



Commission for
Communications Regulation

Market Review: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers

Submissions to Supplementary Consultation to
ComReg Document 13/95

Submissions to Supplementary Consultation 13/95

Reference: ComReg 13/95s

Date: 18 December 2013

Submissions received from Respondents

Submissions received from Respondents	
Documents to which this relates:	12/117, 12/117a published on 26 October 2012, 12/133 published on 11 December 2012, 13/08 published on 18 January 2013 and 13/95 and 13/95a published on 17 October 2013.
Date:	18 December 2013

Contents:

1:Magnet
2:Eircom
3:UPC
5.Sky
7.BT
8.Alto

1: Magnet

Market Review Fixed Voice Access – Supplementary Consultation to 12/117

Magnet Networks welcomes the opportunity to respond to this Supplementary Consultation to ComReg Document 12/117 - Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential customers: ComReg Document 13/95.

Magnet Networks view is that both options considered in the Oxera report must be considered in light of the current market position. Eircom Retail hold circa 84% market share and are overpoweringly dominant in any properly defined geographic breakdown. With Eircom retail holding such a large market share there is a severe lack of competition in the voice market. Magnet Networks feels that this issue needs to be addressed by ComReg.

Magnet Networks submits that in recent weeks the regulation, control and review of Eircom White Label offerings in the market is not at the expected level. There are numerous discrepancies in price, service availability and margin/revenue testing.

Q.1 In the context of the market review and, in view of the 2007 Recommendation and SMP guidelines, is the focal product stand-alone FVA the correct starting point of the market definition (market analysis process), or is a bundle (e.g., of voice and broadband) a more appropriate focal product? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

In the context of the market review and, in view of the 2007 Recommendation and SMP guidelines, Magnet Networks believes that stand-alone FVA is the focal product and the correct starting point of the market definition. The Oxera report at paragraph 2.2.1 confirms that consumers would split a bundle in response to a SSNIP. Magnet is of the opinion that FVA is the cornerstone on which all communications are built and view FVA as the starting point for consumers to either acquire broadband or acquire fixed voice or both in a bundle. With stand-alone FVA as a focal product Magnet believes ex-ante regulation is required to address potential competition problems e.g. excessive pricing, horizontal and vertical leverage of market power.

Q. 2 Do you agree that the traditional competition analysis tools such as the SSNIP (Hypothetical Monopolist) Test are appropriate for market definition in the presence of bundles? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks agrees that the traditional competition analysis tools such as the SSNIP (Hypothetical Monopolist) Test are appropriate for market definition in the presence of bundles. It is necessary that ComReg take into account the development, history, rent and context of the relevant services in general rather than particular reasons as to why the current regulations are in place.

Q. 3 Does mobile access sufficiently constrain Eircom's SMP in fixed access to belong in the same relevant market? Are there other factors or additional analysis that ComReg should consider? Please explain the reasons for your answer, clearly indicating the relevant section of

the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks does not agree with the above for the reason that there is insufficient evidence to suggest that overall mobile and fixed access is in the same market.

Q. 4 In the context of the FVA market review process and based on national circumstances in Ireland, do you believe that ComReg should define a single market for FVA sold within and outside a bundle? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks agrees that ComReg should define a single market for FVA sold within and outside a bundle.

Magnet Networks believes that this market definition would allow ComReg to adequately address potential competition concerns and design and apply remedies to ensure that Eircom's bundles are replicable and furthermore remove the risk of excessive pricing of FVA at retail level which will benefit consumers overall.

Q. 5 Alternatively, do you believe that ComReg should define separate product markets each for stand-alone FVA (and calls) and for FVA sold inside of bundles of broadband? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks believes that yes ComReg should define separate produce markets each for stand-alone FVA (and calls) and for FVA sold inside of bundles of broadband.

Q. 6 If FVA sold inside of bundles of broadband is defined as a separate product market, should ComReg geographically define the latter market (e.g., inside/outside the LEA)? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

Magnet Networks believes that ComReg should geographically define the "inside/outside LEA market. However, competition issues in the voice market must be addressed regardless of geographic location.

Q. 7 Do you believe that an introduction and specification of margin squeeze tests in the future possibly in the wholesale markets for FVCO and/or WBA could be sufficient and likely obviate the need for the NRT at the retail level?

Yes, Magnet Networks believes that an introduction and specification of margin squeeze tests in the future wholesale markets for FVCO and WBA would be sufficient and necessary and may obviate the need for the NRT at retail level.

2: Eircom

eircom Ltd.

**Response on behalf of
eircom Group to
ComReg Consultation 13/95**

**Supplementary Consultation to
ComReg Document 12/117
Retail Access to the Public Telephone
Network at a Fixed Location for
Residential and Non-Residential
Customers: Market definition**



18 December 2013

DOCUMENT CONTROL

Document name	eircom Response to ComReg Consultation 13/95: Supplementary Consultation to ComReg Document 12/117 Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers: Market definition
Document Owner	Eircom
Version	Final
Status	Non Confidential

I. EXECUTIVE SUMMARY

This supplementary consultation on ComReg's assessment of Market 1 is very welcome by eircom. Even though the conclusion of this market review process is long overdue, eircom urges ComReg to complete its assessment of Market 1 in parallel with that of the upstream wholesale market (Market 2), while giving due recognition to the widely anticipated removal of Market 1 next year from the EU Commission's list of relevant markets that are susceptible to *ex ante* regulation.

ComReg's supplementary consultation takes an appropriate "second look" at fixed narrowband access services in light of market developments that were highlighted by eircom and others in response to ComReg's 2012 consultation on Market 1 (the "2012 Consultation"). eircom agrees with ComReg and its economic consultants, Oxera, that fixed voice access and calls (referred to collectively herein as "FVA") should be considered to form part of the same product market. This treatment of FVA is consistent with the market definition approach followed by national regulators in the UK and The Netherlands, both of which concluded that the existence of significant competitive constraints justified de-regulation in Market 1. eircom submits that, for similar reasons, retail FVA services, whether sold standalone or in bundles, are effectively competitive in Ireland and should be deregulated in this country as well.

The treatment of FVA and other market definition issues raised by ComReg's supplemental consultation document are discussed in detail in a report prepared by Frontier Economics (the "Frontier Report"),¹ which has provided its own assessment (appended to this response as Annexe 1).

As demonstrated by the Frontier Report, another change in approach that ComReg should adopt – and which Oxera also concluded would be a reasonable outcome in the report that it prepared for ComReg (the "Oxera Report")² – is to reconfigure Market 1 to include two separate product markets: one for the supply of FVA on a standalone basis and the other for FVA supplied within a wider bundle. The basis for, and the importance of, redefining Market 1 in this way as a baseline step – i.e., at the market definition stage -- is discussed in eircom's response as well as the Frontier Report. It is well recognised that although defining the relevant market is not an end in itself, the scope of the market definition selected is often outcome-determinative with

¹Frontier economics, A review of Oxera's report for ComReg 13/95a), December 2013.

²Oxera, Market definition in the fixed voice access market, Analytical framework and review of economic evidence, prepared for the Commission for Communications Regulation, October 15 2013.

respect to the market power assessment and, hence, the need for *ex ante* remedies in the first place.

As detailed in eircom's response and in the Frontier Report, there is strong empirical evidence confirming the existence in Ireland of separate markets for the supply of FVA on a standalone basis, as distinct from FVA within a wider bundle. The data confirms that all three of the key factors identified in the Oxera Report as justifying separate market definitions (i.e., end-user behaviour, economies of scope and competitive conditions) are satisfied in this case. In particular:

- (i) Customers do not switch from FVA bundled with another service to standalone FVA (nor do they piece together various elements of a bundle), or *vice versa*;
- (ii) There are significant economies of scope between the provision of FVA and other elements of the bundle which implies a preference on the part of suppliers to provide both together; and
- (iii) There are fundamentally different competitive conditions operating in these two markets.

The market assessment also should take full account of the factors relevant to determining the proper geographic market definition in this context. The Frontier Report explains why it is so important to consider the competitive dynamics affecting the provision of both standalone FVA and FVA sold in wider bundles with reference to urban areas (or Larger Exchange Areas "LEAs") where UPC is present and non-urban areas (or non-Larger Exchange Areas "non-LEAs") where UPC is not present. Significantly different competitive conditions prevail in these distinct areas. The existence in Ireland of two discrete geographic markets for fixed narrowband access products (in and outside of bundles) is unequivocally demonstrated by the large disparity in eircom's fixed narrowband market shares, and the substantially different churn rates, investment levels, prices and fixed voice product offerings in these distinct areas.

It cannot be disputed that in the areas where it is present, UPC is a strong competitor for bundled FVA and actually has a larger market share than eircom. The clear competitive constraint exercised by UPC confirms the existence of a sub-national geographic market for these bundles corresponding to the LEAs. eircom does not have significant market power ("SMP") in these areas, and urges ComReg to revise its

preliminary conclusions to take full and fair account of the actual competitive dynamics that are at play.

There is also a strong basis for ComReg to deregulate standalone FVA. Mobile services impose effective competitive constraints on eircom's provision of FVA nationwide. ComReg's Market 1 review fails once again to give adequate attention to actual market developments in Ireland. For most retail customer segments in Ireland (and all of the growth segments), mobile constitutes a direct substitute for standalone FVA. As discussed in the Frontier Report, Oxera's position to the contrary is fundamentally flawed.

eircom is providing additional evidence in this response to demonstrate the significant competitive constraints placed on standalone FVA by mobile services. These constraints include, for example:

- (i) continued migration of voice services from fixed to mobile networks which reduce the relevance of fixed voice-only lines;
- (ii) the existence of robust customer evidence of a perception that fixed and mobile voice connections are now substitutable; and
- (iii) increased competition from mobile operators in the fixed space (e.g. targeted marketing by mobile operators of their services in an effort to incentivise customers to replace their standalone FVA service with mobile services).

In eircom's view, the assumption that fixed and mobile voice services are complements rather than substitutes is simply no longer credible when viewed against actual consumer behaviour in Ireland.

eircom urges ComReg to take this opportunity to rationalise the regulatory approach that applies to fixed narrowband access services in Ireland and bring it into line with the expected removal of Market 1 from the EU Commission's Recommendations. As set out more fully in our response to Question 7 below (Section III), this change in approach will need to be completed in parallel with the "transfer" of certain wholesale-related obligations to Market 2. A holistic review of these markets will take time but, in the longer run, will be the most reasonable and administratively efficient approach for all concerned. eircom urges ComReg to move forward with the Market 2 review without delay.

If, instead, ComReg decides to complete the Market 1 review process before concluding its assessment of Market 2, ComReg should at a minimum commit to complete a further review of Market 1 in parallel with the Market 2 review, which should be completed as expeditiously as possible.

II. **EXPLANATION OF EIRCOM'S POSITION ON MARKET DEFINITION AND MARKET ASSESSMENT**

eircom welcomes this supplemental consultation on ComReg's review of Market 1. This is an opportunity for ComReg to adopt a forward-looking approach and reset the regulation of fixed narrowband services to focus on the wholesale level (Market 2). Although the conclusion of this review has been long in coming, ComReg should now take the time to ensure that its decision reflects expected developments relevant to its assessment of Market 2. For the reasons discussed below, and on the basis of the findings of the Frontier Report, eircom believes that there is a sound economic case for de-regulating Market 1 in its entirety, and that there is no basis at all for continuing to regulate the provision of the bundles that include fixed voice access in LEAs.

ComReg's Decision on Market 1 should reflect developments concerning the approach towards regulation of this market at EU level and the related review of Market 2

eircom notes that ComReg's supplementary consultation document on Market 1 (the "2013 Consultation")³ is being issued over six years after the date of ComReg's Decision Notice D07/61, which found that eircom had SMP in the national FVA Market. These timelines are not consistent with the requirements of the EU Regulatory Framework for electronic communications. We refer in particular to Article 16 of the Framework Directive,⁴ which states that:

"National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7:

- (a) ***within three years from the adoption of a previous measure relating to that market. However, exceptionally, that period may be extended for up to three additional years, where the national regulatory authority has notified a reasoned proposed extension to the Commission and the Commission has not objected within one month of the notified extension;***⁵ (emphasis added).

³ It should be read in conjunction with eircom's response to the ComReg's 2012 consultation.

⁴Article 16 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (as amended by Directive 2009/140/EC and Regulation 544/2009).

⁵This provision is transposed into Irish law under Regulation 27 of the Irish Framework Regulations.SI No. 333 of 2011, European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011.

As the last market review of the FVA market in Ireland was concluded more than six years ago, completion of a new *ex-ante* review of the FVA market in Ireland is long overdue. Despite the momentous changes that have transformed the industry over the past six years, ComReg is proposing to maintain *ex-ante* regulation on Market 1 in Ireland. Yet, at the same time, the EU Commission is expected to conclude a comprehensive review of its Recommendation on relevant markets⁶ in 2014. In the context of its review, DG Connect has commissioned a report on “Future electronic communications markets subject to *ex ante* regulation”, which was published on 18 September 2013.⁷ In this report, external consultants Ecorys and IDATE suggested that the retail voice access market should no longer be considered to be susceptible to *ex ante* regulation, and should, therefore, be removed from the list of relevant markets. All indications are that the EU Commission is poised to remove Market 1 from the list of product markets that are susceptible to *ex ante* regulation.⁸

In light of these circumstances, and despite the long lag between the completion of its reviews of Market 1, ComReg should not now rush to embed outdated regulatory controls in a new decision just a few months in advance of the EU Commission’s anticipated revision to the current Recommendation on relevant markets, which is expected to result in a list of wholesale-only markets.

If ComReg ignores the clear writing on the wall, there is a risk that retail *ex-ante* regulation will become fossilised in Ireland long after de-regulation occurs at EU level and in the other Member States.⁹ eircom’s concerns in this regard are not without foundation, as this same scenario has already unfolded once before in Ireland in the market for transit calls. ComReg had just completed a review of that market in 2007, mandating the imposition of a suite of *ex-ante* regulatory controls, when transit calls were removed from the list of relevant markets susceptible to *ex ante* regulation after the last review of the Recommendation on relevant markets by the EU Commission.

⁶Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁷Future electronic communications markets subject to *ex-ante* regulation, Final Report, Ecorys, 18 September 2013.

⁸ See “EU Commission seeks to shorten list of regulated telecom markets,” MLEX, 10 Dec. 2013 (“The only retail market in the current list would be removed because there are no longer entry barriers, according to a draft version of the recommendation seen by MLex. Traffic is shifting from fixed to mobile networks, and dominant operators in the fixed-access market will be constrained by the presence of mobile operators.”).

