



Market Analysis: – Retail Narrowband Access Markets

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All responses to this consultation should be clearly marked:-
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(current consultations), to arrive on or before 5.30 pm Friday 29
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1 Executive Summary

Introduction

- 1.1 On 01 September 2004 ComReg published a national consultation on the market for Retail Fixed Access (ComReg Doc 04/94), and on the 22 March 2005 ComReg notified to the European Commission and published the response to consultation (ComReg Doc 05/25). Notified measures were accepted by the EU Commission, in correspondence to the Chairperson of ComReg dated 25 April 2005. This process is referred to as the ‘initial review’ throughout this document.
- 1.2 ComReg has decided that before issuing a Final Decision, it is appropriate to review the findings of the market analysis to include current data and to take account of any market developments since the Notification. This allows for consideration of changes in the markets, from the time of the initial review. In order to take account of current industry views ComReg issued a Call for Input¹. This process is referred to as the ‘call for input’ throughout this document.
- 1.3 This current or second consultation will be referred to as the ‘current review’.

Market definition

- 1.4 ComReg proposes to define two retail narrowband access markets. These are :
 - A national market for lower level retail narrowband access, which includes access via analogue exchange lines over copper and FWA² and ISDN BRA³;
 - A national market for higher level narrowband access, which includes access via ISDN FRA⁴ and PRA⁵.

Market analysis

Lower level retail access market

- 1.5 eircom’s share of the **lower level retail narrowband access market** had remained at over 99% for several years, but started to decline from the end of 2004 following the introduction of single billing wholesale line rental (SB-WLR). By the end of March 2006 eircom’s market share was approximately 89%.
- 1.6 In the **lower level** retail access market, competition is largely via indirect access such as SB-WLR – there is minimal direct access.

¹ Information Notice “Retail Access and calls market review” ComReg Doc 06/10, 24 February 2006

² Fixed Wireless Access. See annex B for a glossary of terms.

³ Integrated Services Digital Network Basic Rate Access. See annex B for a glossary of terms.

⁴ Integrated Services Digital Network Fractional Rate Access. See annex B for a glossary of terms.

⁵ Integrated Services Digital Network Primary Rate Access. See annex B for a glossary of terms.

Higher level retail access market

- 1.7 In early 2004, eircom's share on a channel basis of the higher level access market was just over 79%, and had not fallen below 75% in the preceding four years. During 2005, eircom's share dropped to around 70% and has remained around that level through 2006. At the end of March 2006, eircom's market share was 69%.
- 1.8 SB-WLR now accounts for around 5% of the **higher level retail narrowband access** market while OAO direct connection has fluctuated in the region of 24%. Direct connections are defined as the situation where a customer is directly connected to a telecommunications operator to connect that customer to the public telecommunication network. This can be done by a number of technologies and includes access via LLU.

Potential competition

- 1.9 While the high market shares are suggestive of market power, a full analysis of each of the access markets has been carried out to determine if eircom can act independently of its competitors and customers.

1.10 *Key factors assessed include :*

Economies of scale and scope

- 1.11 eircom continues to benefit from economies of scope and of scale, which act as a barrier to entry into the markets.
- 1.12 Regarding retail narrowband access markets, the only wholesale regulation that could potentially impact on competition in this market is LLU⁶. However, local loop unbundling requires time and high investments, a large portion of which are sunk. Moreover, OAOs in principle do not unbundle local loops to provide narrowband access only. Local loop unbundling therefore does not remove the high and non-transitory barriers to enter the retail access market at a fixed location, nor does it make this market tend towards effective competition.

