



Consultation and draft direction

Consultation and draft direction: further specification of the obligation not to unreasonably bundle pursuant to D07/61

Document No:	10/01
Date:	6 January 2010

All responses to this consultation should be clearly marked:-
“Reference: Submission re ComReg 10/01” as indicated above,
and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5 pm, 3 February
2010, to:

Mr. Stephen Brogan
Commission for Communications Regulation
Block DEF
Abbey Court
Abbey Street
Dublin 1
Ireland

Ph: +353-1-804 9600 Fax: +353-1-804 9680 Email:
stephen.brogan@comreg.ie

Please note ComReg will publish all respondents submissions
with the Response to this Consultation, subject to the provisions
of ComReg’s guidelines on the treatment of confidential
information – ComReg 05/24

Contents

1	Executive Summary	2
2	Introduction	6
3	Appropriate economic criteria to be applied in the assessment of compliance with the obligation not to unreasonably bundle	14
4	Legal Basis	43
5	Draft Direction	44
6	Submitting Comments.....	49
	Appendix A - Regulatory Impact Assessment.....	50
	Appendix B – Consultation Questions	59

1 Executive Summary

- 1.1 Pursuant to ComReg Decision D07/61¹, Eircom Limited (“Eircom”) has an obligation not to unreasonably bundle retail fixed narrowband access. The Commission for Communications Regulation (“ComReg”) is now consulting on whether the obligation not to unreasonably bundle should be further specified and in particular whether the current net revenue test, as an *ex-ante* imputation test to assess whether a bundle is reasonable, remains appropriate going forward given the regulatory objectives of the obligation not to unreasonably bundle set out in ComReg Decision D07/61. In particular, ComReg is seeking views on the appropriate economic criteria to be applied in assessment of compliance with that obligation including the appropriate measure of cost to be applied to ensure the obligation does not create market distortions going forward as competition takes hold. Therefore, based on respondents’ views to this consultation, ComReg may allow for flexibility to the current net revenue test, specify a different net revenue test or an alternative *ex-ante* imputation test that will be utilised to assess whether a given bundle that includes retail fixed narrowband access is reasonable. ComReg is also consulting on a further specification to the current obligation, in particular pre-notification and pre-clearance of bundles that include retail fixed narrowband access, pursuant to Regulation 14 of the Universal Service Regulations² and ComReg Decision D07/61.
- 1.2 The obligation not to unreasonably bundle only applies where retail fixed narrowband access is bundled with other services. Retail fixed narrowband access includes retail line rental. Therefore, a retail bundle that does not include retail fixed narrowband access (e.g. a bundle of calls and broadband alone) would not be subject to the obligation not to unreasonably bundle, although it would be subject to other possible regulatory obligations or competition law requirements. Eircom is therefore free to price such bundles that do not include retail line rental as it wishes, once it is satisfied that it complies with all other regulatory obligations and competition law obligations that are in place.
- 1.3 As noted in the supporting consultations³ to Decision D07/61, while bundling can be welfare-enhancing for retail customers, it can also have negative consequences in the regulated market. In particular the operator may use the retail prices of bundles to leverage its significant market power in retail fixed narrowband access into other retail markets – this is known as horizontal leverage. The regulatory objective of the obligation not to unreasonably bundle is to prevent or mitigate the possibility of behaviour such as horizontal leveraging from retail fixed narrowband access into other retail markets.

¹ ‘Decision Notice and Decision Instrument - Designation of SMP and SMP Obligations Market Analysis: Retail Fixed Narrowband Access Markets’ dated 24 August 2007

² The European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003

³ Consultation Document Nos. 06/39 and 07/26

- 1.4 At present, the obligation not to unreasonably bundle includes that Eircom “*must ensure that any bundle avoids a margin squeeze and passes a net revenue test.*”⁴ Therefore, the purpose of the consultation is to determine whether the current net revenue test, as one specific *ex-ante* imputation test to assess whether a bundle is reasonable, remains appropriate. The current net revenue test is akin to an Equally Efficient Operator test, assessed on individual bundles and uses average total cost as its appropriate measure of cost. However, in this consultation, ComReg seeks views as to whether the net revenue test remains appropriate going forward as competition takes hold and if not, should the current net revenue test be amended/replaced. ComReg would welcome any recommendations from respondents as to how the net revenue test could be amended (if respondents believe this to be the case) or replaced by another appropriate *ex-ante* imputation test.
- 1.5 One purpose of the net revenue test is to mitigate the leverage risk that Eircom sells retail fixed narrowband access below cost in a bundle. However, failure to pass the net revenue test does not automatically lead to a bundle being considered unreasonable. At present, it is possible for a bundle that fails the net revenue test and therefore does not cover its costs to be considered reasonable where there is substantive evidence to demonstrate no competitive harm may occur. Currently, as a proportionate measure, ComReg considers any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the loss of the bundle. ComReg also considers the likely impact on competition, direct and indirect, and the ability of existing operators and new entrants to compete in the market on a sustainable basis over the medium to long term. One of ComReg’s objectives is to promote sustainable competition in the medium to long term and failure to monitor the activity of an SMP provider could have serious consequences if not addressed in an *ex-ante* rather than an *ex-post* context.
- 1.6 Currently the net revenue test is based on ‘re-sale’ wholesale inputs provided by Eircom and the average total cost of Eircom. ComReg is cognisant of the developing competitive landscape in the market for retail fixed narrowband access with the possibility of increased competition from cable, local loop unbundling (‘LLU’) and other platform operators over the next two to three years. In this consultation, ComReg recognises that if LLU take-up increases and LLU based operators become a significant source of competition in Ireland, it may be appropriate to consider the price of LLU wholesale inputs as the appropriate wholesale cost in the net revenue test or a variant thereof. ComReg also recognises that if LLU competition increases it would also need to consider through a market analysis process whether Eircom remains the SMP operator in retail narrowband access. However, currently the progress of these alternative platforms is at an early and vulnerable stage of development. Therefore, ComReg is of the preliminary view that to consider utilising LLU wholesale inputs in the net revenue (*ex-ante* imputation) test, the penetration levels of LLU operators would need to be significantly higher than they currently are in Ireland. Furthermore, ComReg considers that the competitive impact of such a move, possibly considered separately for certain urban centres and nationally, would need to be measured through the market analysis process. In this

⁴ At para 6.234 of ComReg document No. 07/26 ‘Market Analysis: – Retail Fixed Narrowband Access Markets (Response to Consultation 06/39 and Consultation on Draft Decision)’ dated 4 May 2007

consultation, ComReg would welcome any recommendations from respondents as to how and when LLU inputs should be considered in the net revenue (*ex-ante* imputation) test and what other flexibility (if any) the test should have to ensure that it is robust and flexible to be in a position to respond to changed market conditions over the next two to three years in a timely fashion so that Eircom is not put at a commercial disadvantage.

- 1.7 It is ComReg's preliminary view that the current net revenue test, complemented by an assessment of the competitive context of the bundle in question, remains appropriate given the regulatory objectives of the obligation not to unreasonably bundle. However, in this consultation, ComReg welcomes views on this including the appropriate economic/regulatory criteria and the appropriate measure of cost to be applied in the assessment of compliance with that obligation.
- 1.8 In this consultation, ComReg is further specifying the pre-notification and pre-clearance requirements of bundles that include retail fixed narrowband access. This is because significant issues can arise where bundles are launched which subsequently do not comply with the regulatory obligation not to unreasonably bundle. This is evident from the recent legal proceedings which took place over the past year and which were recently settled between ComReg and Eircom⁵. Significant consumer and competitive disruption is caused by non-compliant bundles in the market which reinforces the need for robust *ex-ante* monitoring of bundles that include retail line rental prior to their launch into the market, therefore ComReg is further specifying the pre-notification and pre-clearance requirements of bundles that include retail fixed narrowband access.
- 1.9 In summary, subject to the views of respondents to this consultation, the preliminary views of ComReg expressed in this consultation and draft direction are as follows:
 - 1.9.1 The current framework in relation to the net revenue test remains appropriate for assessing whether Eircom is unreasonably bundling retail fixed narrowband access.
 - 1.9.2 It is ComReg's preliminary view that given the current competitive landscape in Ireland, characterised by a low take-up of LLU⁶, that the current net revenue test, complemented by an assessment of the competitive context of the bundle in question, remains appropriate given the regulatory objectives of the obligation not to unreasonably bundle.
 - 1.9.3 Eircom must pre-notify and pre-clear bundles that include retail fixed narrowband access with ComReg.
 - 1.9.4 When ComReg finds a bundle that includes retail fixed narrowband access to be unreasonable, Eircom must modify/withdraw such a bundle within ten weeks so as to make it reasonable.

⁵ See ComReg Information Notice 09/79 'Obligation on Eircom not to unreasonably bundle pursuant to ComReg Decision D07/61: Settlement of Legal Proceedings' dated 14 October 2009

⁶ Which has implications for effective entry across a range of communications markets, as well as the risk of market power in retail narrowband access markets being leveraged to reinforce entry barriers in that market and possibly also in associated retail markets - as identified in ComReg Consultation Document No. 07/26.

- 1.10 In this consultation ComReg welcomes the views of respondents on these preliminary views including any other possible *ex-ante* imputation tests, or any modified specification of the net revenue test, that meet the regulatory objectives of the obligation not to unreasonably bundle pursuant to Decision D07/61.
- 1.11 ComReg believes that the preliminary views and draft direction of this consultation will ensure that operators as efficient as the SMP operator can at least match the SMP operator's bundles that include retail fixed narrowband access, or offer similar bundles, and will minimise the risk of horizontal leverage. ComReg believes that this will ensure that efficient entrants and existing operators can maintain competitive offers in the medium to long term to the benefit of retail customers. ComReg also believes that the draft direction will allow Eircom sufficient price flexibility to offer competing bundles and will ensure that in offering competing bundles that Eircom can recover its costs and therefore operate profitably in the market for retail fixed narrowband access.
- 1.12 In conclusion, ComReg believes that the draft direction presents a practical and fair solution that takes in to account the interests of Eircom, industry and consumers. It is intended to promote efficiency, sustainable competition and consumer welfare.
- 1.13 However, ComReg in making its final direction will consider all the views of respondents to this consultation and will take utmost account of any comments from the European Commission⁷ in deciding whether the current net revenue test needs to be revised and/or whether the further specification of the pre-notification and pre-clearance is appropriate.
- 1.14 Responses to this consultation must arrive at ComReg by 5pm, 3 February 2010.

⁷ Pursuant to Article 7 of the Framework Directive, Regulation 20 of the Framework Regulations

2 Introduction

Regulatory context/background

- 2.1 Following a detailed market review of the retail fixed narrowband access market, ComReg found Eircom to have significant market power ('SMP') in that market. This market includes fixed retail line rental. As part of that market analysis process certain remedies were imposed on Eircom. As part of the final designation of SMP and Decision, namely Decision 7.8 of ComReg Decision D07/61, one of the remedies imposed on Eircom was that when selling retail line rental within a bundle of services for one headline price, they shall not unreasonably bundle that service. ComReg set out what would be considered as unreasonable bundling in Consultation Document No. 07/26 which is construed together with ComReg Decision 07/61⁸. To ensure that Eircom did not unreasonably bundle, the following requirements were specifically noted in Consultation Document No. 07/26:
- 2.1.1 To offer all retail narrowband access services as stand-alone products;
 - 2.1.2 To not price a retail bundle, which includes retail narrowband access, at a price which is below the costs of the fixed wholesale regulated elements;
 - 2.1.3 To ensure that any bundle avoids a margin squeeze⁹ and passes a net revenue test¹⁰.
- 2.2 To be clear, the obligation not to unreasonably bundle relates solely to the inclusion of retail fixed narrowband access e.g. retail line rental in a bundle. If Eircom launched a retail bundle of, for example, calls and retail broadband alone, the obligation not to unreasonably bundle would not apply¹¹ as the obligation specifically relates to that service where retail SMP exists, that is in respect of the fixed retail narrowband access service.

Possible benefits of bundles

- 2.3 As noted by ComReg in paragraph 6.135 of Consultation Document No. 06/39¹²:

“ComReg acknowledges that the bundling of end-user services can be, and usually is, welfare-enhancing. Bundling is not anti-competitive per se, and indeed may generate significant efficiencies for consumers, e.g., in terms of lower prices, increased choice, lower transaction costs, etc. Consumers may value receiving multiple services from one provider and with only one bill. Also, the price of a

⁸ See 1.1.v of the Decision Instrument in ComReg Decision D07/61

⁹ Also known as a “price squeeze”

¹⁰ The net revenue test is an *ex-ante* test and is synonymous with the term “imputation test”, details of the current net revenue test can be found in ComReg Information Notice 09/08 and as Figure 3 in this consultation

¹¹ If the bundle included retail broadband and by implication wholesale broadband access, Eircom’s obligations under ComReg D01/06 would apply including the obligation not to margin squeeze on a product by product basis

¹² ‘Market Analysis: – Retail Narrowband Access Markets’ dated 17 August 2006

bundle will generally be less than buying the elements individually, and this price may simply reflect productive efficiencies that should be encouraged.”

- 2.4 However, as noted by ComReg in the following paragraph of that consultation, “*bundling can have some negative consequences*” and those reasons, which are the regulatory objectives of the obligation not to unreasonably bundle are set out in the next section.

Regulatory objectives of the obligation not to unreasonably bundle

- 2.5 The regulatory objectives of the obligation not to unreasonably bundle were set out in ComReg Consultation Document No. 07/26 which is to be construed together with Decision D07/61. The obligation not to unreasonably bundle was imposed on Eircom in Decision D07/61 pursuant to Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003 (as amended) (the “Universal Service Regulations”). In essence, given the state of competition in Ireland in the market for retail narrowband access, the objectives of the obligation not to unreasonably bundle were to promote competition into the market and to mitigate against the risk of the SMP operator leveraging into closely related markets thereby reinforcing its dominance in the market for retail fixed narrowband access.

- 2.6 An express condition of imposing *ex-ante* regulation is that *ex-post* enforcement under competition law would be inadequate. Thus, in the case of the unreasonable bundling obligation, paragraph 6.229 of Consultation Document No. 07/26 found that:

“ComReg does not believe that the application of competition law alone would adequately address potential market failures. ... As set out above, as a vertically integrated undertaking, the SMP operator may have the incentive to leverage its market power. ComReg believes that it is the appropriate body to monitor and if necessary intervene in a timely manner, because of its expertise in the market and the overlap with other retail obligations in the retail narrowband access markets. ...”

The European Regulators’ Group (‘ERG’) of telecommunications authorities also makes the same point in its recent report on margin squeeze:

“These objectives as laid out in Article 8 of the Framework Directive are to: ‘promote competition (...), contribute to the development of the internal market (...), promote the interests of the citizens of the European Union.’ While competition law is intended to prevent margin squeeze as an exclusionary abuse, ex-ante regulation seeks the more ambitious goal of promoting competition by facilitating entry into those markets.”¹³

- 2.7 Consultation Document No. 07/26 is particularly relevant in the context of the unreasonable bundling obligation, since, as indicated in footnote 40 of ComReg Decision D07/61, the obligation is also to be construed in the light of the reasoning in Consultation Document No. 07/26. Consultation Document No. 07/26 sets out in

¹³ ERG (09) 07 Report On the Discussion Of The Application Of Margin Squeeze Tests To Bundles, para. 6

considerable detail the analysis of the basis for and content of the SMP obligation not to unreasonably bundle. In particular:

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

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

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

“There is nonetheless a risk that eircom may induce a margin squeeze through bundled pricing. This occurs when equally, or more, efficient operators are unable to profitably replicate eircom’s bundled offering, and are effectively foreclosed from competing with eircom in respect of its bundled products. For example, if eircom were to apply a margin squeeze in respect of the retail narrowband access element of a bundled offering this may undermine the effectiveness of the mandated wholesale inputs since OAOs¹⁴ may not be able to effectively replicate the access element of that bundle (due to an insufficient margin). Should eircom engage in such behaviour it could have the effect of i) reinforcing its dominance in the retail narrowband access markets and/or ii) leveraging that dominance into related markets due to an inability on the part of OAOs to effectively replicate the access part of the bundle.”