⁹ Indeed, some of the Member States have already de-regulated Market 1. Examples include Finland and the Netherlands. Partial de-regulation has also occurred in the United Kingdom. This is discussed in more detail in pages below. See also:

https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Market_overview_25_february_2013.pdf

Even so, the market for transit calls remains subject to ex-ante regulation in Ireland to this day.

There is yet another reason not to continue to impose *ex ante* regulation on retail fixed voice access markets. As indicated in the 2013 Consultation, ComReg intends to review the related upstream market, Market 2 (call origination on the public telephone network provide at a fixed location) early in 2014. ComReg's Market 1 review should fully anticipate the decision that ComReg will take with respect to any "transferred" *ex ante* requirements that may be imposed under the next Market 2 review,¹⁰ but this is not likely to be possible until completion of the Market 2 review.

The importance of undertaking a prior review of the upstream wholesale market has been acknowledged by O2 in its response to Consultation 12/117, where it states that:

"The retail remedies proposed in this consultation are assumed to be appropriate in the context of pre-existing wholesale remedies. It has long been argued by the European commission that regulators should in the first instance address wholesale market regulation and set out the appropriate wholesale remedies to address the identified competition problems. Only having defined the wholesale competition problem should the regulator examine 'top-up' retail remedies where dominance is found in a retail market."

For all these reasons, and despite the added delay, eircom strongly urges ComReg to complete a review of Market 2 as expeditiously as possible and to fully consider the competitive impact downstream of the revised remedies adopted for that market prior to finalising its review of Market 1. It would be counter-productive for ComReg to impose a suite of un-necessary remedies in Market 1 prior to concluding the Market 2 review. This is particularly so considering the fact that ComReg has already signalled its intent to transfer some existing Market 1 remedies into Market 2 and has solicited comments on the proposal in this consultation (Question 7).¹¹

¹⁰eircom notes that, in accordance with Art. 17 (1) (b) of the Universal Service Directive, National Regulatory Authorities ("NRAs") may only impose regulatory controls on retail services in the case that the wholesale requirements established under Arts. 9 to 13 of the Access Directive are insufficient to achieve fair competition and the other objectives set out under Art. 8 of the Framework Directive. See: Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services *Universal Service Directive), as amended by Directive 2009/136/EC.

¹¹ We also note that ComReg has not reviewed the Call Origination market since 2007.

If, however, ComReg is intent on completing this Market 1 review before determining how to deal with Market 2, ComReg should make clear in its Final Decision that it will commit to conclude a further review of Market 1 in parallel with the Market 2 review, which should be completed without delay. If ComReg chooses this course, it should make clear that its Market 1 decision is interim in nature and that any remaining vestiges of regulation on Market 1 will be transitory.

There is a compelling argument for defining separate markets for the supply of FVA on a standalone basis and the supply of FVA within a wider bundle¹²

This submission examines the most up-to-date market data available in the context of the 2013 Consultation. The 2013 Consultation considers several of the points raised by eircom almost one year ago in its response to the 2012 Consultation¹³.

ComReg's market analysis as set out in the 2012 Consultation was supported by an external market survey that was carried out prior to the consultation (and published by ComReg as document 12/117a). This market research, while providing some useful indicators, did not give a comprehensive view of the market and was somewhat limited and distorted by its failure to identify certain basic information in relation to the target sample. eircom pointed out many of these shortcomings in its response to that consultation. In the intervening twelve month period, ComReg has not attempted to gather any further market research which would have addressed these shortcomings. ComReg also has failed to consider the evolution of consumer attitudes since the fundamental changes in the marketplace during the intervening period. These include, for example, the introduction of NGA based services, the entry of Sky into the market and the impacts of the reductions in the Department of Social Protection ("DSP") allowances.

eircom's response to the 2012 Consultation relied on evidence that was already available one year ago. The evidence confirmed that separate markets should be defined for the supply of FVA when provided on a standalone basis, as distinct from FVA supplied within a wider bundle.¹⁴ There clearly are distinct competitive conditions in each market. The delineation of these two separate FVA markets is important because when viewed within this frame, it is clear that eircom does not have market power in the supply of service bundles including FVA in areas where UPC is present.

¹² The term "wider bundle" should be understood as referring to fixed voice access and call services provided in bundles with another service or services such as broadband, TV, mobile, etc.

¹³ Response on behalf of eircom Group to ComReg Consultation 12/117 dated 25th January 2013.

¹⁴ Throughout this report we use the term "standalone FVA" to refer to fixed voice access alone, or fixed voice access and calls supplied together.

Indeed, in the urban and suburban markets where eircom competes with UPC, the market data indicate that if any operator has SMP in the market for FVA in service bundles, it is UPC (☒) and not eircom (☒).

With respect to the market for stand-alone FVA, we showed that mobile is a real alternative and substitute for fixed voice and imposes a significant constraint on eircom when setting the terms and conditions of standalone FVA.

In considering eircom's response to its 2012 Consultation, ComReg commissioned a report by Oxera that considered ComReg's 2012 analysis and the responses to its consultation. ComReg's preliminary views, as set out in the 2013 Consultation, rely significantly on the Oxera Report. In order to put the findings and conclusions of the Oxera Report – and ComReg's interpretation of them -- in the proper perspective, we have commissioned a report by Frontier Economics.

This submission, supported by the Frontier Report, provides current market data that the Oxera Report has not considered. This data reinforces the findings set out in eircom's submission to the 2012 Consultation, and raises serious doubts about the basis for the preliminary conclusions reached by ComReg in its 2013 Consultation. Several important developments have taken place since the submission of our January 2013 response which have had a significant impact on the market for retail FVA sold in bundles. These developments include:

- The entry of Sky as a national player into the bundles market in February 2013 (supported by a major national media campaign) with the ability to leverage a substantial and well-established base of existing TV customers with competitively priced broadband/home phone bundles;
- The significant re-alignment by all major players in the bundles market in response to the entry of Sky through enhanced price and value messages;
- The reduction in the DSP telephone allowance in January 2013 (by 58%) and the subsequent announcement of the complete removal of the DSP telephone allowance from January 2014; and
- Intensifying competition in the mobile market including the uptake of unlimited mobile tariffs, leading to further migration of voice traffic from fixed to mobile networks and further reducing the relevance of fixed voice-only lines.

These dynamics have resulted in a dramatic change in the conditions of competition, with all major operators in the bundles market now significantly reducing

prices/improving value. The result of this intensification of competition is that fixed broadband churn rates have almost doubled in rural areas (from 2.8% in October 2012 to 5.6% in October 2013). They have increased over 2.8% in urban non-UPC areas and over 5.6% in urban UPC areas during the same period.

This most recent market data is compelling in its support for eircom's position insofar as it shows that:

- Standalone FVA should be considered as a separate economic market to that for bundled FVA;
- Competition for voice and broadband bundles is significantly different in urban areas (in particular where UPC is present) and in non-urban areas; and
- Mobile has become an effective substitute for voice-only fixed customers.

We discuss each of these issues in turn below.

The market data indicates that standalone FVA services are in a separate market from that for FVA services in wider bundles

Frontier's analysis of the market data and of the Oxera Report does not support ComReg's preliminary conclusions that the Lower Level Voice Access ("LLVA") market should be defined as a single FVA product market, regardless of whether FVA is supplied on a standalone basis or within a wider bundle. As we explain below (see **Figure 1** on page 17), there is very limited switching between standalone FVA and FVA in a wider bundle (and *vice versa*). Moreover, the competitive conditions in the supply of bundles that include FVA are significantly different to those at play in the supply of standalone FVA. The two markets should, therefore, be defined separately.

The rise in popularity of broadband has provided new opportunities for fixed telecommunications operators, who are now able to offer multiple bundled services to consumers including voice, broadband and TV services. The presence of bundles presents well recognised challenges for regulators when assessing markets and the existence of market power. As set out in the annexed Frontier Report, where bundles are present, defining the market by applying the hypothetical monopolist test ("HMT")

provides the correct analytical framework for robustly and systematically identifying the existence of competitive constraints on firms within the relevant markets.

FVA or FVA(C)?

We note that throughout the 2013 Consultation, and particularly in the Oxera Report, the “stand-alone” market being reviewed is described as “FVA (with Calls)” or FVA(C). By way of explanation, Oxera state in their report that:

“Given that most consumers purchase access and calls together, it may be difficult or inappropriate to test just FVA by itself as the focal product, even if this is where the competition concern lies. It therefore seems appropriate that FVAC could be the focal product in the SSNIP framework in the appropriate context, and it is at least appropriate to test whether FVAC can be considered a market rather than FVA and calls separately.”¹⁵

Oxera’s treatment aligns with reality on the ground and with eircom’s stated position in our previous response to the 2012 Consultation, where we set out compelling arguments to support this position. We welcome the fact that ComReg has accepted that customers perceive fixed voice “Access and Calls” to be within the same product market.

eircom notes that fixed voice access and calls have been treated as part of the same product market by other NRAs as well. In the UK, Ofcom defined a market for “fixed narrowband retail services” comprising retail narrowband telephony markets, namely, analogue and digital (“ISDN”) telephone lines and calls for residential and business customers. Following its review of this market in 2009, Ofcom decided not to designate BT with SMP in the retail fixed line analogue access markets (both residential and business). In reaching this conclusion, Ofcom took particular note of the presence of *ex-ante* regulation upstream, including Wholesale Line Rental (“WLR”) and Local Loop Unbundling (“LLU”). Ofcom found that the presence of effective upstream regulation enabled competitors to replicate services offered by BT, and ensured that BT could not foreclose its competitors.¹⁶

¹⁵Oxera Report, p. 22.

¹⁶ Likewise, Ofcom did not propose to find SMP in the fixed calls service markets. Ofcom did, however, propose to continue to find BT with SMP in the market for ISDN2 and ISDN30 access. The EU Commission did not raise any concerns about Ofcom’s approach. Case UK/2009/0899: Fixed narrowband retail services in the UK.

More recently, in 2012, OPTA likewise defined a “fixed telephony market” in The Netherlands that includes retail access and calls services (in the form of: (i) a single; (ii) dual; and (iii) multiple calls market).¹⁷ OPTA concluded that access and calls are part of the same product market owing to the fact that, in The Netherlands, 98% of customers take the access subscription and call services from one and the same provider. Following from this, OPTA concluded that, considering the presence of wholesale regulation (and more specifically carrier (pre-)selection and WLR) as well as the existence of significant pressure from voice over broadband (“VoB”) services, the retail market for single calls in The Netherlands tends towards effective competition, which means that the second criterion of the three-criteria test is not met.¹⁸

In both these instances, the relevant market was found to be competitive, owing the existence of effective upstream *ex-ante* regulation allowing for replication of the incumbent operator’s retail services, and thus leading to competitive pressure downstream. eircom considers that the inclusion of fixed access and calls in the same market is appropriate, and that viewing the focal market as such also should lead ComReg to the conclusion that this market is effectively competitive.¹⁹

Importance of Market Definition Baseline

From an economic perspective, it is essential to properly specify the test for determining the boundaries of the relevant product (and geographic) markets so that they reflect the true nature of substitution and competitive conditions in each market. Otherwise, the market definition process becomes the economic equivalent of “gerrymandering”, resulting in the drawing of artificial boundaries in order to achieve an end result rather than to assist in a proper competition assessment. The incorrect scoping of the product market in this manner can give rise to mistaken findings of market power, and the end result can be costly to consumers and ultimately cause them harm; for example, by limiting the ability of eircom to compete and dampening the overall level of competition in the market. The importance of the choice of market

¹⁷ This was defined as comprising of: (i) PSTN/VoB1 access and calls (single calls market); (ii) ISDN1/ISDN2/VoB2 access and calls (dual calls market); and (iii) ISDN15/ISDN20/ISDN30 access and calls (multiple calls market).

¹⁸Case NL/2012/1306: Fixed Telephony markets in the Netherlands.

¹⁹The Recommendation on relevant markets does not currently list a market for fixed voice access and calls. eircom notes that, where an NRA proposes to regulate a market that is not set out on the list, a higher standard of review is applied in order to justify such deviation (i.e., it would need to pass the so-called “three-criteria test”). Because of the existence of effective wholesale regulation coupled with significant competitive constraints from other voice services provided at a fixed location, the application of this more rigorous test when considering the FVA(C) bundle provides yet further support for removing this redefined Market 1 from *ex-ante* regulation.

definition to the competitive review process as a whole is described in greater detail in the Frontier Report.

ComReg's supplementary consultation, which relies considerably on the Oxera Report, appears to regard the appropriate market definition in the context of bundles as an unimportant issue, apparently owing to the fact that:

*“the effects of bundling are taken into account throughout the market review process”.*²⁰

This is a troubling finesse. An inappropriate market definition can lead to mistaken conclusions that will not necessarily be corrected for in later steps of the market assessment process.

Indeed, as discussed in the Frontier Report, the Oxera Report contains a perfect example of this very problem. ComReg's preliminary conclusions incorrectly assume that eircom has market power to raise the price of its service bundles including FVA. The reality is that there is intense competition for service bundles that include FVA which actually prevents eircom from exercising market power. Indeed, if market power exists in the provision of service bundles with FVA, the market data show that it is UPC, and not eircom, that holds market power in this respect.

Indeed UPC recently implemented a realignment of their bundle portfolio after a number of introductory offers in the Spring of 2013 that involved a “small but significant non-transitory increase in prices” in that the monthly rental charged for several key bundles. The continuing quarter-on-quarter increase in the number of customers buying the UPC bundles means it is highly likely that this small price increase was profitable. In this respect, UPC's behaviour, and the results of that behaviour, indicate the presence of market power.

Below, we discuss the market evidence and how it demonstrates that standalone FVA should be considered separately from FVA supplied within a wider service bundle. In this regard, two key points emerge from the market data:

- Consumers do not switch from FVA bundled with another service to standalone FVA (or piece together various elements of the bundle), or *vice versa*, except for customers who are taking broadband services for the first time; and

²⁰2013 Consultation, para. 43.

- There are fundamentally different competitive conditions operating in the two markets.

Consumers do not switch from FVA with broadband bundles to standalone FVA, or vice versa

ComReg's approach is to consider FVA -- whether sold standalone or within a wider bundle -- to be part of the same relevant product market. ComReg's rationale is that increasing numbers of consumers are switching from standalone FVA to FVA in bundles, which in ComReg's view implies that a wider market definition is appropriate. That assessment, however, fails to consider the full picture. Within the context of applying the HMT (and if considering standalone FVA as the focal market), switching is only relevant to the analysis if the standalone FVA customers would find the bundled product to be a close substitute if faced with a small but significant increase in the price of the standalone product. This would imply that FVA bundled with another service (such as broadband, for example) acts as a competitive constraint on the pricing of standalone FVA. Similarly, it might be reasonable to implement the HMT by starting from FVA bundled with another service if there were significant switching between bundled FVA and standalone FVA.