Countervailing bargaining power (CBP)

- 1.13 Historically eircom has been restricted by regulation (e.g. a non discrimination obligation and the Price Cap) in the lower and higher level retail access markets and therefore has not been in a position to negotiate with customers.
- 1.14 There are different purchasing patterns in the lower and higher level access markets, which would mean that there may be different levels of bargaining power. In the lower level retail access market operators make take-it-or-leave-it-offers by publishing prices publicly e.g. on their websites which would mean that purchasers can not influence price setting behaviour.
- 1.15 Tendering in the higher level retail access market, especially for the provision of ISDN PRA, may limit the SMP operator's ability to price freely. However, CBP could only exist for a very small number of very large organisations, and would have to be assessed on a case by case basis. The fact that ISDN prices have not decreased in nominal terms or appreciably decreased in real terms in the higher level retail access market over the last two years suggests that the exercise of CBP is limited. The use of tendering is not indicative of the overall trend in the higher level access market as a whole and only exists on the margins.

⁶ Local Loop Unbundling. See annex B for a glossary of terms.

Proposed SMP designation

1.16 eircom is preliminarily designated with SMP in the;

- National market for lower level retail narrowband access;
- National market for higher level retail narrowband access.

Remedies

1.17 The market analysis and subsequent identification of competition problems establishes a continuing need for intervention by ComReg to ensure the ongoing availability of CPS and SB-WLR.

1.18 CPS is mandated by virtue of SMP in the retail narrowband access market. CPS and SB-WLR are considered wholesale remedies, which are aimed to address competition problems in the retail market.

1.19 The remedies proposed for both higher and lower level retail access markets are :

Wholesale Remedies

- Mandate an obligation to provide SB-WLR and CPS – under Regulation 16(1) of the Universal Service Regulations for CPS and under the Access Regulations for SB-WLR.
- Impose supporting obligations to support the implementation and development of SB-WLR and CPS products. This would be done under the Access Regulations and it covers the following :
 - **Access (SB-WLR)**
 - ComReg proposes that the SMP operator should be obliged to permit access to relevant wholesale products.
 - ComReg proposes that the SMP operator should be required to grant open access to relevant information, interfaces, protocols and key technologies, and should be required to provide OSS⁷ or similar software to ensure fair competition in SB-WLR and adequate granularity of information
 - ComReg proposes that the SMP operator should be obliged not to withdraw access to facilities already granted, except where ComReg has approved this withdrawal.
 - **Non-discrimination (SB-WLR and CPS)**
 - Oblige the SMP operator to apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and to provide services and information to others under the same conditions and of the same quality as it would provide for its own services or those of its subsidiaries or partners.
 - This obligation would aim to ensure that the CPS and SB-WLR products are fit for purpose and that detailed SLA⁸ development should be supported with a transparency obligation.

⁷ Operational support Systems.

⁸ Service Level Agreements.

- **Transparency (SB-WLR and CPS)**
 - Impose a general transparency obligation to support other obligations.
 - Oblige the SMP operator to maintain all current product documentation (including reference offers) for the SB-WLR and CPS product sets and any new offerings.
- **Price control (SB-WLR)**
 - Continue with the application of the retail minus price control for SB-WLR. It is proposed that the margin of retail minus 10% is appropriate.
- **Cost Accounting and Accounting separation**
 - The existing systems should be maintained and suitably developed, pending the outcome of further consultation on accounting systems and associated methodologies for their support.

Retail Remedies

- **Price control**
 - Maintain current price cap order pending outcome of parallel review.
- **Transparency**
 - Propose to remove obligation to publish changes to prices and the terms and conditions in advance. The SMP operator is still required to publish in named sources⁹ when changes come into effect. Propose that the SMP operator should notify ComReg five working days before changes come into effect (currently this is done on a voluntary basis).
- **Cost accounting systems**
 - The existing level should be maintained and developed, pending the outcome of further consultation on accounting systems and associated methodologies for their support.
- **Obligation not to unreasonably bundle**
 - It is proposed that the SMP operator is required to offer all retail narrowband access services as stand-alone products. ComReg would also like views as to whether the SMP operator should be required to pre-notify the introduction of new bundles which include narrowband access services.

1.20 ComReg believes the remedies set out in this market review support the objectives outlined in the Communications Regulation Act 2002 as to how ComReg should exercise its functions. Remedies proposed aim to address market failures, to protect consumers against the exercise of market power and to promote competition in the markets for higher and lower level retail access.