- (3) Paragraph 6.232 then concludes on the core regulatory concern in relation to retail bundling, reinforcing Eircom’s SMP in retail narrowband and leveraging that SMP into other related markets:

“However, there is a need for some obligation to prevent bundling being used for anti-competitive purposes, in particular where it may be used to disguise a possible margin squeeze in respect of the retail narrowband access element of the bundle and thereby potentially reinforce eircom’s dominance in the retail narrowband access markets and providing scope for leveraging into related markets. As a result, ComReg proposes to impose an obligation on an ex post-basis on the SMP operator ‘not to unreasonably bundle’.”

- 2.8 Therefore the obligation not to unreasonably bundle included that Eircom “*must ensure that any bundle avoids a margin squeeze and passes a net revenue test*” in order that the issues above do not arise.

¹⁴ OAOs: ‘Other Authorised Operators’

- 2.9 These issues were of particular concern over the past year as, based on actual customer usage of the bundles in question, Eircom sold certain bundles that did not pass the net revenue test and were unreasonable¹⁵.
- 2.10 Following the reaching of a settlement agreement with Eircom in relation to legal proceedings taken in relation to Eircom's obligation not to unreasonably bundle¹⁶, ComReg and Eircom agreed the following for bundles that include retail line rental (fixed narrowband access), pending the resultant decision based on this consultation becoming effective:
- 2.10.1 Bundles will be assessed by reference to the net revenue test using average total cost as the measure of cost. For the purposes of assessing whether a bundle is reasonable, it is appropriate to have regard to retail efficiencies and related savings, subject to the existence and/or quantum of such being demonstrated to ComReg's satisfaction by Eircom.
- 2.10.2 Eircom is not to launch bundles which include retail line rental without ComReg's prior approval (which, consistent with its statutory obligations, ComReg will not unreasonably withhold or delay);
- 2.10.3 ComReg has agreed to conduct this consultation on a further specification of the existing obligation not to unreasonably bundle and, in particular, the appropriate economic/regulatory criteria to be applied on the assessment of compliance with that obligation including (but not limited to) the appropriate measure of cost to be applied and whether the pre-clearance requirement should continue.
- 2.11 The terms of the settlement agreement apply pending the resultant decision based on this consultation becoming effective and as long as Eircom is designated as having SMP in the retail narrowband access and, on foot of that designation, subject to an obligation not to unreasonably bundle. It is proposed in this consultation to further specify the obligation not to unreasonably bundle and therefore ComReg is seeking views as to how the obligation can be further specified (if required).

Purpose of this consultation

- 2.12 The purpose of this consultation is to seek views if the obligation not to unreasonably bundle should be further specified and whether the current net revenue test, as an *ex-ante* imputation test to assess whether a bundle is reasonable, remains appropriate given the regulatory objectives of the obligation not to unreasonably bundle set out in Document No. 07/26. In particular, ComReg is seeking views on the appropriate economic criteria to be applied in assessment of compliance with that obligation including the appropriate measure of cost to be applied. Subject to respondents' views, this could lead to a modified specification of the net revenue test from that currently applied.

¹⁵ See ComReg Document Nos. 09/08, 09/25, 09/31 and 09/53 (D02/09)

¹⁶ See ComReg Information Notice 09/79 'Obligation on Eircom not to unreasonably bundle pursuant to ComReg Decision D07/61 - Settlement of Legal Proceedings'

- 2.13 The consultation is also seeking views on a further specification to the current obligation, in relation to pre-notification and pre-clearance of bundles that include retail fixed narrowband access, pursuant to Regulation 14 of the Universal Service Regulations¹⁷ and ComReg Decision D07/61.
- 2.14 The obligation not to unreasonably bundle is concerned with possible anti-competitive effects that can arise where for example an SMP operator is allowed to engage in horizontal leverage (that is, cases where Eircom uses retail prices to leverage its SMP in retail fixed narrowband access into other retail markets).
- 2.15 The purpose of this consultation is to seek views on whether further specification of the obligation not to unreasonably bundle is necessary at this stage. In particular views are sought as to whether the current net revenue test, which was set out publicly in ComReg Information Notice 09/08 and which is detailed later in this document, together with a complementary assessment of the competitive context in which the bundling behaviour takes place, remains appropriate as an *ex-ante* imputation test to assess whether a bundle that includes retail fixed narrowband access is reasonable. If respondents do not believe that the current net revenue test, together with a complementary assessment of the competitive context in which the bundling behaviour takes place is appropriate, ComReg is seeking views on alternative approaches that could be adopted, or a modified specification of the net revenue test, which would meet the regulatory objectives of the obligation not to unreasonably bundle.
- 2.16 ComReg in making its final decision will be minded *inter alia* to the following objectives set out under Section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007¹⁸ (“the Act”), namely:
- Promote competition;
 - Promote the interests of users within the community;
 - Ensure that there is no distortion or restriction of competition;
 - Encourage efficient investment in infrastructure; and
 - Encourage access to the internet at a reasonable cost to end-users.

Net revenue (*ex-ante* imputation) test

- 2.17 The current net revenue test is akin to an equally efficient operator¹⁹ (‘EEO’) as it is mainly informed by the costs of Eircom. The current revenue test uses average total cost (‘ATC’) and the test is conducted on a bundled product by bundled product basis. This test has been carried out by Eircom and ComReg for some time now, since the introduction of bundles, and is clear based on known regulated prices set over the years and actual retail costs incurred by Eircom. For information, a further

¹⁷ The European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003

¹⁸ No. 22 of 2007

¹⁹ Reference operator is similar to the SMP operator

explanation of the current net revenue test is given later in this document and it was previously set out in ComReg Information Notice 09/08 and ComReg Decision D02/09²⁰.

Reasonably Efficient Operator test or Equally Efficient Operator test?

- 2.18 ComReg believes EEO remains appropriate to test the existence of specific behaviour of the SMP operator in relation to the obligation not to unreasonably bundle. However, there are many economic publications which allow for the use of alternative tests, for example a regulator could use the reasonably efficient operator²¹ ('REO') test. The difference between the two tests is that the REO test mainly uses information from other operators who do not have SMP in the fixed narrowband market while the EEO test for the most part uses the information of the SMP operator. The EEO approach recognises that in a competitive situation an effective alternative operator will be able to compete only if it is as efficient as the SMP operator in the market. The REO approach recognises that even in the long-run alternative operators will not be able to compete with the SMP operator due to structural diseconomies of scale and scope, and the nature of the market.
- 2.19 ComReg believes that this choice between EEO and REO depends on the regulatory objectives and therefore the SMP operator could be subject to a REO test in a different market e.g. Wholesale Broadband Access. REO may be used by some regulators where their objective is to promote entry which, even if initially inefficient, is expected to become efficient over time. However, a key consideration before adopting a REO test is whether quality and efficiency of other operator data is robust. Also, in adopting a REO test consideration needs to be made as to whether, given the current state of competition and the regulatory objectives, that the *ex-ante* imputation test threshold is not set too low as this may promote inefficient entry and could deny the consumers benefits of bundling. ComReg considers that an EEO test, to assess whether a bundle that includes retail fixed narrowband access is reasonable, seems to be more consistent with the regulatory objectives of section 12 of the Act, namely encouraging efficient investment in infrastructure. However, ComReg would welcome views as to whether, given the regulatory objectives of the obligation not to unreasonably bundle and the current state of competition, if the net revenue test should be based on REO²² and if respondents do believe REO is more appropriate, ComReg would welcome submissions of what robust and verifiable information respondents could provide to support the use of a REO test.

²⁰ 'Response to Consultation and Direction Extension of April 2009 Direction requiring Eircom to refrain from launching proposed 1MB and 3MB Family "free calls to meteor" TalkTime bundles' dated 7 July 2009

²¹ Reference operator is a competitor of the SMP operator. In this case a number of parameters, such as network dimensioning, volumes, customer base, costs and revenues, are structured to replicate an operator with achievable efficiencies (efficiency that is feasible and reachable by an operator in the designed market)

²² This is the position proposed in Denmark: see 'A Report for NITA: Methodology for an ex-ante margin squeeze test of electronic communications products and services offered by operators with significant market power' dated June 2009

'http://www.svpadvisors.com/pdf/Methodology%20for%20assessment%20or%20margin%20squeeze_20090617_finale.pdf'

Possible *ex-ante* imputation tests for bundles including retail fixed narrowband access

2.20 There are other *ex-ante* imputation tests, or modified specifications of the net revenue test, that respondents may consider to be more appropriate than the current specification of the net revenue test for monitoring the *ex-ante* obligation not to unreasonably bundle retail fixed narrowband access. These possible *ex-ante* imputation tests or possible different specifications are set out below or there may be other tests or other different specifications which are not included below that respondents' believe may be more appropriate. Starting from the left in the figure below is a test that could be considered to be the best entry-promoting²³ *ex-ante* imputation test and ends with the test being used by the European Commission as their *ex-post* competition law test. ComReg seeks respondents' views on the possible *ex-ante* imputation tests below (or any others) as to whether they are more appropriate than the current net revenue test.

2.21 ComReg believes that respondents in proposing any alternative *ex-ante* imputation test or a modified specification of the net revenue test should consider:

2.21.1 Does the proposed test promote efficient competitors and entrants?

2.21.2 Does the proposed test allow the SMP operator sufficient price flexibility to compete effectively?

2.21.3 Is the input data required for the proposed test available, accurate and practicable?

2.21.4 Will the proposed test give sound results?

2.21.5 Is the proposed test practical to implement?

2.22 In the possible *ex-ante* imputation tests set out in the figure below, one consideration is whether the *ex-ante* imputation test should be REO or EEO which was discussed above. Another consideration is to what cost measure is appropriate – ComReg believes that average total cost ('ATC') and long run average incremental costs ('LRAIC') can be considered for an *ex-ante* imputation test. There are further discussions on the merits of different possible cost measures later in this document and ComReg's preliminary view is presented. A final consideration is whether the *ex-ante* imputation test should be on an individual bundled product by product basis or whether a test on the aggregate result of all the bundles offered should be used – there is further discussion on this later in this document and ComReg's preliminary view is presented.



Figure 1: Possible *ex-ante* imputation tests for bundles including retail fixed narrowband access

²³ But not necessarily efficient entry

Obligation not to unreasonably bundle

- 2.23 Again, to be clear, as is currently the case²⁴, failing the current net revenue test would not in itself be sufficient for amending or withdrawing the bundle. A further check is carried out on the competitive context of the bundle and possible efficiency reasons for the revenue being below ATC, such as retail efficiencies which could be replicated by efficient new entrants. If the bundle fails the net revenue test and the competitive assessment does not show it to be justified by countervailing efficiencies and that concerns arise, then the bundle in question will be considered unreasonable.
- 2.24 This consultation will also consider at a broad level the possible options available to the SMP operator when a bundle is unreasonable, for example, increasing the price or amending terms and conditions etc. Its purpose is not to provide detailed guidance on the procedure whereby any wholesale prices may be modified so that there is no risk of a margin or price squeeze. This is outside the scope of this document and will be considered in a separate consultation that ComReg plans to issue in early 2010.
- 2.25 As end-users increasingly migrate from stand-alone products to bundles²⁵ and bundling increasingly becomes a driver of telecoms services growth, the need for effective and efficient replication remains a compelling regulatory objective for ComReg as set out in Consultation Document No. 07/26 and as noted above. That is the purpose and scope of the current net revenue test and therefore, with this in mind, ComReg is seeking views on how the obligation not to unreasonably bundle can be further specified if necessary, in particular, the appropriate economic/regulatory criteria to be applied in the context of compliance with that obligation including (but not limited to) the appropriate measure of cost to be applied.

²⁴ See Figure 2 in this consultation

²⁵ Though increasing, bundle take-up seems to be low at this time, according to ComReg document 09 (07) 'Consumer ICT Survey Q4 2008' based on a representative sample, nearly two thirds of respondents do not use a bundled service, this is higher among those aged 65-74 (72%), those living in the farming community (78%), living in a rural area (72%) and those living in the Rest of Leinster (69%). However, ComReg believes that the trend to bundling is important and therefore any below cost pricing of such bundled services (even if limited in time) could artificially stimulate customer take-up thereby reinforcing entry barriers into the retail narrowband access market and possibly into adjacent retail markets for OAOs which could not feasibly replicate such offers. ComReg believes that this would be a rational strategy for the SMP operator to protect its market power in the retail narrowband access market.

3 Appropriate economic criteria to be applied in the assessment of compliance with the obligation not to unreasonably bundle

- 3.1 As set out earlier, as part of its obligation not to unreasonably bundle, Eircom must not create a margin squeeze in the market for retail fixed narrowband access and must pass a net revenue test – this net revenue test is one *ex-ante* method for assessing whether a bundle is unreasonable. This consultation seeks views as to whether the net revenue test remains appropriate or should it be revised/replaced with a more appropriate *ex-ante* imputation test. The consultation also seeks respondents’ views on a further specification of the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access.
- 3.2 Set out below is the current framework for the assessment of whether a bundle is unreasonable²⁶ under ComReg Decision D07/61 by reference to the net revenue test. If the net revenue test is further specified as a result of this consultation, ComReg believes that the current framework remains appropriate. ComReg seeks respondents’ views on this and will examine each part of the framework below.

