timeframe following a relative price increase; that is, a small but significant, lasting price increase.

### Preliminary conclusion

- 3.103 ComReg draws the preliminary conclusion that from the demand and supply-side the relevant geographic market for payphone access and calls is national in scope.

**Q. 3. Do you agree with ComReg's preliminary conclusion that the market for retail payphone access and calls, is national in scope? Please provide evidence in support of your response.**

## 4 Retail Market Definition in the Presence of Wholesale Regulation - Assessment of the three criteria

- 4.1 ComReg has defined a retail market for payphone access and calls. As the proposed market is not listed in the *Relevant Markets Recommendation*, the *Explanatory Memorandum*<sup>69</sup> states that it is necessary that ComReg assess the market under the three criteria to establish whether the market should be subject to *ex ante* regulation.
- 4.2 Only markets where national and Community competition law are not considered sufficient in themselves to redress market failures and to ensure effective and sustainable competition over a foreseeable time horizon should be identified for potential *ex ante* regulation. It is therefore considered that the following specific cumulative criteria are appropriate to identify relevant markets.
- 4.3 The three criteria are:
1. Whether a market is subject to high and non-transitory entry barriers;
  2. Whether a market has characteristics such that it will tend over time towards effective competition;
  3. The sufficiency of competition law by itself (absent *ex ante* regulation).

### Barriers to entry and to the development of competition

- 4.4 With respect to the first criterion, two types of barriers to entry and to the development of competition in the electronic communications sector appear to be relevant: structural barriers and legal or regulatory barriers. These are considered below.
- 4.5 It should be noted that Regulation 27 of the Framework Regulations obliges ComReg to take the “utmost account” of the *Relevant Markets Recommendation*. This states that the *barriers to entry* should be high for this criterion to be fulfilled. The question then is when a barrier can be considered as “high”. A crucial question guiding the analysis is whether or not there is a disciplining threat (to payphone service providers from behaving independently) from potential new entrants to the retail payphone market. The relative ease with which undertakings can enter the market for payphone access and calls would act as such a disciplining threat. Since liberalisation, this market has experienced three new entries into the retail payphone access and calls market.

#### Structural Barriers

- 4.6 A structural barrier to entry exists when, given the level of demand, the state of the technology and its associated cost structure are such that they create asymmetric conditions between incumbents and new entrants impeding or preventing market entry of the latter.
- 4.7 From the data collected as part of this market review and analysis of the number of payphones in the market, there is evidence to suggest that there are not significant barriers for entry into the market in the presence of wholesale regulation. Furthermore, it was suggested by one operator that timelines in the order of three to four weeks are required for current providers to initiate the provision of private payphones<sup>70</sup>. This was supported by another submission which noted that the

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<sup>69</sup> Page 9 - 12.

<sup>70</sup> Operator responses to the Payphone Data Direction issued by ComReg.



## Payphone Market Review

installation period for the private payphone market is about one month, though this is dependent on the site owner, and approximately three months for public payphones dependent on a number of factors such as the local authority, and contractor/staff availability<sup>71</sup>.

- 4.8 In order to provide payphone services to an end user there is no requirement to have a billing relationship with that user. An operator simply installs the payphone and the user avails of its service on an ad hoc basis. Furthermore, the revenue earned per handset is likely to be greater for a payphone than e.g. a landline, as it is used by multiple users as opposed to being designated to a single household/business. The average revenue earned for payphone operators per phone (for H2 2005-H1 2005) was over €1,500<sup>72</sup>. This would indicate that relatively the barriers to entry are low.
- 4.9 ComReg puts forward as part of this consultation that there are no barriers which prevent an operator from entering the market for the provision of retail payphone services in the presence of wholesale regulation. There is a sufficient number of operators which have entered the market since liberalisation and which are in a position to compete with eircom.
- 4.10 Rather than having to build their own infrastructure, indirect access products (Carrier Pre Select (CPS) and Single Billing Wholesale Line Rental (SB-WLR)) are available to OAOs for the provision of retail services under current regulations. This significantly lowers entry barriers and facilitates admission into the payphone access and calls market. ComReg has identified that the ownership of payphone equipment for the provision of retail services is not useful without access to the network which is provided via indirect access products (CPS or SB-WLR). From submissions it is clear that all operators other than eircom (Smart, silvertel and Dome) provide services in the retail market via CPS and SB-WLR.

### Legal or regulatory barriers

- 4.11 Legal or regulatory barriers are not based on economic conditions, but result from legislative, administrative or other state measures that have a direct effect on the conditions of entry and/or the positioning of operators on the relevant market.
- 4.12 ComReg must recognise that even though supply-side substitution exists between public and private payphones and a single market has been defined there are somewhat asymmetric market conditions for private and public payphones. eircom has an obligation as the Universal Service Provider to provide public payphones in sufficient numbers to meet the reasonable needs of end users. As a result eircom has an existing network which currently is likely to meet most, if not all, demand in some (typically more rural) locations and therefore there is not as much incentive for operators to enter the market to provide public payphones.
- 4.13 ComReg suggests that, in the presence of wholesale regulation, there are not high barriers to entry, but rather a market where there are limited entry costs, plus a static/declining market demand (due to increasing mobile penetration) which, taken with the high level of coverage already, makes future entry unlikely for public

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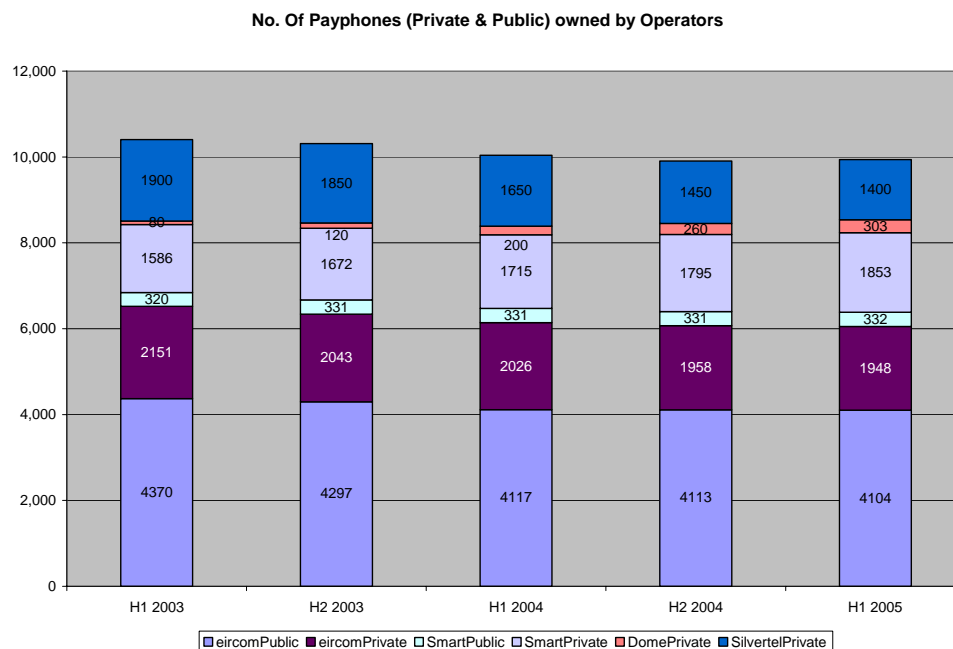
<sup>71</sup> Operator responses to the Payphone Data Direction issued by ComReg.

<sup>72</sup> This can be compared to data collected via consumer surveys which showed that among residential users, for the first quarter in 2006 the average bi-monthly bill was €103.49 and €104 in Q2 2005 and €549 among SMEs and €3,230 for Corporates. Business Telecommunications Survey Wave 2, 2005. 06/04a. Amarach, Survey Results, April 2006.

payphones, save in targeted areas. While mobile penetration has an impact on the market, it is likely that there will always be a demand for payphones – this is supported by a consumer survey which indicates that payphones are complementary rather than substitutes to landlines or mobiles. There is support for this view among industry players.<sup>73</sup>

4.14 As can be seen from Figure 4.1, while some operators have reduced the number of payphones (for a number of strategic decisions) other operators have increased theirs. For example, Dome telecom installed over 200 private payphones in the last two years, while Smart installed nearly 300. With new facilities, such as shopping centres and pubs, being built, comes a demand for payphones<sup>74</sup>. Smart noted in its June Annual Report that *‘the payphone and prepaid card businesses while continuing to generate positive cashflow showed a modest decline in revenues in line with our expectations of changes in these markets’*.<sup>75</sup> Smart is however continuing to install payphones.

4.15 In response to declining demand for public payphones and in order to enhance the attractiveness of payphone services, in recent years eircom has (i) developed newly designed payphone kiosks; (ii) completed a national rollout of a new multi-payment method payphone; and (iii) introduced a new multimedia payphone, the Smartphone, which provides e-mail, Internet and payphone services, which gives them an opportunity to sell advertising space.<sup>76</sup> So rather than new build, eircom seems to be focusing on increasing revenue earned on existing infrastructure.



**Figure 4.1: Number of Payphones/Operator**

<sup>73</sup> Sunday Tribune, August 21 2005, eircom won't hang up on phone boxes.

<sup>74</sup> Sunday Business Post, March 20, 2005: eircom in €2m payphone deal.

<sup>75</sup> Smart Annual Report June 2005

<sup>76</sup> eircom Group plc SEC Form 20-F for the fiscal year ended 31st March 2005. Published 30 June 2005

- 4.16 ComReg therefore concludes that the retail payphone market is not subject to high non-transitory entry barriers and therefore should not be subject to ex-ante regulation at the retail level. While demand for traditional payphone services may be declining the market is still viable and for some operators continues to generate positive returns. It should be noted that this analysis is in the presence of regulation at the wholesale level.

### **Assessment of the tendency towards effective competition**

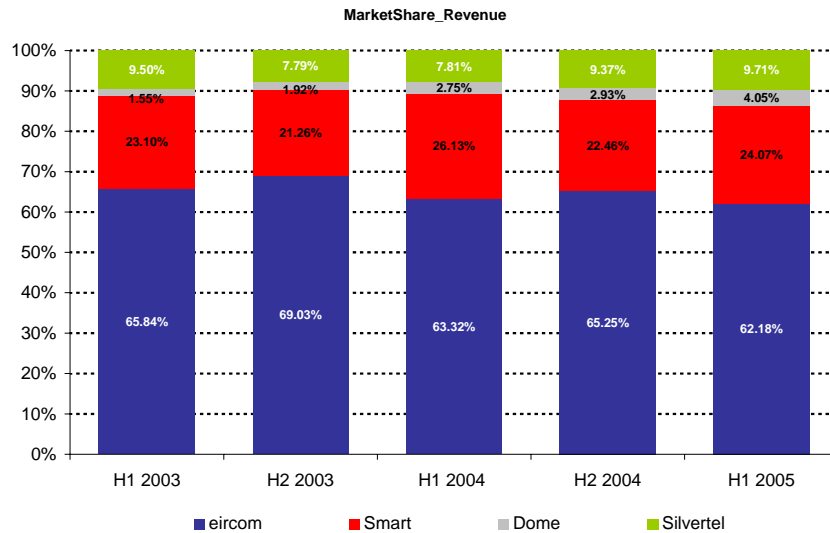
- 4.17 ComReg considers below the impact of a number of factors on the competitiveness of the market. There are a number of market characteristics which would prevent any operator from acting independently of its competitors, and consumers, notably higher quality mobile voice and data services, the emergence of VoIP and the availability of calling card services. It is important to note that this is not to say that these products/services present sufficient levels of substitution to justify inclusion in the relevant market, but rather they can be considered under potential competition.
- 4.18 Although not formally in the market (as a result of insufficient substitutability), calling card providers will exercise competitive pressure on the ability of any single retailer to increase prices. This is particularly true if one considers the PAC<sup>77</sup>. This forces the actual payphone operator to give access to calling card operators at a regulated price. Thus, the presence of calling card operators, allied to the PAC, constitutes a constraint on the ability of payphone operators to act independently. However, as noted in section three, calling card providers are not substitutes as they offer an indirect as opposed to a direct form of access, and thus are not in the same market.
- 4.19 ComReg considers that countervailing bargaining power also exists, exerted by premises owners and local authorities, as generally contracts for the provision of services are tendered for which a number of alternative operators compete on price and service. These factors preclude any operator from acting independently from consumers and competitors. This is evidenced from the examination of market share for the provision of retail payphone access and calls which is presented below. It can be seen that eircom's market share has fallen since H1 2003<sup>78</sup>. As can be seen, despite the total number of minutes falling in the market, all operators other than eircom have increased market share over the period.
- 4.20 ComReg notes that the market share data presented below is up to H1 2005. Further data directions have been sent to operators to seek more recent data however, one submission was not provided by the time of publication. ComReg will continue to seek the relevant data from the operator during the period of consultation. It should be noted that there has not been dynamic fluctuations in market share, which has remained relatively stable over the past two and a half years. ComReg does not foresee that any significant change in market share data which would affect overall preliminary conclusions. Updated data will be published in the response to this consultation.

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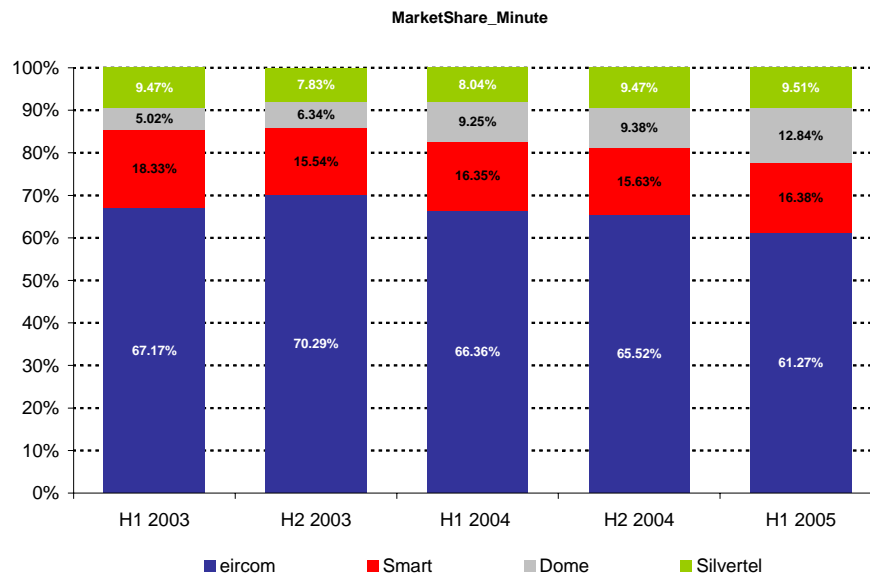
<sup>77</sup> Payphone Access Charge – see Appendix C.

<sup>78</sup> Total minutes have fallen by close to 20% H1 2004.

## Payphone Market Review



**Figure 4.2: Retail Market Share - Revenue**<sup>79</sup>



**Figure 4.3: Retail Market Share - Minute**<sup>80</sup>

### Preliminary Conclusion

4.21 With the availability of wholesale obligations, ComReg holds that there are not high, non-transitory barriers to entry into the retail market for payphone access and calls, and there is a tendency towards effective competition. Therefore the market

<sup>79</sup> Silvertel was not in a position to provide revenue data for 2003. Therefore ComReg used Silvertel's 2004 submission which was multiplied by the rate of growth from 2004 to 2005. The 2003 revenue data presented for Silvertel is therefore an estimate.