⁹ eircom's public offices and eircom's web site.

2 Introduction

Background

- 2.1 On 01 September 2004 ComReg published a national consultation on the market for Retail Fixed Narrowband Access (ComReg Doc 04/95), and on the 22 March 2005 ComReg notified to the European Commission and published the response to consultation (ComReg Doc 05/25). The notified measures were accepted by the EU Commission, in correspondence to the Chairperson of ComReg dated 25 April 2005. This process is referred to throughout the document as the ‘initial review’.
- 2.2 ComReg has decided that, before issuing a Final Decision, it is appropriate to re-examine and update the market analysis contained in the initial review. This will allow ComReg to fully consider any change in the market from the time of the initial review. This process is referred to throughout the document as the ‘current review’.
- 2.3 The current review has involved collecting and updating data, and extending some elements of the analysis to take account of changing conditions. As part of the current review, ComReg issued specific data directions¹⁰. ComReg also issued an Information Notice inviting further input¹¹ which is referred to as the ‘call for input’ throughout the document.
- 2.4 The initial review generally incorporated market information to the end of 2004, where this information was available, and looked ahead two years in considering how the markets were likely to develop. This current review has updated market information to the end of 2005, and in some cases has included data for the first quarter of 2006. As recommended in *The Guidelines*¹² the current review considers the market prospectively, and considers how the market is likely to change over the next two years.
- 2.5 ComReg is now inviting response to this updated market analysis, and to the proposals and views contained herein. The intention is to consider responses and publish a Final Decision, which will also be notified to the European Commission.
- 2.6 ComReg would welcome comments from all interested parties on the questions posed in this market review and will accept written comments on or before 5.30 pm Friday 29 September 2006. Under Article 5 of the Framework Regulations and in order to promote further openness and transparency, ComReg will publish the names of all respondents subject to maintaining confidentiality.
- 2.7 In parallel with the publication of the current review on the Retail Narrowband Access Markets, ComReg has also published a consultation of the Payphone Market Review - see Document Number 06/40¹³. ComReg also plans to issue a consultation on the Retail Fixed Calls Markets in the immediate future.

¹⁰ Calls Data Direction – dated 08 March 2006 and 24 May 2006, VoIP Data Direction – dated 11 May 2006 and Customer Categorisation Data Direction 02 March 2006.

¹¹ Information Notice “Retail Access and calls market review” doc 06/10, 24.02.06

¹² Commission’s Guidelines on Market Analysis and Significant Market Power (“The Guidelines”). OJ C 165/03. Paragraphn 20.

¹³ Available from the ComReg website www.comreg.ie.

Structure of this document

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

- **Section 3** presents ComReg's preliminary conclusions on the definition of the markets for fixed retail narrowband access. This section consists of a review of the market definition procedure and its scope, as well as demand- and supply-side assessments at the wholesale and retail level;
- **Section 4** presents ComReg's market analysis for the retail narrowband access market and presents ComReg's preliminary view on whether the markets are effectively competitive;
- **Section 5** presents ComReg's preliminary view on those undertakings with significant market power in the retail narrowband access markets;
- **Section 6** provides a discussion of competition problems. The general principles associated with remedies are outlined. A range of possible remedies is identified, and likely remedies proposed;
- **Section 7** outlines the nature of the regulatory impact assessment that needs to be conducted in relation to any proposed regulatory intervention regarding these markets;
- **Section 8** provides details with regard to the submission of comments on this consultation document.

Q.1. Are there additional factors that in your opinion require analysis by ComReg. If yes, please indicate precisely what they are. In respect of the factors analysed, is there additional analysis that in your opinion must be carried out. If yes, please indicate precisely what that is.