²⁶ Current framework is assessed on an individual bundled product basis. If respondents to this consultation believe an aggregate approach is more appropriate, the framework will apply to the aggregate of the SMP operator’s bundled products

Current framework to assess whether bundle is unreasonable by reference to the net revenue test together with the assessment of possible retail efficiencies and the impact on competition

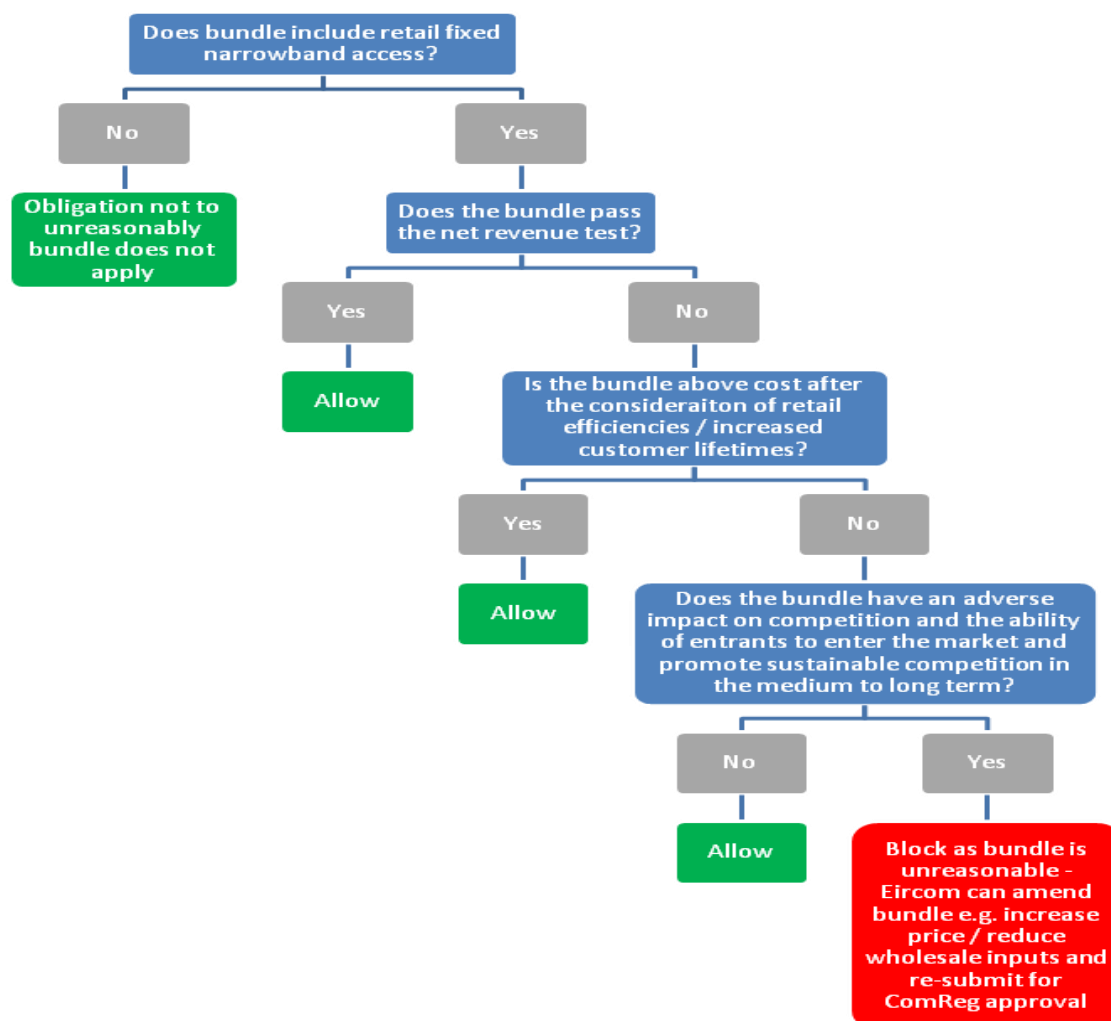


Figure 2: Current framework to assess whether bundle is unreasonable by reference to the net revenue test together with the assessment of possible retail efficiencies and the likely impact on competition

Current net revenue test

- 3.3 Once it has been established that the bundle to be reviewed for reasonableness includes retail fixed narrowband access, and as the ability and incentives for adverse behaviour by the SMP operator in the retail narrowband access market have been demonstrated in ComReg Decision D07/61, the first step in ComReg’s framework is to establish whether the bundle in question passes the net revenue test.
- 3.4 As discussed earlier, the net revenue test is one test to assess whether a bundle is reasonable. The current net revenue test, in essence, is akin to an EEO test as it is

informed by the costs of Eircom for the most part²⁷. The net revenue test is an *ex-ante* imputation test to assess whether a bundle offered by Eircom is above cost. If the bundle is not above cost, it is considered that the retail line rental within the bundle has been therefore sold below cost. Before finding whether this below cost selling is unreasonable, ComReg will, as a proportionate measure, consider any retail efficiencies as a result of the bundling²⁸ and the impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term.

- 3.5 The current net revenue test (conducted on a per month basis for each individual bundle) consists of the following for all bundles that include retail fixed narrowband access (retail line rental) launched by Eircom as SMP operator in the retail fixed narrowband access market.

²⁷ The operating costs associated with retail broadband are informed based on the current retail minus price control which is based on the concept of a 'similarly efficient operator' i.e. one which shares the same cost function as Eircom's own downstream businesses but which does not yet necessarily enjoy the same economies of scale and scope as Eircom's overall business currently does - see section 4.2 of Consultation Document No. 05/67 'Consultation on retail minus wholesale price control for the WBA market' dated 19 August 2005

²⁸ Where supported by robust and verifiable evidence – there is a further discussion on this later in this document

Further specification of the obligation not to unreasonably bundle

NET REVENUE TEST (all ex VAT)	Factors considered in the net revenue test
Revenue:	
Package Price	This is the bundle package price charged to retail customers.
Calls Revenue	This is the total calls revenue earned on average outside the bundle package. This is calculated for each component that is charged separately outside the bundle by: (i) taking the total calls for that component and multiplying that by the call set up fee; and (ii) taking the total minutes for that component and multiplying that by the retail price per minute. This total revenue for the component is then divided by the total number of customers to get an average revenue per customer for that component. The totals of all revenue components sold outside the bundle are included.
Costs:	
Wholesale line rental	This is the Single Billing –Wholesale Line Rental regulated price as per the regulated retail minus price control and as published in Eircom’s Reference Interconnect Offer price list.
Operating costs associated with retail line rental	These are the operating costs as derived from the SB-WLR regulated retail minus price control. <i>Therefore, the full cost of retail line rental, that is the SB-WLR plus the associated retail costs as per the regulated retail minus price control, is taken into account in the analysis.</i>
Mailbox	Where the TalkTime packages include free mailbox, the wholesale price of the mailbox as per the regulated retail minus price control as published in Eircom’s Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer. However, consideration will be taken of the take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control could also be included here.
Costs associated with retail calls	These are the wholesale and retail costs as calculated for each retail cost, e.g. calls to Local, National, UK etc. The retail costs of each are calculated by including the wholesale interconnection prices applicable in the market plus the latest audited average total retail costs (residential average total costs for a residential bundle, business average total cost for a business bundle) provided by Eircom and as reviewed and approved by ComReg. Where applicable, these total retail costs include relevant international calls out payments costs and mobile termination costs applicable (including the costs and mobile termination costs for those mobile calls that are sold for free).
Wholesale broadband	This is the relevant regulated Bitstream price as per the regulated retail minus control and as published in Eircom’s Bitstream price list.
Operating costs associated with retail broadband	These are the operating costs as derived from the Bitstream regulated retail minus price control.
Net Revenue: Total Revenue – Total Costs	<i>If total costs are greater than total revenue, bundle is not profitable</i>

If the above results show the costs are above revenue, ComReg, as a proportionate measure, will consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the loss of the bundle. ComReg will also consider the impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term.

Figure 3: Current net revenue test

3.6 A worked example of the net revenue test for a 1MB Broadband and TalkTime Anytime (Eircom Talker) is included below. Please note, this is an example using the published retail and wholesale prices and hypothetical figures for illustrative purposes of other revenues and costs. The example should not be construed as the actual net revenue test for an Eircom bundle, as it is only an example to demonstrate how the net revenue test is calculated.

Further specification of the obligation not to unreasonably bundle

REVENUE:	€
Package price ex Vat	42.79
Calls revenue outside bundle allowance	15.00 (Illustrative)
TOTAL REVENUE	57.79
COSTS:	
Line Rental	
SB-WLR	18.02
Operating costs with line rental (14%)	2.94
Total Line Rental cost	20.96
Broadband	
1MB Bitstream	9.48
Operating costs with broadband	11.17
Total Broadband cost	20.65
Calls	
Costs associated with all retail calls (those inside bundle allowance and those outside bundle allowance)	15.00 (Illustrative)
Average Mailbox costs where Mailbox is offered for free to customer	0.80 (Illustrative)
TOTAL COSTS	57.41
NET REVENUE	0.38

Figure 4: Worked example of current net revenue test with sample monetary figures

3.7 The purpose of the net revenue test is to ensure that an operator as efficient as Eircom and availing of wholesale inputs from Eircom can replicate an Eircom retail bundle that includes retail fixed narrowband access (retail line rental) and cover its costs. Though a bundle may cover its costs, a question remains as to whether a reasonable return is being made - the current net revenue test includes wholesale prices offered by Eircom that include the required Weighted Average Cost of Capital

(‘WACC’) return for Eircom. Therefore, in this respect, ComReg would welcome respondents’ views whether this is sufficient return for operators as efficient as the SMP operator.

- 3.8 ComReg will examine the components of the current net revenue test as below and will seek views on each of these. If respondents believe the net revenue test is no longer appropriate and that a different specification of the net revenue test, as an *ex-ante* imputation test, is required, respondents are asked to answer the below questions by reference to any other *ex-ante* imputation test they propose to replace the current net revenue test.

COMPONENTS OF THE NET REVENUE (EX-ANTE IMPUTATION) TEST

REVENUE

- 3.9 ComReg is of the preliminary view that it is appropriate to continue to use the average monthly revenue from an individual bundle as the revenue total in the net revenue test or any other *ex-ante* imputation test in order to assess to whether a bundle is reasonable. That is, the test will consider both the package price of the bundle in effect in the market at the time and the revenue earned on average on components that are outside the bundle allowance.

COSTS

Wholesale input costs

- 3.10 In order to offer line rental and broadband, an operator could utilise the following wholesale inputs:

- 3.10.1 SB-WLR and Bitstream;
- 3.10.2 SB-WLR and LLU Line Share;
- 3.10.3 LLU (ULMP).

- 3.11 Therefore, the net revenue test (or any other *ex-ante* imputation test respondents consider is more appropriate) could utilise these different combinations of wholesale inputs in its test to assess whether a bundle that includes retail fixed narrowband access is below cost.

- 3.12 Currently, the net revenue test considers the wholesale inputs that an OAO with limited infrastructure investment would purchase from Eircom as they reflect the current state of the market with the low take-up of LLU in Ireland²⁹, namely, SB-WLR and Bitstream is used as the wholesale inputs in the net revenue test. It could be argued that the use of these wholesale inputs based on limited infrastructure investment in the net revenue test may advantage LLU operators to compete with Eircom as Eircom must cover the higher price of the ‘re-sale’ wholesale inputs of SB-WLR and Bistream combined. However, countering this possible argument is the fact that an operator availing of LLU must also cover the high cost of up-front

²⁹ c.23k LLU lines – see Figure 3.2.2 of ComReg Document No. 09/101

infrastructure investment required to avail of LLU. Therefore, in the discussion below, ComReg also seeks views as to how the net revenue test could evolve over time to reflect any increased competition from LLU operators, should it emerge, to ensure that Eircom is not put at a commercial disadvantage if there was a significant take-up of LLU in Ireland.

Wholesale narrowband rental

3.13 Currently, given the low take-up of LLU in Ireland, the net revenue test considers the SB-WLR monthly rental price as the applicable wholesale input for line rental. Together with the retail costs associated with retail line rental based on the regulated retail-minus %, this ensures that the full price of retail line rental is considered in the test to see if retail fixed narrowband access (retail line rental) is being sold below cost within the bundle contrary to Eircom's regulatory obligations. Therefore, as the obligation not to unreasonably bundle is in relation to retail fixed narrowband access (retail line rental), ComReg is of the preliminary view that it is logical that the full retail price of retail line rental is included in the test to determine if the retail line rental is being sold below cost within a retail bundle. However, currently³⁰ if a bundle is below cost, ComReg will consider any retail efficiencies that there may be, including those from selling retail line rental in a bundle, before forming the opinion that a bundle that includes retail fixed narrowband access is unreasonable. However, as will be noted later in this consultation and is the current practice to date, any such retail efficiencies must be clearly demonstrated and substantiated with robust evidence.

Wholesale broadband rental

3.14 Similarly, given the low take-up of LLU, where a bundle includes broadband, the Bitstream monthly rental price is the applicable wholesale input for broadband and the retail costs associated with the provision of the broadband are as derived from the regulated retail-minus %. However, if Eircom elects to set the wholesale input prices of Bitstream below the maximum price allowed under the respective retail-minus price control, cognisant of its need to recover its costs and of meeting its competition law and regulatory obligations, ComReg is of the preliminary view that it is this price in the wholesale market as determined by Eircom that would be included as the applicable wholesale input cost in the net revenue test as it is a test of replication and other OAOs can naturally avail of that lower wholesale input price if it is set below the maximum under the WBA retail-minus price control. For example, based on a €20 retail price, the WBA retail-minus price control may show that the price for the associated Bitstream product is €10 in order to ensure that there is no margin squeeze on a product by product basis. However Eircom, may decide to set the Bitstream price below €10, say, at €9. In this case, ComReg will take the €9 Bitstream price as the relevant wholesale input cost for broadband. However, ComReg in reviewing the actual Bitstream price set by Eircom will ensure that

³⁰ See Figure 2

investment in infrastructure by OAOs is not discouraged³¹, a principle supported by the ERG³² who note the need for National Regulatory Authorities ('NRAs') to maintain an appropriate economic space between the price of wholesale inputs so as to encourage OAOs to make infrastructure investments and protect any existing infrastructure investment made by OAOs.

LLU

3.15 Currently the net revenue test considers the wholesale inputs of SB-WLR and Bitstream as they are the predominant wholesale inputs available to OAOs. However, over the past couple of years, following a significant amount of consultation and engagement with Eircom, ComReg has made significant progress in ensuring the process for LLU is fit for purpose and more recently has reviewed the prices for LLU products which ComReg believes, once in effect, should result in increased demand by OAOs for these products³³. However, LLU is at a very low take-up stage and development where significant volumes have not been processed by Eircom to date. At present, the take-up of LLU in Ireland is relatively limited thus far. At the end of September 2009, there were only c.23k local loops unbundled³⁴. Thus, the use of unbundled local loops for providing lower level narrowband access and/or broadband access is very limited. Compared with other EU countries, this is a very low percentage for OAOs using local loop unbundling (see figure 5 below which sets out the Digital Subscriber Line ('DSL') lines offered on the basis of unbundled local loops as a percentage of all DSL lines across the European Union).

³¹ See page 16 of Consultation Document No. 05/67 'Consultation on retail minus wholesale price control for the WBA market'

³² ERG 09 (21) 'ERG Report on price consistency in upstream broadband markets'

³³ ComReg has issued Decision 04/09 'Rental Price for Shared Access to the Unbundled Local loop' (under appeal by Eircom) and will shortly issue a decision in relation to monthly rental prices for LLU and Sub Loop Unbundling following Consultation Document No. 09/39

³⁴ See Figure 3.2.2 of ComReg Document No. 09/101 'Irish Communications Market: Key Data Report – Q3 2009'

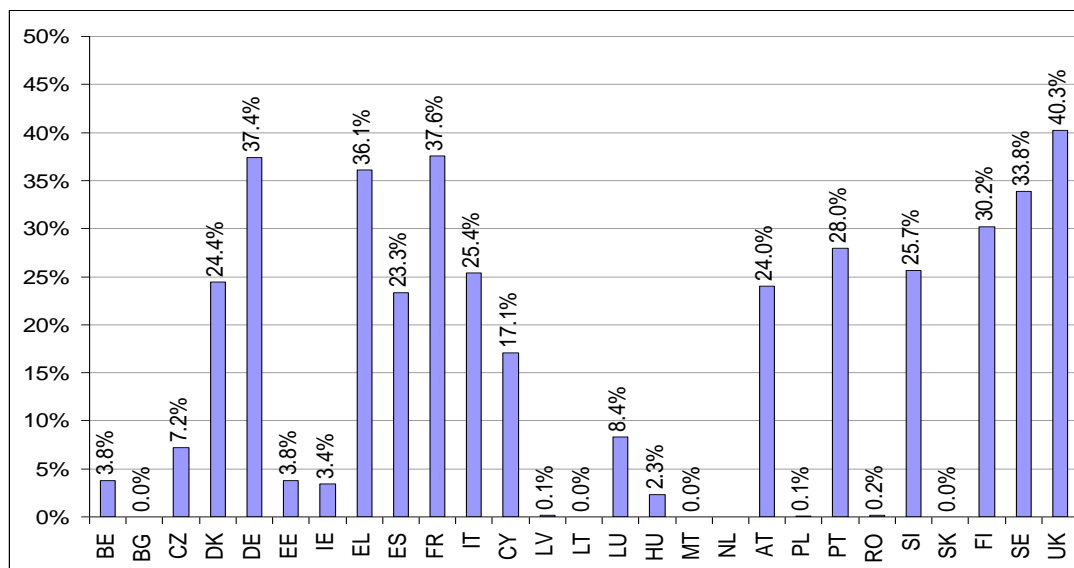


Figure 5: Source: Based on data from European Commission, 14th Implementation Report, 2009, p. 103.