<sup>80</sup> Silvertel and Smart were not in a position to provide minute data for 2003. Therefore ComReg used Silvertel's and Smart's 2004 submission which was multiplied by the rate of growth from 2004 to 2005. The 2003 minute data presented for Smart and Silvertel are therefore estimates.

does not pass the three criteria test and should not be subject to ex-ante obligations at the retail level.

4.22 As noted by the EU Commission, the key principle for market analysis is to assess whether effective competition is or is not entirely or primarily a result of regulation in place and whether the status of competition in the defined market is likely to be different in the absence of such regulation.<sup>81</sup> In that respect, ComReg concludes that existing regulatory obligations, which are imposed on eircom in a closely related market i.e. the wholesale market for *the provision of access facilities to other authorised operators for the delivery of payphone access and calls to the end user*, have a substantial competitive effect on the market for retail payphone access and calls. As identified in ComReg's review of the retail market absent wholesale regulation – see section five - the vertically integrated owner of the PSTN would be likely to have 100% market share (and hence SMP), as there would be high barriers to entry.

4.23 ComReg preliminarily concludes that the retail market is not in need of ex-ante regulation as there are not significant barriers to entry in the presence of wholesale regulation, the market tends towards effective competition and competition law is sufficient to deal with any potential competition problem. Accordingly, ComReg proposes:

- not to conduct a market analysis in respect of this retail market for payphone access and calls; and
- not to impose any new SMP obligation on any operator in this market.<sup>82</sup>

4.24 However, ComReg intends to monitor closely the effect such a removal of obligations has on competition in the market. Retail regulation pertaining to payphone services is outlined in Appendix D.

**Q. 4. Do you agree with ComReg's preliminary conclusion that the retail market for payphone access and calls, should not be subject to ex-ante obligations at the retail level? Please provide evidence in support of your response.**

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<sup>81</sup> Commission Decision of 20 February 2004 Pursant to Article 7 (4) of the Directive 2002/21/EC. Case FI/2003/0024 and FI/2003/0027.

<sup>82</sup> Article 8(3) of the Access Directive provides, amongst other things, that national regulatory authorities shall not impose obligations set out in Articles 9 to 13 on operators that have not been designated with SMP. See also Article 2 of the Access Directive, generally, in relation to withdrawal of obligations.

## 5 Review of the Retail Market absent Wholesale Regulation

- 5.1 The hypothetical monopolist test should be applied in a context where regulation is absent, as this leads to the correct identification of market boundaries, and as such enables market power to be correctly assessed. Further, applying the hypothetical monopolist test in the absence of regulation avoids the problem of circularity<sup>83</sup>.
- 5.2 ComReg must review the retail payphone access and calls market in the absence of regulatory measures, that is, where direct and indirect access products (e.g. CPS and SB-WLR) are not available to third parties. Otherwise the market would artificially be found to be competitive, because it is only the presence of regulation which makes the market competitive.
- 5.3 The absence of regulation in both the wholesale and retail segments ought to strengthen the profitable opportunities for a vertically integrated hypothetical monopolist. For example, if the price of a retail service was increased by a small amount, a vertically integrated hypothetical monopolist may find it profitable to deny competitors access to wholesale elements that are used as inputs to the retail offerings and in the absence of regulation may be in a position to implement such a strategy.
- 5.4 In relation to the delineation of market definition, the scope of the market chosen would be similar and does not depend on whether analysis is in the presence or absence of regulation. ComReg notes that the retail market for payphone access and calls in the absence of regulation will be no wider (e.g. a market for payphone services which includes mobile and payphone services).
- 5.5 Furthermore, in the absence of wholesale regulation (e.g. CPS/SB-WLR) the retail market would be characterised by high barriers to entry and therefore subject to ex-ante regulation. A new entrant would have to duplicate the PSTN network as there is only one PSTN and retail payphone boxes are useless without network access.
- 5.6 In the absence of regulation ComReg suggests that the vertically integrated owner of the PSTN would ultimately have 100% retail market share and consequently SMP in the relevant market.
- 5.7 Therefore ComReg concludes that the market for retail payphone access and calls tends towards effective competition only in the presence of wholesale regulation.

**Q. 5. Do you agree with ComReg's analysis of the retail market for payphone access and calls absent regulation? Please provide evidence in support of your response.**

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<sup>83</sup> Circularity occurs when markets are defined in the presence of regulation. This is because in the presence of regulation there is no market power, but in the absence of that regulation, market power will immediately return.

## 6 Wholesale Market Definition

### Introduction

- 6.1 This section considers the relevant wholesale market definition in light of the preliminary conclusions on the relevant retail market definition.
- 6.2 Carrier Pre Select (CPS) and Single Billing Wholesale Line Rental (SB-WLR) mean that while ownership of assets may not change, access services can be offered to end users by a third party. See section three for a further description of these wholesale products.
- 6.3 CPS is a form of indirect access. This allows authorised operators (OAO) to have traffic routed to their networks at an agreed point of interconnection. The requirement for the provision of CPS currently only applies to fixed operators with SMP, and all OAOs are eligible to provide services via CPS. CPS became the preferred way for OAOs to provide a calls service to a significant portion of Irish telephone users.
- 6.4 SB-WLR is used where the OAO provides, in conjunction with CPS ‘All Calls’, a single bill covering all aspects of Voice Services to its customers at rates it determines. The OAO thus ‘rents’ the line from eircom wholesale and onward rents it to the end user via the single bill.
- 6.5 Currently most OAOs provide payphone services via a retail narrowband access line and CPS but there is a growing trend of migrating services to SB-WLR, due to the retail minus margin associated with SB-WLR and the convenience of a single bill for private payphones.<sup>84</sup> ComReg considers that the acquisition of a retail narrowband access line and the carrying of calls over that line via CPS is substitutable for SB-WLR. SB-WLR is thus essentially a development of the CPS product that combines CPS ‘All Calls’ with a narrowband access line.
- 6.6 In section four ComReg considered, in the presence of *ex ante* regulation, a proposed retail market for public payphones, specifically where CPS and SB-WLR are available to OAOs for the provision of retail payphone services. ComReg followed this in section five with a review of the market in the absence of regulation.
- 6.7 ComReg identified in its review (section three) that all operators, other than eircom, provide services at the retail level through the purchase of CPS or SB-WLR products. ComReg now proposes to define a separate market at the wholesale level for services of this type. As a starting point ComReg has defined the relevant wholesale product market as one for:

*The provision of access facilities to other authorised operators for the delivery of payphone access and calls to the end user.*

- 6.8 From the demand-side ComReg considers whether local loop unbundling (LLU) products are a substitute to CPS/SB-WLR products for the provision of payphone access and calls. Competing operators to eircom currently can avail of LLU products, specifically the Unbundled Local Metallic Path (ULMP) product. This would potentially allow competing operators access to end customers for the purpose of providing payphone access and calls services.
- 6.9 Indeed, fully unbundled local loops give full control to the purchasing operator of the local loop connection to the end user. As such, the purchasing operator has

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<sup>84</sup> Wholesale Line Rental – Pricing Issues, Margin Document No 04/34.



## Payphone Market Review

almost complete discretion in relation to the services offered. Perhaps at some point in the future the types of services demanded by users of payphones might be fulfilled via LLU products, but ComReg is not of the view that this will occur within the two year timeframe of this review

- 6.10 Although ComReg acknowledges the theoretical potential of the ULMP services to enable competition in the retail market for payphone access and calls in certain geographic areas, ComReg does not believe that ULMP currently constrains eircom in the provision of wholesale payphone access services. As part of the initial data collection<sup>85</sup> for this market review that the level of investment required to unbundle the local loop would not be justified by the potential revenue stream from the provision of payphone call services. ComReg is not aware of any operator currently providing or intending to provide payphone services via ULMP.
- 6.11 If an OAO could competitively provide its own local loop (or equivalent) infrastructure, and necessary backhaul to its own switched network, then regulatory intervention might not be required. It might be argued that LLU is sufficient to remedy the situation where an OAO cannot justify its own local network infrastructure. However, LLU would still require the OAO to install its own technical equipment in the primary exchange/RSU (remote subscriber unit), and to provide backhaul to its main switched network. The costs of this additional investment would be prohibitive when compared to the revenues available from a, comparatively, few payphones in each exchange/RSU area. Thus additional “facilities, services or both facilities and services” are necessary in order to allow the OAO’s competitive access to the payphone market, and CPS provides a suitable alternative to full LLU.
- 6.12 From the supply-side ComReg maintains that within the timeframe of the review (two years), LLU does not provide supply-side substitution to CPS/SB-WLR, due to the high level of investment required. This is not to say that it will not happen at all. As noted in the ‘*ERG Common Position on the approach to Appropriate Remedies in the New Regulatory Framework*’ investment on fixed networks creates the opportunity for competitors to invest in assets which take them progressively closer to the customer. However it should be noted that not all operators will wish to ascend to the top of the ladder; depending on their business plans they will stop at various places.
- 6.13 ComReg is therefore of the view that Local Loop Unbundling is not a substitute for indirect access for payphone services as these services operate at entirely different functional layers and are thus not in the same relevant market.
- 6.14 Thus ComReg concludes that it is more appropriate to consider LLU under potential competition (below) rather than at the market definitional stage. Also, it should be noted that an obligation has been imposed on eircom to provide LLU as part of the Market Review: Wholesale unbundled access (including shared access) to metallic loops and sub-loops<sup>86</sup>.

### Geographic market

- 6.15 CPS/SB-WLR is provided by eircom only and is available nationally. Pricing and functionality is homogeneous throughout Ireland. ComReg therefore concludes that

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<sup>85</sup> Source: submissions received by ComReg as part of this market review in response to payphone data direction (26/07/05).

<sup>86</sup> ComReg Document Number: 03/146.



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the wholesale access to the public telephone network at a fixed location for the provision of payphone access and calls to end users is national in scope.

### Preliminary conclusion

6.16 ComReg is of the preliminary view that there is a national market for wholesale access to the public telephone network at a fixed location for the provision of payphone access and calls to end users.

**Q. 6. Do you agree with ComReg's definition of the wholesale market for payphone access and calls? Please provide evidence in support of your response.**

## 7 Wholesale Market Definition - Assessment of the three criteria

### Introduction

- 7.1 As discussed in detail in section four the three criteria identified by the European Commission are intended to serve as an initial screen for considering whether a market has the propensity to be regulated by competition law alone, or whether the market requires some form of ex-ante regulation. Only markets that comply with all three criteria, cumulatively, should require ex-ante regulation.
- 7.2 Having defined a market for access to the public telephone network at a fixed location for the provision of payphone services to end users, a market not listed in the *Relevant Markets Recommendation*, ComReg must assess whether this is a relevant market that is potentially susceptible to ex-ante regulation using the three criteria test, which is summarised as follows:
- Are there are high and persistent barriers to entry?
  - Is the market one that tends towards a competitive outcome?
  - Would competition law alone be sufficient to address any competition problems?
- 7.3 ComReg is of the view that the market for the provision of wholesale payphone access is characterised by high and non-transitory entry barriers. There are currently no alternatives to eircom's network for the provision of wholesale services. The data collected as part of this market review indicate that no payphone operator other than eircom provides services over its own infrastructure. Rather operators acquire either CPS (Carrier Pre Select) or Single Billing Wholesale Line Rental (SB-WLR) for the provision of retail services.
- 7.4 ComReg considers that entry to the market for wholesale payphone access would require significant investment, predominantly as sunk costs. As noted above, these high sunk costs, together with the economies of scale and density that characterise access networks, significantly increase the barriers to entry for entities considering constructing new local access networks. As such, ComReg takes the view that there is little likelihood of new fixed entry to provide services in the period of the review. As outlined above LLU is not considered a substitute.
- 7.5 Operators other than eircom currently provide retail payphone services via the acquisition of a retail narrowband access line and carry calls over this via CPS. As an alternative to acquiring CPS, a new entrant would need to build its own network. In order to offer a competing national payphone service equivalent to eircom's, an OAO would have to un-bundle in excess of 1,000 exchanges each of which involves considerable time and costs, and to provide physical connectivity to each of those exchanges.
- 7.6 The cost and time required to replicate eircom's switched network represents a significant barrier to entry, which would preclude entry over the time frame of the review. Barriers would include *inter alia*, economies of scale and scope (enjoyed by eircom) and high sunk cost associated with the installation of local, primary, secondary and tertiary exchanges, in-depth network design and management etc. ComReg preliminarily concludes that there are high and persistent barriers to entry into the market for wholesale access for the provision of retail payphone access and calls.

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- 7.7 ComReg is not aware of any operator other than eircom providing or intending to provide itself or third parties with wholesale access for the provision of retail payphone services. eircom has 100% market share and currently there is nothing to indicate that the market is tending towards effective competition; therefore the market fails the second criterion.
- 7.8 Further, it appears that competition rules are insufficient of themselves (absent *ex ante* regulation) to address the lack of effective competition in the relevant market for wholesale payphone access and calls services. As a general rule, competition rules find it difficult to address the competitive harm which can occur in wholesale market relationships in the context of a network industry. Where such competition law-based investigations have taken place, they have tended to be subject to lengthy delays. Accordingly, ComReg consider that *ex ante* regulation is best positioned to address the competitive failures arising from provision of national wholesale payphone access and calls services.

### Preliminary Conclusion

- 7.9 ComReg deems it appropriate to undertake market analyses to assess the level of effective competition in the wholesale market for payphone access and calls.

**Q. 7. Do you agree with ComReg's analysis of the wholesale market for payphone access and calls under the three criteria? Please provide evidence in support of your response.**

## 8 Wholesale Payphone Access and Call Market Analysis

### Introduction

8.1 Having identified the wholesale payphone access and calls markets, ComReg is required to conduct an analysis of whether the market is effectively competitive by reference to whether any given undertaking or undertakings is/are deemed to hold SMP in these markets. Recital 27 of the Framework Directive states that a relevant market will not be effectively competitive “where there are one or more undertakings with significant market power”. Regulation 25(1) of the Framework Regulations states that:

*“A reference in these Regulations ... to an undertaking with significant market power is to an ... undertaking (whether individually or jointly with others) enjoys a position which is equivalent to dominance of that market, that is to say a position of economic strength affording it the power to behave to an appreciable extent, independently of competitors, customers, and, ultimately, consumers”.*

8.2 Accordingly, an undertaking may be deemed to have SMP either individually or jointly with other undertakings in a relevant market. ComReg is obliged under the Framework Regulations to assess SMP in accordance with European Community law and to take the “utmost account” of *The Guidelines*<sup>87</sup>.

### Assessment of SMP

#### Market share

8.3 As noted in ‘*The Guidelines*’ the criteria to be used to measure the market share of undertakings concerned will depend on the characteristics of the market<sup>88</sup>. It is for ComReg to decide which criteria are most appropriate for measuring market presence. As noted previously, demand at the wholesale level is derived from the retail market. ComReg suggests that the most correct measures are the number of lines (measured by the number of payphones) and the number of minutes conveyed (measured by the number of minutes sold at the retail level).

8.4 From the information available to ComReg eircom provides 100% of access lines to itself and other retail payphone providers.