This approach is, however, mistaken. Standalone FVA should be considered separately from FVA sold in a wider bundle because:²¹

- When switching, the vast majority of consumers that purchase FVA bundled with broadband (which is the most common form of service bundle that includes FVA) switch to other broadband bundles;
- Very few consumers purchase FVA and broadband separately;
- The vast majority of standalone FVA customers switch to standalone FVA; and
- Price and convenience explain why consumers prefer bundles.

²¹ We note that in future this may change if there is increased take up of VoIP services over naked bitstream or wholesale NGA services and these services became a more suitable alternative for standalone FVA customers.

These points are discussed individually below.

Most consumers retain the same FVA product when switching

When customers of FVA bundles switch to another service, the vast majority switch to an alternative FVA bundle and not to standalone FVA. As can be seen in **Figure 1**, 82% of eircom churners who previously took an FVA bundle from eircom, switched to an alternative FVA bundle.²² Similarly, and when changing to another service provider, most of eircom's standalone FVA consumers do not switch to broadband FVA bundles – 82% of voice only switchers switched to another voice only service.

Figure 1. Destination product of eircom churners to third party service providers



Source: customer churn tracking survey Feb to April. 82%

Whilst 82% of standalone FVA churners take up a broadband bundle that includes FVA, this simply reflects the fact that these customers are taking up broadband as well as voice; i.e. these are new broadband customers. As can be seen from **Figure**

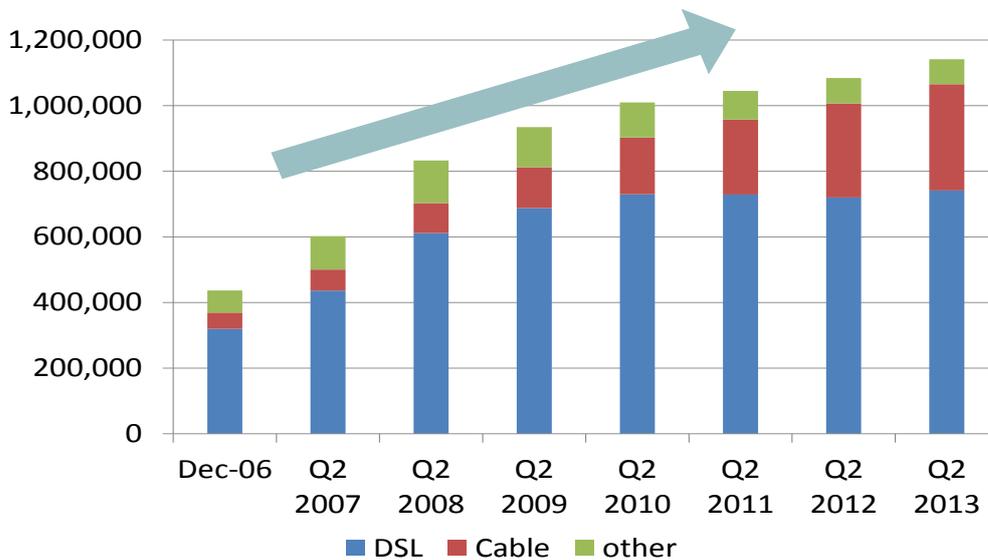
²² Reference to "eircom churners" here denotes eircom customers that switch from eircom to a third party service, as opposed to eircom customers that change from one service to another service bundle within eircom.

2, there are currently 1.1 million fixed broadband subscribers in Ireland,²³ a figure that has increased from 440,000 in December 2006. As more existing customers take up broadband, they switch from a standalone FVA product to a bundle product. However, this is typically a one-way change – eircom’s experience is that once a consumer has chosen to take fixed broadband as part of a bundle including FVA, the consumer will continue to purchase bundled broadband and FVA, and will not revert to stand-alone FVA.

This trend is reinforced by the make-up of fixed voice-related services being ordered by new customers to eircom. Over 80% of new customers to eircom (i.e., those never before having subscribed to an eircom service) order FVA/broadband bundles.

²³Including fixed wireless access (“FWA”) broadband.

Figure 2. Fixed broadband subscriptions



Source: ComReg Quarterly Key Data. Other refers to fibre, satellite and fixed wireless access (“FWA”)

Almost all consumers who take both FVA and broadband purchase bundles

The growth in popularity of bundled services reflects the fact that consumers generally prefer to take their telecommunications services from a single provider. This means that, as broadband has become more popular, those consumers who value broadband typically choose to take it from the same provider as their FVA provider. As can be seen from Table 1, close to 1 million households purchase both FVA and broadband from the same provider. In contrast, we estimate that around 2% customers purchase broadband and FVA from different providers – these customers make up only 2% of the total number of bundled FVA customers.²⁴ Based on the profile of the eircom customer base, over 98% of eircom’s retail customers who buy both broadband and FVA purchase a bundled product from eircom, with only 2% taking one product (either fixed voice or broadband) from eircom, and

²⁴ These estimates do not take into account that: (i) a customer could purchase broadband from UPC (or other providers that own their own infrastructure) and voice service from eircom or a provider using an eircom SB-WLR product; and (ii) a customer could purchase retail FVA from one provider (that purchases the eircom SB-WLR product) and broadband from another (that purchases eircom’s wholesale broadband access product). eircom believes there are very few such customers.

the other from a different provider.

Table 1. bundle and non-bundle FVA and broadband consumers

✂		✂
✂		✂
✂	✂	✂
✂	✂	✂
✂	✂	✂
✂	✂	✂
✂		✂
✂	✂	✂
✂	✂	✂
✂	✂	✂
✂		✂

There are good reasons why consumers prefer bundles: price and convenience

As can be seen from **Table 2**, the combined price of voice and broadband is significantly lower when bought as a part of a bundle than when bought separately. This reflects the clear economies of scope achieved by telecommunications providers when supplying FVA along with another service (most commonly, a broadband service) on the same access line. Indeed, the Oxera Report agrees that cost savings are:

*“likely to be available from switching to a bundle for those customers who currently purchase the components separately”.*²⁵

Thus, it is unsurprising that consumers are very unlikely to switch from purchasing FVA bundled with broadband, for example, to purchasing standalone FVA or FVA plus stand-alone broadband.

²⁵Oxera Report, para. 3.3.1.

Table 2. Prices of FVA and broadband

Type of product	Cheapest price
Standalone products	
Cheapest standalone broadband (Vodafone)	€ 27
Cheapest standalone FVA (eircom)	€ 25
Cheapest broadband and FVA bundle from different suppliers	€ 52
Bundled products	
Broadband and FVA from eircom	€ 45
Broadband and FVA from Vodafone	€ 37
Broadband and FVA from UPC	€ 37

Source: operator websites access 14 November 2013

Consumers perceive many advantages to taking products as a bundle, and have, therefore, strong preferences for such bundles. For example, as can be seen in **Figure 3**, according to survey data, consumers perceive that bundled services offer convenience, value for money and a single point of contact.²⁶

²⁶ Source: eircom household survey sentiment survey, Phase 3 August 13.

Figure 3. householders spontaneously mention advantages of bundling



Source: eircom household survey sentiment survey, Phase 3 August 13.

“What can be the advantages of getting more than one service from the one supplier?” Base: Decision makers aware of bundling.

There are the fundamentally different competitive conditions in the market for standalone FVA and FVA supplied within a wider bundle

The competitive conditions for the supply of standalone FVA are very different from those that apply with respect to the supply of FVA within a wider bundle. As we explain in more detail in the following section, this is because:

- eircom faces different competitors with different strategies for bundled FVA compared with standalone FVA; and
- The nature of competition for bundled FVA is very different to that for standalone FVA.

In contrast, ComReg’s analysis effectively assumes away the significant differences at the market definition stage and thus leads to the mistaken finding of the existence SMP based on the assessment of a product (and geographic) market whose boundaries have been erroneously set.

eircom faces different competitors in standalone voice compared with voice bundled with another service

The different commercial strategies adopted by the suppliers of bundled FVA as opposed to standalone FVA means that eircom faces very different competitive conditions in each market. This clearly implies that separate markets should be considered for standalone FVA and for bundled FVA.

In the provision of bundles, UPC, Sky and Vodafone all compete strongly. As can be seen in **Figure 4**, approximately 30% of eircom’s bundle churners moved to one of either UPC, Vodafone or Sky. These providers either do not compete, or compete to only a limited extent, in the market for standalone voice. These competitors leverage specific advantages:

- UPC has a superfast fibre-based network and a well established brand in Ireland with a large TV subscriber base, and because it relies on its own infrastructure, it has significant flexibility over its pricing and service levels; and
- Vodafone and Sky can leverage their existing assets and subscriber bases in related markets (mobile and TV) to aggressively compete with eircom using eircom's regulated wholesale access products.

In the supply of standalone FVA, the situation is very different. eircom principally competes with Pure Telecom in this space. We note that 8% of standalone FVA churners moved to Pure Telecom, as can be seen in **Figure 4**. Pure Telecom is one of the few operators in the marketplace that actively promote standalone FVA services.

Figure 4. Destination of churners



Competition is intense for FVA bundles

The supply of FVA bundled with another service is characterised by a different type and intensity of competition than is found in the supply of standalone FVA. The key suppliers (eircom, UPC, Vodafone and Sky) compete fiercely with one another to attract customers. UPC has quickly grown its share of bundled FVA since entering in 2007, and Sky's entry into the market in February 2013 has further affected the competitive dynamics. eircom's share of this market is eclipsed by that of UPC.

In contrast, eircom remains the main provider of standalone FVA. Its competitive constraints come principally from Pure Telecom and mobile voice services.

The dynamic nature of competition for bundles is illustrated by the active discounting and marketing in which the suppliers engage. In the period since the submission of eircom's January 2013 response to the 2012 Consultation, the dynamics of the fixed markets in Ireland have changed fundamentally. During the previous twelve months, there has been a significant re-alignment by all major players in the bundles market in

response to the increased competitive pressure posed by UPC (as discussed below) and the entry of Sky in February 2013.

As described below, all four major providers have revised (downwards) their pricing for monthly broadband subscription packages in the year since eircom's response to the 2012 Consultation.

- UPC was charging €44 for a 50Mbps broadband connection, with unlimited downloads bundled with voice in January. It is now charging €37 for the same bundle.²⁷
- Sky entered the bundles market in February 2013, with products starting at €30 for a bundle including voice and broadband with a 24Mbps speed connection and 2GB download limit;²⁸ and €40 for a bundle including voice and broadband with a 24Mbps speed and unlimited downloads.²⁹ Sky promote heavily off these headline prices, e.g. with 'free' and 'half-price' introductory pricing.
- Vodafone was charging €38 for an 8Mbps broadband connection capped January; and €45 for an 8Mbps connection with unlimited downloads. Vodafone now charges existing mobile subscribers €27 for a 70Mbps broadband only connection (from fibre exchanges) with a 20GB download limit; and €37 a 70Mbps connection (from fibre exchanges) with unlimited downloads.³⁰
- Eircom was charging €45 in January 2013 for an 8Mbps connection with 10GB download limit bundled with voice; and €60 for a 24Mbps connection bundled with voice. eircom is now charging €45 for a 50Mbps connection (from fibre exchanges) with 30GB download limit; and €50 for a 70Mbps connection (from fibre exchanges) with unlimited downloads bundled with voice.³¹

²⁷ UPC Fibre 50 Chat, currently priced at €37 per month. See <http://www.upc.ie/broadbandandphone/> accessed 02/12/13.

²⁸ Sky Broadband Lite 2GB monthly usage allowance, See <http://www.sky.com/ireland/broadband-talk/> accessed 02/12/13.

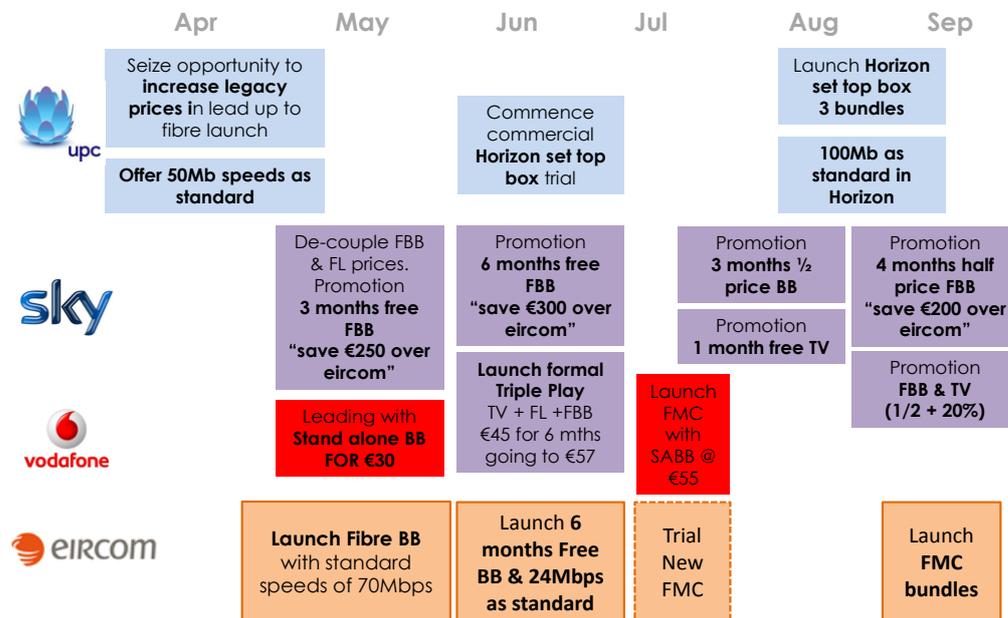
²⁹ Sky Broadband Unlimited: unlimited broadband with no usage caps. See <http://www.sky.com/ireland/broadband-talk/> accessed 02/12/13.

³⁰ See: <http://www.vodafone.ie/home-phone-broadband/?ts=1385997829481> accessed 02/12/13.

³¹ See: <https://secure.eircom.net/fibre/> accessed 02/12/13.

In addition to the above adjustments, all four operators are now launching new products and engaging in selective discounting to attract customers, as can be seen in **Figure 5**. UPC leads the market in terms of broadband speeds and TV services. Its entry level package now offers download speeds of 50Mbps, while some of its bundles now offer up to 200 Mbps. UPC has recently launched its Horizon set top box which is the market leader in terms of features.³² Other providers which use eircom’s DSL network (and will increasingly use its fibre network) compete strongly on a range of promotional offers.