3.16 As such, ComReg believes that the net revenue test as set out earlier in this document can only consider the non-physical wholesale inputs ('re-sale' services) available to foster existing and possible future competition, namely SB-WLR/Bitstream.

3.17 However, if LLU take-up increases significantly, there is a valid question to consider at which point should LLU products be used as the wholesale inputs into the net revenue test or any other *ex-ante* imputation test respondents consider is more appropriate and therefore ComReg is seeking views on this.

3.18 ComReg does recognise that the use of LLU products does involve significant infrastructure investment by the entrant/OAO and if LLU products are used as the wholesale inputs, the net revenue (*ex-ante* imputation) test may need to consider the up-front investment cost that needs to be recovered over the average customer lifetime.

3.19 ComReg is of the preliminary view that to consider utilising LLU wholesale inputs in the net revenue (*ex-ante* imputation) test, that the penetration levels of LLU operators would need to be significantly higher than they currently are in Ireland.

A possible roadmap to an alternative approach if LLU based competition increases

3.20 ComReg recognises that if LLU take-up increases and LLU based operators become a significant source of competition in Ireland, that it may be appropriate to consider the price of LLU wholesale inputs as the appropriate wholesale cost in the net revenue test or a variant thereof. ComReg also recognises that if LLU competition increases it may also need to consider through a market analysis process whether Eircom remains the SMP operator in retail narrowband access.

3.21 If LLU competition becomes more significant in Ireland, it may be appropriate that the net revenue test includes LLU costs as the relevant wholesale input(s) instead of

SB-WLR and/or Bitstream. For example, if the use of LLU Line Share increases significantly, it may be necessary to use the price of LLU Line Share as a wholesale input for broadband, consistent with the view that the net revenue test is akin to an EEO test. Otherwise, ComReg believes that competition distortions could occur due to a mechanical regulatory regime that is not flexible going forward. If the use of full LLU (ULMP) increases for example, there may be a case for that product (or a modified version thereof) to be used as a wholesale input in place of SB-WLR/Bitstream to mitigate against such distortions. This should ensure that Eircom and LLU operators can compete on a fair and transparent basis. In taking LLU wholesale input costs, ComReg would still also have to consider the associated retail costs to determine if retail fixed narrowband access³⁵ (retail line rental) is being sold below cost in a bundle. ComReg is of the preliminary view however that at this stage given the low take-up of LLU in Ireland, it is not yet necessary to use LLU products as the wholesale inputs in the net revenue test or any other *ex-ante* imputation test that may be deemed appropriate to assess whether a bundle is reasonable pursuant to ComReg Decision D07/61. The progress of LLU in Ireland will be kept under constant review and where appropriate ComReg will make the necessary adjustment if appropriate to ensure a level playing field for all players in the market. In the meantime, ComReg welcomes views from respondents as to how and when the adoption of LLU (or a modified version thereof) might best be reflected as the applicable wholesale inputs in the net revenue test or any other *ex-ante* imputation test that may be deemed appropriate.

Competition from other platform providers

- 3.22 Currently, Eircom, as SMP operator in the market for retail fixed narrowband access, faces competition from other platform providers. For example, Eircom competes against the cable operator in the five major urban areas of Ireland i.e. Waterford, Galway, Limerick, Cork and parts of Dublin. It is possible in the near future that this competition from cable will increase as the cable operator continues its move to offer telephony to its customers³⁶. Furthermore, it is possible over the next two to three years that Eircom will see increased competition from other platforms such as WiMax³⁷.
- 3.23 Therefore, in this further specification, ComReg seeks respondents' views as to the flexibility (if any) the net revenue (*ex-ante* imputation) test should allow so that the SMP operator is not put at a commercial disadvantage against competition from other platform providers.

³⁵ This may be held at the retail cost as per the last retail-minus review or may be updated annually following ComReg's review of Eircom's Historical Cost Accounts (also known as regulatory/separated accounts)

³⁶ See <http://www.upc.ie/phone/>

³⁷ For example, see the current WiMax offer from Imagine (www.imagine.ie)

Other wholesale costs

3.24 In relation to other wholesale costs, such as interconnection costs, mobile termination rates ('MTRs') etc., ComReg is of the preliminary view that the net revenue test continues to use the actual price of such wholesale inputs in effect at the time in the test as they are the applicable wholesale prices available to all operators wishing to replicate a bundle. In relation to outpayment costs (e.g. international outpayments), ComReg is of the preliminary view that consistent with the EEO approach, the actual outpayment costs incurred by the SMP operator are used. Where there is clear, unambiguous and robust evidence of future changes to outpayments to other operators, in Ireland or internationally, it is likely that such input costs for a bundle should be taken into account. How these actual wholesale prices are reflected in the monthly net revenue test is determined by Eircom based on typical usage patterns and is reviewed by ComReg to ensure it is satisfactory and robust. ComReg welcomes views on this.

Appropriate measure of cost to be applied to retail activities³⁸

3.25 The issue as to the appropriate measure of cost to be applied to retail activities was discussed extensively in response to Consultation Document No. 09/43³⁹. ComReg was of the view that ATC is appropriate while Eircom maintained that a cost measure other than ATC is appropriate.

3.26 The appropriate cost standard can be between the lower threshold of average variable cost ('AVC') toward the respectively higher thresholds of average avoidable cost ('AAC'), then LRAIC and then ATC.

3.27 ComReg believes that an important issue to consider in whatever cost standard is deemed to be appropriate is that it needs to support the regulatory objective of the obligation not to unreasonably bundle and that the cost information required needs to be supported by fit for purpose separated accounts with a sufficient level of granularity and it may mean that separated accounts are presented to ComReg for markets that are no longer regulated. ComReg would welcome views on this. Also, ComReg has commenced a process to ensure the separated accounts are fit for purpose and the outcome of this consultation will be considered in that consultation⁴⁰.

³⁸ As retail narrowband access services were deemed in Decision D07/61 to continue to fall into a distinct relevant market to retail calls and retail broadband services and to the extent that no corresponding relevant market for *ex-ante* regulation has yet been identified for bundled services including narrowband access elements, the relevant unit of output for which revenues and costs are assessed is defined in terms of each distinct product element contained in the bundle in question

³⁹ See ComReg document No. 09/53s 'Extension of April 2009 Direction requiring Eircom to refrain from launching proposed 1MB and 3MB Family "free calls to meteor" TalkTime bundles - Submissions received from respondents dated 13 July 2009

⁴⁰ See ComReg Document No. 09/75 'Accounting Separation and Cost Accounting Review: Draft Accounting Direction to Eircom Limited'

Is AVC an appropriate measure of cost to be applied?

- 3.28 AVC approximates the variable cost of producing an additional unit of output. ComReg is of the preliminary view that AVC would not be an appropriate measure of cost to be applied as it is too low a cost threshold for use in the net revenue test or any other *ex-ante* imputation test given the competitive conditions of the market for retail fixed narrowband access. AVC does not consider fixed costs, which are the major cost components faced by telecom operators. Therefore, ComReg believes that applying a cost standard on this basis could therefore significantly constrain the potential for entry by efficient entrants. ComReg believes that to use such a cost standard could give lead to a medium to long term exit of operators who cannot sustain an entry strategy that may involve loss leaders for example. Therefore, where an SMP operator is allowed to use an AVC cost standard in an *ex-ante* context, ComReg believes that market entry distortions can arise, not only to the entrant/OAO but also to the profitability of the SMP operator who may have a short term strategy of foreclosure or maintaining market share. ComReg welcomes views as to whether AVC should be used as the appropriate cost measure in the net revenue (*ex-ante* imputation) test.

Is AAC an appropriate measure of cost to be applied?

- 3.29 The precise definition of AAC depends critically on its actual implementation. For example, AAC may include avoidable fixed cost elements in addition to variable costs, depending on the timescale over which AAC is assessed. Therefore, these timescales would need to be clearly defined if AAC was to be considered in the net revenue test or any other *ex-ante* imputation test respondents may believe is more appropriate.
- 3.30 ComReg considers that AAC are the avoidable variable and incremental fixed costs of the additional sales of the product in question. The inclusion of fixed costs which would otherwise be avoided if the incremental output were no longer produced distinguishes AAC from AVC. Furthermore, the exclusion of a mark-up for overall fixed and common retail costs distinguishes AAC from ATC. More specifically, AAC represents the avoidable costs of developing, launching, marketing and servicing each individual product element of the new bundled product. That is, each product/service which constitutes the new bundled product should be treated as a discrete element which is incremental to the retail fixed narrowband service provided by the SMP operator. This means that general fixed and overhead costs are excluded, though not the fixed development, launch and any other costs directly attributable to the bundled products and which would be avoided should they cease to be provided.
- 3.31 For information, an example of a possible *ex-ante* imputation test which utilises AAC as the appropriate measure of cost for a bundle of retail line rental, calls and broadband is as below. The test below based on AAC is conducted on a bundled product by product basis.

Further specification of the obligation not to unreasonably bundle

Sample <i>Ex-Ante</i> Imputation Test based on Average Avoidable Cost	
Inputs to calculate monthly costs below:	
Sales Volume	This is the forecast/actual volume as provided by Eircom for the individual bundle in question
Cost recovery months	Average customer lifetime
Wholesale Cost Component	Comment
WLR Rental	
WLR Connection	Any applicable WLR connection charge (usually none as continued promotions of zero connection charge by Eircom). If there was a WLR connection fee, it would apply only to win-back or new customers. No connection fee would apply to existing eircom customers moving to a new retail bundle. This cost is offset by any revenue earned from a retail connection fee.
Call answering	This is the Wholesale charge for call answering multiplied by the percentage of customers who take-up the service
Bitstream Rental	
Bitstream Connection	The bitstream connection fee applies for new customers in periods where no promotion is run. This does not arise for existing broadband customers moving to a bundle. It applies for win-back and new customers, for existing eircom customers taking broadband for the first time, and for customers upgrading. This cost is offset by any revenue earned from a retail connection fee.
Call Costs: origination and termination	This is the network cost for a whole call on the eircom network.
MTR	MTRs in effect
Other outpayments/international settlements	
TOTAL WHOLESALE COST COMPONENT	
Retail Cost Components	Comment
Billing and Cash Collection	This cost reflects the variable cost of printing and posting the bill, the cost of credit management calculated based on a % of billed revenue including VAT, and the cost of putting each call on the bill.
Customer Care	Variable customer care cost.
ISP Connectivity	This cost is developed on the basis of the observed level of busy hour traffic for each Broadband product.
Product development and Product management: direct cost	Direct cost for customer care training and testing and for product development. This is recovered monthly over the period of the cost recovery months.
IT development to support this specific bundle	Cost of direct capex specifically for this bundle. This is recovered monthly over the period of the cost recovery months.
Modem and Fulfillment costs	Cost of modem and delivery (where bundle includes broadband). This is recovered monthly over the period of the cost recovery months.
Ongoing Marketing to support this bundle over its lifetime	This is the ongoing marketing specific to this bundle, rather than generic marketing spend. This is recovered monthly over the period of the cost recovery months.
Marketing : Launch Campaign	The cost of the specific campaign only. This is recovered monthly over the period of the cost recovery months.
Sales Commissions/Bounty to Third Party	Sales through call centres, Meteor Shops and third party shops. This is recovered monthly over the period of the cost recovery months.
TOTAL RETAIL COST COMPONENTS	
ESTIMATED CALL REVENUE	Bundle package price plus average revenue earned on calls outside the bundle allowances.
BUNDLE IS ABOVE COST IF ESTIMATED CALL REVENUE IS GREATER THAN TOTAL WHOLESALE AND RETAIL COST COMPONENTS	

Figure 6: Sample *ex-ante* imputation test for a bundle of line rental, calls and broadband using AAC as the appropriate cost measure

3.32 As the AAC standard does not include provision for (non-avoidable) fixed costs and common costs in a net revenue (*ex-ante* imputation) test, it could be argued that this provides the SMP operator with an advantage given the broad range of products and services over which it could conceivably recover such common costs. Entry/expansion by efficient OAOs, albeit with lower economies of scale and scope than Eircom, could thereby be impeded.

3.33 ComReg believes that *ex-ante* price controls should seek to ensure entry, and hence, the cost benchmarks that incorporate common costs should be warranted, as SMP

operators are assumed to enjoy economies of scope that are not achievable for new entrants. Critically, ComReg believes that the decision to enter the market depends on the expectation that fixed and common costs are going to be recovered; not only additional avoidable costs incurred by the SMP operator. The reasoning behind this is that an entrant would enter a market only if it considered that it would be profitable to do so, taking into account all the costs that it would have to incur in order to enter i.e., the fixed, common, joint and variable costs. Cost measures such as AAC do not ensure this as the total full costs of an operator are not covered. This is supported by the ERG:

“...Avoidable costs are typically employed in ex post predatory pricing cases and here, they are defined as costs that the vertically integrated SMP firm could avoid if it decided to close its downstream operations while continuing to provide the upstream input to third parties. However, avoidable costs are also subject to criticism. In the context of an ex-ante regulatory tool, they may provide too low a threshold for retail prices, constraining the potential for entry by efficient entrants when the avoidable cost standard does not guarantee the recovery of the fixed costs of entry. Similarly, pricing at the avoidable cost level could even mean that competitors who provide a competitive constraint could be excluded. This is especially so if there are common or joint costs between different downstream services. Accordingly, the use of fully allocated costs as a proxy for average total cost has also been put forward as an alternative cost measure or the allocation of common costs to the LRIC calculation.”⁴¹

- 3.34 Therefore, ComReg is of the preliminary view that to apply an AAC cost rule to an *ex-ante* context could therefore lead to sub-optimal entry conditions with little entry occurring. This would be to the detriment of competition and, in turn, consumers.
- 3.35 Therefore, given ComReg’s statutory objective to promote competition⁴², as well as taking account of the current state of market development of retail narrowband access in Ireland, ComReg is of the preliminary view that the use of an AAC test in an *ex-ante* context to assess whether a bundle that includes retail fixed narrowband access is reasonable is not appropriate.
- 3.36 ComReg would appreciate any comments respondents may have on the use of AAC and whether it should be used in the net revenue (*ex-ante* imputation) test generally to assess whether a bundle is reasonable. ComReg would also appreciate views on the *ex-ante* imputation test based on AAC as set out in Figure 6 above and whether this (or a modification of it) should be used as the net revenue test to assess whether a bundle is reasonable pursuant to D07/61. The issue as to whether AAC should be used if a bundle is a response to a competitor’s bundle is discussed later in this consultation.