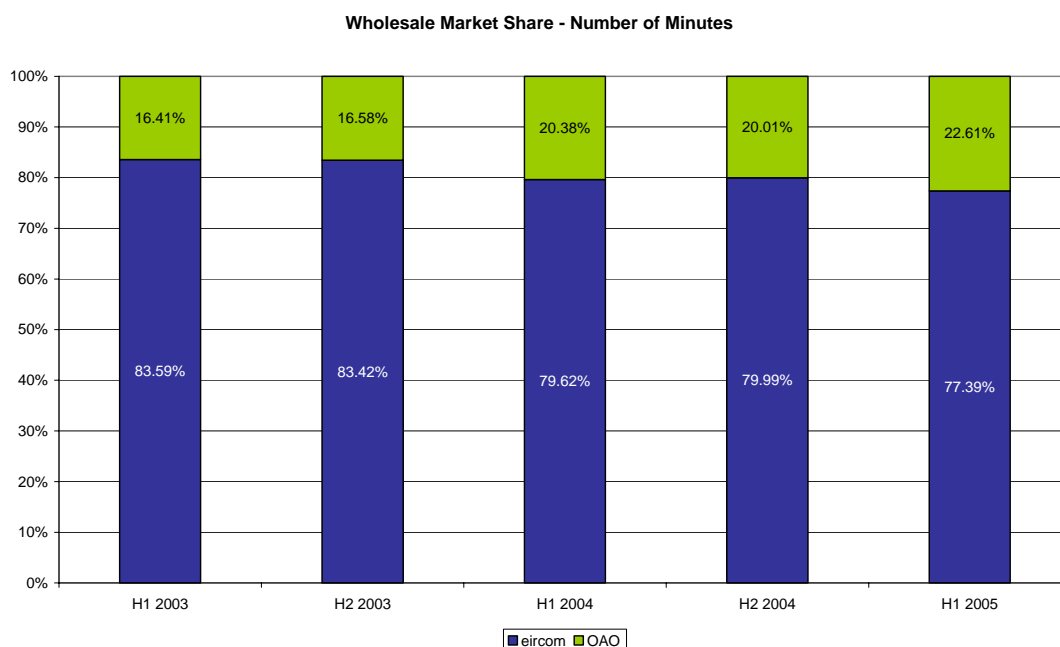
8.5 Currently, CPS minutes are acquired from eircom and are resold to a number of the retail payphone providers. However, ComReg takes the view resellers exert no competitive pressure at the wholesale level on eircom, given the extent to which eircom is vertically integrated and the fact that minutes are sold by eircom at a regulated price. Resellers are effectively required to acquire from eircom at its wholesale price and must set their resale price at a level that permits their customers (e.g. retail payphone providers) to compete with eircom's retail services. As such, the impact of such resellers is less than even the market shares<sup>89</sup> suggest they have. The percentage of total minutes provided by eircom and resellers (OAOs) at the wholesale level is presented in Figure 8.1 below.

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<sup>87</sup> Framework Regulation 25(2).

<sup>88</sup> Paragraph 77.

<sup>89</sup> Resellers account for approximately 23% of total number of CPS minutes.



**Figure 8.1: Wholesale market share: Number of Minutes**

8.6 *The Guidelines* state that the existence of a dominant position cannot be established on the sole basis of large market shares and those NRAs should undertake a thorough and overall analysis of economic characteristics of the relevant market before coming to the preliminary conclusion as to the existence of significant market power<sup>90</sup>. However *The Guidelines* state that according to established case law, very large market shares – in excess of 50% - are in themselves save in exceptional circumstances, evidence of the existence of a dominant position.<sup>91</sup> For completeness, ComReg considers other criteria below.

Potential competition and barriers to entry

8.7 The threat of market entry, either on a long-term or "hit and run" basis, is one of the main potential competitive constraints on incumbent firms, where such entry is probable (rather than hypothetical), timely and appreciable. The threat of entry will be reduced by the existence of barriers to entry.

8.8 ComReg considers that entry to the market for wholesale payphone access and calls would require significant investment, predominantly as sunk costs. As noted above, these high sunk costs, together with the economies of scale and density that characterise access networks, significantly increase the barriers to entry for entities considering constructing new local access networks. As such, ComReg takes the view that there is little likelihood of new fixed entry to provide services in the period of the review.

8.9 In addition, ComReg does not anticipate medium-term market entry using alternative platforms (*e.g.*, satellite, wireless services using unlicensed frequencies (*e.g.*, based on the 802.11b standard), mobile wireless or power line platforms), given the asymmetry

<sup>90</sup> *The Guidelines*, Paragraph 78.

<sup>91</sup> *The Guidelines*, Para 75.

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of the positions of the incumbent and new entrants. ComReg is unaware of any payphone operator considering the use of these alternative platforms for the provision of wholesale access and call services.

- 8.10 ComReg notes that although ULMP can be used to provide voice services, currently the product is not used for the provision of payphone services. Where ULMP lines have been purchased by OAOs, they are used to provide high capacity data services and all the information available to ComReg indicates that this pattern of use is unlikely to change in the foreseeable future.
- 8.11 Secondly, there are very considerable barriers to entry into the voice market associated with ULMP. In order to offer a competing national voice service equivalent to eircom's, an OAO would have to un-bundle in excess of 1,000 exchanges each of which involves considerable time and costs, and to provide physical connectivity to each of those exchanges.
- 8.12 It is unlikely that retail payphone services provided by OAOs over LLU will offer sufficient potential competition to act as a competitive constraint on eircom over the timeframe of the review. ComReg will however monitor the impact of ULMP on the relevant markets, and revisit its analysis if necessary.
- 8.13 There is no information available to ComReg to indicate that that any new entrant is considering building a new access network (capable of supplying such services), replicating all or part of eircom's network or that sufficient investment will be made in existing infrastructure to upgrade it to the point at which it is able to support the provision of replicable access.

### Countervailing buying power

- 8.14 If an operator engages in practices that are potentially exploitative, customers might be able to exert countervailing buyer power against such practices. Where buyers are large and powerful, they can effectively respond to any attempt to increase prices by sellers. ComReg has considered the likelihood and/ or existence of such countervailing power, given that countervailing power is often a relevant factor in wholesale market.
- 8.15 However, countervailing buyer power can only exist where large customers have the ability (within a reasonable timeframe) to resort to credible alternatives (e.g., not to purchase or to switch supplier) in response to a price increase or threatened price increase. While there are a small number of purchasers (three independent payphone providers) ComReg does not believe that any purchaser of wholesale payphone access has credible alternatives to eircom. As such, ComReg does not believe that any purchaser has countervailing market power that would offset eircom's overwhelming market power in these market.

### Preliminary conclusions

- 8.16 On the basis of its market analysis, ComReg has come to the preliminary conclusion that eircom has SMP in the market for wholesale payphone access (direct and indirect). This conclusion is based mainly on the following factors:
- development of market shares;
  - difficulty of market entry and the number of operators in the market;
  - lack of potential competition and barriers to entry;

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- lack of countervailing bargaining power.

**Q. 8. Do you agree with ComReg's preliminary conclusion for its market analysis of the wholesale market for payphone access and calls? Please provide evidence in support of your response.**

## 9 Designation of Undertakings with Significant Market Power

- 9.1 This market review has defined a market in Ireland which is concerned with wholesale payphone access to the public telephone network. For each market, ComReg has analysed the market characteristics, and has concluded that eircom has SMP in the relevant market.
- 9.2 Having regard to the sections above, particularly sections 7 and 8, ComReg is of the view that, in accordance with the Framework Regulations:
- eircom Ltd should be designated as having SMP in the wholesale provision of access facilities to other authorised operators for the delivery of payphone access and calls to the end user.*
- 9.3 A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

**Q. 9. Do you believe that it is appropriate to designate eircom with SMP in the market for wholesale provision of access facilities to other authorised operators for the delivery of payphone access and calls to the end user?  
Please substantiate your response.**



## 10 Proposed Market Remedies

### Introduction

- 10.1 The purpose of this section is to consider the actual and potential competition problems in the defined market for wholesale payphone access and calls and to propose remedies to address these problems.
- 10.2 Under Regulation 9(1) of the Access Regulations, where an operator is designated as having significant market power (SMP) in a relevant market, as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, ComReg is obliged to impose on such an operator, obligations set out in Regulations 10 to 14 of the Access Regulations as ComReg considers appropriate.
- 10.3 ComReg proposes to impose on eircom a specific requirement to provide **CPS and SB- WLR** at the wholesale level to ensure that retail competition can be sustained.
- 10.4 In addition to mandating access to wholesale products, **ancillary obligations** are proposed. These relate to (i) product development; and (ii) conditions of provision of Carrier Pre Select (CPS) and Single Billing Wholesale Line Rental (SB-WLR).
- 10.5 The CPS and SB-WLR products used to provide retail payphone services are identical in all respects to those used to offer residential and non residential access and calls (which falls within the scope of the Retail Fixed Narrowband Access Markets). Also, it should be acknowledged that ComReg has not encountered any payphone specific competition problems associated with the development or provision of CPS and SB-WLR. Competition problems and obligations associated with the ancillary remedies were previously examined in the context of the initial review of the retail narrowband access markets<sup>92</sup>. Where relevant, reference is made to this initial review on some occasions below.
- 10.6 An obligation not to exert a **margin squeeze** is also imposed by virtue of SMP in the wholesale payphone market which is aimed to prevent leverage from the wholesale into the retail market. This obligation is supported by accounting separation.

### Competition problems in the wholesale access market

- 10.7 ComReg outlines below actual and potential competition problems in the wholesale payphone market. The approach which was taken to the assessment of competition problems was forward-looking, and followed the recommendations of the *SMP Guidelines*. While evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation. ComReg has carried out the assessment on competition problems, in the absence of regulation.
- 10.8 ComReg considers that the justification for considering *ex ante* remedies must therefore be broader than if solely based on demonstrable acts of past behaviour. ComReg instead has to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis. The

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<sup>92</sup> ComReg document number 04/95 and 05/25.

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analysis has proposed that eircom should be designated with SMP. ComReg suggests that this is a key difference in approach between ex ante and ex post analysis, and ComReg notes that its approach is similar to that of other NRAs as evident from their notifications to the European Commission.

- 10.9 According to settled case law,  
“ *dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.*”<sup>93</sup>
- 10.10 An undertaking which is dominant has the potential ability to influence a range of competition parameters, including prices, innovation, output and the variety or quality of goods and services. Absent regulation, a dominant firm would rationally have the incentive to raise prices, as there would be no competitive pressure to prevent this. In addition, a firm which was dominant in an upstream market could use its market power to leverage into a downstream market. A firm which was dominant in one market could attempt to leverage power horizontally into a related market.
- 10.11 It is however important to note that in any discussion of competition problems and of the incentives for an operator to exert its SMP, it is not necessary for ComReg to point to examples of abuse that have occurred. While such examples would be corroborative, the nature of ex ante regulation is that it is concerned with guarding against this in advance.

### **Vertical leveraging**

- 10.12 Vertical leveraging arises where an operator has dominance at a wholesale level and can potentially transfer this power into the retail markets. In the wholesale payphone market, a vertically-integrated SMP operator has control of the wholesale inputs necessary for an entrant to offer an access service, and is in a position to control the use of these inputs and so affect the competitive conditions in the downstream retail markets.
- 10.13 ComReg outline below actual and potential ways in which this could happen, and characterised vertical leverage in terms of:
- Denial of access;
  - Leveraging by non-price means;
  - Leveraging by means of pricing.

### **Denial of access**

- 10.14 eircom is a vertically integrated operator which has control of the wholesale inputs needed to offer an effective SB-WLR product in the retail payphone market. Absent regulation, eircom would have incentives to leverage its market power from the wholesale market to the retail market, thus establishing potential competition problems associated with vertical leveraging.

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<sup>93</sup> DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, Dec 2005.

- 10.15 eircom's continuing high market share in the wholesale market, and the limited existence of other factors which would act to significantly dilute eircom's potential market power within the timeframe of the review, would suggest that competition problems persist. This indicates a continuing need for regulatory intervention and the need to create an environment where OAOs can obtain the necessary wholesale components on appropriate terms. It is ComReg's view that the provision of CPS and SB-WLR products are necessary to ensure that operators and resellers of OAO products can enter the retail market by availing of eircom's infrastructure. Certain regulatory safeguards would be required over the period of the review in order to do this.

**Leveraging by non-price means**

- 10.16 ComReg recognises that in the period since the launch of the SB-WLR product there has been considerable take-up. However, ComReg has specific experience of continuing competition problems. These problems have been communicated via Industry fora and correspondence from operators to ComReg, for which ComReg has records of. An example is the level of intervention regarding the introduction of wholesale access products, not just SB-WLR but other wholesale access products such as Partial Private Circuits and Wholesale Leased Lines, Bitstream and LLU. While some of these products may not be in the scope of this review, the ability of the dominant operator to leverage into related markets must also be considered as a factor that is relevant to this review.
- 10.17 There are many kinds of potential competition problems associated with vertical leveraging into the retail narrowband access markets. Two such examples are product development and service delivery and assurance. The examples are not meant to be exhaustive.
- 10.18 In relation to product development OAOs have frequently complained about the lack of visibility of eircom's prioritisation of wholesale as opposed to retail product development. Both they and ComReg have noted a lack of visibility regarding for example the IT processes which underpin wholesale products. OAOs have reported to ComReg that such information is required to enable OAOs to efficiently manage and schedule their internal IT developments. Similarly it is not clear that eircom's own product development process is structured in such a way that its wholesale customers have a proportionate influence over eircom's product development roadmap. From ComReg's experience, OAOs continue to identify the more subtle quality of service issues which directly impact the competitive offering of an OAO, and the experience of the end customer that is using the product. ComReg's assessment is that wholesale product development has frequently been a highly burdensome and difficult process, requiring significant time and resources. While not all difficulties are due to eircom, ComReg is of the view that more could be done by eircom to provide assurance both to ComReg and industry that OAOs are receiving an appropriate level of service.
- 10.19 The net effect of this is that OAOs have no guaranteed influence in the product development process and their role is largely reactive. ComReg considers that this is unlikely to be the position enjoyed by eircom retail. Should this problem fail to be addressed then there is scope for eircom's requirements to be the main driver for product development and so discriminate against the OAOs. In addition the lack of communication regarding product and IT development means that there is a risk that OAOs will suffer a sufficient delay in implementing changes that might have already been implemented by eircom retail.

- 10.20 Further concerns arise in the case of service delivery where, due to a lack of visibility of the guarantee provided to eircom Retail it has not been easy for OAOs to be confident that eircom retail does not benefit from a better quality of service than that provided to OAOs. Such an asymmetry of information makes it more difficult for OAO's to compete with eircom at the retail level. One example of this was where eircom retail was able to provide a retail customer service commitment superior to that provided via the corresponding wholesale SLA.
- 10.21 ComReg is of the view that these problems can be addressed by obligations at the wholesale level in relation to transparency and non- discrimination.