Figure 5. New products and offers in the fixed broadband market



Conclusion

The market evidence presented above supports separate markets for FVA sold on a standalone basis, and FVA sold in a wider bundle. According to Oxera, the three key criteria which should be used to assess whether the market for standalone FVA should be widened to include bundles include: (i) economies of scope; (ii) end-user

³² It offers seamless video on demand (“VoD”) and linear channels, it connects the TV to the internet, it allows users to record four shows at once, while watching another.

behaviour;³³ and (iii) competitive conditions.³⁴ Based on these three criteria, it is clear that standalone FVA should be considered as a separate market from FVA bundled with other products because:

- End-user behaviour is consistent with users not viewing the individual elements of a bundle as a substitute for the bundle as a whole. Analysis of switching behaviour suggests that consumers do not switch from a bundle to standalone elements of the bundle or *vice versa*. Bundles are significantly cheaper and offer advantages of convenience;
- There are significant economies of scope between the provision of FVA and other elements of the bundle, which implies that suppliers prefer to compete in the provision of bundles and explains why the prices of bundles are significantly less than the sum of the prices of the elements of the bundle; and
- Competitive conditions are very different for standalone FVA and FVA sold in wider bundles. The suppliers are different; they have different commercial strategies; and the intensity of competition is different.

It is therefore incorrect for ComReg to conclude that FVA, irrespective of whether it is considered within a bundle or sold on a standalone basis, should be treated as falling within the same service market. The empirical evidence outlined above strongly indicates that standalone FVA is not a substitute for FVA sold in bundles, and *vice versa*. These products should, therefore, be considered to be in separate retail markets.

The nature of competition in urban areas is different from that in non-urban areas

There are significant differences in the competitive conditions that exist in the urban and non-urban (LEA and non-LEA) areas. In areas where UPC is present, it is a strong competitor for bundled FVA and has a larger market share than eircom. The

³³ Such end-user behaviour would be expected to reflect transaction costs and economies of scope.

³⁴ Oxera Report, p. 9. The report also noted that transaction costs could be a relevant factor. The Oxera Report relied on the BEREC report on market definition in the context of bundles. BEREC (2010), 'Impact of bundled offers in retail and wholesale market definition', 10:64, December.

impact that the presence of UPC has on the market is demonstrated by the differing market shares that exist in the UPC areas as opposed to the non-UPC areas, as well as the differences in prices and product offerings. The geographic markets should, therefore, be defined to broadly reflect the areas where UPC competes and where it does not. The compelling reasons for doing so are set out and discussed in more detail in the sections below.

Moreover, eircom's share of the bundles market in urban areas where UPC competes is low and not consistent with a finding of SMP.

Competition is intense in urban areas where UPC is present

eircom faces strong and growing competition in urban areas where, in particular, UPC, Vodafone and Sky compete for consumers. The differences in competitive conditions can be observed in the market shares as well as in the churn rates.

In areas where UPC is present, eircom's market share provides a strong indication that it does not have market power. As can be seen from **Figure** , eircom's share of the retail market of FVA bundles is 2%. This compares to a 2% market share for UPC.

Figure 6. eircom estimate of FVA bundle customers within UPC's footprint



Source: eircom

In contrast, as can be seen in **Figure 7**, eircom's market share is 2% in areas where UPC is not present. The difference in competitive conditions is also observed in Sky's broadband subscriber growth. The competitive constraint posed by UPC in the geographic areas in which it is present is suggested by the fact that Sky is managing to grow its market share much more quickly in the non-UPC areas (where Sky's current market share is 6%)³⁵ compared to the UPC areas (where Sky's share is smaller at 2%).

³⁵ Source: eircom brand tracker. Sky's share at July to September 2013 is 6% in rural areas, and 8 % in urban non-UPC areas.

Figure 7. eircom estimate of Bundled Voice customers in non-UPC areas

✂

Churn rates for broadband bundles are radically different in UPC areas

Churn rates are also significantly higher in areas where UPC competes, which indicates the existence of much more intense competition as can be seen in **Figure 8**. eircom's annualised churn for bundled FVA in UPC areas averaged at 3.8% in 2013, whereas it was 2.2% in non-UPC areas, a difference of 1.6%.

Figure 8. Bundled FVA churn rates (eircom consumer to third party)

✂

Source: eircom

By contrast, the difference in FVA churn between areas where UPC is present (3.8%) and it is not present (2.2%) is just 1.6%, as can be seen in **Figure 9**.

Figure 9. Standalone FVA churn rates (eircom consumer to third party)

✂

Source: eircom (It should be noted that these churn rates include customers who simply cease service completely or migrate to mobile only service.)

The products available to the market are different in UPC areas and rural areas

There are clear differences in the type and quality of the products available in areas where UPC competes and where it does not. In particular:

- Broadband quality is higher in urban areas. UPC offers faster broadband speeds offering up to 100Mbps, and eircom has focused investments in ADSL2+ technologies in areas where UPC is present;
- Consumers have a wider choice of technology. Consumers in UPC areas have access to either UPC's fibre network and increasingly to eircom's fibre network. eircom's efibre was launched in March 2013 with 300,000 households accessing the network (1 million projected by June 2014); and
- eircom prices its wholesale products differently in LEA and non-LEA areas.³⁶ eircom introduced a discount of €3.00 for bundles including FVA sold within the LEA.

eircom responds differentially based on whether it faces strong competition from UPC

As noted in its response to the 2012 Consultation, eircom has focused investment in urban areas where it competes with UPC.³⁷ In its response, eircom noted that:

“eircom has chosen to roll out a NGA network which ComReg recognises “is likely to coincide with the current cable footprint areas of UPC.” Moreover, ComReg accepts that the nature of eircom’s NGA investment is “defensive”, i.e. that eircom has been forced into the investment because “It is apparent that consumers are responding to UPC’s product offering, putting pressure on both eircom and its wholesale customers.”³⁸ Alternatively, as ComReg’s advisors Oxera put it, eircom’s planned NGA investments “are indeed a defensive response to UPC’s high-speed offerings.”³⁹ Thus ComReg accepts that eircom’s competitive decisions in urban areas where it is competing with UPC are conditioned by the desire to be able to compete with UPC.”

Conclusion

The data is consistent with the existence of sub-national geographic markets for bundles broadly defined by areas where UPC is present. This is because:

³⁶Eircom only has freedom to differentiate prices in LEA and non-LEA areas.

³⁷ See eircom response to 2012 Consultation, section 2.4.1.2

³⁸ComReg 12/27, para.11.3, 11.46 and 14.121.

³⁹ComReg 12/27a, p. 29.

- There are very different market shares for the supply of FVA bundles in areas where UPC competes and areas where it is not present; and
- There are different products offered and prices in the two geographic areas.

In areas where UPC is present, the data is consistent with eircom not having SMP.

ComReg seems to accept that there are geographic differences in the competitive conditions in the provision of bundles. However, when considering the appropriate geographic market definition, ComReg regards the conclusions on market definition as unimportant. It notes:

“As with the product market definition, geographic market definition is a means to an end and what matters ultimately is that the remedies are imposed in a way that reflects the degree of competition problems across different areas.”⁴⁰

eircom fundamentally disagrees with this position. Defining the boundaries of the relevant markets is an essential step to understanding the competitive conditions in the markets and for properly identifying appropriate, targeted and proportionate remedies. As BEREC recently noted in its paper on geographic market definition,⁴¹ geographically delineated markets and geographically delineated remedies should not be considered equally applicable substitutes. BEREC noted that:

*“[...] the **geographical segmentation of markets and the geographical differentiation of remedies should not be viewed as two equally applicable options** in the presence of uneven development of competition across the territory.*

Where the available evidence suggests that the scope of the relevant market is subnational and this is duly justified, then market power will have to be assessed in each of the separate markets and appropriate remedies will have to be imposed to address SMP for each of the given subnational areas previously identified.

⁴⁰2013 Consultation, par 44.

⁴¹ BEREC (2013) Draft review of the BEREC Common Position on geographical aspects of market analysis,

In contrast, where the available evidence suggests that the scope of the relevant market is national (any differences in the conditions of competition between geographical areas are not yet sufficiently stable or sustainable to justify the definition of regional or local markets), market power will have to be assessed within this national market. In case of geographical variations in competitive conditions within this national market, it may be appropriate to vary remedies within that national market, despite the fact that an operator is found to have SMP throughout the entire territory.”(emphasis added).

Therefore consistent with the evidence reviewed by ComReg, the Guidelines on market definition and BEREC’s paper on geographic markets, ComReg should define sub-national geographic markets for bundles broadly defined by areas where UPC is present.

Mobile is a suitable substitute for voice-only fixed customers

Mobile is a suitable alternative for standalone FVA, and thus constrains the pricing of standalone FVA. There are a significant number of consumers in Ireland that have not adopted broadband and have no intention of doing so. These consumers have different preferences than customers who wish to purchase fixed broadband, and are willing to switch to mobile voice services as they offer a similar service to fixed voice.

Evidence presented in eircom’s response to the 2012 Consultation strongly implies that mobile is a substitute for fixed voice services.

In that response, eircom provided a comprehensive base of evidence showing that mobile services provide a constraint on standalone FVA services. This included:

- The functionality of mobile is similar to fixed (though mobile has the added convenience of mobility);⁴²
- There was already strong substitution between fixed and mobile; ⁴³
- ComReg’s own consumer survey evidence revealed that consumers viewed mobile as a substitute;⁴⁴

⁴² See eircom response to 2012 Consultation, section 2.3.1.

⁴³ See eircom response to 2012 Consultation, section 2.3.2.

- The consumer evidence suggested a high cross price elasticity between fixed and mobile services;⁴⁵ and
- Ireland has one of the lowest mobile voice premiums in Europe (second only to Austria).

Since ComReg's previous report, the evidence that mobile and FVA are in the same market continues to mount. These developments are addressed below.

Demand for voice services has continued to migrate to mobile

As noted in eircom's response to the 2012 Consultation:

"Since 2005, a period when the number of domestic premises in Ireland increased by over 225,000 – the percentage of mobile only households has more than doubled."⁴⁶

Since eircom submitted its response to the 2012 Consultation, there has been a further migration of voice traffic from fixed to mobile networks due to increasing price competition in the mobile market and the uptake of unlimited mobile packages over the period.

Mobile originating voice minutes accounted for 66.8% of all voice minutes in Q2 2013 (compared to 64.9% in Q2 2012), while traffic originating on a fixed line network accounted for the remaining 33.2% of all voice minutes (compared to 35.1% in Q2 2012).

Existing fixed customers can switch to a mobile connection.

A recent consumer survey⁴⁷ undertaken for eircom underlines the degree of substitutability between fixed and mobile connections. For example:

- 8% of fixed consumers who are considering terminating their fixed line connection noted that the main reason was that they prefer to use a mobile connection; and

⁴⁴ See eircom response to 2012 Consultation, section 2.3.2.2.

⁴⁵ See eircom response to 2012 Consultation, section 2.3.2.2.

⁴⁶ See eircom response to 2012 Consultation, section 2.3.2.1.

⁴⁷ Monthly Consumer Brand Tracking Survey run in conjunction with RedC Research.

- A further 8% noted that they did not need to use their fixed line, and 8% were generally cutting back expenditure on this service.

In the context of consumers switching away from a fixed line, it is clear that the presence of mobile means that consumers can switch easily to a close substitute.

Mobile operators are increasingly competing in the fixed space

The distinction between fixed and mobile services is blurring as mobile operators compete more and more for fixed customers. If FVA and mobile access were complements, rather than substitutes as ComReg claims,⁴⁸ then we would not expect mobile operators to be seeking to induce fixed consumers to switch from a landline to a mobile only line. In fact, as set out below, this is exactly the strategy of some mobile operators.

In the time that has passed since the previous review, intensifying competition in the mobile market, including the increased take up of unlimited mobile tariffs, has led to further migration of voice traffic from fixed to mobile networks, further reducing the relevance of fixed voice-only lines.

Similar to individual consumers, many small business owners have opted to use mobiles as their only means of contact. Mobile-only is seen as an accepted contact method in the small business arena. In larger businesses the trend has seen employees replacing their fixed line usage with mobiles as businesses become more flexible. For example, many large corporate businesses operate a hot desk only policy for all workers, meaning that no one has a fixed desk anymore. Mobiles are the only form of contact in this scenario. Another phenomenon in the work place that is leading to the replacement of fixed line usage with mobile-only is the rise of remote working.⁴⁹ These important shifts in working practices are driving down demand for fixed lines and channels in the market generally. Moreover, the regulatory environment itself has, in recent years, led to an accelerated level of fixed to mobile substitution. The steady fall in regulated mobile termination rates (“MTRs”), has meant that users and businesses no longer view mobile usage in place of fixed line usage as cost prohibitive.

eircom disagrees with Oxera’s findings that there is not sufficiently strong evidence to suggest that mobile access exerts a competitive constraint on fixed access. Eircom

⁴⁸ See Oxera report, Figure 5.1.

⁴⁹ This phenomenon occurs typically in cases where businesses seek to reduce their fixed requirements in their office locations as they encourage employees to work remotely.

believes that there is ample evidence demonstrating that mobile access now imposes a strong constraint on eircom's provision of standalone FVA and should, therefore, be considered as part of the same relevant market.

- Mobile as a replacement for fixed line has gained significant traction in recent years with mobile operators now providing Geographic Number Portability ("GNP") of geographic numbers onto mobile services as part of their standard offering.
- In the business space, mobile operators are targeting mobile products at customers which are specifically designed to incentivise them to replace their FVA service with mobile services. eircom is aware of a number of instances where mobile operators have targeted fixed customers with specific promotions, such as line rental reductions. Likewise Vodafone's Onenet Express is designed to replace fixed access with the entire service delivered over Vodafone's mobile network.⁵⁰

Conclusion on mobile switching

The growing number of households that are choosing to forego an FVA connection in favour of a mobile only connection underlines the competitive constraint that mobile imposes on fixed providers. For the reasons set out above, and those set out in eircom's response to the 2012 Consultation, mobile services now clearly impose a strong constraint on standalone FVA services. When combined with other approaches for providing standalone FVA (including single billing WLR; or IP based VOIP services for example using different wholesale inputs such as LLU or NGA access) there is strong competitive threat imposed on eircom's supply of voice only fixed access services.