⁴¹ At para 60 & 61 of ERG 09(07) ‘Report on the Discussion on the application of margin squeeze tests to bundles’ dated March 2009

⁴² Under Section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007

Is ATC or LRAIC the appropriate measure of cost to be applied?

3.37 The European Commission in its ‘Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’⁴³ noted that:

“Long-run average incremental cost is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. LRAIC and average total cost (ATC) are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs. In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose equally efficient competitors.”

3.38 Therefore, as noted by the European Commission above, ComReg does recognise that that LRAIC and ATC are good proxies for each other in the case of single product provision. When applying the net revenue test to individual bundles and where the promotion of efficient entry is a key *ex-ante* regulatory objective, ComReg believes regulators may only have a choice between a LRAIC or an ATC approach, where regulators may opt for LRAIC (in countries where competition is more developed) or for ATC (in countries where competition is not mature or effective).

3.39 LRAIC generally provides a higher cost benchmark than AAC but, as inter service common costs are not taken into account, provides a lower cost reference than ATC where multiple services are at issue. ComReg is of the preliminary view that competition is not yet sufficiently developed for the use of LRAIC (excluding a mark-up for shared or common costs) as the appropriate cost standard for bundles involving retail narrowband access services. In the present circumstances in Ireland, ComReg believes that it is legitimate and appropriate to rely on ATC for now with a view to promoting efficient competition in an *ex-ante* context. However, in this consultation, ComReg is seeking respondents’ views on this and whether respondents believe that a LRAIC approach is more appropriate, feasible⁴⁴ and not overly burdensome for the SMP operator for use in the net revenue (*ex-ante* imputation) test.

3.40 The reasons why ComReg is of the preliminary view that ATC is the appropriate cost measure to be applied in the net revenue (*ex-ante* imputation) test are as set out below.

3.41 In the first place, ComReg has been of the view and, on a preliminary basis, remains so that ATC is the correct cost input for the net revenue test in light of ComReg’s statutory objectives under Section 12 of the Communications Regulation Act 2002 to promote competition and protect the interests of end-users⁴⁵. In the context of an *ex-*

⁴³ C (2009) 864 dated 9 February 2009 – at footnote 18

⁴⁴ LRAIC would need to be supported by Eircom’s separated accounts as is the case for ATC

⁴⁵ It is also supported by competition case law. Case 62/86 *AKZO Chemie v Commission* [1991] ECR I-3359, paragraph 72: in relation to pricing below average total cost (ATC) the Court of Justice stated: “Such

ante regulatory tool to be applied by ComReg, ATC would appear to be the appropriate *ex-ante* cost basis to adopt as it should enable a potential entrant to recover all its efficiently incurred costs. ComReg believes that the use of a cost basis other than ATC could significantly constrain the potential for entry by efficient entrants. This is because telecom networks not only require significant upfront investment, but they also enable a wide range of services to be provided. Therefore, ComReg maintains that ATC is the appropriate cost measure to ensure that an OAO as efficient as Eircom and utilising Eircom's wholesale inputs can replicate Eircom's retail bundles that include retail line rental and cover their costs.

- 3.42 ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ComReg is of the preliminary view that this is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets.
- 3.43 Under the present market circumstances in Ireland, ComReg believes that it is legitimate and appropriate for ComReg to use ATC as the base for calculating Eircom's retail costs in an *ex-ante* context. Looked at differently, ComReg believes that relying only on any other cost measure would exclude any assessment of common costs and would therefore ignore the market entry or expansion realities faced by OAOs and new entrants. However, as noted earlier, the current framework allows the pricing below ATC on a case by case basis if supported by robust evidence of retail efficiencies as a result of bundling and that the below cost selling of retail fixed narrowband access is not having a negative impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term.

Modified ATC

- 3.44 However, a possible defect of ATC and its appropriateness, is that ATC for Eircom as the SMP operator, is naturally calculated on a very large installed customer base. It could be argued that, for example, for subscriber acquisition costs ('SACs') or marketing and sales costs incurred in a year, these costs and other customer acquisition should be apportioned over the number of new customers gained and that cost per new customer gained should be used in the test. It could also be argued that this more accurately reflects the cost structure facing a new entrant in its efforts to take customers from the incumbent SMP operator especially if the majority of the available market has not moved and is unlikely to move to another operator. It could be further argued that such an ATC cost for marketing and sales is not appropriate as it is lower due to the SMP operator's larger customer base which is a benefit of its incumbency – an advantage that is not available to OAOs/new entrants. Therefore, ComReg considers that in using ATC there is likely to be a risk that marketing costs per new bundled customer may be under-stated and there may be a valid question

prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them". See also Judgment of 10 April 2008 in Case T-271/03 Deutsche Telekom v Commission not yet reported, paragraph 194.

here whether the net revenue test as an EEO test should be modified. However, countering this concern is the argument that once a customer is acquired they should stay with the operator for their customer lifetime and any such customer acquisition costs (such as marketing and sales) will be recovered over the customer lifetime.

- 3.45 Therefore, ComReg seeks views on the complexity of the relationship between bundles and marketing spend and SACs. For example, while there may be efficiencies in bundling as suppliers are advertising one product rather than two or more, there may be increased marketing spend as the suppliers of bundles look to inform consumers about the changes in the offers available, persuading them to change their purchasing behaviour. The increased variety of potential bundles available could also lead to an increase in marketing spend in the short-term as there are more packages to be marketed. Furthermore, as penetration of broadband increases, ComReg believes that SACs could increase as it takes increasingly more resources and cost to persuade new customers to join and/or switch from other operators.

Source of ATC data

- 3.46 Currently, the ATC data used in the net revenue test is sourced from Eircom based on cost allocations it makes which are informed from the latest set of its separated accounts which are subject to an external audit⁴⁶. As discussed earlier, ComReg has commenced a consultation process to ensure that the separated accounts are fit for purpose. In the case of the ATC data provided for the net revenue (*ex-ante* imputation) test, it is of critical importance to ComReg that the apportionment of retail costs between retail products are appropriate especially in the context of the increased take-up of bundled offers and of broadband products. For example, a particular concern of ComReg is to ensure that, say, for a general marketing campaign, that line rental, calls and broadband receive their appropriate share of that marketing cost although it may be perceived that the marketing campaign was for broadband alone. ComReg is of the preliminary view that the latest set of audited ATC allocations provided by Eircom, once approved by ComReg, are utilised in the net revenue (*ex-ante* imputation) test. ComReg is also of the preliminary view that where an audit opinion is not received from Eircom's external auditors on the allocation of costs between the specific services sold by Eircom, that it would be necessary for ComReg to conduct an independent regulatory review in order to assess whether the allocations are satisfactory. ComReg seeks respondents' views on these preliminary views.

Associated retail costs of narrowband and broadband wholesale inputs if there is a move from retail-minus to cost-plus

- 3.47 The current net revenue test utilises the retail costs as derived from the regulated retail minus associated with SB-WLR and Bitstream. This approach ensures that full monthly retail price of line rental is considered in the net revenue test in order to assess whether it is being sold below cost within a bundle while at the same time the

⁴⁶ See <http://home.eircom.net/Images/eircomie/2009HCAFinancialStatement.pdf>

presence of any retail efficiencies implying a possibly lower retail line rental cost would be assessed at a later stage in the framework to the extent that they may be replicable by an equally efficient OAO.

- 3.48 This section discusses what retail costs should be considered if there is a move to a cost-plus price control for SB-WLR and/or Bitstream from the current retail-minus and ComReg is seeking respondents' views on this.
- 3.49 ComReg's preliminary view is that in relation to retail line rental, the retail costs should be ascertained by deducting the price of wholesale SB-WLR from the retail line rental cost, this would ensure that the full price of retail line rental is considered in the test in order to assess whether retail line rental is being sold below cost within a retail bundle. However, as allowed under the current framework as set out in figure 2, any retail efficiencies, where supported by robust evidence, implying a possibly lower retail line rental cost are assessed at a later stage in the framework to the extent that they may be replicable by an equally efficient OAO.
- 3.50 In relation to broadband, ComReg has commenced a process to assess whether the price control for WBA should move from retail-minus to cost-plus. However, currently Eircom has an obligation not to margin or price squeeze on a product by product basis under ComReg Decision D01/06 and it is possible (subject to consultation) that this obligation would not change if there was a revised price control. Therefore, if there is move to a cost-plus price control for WBA, ComReg is of the preliminary view that it will utilise the retail cost as provided by Eircom and reviewed by ComReg in order to demonstrate that Eircom is not margin squeezing on a product by product basis in the market for WBA.

Unregulated products not included in Eircom's separated accounts

- 3.51 ComReg is of the preliminary view that, where an unregulated product forms part of a bundle incorporating retail narrowband access, the use of ATC in the net revenue (*ex-ante* imputation) test holds true whether a market is regulated or not. As noted above, Eircom's separated accounts are an essential resource to determine the retail and wholesale cost of products, and as a result the associated available margin. However, the current separated accounts do not cover some unregulated products for example, mobile broadband, IPTV⁴⁷ etc. In the absence of separated accounts on these products, ComReg does not have visibility of the wholesale and retail costs for these unregulated services (excluding calls⁴⁸) and therefore determining the ATC cost levels is complicated and problematic.
- 3.52 ComReg believes that for unregulated products that are not accounted for in sufficient granularity in the separated accounts it may be difficult to estimate the

⁴⁷ Internet Protocol television (IPTV) is a system through which digital television service is delivered using the architecture and networking methods of the Internet Protocol Suite over a packet-switched network infrastructure, instead of being delivered through traditional radio frequency broadcast, satellite signal, and cable television formats

⁴⁸ At this stage, Eircom's separated accounts include details on calls. However, as calls are no longer subject to *ex-ante* regulation, this may change following the update of the separated accounts. It may be the case that cost details in relation to calls is provided as a confidential Additional Financial Information to ComReg alone

wholesale cost and retail cost of these products. ComReg believes that if the market for the unregulated product is considered to be effectively competitive (excluding calls), this implies that the economic margin should be close to zero (i.e. profits are restricted to the cost of capital). Therefore, ComReg is of the preliminary view that using the SMP operator's retail prices for such standalone products in the net revenue test is the most practical method to assess if retail fixed narrowband access is being sold below cost within the bundle. Furthermore, ComReg recognises that new unregulated products may be sold as loss leaders say, for example, to gain or maintain market share and this further supports the taking of the standalone price (in effect a zero margin).

- 3.53 However, ComReg recognises that the approach may not be proportionate and justified in all circumstances. Therefore, ComReg proposes a two-stage process:
- 3.53.1 If the net revenue test is passed with a zero margin assumption, that is, using the standalone price of the unregulated product, then no further investigation would be required.
- 3.53.2 If it is failed with that assumption, then it would be necessary to consider what margin would make the difference between passing or failing. In that situation, ComReg will require actual information to be provided by the SMP operator to justify the adoption of margin of greater than zero in the net revenue (*ex-ante* imputation) test. This actual margin information provided by Eircom should be robust and fully supported. Therefore, if Eircom believe that there are a number of unregulated products that will be always added to bundles (e.g. mobile broadband); there may be merit in Eircom including cost details on such products in a confidential Additional Financial Information submission to ComReg each year with its separated accounts submission.
- 3.54 ComReg seeks respondents' views on these preliminary views.

Case by case competitive assessment of a bundle's reasonableness

- 3.55 As noted in figure 2, currently, if a bundle fails the net revenue test, ComReg as a proportionate measure will consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the below cost loss of the bundle. ComReg will also consider the impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term. Therefore, currently, just because a bundle fails the net revenue test and is selling retail fixed narrowband access below cost, it does not automatically lead to that bundle being considered unreasonable, ComReg will assess other factors and those factors include:

Retail efficiencies

- 3.56 For the purposes of applying the net revenue test, ComReg accepts that, in principle, it is appropriate to have regard to retail efficiencies and related savings, subject to the existence and/or quantum of such being demonstrated to ComReg's satisfaction, with robust supporting evidence, by Eircom. For example, such retail efficiencies could relate to cost savings derived from reduced billing and customer service costs to the extent that such savings could also be replicated by equally efficient entrants.

Therefore, full consideration will be given by ComReg of any efficiency gain presented which is substantiated with a sound rationale and robust supporting evidence.

- 3.57 ComReg believes that in order to demonstrate such retail efficiencies and related savings it will require the existing separated accounts to be maintained and improved by Eircom. ComReg also believes that with increased retail bundling that when costs used within the net revenue test are based on actual costs that these costs used in the net revenue test may already reflect the efficiencies due to bundling, that is for example, a reduced sales and billing cost. Therefore, in conducting an assessment of the retail efficiencies, ComReg believes it must be mindful of this potential for a double count of retail efficiencies. Furthermore, ComReg must assess any such claims of efficiencies carefully when the test is based on actual retail costs incurred from a previous period as many factors may have changed since that period, for example the relevant volumes of the SMP operator may have reduced which may have increased the per unit retail costs rather than reduced them due to efficiencies. Therefore, ComReg believes that it is highly important to understand in detail the underlying unit costs as any bundle allowed due to perceived retail efficiencies could cause significant harm to the market where it is found *ex-post* that the bundle was in fact non-compliant as the claimed retail efficiencies due to bundling were not real.
- 3.58 In this respect, as mentioned earlier, ComReg has commenced a process to review and improve the current separated accounts with the goal of ensuring that they are fit for purpose⁴⁹. ComReg would appreciate respondents' views as to what they would consider to be retail efficiencies and associated savings as a result of bundled offers and to how such claimed savings can be demonstrated with robust supporting evidence by Eircom and how ComReg can ensure that there is no double count in the savings claimed.

Increased customer lifetimes

- 3.59 Eircom believes that bundled offers result in longer customer lifetimes than customers on standalone retail offers⁵⁰. If such longer customer lifetimes are to be considered in the assessment of unreasonable bundling, ComReg believes that they should be demonstrated to ComReg's satisfaction by robust supporting evidence. An issue in the assessment of increased customer lifetimes is that bundled products are relatively new and that customers who avail of bundled products from the SMP operator are subject to a minimum twelve month contract. Therefore, there may not be a sufficiently long or robust set of data to inform a claimed longer customer lifetime for customers within bundles. Furthermore, any claimed increased customer lifetime is for existing customers on an existing bundled package and may not reflect the customer lifetime of a customer availing of a new bundled offer. Also, it is likely, given its position of incumbency, that the majority of customers availing of

⁴⁹ See ComReg Document No. 09/75 'Accounting Separation and Cost Accounting Review: Draft Accounting Direction to Eircom Limited'

⁵⁰ As a result of the Discounted Cash Flow model developed by Eircom to ensure it does not margin squeeze pursuant to ComReg Decision D01/06, an average customer lifetime of 42 months is currently used – Eircom claim that their customer lifetime is longer than this for customers that purchase retail bundles

the SMP operator's bundles will be existing customers of the SMP operator on stand-alone products and therefore it is unlikely that these customers have moved between operators.

- 3.60 OAOs may not have average customer lifetimes within bundles as long as Eircom and therefore this may need to be considered. Furthermore, OAOs, for the most part, have a base of customers that have left Eircom and therefore are customers who have moved between operators and may be more likely to do so again. ComReg is of the preliminary view that these factors would likely to be considered to ensure that any claim for increased customer lifetime by the SMP operator can be replicated by an efficient operator.
- 3.61 Therefore, ComReg would appreciate respondents' views on ComReg's preliminary view and the associated issues presented. ComReg would also welcome any data respondents' may have on their average customer lifetimes for both their bundle and standalone customers respectively which can be submitted in confidence for ComReg's consideration.