**Leverage by pricing means**

- 10.22 ComReg suggests that based on past behaviour, eircom as a vertically integrated operator with SMP in the wholesale payphone services market would have an incentive to engage in pricing that gives rise to a 'margin squeeze'<sup>94</sup>. A margin squeeze may harm competition in the downstream market in several ways.
- 10.23 First, eircom could choose a combination of input and downstream prices that meant that an efficient downstream competitor could not earn a normal profit and so would exit the market.
- 10.24 Second, a margin squeeze could undermine a downstream competitor's ability to compete even without forcing exit. This might occur, for example, where eircom Retail and the downstream competitor produce differentiated products. In this case the integrated operator might profit from setting an input price high enough to weaken downstream competition (thereby raising profits) but not high enough to force exit, as that might entail fewer sales of the inputs (and thereby damage profits upstream).
- 10.25 In the case where the vertically integrated operator is able to access economies of scale and scope that are not so readily available to operators competing at the downstream level, then the availability of those economies to the integrated operator may bring extra pressure to bear on the margins available for competing downstream operators. Similarly, if the vertically integrated operator is a multi-product firm operating in several markets, it may have incentives to set prices in such a way as to ensure that the product in question is making little or no contribution to common costs. Downstream competitors with smaller product ranges may have to recover a much large proportion of common costs from this product and so be unable to compete on price.
- 10.26 The prevention of margin squeeze, with the aim of promoting competition, may require the application of remedies from the Access Regulations and in particular Regulation 14 (price control and cost accounting) and may also require Regulation 12 (accounting separation) as an ancillary remedy.

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<sup>94</sup> A margin squeeze is sometimes referred to as a price squeeze. It occurs when a dominant provider supplies an upstream (e.g. wholesale) product A which is used in combination with a downstream (e.g. retail) component B to produce a final service or product A+B; where undertakings competing against A+B would provide their own alternative to B; and the implicit charge by the dominant provider to itself for B (i.e. the difference between the prices at which it supplies A+B and A only) is so low that an efficient competitor cannot profitably compete against A+B.

**Q. 10. Do you agree with the competition problems identified by ComReg, as outlined above? Please provide evidence in support of your response.**

### **Principles in selecting remedies**

- 10.27 ComReg is obliged under Regulation 9(6) of the Access Regulations to ensure that any obligations imposed on an operator, in accordance with Regulation 9 of the Access Regulations, be based on the nature of the problem identified, be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Act, 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations.
- 10.28 Also, in designing such access remedies, ComReg will ensure that they take due account of investment incentives in accordance with Access Regulation 13(4).
- 10.29 A further principle which ComReg took into consideration was the aim of the new regulatory framework, as outlined in *Recommendation*<sup>95</sup>, to enhance user and consumer benefits in terms of choice, price and quality by promoting and ensuring effective competition.

**Q. 11. Do you agree with the principles which ComReg proposes should be used when selecting remedies? Do you think there are other principles that ComReg should consider when selecting appropriate remedies?**

### **Application of remedies to competition problems**

- 10.30 In terms of wholesale payphone access, a significant competition problem is associated with barriers to entry arising from sunk costs. ComReg's analysis has concluded that replication of the access network is not a feasible option, and that this situation is unlikely to change substantially during the lifetime of this review. In order to bring the benefits of competition to end users, and to avoid the market failures associated with foreclosure of the retail market, it is essential that competing operators can have access to eircom's local access and switched network infrastructure. This indicates that remedies should be designed in the first instance to provide OAOs with sufficient access to wholesale inputs, so that access services may be offered using eircom's network. ComReg proposes to impose an obligation of CPS and SB-WLR, the details of which are outlined below.
- 10.31 ComReg also noted the incentive to leverage by pricing means and proposes to impose an ex post obligation on eircom not to margin squeeze. In support an obligation of accounting separation is also proposed.
- 10.32 ComReg's consideration of remedies are discussed below in terms of :
- a) Continuing need for wholesale products;
  - b) Regulatory intervention in product development and implementation;
  - c) Supporting remedies to these wholesale access remedies; and

<sup>95</sup> Page 15. European Commission's Recommendation on Relevant Products and Services Markets.

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d) Obligations in relation to margin squeeze.

10.33 Each of these is considered in turn.

### **a. Continuing need for wholesale products**

10.34 It is ComReg's view that the analysis of the wholesale retail payphone services market clearly justifies the need for CPS and SB-WLR products consisting of calls and access.

### **Carrier Pre Select (CPS)**

10.35 ComReg proposes to impose on eircom a specific requirement to provide CPS at the wholesale level to ensure that competition at the retail level can be sustained.

10.36 "Access" is defined in the Access Regulations as the "*making available of facilities, services or both facilities and services... .. for the purpose of providing electronic communications services.*" The regulations further state that "*this includes access to the local loop and to facilities and services necessary to provide services over the local loop*". [2, (2)]

10.37 The "electronic communications services" under consideration here are payphone services, and thus the "facilities, services or both facilities and services" are those necessary to allow for competitive provision of payphone services at the retail level.

10.38 As outlined in section six (in the assessment of potential substitutes in the wholesale payphone market), additional "facilities, services or both facilities and services" are necessary in order to allow the OAO's competitive access to the payphone market, and CPS provides a suitable alternative to full LLU.

10.39 The assessment of competition problems indicates that it is highly unlikely that eircom would offer sufficient wholesale products through commercial negotiations with OAOs. To support this, ComReg points to the many interventions which it has had to make in respect of the introduction of wholesale access products (not just Wholesale Line Rental but other wholesale access products outside the scope of this review such as Partial Private Circuits and Wholesale Leased Lines, Bitstream and Local Loop Unbundling) over the last number of years. While some of these products may not be within the scope of this review, the ability of the dominant operator to leverage into related markets must also be considered as a factor that is relevant to this review.

10.40 Accordingly, it is ComReg's view that in order to ensure OAOs will be able to avail of CPS for the provision of retail services, it is necessary for ComReg to mandate this from eircom. These requirements are derived from obligations under the Access Regulations.

10.41 ComReg therefore proposes pursuant to *Regulation 13* to impose an obligation on eircom to provide access and use of specific network facilities and to require eircom to provide a CPS offering. An access remedy is the only remedy which allows OAOs to make reasonable requests for products according to their specifications.

### **Preliminary conclusion**

**ComReg proposes to continue to impose obligations on the SMP operator to ensure that its subscribers have access to CA/CS and CPS.**

**Q. 12. Do you agree that an access obligation should be imposed on the SMP operator pursuant to Regulation 13 of the Access Regulations? Do you agree that this access obligation should mandate Carrier Pre Select? Please detail your response.**

**Single Billing Wholesale Line Rental (SB-WLR)**

- 10.42 WLR is generally based on an OAO contracting wholesale access lines and ancillary services from the incumbent to provide end to end services to consumers via CPS.
- 10.43 The wholesale payphone market encompasses both access and calls. ComReg believes that the CPS obligation is insufficient to maintain competition in the retail payphone market and that it is appropriate that the wholesale remedy should facilitate the provision of a bundled retail product – one which includes access and calls.
- 10.44 ComReg does not consider that alternative wholesale products are more appropriate to requiring the provision of a SB-WLR product. All OAOs providing payphone services in the retail market do so via CPS or SB-WLR, and most operators are currently in the process of migrating payphones from CPS to SB-WLR. As established earlier in this paper LLU does not provide a sufficient remedy and from the information available to ComReg no operator currently or plans to provide retail payphones service directly over own infrastructure or LLU.
- 10.45 ComReg suggests that the market analysis and identification of competition problems carried out in this market review indicate a clear need for the continuation of SB-WLR as a remedy.

**Preliminary conclusion**

**ComReg proposes to impose obligations on the SMP operator under the Access Regulations to ensure that a SB-WLR product will continue to be offered and its detailed development should be supported.**

**Q. 13. Do you agree that eircom should be obliged to offer a SB-WLR product in line with requirements as determined by ComReg, under the obligations of the Access Regulations? Please detail your response.**

**b. Requirement for intervention in product development & implementation**

**Carrier Pre Select**

- 10.46 CPS was mandated in Ireland in 2000 and to ensure the proper functioning of the CPS product, ComReg has found it necessary to intervene on a number of occasions to address various competition problems of the type described earlier in this section. ComReg believes that, in addition to the imposition of the obligation for CA/CS and CPS on eircom, it is necessary to ensure continuity in relation to the provision of CA/CS and CPS by eircom. ComReg therefore proposes that eircom be required to continue to comply with the various requirements imposed on it, as

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set out in the current suite of industry agreed product documentation (as amended)<sup>96</sup> which deals with the following key product areas:

- inter-operator processes;
- network and IT specifications;
- service level agreements;
- fault handling;
- disputes.

10.47 ComReg also recognised that further interventions may be required in the future to continue to develop the CPS product and ComReg expects to consult with industry fully on the specific details of such developments. It is ComReg's view that intervention has been essential in the past, and that a workable competitive CPS product would not be available in the calls market through commercial negotiation alone.

10.48 ComReg explained in the current consultation document that it considers failure to impose obligations on eircom would mean that the effective operation of CPS in the market would be limited, and, accordingly, the ability of subscribers to avail of CPS services would be greatly hindered.

### **Wholesale Line Rental**

10.49 ComReg's analysis of competition problems indicates that regulatory intervention continues to be required at a detailed and operational level in the development and implementation of SB-WLR. Specifically this entails:

- Access to wholesale products;
- Open access; and
- Withdrawal of access.

10.50 Each of these obligations is considered in turn.

#### **(i) Access to wholesale products**

10.51 In order to avail of SB-WLR, OAOs need to acquire the relevant wholesale products as currently set out in Service Schedule 401 of eircom's Reference Interconnect Offer (RIO)<sup>97</sup>, as amended from time to time. ComReg considers that these products are an essential requirement for the provision of SB-WLR and proposes, pursuant to Regulation 13 of the Access Regulations, that eircom be required to provide such access.

### **Preliminary Conclusion**

**ComReg proposes that the SMP operator should be obliged to permit access to relevant wholesale products.**

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<sup>97</sup> See [http://www.eircomwholesale.ie/regulatory/reg\\_details.asp?id=37](http://www.eircomwholesale.ie/regulatory/reg_details.asp?id=37)



**Q. 14. Do you agree that an access obligation should be imposed on the SMP operator pursuant to Regulation 13 of the Access Regulations? Do you agree that this access obligation should mandate Wholesale Line Rental? Please detail your response.**

**(ii) Open access**

- 10.52 ComReg considers that, insofar as it is required to provide access, the SMP operator should also grant open access to relevant information, technical interfaces, protocols, or other key technologies, and should be required to provide such OSS<sup>98</sup> or similar software necessary to ensure fair competition in the provision of services.
- 10.53 It is considered that while a SB-WLR product has been made available, inadequacies in the provision have resulted in many referrals to ComReg. ComReg considers that it is the quality of wholesale inputs that determines the operational detail which enables the OAO to develop a viable customer proposition. This issue also needs to be considered in the context of an obligation of non-discrimination.
- 10.54 In proposing these measures ComReg has considered the incentives to the SMP operator to engage in discriminatory behaviour. ComReg considers that there is sufficient potential advantage to the SMP operator in restricting access to relevant information, interfaces, protocols and key technologies, and restricting the OAOs ability to influence the product development process.
- 10.55 ComReg notes that the remedies proposed are without prejudice to the co-operative developments which may happen from time to time and the positive bilateral support which eircom may provide to OAOs through a launch period etc.

**Preliminary Conclusion**

**ComReg proposes that the SMP operator should be required to grant open access to relevant information, interfaces, protocols and key technologies, and should be required to provide OSS or similar software to ensure fair competition in SB-WLR and adequate granularity of information.**

**Q. 15. Do you agree that the SMP operator should be required to grant open access to relevant information, technical interfaces, protocols, or other key technologies and should also be required to provide such OSS or similar software necessary to ensure fair competition in the provision of SB-WLR services? Please detail your response.**

**(iii) Withdrawal of Access**

- 10.56 ComReg proposes to impose the obligation on eircom not to unreasonably withdraw access to facilities already granted. This remedy continues to be required to ensure that OAOs have the certainty to provide retail services to the marketplace

<sup>98</sup> Operational Support Systems.

and so compete with eircom and in turn ensure that consumers have certainty in the delivery of services.

- 10.57 ComReg notes that there are circumstances where it may be desirable to withdraw access to facilities, for example when a facility is no longer needed and it is an undue burden on eircom to maintain it. ComReg therefore proposes to qualify the obligation on eircom not to withdraw access to facilities already granted, where there exists a clearly defined objective justification. In this regard it would be a matter for eircom to demonstrate that such an objective justification actually exists. Thus withdrawal would be subject to prior ComReg approval which would only be granted following appropriate consultation.
- 10.58 It was recommended by one operator, in response to the initial review of the narrowband retail access obligations, that the concept of using *Consents* (as proposed in the consultation on financial reporting obligations for SMP operators<sup>99</sup>) should be applied similarly to the withdrawal of access to facilities, whereby the SMP operator would issue a notice to ComReg indicating their request in writing and justifying their reasoning. The concept of *Consents*, as proposed in the case of financial reporting obligations, did not involve any consultation process and may not be appropriate in this context since operators would be directly affected without being given sufficient opportunity to put forward their viewpoint on the matter.

### **Preliminary Conclusion**

**ComReg proposes that the SMP operator should be obliged not to withdraw access to facilities already granted, except where ComReg has approved this withdrawal.**

**Q. 16. Do you agree that the SMP operator should be required not to withdraw access to facilities already granted, save without prior ComReg approval? Please detail your response.**

### **c. Supporting remedies for CPS and SB-WLR**

- 10.59 ComReg suggests it is not sufficient to simply mandate the requirement to ensure the existence of the necessary wholesale inputs. There is a continuing concern with how these inputs were provided in terms of quality, timeliness and scope. ComReg therefore proposes a set of supporting obligations designed to assist in the implementation and development of indirect access products.
- 10.60 In support of the obligations for CPS and SB-WLR as outlined above, ComReg has concluded that there are a number of additional obligations required which are necessary to fully address the competition problems identified. ComReg considers that each of the following remedies is necessitated:
- Non-discrimination
  - Transparency;
  - Price control;
  - Accounting separation;
  - Cost accounting systems.

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<sup>99</sup> Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18).

## **Non - Discrimination**

10.61 ComReg proposes to impose a non-discrimination obligation on the SMP operator. It should be stressed that ComReg is concerned with instances of discrimination that ordinarily have no objective justification. A non-discrimination obligation is the appropriate remedy to target competition problems such as withholding of information, delaying tactics, undue requirements, low or discriminatory service or product quality, strategic design of product in a manner that disadvantages competitors, and discriminatory use of information.

10.62 The key elements are as follows:

- ComReg considers that an obligation of non-discrimination is an essential remedy to target the kinds of actual and potential competition problems which have been identified in the wholesale payphone market.
- ComReg proposes that an obligation of non discrimination is necessary to provide the same ability to OAOs as is afforded to eircom retail to purchase wholesale access to eircom retail lines, specified network elements, and associated facilities under terms and conditions that are at least as equivalent as would apply to the SMP operator's retail arm.
- A non-discrimination obligation would oblige the SMP operator to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and to provide services and information to others under the same conditions and of the same quality as it would provide for its own services or those of its subsidiaries or partners.
- Information and services must be provided to alternative operators in timescales, on a basis, and of a quality, which are at least equivalent with those provided to the SMP operator's retail arm and associates. It is important that information about an OAO gained by eircom as a result of its provision of wholesale services to that operator. ComReg has referred to several situations in which there is considerable incentive for the eircom to act in a discriminatory manner and therefore the potential for serious competition problems leading to foreclosure justifies the remedy of non-discrimination.