Overall Conclusion

The data and analysis set out above, which should be read in conjunction with eircom's previous submission to ComReg's 2012 Consultation, provides compelling evidence for the following conclusions:

⁵⁰See: <http://www.vodafone.ie/small-business/phones-plans/one-net-express/>

- ComReg should define separate markets for standalone FVA and for FVA purchased in a wider bundle.
- The competitive conditions for bundles imply subnational markets which can be broadly defined by locations where UPC is present and where it is not.
- In the standalone FVA market, mobile continues to play a strong and growing competitive constraint

ComReg therefore should conclude that there is effective competition in both the standalone and FVA markets and should remove all economic regulation from these fixed access markets at the retail level. In this regard, eircom would point to the following comments made by a senior representative of the EU Commission:

“If we see that the market is becoming competitive . . . we don’t have to wait until we’ve got there to lift regulation,” said Anthony Whelan, who heads the electronic communications networks division at the commission, at a conference in Brussels. “Ultimately, the market . . . will look after itself.”

....

“We cannot hold out the prospect that we should continue to regulate markets just because they have been regulated in the past,” he added.”⁵¹

The evidence before ComReg shows that competition in the retail markets for fixed voice access has already arrived in Ireland. ComReg should not allow the habit of regulating these markets in the past to affect its judgement with respect to these markets going forward.

⁵¹“EU Commission seeks to shorten list of regulated telecom markets,” MLEX, 10 Dec. 2013

III. RESPONSES TO CONSULTATION QUESTIONS

Q.1 In the context of the market review and, in view of the 2007 Recommendation and SMP guidelines, is the focal product stand-alone FVA the correct starting point of the market definition (market analysis process), or is a bundle (e.g., of voice and broadband) a more appropriate focal product? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

eircom does not agree that it is appropriate to use stand-alone FVA as the sole focal product in the market definition exercise. As explained in the attached Frontier Report, Oxera has identified three factors to consider when selecting the focal market or starting point when applying the SSNIP test.⁵² If these factors are applied properly, they indicate (contrary to Oxera's conclusions) that bundled and stand-alone FVA should each be used as the focal market in separate applications of the SSNIP test.⁵³ The justification for this conclusion is explained in detail in Section 2.2 of the Frontier Report.

As indicated in our response to Q4 and Q5, both the evidence presented by Oxera and the additional evidence provided by eircom above suggest that conducting separate SSNIP tests for these two focal products will lead to the delineation of two of separate product markets for stand-alone FVA and bundled FVA respectively.

Q.2 Do you agree that the traditional competition analysis tools such as the SSNIP (Hypothetical Monopolist) Test are appropriate for market definition in the presence of bundles? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees with ComReg and Oxera that the SSNIP test is the appropriate framework to use when defining a market, including in the presence of bundles.

⁵²Oxera Report, p. 10

⁵³ Frontier Report, Section 2.3.

Conceptually, the SSNIP test seeks to identify the competitive constraints faced by firms in a specific product and geographic market. This is the appropriate question to consider when determining whether an undertaking has SMP.

However, eircom does not agree with the manner in which Oxera has applied this framework. As indicated in our reply to Q.1, eircom considers that Oxera should have looked at separate focal markets for stand-alone FVA and FVA within a bundle when carrying out the SSNIP test.

Most crucially, eircom believes that ComReg and Oxera have attributed an inappropriately low value to the outcomes of the SSNIP test. As explained in the attached Frontier Report, a balanced reading of the evidence contained in the Oxera Report leads to a market definition broadly consistent with that proposed by eircom. In many places, Oxera itself notes that the evidence falls more strongly in favour of eircom's proposed market definition.⁵⁴ However, Oxera downplays the importance of these results, stating, for example, that it is only important that competitive dynamics are "reflected somewhere (be it at the market definition stage, SMP assessment or design of remedies)".⁵⁵ This appears to evidence an outcome-oriented approach, whereby the market definition is scoped at the outset to produce a view of the "competitive dynamics" that justifies a conservative remedial result. This is not an objective regulatory approach.

As underlined in the Frontier Report, coming to the best possible market definition is crucial – both in principle and in practice.⁵⁶ eircom considers that attempting to "fix up" an incorrect market definition at the remedies stage risks leading to false positive findings of market power. This is consistent with recent comments by the EU Commission, which has stated: "...the differentiation of remedies for the LEA should be based on a sound analysis of the competitive conditions in the LEA... In this regard, the Commission invites ComReg to strengthen its analysis of all relevant structural and behavioural factors (before the final adoption of the revised remedies) to justify that existing variations of competitive conditions that have lead ComReg to

⁵⁴ For example, the results of the SSNIP tests discussed on p33 of the report, or the description of "...emerging structural differences in both the supply and the demand side" of bundled services in relation geographic market definition (p. 41).

⁵⁵ Oxera Report, p. 8.

⁵⁶ Frontier Report, Section 1.

proposing differentiated remedies are not strong and stable enough to justify the definition of sub-national markets".⁵⁷

Q.3 Does mobile access sufficiently constrain Eircom's SMP in fixed access to belong in the same relevant market? Are there other factors or additional analysis that ComReg should consider? Please explain the reasons for your answer, clearly indicating the relevant section of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

eircom believes that mobile access places a sufficient constraint on its FVA offerings to merit inclusion in the same product market. This holds especially true for the market for stand-alone FVA.⁵⁸

As explained in Section 4 of the attached Frontier Report, Oxera's analysis of fixed-mobile substitution does not separately consider conditions for stand-alone FVA. It is therefore not possible to draw any conclusions regarding fixed-mobile substitutability in the standalone FVA market from the Oxera Report.

The additional evidence presented by eircom in Section II above⁵⁹ demonstrates the strong and ever increasing competitive constraint that mobile has upon the stand-alone FVA market. In particular, a substantial proportion of customers considering termination of their fixed line connection are doing so in order to use a mobile connection, or because they no longer use their fixed phone line.

Q.4 In the context of the FVA market review process and based on national circumstances in Ireland, do you believe that ComReg should define a single market for FVA sold within and outside a bundle? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

⁵⁷ Commission Decision concerning Case IE/2012/1381 and IE/2012/1382: modification of remedies related to the retail market for access to the public telephone network at a fixed location and the wholesale market for network infrastructure access, p. 5.

⁵⁸ The difference in the competitive constraint exerted by mobile across the markets for stand-alone and bundled FVA is further evidence that these two markets should be considered separately.

⁵⁹ See above section entitled "Mobile is a suitable substitute for voice-only fixed customers".

Q.5 Alternatively, do you believe that ComReg should define separate product markets each for stand-alone FVA (and calls) and for FVA sold inside of bundles of broadband? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

eircom believes that the wording of Q.4 is based on a false predicate since it implies that the product market definition should be determined under the assumption that there is a national geographic market for all FVA services, whether bundled or standalone. As described in the response to Q.6, there is strong evidence to support the definition of sub-national markets. The process of defining product and geographic markets in such circumstances is necessarily iterative, and ComReg's formulation of the question therefore dictates the answer.

Nevertheless, following the approach taken in the Oxera Report (which considers product market definition before turning to geographic market definition), it is possible to come to a conclusion regarding the appropriate product market independently of the geographic market that is ultimately chosen. eircom considers that there is strong evidence – both in the Oxera Report and in the additional material in our response above – that ComReg should define separate product markets for stand-alone FVA (and calls) and for FVA sold inside bundles of broadband. Both of these sources of evidence are considered in turn below.

As Frontier has observed in Section 2.3 of its report, “The evidence published in the Oxera Report appears to largely agree with eircom’s argument that the standalone FVA and bundled FVA are in separate markets”. Likewise, the Frontier Report concludes that an appropriate application of Oxera’s framework would suggest that there are separate product markets for stand-alone and bundled FVA. The reasons may be summarised as follows:

- Firstly, ComReg continues to rely on its consumer survey results (notwithstanding eircom’s previous critique of the survey in our response to the 2012 Consultation). Using these flawed results, Oxera’s application of the SSNIP test reaches the conclusion that stand-alone and bundled FVA should be in the same product markets. As stated by Oxera, the SSNIP test is the appropriate framework within which to define markets (we discuss this point in our response to Q.2).

- Secondly, the data cited by Oxera regarding switching behaviour is entirely uninformative regarding market definition. Oxera has described the shift of consumers from stand-alone FVA to bundles of broadband and FVA. However, the simplest explanation for this is that customers who formerly did not have broadband have been taking it up – within a bundle – as this is preferred to stand-alone products from separate suppliers.⁶⁰ As set out above,⁶¹ there is no evidence that this switching represents a continued potential for customers on stand-alone FVA to switch to bundled FVA in response to a SSNIP in the retail prices of stand-alone FVA (or *vice versa*). Indeed, given the high proportion of customers on stand-alone FVA who do not have any broadband service whatsoever, it seems that the two groups of customers (those on stand-alone FVA and those on bundled FVA) are highly dissimilar. This is discussed in further detail Section II of this Response and Section 2.3 of the Frontier Report.
- Finally, the differing margins that Oxera point to (assuming that these vary by whether FVA is bundled or not) are, if anything, further evidence that these two products are in separate markets.

These points are all consistent with Oxera’s second recommended market definition approach (that of separate markets for stand-alone and bundled FVA). Oxera’s case for its first recommendation appears to be based on the notion that ComReg could still ensure that “...differences in competitive conditions are... captured in the design of remedies...”⁶² However, as we explain in our response to Q.2, the question of market definition should be answered on the basis of the best available evidence, looked at through the lens of the hypothetical monopolist test. It should not simply be justified by past practice in such a dynamic market. In addition, it is self-evident that the choice of market definition does affect the remedies that can be applied.⁶³

The additional evidence presented by eircom above⁶⁴ is also strongly consistent with two separate markets for stand-alone and bundled FVA:

- Consumers do not switch from bundled FVA to stand-alone products. X% of eircom churners who previously took a bundle from eircom switched to an

⁶⁰eircom has provided evidence of customers’ preferences for a bundled product – see Figure 3 on page 22.

⁶¹ See above section entitled “Most consumers retain the same FVA product when switching”

⁶²Oxera Report, p. 54.

⁶³ Frontier Report, Section 3.1

⁶⁴ See above section entitled “Most consumers retain the same FVA product when switching” and “Competition is intense for FVA bundles”.

alternative bundle, rather than “unpicking” the bundle. Similarly, the majority of voice-only customers switch to another voice service, rather than a bundle.

- eircom faces different competitors with different strategies in the bundles market compared with the standalone FVA market. eircom competes strongly with UPC, Sky and Vodafone in the former market, while its principle competitor in the latter market is Pure Telecom (in addition to competition from mobile services).
- The competitive dynamics in the bundles market is radically different to the FVA market. Competition in the bundles market is considerably more intense than in the stand-alone market.

Q.6lf FVA sold inside of bundles of broadband is defined as a separate product market, should ComReg geographically define the latter market (e.g., inside/outside the LEA)? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees with Oxera that “if a separate product market were defined for bundled services, eircom’s reasoning on geographical differences in competitive conditions appears justifiable”.⁶⁵ Evidence for this conclusion can be found both in the Oxera Report, as well as in the additional evidence submitted by eircom. It is also consistent with evolving practice as set out in the recently published draft BEREC Common Position on geographical aspects of market definition.

Oxera finds that there are differences in the competitive conditions for bundles in the areas where UPC is present against those areas in which it is not. This is demonstrated by the fact that there is a different set of competitors, market shares and quality-adjusted prices.⁶⁶

Moreover, and as indicated by the Frontier Report,⁶⁷ an examination of supply-side substitution between regions (as described in our response to Q.2, this is the theoretically correct framework within which to assess this issue) supports the notion of a geographically segmented market for bundles.

⁶⁵Oxera Report, p. 40

⁶⁶Oxera Report, p. 39

⁶⁷Frontier Report, Section 3.1

The additional evidence submitted by eircom demonstrates that:⁶⁸

- There is a considerable difference in competitive conditions for FVA bundles within and outside the UPC network footprint. eircom faces a different set of competitors in these areas, and customer churn is higher within UPC's footprint (indicating the greater intensity of competition).
- The nature of the bundled product is different between these two types of areas, with broadband quality being higher in urban districts.
- eircom's competitive strategy is different in areas within the UPC footprint (where eircom is rolling out a NGA network) compared to areas outside UPC's footprint.

Q.7 Do you believe that an introduction and specification of margin squeeze tests in the future possibly in the wholesale markets for FVCO and/or WBA could be sufficient and likely obviate the need for the NRT at the retail level?

Notwithstanding the broadly positive tenor of the technical answer to the question raised here, eircom does not believe there is any basis for *ex ante* regulation of the market for FVCO. As we have argued elsewhere in this submission, and in previous submissions, mobile voice calling is now a substitute for fixed voice calling. The presence of this universally available substitute means that the market for call origination will now fail the three criteria test used to determine whether markets are susceptible to *ex ante* regulation.

The particular question raised here relates to the replacement of the net revenue test ("NRT") that ComReg applies to enforce therequirement that eircom not unreasonably bundle services with fixed narrowband access. This constitutes an *ex-ante* remedy against the risk of eircom horizontally leveraging market power from the retail market for fixed narrow band access into competitive adjacent retail markets by offerings bundles that competitors using wholesale fixed narrow band access could not replicate. The eircom experience is that it is equally feasible to achieve the same regulatory objective by implementing the remedy from one of a number of upstream markets where ComReg has designated eircom with market power. This can be done

⁶⁸See above section entitled "There are the fundamentally different competitive conditions in the market for standalone FVA and FVA supplied within a wider bundle" and "The products available to the market are different in UPC areas and rural areas"

by constructing a margin squeeze test appropriate to the relationship between the essential input from the upstream market and the service combination sold into the downstream market for bundles.

ComReg and eircom have considerable experience in designing, implementing, and operating margin squeeze tests across a range of markets to protect against threats of the horizontal or vertical leveraging of market power from markets where eircom has been designated with market power. The first of these tests was developed to prevent eircom leveraging power from the WBA market (Market 5) into the downstream market for retail Broadband – and was used to set a ceiling on Bitstream prices. The spreadsheet model based on a hypothetical efficient retail entrant was built jointly during 2005 and was informed by the consultation ComReg 05/67, with the resulting control published as ComReg D01/06. Since that time, similar tests have been developed (and supporting models built) to prevent eircom leveraging power from the WPNIA market (Market 4) into the downstream WBA market, and from the terminating segment market (Market 6) into the downstream market for wholesale leased lines.

Despite a number of serious disagreements on issues of principle, and on the details of the appropriate measures of costs to be used in these tests, eircom and ComReg have reached a *modus vivendi* in operating a number of margin squeeze tests. Many of the principles relating to the treatment of costs that were determined in ComReg D04/13 on “Price Regulation of Bundled Offers” will apply again where the test is re-oriented to address hypothetical vertical leveraging of market power, rather than the hypothetical horizontal leveraging of market power from a retail market that is prospectively competitive.