3 Relevant Market Definition

Background

- 3.1 In order to consider the definition of retail access markets, ComReg assessed the extent to which products or services have objective characteristics, prices and intended use which make them sufficiently interchangeable. ComReg examined, where necessary, the prevailing conditions of demand and supply substitution by applying the hypothetical monopolist test.
- 3.2 The initial review¹⁴ described the procedures which were followed by ComReg in undertaking market definition and analysis and outlined the regulatory basis of the exercise. This current review takes into account developments in the retail narrowband access markets and comments made by respondents to ComReg's call for input.
- 3.3 In considering the markets for retail narrowband access, it is noted that access to the telephone network may be offered:

Directly – this is where the customer is connected directly to the operator's network. Direct access may be offered via copper, FWA, fibre or cable. ComReg considers that access via LLU (Local Loop Unbundling) is a form of direct access, which is the process where an incumbent operator makes its local network (the connection from the customer's premises to the telephone exchange) available to other companies. Operators are then able to upgrade individual lines to offer services direct to the customer.

Indirectly - where wholesale inputs are used to offer access services. Products such as single billing wholesale line rental (SB-WLR) mean that while ownership of assets may not change, access services can be offered to end users by a third party.

Scope

- 3.4 The *Framework Regulations* require that the market analysis procedure under Regulation 27 be carried out subsequent to ComReg defining a relevant market, which is to occur as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets ("*the Relevant Markets Recommendation*") by the EU Commission.¹⁵ In carrying out market definition and market analysis, ComReg must take the utmost account of the Relevant Markets Recommendation and the Commission's Guidelines on Market Analysis and Significant Market Power ("*The Guidelines*"). ComReg adopted the EU Commission's approach¹⁶ as its starting point for defining the market, such that the review was concerned with the ability of customers to access the public fixed telephone network.
- 3.5 The scope of this market definition considers the following:

- Are fixed access and fixed calls in the same relevant market?

¹⁴ ComReg document numbers 04/94 and 05/25.

¹⁵ Framework Regulations 26 and 27.

¹⁶ Commission Recommendation on Relevant Product and Service Markets, in accordance with Directive 2002/21/EC.

- Are fixed access and mobile access in the same relevant market?
 - Are all forms of fixed narrowband access in the same market?
 - Are there separate relevant markets for residential and non-residential customers?
 - What is the geographic scope of the market?
- 3.6 Each of these matters is reviewed below, with a focus on any change that has occurred since the time of the last review.
- 3.7 The timeframe of this review is approximately two years from the date of publication of the Decision. In accordance with the *SMP Guidelines*¹⁷ ComReg must conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions. Thus, the market definition and SMP analysis takes into consideration both current market conditions and any potential developments over the next two years.

Q. 2. Do you agree with the scope of the review? Please substantiate your answer.

Is there a single market for fixed access and fixed calls?

Introduction

- 3.8 In the initial review, ComReg proposed to define separate markets for retail access and retail calls.
- 3.9 Demand-side analysis preliminarily concluded that access and calls were complementary, and are not functional substitutes. It was noted that while many users have a preference for purchasing access and calls from the same provider due to lower transactional costs and the ease of a single bill, consumers continue to acquire call services from alternative service providers for some/all of their outgoing calls. If a provider of access and calls attempted to raise its price of some/all of these outgoing calls above the competitive level, they would be constrained by the ‘alternative provider’. Furthermore, it was noted that there is no functional substitutability between access and calls. The relationship between the two is vertical, and they perform different functions. On the demand side, therefore, fixed access and fixed calls cannot be seen as close demand side substitutes.
- 3.10 In terms of the supply-side, it was noted in the initial review that there was greater potential, absent regulation, for an access provider to enter the calls market than for a calls provider to enter the access market. It was suggested that the main area of potential change on the supply-side was likely to be the development of combined calls and access products, and that this could change the conclusions on supply side substitutability. ComReg noted that this would be monitored.
- 3.11 As part of the current review and in considering changes in the market since the initial review, ComReg has examined in detail changes in the supply and demand of access and calls products. This is presented below.
- 3.12 The key question that remains relevant in the current review is whether the ability to purchase access and calls together is sufficient to render them in the same market. In

¹⁷ See paragraph 20.

the context of the Irish market, this means that ComReg needs to examine the extent to which the prevalence of a single calls and access product is such that calls and access should be considered as a single market

3.13 Figure 3.1 below shows the development of wholesale indirect access products over the period 1997-2006. End users have been able to buy calls separately from access, from an operator other than eircom, since the introduction of Carrier Pre select (CPS) in 2000. In 2004, SB-WLR was introduced to allow retail customers to buy a bundled access and calls product from other operators competing with eircom.