### **Preliminary Conclusion**

**ComReg proposes to impose an obligation of non-discrimination on the SMP operator and this should be supported with a transparency obligation.**

**Q. 17. Do you agree that obligations of non-discrimination should be imposed on the SMP operator? Please detail your response, making references to ComReg's interpretation of such an obligation set out above.**

### **Approach to SLAs**

10.63 ComReg proposes that under the non discrimination obligation, Service Level Agreements (SLAs) are required in respect of those products mandated following an access obligation, CPS and SB-WLR. SLAs are necessary to allow OAOs the ability to compete in the retail market by giving them appropriate certainty in relation to the supply and repair of the wholesale inputs.

- 10.64 The provision of SLAs and consistent and timely reporting on service levels is essential to demonstrate that eircom is providing at least equivalent conditions between its downstream retail affiliate and OAOs.
- 10.65 Where SLAs are in force, ComReg, having considered the views of all parties, should have the ability to set reasonable targets for performance, which are not defined by present constraints within eircom in terms of resources or provisioning systems. A remedy of transparency is also appropriate as a further supporting remedy. For example, this would empower ComReg to review the fault handling metric as appropriate, consistent with retail customer expectations. The reporting mechanisms that support this process should be transparent and demonstrate to OAOs what level of service they receive compared with eircom and other OAOs.
- 10.66 Where SLAs are in place, ComReg is of the view that penalties should apply where appropriate to provide for incentive compatibility. ComReg notes that this is ultimately a contractual matter between the SMP operator and the OAO. However, generally, ComReg fully supports the use of penalties as a means of making sure that the SLA is effective.
- 10.67 ComReg suggests that a key purpose of the SLA is as a means of ensuring that there is no discrimination in terms of quality of service between one wholesale customer of the SMP operator and another and also between the SMP operator's retail arm and the OAOs. It is ComReg's view that the SLAs dictate the quality of wholesale inputs available to the OAOs, and that this shapes the service which can be offered to end users. It is also ComReg's view that the SLA is key to making the product fit for purpose.
- 10.68 ComReg does not consider that the SLAs currently in place for CPS and SB-WLR fully meet the needs of the OAO community, as there is insufficient transparency in relation to the level of service provided to the SMP operator's retail arm.
- 10.69 To ensure compliance with a non-discrimination obligation it is thus necessary to apply an ancillary obligation of transparency.

### **Preliminary Conclusion**

**ComReg considers that SLAs are central to ensuring that the CPS and SB-WLR wholesale products are fit for purpose and that detailed SLA development should be supported with a transparency obligation.**

**Q. 18. Do you agree with the approach to Service Level Agreements for access obligations set out above? Are there any other conditions which should be attached to the proposed obligations? Please detail any response.**

### **Transparency**

- 10.70 The discussion of transparency is presented under the following headings, each of which are consider in turn:
- Transparency in support of non discrimination;
  - Approach to product documentation;
  - Approach to CPS and SB-WLR Code of Practice;
  - Approach to price amendments.

### **Transparency in support of non discrimination**

10.71 A transparency obligation ensures that OAOs have access to the information which they need to enter and operate in the retail payphone market. Transparency also provides a method of ensuring compliance with a non-discrimination obligation, as the information needed to measure compliance would not otherwise be available. ComReg believes that there is evidence of a lack of transparency in these markets, and that, coupled with the potential for the SMP operator to be less transparent than is necessary, justifies the imposition of a transparency obligation. ComReg notes the continuing requests for intervention by OAOs in relation to process modification and development as further evidence justifying the need for a transparency obligation.

### **Preliminary Conclusion**

**ComReg proposes that an obligation of transparency be imposed on eircom in support of the obligations to provide wholesale products on a non-discriminatory basis.**

**Q. 19. Do you agree that an obligation of transparency should be imposed on the SMP operator? Please detail your response.**

### **Approach to product documentation**

10.72 ComReg notes that eircom currently publishes product documentation in relation to CPS and SB-WLR, including the following:-

- Reference Interconnect Offer (RIO) (CPS Service Schedule 102, SB-WLR Service Schedule 401) ;
- Inter-Operator Process Manuals;
- Product Descriptions;
- Codes of Practice ;
- Service Level Agreements (SLA).

10.73 However, despite the availability of the listed publications, it is not obvious that OAOs receive the equivalent level of service and it is difficult to find objective evidence that OAOs receive the equivalent level of service as that enjoyed by the SMP operator's retail arm. As such, the OAOs have requested progressive improvements in the level of detail of product related information. The details of any additional information should be agreed with industry, and be published in parallel with the existing documentation.

10.74 Regulation 10 (2) of the Access Regulations permits ComReg to require the SMP operator to publish a reference offer that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. This would include a description of the payphone access and calls relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices.

10.75 Regulation 10 (3) of the Access Regulations allows ComReg to specify the precise information to be made available, the level of detail required and the manner of publication. ComReg also notes that the product documentation does not in anyway

constrain the obligation and expects that any new offerings developed pursuant to Regulations 11 and 13 of the Access Regulations should also be detailed in the appropriate documentation.

- 10.76 ComReg considers that greater procedural transparency in the delivery of wholesale products is required.

### **Preliminary Conclusion**

**ComReg proposes that the current product documentation (including RIOs) should be maintained in respect of the CPS and SB-WLR products and that any new documentation should be developed in accordance with Regulations 10 to 13 of the Access Regulations.**

**Q. 20. Do you believe that the current product documentation (including RIOs) should be maintained in respect of the CPS and SB-WLR products and that any new documentation should be developed in accordance with regulations 10 to 13 of the Access Regulations?**

### **Approach to CPS and SB-WLR Code of Practice**

- 10.77 In May 1999, ComReg (then the ODTR) issued a decision notice<sup>100</sup> ‘Introducing Carrier Pre Selection in Ireland’. This Decision Notice was issued pursuant to the European Communities (Interconnection in Telecommunications) Regulations, 1998 (SI 15 of 1998), as amended by the European Communities (Interconnection in Telecommunications) (Amendment) Regulations, 1999 (SI 249 of 1999).

- 10.78 The Decision Notice directed that CPS committee should develop an industry Code of Practice for CPS to ensure that operators develop adequate customer information and consumer protection procedures to assist the public in understanding the choices they have, and how the new CPS services would work. The Code of Practice (‘the Code’) would also protect customers from potential operator misuse of the CPS facility, most notably ‘slamming’<sup>101</sup>. Slamming is not a practice in which reputable operators engage but nevertheless safeguards do need to be put in place. The Code was binding on all parties engaged in CPS and addressed the following areas of consumer interaction :-

- customer contracts
- use of customer information and win-back activities
- promotion of CPS
- the order handling process
- billing and bill payment
- fraud and bad debt
- complaint and inquiry handling

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<sup>100</sup> Document Number 99/29 and Decision Number D2/99.

<sup>101</sup> Slamming means any activity undertaken by an Operator that dishonestly attempts to initiate a service change without the explicit permission of the customer.

- 10.79 In the decision notice D13/02 (as supplemented by D2/03) eircom was required to offer CPS Single Billing products and allow operators to offer a single bill to end users. A code of practice was developed by industry for the SB-WLR product to address the same issues of consumer protection. This code of practice, the ‘Code of Practice for Single Billing’ was an extension of the CPS code and any operator wishing to provide Single Billing Wholesale Line Rental (SB-WLR) was also required to sign the ‘Code of Practice for Single Billing’.
- 10.80 As the Code is based upon the legislative provisions of the Old Framework, it will fall away following the market review and the imposition of any SMP obligations under the review (Regulation 8 of the Access Regulations). Obligations which result from a market review can only be applied to an SMP operator. On the other hand, for the Code to be operational it should apply to all operators.
- 10.81 While the Code of Practice deals with a range of consumer issues, ComReg considers that the clause pertaining to slamming is of particular importance in protecting consumers. ComReg believes that barriers to switching have diminished since the time which the Code was first introduced. Evidence supporting this view was presented in Section 3 of this paper. However it is not clear whether barriers have diminished to a sufficient degree to preclude the need for a ‘winback’ provision which prevents a losing operator<sup>102</sup> from contacting the consumer for a given period. This was aimed at allowing the gaining operator<sup>103</sup> to offer access and calls for a given time and enabling the consumer to have sufficient time to evaluate the service.
- 10.82 In terms of winback, eircom has been effective. The table below, reproduced from eircom’s 2006 results presentation<sup>104</sup>, provides detail on the numbers of customers who returned to eircom in 2005. For the year eircom indicated that it had won back almost 82% of the customers that it had lost in the past to OAOs (Other Authorised Operators).

<b>To end of March 2006 Winback - No. of Subscribers</b>	
Gross losses YTD	-176,203
Winback TYD	144,303
Net losses YTD	31,900

**Table 10.1: eircom winback**

- 10.83 Regulation 5 of the Access Regulations also provides that an undertaking (which includes non SMP operators) shall not pass any information (i.e. information obtained from another undertaking before, during or after the process of negotiating access or interconnection arrangements) on to any other party, in particular, other departments, subsidiaries or partners of the undertaking for whom such information could provide a competitive advantage. The undertaking must use the information solely for the purpose for which it was supplied. Furthermore, by virtue of data protection legislation, there are certain restrictions as to how a company such as eircom may use the personal data of a customer, once that customer has ceased to have any contractual relationship with eircom (because it no longer obtains a calls service or rents a phone line from eircom).

<sup>102</sup> The losing operator is the Operator which provided CPS Services to the customer prior to the customer electing to change to the Gaining Operator.

<sup>103</sup> The gaining operator is the Operator which the customer has chosen to provide CPS Service in the future.

<sup>104</sup> Source: eircom presentation on preliminary 2006 results, 15 May 2006.



- 10.84 In summary, ComReg recognises the benefit of the Code to date and believes that it has been integral to the effectiveness of the CPS and SB-WLR products. It is ComReg's wish to carry forward such a provision, potentially on a voluntary basis and would apply to all operators.
- 10.85 ComReg seeks the views from respondents in respect to Code of Practice for CPS and SB-WLR and the potential impact of its removal.

**Q. 21. Do you believe that the win back provisions of the Code of Practice are achieving the objectives for which they were intended? Can you identify any problems that the withdrawal of the Code of Practice would create? Please substantiate your answer.**

### **Approach to price amendments**

- 10.86 In order to implement the retail minus price control currently applied to SB-WLR, eircom publishes wholesale changes to prices in advance of their coming into effect. This is done on a voluntary, rather than a regulated, basis. Eircom's current practice is to publish changes to wholesale prices 21 calendar days before they come into effect. This is necessary to allow OAOs to update their billing systems. An additional 5 days' notification is provided to ComReg, again on a voluntary basis.
- 10.87 ComReg believes that these timelines are sufficient to allow OAOs react to any price change at the wholesale level and are not overly burdensome on eircom. ComReg invites respondents to comment on whether current practice is sufficient and satisfactory.
- 10.88 In the circumstance where a retail minus price control is applied, ComReg suggests that it is essential that changes to the wholesale price are published in advance. ComReg recognises that this is eircom's current practice, but suggests that this practice should be formalised.
- 10.89 ComReg therefore proposes that eircom should be required to publish changes to wholesale prices 15 working days before they come into effect, and that eircom should notify ComReg of changes 5 working days before publication (i.e. 20 working days before they come into effect). This proposal would allow OAOs time to incorporate changes to prices in their billing systems, and would allow ComReg to examine and monitor the implementation of the retail minus mechanism.
- 10.90 Where charges are set on a cost-oriented basis, as is currently the case with CPS, it may be that the calculation of such charges cannot be satisfactorily concluded in advance of the period to which they relate (in particular where costs are derived from those actually incurred in a period) and that prior publication is impossible. In these instances eircom will be required to follow existing practice, that is to say the publication of interim prices with subsequent publication of final prices once available.

### **Preliminary Conclusion**

**ComReg proposes to formalise current practice and, in circumstances where a retail minus price control is in place, oblige eircom to publish changes to wholesale prices 15 working days before they come into effect. Eircom will be**



**required to notify ComReg of details of changes to wholesale prices 5 working days before publication (i.e. 20 working days before they come into effect).**

**Q. 22. Do you believe that it is correct to formalise current practice and oblige eircom to publish changes to wholesale prices 15 working days before they come into effect. It is proposed that the obligations will also require eircom to notify ComReg of changes to wholesale prices 5 working days before publication (i.e. 20 working days before they come into effect).**

## Price Control

### CPS

10.91 As outlined in the Retail Narrowband Access Market Review<sup>105</sup> the mandated remedy for CA/CS and CPS within the *Universal Service Regulations* imposes the obligation on the SMP operator to ensure that pricing for access and interconnection related to the provision of CA/CS and/or CPS facilities is cost oriented. ComReg suggests that it is appropriate to impose the same price control of CPS for the provision of payphone services. This reduces the regulatory burden for eircom and sustains competition at the retail level through access to wholesale inputs at cost.

### SB-WLR

10.92 ComReg has justified the imposition of SB-WLR above. In mandating a wholesale charge for line rental, the mechanism must support a competitive product, and must provide incentives for investment. Research indicates that the wrong price signals might either frustrate investment of operators, and the potential to build sustainable competition, or lead to a situation where positive effects on competition will not emerge because the product may not be competitive<sup>106</sup>.

10.93 ComReg suggests that setting an access price is a function of encouraging efficient entry and preserving the incentive to invest. Access prices that are too high could exclude efficient entrants and access prices that are too low could enable inefficient firms to enter and undermine long-term investment in the market. It is important that the need to encourage long-term investment is balanced by the requirement to promote entry into downstream markets. Therefore careful consideration must be given to the calculation of the minus element.<sup>107</sup>

10.94 ComReg has considered two forms of price control which can be used to encourage efficient entry and preserve the incentive to enter:

- Cost orientation on the basis of forward looking long run incremental costs (FL-LRIC<sup>108</sup>); and

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<sup>105</sup> Market review: Fixed Retail Narrowband Access. ComReg document number 06/39.

<sup>106</sup> Yankee Group. SB-WLR Regulatory Developments – September 2005.

<sup>107</sup> Analysis of single billing wholesale line rental (SB-WLR), conducted by WIK as part of the analysis of the market for fixed telephony. 10/27/2004.

<sup>108</sup> Forward looking Long Run Incremental Cost.

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- Retail minus.
- 10.95 At the beginning of June 2003, ComReg set the price for SB-WLR at retail minus 8.5%<sup>109</sup>. In April 2004 access to eircom's SB-WLR product was set at retail price less 10%<sup>110</sup>.
- 10.96 ComReg suggests that to preserve incentives for investment, a retail minus price control should be maintained. The current price control of retail minus 10% was set at the time to be a reasonable contribution towards retail costs of other operators availing of this product while also allowing for a margin.
- 10.97 ComReg has considered the effectiveness of SB-WLR and take up relative to other member states<sup>111</sup>. Since the launch of SB-WLR there has been<sup>112</sup>:
- significant migration from CPS to SB-WLR;
  - an increase in the number of operators (including resellers) providing retail services via SB-WLR;
  - an increase in the number of lines purchased by OAOs and
  - an increase in the take-up of LLU.
- 10.98 These factors coupled with decreasing market shares for eircom in the retail payphone market suggest that an appropriate price point has been achieved and it is ComReg's view that the continuation of the current price point will encourage further take up. Currently, it is ComReg's view that the contribution available above the wholesale cost is sufficient to incentivise operators to continue with SB-WLR.
- 10.99 Furthermore, maintaining retail minus at 10% preserves certainty and predictability as regards prices until such time as ComReg notes a significant change in market circumstance or take up of SB-WLR that intervention is required, at which point a detailed consultation will be carried out.
- 10.100 In response to the initial review of the CPS and SB-WLR price control (which took place in the context of the retail narrowband access market review<sup>113</sup>), a number of operators requested that a higher margin should be considered. At this point, ComReg is of the view that this is inappropriate and suggests that a higher margin may encourage inefficient entry and communicate the wrong signal in relation to the take up other forms of infrastructure-based competition for the provision of retail payphone services. ComReg believes that SB-WLR has not reached saturation to date and that there is sufficient justification for its imposition.