One of the risks of applying an interlocking mesh of margin squeeze tests to eircom service bundles offered on consumer markets is that the standard of cost input used must be reviewed regularly to ensure that it is proportionate to the stage of competition in the downstream market. Use of an inappropriate cost standard will unreasonably and disproportionately require eircom to set bundle prices well above market rates in order to pass the margin test. This will ultimately be to the detriment of consumers as general price levels are forced to remain artificially inflated and above the true competitive level.

For these reasons, eircom finds that it is now more appropriate, and eminently feasible, to remove the NRT at the retail level and, where eircom retains market power

in the upstream market for any essential wholesale input, for ComReg to specify a balanced and appropriate margin squeeze test. Such a specification must include continuous review of cost standards and other inputs to the test to ensure that eircom can continue to compete fairly in the market for retail bundles.

Annex 1

A review of Oxera's report for ComReg (13/95a)

A REPORT PREPARED FOR EIRCOM

BY



3: UPC



UPC Ireland Response to:

Supplementary Consultation to ComReg 12/117.

Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers: Market Definition.

Introduction

Many of the detailed specifics of this consultation are not directly relevant to UPC Communications Ireland Limited (“UPC”) as UPC relies primarily on its own physical infrastructure and self-provides managed Voice over Broadband (VoB – also sometimes termed managed VOIP).

This submission therefore does not include detailed responses to the consultation questions and instead focuses on setting out some specific concerns of UPC in relation to this consultation, and related earlier consultations¹. UPC also takes this opportunity to remind ComReg of the importance of proper, timely process and certainty for all industry players in any measures proposed by ComReg.

UPC concerns

UPC observes with some concern that ComReg is taking the extremely unusual step of introducing a further consultation on this market analysis when a decision on the original market analysis² is outstanding for almost a year. It is all the more concerning given that ComReg state when referring to the original consultation that “*most of the respondents agreed with ComReg’s proposed market definition*”, and it appears that only Eircom was of the view that ComReg’s proposals were not consistent with the market evidence. ComReg state that Eircom’s view is that:

- the natural starting point for defining markets, should be bundles of services rather than specific elements of the bundles;
- when assessing the potential for market power, ComReg should separately consider “Voice Only” and “Bundled Voice” given the clear distinction between the characteristics and preferences of the different groups of customers and the demand-side substitutes available to them;
- and the latter market should be further broken down into separate geographic markets defined to recognise the differing competitive constraints that exist within and outside of the LEAs.

It is this proposition, put forward by Eircom alone (one of eight respondents to Consultation 12/117), that appears to have led to this belated decision by ComReg to issue a further consultation. UPC disagrees with the views expressed by Eircom and summarises below the relevant section of our response to the original consultation (updated where appropriate). UPC also notes that, so far, no NRA in the EU has

¹ ComReg Document 12/117 and ComReg Document 12/63

² ComReg Document 12/117

notified to the European Commission a fixed retail access market based on bundled products in the manner proposed by Eircom.

UPC is concerned that this consultation, along with Consultation 12/63 (Price regulation of bundles), strongly suggests that ComReg, through piecemeal, incremental regulatory adjustments, is keen to offer immediate regulatory relief to Eircom, quite possibly to enable the SMP operator to target a particular competitor (e.g. UPC). In doing so, ComReg is seemingly prepared to deviate from proper market analysis procedures enshrined in both EU and Irish law. As ComReg will be aware, due regulatory process involves three key steps, including:

- determining a market definition for the relevant market (initiated in October 2012 with the publication of ComReg 12/117),
- secondly, undertaking an assessment of SMP,
- and finally, if SMP is found to exist, imposing the appropriate specific regulatory obligations.

With this in mind, UPC requests ComReg to state when a decision on the original market analysis, ComReg 12/117 will be published. UPC also requests ComReg to clarify whether the original market analysis will be finalised prior to any further introduction or relaxation of remedies in market 1.

Updated summary of UPC views on Market Definition submitted in response to 12/117

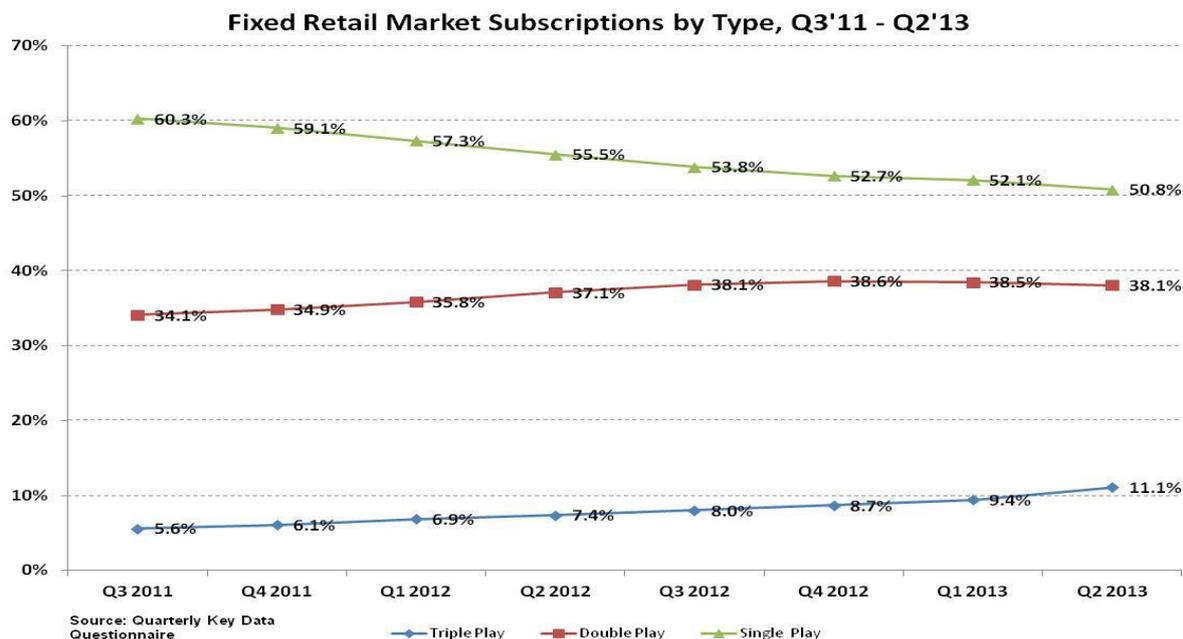
UPC generally agrees with and supports ComReg's continued sub-division of the Fixed Voice Access (FVA) market into a national market for lower level retail narrowband access (LLVA) and a national market for higher level retail narrowband access (HLVA) given the limited demand and supply side substitution between the two.

More specifically, UPC agrees that the geographic market for both sub-markets is national in scope. UPC believes that this national scope of the market is supported by data in ComReg's most recent market report³ and much of the analysis presented by ComReg in consultation document 12/117, in particular the fact that:

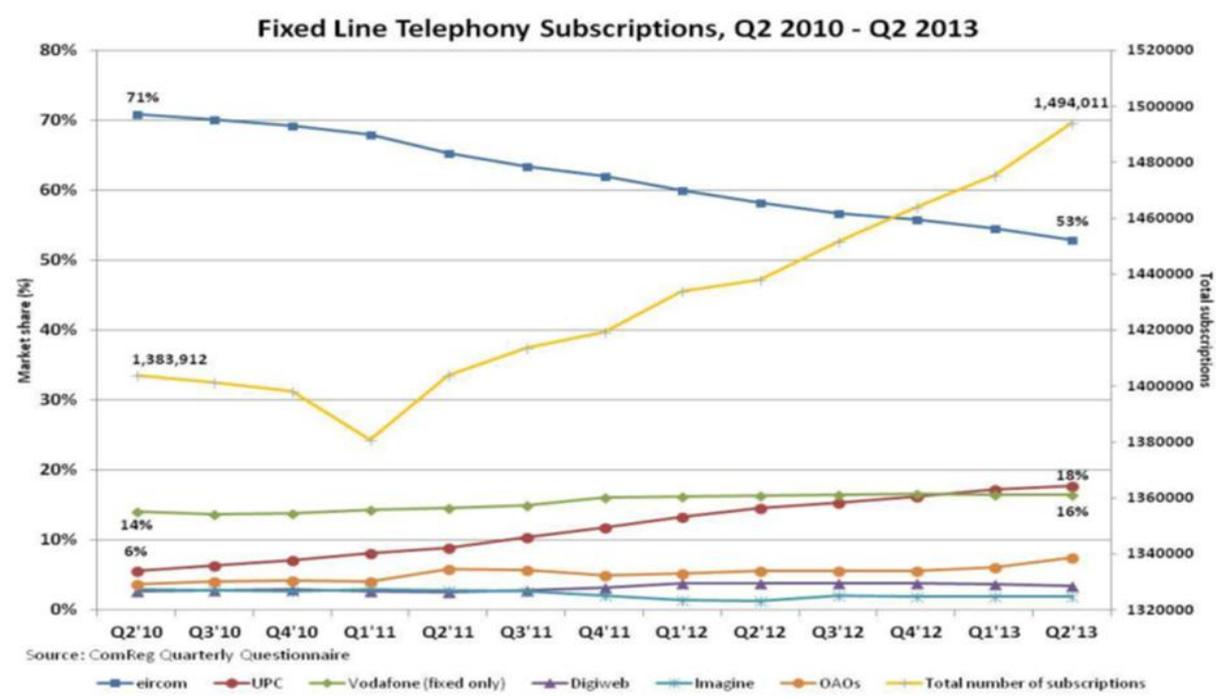
³ Irish communications market report ComReg 13/87

Irish communications market report Q2 2013

50.8% of subscriptions were single play, 38.1% double play (a bundle of two services) and 11.1% triple play (a bundle of 3 services).



Total fixed voice subscriptions in Q2 2013 were 1,494,011 of which UPC had an 18% share and Eircom 53%.



UPC considers that the latest market report data highlighted above does not warrant a change in approach compared to ComReg 12/117.

ComReg analysis in 12/117

- “Eircom supplies FVA nationwide over its PSTN network and, as set out in Chapter 3, Eircom is by far the supplier with largest nationwide market share. FSPs can buy wholesale inputs from Eircom on a national scale, enabling any FSP to also supply a nationwide service. Therefore, it can be assumed that resellers have the ability to enter any geographic area sufficiently quickly and provide FVA using resale products, in response to a 5-10% price increase. This is indicative that the market for standalone FVA is national [...]”
- “The sizable minority of end users (44%) who have demonstrated a desire for stand-alone FVA products are spread across all areas of the country and are not exclusively concentrated in areas outside of the cable/NGA/LLU footprint. In view of the fact that one-third of Irish households still do not have a broadband connection, there is likely to be a continuing segment of customers over the period of this market review which will not avail of bundles offered over alternative networks.”

Summary

Further to the commentary provided above, UPC would summarise its observations as follows:

- UPC stresses the importance of proper, timely process and certainty for all industry players in any measures proposed by ComReg.
- UPC requests ComReg to state when a decision on the original market analysis, ComReg 12/117 will be published.
- UPC requests ComReg to clarify whether the original market analysis will be finalised prior to any further introduction or relaxation of remedies in market 1.
- UPC considers that the market facts have not changed to a degree that supports a change in the market definition proposed in ComReg 12/117.

4: Sky



SKY RESPONSE TO

SUPPLEMENTARY CONSULTATION TO COMREG DOCUMENT 12/117¹

1. SUMMARY

- 1.1 This is the response of Sky Ireland (Sky) to ComReg's consultation document entitled "Supplementary Consultation to ComReg Document 12/117" (the Supplementary Consultation).
- 1.2 The Supplementary Consultation gives an outline of a conceptual framework for approaching the subject of market definition for Fixed Voice Access (FVA). However, Sky considers that no new evidence has been presented at this time by either ComReg or industry, such as would justify a deviation from ComReg's market definition of FVA as proposed in the Original Consultation.² Sky addresses this and its relevance to the proposed SMP³ remedies below.

2. MARKET DEFINITION AND SMP REMEDIES

(i) Market definition

- 2.1 Sky considers that there is not sufficient evidence in the Supplementary Consultation to justify a deviation from the view in the Original Consultation that the FVA market is national in scope (notwithstanding ComReg's views on the emergence of different competitive conditions in some specific geographic areas). ComReg's preliminary views on a different market definition in the Supplementary Consultation appear to a significant extent to be based on the '2012 Market Research', which involved 1,000 face-to-face interviews.
- 2.2 One of ComReg's stated aims is to be able to respond quickly and flexibly to competitive developments in the market. For example, the Original Consultation states that:

*"ComReg proposes that... remedies can be sufficiently flexible to accommodate any more distinctive competitive developments should they materialise prior to the undertaking of a further market review."*⁴
- 2.3 However, this aim should not supersede the requirement to conduct a thorough and up to date market review, which is a prerequisite for establishing any new product/geographic market definition boundaries.

¹ Supplementary Consultation to ComReg Document 12/117: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers: Market definition, 17 October 2013.

² Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, ComReg Document No. 12/117, 26 October 2012

³ Significant Market Power.

⁴ At paragraph 4.238 of the Original Consultation.

(ii) SMP remedies

2.4 Sky considers that in general, the competition problems described in the Original Consultation remain valid concerns, particularly absent regulation. Sky supports an appropriate and proportionate regulatory response to these competition problems, which promotes competition and protects consumers. Sky therefore considers that ComReg should maintain the existing wholesale obligation on eircom to provide a price regulated, SB-WLR product⁵ and the obligation on eircom not to unreasonably bundle, which includes the obligation on eircom to pass a Net Revenue Test and to notify new retail bundles to ComReg for approval, prior to market launch.

2.5 Any proposed sub-national differentiation of SMP remedies imposed on eircom (and based on a national market definition) would constitute a novel approach and need to be supported by cogent evidence. Similarly, any firm conclusions by ComReg about the emergence of different competitive conditions in specific geographic areas (known as Large Exchange Areas (LEAs)), would need to be supported by cogent evidence about the structural and behavioural factors at play, to further justify any sub-national differentiation of SMP remedies on eircom, based on a national market definition.

2.6 Sky notes eircom's response to the Original Consultation where it states that the:

"...principal justification for the regulatory controls proposed by ComReg in terms of LLVA⁶ services is that they are necessary to avoid exploitation by eircom of its SMP in relation to those customers who value stand-alone LLVA."⁷ [Emphasis added].