Competitive assessment

- 3.62 ComReg will consider all available information to hand to consider the impact of the below cost selling of retail fixed narrowband access in a bundle on competing operators and the ability of entrants to enter the market and promote sustainable competition in the medium to long term. For example, as noted by ComReg in ComReg Decision D02/09, for assessing whether Eircom's "April 2009" bundles were unreasonable, ComReg was informed by the actual month by month information provided by Eircom for their similar bundles launched in October 2008 and also considered information presented by Eircom and OAOs at the time and also considered information provided by Eircom regarding DSL net additions.
- 3.63 Relevant considerations which ComReg will take into account when assessing each bundle in its relevant competitive context will include relevant commercial or strategic reasons for the bundled offer, the duration and scope of the bundled offer, whether the pricing of the bundle in question is likely to have an appreciable effect on existing competitors or new or potential entrants to the market, medium-to-longer term implications for retail pricing and consumers, etc.
- 3.64 ComReg would welcome respondents' views on the information ComReg can utilise in its assessment of the impact of a below cost bundle on competing operators and entrants and therefore whether it is unreasonable.

A different net revenue test in different circumstances?

- 3.65 ComReg will consider below whether the net revenue test (*ex-ante* imputation test) needs to be revised if any of the circumstances below arise and will set out its preliminary views:

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

3.66 In its response to Consultation Document No. 09/43⁵¹, Eircom maintained that a different test should be conducted to assess whether a bundle is reasonable when a bundle that includes retail line rental is in response to a competitor's bundle⁵². Eircom believed that the test should compare the total revenue of the bundle to the AAC of the bundle.

3.67 In relation to this proposal of a different net revenue (*ex-ante* imputation) test to assess the reasonableness of a bundle when it is a response to competition, ComReg's preliminary view remains as the view noted in ComReg Decision D02/09. ComReg believes that if entrants knew that the incumbent could respond to entry by dropping prices to AAC, this would increase the risk that the entrant would not be able to recover their fixed costs, and might therefore preclude (efficient) entry. The current net revenue test has a clear underlying logic: if Eircom's pricing does not cover its ATC it is reasonable to assume, subject to the outcome of the complementary competitive assessment noted in the previous section, that an efficient rival would also not be covering its full costs since Eircom has economies of scale and scope within the fixed sector that others are unlikely to be able to match. Other operators' ability to compete with Eircom would therefore be constrained, their incentives to enter would be weakened, and their ability to establish themselves as sustainable retail competitors in the longer term could also be hampered. ComReg believes that applying a different cost basis when a bundle is meeting competition would also give rise to perverse consequences. If accepted, the legality of Eircom's pricing would depend on the happenstance of there being another offering already in the market. Moreover, Eircom could clearly skew the analysis by slightly delaying its offering to follow another operator's launch. ComReg also believes it would also lead to odd results. If, by pricing below cost, Eircom succeeded in eliminating the other operator from the market, in Eircom's view, their conduct (i.e. dropping prices to AAC) would nevertheless be legal, given that they were pricing to meet competition. If there was no competitor left on the market, Eircom's pricing would at that moment become illegal, since there would be no competition to "meet". ComReg is of the preliminary view that all of this shows how inappropriate a meeting competition defence would be in an *ex-ante* regulatory context. ComReg welcomes respondents' views on this and whether the test should be a different standard when a bundle offered by the SMP operator is a response to a competitor's bundle.

Promotions

3.68 While the duration of a promotion may play some role in its potential to foreclose a market, ComReg is of the preliminary view that the obligation not to unreasonably bundle and all its facets still apply even if a bundle is only planned to be offered for a

⁵¹ 'Consultation and Draft Direction on extending a Direction of April 2009 requiring Eircom to refrain from launching proposed 1MB and 3MB Family "free calls to meteor" TalkTime bundles' dated 19 May 2009

⁵² See ComReg document No. 09/53s

limited promotional period. ComReg believes that it would not make sense for promotions not to be subject to full regulatory controls. ComReg believes just because a bundle is only offered for a promotional period does not automatically imply no potential harm to equally efficient competitors⁵³. Therefore, ComReg believes that a bundle must be reasonable at all times. However, as noted earlier, under the current framework if a bundle is below cost it does not automatically lead to that bundle being considered unreasonable. As a proportionate measure, on a case by case basis, ComReg considers retail efficiencies as a result of the bundled offer and the extent to which such retail offers could in practice have an appreciable negative effect on existing competitors or potential entrants to the market. ComReg welcomes respondents' views on this preliminary view.

Obligation applies to individual bundles - 'product by product' basis

- 3.69 ComReg is of the preliminary view that it is legitimate and appropriate to continue to apply the obligation not to unreasonably bundle (including the net revenue test) to individual bundles and not only to the aggregation of bundles, for example, the test applies say to the 1MB Anytime bundle and not to the whole Anytime bundle range offered by Eircom as SMP operator in the market for retail fixed narrowband access. ComReg believes that applying the obligation only to bundles as a whole would give Eircom a large discretion in selectively discounting individual bundles according to the degree of competition in the various segments, that is, it would allow Eircom to selectively reduce the prices of those bundles where competition is more intense. ComReg believes that this could negatively impact on those competitors, whose scope of retail products and bundles is smaller and which would not be able to reduce the price of their bundles without jeopardising the viability of their business case.
- 3.70 ComReg believes that applying the obligation only to bundles as a whole would make Eircom's own range of bundles, and its pricing across bundles, a reference point, from which it would be difficult for competitors to deviate. ComReg believes that application of the obligation on individual bundles in an *ex-ante* context allows the promotion of competition by OAOs which currently have a smaller range of retail services and bundles than Eircom.
- 3.71 ComReg believes that it is perfectly legitimate and appropriate to ensure that efficient retail competitors are not excluded, marginalised, or deterred from entry or expansion via a net revenue test applied to individual bundles. This is justified under the prevailing competitive conditions on Ireland. This may be subject to reassessment in a future market review if the competitive dynamics change. Without such action in the present situation, rivals would face enormous difficulties in entering the market, becoming as efficient as Eircom and/or competing effectively with Eircom, to the detriment of competition and consumers in Ireland.

⁵³ For example, the recent legal proceedings concerned bundles that were available for sale within a six month promotional window but customers who availed of the promotion could avail of the bundle for the entire period of their customer lifetime with the SMP operator – therefore the impact on competitors and entrants was longer than the period of the promotion itself

3.72 ComReg is seeking respondents' views as to whether the product by product assessment remains appropriate to assess whether a bundle is reasonable pursuant to ComReg Decision D07/61.

ComReg's preliminary views on the net revenue (*ex-ante* imputation) test to assess whether a bundle is unreasonable pursuant to D07/61

3.73 In summary, as discussed in the above sections, ComReg's preliminary views are that:

3.73.1 The obligation not to unreasonably bundle applies to individual bundles that include retail fixed narrowband access and not to the aggregation of bundles.

3.73.2 The obligation not to unreasonably bundle still applies when a bundle that includes retail fixed narrowband access is only available for a promotional period.

3.73.3 Given the state of competition in Ireland and the regulatory objectives behind the obligation not to unreasonably bundle, that the current net revenue test remains appropriate.

3.73.3.1 For revenue, the net revenue test uses the average monthly revenue of the bundle in question by reference to the package price applicable in the market at the time plus the monthly revenue earned on average outside the bundle.

3.73.3.2 For wholesale costs, the net revenue test uses the actual monthly rental price of SB-WLR and Bitstream as well as the price of all other relevant wholesale inputs (e.g. interconnection, MTRs etc.).

3.73.3.3 For retail costs, the net revenue test will use ATC data provided by Eircom. ComReg does not believe this ATC data should be modified.

3.73.3.4 For other unregulated products that Eircom does not have ATC data for, ComReg proposes to use the standalone price of that product in the test.

3.73.3.5 If a bundle fails the net revenue test, ComReg as a proportionate measure will consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the below cost loss of the bundle. ComReg will also consider all available information to hand on the competitive context to consider whether the bundle is anti-competitive and therefore unreasonable.

3.73.3.6 The net revenue test (*ex-ante* imputation test) should not be altered if an Eircom bundle that includes retail fixed narrowband access is a response to competition.

3.73.4 However, in this consultation, ComReg is seeking views on the above and is open, if respondents believe it is appropriate, to a modified specification of the net revenue test or to the use of a different *ex-ante* imputation test to assess whether a bundle is reasonable pursuant to D07/61.

Appropriate regulatory and economic criteria applied?

- 3.74 Given the current state of competition in Ireland, the above sets out ComReg's preliminary views on an how the current net revenue test and framework remains appropriate as an *ex-ante* imputation test to ensure that any Eircom bundle that includes retail line rental can be replicated by an as efficient OAO using Eircom's wholesale inputs and to cover all its efficient costs.
- 3.75 However, ComReg would welcome and consider any other appropriate regulatory and economic criteria to address the concerns discussed in this consultation, in Consultation Document No. 07/26 and in ComReg Decisions D07/61 and D02/09.

Q. 1. To meet the regulatory objectives of the obligation not to unreasonably bundle, what *ex-ante* imputation test do you think is appropriate to assess whether a bundle that includes retail fixed narrowband access is reasonable pursuant to ComReg Decision D07/61? To support your view, please detail your response setting out why you believe the proposed *ex-ante* imputation test meets the regulatory objectives of the obligation not to unreasonably bundle, detail the components of the test including why such components are appropriate and include worked examples of the test and its components where appropriate.

Q. 2. Do you agree or disagree with the preliminary views expressed by ComReg in the above (namely in paragraphs 2.18, 3.2, 3.9, 3.13, 3.14, 3.19, 3.24, 3.28, 3.35, 3.39 , 3.46, 3.49, 3.50, 3.51 - 3.53, 3.60, 3.67, 3.68, 3.69)? Do you have any views on the matters ComReg seeks further input on in the above (namely in paragraphs 2.19, 2.20, 3.7, 3.17, 3.21, 3.23, 3.27, 3.36, 3.45, 3.58, 3.61, 3.64)? Please give a detailed response with examples where appropriate to support your view.

Notification and pre-clearance of retail bundles that include retail fixed narrowband access

- 3.76 Currently ComReg Decision D07/61 requires Eircom to notify ComReg no later than five working days in advance of proposed changes to the terms and conditions of supply within the retail fixed narrowband access market. Also, where bundles include broadband, under ComReg Decision D01/06, Eircom must notify ComReg

of such bundles and within five working days, ComReg may do one of the actions as noted in 4.6.5 of ComReg Decision D01/06. Pending the conclusion of this consultation and the resultant decision becoming effective, as part of the settlement agreement, Eircom is not permitted to launch bundles which include line rental without ComReg's prior approval, which ComReg would not unreasonably withhold or delay.

- 3.77 To supplement these existing pre-notification requirements, it is proposed to further specify the notification and pre-clearance of bundles that include retail fixed narrowband access as follows.
- 3.78 ComReg is of the preliminary view that prior to the date that a new bundle that includes retail fixed narrowband access is to be made available or offered for sale by Eircom, that Eircom should furnish to ComReg a detailed written submission including the net revenue test demonstrating Eircom's proposed compliance with the obligation not to unreasonably bundle. The submission would, under this proposal, make full and true disclosure of all material facts for the purpose of demonstrating the proposed compliance with the obligation not to unreasonably bundle. In the submission, all assumptions would be clearly set out in an associated document together with the rationale and supporting evidence for such an assumption and the likely effect if an assumption is not met in actuality. The net revenue test workbook presented would be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies/increased customer lifetimes should be supported by robust evidence. Upon receipt of the submission, ComReg would review the submission and within ten working days, give or withhold approval for launch of the proposed bundle that includes retail fixed narrowband access - such approval would not be unreasonably withheld and Eircom may not launch the bundle without having received such approval from ComReg. In the ten working day period, ComReg may seek further information to inform whether approval to launch should be given or withheld. ComReg seeks respondents' views as on the preliminary views expressed above.

Modify/withdraw non-compliant bundles within ten weeks

- 3.79 Though a bundle that includes retail fixed narrowband access is launched and in the market, Eircom must at all times ensure it meets its regulatory obligation not to unreasonably bundle. Therefore, Eircom must notify ComReg immediately together with supporting evidence if it believes that any such bundle may have become unreasonable. Also, if requested by ComReg at any time, Eircom should provide actual data and the actual net revenue test for a bundle that includes retail fixed narrowband access. In this submission Eircom should also provide any other relevant information it believes is required so that ComReg can make an informed decision as to whether the bundle is reasonable and that Eircom is meeting its regulatory obligations.
- 3.80 If ComReg is of the view that a bundle that includes retail fixed narrowband access in the market is no longer reasonable, ComReg would inform Eircom in writing of this. In a further specification to the obligation not to unreasonably bundle, ComReg is of the preliminary view that upon receipt of the written view from ComReg, Eircom would within ten weeks modify/withdraw the bundle such that the bundle is

no longer unreasonable. If Eircom does not wish to withdraw the bundle, Eircom could modify the bundle as follows:

- 3.80.1 Reduce the stand-alone price of retail line rental⁵⁴;
- 3.80.2 Increase the headline package price of the bundle;
- 3.80.3 Increase the prices of calls outside bundle allowance;
- 3.80.4 Modify the “free” allowance within the bundle;
- 3.80.5 Reduce the price(s) of the wholesale input(s) mindful of the need to maintain an appropriate economic space to the prices of LLU inputs such that no squeeze occurs⁵⁵;
- 3.80.6 Any other appropriate solution that Eircom believes will result in the bundle being reasonable;
- 3.80.7 A combination of the above.

3.81 In this further specification, ComReg is of the preliminary view that such proposed modifications to the bundle by Eircom must be notified to and cleared by ComReg in advance of the expiry of the ten week deadline. In notifying ComReg to meet the ten week deadline, ComReg believes that Eircom would need to be cognisant of any other regulatory notification requirements it may have, for example, its regulatory obligation to notify OAOs of any proposed change to the price of SB-WLR⁵⁶ if a change to such price is required to make the bundle reasonable.

3.82 If a bundle has to be withdraw/modified, ComReg is of the preliminary view that any communication to the affected retail customer is pre-cleared with ComReg and such communication by Eircom would clearly set out the customer’s right to end its Eircom contract without undue penalty and to move to another operator if it so wishes.

3.83 ComReg seeks respondents’ views as on the preliminary views in relation to the modification/withdrawal of non-complaint bundles by the SMP operator as expressed above.

⁵⁴ And its associated wholesale price, SB-WLR, if the retail-minus price control is still in effect

⁵⁵ ComReg will shortly issue a separate consultation on how wholesale prices can be amended so that a squeeze no longer occurs

⁵⁶ See for example 6.12 of Decision Instrument D07/61 – Eircom must notify ComReg two months in advance of change

Q. 3. Do you agree or disagree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access as set out in the section above? Please explain your response and provide detailed information to support your view.

Q. 4. Do you agree or disagree that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that Eircom should modify/withdraw such bundle within ten weeks? Please explain your response and provide detailed information to support your view.

Any issues not considered in this consultation?

3.84 ComReg would also welcome any views respondents' may have on issues that ComReg has not considered in relation to the further specification of Eircom's obligation not to unreasonably bundle.

Q. 5. Are there any issues in relation to the further specification of obligation not to unreasonably bundle that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

Duration of this further specification

3.85 The further specification outlined in the draft decision in this consultation will apply as long as Eircom is still found to have SMP in retail fixed narrowband access or until otherwise amended by ComReg. If there is a significant change in the current state of competition, for example a significant take-up of LLU, ComReg might alter and/or further specify the obligation not to unreasonably bundle by way of a further consultation.