### **Preliminary Conclusion**

**ComReg intends to continue with the application of the retail minus price control for SB-WLR.**

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<sup>109</sup> Reference Number : 03/24. Wholesale Line Rental - Pricing Issues.

<sup>110</sup> Reference Number : 04/34 Wholesale Line Rental - Pricing Issues, Margin.

<sup>111</sup> Source: internal ComReg data and The Status of Wholesale Line Rental in Europe, Ovum, September 2005. Analysys: Wholesale line rental: a hedge against unbundlers? June 2005.

<sup>112</sup> This data is presented in section six of this consultation paper. At the end of May SB-WLR accounted for approximately 55% of all indirect access lines.

<sup>113</sup> ComReg document number 05/25.

**Q. 23. ComReg proposes that prices set on the basis of FL-LRIC would not be appropriate in the period of this review. Do you agree with this position?**

**Q. 24. ComReg proposes to continue with the application of the retail minus price control for SB-WLR for the period of this review. Do you agree with this position? Please provide reasons for your answer.**

### **Accounting Separation**

- 10.101 ComReg has required eircom to supply financial information either on-request to support investigations and pricing reviews and/or on an annual basis in order to support regular monitoring of its decisions since deregulation of the market. Such data is crucial to effective regulation.
- 10.102 The obligation of accounting separation would support ComReg in its monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting the wholesale prices and internal transfer prices for services.
- 10.103 ComReg notes that, if it were to withdraw the accounting separation obligation, it would not have any means of monitoring the non-discrimination obligation or of having any information on margins in the retail business.
- 10.104 ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts; it is not possible to implement the formal aspects of accounting separation. ComReg therefore believes that the need for accounting separation is clearly established and justified.
- 10.105 In circumstances where retail minus is imposed as a form of price control and for the accounting separation remedy to be effective, further information on the associated retail costs will be necessary to enable the calculation of the retail minus price control.
- 10.106 ComReg proposes that further consultation is required.

### **Preliminary Conclusion**

**ComReg proposes that the existing level of accounting separation obligations should be maintained and developed, pending the outcome of the consultation on accounting systems and associated methodologies for their support.**

**Q. 25. Do you agree that the obligations of accounting separation currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.**

### **Cost Accounting Systems**

- 10.107 ComReg considers that the obligation of cost accounting systems supports the obligations of price control and accounting separation. ComReg does not consider that this obligation will constitute an unreasonable burden on eircom, as the organisation already has management accounting systems in place to support internal business decision making.

- 10.108 ComReg is currently consulting further on this issue in more detail in a consultation on Accounting Separation and Cost Accounting<sup>114</sup>. In the interim ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it until such time as any further consultations are completed.

### **Preliminary Conclusion**

**ComReg proposes that existing cost accounting systems should be maintained and suitably developed, pending the outcome of further consultation on accounting systems and associated methodologies for their support.**

**Q. 26. Do you agree that the obligations of cost accounting currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.**

#### **d. Obligations in relation to margin squeeze**

- 10.109 As part of the analysis of potential competition problems in the wholesale payphone access and calls market, ComReg has identified that based on eircom's past behaviour, there is a possibility of vertical leverage of market power by eircom in the upstream market into the downstream retail market for payphone access and calls, by way of a margin squeeze by reducing its retail prices to a level that is below cost.
- 10.110 On the other hand, most of the costs associated with provision of retail payphone access and calls are incurred at the retail level (coin collection, repair and maintenance, erection of phone box, advertising and other operating costs such as administration and labour costs). These are not sunk costs, nor are they non cash transfer charges from the incumbent's wholesale arm: they represent ongoing cash outgoings. This should act to reduce the incentive to price below cost over the long term.
- 10.111 However the risk that eircom would price at a level that prevents efficient sustainable competition is nevertheless real. A relatively large company such as eircom may well be in a position to fund reduced returns or losses for a considerable period of time and may well have the incentive to do so if it believed that it could recoup these losses later as a consequence of reduced competition. For this reason ComReg proposes that some form of regulatory control over margins between retail and wholesale prices is justified.
- 10.112 ComReg has concluded in section four<sup>115</sup> that the retail market for payphone access and calls should not be subject to *ex ante* regulation and that retail price control is not justified and thus should be removed. However, in order to assess compliance with the control at the wholesale level and to prevent a margin squeeze, ComReg requires visibility of both retail and wholesale prices and any change to these.

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<sup>114</sup> Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

<sup>115</sup> Retail Market Definition in the Presence of Regulation – assessment of the three criteria.

- 10.113 For the reasons set out above ComReg proposes that an ex post margin squeeze test is appropriate.
- 10.114 ComReg believes that there should be as much transparency as possible regarding the measurement of what constitutes an appropriate margin.
- 10.115 In order to establish the cost of maintaining payphones and delivering a calls service it is necessary to take the wholesale inputs and the retail inputs. However, ComReg proposes to set a simple model under which a margin squeeze test would be carried out in the event of an ex-poste investigation into anti competitive practice as follows;

**Proposed cost model**

- a) Conveyance charges;
- Local and national calls using average rates for a given month of traffic.
  - Call origination and International out-payments based on average termination rates on traffic for a given month.
- b) Taking the current Payphone Access Charge as a proxy for all costs associated with operating costs<sup>116</sup> of a payphone box. ODTR 02/75 Annex 1 gives the details of the types of costs recoverable under the interconnection charge.
- c) Retail costs to be assessed based on eircom's and assessed on a per unit basis taking all volumes for a given period.
- d) An appropriate margin based on a suitable forward looking discounted cash flow calculation and eircom's regulated rate of return.

- 10.116 This model, or as amended following the consultation, will be agreed with eircom prior to a final decision being made by ComReg. Following the establishment of this cost floor, any testing of this will be less onerous on eircom and will give certainty to the market that any retail offerings made are above cost. It is suggested that a sufficient margin is allowed to incentivise competition in the market.
- 10.117 ComReg proposes that it would investigate the possibility of a margin squeeze where it has reasonable grounds to suspect one exists. This could be on foot of an own initiative investigation or on foot of a complaint by a third party. In either case it will be necessary to arrive at a conclusion quickly. Accounting data regarding eircom's retail costs will be required. ComReg proposes that this should be available on an on request basis and also that separated accounting information in relation to retail costs should be presented in separated accounts on an annual basis.
- 10.118 ComReg has recognised the importance of a balance between protecting competitors in the downstream market from the possible application of a margin squeeze and enabling a vertically integrated SMP operator to compete unimpeded in a down stream market.
- 10.119 ComReg considers that this is a reasonable approach and is less burdensome than the obligations of cost orientation, pre notification and pre publication which currently exist at the retail level and is more appropriate to address the competition problems identified.

**Preliminary Conclusion**

**ComReg will impose an ex post obligation which aims to ensure that eircom will not set the structure of its tariffs in such a manner that would result in a margin squeeze.**

<sup>116</sup> See ODTR 02/75 and ComReg documents 03/73 and 03/111.

**Q. 27. Do you believe that a model as described above would meet the objective of preventing a margin squeeze in this market? Please detail your response with an alternative method you feel is more appropriate.**

**Q. 28. Or alternatively do you consider it more appropriate to carry out an additional consultation on the assessment of these costs? Please substantiate your response.**

### **Accounting Separation**

- 10.120 ComReg has required eircom to supply financial information either on-request to support investigations and pricing reviews and/or on an annual basis in order to support regular monitoring of its decisions since deregulation of the market. Such data is crucial to effective implementation of an obligation not to margin squeeze.
- 10.121 The obligation of accounting separation would support ComReg in its monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting the wholesale prices and internal transfer prices for services.
- 10.122 ComReg notes that, if it were to withdraw the accounting separation obligation, it would not have any means of monitoring the non-discrimination obligation or of having any information on margins in the retail business.
- 10.123 ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts; it is not possible to implement the formal aspects of accounting separation. ComReg therefore believes that the need for accounting separation is clearly established and justified.
- 10.124 ComReg proposes that further consultation is required.

### **Preliminary Conclusion**

**ComReg proposes that the existing level of accounting separation obligations should be maintained and developed, pending the outcome of the consultation on accounting systems and associated methodologies for their support.**

**Q. 29. ComReg proposes that the existing level of accounting separation obligations should be maintained and developed, pending the outcome of the consultation on accounting systems and associated methodologies for their support.**

## 11 Regulatory Impact Assessment and Justification of Remedies

- 11.1 Regulation 9(1) of the Access Regulations states that: “Where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate”. Furthermore, paragraph 21 of *The Guidelines* says, “if NRAs designate undertakings as having SMP, they must impose on them one or more regulatory obligations, in accordance with the relevant Directives and taking into account the principle of proportionality.” ComReg is therefore compelled to impose at least one obligation where an undertaking is designated to have SMP.
- 11.2 ComReg can impose any or a combination of obligations from those obligations listed in Regulation 10 to 14 of the Access Regulations<sup>117</sup>. Under Regulation 9(6) of the Access Regulations, obligations shall be ‘based on the nature of problem identified; be proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations’.
- 11.3 The Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources) in accordance with S13 of the Communications Regulation Act, 2002 published in February 2003<sup>118</sup>, directs that ComReg:  
“...shall conduct a Regulatory Impact Assessment in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government’s Better Regulation programme.”
- 11.4 ComReg has also taken account of the *RIA Guidelines – How to Conduct a Regulatory Impact Analysis*<sup>119</sup>. The steps of conducting a RIA are as follows:
- Description of policy context, objectives and options;
  - Identification of costs, benefits and other impacts;
  - Consultation;
  - Enforcement and Compliance; and
  - Review.
- 11.5 As shown in section ten<sup>120</sup>, ComReg has concluded that it is appropriate to regulate at the wholesale level only, via the imposition of Carrier Pre Select (CPS) and SB-WLR. In the consideration of the impact of this decision, ComReg has analysed how the decision will effect the relevant stakeholders, this is summarised in Figure 11.1 below.

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<sup>117</sup> European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I No. 305 of 2003.

<sup>118</sup> Policy Directions to Commission for Communications Regulation Mr Dermot Ahern T.D., Minister for Communications, Marine and Natural Resources has issued Policy Directions to the Commission for Communications Regulation.

<sup>119</sup> Published by the Department of the Taoiseach, October 2005. To ensure that the RIA is proportionate and does not become overly burdensome, the RIA involves a two-phase approach. Regulations with relatively low impact only require a Screening RIA, ComReg considers that this is sufficient in the case of this review.

<sup>120</sup> Proposed Market Remedies.



- 11.6 ComReg proposes that all retail obligations relating to the provision of payphone services applicable to eircom Limited by virtue of Access Regulations (Regulation 8) and the Universal Service (US) Regulations (Regulation 13) should be withdrawn. It has been established that the retail market should not be subject to ex-ante regulation due to the lack of barriers to entry and constraining effect from competitors and consumers<sup>121</sup>.
- 11.7 Payphone services are currently price controlled under the Price Cap Order. This was aimed to limit eircom in its price setting behaviour in the absence of market constraints and to facilitate competition. Additionally, under Regulation 21 of the VT Regulation eircom was and, by virtue of Regulation 13 of the Universal Service Regulations, continues to be, regulated in respect of payphone tariff principles.
- 11.8 ComReg preliminarily concludes that the retail market is not susceptible to ex-ante regulation and the decision to remove protection will not negatively impact consumers. If eircom did raise its price the affordability provisions in the US Regulations<sup>122</sup> would enable ComReg to intervene *ex post* with the consent of the Minister. However, ComReg does not believe that the risk of this is significant, as consumers have a choice to switch to other service providers or mobile services. In such circumstances ComReg concludes that it would be overly burdensome and unjustified to maintain these obligations and would provide an unfair advantage to OAOs. The removal of these obligations is likely to reduce administrative and regulatory burden for both eircom and ComReg.
- 11.9 Payphone call volumes account for approximately 1% of the total basket of services regulated by the Price Cap Order. As such their removal will not have a significant impact on the basket as whole – which will still be maintained<sup>123</sup>. eircom's obligations as the Universal Service Provider<sup>124</sup> will be unaffected by the conclusions of this review. At this point, ComReg proposes, in line with the EU, that wholesale regulation is sufficient to sustain competition at the retail level.
- 11.10 ComReg has decided the most appropriate remedy to ameliorate SMP in the wholesale payphone access market is to mandate the non discriminatory<sup>125</sup> provision of CPS and SB-WLR. ComReg suggests that the cost to eircom of complying with this obligation is not significant as they currently provide the CPS and SB-WLR products. Furthermore, with regard to payphones at this point, ComReg does not propose to alter the specification or terms and conditions relating to purchase or delivery of the products.<sup>126</sup> Therefore, it can be concluded that the marginal cost of providing CPS/SB-WLR to payphone operators is minor, essentially being administrative
- 11.11 Conversely, the benefit to OAOs from having these wholesale inputs available is considerable as these products make possible the provision of retail payphone services.

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<sup>121</sup> See section 4 of this document – Retail Market Definition in the Presence of Regulation – Assessment of the Three Criteria.

<sup>122</sup> Regulation 8(2) of the US regulations (which appears under the heading “Affordability of Tariffs”) permits ComReg to specify, with the Minister's consent, requirements to be complied with by a designated undertaking for the purposes of ensuring that such undertaking provides tariff options or packages which depart from those provided under normal commercial conditions, in particular to ensure that those on low incomes or on [sic] special social needs are not prevented from accessing or using the publicly available telephone service.

<sup>123</sup> ComReg will review the current Price Cap Order during 2005-2006.

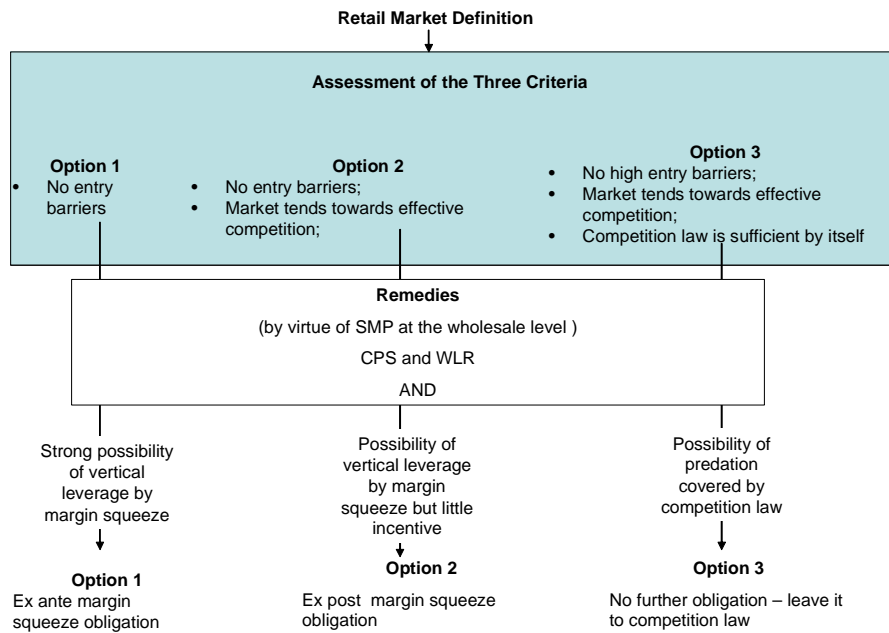
<sup>124</sup> Imposed by virtue of Designation of Universal Service Provider - Decision Notice D3/99. ComReg Document Number 99/31.