2.7 It is not clear what eircom's basis for this assertion is. Implementing SMP remedies to guard against the exploitation of customers who value stand-alone LLVA is important, but as ComReg notes in the Original Consultation:

"...competition concerns also arise in relation to potential exploitative behaviour at the wholesale level [where]...strategic benefits could be accrued through Eircom charging an unjustified high price for network or wholesale services for resale."⁸

2.8 Any evidence of different competitive conditions in the LEAs does not alleviate this concern, nor has eircom provided evidence for this in its response to the Original Consultation. On the contrary, any stronger retail competition in the LEAs may in fact heighten those concerns, because, as ComReg notes in the Original Consultation:

"...there is a risk that eircom would have the ability and incentives to apply a margin squeeze between wholesale and retail prices so that an efficient downstream FSP is forced to exit the market or is unable to compete effectively."⁹

2.9 Given the risks and incentives for eircom to exploit its SMP that ComReg identifies, it should proceed with caution, on the basis of a robust, detailed analysis that is consulted

⁵ Single Billing Wholesale Line Rental.

⁶ Lower Level Voice Access.

⁷ At page 4.

⁸ Paragraph 6.18 of the Supplementary Consultation.

⁹ Paragraph 6.23 of the Supplementary Consultation.

on, to justify any potential relaxation, or removal of regulation at the retail level. In particular, it is unclear to Sky at this point how an *ex ante* 'margin squeeze test' at the wholesale level would adequately address the legitimate concerns identified by ComReg.

(iii) Wholesale Line Rental (WLR) Service Level Agreements (SLAs)

2.10 Finally, as Sky noted in its response to the Original Consultation,¹⁰ eircom has often and significantly failed to meet its SLA targets for WLR.¹¹ In relation to SLAs, we note that eircom's suggestion that there should be a market for bundles¹², does not acknowledge that SMP remedies in relation to SLAs would need to be amended and aligned to the appropriate market definition, i.e. the SLAs for WLR would have to be extended, to compensate for the economic losses arising from a SLA breach affecting the sale/provision of the combined elements of a single market bundle. Thus, any change to SMP remedies, resulting from a revised market definition, would require a thorough review of the current SLA regime (and other remedies) as well as the prompt implementation of a new SLA regime.

Sky

13 December 2013

¹⁰ Sky response, page 4.

¹¹ Wholesale Line Rental.

¹² eircom advocates (i) a voice only services product market definition, where FVA and fixed voice calls are provided together, and (ii) a bundled voice services product market definition, where FVA and fixed voice calls are provided together with other services, in particular broadband.

7: BT

BT Communications Ireland (“BT”) Response to ComReg’s Supplementary Consultation to 12/117:

Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers: Market definition.

Issue 1 – 18th December 2013

1.0 Introduction

We welcome the opportunity to comment on what is a narrow and specific consultation to define a market detail. In summary we believe the consultation is primarily aimed at determining which of the two options recommended by Oxera below is the most appropriate. The choice determines whether to apply regulation based on geographic location or not for Voice Access Services.

– **recommended option 1**—a national relevant market for FVA (with calls), whether sold inside or outside bundles. This is ComReg’s original market definition as set out in the consultation;

– **recommended option 2**—two separate relevant product markets: a national market for stand-alone FVA (and calls); and FVA sold inside of bundles of broadband, split by geography between the LEA and non-LEAs.

1.1 In Summary

We consider the options need to be considered within the context of the market in Ireland – such as the overwhelming lack of alternative voice access competition. We consider it important to emphasise the fact that the supply of Voice Access is not yet competitive in Ireland with the overwhelming majority (82%)¹ of customers served by Eircom PSTN/WLR or ISDN/WLR irrespective of precise geographic breakdowns, and we believe Eircom Retail remain dominant in any realistically defined geography.

- Given the definition of market boundaries will impact the type of regulatory remedies we have also considered the potential competition problems in the market to understand whether the market definitions are appropriate. Our conclusion is that regulatory remedies are required to address the lack of voice access competition irrespective of geographic boundaries.

¹ Derived from ComReg 13_87 Quarter Report Q2 2013 – Total lines minus other operators gives an estimate of Eircom share by lines.

- We accept the position that it is possible to define a wider market than just standalone voice and both options 1 and 2 appear to be plausible; however the local competition issues must still be addressed in either case.
- The progression of the review of Market 1 ahead of Market 2 is unhelpful as we consider any outcome must have proper regard and sensitivity to the inter-linkage to the Market 2 review which is due shortly.

We have analysed the two options and would like to offer the following comments.

1.2 Competitive Analysis and the need for regulation.

- In either scenario of standalone voice or where it is supplied as part of a bundle we see significant risks of upstream prices to third parties being set at excessive levels and/or margin squeeze relative to downstream equivalents.
- Given the potential to change from the current definition to one which encompasses another service contingent on a different set of upstream inputs (active service for broadband as distinct from active service for voice but both also reliant on passive access and/or WLR) – we suggest that the market context needs to be wider than just voice calls.
- The situation in Ireland is quite different from that of a number of other Member States including for example the UK where an extensive cable network and LLU via Full Unbundling has led to vibrant direct competition to the incumbent avoiding the need to purchase upstream active products for either retail service. MSANs when deployed with Full Unbundling - provide functionality for both services. In Ireland however, the provision of LLU broadband is generally via Line Share with a corresponding requirement also to purchase Eircom WLR to provide voice.
- Unlike the UK UPCs rollout of its own voice is modest to the size of the market and VoIP providers whilst growing, are not offering volume alternatives to PSTN and still only address an insignificant share of the market. Further, the growth of UPC as an alternative provider appears to be slowing, their penetration of their addressable market may have stabilised and future growth may therefore depend on large scale network investments. The recent entry of Sky into the market and the launch of Eircom's NGA and TV services may also change the market and constrain the future growth of UPC voice access.
- It is therefore as important as ever to ensure that a strong regulatory framework exists to provide the certainty for both the incumbent Eircom and wholesale/ retail competitors. But the scope for significant deregulation at the upstream wholesale level is not comparable to the UK as the incumbent in Ireland has much greater opportunity to price components to itself and others in a way which thwarts downstream competition and the associated potential of other authorised operators to move away from upstream regulated active products.
- Absent Functional Separation and EOI in Ireland we are of the view that competition is developing at a slower pace than otherwise would be the case and there remains a need for stringent regulatory remedies for the foreseeable future.

As discussed above, the lack of alternative and scalable voice services is a particular case in point.

- In either scenario of standalone voice or where it is supplied as part of a bundle we see significant risks of upstream prices to third parties being set at excessive levels and/or margin squeeze relative to downstream equivalents. Even where pricing of individual units is transparent extensive bundling in both areas of higher and lower competition could undermine regulatory remedies and or competition.
- We conclude that especially given the weak state of competition in the voice access market, at the wholesale layer the following regulation is required in all scenarios:
 - Cost orientation obligation in each market defined.
 - In the absence of Functional Separation and Equivalence of Input the market is not as competitive as it should be hence there is a continuing need for regulatory obligations. In this case a Margin Squeeze Test as a modern equivalent of the Retail Minus Price control is required.
- At the retail layer an Unreasonable Bundles Net Revenue Test (NRT) is still required given the lack of Voice Access Competition.
- A separate concern for us is the regulatory outcome clearly depends on upstream regulation which is also in the process of change. We note that ComReg indicated in the main consultation² that it plans to move WLR to Market 2 however there is no clarity as to its associated regulatory remedies at this time. Our concern is that the remedies mandated for Market 1 could be undermined by the decisions in Market 2. We understand that both markets are being reviewed sequentially by ComReg and consider in this case it is pragmatic to complete the Market 2 review before finalising the Market 1 decision.

1.3 Economic Analysis

- The Oxera Paper is a comprehensive application of the broad principles suggested by BEREK (2010) and whilst we do not subscribe to all the comments and points made, we consider that the paper generally approaches the issues in an open and fair minded fashion.
- We agree with two sets of plausible and sensible (retail) markets (page 41) others are either not proven and/or unlikely. Of the two options it is arguable that the second (split market) is stronger on empirical grounds but we consider that whichever is adopted there should at the current time be no difference in the wholesale remedies for upstream markets and linking to relevant downstream markets. These need to be focussed and proportionate to the competition

² ComReg Consultation document 12/117

problems identified and directed to relevant customer and geographic cohorts of the consumer and business markets

- Our detailed response to the Oxera paper can be found in Annex A.

2.0 Response to the Detailed Questions

Q. 1 In the context of the market review and, in view of the 2007 Recommendation and SMP guidelines, is the focal product stand-alone FVA the correct starting point of the market definition (market analysis process), or is a bundle (e.g., of voice and broadband) a more appropriate focal product? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A.1 We provide more detailed discussion in Annex A but in essence consider that Oxera is presenting us with something of a false dichotomy as an either/or solution. There is no reason why the economic analysis cannot treat both stand-alone voice users and bundled users equally and the economic analysis be considered in parallel. In other words, equal treatment should be given to both sets of consumers and they both be regarded as relevant focal products. The Decision tree as shown implicitly is really leading to the first Recommendation even though it is couched as voice only which then gets potentially modified at the second stage as a consequence of consideration of Criterion 2. This is hard to sustain where the majority of consumers take a bundle of services.

Q. 2 Do you agree that the traditional competition analysis tools such as the SSNIP (Hypothetical Monopolist) Test are appropriate for market definition in the presence of bundles? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A.2 We understand that NRAs are largely bound by the principles and application guidance of the Commission and through BEREC. However we do note that the principles of market definition such as the SSNIP test have been taken well outside the scope for which it was intended. We therefore support the use of informed judgement alongside empirical and theoretical evidence and as noted above, consider that when it comes to remedies it is important to be aware of the history and context of the relevant services and the reasons why current regulation is in place.

Q. 3 Does mobile access sufficiently constrain Eircom's SMP in fixed access to belong in the same relevant market? Are there other factors or additional analysis that ComReg should consider? Please explain the reasons for your answer, clearly indicating the relevant section of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A.3 We are of the view that mobile access does not constrain Eircom's fixed access in the same relevant market for the following reasons:

1. We agree with Vodafone namely that the dynamic at play in the wider retail market is generally not a substitution of mobile access for fixed access but rather an independent assessment by end users of whether the incremental utility that they derive from having FVA in addition to their mobile justifies the additional cost. However this trade-off will likely vary considerably across different customer cohorts and it is hard to generalise at this stage.
2. We understand the view of the European Commission is that there is insufficient evidence to suggest that overall mobile and fixed access is in the same market.

Q. 4 In the context of the FVA market review process and based on national circumstances in Ireland, do you believe that ComReg should define a single market for FVA sold within and outside a bundle? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A.4. Please see Annex A. In general what is pivotal are that remedies are proportionate and targeted.

Q. 5 Alternatively, do you believe that ComReg should define separate product markets each for stand-alone FVA (and calls) and for FVA sold inside of bundles of broadband? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A.5. We are broadly more supportive of this approach and stance.

Q. 6 If FVA sold inside of bundles of broadband is defined as a separate product market, should ComReg geographically define the latter market (e.g., inside/outside the LEA)? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A.6 We consider that a geographical delineation based on LEA and non LEA would be appropriate however the lack of voice access competition nationally suggests that competition problems need to be addressed irrespective of geographic boundaries.

Q. 7 Do you believe that an introduction and specification of margin squeeze tests in the future possibly in the wholesale markets for FVCO and/or WBA could be sufficient and likely obviate the need for the NRT at the retail level?

Q.7 Our view is the Net Revenue Test (NRT) is designed to address the situation where non-regulated services can potentially be used to undermine the set margin of a regulated product such as Fixed Voice Access/Calls. Looking at this another way, ComReg found it necessary to apply an NRT in the presence of the retail minus price control; as the MST works in a similar way the NRT continues to be required.

Annex A – Economic Review of the Oxera Paper

I. Overall findings

- I. The Paper is a comprehensive application of the broad principles suggested by BEREC (2010) and whilst we do not subscribe to all the comments and points made, we consider that the Paper generally approaches the issues in an open and fair minded fashion.
- II. We agree with two sets of plausible and sensible (retail) markets (page 41) others are either not proven and/or unlikely. Of the two options it is arguable that the second (split market) is stronger on empirical grounds but we consider that whichever is adopted there should at the current time be no difference in the wholesale remedies for upstream markets and linking to relevant downstream markets. These need to be focussed and proportionate to the competition problems identified and directed to relevant customer and geographic cohorts of the consumer and business markets.
- III. Prior to some comments on the Oxera Paper, we provide some contextual thoughts on the BEREC 2010 Paper which Oxera extensively draws upon.

II. The approach advocated by BEREC³

- IV. The BEREC approach has made some suggestions as to how the more limited approach of the SSNIP test might be extended to deal with bundles of services. We consider that these ideas need to be treated with some caution for the reasons set out below. Whilst the SSNIP test has a substantive history and application in merger control, its use in this context is not fully assessed or understood.
- V. Non-uniform pricing. The SSNIP test is strictly one of comparing goods which are substitutes in a model of single product comparisons of uniform pricing⁴. It is an entirely *arbitrary* test (albeit applied with consistency for the purposes of assessing mergers) and not set up for non-linear complex tariffs in which additionally there are both vertical and horizontal complementarities which are characteristics of bundles.
- VI. Treatment of complementary goods. Where multiple services are being tested which are not substitutes but bound together in a bundle as complements, the implications for consequential geographic market definition is particularly important and we consider that this is not adequately examined by BEREC which effectively only addresses the matter from the perspective of dilution of indirect constraints⁵.
- VII. Briglauer⁶ sets out the related issues of bundling and complementarity as follows:

‘The practice of bundling and the issue of complementary products do not change the principles of market definition. However, it increases the number of products

³ BEREC Report on impact of bundled offers in retail and wholesale market definition. BoR (10) 64 December 2010.

⁴ Dobbs I. 2006. Int. J. of the Economics of Business, Vol. 13, No. 1, February 2006, pp. 83–109.

⁵ Paragraph 7 of BEREC 2010 appears to simply leave open the possibility of differential geographic markets based on direct constraints. However all the empirical evidence shows that from the supply side, economies of density are very critical in determining competitive footprints of alternative networks either fully owned by CPs or for example just using LLU.