Conclusion

3.86 ComReg is of the preliminary view that given the current state of competition in Ireland the current net revenue test, as an *ex-ante* imputation test, complemented by an assessment of the competitive context of the bundle in question, remains appropriate as one test to assess whether a bundle is unreasonable pursuant to ComReg Decision D07/61. ComReg has further specified the pre-notification and pre-clearance obligation on Eircom in relation to bundles that include retail fixed narrowband access. ComReg, in this consultation, is seeking views on these preliminary views and conclusions and therefore ComReg in forming its final

direction will consider respondents' views to this consultation and will take utmost account of comments, if any, from the European Commission⁵⁷ and as such the final direction adopted may be different than the draft direction included in this consultation.

⁵⁷ Pursuant to Article 7 of the Framework Directive, Regulation 20 of the Framework Regulations

4 Legal Basis

4.1 Eircom was formally designated by ComReg as having SMP in the markets for higher and lower level narrowband access from a fixed location in ComReg Decision No. D07/61 “Market Analysis: Retail Fixed Narrowband Access Markets” dated 24 August 2007 (the “SMP Decision”). In the SMP Decision, ComReg imposed a number of obligations on Eircom including the obligation not to unreasonably bundle pursuant to Regulations 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003 (as amended) (the “Universal Service Regulations”), in particular in sections 7.8 and 7.9 of the SMP Decision Instrument, annexed to the SMP Decision.

4.2 ComReg Document No. 07/26 and the SMP Decision are to be construed together for the purpose of Eircom’s legal obligation not to unreasonably bundle. This is provided for in section 1 of Decision Instrument annexed to the SMP Decision, which provides inter alia as follows:

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

...

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

4.3 Paragraphs 6.216 – 6.234 of ComReg Document No. 07/26 discuss unreasonable bundling. By way of example, paragraph 6.233 provided two specific instances of what can constitute “unreasonable bundling” for the purposes of Eircom’s legal obligations. In addition to these examples, paragraph 6.234 notes that the SMP operator must ensure that any bundle avoids a margin squeeze and passes a net revenue test. Regulation 14(2)(d) of the Universal Service Regulations provides the legal basis for the obligation not to unreasonably bundle services where a retail market is not effectively competitive, that is, where there is SMP. The obligation not to unreasonably bundle was imposed on Eircom in D07/61 because the obligations imposed under the Access Regulations and Regulation 16 of the Universal Service Regulations would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act of 2002. The imposition of the obligation not to unreasonably bundle is based on the nature of the problem identified in Document No. 07/26, and was imposed pursuant to the market analysis in D07/61 and was proportionate and justified in the light of the objectives set out in section 12 of the Act of 2002. Regulation 31 of the Universal Service Regulations provides that ComReg may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under the Universal Service Regulations, issue directions to do or refrain from doing anything which the Regulator specifies in the direction. ComReg is now consulting on issuing such a direction to Eircom pursuant to Regulation 31 in conjunction with Regulation 14 of the Universal Service Regulations.

5 Draft Direction

5.1 ComReg would appreciate respondents' views on this draft direction.

Q. 6. Do you believe that the draft text of the proposed direction is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

1. STATUTORY AND LEGAL POWERS

1.1 This Direction relates to a further specification of the obligation not to unreasonably bundle in the markets for retail narrowband access from a fixed location and is made by the Commission for Communications Regulation (“ComReg”):

- i. Having had regard to sections 10 and 12 of the Communications Regulations Act, 2002;
- ii. Having taken account, of its functions under Regulation 6 (1) of Access Regulations;
- iii. Having (where appropriate) complied with the Policy Directions made by the Minister;
- iv. Having notified the draft measure to the European Commission pursuant to Regulation 20 of the Framework Regulations and having taken the utmost account of the European Commission’s comments;
- v. Having had regard to the market definition, market analysis and reasoning set out in Document No. 07/26, ComReg Decision D07/61 and ComReg Decision D02/09, the reasoning and individual decisions set out therein;
- vi. Having had regard to the reasoning set out in the Consultation on the Further Specification of the Obligation not to Unreasonably Bundle ComReg Document No. 10/01 and having taken account of the submissions received in relation to Document No. 10/01 pursuant to Regulation 19 of the Framework Regulations; and
- vii. Pursuant to Regulations 14 and 31 of the Universal Service Regulations.

1.2 The provisions of the Response to Consultation and Decision No. [10/XX], ComReg Document No. 10/01 and the individual decisions in the Response to Consultation and Decision in ComReg Document No. [10/XX] shall, where appropriate, be construed as forming part of this Decision Instrument.

2. SCOPE AND APPLICATION

2.1 This direction applies to Eircom Limited and its subsidiaries, its successors and assigns (“Eircom”).

2.2 This direction is binding upon Eircom and Eircom shall comply with it in all respects.

3. OBLIGATION NOT TO UNREASONABLY BUNDLE

3.1 Pursuant to ComReg Decision D07/61 the obligation not to unreasonably bundle retail fixed narrowband access was imposed on Eircom. For the avoidance of doubt, this obligation includes that any bundle avoids a margin squeeze and passes a net revenue test.

3.2. The net revenue test is hereby specified as follows:

NET REVENUE TEST (all ex VAT)	Factors considered in the Net Revenue Test
Revenue:	
Package Price	This is the bundle package price charged to retail customers.
Calls Revenue	This is the total calls revenue earned on average outside the bundle package. This is calculated for each component that is charged separately outside the bundle by: (i) taking the total calls for that component and multiplying that by the call set up fee; and (ii) taking the total minutes for that component and multiplying that by the retail price per minute. This total revenue for the component is then divided by the total number of customers to get an average revenue per customer for that component. The totals of all revenue components sold outside the bundle are included.
Costs:	
Wholesale line rental	This is the Single Billing –Wholesale Line Rental regulated price as per the regulated retail minus price control and as published in Eircom’s Reference Interconnect Offer price list.
Operating costs associated with retail line rental	These are the operating costs as derived from the SB-WLR regulated retail minus price control. <i>Therefore, the full cost of retail line rental, that is the SB-WLR plus the associated retail costs as per the regulated retail minus price control, is taken into account in the analysis.</i>
Mailbox	Where the TalkTime packages include free mailbox, the wholesale price of the mailbox as per the regulated retail minus price control as published in Eircom’s Reference Interconnect Offer Price List must be taken to ensure an operator can replicate the offer. However, consideration will be taken of the take up of the mailbox and the wholesale price will be adjusted to reflect this. The retail costs as derived from the retail minus price control could also be included here.
Costs associated with retail calls	These are the wholesale and retail costs as calculated for each retail cost, e.g. calls to Local, National, UK etc. The retail costs of each are calculated by including the wholesale interconnection prices applicable in the market plus the latest audited average total retail costs (residential average total costs for a residential bundle, business average total cost for a business bundle) provided by Eircom and as reviewed and approved by ComReg. Where applicable, these total retail costs include relevant international calls out payments costs and mobile termination costs applicable (including the costs and mobile termination costs for those mobile calls that are sold for free).
Wholesale broadband	This is the relevant regulated Bitstream price as per the regulated retail minus control and as published in Eircom’s Bitstream price list.
Operating costs associated with retail broadband	These are the operating costs as derived from the Bitstream regulated retail minus price control.
Net Revenue: Total Revenue – Total Costs	<i>If total costs are greater than total revenue, bundle is not profitable</i>

- 3.3 Where the net revenue test is failed, that is, if the average monthly costs are above average monthly revenue, this does not automatically lead to the conclusion that a bundle is unreasonable. ComReg, as a proportionate measure, will consider any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the loss of the bundle. ComReg will also consider the impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term.
- 3.4 The net revenue test is applied to individual bundles that include retail fixed narrowband access.
- 3.5 Eircom must comply with the obligation not to unreasonably bundle at all times.
- 3.6 Prior to the date when a new bundle that includes retail fixed narrowband access is to be made available or offered for sale, Eircom shall furnish ComReg with a detailed written submission including the net revenue test demonstrating Eircom's proposed compliance with the obligation not to unreasonably bundle. The submission shall make full and true disclosure of all material facts for the purpose of demonstrating the proposed compliance with the obligation not to unreasonably bundle. In the submission, all assumptions should be clearly set out in an associated document together with the rationale and supporting evidence for such an assumption and the likely effect if an assumption is not met in actuality. The net revenue test workbook presented should be capable of running scenarios for changed key assumptions. Any claims for retail efficiencies or increased customer lifetimes should be supported by robust evidence. Upon receipt of the submission, ComReg shall review the submission and within ten working days, shall give or withhold approval for launch of the proposed bundle that includes retail fixed narrowband access. Such approval will not be unreasonably withheld. Eircom shall not launch the bundle without having received such approval from ComReg. In the ten working day period, ComReg may seek further information to inform whether approval to launch shall be given or withheld.
- 3.7 Once a bundle that includes retail fixed narrowband access is launched and in the market, Eircom must at all times ensure it meets its regulatory obligation not to unreasonably bundle and must notify ComReg immediately if it believes that any such bundle may not be compliant with this obligation. If requested by ComReg, Eircom shall provide actual data and the actual net revenue test for the bundle. Eircom shall also provide any other relevant information it believes is required so that ComReg can make an informed decision as to whether Eircom is meeting its regulatory obligations including in particular its obligation not to unreasonably bundle.

- 3.8 If ComReg is of the view that a bundle that includes retail fixed narrowband access amounts to unreasonable bundling, ComReg will inform Eircom in writing of such opinion. Upon receipt of that opinion, Eircom shall within ten weeks modify or withdraw that bundle. If Eircom does not wish to withdraw the bundle, Eircom could modify the bundle as follows:
- (i) Reduce the stand-alone price of retail line rental and its associated wholesale price, single bill wholesale line rental (“SB-WLR”);
 - (ii) Increase the headline package price of the bundle;
 - (iii) Increase the prices of calls outside the bundle allowance;
 - (iv) Modify the “free” allowance within the bundle;
 - (v) Reduce the price of the wholesale inputs mindful of the need to maintain an appropriate economic space relative to the prices of local loop unbundling (“LLU”) wholesale inputs such that no margin or price squeeze occurs;
 - (vi) A combination of the above.

Such proposed modifications to the bundle by Eircom must be notified and cleared by ComReg in advance of the expiry of the ten week deadline. In notifying ComReg to meet the ten week deadline, Eircom shall be cognisant of any other regulatory notification requirements it may have, including its regulatory obligation to notify OAOs of any proposed change to the price of SB-WLR.

- 3.9 In the event of a withdrawal or modification of an unreasonable bundle, Eircom shall pre-clear any communication to the affected retail customer with ComReg and such communication by Eircom will clearly set out the affected customers right to terminate its Eircom contract without undue penalty and to move to another operator if it so wishes.

4 MAINTENANCE OF OBLIGATIONS

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

5 STATUTORY POWERS NOT AFFECTED

5.1 Nothing in this further specification 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 Direction) from time to time as the occasion requires.

6 EFFECTIVE DATE

6.1 This Direction shall be effective from the date of its publication and notification to Eircom and shall remain in force until further notice by ComReg.

6.2 Section 3 of this Decision Instrument shall be applied 28 days from the effective date.

█
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE █ DAY OF █ 2010

6 Submitting Comments

- 6.1 All comments are welcome; however it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.
- 6.2 The consultation period will run from 6 January 2010 to 3 February 2010 during which the Commission welcomes written comments on any of the issues raised in this paper.
- 6.3 Having analysed and considered the comments received, ComReg will review the existing obligation not to unreasonably bundle and publish a decision in April 2010 on the consultation which will, *inter alia* summarise the responses to the consultation.
- 6.4 In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg Document No. 05/24⁵⁸.

Please note

- 6.5 ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful.
- 6.6 As it is ComReg's policy to make all responses available on its web-site and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response.
- 6.7 Such information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg Document No. 05/24.

⁵⁸ Guidelines on the treatment of confidential information - Final text of Guidelines

Appendix A - Regulatory Impact Assessment

Role of the Regulatory Impact Assessment

- A1. Regulatory Impact Assessment ('RIA') is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.
- A2. ComReg's approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 & 07/56a. In conducting the RIA, ComReg takes into account the RIA Guidelines⁵⁹, adopted under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002, as amended requires ComReg to comply with Ministerial directions issued. Policy Direction 6 of February 2003 requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.
- A3. In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation may be different to regulation exclusively by way of enacting primary or secondary legislation. In conducting a RIA, ComReg takes into account the six principles of Better Regulation that is, necessity, effectiveness, proportionality, transparency, accountability and consistency. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact; ComReg may carry out a lighter RIA in respect of those decisions.

Steps Involved

- A4. ComReg wishes to point out that since it is not imposing a new regulatory obligation on an undertaking, it is not mandatory for it to conduct a RIA. In relation to the current draft direction, ComReg has nonetheless decided to carry out a RIA in order to demonstrate that it has considered and evaluated the regulatory options available, with due regard to necessity, effectiveness, proportionality, transparency, accountability and consistency. However, ComReg will consider all respondents' views to this consultation and therefore in finalising the decision, the draft direction as set out in this document may change and if so, ComReg will assess whether a further RIA should be conducted, though it is not mandatory for ComReg to do so.

⁵⁹ See "RIA Guidelines: How to conduct a Regulatory Impact Analysis", October 2005, www.betterregulation.ie

A5. In assessing the available regulatory options, ComReg's approach to RIA follows five steps as follows:

Step 1: describe the policy issue and identify the objectives

Step 2: identify and describe the regulatory options

Step 3: determine the impacts on stakeholders

Step 4: determine the impacts on competition

Step 5: assess the impacts and choose the best option

Describe the policy issue and identify the objectives

A6. The purpose of the consultation is to seek respondents' views on a further specification of the obligation not to unreasonably bundle which currently pertains to the markets for higher and lower level retail narrowband access from a fixed location. As noted in the supporting consultations to ComReg Decision D07/61, while bundling can be welfare-enhancing for retail customers, it can also have negative consequences, in particular that the operator may use the retail prices of bundles to leverage its significant market power in retail fixed narrowband access into other retail markets – this is known as horizontal leverage. The regulatory objective of the obligation not to unreasonably bundle is to prevent or mitigate the possibility of anti-competitive behaviour such as horizontal leveraging from retail fixed narrowband access into other retail markets.

A7. In particular, the purpose of this consultation is to seek respondents' views on the appropriate economic/regulatory criteria to be applied in the assessment of compliance with the obligation not to unreasonably bundle including the appropriate measure of cost to be applied. At present, the obligation not to unreasonably bundle includes that Eircom "*must ensure that any bundle avoids a margin squeeze and passes a net revenue test.*"⁶⁰ Therefore, the purpose of the consultation is to seek respondents' views as to whether the current net revenue test, as one specific *ex-ante* imputation test to assess whether a bundle is reasonable, remains appropriate. The current net revenue test mitigates the risk that Eircom sells retail fixed narrowband access below cost in a bundle. However, currently, failure to pass the net revenue test does not automatically lead to a bundle being unreasonable. As a proportionate measure, ComReg considers any robust evidence of retail efficiencies or increased customer lifetimes as a result of bundling to assess against the loss of the bundle. ComReg also considers the likely impact on competition and the ability of entrants to enter the market and promote sustainable competition in the medium to long term. Therefore, at present, it is possible for a bundle that fails the net revenue test and therefore does not cover its costs to be considered reasonable where there is substantive evidence to demonstrate no competitive harm may occur.