<sup>125</sup> In terms of price and quality.

<sup>126</sup> ComReg also recognises that further interventions may be required in the future to continue to develop the CPS product and ComReg will consult with industry fully on the specific details of such developments.

In the absence of these inputs, there would be no viable alternative, which is extremely likely to result in a single operator who would potentially be in a position to act independently of consumers. Ultimately, the consumer is the greatest beneficiary of this decision. The continued presence of more than one operator at the retail level will promote and ensure effective competition and enhance user and consumer benefit in terms of choice, price and quality. As a result, ComReg considers that the benefits accrued by OAOs and consumers via the availability of CPS/SB-WLR considerably outweigh the regulatory burden imposed on eircom.

11.12 ComReg intends to impose an ex post obligation on eircom not to exert a margin squeeze. ComReg also considered the options of imposing an ex ante approach and no test at all – this is outlined in Figure 11.1 below. However it is considered that an ex post obligation is most appropriate for the wholesale market for payphone access and calls. This has been considered in section ten.



**Figure 11.1: Margin Squeeze Obligation**

11.13 The regulatory burden (from the margin squeeze test) on eircom is not significant, and will only be initiated if there is a breach of the obligation. Applying an ex post obligation aims to limit regulatory intervention and encourage price competition at the retail level. Not to impose this obligation would have ignored the possibility of vertical leverage of market power by eircom in the upstream market into the downstream retail market for payphone access and calls, by way of a margin squeeze.

		STAKEHOLDERS		
		eircom	OAO	Consumer
Retail	Option 1 - Remove	Reduce Regulatory Burden	Create level playing field	Increased competition
	Option 2 - Maintain	Unjustified in presence of competitive constraints	Provide unfair Advantage - additional information	More static price
Wholesale	Option 1 - Remove	Reduce Regulatory Burden	Unable to provide retail services	Single operator - probable increase in consumer price
	Option 2 - Maintain	Marginal Compliance Burden	Facilitate Provision of Retail Services	Multiple operators - maintaining competition with corresponding benefit to consumers

**Figure 11.2: RIA and Stakeholder Considerations**

- 11.14 ComReg suggests that the appropriate conclusion at this point therefore is to adopt option 1 relating to the retail market and remove obligations while adopting Option 2 in the wholesale market, imposing an obligation on eircom to provide CPS and SB-WLR.
- 11.15 ComReg proposes that this approach is correct; however these conclusions are preliminary and are still subject to national consultation. ComReg shall consider all responses received in relation to the consultation questions posed. The response to consultation shall be made available publicly and a draft Decision outlining obligations will be consulted upon. The purpose of this second consultation is to ensure that from a legal, technical and practical perspective, the Final Decision is sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed.
- 11.16 At this point, ComReg concludes that the range of obligations proposed are proportionate and justified and meets ComReg’s objectives in terms of the promotion of competition, the development of the internal market and the promotion of the interests of end-users.

**Q. 30. Respondents are asked to provide views on whether the remedies in section 10 of this consultation paper are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impact of these remedies on end-users, competition, the internal single market and technological neutrality**

## Appendix A: Draft Decision Instrument

The Draft Decision Instrument set out below is outlined for information purposes only. ComReg has set out its preliminary views on the market and its initial views on any potential remedies, both of which are subject to consideration of any views expressed in the consultation exercise.

### **[DRAFT] DECISION INSTRUMENT**

#### **1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT**

- 1.1 This decision instrument relates to the market for wholesale payphone services<sup>127</sup> and is made by the Commission for Communications Regulation (“ComReg”):
- i. Having had regard to ss 10 and 12 of the Communications Regulations Act 2002;
  - ii. Having taken account, of its functions under Regulation 6 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003<sup>128</sup>;
  - iii. Having (where appropriate) complied with the Policy Directions made by the Minister<sup>129</sup>;
  - iv. Having taken the utmost account of the EU Commission’s Recommendation<sup>130</sup> and the SMP Guidelines<sup>131</sup>;
  - v. Having had regard to the market definition, market analysis and reasoning conducted by ComReg in [●] the analysis and reasoning set out in document No. and the reasoning and individual decisions set out previously in this document, each of which form part of and shall be construed with this decision instrument;
  - vi. Having taken account of the submissions received in relation to document No. [●]; and
  - vii. Pursuant to Regulations 27 (4) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003<sup>132</sup>,

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<sup>127</sup> The provision of access facilities to other authorised operators for the delivery of payphone access and calls to the end user.

<sup>128</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

<sup>129</sup> Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

<sup>130</sup> EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>131</sup> Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

and Regulations 9, 10, 11, 12, 13 and 14 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003<sup>133</sup>.

## **2 MARKET DEFINITION**

- 2.1 Pursuant to Regulation 26 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, the market in this decision instrument are defined as the market for wholesale payphone services (“the Market”) and differ from any defined in the EU Commission’s Recommendation.
- 2.2 Pursuant to Regulation 26 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, the relevant geographic area within the State for the Market is defined as Ireland.

## **3 DESIGNATION OF SIGNIFICANT MARKET POWER (“SMP”)**

- 3.1 Pursuant to Regulation 25 and Regulation 26 (4) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, eircom Limited (“eircom”) is designated as having SMP on the Market.

## **4 SMP OBLIGATIONS**

- 4.1 ComReg is imposing certain obligations on eircom in accordance with Regulations 9, 10, 11, 12, 13 and 14 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

## **5 WHOLESALE OBLIGATIONS: CARRIER SELECTION AND PRE-SELECTION**

### **Carrier selection and pre-selection**

- 5.1 Pursuant to Regulation 13 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall meet reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities, by undertakings requesting access or use of such access products, features or additional associated facilities, which enable such other undertakings to provide retail equivalents to the retail products offered by eircom in the Market.

### **Cost orientation of prices**

- 5.2 Eircom’s charges for those products and services described in Section 5.1 shall be cost oriented and such costs shall be calculated using a pricing model based on forward looking long run incremental costs (‘FL-LRIC’).

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<sup>132</sup> S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

<sup>133</sup> S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

- 5.3 Without prejudice to the generality of sections 5.1 and 5.2, all of the obligations in relation to provision of those facilities referred to in section 5.1, applicable to eircom immediately prior to the effective date of this decision instrument, shall be maintained in their entirety and eircom shall comply with those obligations. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of those facilities referred to in section 5.2, of the type, and in accordance with the processes, described in the eircom Reference Interconnect Offer – Annex C -Service Schedule 120.<sup>134</sup>

### **Undue preference**

- 5.4 eircom shall not show undue preference with regard to the provision of access and interconnection related to the provision of the facilities referred to in section 5.1. Without prejudice to the generality of the foregoing, eircom shall apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and shall provide services information to others under the same conditions and of the same quality as the operator provides for its own services or those of its subsidiaries or partners.

### **Transparency**

- 5.5 eircom shall, in furtherance of its obligation under section 5.4 not to show undue preference and for the purpose of ComReg monitoring compliance with that obligation, ensure that it is transparent in relation to interconnection, access or both interconnection and access.

- 5.6 Without prejudice to the generality of the obligation in section 5.5, ComReg may issue directions to eircom requiring it to publish specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.

- 5.7 Without prejudice to the generality of the obligation in section 5.5, eircom shall:

- i. Publish any amendments to wholesale prices for carrier selection and pre-selection, 15 (fifteen) working days before they are due to take effect; and
- ii. Notify ComReg in writing of any proposed amendments to wholesale prices for carrier selection and pre-selection, 20 (twenty) working days before they are due to take effect.

In this section, the expression “working day” means any day other than Saturday, Sunday a bank holiday or a public holiday.

### **SLAs**

- 5.8 eircom shall conclude legally binding SLAs with OAOs in respect of those facilities referred to in section 5.1.
- 5.9 eircom shall publish all SLAs concluded (and as from time to time amended) in accordance with this decision instrument.

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<sup>134</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/triouv3.12.pdf> and as amended from time to time in accordance with agreed processes.

**Publication of RO**

- 5.10 eircom shall publish a RO for those facilities referred to in section 5.1 and that reference offer shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and such offer shall include:
- i. A description of the relevant offerings broken down into components according to market needs; and
  - ii. A description of the associated terms and conditions, including prices.

**Accounting separation**

5.11 All of the obligations in relation to accounting separation applying to eircom in force immediately prior to the effective date of this decision instrument in respect of access and interconnection related to the provision of the facilities referred to in section 5.2, shall be maintained in their entirety and eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this decision instrument, eircom shall continue to comply with *inter alia*, the obligations described in the following Decision Notices previously issued by ComReg:

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and eircom.net.
- D7/01- eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by eircom.

## **6 WHOLESALE OBLIGATIONS: WHOLESALE LINE RENTAL**

### **Access**

6.1 Pursuant to Regulation 13 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall meet reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities, by undertakings requesting access or use of such access products, features or additional associated facilities, which enable such other undertakings to provide retail equivalents to the retail products offered by eircom in the Market.

### **Single Billing Wholesale line rental**

6.2 Without prejudice to the generality of the foregoing and, for the avoidance of doubt, eircom shall, pursuant to Regulation 13 (2) (d) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, continue to provide single billing wholesale line rental (“SB-WLR”) for resale by third parties of the type, and in accordance with the processes, described in the industry documentation published on the relevant eircom website. The industry documentation includes but is not limited to the following documentation, as from time to time amended and / or supplemented by new industry documentation:

- i. eircom Reference Interconnect Offer – Annex C -Service Schedule 401<sup>135</sup>;
- ii. Single Billing through Wholesale Line Rental Code of Practice Version 1.2;<sup>136</sup>
- iii. Single Billing through Wholesale Line Rental Service Level Agreement 31/03/04;<sup>137</sup>
- iv. Single Billing through Wholesale Line Rental Product Description Version M;<sup>138</sup> and
- v. Single Billing through Wholesale Line Rental Interoperator Process Manual Version 3.1.<sup>139</sup>

6.3 All of the obligations in relation to provision of those facilities referred to in section 6.2, applicable to eircom immediately prior to the effective date of this decision instrument, shall be maintained in their entirety and eircom shall comply with those obligations. Without limiting the generality of the foregoing, eircom

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<sup>135</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

<sup>136</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrcpv1.2.pdf> and as amended from time to time in accordance with agreed processes.

<sup>137</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrsla.pdf> and as amended from time to time in accordance with agreed processes.

<sup>138</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrproddescversionm.pdf> and as amended from time to time in accordance with agreed processes.

<sup>139</sup> As published at <http://www.eircomwholesale.ie/dynamic/pdf/sbwlrinteropproccmanualv.3.1.pdf> and as amended from time to time in accordance with agreed processes.



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shall continue to comply with, *inter alia*, the various requirements described in the following Decision Notices previously issued by ComReg:

- i. D13/02 - CPS in Ireland 2002;
- ii. D2/03 - Implementation of CPS Single Billing Products: Wholesale Line Rental;
- iii. (SB-WLR), Agency Rebilling (SB-AR), Wholesale Ancillary Services (WAS);
- iv. D9/03 - Implementation of CPS Single Billing Products – Wholesale Line Rental and Agency Rebilling Updating of Timetable and Formalisation of Product Descriptions; and
- v. D4/04 - SB-WLR – Requirements for 31 March 2004 Launch Date.

### **Additional SB-WLR obligations**

6.4 Without prejudice to the generality of sections 6.1 and 6.2, eircom shall in relation to those services referred to in section 6.2:

- i. Pursuant to Regulation 13 (2) (c) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, not withdraw access to facilities granted without the prior approval of ComReg;
- ii. Pursuant to Regulation 13 (2) (e) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services; and
- iii. Pursuant to Regulation 13 (2) (h) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services.

### **Non-discrimination**

6.5 Pursuant to Regulation 11 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall have an obligation of non-discrimination in respect of the provision of those facilities referred to in section 6.2

6.6 Without prejudice to the generality of section 6.5, eircom shall:

- i. Provide a wholesale equivalent for retail offerings offered by eircom in the Market;
- ii. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as

## Payphone Market Review

eircom provides for its own services or those of its subsidiaries or partners;  
and

- iii. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are at least equivalent to those provided to eircom's retail arm and associates.

## Transparency

- 6.7 eircom shall, in furtherance of its obligations under sections 6.5 and 6.6 and for the purpose of ComReg monitoring compliance with those obligations, ensure that it is transparent in relation to interconnection, access or both interconnection and access.
- 6.8 Without prejudice to the generality of the obligation in section 6.7, eircom shall:
  - i. Publish any amendments to wholesale prices for SB-WLR, 15 (fifteen) working days before they are due to take effect; and
  - ii. Notify ComReg in writing of any proposed amendments to wholesale prices for SB-WLR, 20 (twenty) working days before they are due to take effect.

In this section, the expression "working day" means any day other than Saturday, Sunday a bank holiday or a public holiday.

## Publication of reference offer ("RO")

- 6.9 Pursuant to Regulation 10 (2) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall publish and keep updated a RO in respect of the services and facilities referred to in section 6.2 that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. eircom shall also ensure that the RO includes a description of the relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices.
- 6.10 Pursuant to Regulation 10 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall make public such information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 6.2, as specified by ComReg from time to time.

## Service level agreements ("SLAs")

- 6.11 Pursuant to Regulation 13 (3) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, it shall be a condition of the obligations referred to in section 6.1 and section 6.2 that eircom shall conclude legally binding Service Level Agreements ("SLAs") with Other Authorised Operators ("OAOs") in respect of those facilities referred to in sections 6.1 and section 6.2.

- 6.12 Pursuant to Regulation 13 (3) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, it shall be a condition of the obligations referred to in section 6.1 and section 6.2 that eircom shall publish all SLAs concluded (and as from time to time amended) in respect of those facilities referred to in sections 6.1 and section 6.2.

**Retail minus pricing**

- 6.13 Pursuant to Regulation 14 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, the prices charged by eircom to any other undertaking for access to or use of those facilities referred to in section 6.2 shall be at least 10% less than the retail price charged by eircom to its end-users for retail access to the public telephone network at a fixed location, which is the retail equivalent of such facilities. eircom shall continue to comply with the obligations described in the following Decision Notices previously issued by ComReg:

- D03/24. Wholesale Line Rental - Pricing Issues.
- D 04/34 Wholesale Line Rental - Pricing Issues, Margin.