⁶ Briglauer, W. Conceptual problems with the hypothetical monopolist test in ex-ante regulation of communications under the new regulatory framework. Journal of Competition Law & Economics, 4(2) December 2007. (Footnotes are omitted from this extract.)

and combinations between bundles and stand-alone products. One has to identify which products are offered on a stand-alone basis and which ones are offered only within a bundle. **Complementarities within bundled products that are only offered as a bundle then become irrelevant (because they are considered as a single candidate product subject to the HMT routine);** complementarities between an initial set of products (M) and a (stand alone or another bundled) candidate product will by definition lead to different markets (because the candidate product meets different, albeit complementary demand). Furthermore, because complementary wholesale services are naturally derived from retail demand, **market definition based on complementarities could lead to broad clusters alongside the whole value chain (suppressing potentially highly different competitive market constellations).**' (emphasis added)

- VIII. As Oxera correctly notes (page 16), variation in product definition could have a profound impact on the assessment of competitive conditions. Previously BEREC has suggested that where product market boundaries are unclear this should orientate to a national geographic market but with possible variation in remedies⁷. However BEREC also stated that 'It is nevertheless emphasised that the geographic segmentation of markets and the geographic differentiation of remedies should not be viewed as two alternative equally applicable options in the presence of uneven developments of competition across the territory. Rather, the result of the market definition is determined by the evidence from the analysis'.
- IX. In summary, we consider that in some instances, bundling will have an impact on the geographic market which should be carefully assessed prior to the remedies stage.
- X. Adding services together. BEREC continues to advocate the practice of adding services that *fail* the SSNIP test to those that *pass* it, thereby breaking a fundamental assumption of the market definition process of finding the smallest possible group of services which pass the test (Footnote 1 above). This is a significant variation in methodology which again may lead to invalid SMP findings.
- XI. It is established that there can be circumstances when combinations of services that do pass the rules of market definition can be non-unique. An example is where each of three services fails the SSNIP test taken individually but each pair-wise combination passes the test so the smallest set of services is not unique. This is not the same however as advocated by BEREC where in the context of bundle splitting, they suggest that a bundle goes into the individual elements which are presumed to be economic markets in their own right. (Note the converse might also apply.) This practice is likely to compound the problems of misidentification of competitive conditions cited by Briglauer and could lead to remedies being imposed where they are not required or which do not meet the competitive issues that are present in the market. Conversely regulation may be relaxed too widely if the product market is then focussed just on the customers and services which are observed to be supplied in stronger competitive conditions.
- XII. We suggest in summary that NRAs to be aware of the limitations of the SSNIP methodology as it has been advocated by BEREC and explicitly consider the robustness of any finding of SMP to alternatives. In particular this applies to choice of focal product as the starting point of the analysis.

⁷ ERG Common Position on geographic aspects of market analysis October 2008.

III. Comments on the Oxera Paper

- XIII. As stated above, we consider that Oxera have taken a commendably open and transparent treatment to the issues in hand, recognising limitations of theory and application and looking at alternative hypotheses. We limit comments to a few of the more problematic statements where we have some reservations but also indicate where we are in positive agreement with key points made, noting that we agree with the two principal market boundary options presented.
- XIV. General difficulties of market definition with bundling. We agree with Oxera (Page 11) that the application of the approach given by BEREC using SSNIP principles can in theory result in a multiplicity of definitions of the product market which get additionally compounded at the stage of geographic markets if it is concluded that conditions of competition vary to a sufficient degree.
- XV. Caution to be applied to surveys as the basis of the SSNIP test. We consider Oxera is correct to place conservative caution on surveys relative to critical sales losses especially as the theory of constraints from solus to bundled services is not clear cut. That said, we would not agree that the choice of focal product can solely be dictated by the competition concern (first paragraph page 33). This is much too strong a position to take which risks bias and other factors should be taken into account at this stage including evidence of consumer preferences for purchasing services.
- XVI. Further, the conclusions in the Paper (pages 33-34) do not exactly mirror the later conclusion (Page 40) that if we accept Eircom's hypothesis of the bundle as the focal product - then the geographic dimension becomes very important as the SMP remedies will likely differ. At Section 3 Oxera appears to suggest that a potentially false market definition can be acceptable if any errors are subsequently reflected in remedies. We suggest that at the product stage the investigation needs to be open and not foreclosed in this way.
- XVII. The choice of focal product and adding services together. The Decision tree at Figure 2.1 is not actually completed for the scenarios where either or both the solus product or joint products do not pass the SSNIP test. Table 2.1 Set 3 (B and C) and Set 4 (B and D) are also ambiguous in interpretation. In Set 3, both services are 'unpicked' and it is not self-evident that combined the SSNIP test is passed either. A similar position arises where solus line plus voice is not a relevant economic market but then simply 'added' to the bundle. That the bundle might pass the SSNIP test might reflect the value of broadband but not calls, and as noted above, conditions of competition of the two services supplied jointly could be quite different when supply side geographic factors are taken into account.
- XVIII. More generally, as discussed above, we would not agree that starting from first principles; it is fair to move to the RHS of Figure 2.1 in the Decision tree simply to meet Criterion 2. This is especially problematic when a much greater and growing proportion of customers actually take both services in a bundle than take them separately or either product alone.
- XIX. Interpretation of the surveys. It is not easy to infer a great deal from the surveys for the good reasons that Oxera sets out and the interpretation of them as *prima facie* evidence of separate markets for solus voice and broadband with voice is fair. Given the issue of holding prices outside the focal product constant is at least questionable, this suggests that the surveys may overstate willingness to switch out, if alternatives *also* rose in price from the monopolist increasing the input price of those services.

- XX. Overall position on bundling. It appears that the majority of customers are actually taking a bundle whether from one supplier or more than one supplier with a trend toward the former. Given the empirical evidence of customer behaviour and the nature of competition we consider the Oxa two options recommendation plausible.

If you have enquires concerning this submission please contact: john.odwyer@bt.com

8: Alto

alto

alternative operators in the communications market

Supplementary Consultation to 12/117: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers: Market definition - Ref: 13/95

Submission By ALTO

Date: December 18th 2013

ALTO is pleased to respond to Supplementary Consultation 12/117: Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers: Market definition - Ref: 13/95.

ALTO welcomes this opportunity to comment on this quite narrow and specific consultation and would like to make the following general comments before addressing the questions in detail.

Preliminary Remarks

ALTO submits remarks below in a number of specific areas that we would like ComReg to consider carefully.

Aims of the Consultation

ALTO's view is that this consultation aims to ascertain and determining which of the two options recommended by the independent consultants Oxera is the most appropriate. The choice determines whether to apply regulation based on geographic location or not for Voice Access Services.

The Choices are:

Recommended Option 1—a national relevant market for FVA (with calls), whether sold inside or outside bundles. This is ComReg's original market definition as set out in the consultation;

Recommended Option 2—two separate relevant product markets: a national market for stand-alone FVA (and calls); and FVA sold inside of bundles of broadband, split by geography between the LEA and non-LEAs.

ALTO's view is that both options must be considered in light of the current and previously subsisting market position, that being an overwhelmingly dominant incumbent operator with in or around 84% market share in both PSTN and ISDN services notwithstanding a clear lack of precise data on geographic breakdowns. It is common case that Eircom Retail remains dominant in any properly defined geography.

Lack of Local Competition

ALTO members submit that there has been and remains a desperate lack of local competition in the voice services markets. This will come as no surprise to ComReg, particularly when assessing the attractiveness or lack thereof to invest in certain geographic areas.

ALTO members clearly accept that it is possible to argue that defining a wider market than just standalone voice thereby making options 1 and 2 appear to be *prima facie* plausible; however, as mentioned, the desperate lack of local competition must be addressed in either case.

Sequencing, Consultation and Conclusion

ALTO members conclude that the completion and definition of Market 1 ahead of Market 2 is deeply unhelpful. ALTO members consider that any outcome must have proper regard to the clear interrelation to the Market 2 review, which is due to commence shortly.

Requirement for Consultation

ALTO notes with certain interest that ComReg has taken the rather unusual step of holding a supplementary consultation on a previously held consultation related to a Market Review.

ALTO notes that there have been certain significant changes to the structure and economics of the market since 12/117, perhaps necessitating such an approach. We submit that this approach should be the exception rather than the norm.

In terms of the law relating to consultation and adequacy of same, Auld LJ has described the requirements of adequate consultation in the following terms:¹

“[T]he classic statement of the basic requirements of consultation is that formulated by Mr Stephen Sedley QC, as he then was, in argument, and adopted by Hodgson J in his judgment in R v Brent London Borough Council, ex p Gunning 919850 84 LGR 168, and approved by Webster J in R v Sutton London Borough Council, ex p Hamlet (unreported) namely ...: “First ... consultation must be at a time when proposals are still at a formative stage. Secondly ... the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Thirdly ... adequate time must be given for consideration and response and finally, fourthly, the product of consultation must be conscientiously taken into account in finalising any ...proposals.”

The process described above is one providing for the give and take of information and views between the relevant parties before a final proposal is made. It is predicated on early disclosure of sufficient information facilitating an informed response to be made. Whether or not persons take the chance to be involved in a consultation is their choice. However, those affected should be given the chance in a meaningful way so that they may become involved.

¹ R v London Borough of Barnet, ex p B [1994] ELR 357

The requirement for adequate consultation has not yet been formally incorporated into Irish jurisprudence as a ground for judicial review. However, it should be presumed as operative, particularly in utilities markets, such as the Communication market. Further, it will arise where there is a mandatory statutory requirement to consult and may then form part of a lack of procedural fairness ground for review, or indeed in the case of absence of any consultation where one is statutorily required, the procedural *ultra vires* ground for review.

Competition and Economics

It is ALTO's strong preference and indeed requirement that a strong and robust regulatory environment subsists in the absence of Structural/Functional Separation and Equivalence of Input – EOI, in the Irish communications market, but most particularly in Market 1. As an offshoot requirement, ALTO submits that a set of stringent remedies must also be mandated which can exist in the medium to long term.

Given the weak, if not dire state of voice competition at the wholesale level in Ireland, ALTO submits that the following remedies all be implemented in short course:

1. Full and transparent Cost orientation obligations in each market defined;
2. Full Margin Squeeze Testing as a modern equivalent of the Retail Minus Price control;
3. Retail Level: Unreasonable Bundles Net Revenue Test – UBNRT, be maintained and required given the lack of voice access competition.

As ALTO members are unaware of ComReg's desired approach to the regulation of Wholesale Line Rental – WLR, ALTO simply can not know whether proposed Market 1 regulation will be effective. Further (and as mentioned above), ALTO is aware that Market 2 is scheduled to be fully reviewed in the near future, therefore it is ALTO's strong view and submission that Market 2 review should be completed prior to Market 1 being concluded and decided upon.

The Oxera Papers

ALTO commends the work of Oxera and the conclusions it reaches. ALTO's view of the two options proposed is that, arguably the second market, which might be described as a split market, appears to be somewhat stronger on empirical grounds. However, we consider that whichever option is adopted, there should at the current time be no difference in the wholesale remedies for upstream markets and linking to relevant downstream markets. Remedies must be focussed, proportionate to apparent competition problems and be directed to relevant aspects of the relevant market's sub-markets, e.g., consumer, business, etc.

White Label Offerings – Market 1

ALTO submits that in recent weeks it has come to members' attention that the regulation, control and review of Eircom White Label offerings in the market is to be found wanting. Specific queries relating to White Label offerings have been raised in industry meetings in recent weeks. Queries include: Pricing differences, service availability and margin squeeze/net revenue testing.

ComReg should note that while it is the case that many ALTO members procure White Label offerings from Eircom Wholesale, clear problems are emerging with respect to this particular feature, or wholesale offering being made to the market.

These issues underpin our comments in this response re. Option 2 as opposed to Option 1.

Response to Consultation Questions:

Q.1. In the context of the market review and, in view of the 2007 Recommendation and SMP guidelines, is the focal product stand-alone FVA the correct starting point of the market definition (market analysis process), or is a bundle (e.g., of voice and broadband) a more appropriate focal product? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A. 1. ALTO submits the Oxera proposals may not actually reflect the market realities experienced by members. The market is not an “either, or” place in which members undertake business. ALTO submits that there is no reason why regulatory economic analysis cannot treat both stand-alone voice users and bundled users equally and the economic analysis be considered in parallel. It is common case that the vast majority of consumers are involved in some form of bundled service, whether that be a bundle for all communications services, or a bundle containing elements of the desired communications services.

Q. 2. Do you agree that the traditional competition analysis tools such as the SSNIP (Hypothetical Monopolist) Test are appropriate for market definition in the presence of bundles? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A. 2. ALTO agrees with ComReg's approach in respect of the technical economic analysis required to form its views on the market(s) and regulation. We submit however that in the context of market remedies, it is of critical import that ComReg be aware of the development, history, economic rent, the context of the relevant services and the generally rather acute reasons as to why current regulations are in place.

ALTO notes with some concern that modern economic/empirical analysis may remove or reduce certain context (albeit historical), which is more properly described as qualitative analysis, which remains vital in forming final decisions.

Q. 3. Does mobile access sufficiently constrain Eircom's SMP in fixed access to belong in the same relevant market? Are there other factors or additional analysis that ComReg should consider? Please explain the reasons for your answer, clearly indicating the relevant section of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A. 3. ALTO answers this question in the negative. ALTO rationale is that we agree:

1. With the views of the European Commission in that there is insufficient evidence to suggest that overall mobile and fixed access is in the same market;
2. That rather than substitution, which has been incorrectly assumed, it is ALTO's view that independent user assessment of whether the incremental utility that they derive from having Fixed Voice Access – FVA, in addition to their mobile, actually justifies the additional cost.

ALTO suggests that simply and broadly assuming uninformed consumer FVA substitution in the absence of clear data is incorrect.

Q. 4. In the context of the FVA market review process and based on national circumstances in Ireland, do you believe that ComReg should define a single market for FVA sold within and outside a bundle? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A. 4. ALTO submits that all remedies must be proportionate, relevant and targeted. We have already set out our comments related to the Oxera study above.

Q. 5. Alternatively, do you believe that ComReg should define separate product markets each for stand-alone FVA (and calls) and for FVA sold inside of bundles of broadband? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A. 5. ALTO broadly supports ComReg's position on the subject matter of this question. Our rationale is broadly set out above.

Q. 6. If FVA sold inside of bundles of broadband is defined as a separate product market, should ComReg geographically define the latter market (e.g., inside/outside the LEA)? Please explain the reasons for your answer, clearly indicating the relevant sections of the Oxera report or responses to which your comments refer, along with all relevant factual evidence supporting your views.

A. 6. ALTO considers that geographic splitting based on LEA/non-LEA logic would be appropriate, however the clear and depressing lack of voice access competition nationally, suggests that competition issues must to be addressed, irrespective of any notional geographic boundaries.

Q. 7. Do you believe that an introduction and specification of margin squeeze tests in the future possibly in the wholesale markets for FVCO and/or WBA could be sufficient and likely obviate the need for the NRT at the retail level?

A. 7. ALTO submits that Net Revenue Testing – NRT, is designed to deal with situations where unregulated services can potentially be used to undermine the set margin of a regulated product such as Fixed Voice Access and/or Fixed Call Access. ComReg has already found it necessary to apply an NRT in the presence of the retail minus price control; as the Margin Squeeze Testing – MST, works in an identical manner and of course the Net Revenue Test continues to be required.

ALTO

18th December 2013

Appendix 1: Text

A 1.1 Paragraph

Annex 1: Text

A 1.1 Annex Paragraph