A8. In this consultation, ComReg is further also seeking respondents' views on a specification of the pre-notification and pre-clearance requirements of bundles that include retail fixed narrowband access. This is because significant issues can arise where bundles are

⁶⁰ At para 6.234 of ComReg document No. 07/26 'Market Analysis: – Retail Fixed Narrowband Access Markets (Response to Consultation 06/39 and Consultation on Draft Decision)' dated 4 May 2007

launched which subsequently do not comply with the regulatory obligation not to unreasonably bundle. This is evident from the recent legal proceedings which took place over the past year and which were recently settled between ComReg and Eircom.⁶¹ Significant consumer and competitive disruption is caused by non-compliant bundles in the market which reinforces the need for robust *ex-ante* monitoring of bundles that include retail line rental prior to entering the market, therefore ComReg is further specifying the pre-notification and pre-clearance requirements of bundles that include retail fixed narrowband access.

- A9. In any further specification, ComReg will be minded to the relevant objectives, as set out in section 12 of the Communications Regulation Act, 2002 as amended by the Communications Regulation (Amendment) Act 2007⁶² (“the Act”) to be taken into account when applying remedies which are as follows:
- Promote competition;
 - Promote the interests of users within the community;
 - Ensure that there is no distortion or restriction of competition;
 - Encourage efficient investment in infrastructure; and
 - Encourage access to the internet at a reasonable cost to end-users.

Identify and describe the regulatory options

- A10. As the existing obligation not to unreasonably bundle in the retail narrowband access markets already includes reference to the avoidance of a margin squeeze and the passing of a net revenue test, the available regulatory options in the current RIA would appear to relate to specifying the detail of that net revenue test. Thus, the present consultation process is inviting input from interested parties on whether the current net revenue test, as set out publicly in ComReg Information Notice 09/08 and which is detailed in this consultation, together with a complementary assessment of the competitive context of the bundling in question remains appropriate as an *ex-ante* imputation test to assess whether a bundle that includes retail fixed narrowband access is reasonable, given the current state of competition.
- A.11 The possible specification options for the net revenue test, as an *ex-ante* imputation test include the following:
1. Should the test be an Equally Efficient Operator (‘EEO’) or Reasonably Efficient Operator (‘REO’) test?
 2. Should the test be conducted on a product by product basis or on the aggregate of the products?
 3. Is Average Total Cost (‘ATC’) the appropriate measure of cost?

⁶¹ See ComReg Information Notice 09/79 ‘Information Notice - Obligation on Eircom not to unreasonably bundle pursuant to ComReg Decision D07/61 - Settlement of Legal Proceedings’ dated 14 October 2009

⁶² No. 22 of 2007

A.11.1 ComReg is of the preliminary view that the current net revenue test, as a test akin to an EEO test, assessed on a product by product basis and using ATC as the appropriate measure of cost remains appropriate as ComReg believes it meets the regulatory objective of the obligation not to unreasonably bundle.

A.11.2 In particular, based on the possible options for the net revenue test and subject to the views of respondents to this consultation, ComReg is of the preliminary view that:

1. EEO remains appropriate to test the existence of the specific behaviour of the SMP operator in relation to the obligation not to unreasonably bundle. ComReg believes that EEO is the appropriate standard as it ensures that operators as efficient as the SMP operator are protected against possible horizontal leverage by the SMP operator and that the SMP operator cannot sell retail fixed narrowband access below cost to the detriment of competition as the test mainly uses information from the SMP operator to demonstrate that retail fixed narrowband access is not being sold below cost within a bundle. ComReg believes an EEO test encourages efficient investment in infrastructure which is consistent with ComReg's objectives under section 12 of the Act. ComReg believes that using REO may result in uncertainty regards the quality and efficiency of operator data that is required to put in place a REO test.

2. It is legitimate and appropriate to continue to apply the obligation not to unreasonably bundle (including the net revenue test) to individual bundles and not only to the aggregation of bundles. ComReg believes that applying the obligation only to bundles as a whole would give Eircom a large discretion in selectively discounting individual bundles according to the degree of competition in the various segments, that is, it would allow Eircom to selectively reduce the prices of those bundles where competition is more intense. ComReg believes that this could negatively impact on those competitors, whose scope of retail products and bundles is smaller and which would not be able to reduce the price of their bundles without jeopardising the viability of their business case. ComReg believes that applying the obligation only to bundles as a whole would make Eircom's own range of bundles, and its pricing across bundles, a reference point, from which it would be difficult for competitors to deviate. ComReg believes that application of the obligation on individual bundles in an *ex-ante* context allows the promotion of competition by OAOs/entrants which currently have a smaller range of retail services and bundles than Eircom.

3. It is legitimate and appropriate for ComReg to use ATC as the appropriate basis of cost in an *ex-ante* context. ATC requires an operator with SMP to price at levels that include appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand. ComReg believes that, under the present market conditions in Ireland, this cost measure is the most appropriate way to promote competition under regulation, and to avoid further deterioration in the already weak nature of competition in SMP markets. Looked at differently, ComReg believes that relying only on any other cost measure would exclude any assessment of common costs and would therefore ignore the market entry or expansion realities faced by Other Authorised Operators ('OAOs') and new entrants.

A12. The present consultation process is further inviting input on the details of the regulatory pre-clearance and pre-notification processes for bundles involving retail narrowband access. Furthermore, in the case of bundles that include retail fixed narrowband access and that are found to be unreasonable, the consultation proposes a regulatory process whereby Eircom must withdraw/modify such bundles within ten weeks of ComReg notifying it that such bundle(s) are unreasonable and must also pre-clear with ComReg any correspondence with the affected retail customer which should clearly set out the retail customer's right to end its contract with Eircom and move to another operator if it so wishes.

Determine the impacts on stakeholders and competition

A13. In assessing the impacts of the proposed net revenue test for stakeholders and for competition, there are a number of reasons why the proposed test would be considered consistent with ComReg's statutory objectives under Section 12 of the Act:

a. Promoting the interests of users within the community

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

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

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

c. Encouraging efficient investment in infrastructure and promoting competition

As the net revenue test, in taking account of the current state of competition, is based on non-physical wholesale inputs (e.g. Single Billing Wholesale Line Rental ('SB-WLR') and Bitstream), this should encourage entry initially and expansion by competitors wishing to invest in their own infrastructure over time⁶³. At the same time, the net revenue test should facilitate entry by competitors as efficient as the SMP operator which is consistent with encouraging efficient investment. Furthermore, if LLU competition increases and becomes established, it is considered appropriate to ensure that the SMP operator is not penalised, and ComReg would consider in a further consultation the use of LLU inputs in the net revenue test.

⁶³ Subject to fit for purpose processes and prices related to infrastructure investment being in place

Summary of Impacts on Stakeholders and on Competition

Option – That the net revenue test remains unchanged		
Impact on incumbent	Impact on OAOs	Impact on consumer
Test is current test that applies, and is thus less burdensome for the incumbent.	Test is current test that applies, OAOs unaffected – ensures OAOs can enter and sustain competition in the retail fixed narrowband access market.	Test is current test that applies – ensures competition is maintained to the benefit of consumers.
Option – That the net revenue test remains akin to an EEO test		
Impact on incumbent	Impact on OAOs	Impact on consumer
Test remains akin to EEO test, therefore no additional impact on incumbent. EEO test will need to be supported by incumbent’s separated accounts and a separate consultation process is in progress to ensure they are fit for purpose.	Facilitates competition from as efficient operators - ensures operators as efficient as the incumbent are protected against possible horizontal leverage by the incumbent and that the SMP incumbent cannot sell retail fixed narrowband access below cost to the detriment of competition. To change the net revenue test to a REO test would require OAO to provide robust and reliable data.	Facilitates competition from as efficient operators to the benefit of consumers.
Option – That the net revenue test remains conducted on a bundle product by bundle product basis		
Impact on incumbent	Impact on OAOs	Impact on consumer
Test remains conducted on an individual bundled product basis, therefore no additional impact on the incumbent.	Allows the promotion of competition by OAOs/entrants which currently have a smaller range of retail services and bundles than the incumbent.	Allows the promotion of competition by OAOs/entrants which currently have a smaller range of retail services and bundles than the incumbent to the benefit of consumers.
Option – That the net revenue test remains using ATC as the appropriate measure of cost		
Impact on incumbent	Impact on OAOs	Impact on consumer
ATC remains as the appropriate measure of cost in net revenue test, therefore no additional	Allows the promotion of competition by OAOs as ATC includes appropriate amounts of variable, fixed	Allows the promotion of competition by OAOs to the benefit of consumers.

Further specification of the obligation not to unreasonably bundle

<p>impact on the incumbent.</p>	<p>and common costs, which is the calculus faced by any operator when deciding to enter or expand.</p>	
<p>Option – That bundles including retail fixed narrowband access must be pre-notified by Eircom to ComReg as further specified in this consultation</p>		
<p>Impact on incumbent</p>	<p>Impact on OAOs</p>	<p>Impact on consumer</p>
<p>The pre-notification requirement is further specified; however ComReg believes that the information sought in that pre-notification is not significantly increased from the information currently provided by Eircom. The pre-notification timing may result in a longer lead-in time for an Eircom bundle to launch, however it is not believed that this should be overly onerous or burdensome on Eircom.</p>	<p>Will give OAOs legal certainty that there will be regulatory monitoring of bundles provided by the SMP operator that include retail fixed narrowband access prior to their launch.</p>	<p>Ensures a transparent regulatory environment which monitors bundles at risk of being anti-competitive and which may have long-term negative impacts for consumer choice.</p>
<p>Option – That bundles including retail fixed narrowband access must be pre-cleared by ComReg as further specified in this consultation</p>		
<p>Impact on incumbent</p>	<p>Impact on OAOs</p>	<p>Impact on consumer</p>
<p>The pre-clearance requirement is a further specification. This pre-clearance should give Eircom and ComReg some comfort that bundles are likely to be reasonable before they are launched. This should minimise the likelihood of bundles needing to be withdrawn as they are unreasonable, however this can still occur for example if actual usage of the “free” allowance within a bundle is much greater than the forecast</p>	<p>Will give OAOs some comfort that bundles launched should be reasonable as they should meet the net revenue test – this will be confirmed based on actual results provided to ComReg. Should minimise the risk of OAOs being adversely affected by unreasonable bundles that are launched – however such risk is not eliminated completely.</p>	<p>Less risk (but risk is not eliminated) that a launched bundle is found to be unreasonable and therefore consumers must be moved off the non-compliant bundle.</p>

usage.		
Option – For unreasonable bundles, Eircom must withdraw/modify such bundles within ten weeks and must pre-clear correspondence with the retail customer with ComReg		
Impact on incumbent	Impact on OAOs	Impact on consumer
This is a further specification. It is believed that ten weeks is sufficient time for Eircom to withdraw/modify an unreasonable bundle, it recognises that if a change to wholesale prices is required, given Eircom’s other regulatory obligations, that this may require up to 8 weeks to do so. It is believed that the requirement to pre-clear correspondence with the retail customer is not overly onerous or burdensome on Eircom.	Gives assurance to OAOs that unreasonable bundles will be modified/withdrawn within a reasonable timeframe (ten weeks) thereby limiting their potential anti-competitive impact.	In pre-clearing correspondence to the affected retail customer, ComReg will ensure that the affected retail customer is fully informed as to its options - including its option to terminate its service with the SMP operator without undue penalty, if a bundle it is availing of is found to be unreasonable.

Assess the impacts and choose the best option

A14. ComReg is of the view that the preferred approach, maintaining the current net revenue test and specifying the notification, pre-clearance and modification/withdrawal requirements for bundles that include retail fixed narrowband access, is for the reasons set out in this consultation and the previous market analysis justified and should foster OAO and entrant competition in the markets for retail fixed narrowband access. It is therefore consistent with ComReg’s statutory objectives under section 12 of the Act.

A15. ComReg is of the view that the further specification set out in this consultation meets the six principles of “Better Regulation” as follows:

- i. ComReg has clearly outlined why it is **necessary** to undertake this review. ComReg considers that net revenue test is justified as the purpose of the net revenue test is to ensure that an OAO as efficient as Eircom and availing of wholesale inputs from Eircom can replicate an Eircom retail bundle that includes retail line rental and cover its costs. ComReg believes the current net revenue test meets this objective and therefore it is necessary that it remains. ComReg also believes that the further specification of the pre-notification and pre-clearance of bundles that include retail fixed narrowband access is necessary as it should minimise the risk of unreasonable bundles being launched by the SMP operator;

- ii. ComReg considers that it has been **effective** in addressing the potential for margin (price) squeeze that could act as a constraint to the entry and growth of OAOs in the market for retail fixed narrowband access;
- iii. ComReg considers that it has been **proportionate** in its review. ComReg believes the proposed further specifications are not overly burdensome or onerous on Eircom;
- iv. ComReg considers its approach offers complete **transparency** in reaching the preliminary view that the net revenue test should be maintained and that the requirement for bundles that include retail fixed narrowband access are pre-notified and pre-cleared is further specified. This consultation seeks respondents views on these matters which will be considered by ComReg;
- v. ComReg considers that it has been **accountable** in its review and that it has provided all of the detail, reasoning and information necessary to demonstrate how it reached the preliminary view that the net revenue test should be maintained and that the pre-notification and pre-clearance of bundles that include retail fixed narrowband access is further specified. ComReg believes that its preliminary view is consistent with its statutory objectives under section 12 of the Act;
- vi. ComReg considers that its preliminary view is **consistent** with previous ComReg decisions. However ComReg will review and consider responses to this consultation and, based on those responses, ComReg may make a decision different to the preliminary views expressed in this consultation.

Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Appendix B – Consultation Questions

List of Questions

- Q. 1. To meet the regulatory objectives of the obligation not to unreasonably bundle, what *ex-ante* imputation test do you think is appropriate to assess whether a bundle that includes retail fixed narrowband access is reasonable pursuant to ComReg Decision D07/61? To support your view, please detail your response setting out why you believe the proposed *ex-ante* imputation test meets the regulatory objectives of the obligation not to unreasonably bundle, detail the components of the test including why such components are appropriate and include worked examples of the test and its components where appropriate. 38
- Q. 2. Do you agree or disagree with the preliminary views expressed by ComReg in the above (namely in paragraphs 2.18, 3.2, 3.9, 3.13, 3.14, 3.19, 3.24, 3.28, 3.35, 3.39, 3.46, 3.49, 3.50, 3.51 - 3.53, 3.60, 3.67, 3.68, 3.69)? Do you have any views on the matters ComReg seeks further input on in the above (namely in paragraphs 2.19, 2.20, 3.7, 3.17, 3.21, 3.23, 3.27, 3.36, 3.45, 3.58, 3.61, 3.64)? Please give a detailed response with examples where appropriate to support your view. 38
- Q. 3. Do you agree or disagree with the pre-notification and pre-clearance requirements for bundles that include retail fixed narrowband access as set out in the section above? Please explain your response and provide detailed information to support your view. 41
- Q. 4. Do you agree or disagree that if ComReg is of the view that a bundle in the retail fixed narrowband access market is unreasonable that Eircom should modify/withdraw such bundle within ten weeks? Please explain your response and provide detailed information to support your view. 41
- Q. 5. Are there any issues in relation to the further specification of obligation not to unreasonably bundle that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate. 41
- Q. 6. Do you believe that the draft text of the proposed direction is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required. 44
- Q. 7. Do you have any views on this Regulatory Impact Assessment and is there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg. 58