**Accounting separation and cost accounting**

- 6.14 Pursuant to Regulation 14 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall have an obligation to make transparent its wholesale prices and its internal transfer prices by maintaining separated accounts in respect of wholesale line rental. All of the obligations in relation to accounting separation applying to eircom in force immediately prior to the effective date of this decision instrument in respect of access and interconnection related to the provision of the facilities referred to in section 6.2, shall be maintained in their entirety and eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this decision instrument, eircom shall continue to comply with *inter alia*, the obligations described in the following Decision Notices previously issued by ComReg:

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.
- D8/99 – Costing Methodology for use in Accounting Separation.
- D10/99 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D9/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators.

- D10/00 – Accounting Separation and Publication of Financial Information for Telecommunications Operators, Supplemental Information referring to Decision Notice D9/00.
- D2/01- Accounting Separation for Internet Service provision and Report on Investigation into Indigo and eircom.net.
- D7/01- eircom’s Reference Interconnection Offer & Accounting Separation and Publication of Financial Information for Telecommunications Operators.
- D12/01- Revision of Timetable for Publication of Separated Accounts and Financial Information by eircom.

## **7 OBLIGATION NOT TO EXERT A MARGIN SQUEEZE**

- 7.1. Pursuant to Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 eircom will not set the structure of its tariffs in such a manner that would result in a margin squeeze.

In support of the obligation set out in 7.1 and pursuant to Regulation 14 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall have an obligation to make transparent its wholesale prices and its internal transfer prices by maintaining separated accounts in respect of wholesale line rental.

## **8 WITHDRAWAL OF CERTAIN OBLIGATIONS**

- 8.1 The obligations previously imposed upon eircom in the retail payphone market, are withdrawn as of the effective date of this decision instrument.

## **9 STATUTORY POWERS NOT AFFECTED**

- 9.1 Nothing in this decision instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the effective date of this decision instrument) from time to time as the occasion requires.

## **10 EFFECTIVE DATE**

- 10.1 This decision instrument shall be effective from the [●] day of [●] 2006 until further notice by ComReg.

**ISOLDE GOGGIN**  
**CHAIRPERSON**  
**THE COMMISSION FOR COMMUNICATIONS REGULATION**  
**THE [ ] DAY OF [ ] 2006**

## Appendix B – Consultation Questions

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Q. 3. Do you agree with ComReg's preliminary conclusion that the market for retail payphone access and calls, is national in scope? Please provide evidence in support of your response. ....	30
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Q. 9. Do you believe that it is appropriate to designate eircom with SMP in the market for wholesale provision of access facilities to other authorised operators for the delivery of payphone access and calls to the end user? Please substantiate your response. ....	47
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Q. 12. Do you agree that an access obligation should be imposed on the SMP operator pursuant to Regulation 13 of the Access Regulations? Do you agree that this access obligation should mandate Carrier Pre Select? Please detail your response. ....	54
Q. 13. Do you agree that eircom should be obliged to offer a SB-WLR product in line with requirements as determined by ComReg, under the obligations of the Access Regulations? Please detail your response. ....	54

Q. 14. Do you agree that an access obligation should be imposed on the SMP operator pursuant to Regulation 13 of the Access Regulations? Do you agree that this access obligation should mandate Wholesale Line Rental? Please detail your response.....	56
Q. 15. Do you agree that the SMP operator should be required to grant open access to relevant information, technical interfaces, protocols, or other key technologies and should also be required to provide such OSS or similar software necessary to ensure fair competition in the provision of SB-WLR services? Please detail your response. ....	56
Q. 16. Do you agree that the SMP operator should be required not to withdraw access to facilities already granted, save without prior ComReg approval? Please detail your response. ....	57
Q. 17. Do you agree that obligations of non-discrimination should be imposed on the SMP operator? Please detail your response, making references to ComReg’s interpretation of such an obligation set out above. ....	58
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Q. 19. Do you agree that an obligation of transparency should be imposed on the SMP operator? Please detail your response. ....	60
Q. 20. Do you believe that the current product documentation (including RIOs) should be maintained in respect of the CPS and SB-WLR products and that any new documentation should be developed in accordance with regulations 10 to 13 of the Access Regulations?.....	61
Q. 21. Do you believe that the win back provisions of the Code of Practice are achieving the objectives for which they were intended? Can you identify any problems that the withdrawal of the Code of Practice would create? Please substantiate your answer. ....	63
Q. 22. Do you believe that it is correct to formalise current practice and oblige eircom to publish changes to wholesale prices 15 working days before they come into effect. It is proposed that the obligations will also require eircom to notify ComReg of changes to wholesale prices 5 working days before publication (i.e. 20 working days before they come into effect). ....	64
Q. 23. ComReg proposes that prices set on the basis of FL-LRIC would not be appropriate in the period of this review. Do you agree with this position? 66	
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Q. 25. Do you agree that the obligations of accounting separation currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.....	66
Q. 26. Do you agree that the obligations of cost accounting currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.....	67

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Q. 27. Do you believe that a model as described above would meet the objective of preventing a margin squeeze in this market? Please detail your response with an alternative method you feel is more appropriate..... 69

Q. 28. Or alternatively do you consider it more appropriate to carry out an additional consultation on the assessment of these costs? Please substantiate your response..... 69

Q. 29. ComReg proposes that the existing level of accounting separation obligations should be maintained and developed, pending the outcome of the consultation on accounting systems and associated methodologies for their support. 69

Q. 30. Respondents are asked to provide views on whether the remedies in section 10 of this consultation paper are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impact of these remedies on end-users, competition, the internal single market and technological neutrality..... 73

## Appendix C – Explanation of the PAC

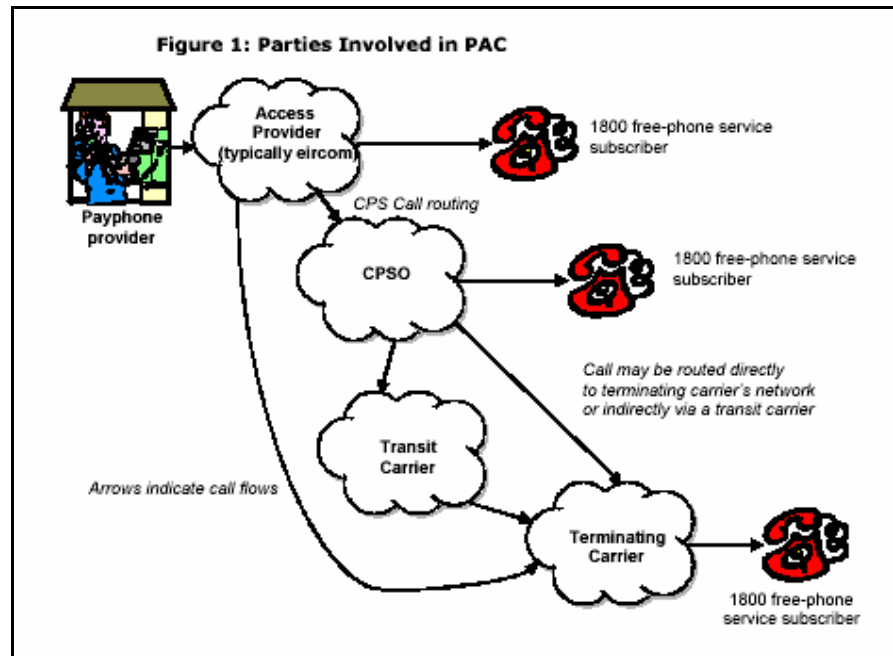


Figure 1: Parties Involved in PAC<sup>140</sup>

The Payphone Access Charge (PAC) is a call charge levied on calls from payphones to 1800 free-phone numbers. The PAC provides payphone operators with revenue for 1800 free-phone calls that would otherwise be carried without charge and is designed to cover the costs incurred by the payphone operator in supplying the service to the general public. All payphone operators can recover the costs of supplying their payphone service for calls to 1800 free-phone numbers.

The parties involved depend on the carrier used by the payphone provider, the network where the 1800 free-phone service resides and the call routing arrangements of each carrier. In the simplest case, with a payphone using eircom for both calls and access, calling an 1800 free-phone service on eircom's network, the call is routed directly across eircom's networks.

Often, the payphone provider uses eircom for access and another carrier for calls (the Carrier Pre-Selection Operator). In this case, the CPSO routes the call to the terminating carrier's network. If the CPSO does not have a direct link to the terminating network the call is routed via another carrier's network (the transit carrier). The transit carrier is often eircom since eircom has direct connections to all other networks.

Interconnect billing arrangements provide payment for each carrier that transports the call.

Important points to note are:

- that in several of the call scenarios, the payphone and the 1800 free-phone service are not connected to the same network.

<sup>140</sup> See Payphone Access Charge, Industry Implementation - Response to Consultation & Decision Notice D19/03. ComReg Reference Number : 03/111.



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- that the payphone provider has commercial relationships only with its access provider and service provider
- the 1800 free-phone service subscriber has a commercial relationship only with the carrier
- there is no direct commercial relationship between the payphone provider and the 1800 free-phone service provider

## Appendix D – Payphone Regulation

When defining a market ComReg is required to take utmost account of what are commonly known as the *Relevant Markets Recommendation* and *The Guidelines*, when defining relevant markets for the purposes of the Framework Regulations and the Universal Service Regulations. In that regard, it is helpful to look at recitals 9 and 16 to the Relevant Markets Recommendation. Recital 9 to the Relevant Markets Recommendation identifies three criteria to which recourse should be had when identifying markets in accordance with competition law principles. These are summarised as follows:

- Are there are high and persistent barriers to entry?
- Is the market one that tends towards a competitive outcome?
- Would competition law alone be sufficient to address any competition problems?

Recital 16 of the Relevant Markets Recommendation provides, inter alia, that:-

*“... whether an electronic communications market continues to be identified by subsequent versions of the Recommendation as justifying possible ex ante regulation would depend on the persistence of high entry barriers, on the second criterion measuring the dynamic state of competitiveness and thirdly on the sufficiency of competition law (absent ex ante regulation) to address persistent market failures.”*

### **Universal Service Obligation<sup>141</sup>**

eircom has an obligation as the Universal Service Provider to provide public payphones and to ensure that payphones are provided to meet reasonable needs of end users in terms of geographical coverage, the number of telephones, the accessibility of such telephones to disabled users and the quality of services. There are currently, nearly 10,000 payphones in Ireland, of which 4,100 are provided by eircom under their USO obligations. eircom’s obligations as the Universal Service Provider will be unaffected by the conclusion reached from this review. The presence of such regulatory intervention is likely to have had an impact on the structure of the market.

Universal Service obligations are not imposed for the purpose of addressing market failure - they are imposed to ensure the provision of a defined minimum set of services to all end-users at an affordable price. In that regard, it is not necessary for an undertaking to be designated as having SMP in a relevant market in order for it be designated to provide services which fall within the universal service.

### **Payphone Access Charge<sup>142</sup>**

These obligations will be unaffected by the outcome of this review. The concept behind the PAC is to provide a contribution towards the rental cost of the payphone. In private rented payphones this rental element is covered by the rental agreement with the landowner, in public payphones call charges are incremented to provide a contribution towards rental costs, but freephone calls cannot be incremented and so the contribution is recovered from the freephone wholesale terminating operator through the supplementary

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<sup>141</sup> Imposed by virtue of Designation of Universal Service Provider - Decision Notice D3/99. ComReg Document Number 99/3

<sup>142</sup> See ComReg Document No. 05/37 for further details of the justification and proposed imposition of the PAC.

interconnect charge. It is proposed that this should be maintained under the Interconnection market review – Response to Consultation and Draft Direction (ComReg 05/37).

Such obligations do not apply to the retail market which ComReg has proposed to define but to other, albeit related, relevant wholesale markets<sup>143</sup>. Therefore, when proposing to define a retail market for public payphones it would not be a breach of the principle of considering the sufficiency of competition law, absent *ex ante* regulation, to consider the indirect impact of the obligations of PAC on a related, but different downstream retail market.

### **Price Cap Order** <sup>144</sup>

ComReg has, hitherto, imposed price controls on retail payphone calls on eircom via a price cap mechanism limiting its freedom to increase prices for a group of services notably access (connection and rentals) and calls (domestic, operator assisted, payphone and fixed to mobile calls). An overall price cap of CPI-0% has been in place since February 2003.

### **Voice Telephony Regulations**

Certain regulatory obligations that were imposed on *eircom* with respect to payphones before the coming in to force of the new regulatory framework for electronic communications on 24 July, 2003, remain in place, pending the outcome of ComReg's review of the payphone market. By virtue of Regulation 13 of the Universal Service Regulations, *eircom* is obliged to continue to comply with any obligations that were applicable to it relating to retail tariffs for the provision of access to and use of the public telephone network under Regulation 21 of the European Communities (Voice Telephony and Universal Service) Regulations 1999 ("the 1999 Regulations") until such time as obligations under Regulation 14, 15 or 16 under the Universal Service Regulations are imposed on any undertaking.

Under Regulation 21 (2) of the 1999 Regulations, *eircom* is obliged to ensure that the tariffs for the use of its fixed public telephone networks and fixed public telephone services follow the basic principles of transparency and cost orientation (as specified in Annex II of Directive No. 90/387/EEC). Under the 1999 Regulations *eircom* is also obliged to:

- Ensure that tariffs for access to and use of its fixed public telephone networks are independent of the type of application which the user implements, except in so far as such user requires different services or facilities;
- Ensure that tariffs for facilities additional to the provision of connection to its fixed public telephone network and fixed public telephone services are sufficiently unbundled, so that the user is not required to pay for facilities which are not necessary for the service requested; and
- Implement tariff changes on the 21st day after public notice has been given.

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<sup>143</sup> The markets for wholesale origination, transit and termination.

<sup>144</sup> See ComReg Document No. 03/14 for further details of the justification and imposition of the Price Cap Order. Review of the Price Cap on Certain Telecommunications Services - Decision Notice D3/03.

Regulation 21 of the 1999 Regulations applies without prejudice to any requirements relating to the affordability of services specified under Regulation 8 thereof.

### **Carrier Pre Select/ Wholesale Line Rental<sup>145</sup>**

Under Regulation 21 of the VT Regulation eircom was and, by virtue of Regulation 13 of the Universal Service Regulations, continues to be, regulated in respect of CPS and SB-WLR.

All operators other than eircom provide payphone services via eircom's wholesale product, Carrier Pre Select (CPS) or Single Billing Wholesale Line Rental (SB-WLR). CPS is a form of indirect access, the facility allows its customers, to access switched services of interconnected providers of publicly available telecommunications services. This allows OAO's switch traffic to their networks at an agreed point of interconnection. The provision of CPS currently only applies to fixed operators with SMP and all OAOs are eligible to provide services via CPS. CPS became the preferred way for OAOs to provide a calls service to a significant portion of Irish telephone users. SB-WLR is where the OAO provides in conjunction with CPS 'All Calls' a single bill covering all aspects of Voice Services to its customers at rates it determines. The OAO 'rents' the line from eircom wholesale. The CPSO can provide their own Ancillary Services or may purchase Ancillary Services from eircom Wholesale. SB-WLR allows OAOs to provide calls and line rental package to Irish telephone users

With regard to CPS ComReg considered the market, in the presence of *ex ante* regulation, in a proposed retail market for public payphones e.g. where CPS and SB-WLR is available to OAOs for the provision of retail payphone services. This was followed by a review of the market in the absence of regulation – see section five.

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<sup>145</sup> See Appendix A for a list of documents which outlined the development of CPS and WLR.