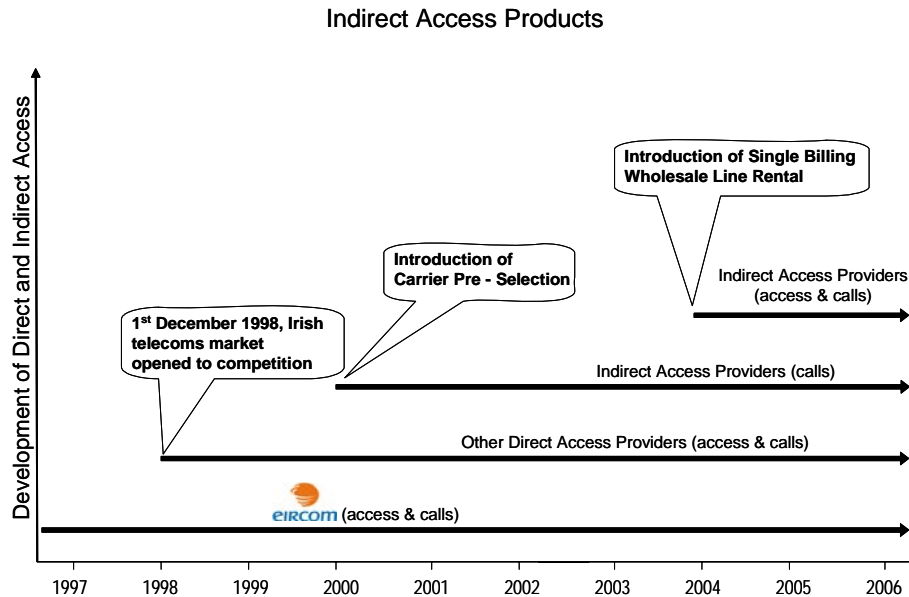


Figure 3.1: Development of CPS and SB WLR¹⁸

3.14 The impetus for the introduction of SB-WLR was that separate billing for access and calls acted as a constraint on the development of competition. This was because many customers can see the advantage of and wish to receive a single bill for both products from a single operator.

3.15 ComReg has analysed change in the narrowband access markets in terms of :

- Service take-up;
- Customer awareness; and
- Bundled services.

3.16 Each of these issues will be considered in turn.

Service take up - Take-up of combined calls and access products

3.17 In assessing purchasing patterns of access and calls, ComReg has examined the take up of:

- SBWLR (which facilitates the provision of access and calls together) compared to CPS (which facilitates the provision of calls only)

¹⁸ Source: ComReg.

- eircom’s Talktime product (bundled access and calls) compared to calls separately

3.18 ComReg has assessed the pattern of growth in SB-WLR lines within the overall take-up of indirect access. If there is a strong increase in SB-WLR lines as a proportion of all lines, then it would indicate a possible tendency towards convergence of access and calls products.

3.19 As will be discussed in more detail further on in this document, indirect access accounts for approximately 11% of all PSTN¹⁹ and ISDN BRA lines, and around 5% of ISDN FRA and PRA lines.

3.20 As shown in Figure 3.2 below (which presents the take up of indirect access products) there has been rapid growth of SB-WLR since its launch, and the single billing product now accounts for more than half of all indirect access products. Since June 2004, SB-WLR has increased by over 250,000 lines while CPS has decreased by approximately 120,000 lines. This would indicate that while there has been migration from CPS-only to SB-WLR, nearly half of CPS-only subscribers have remained despite the availability of a single billed product. .

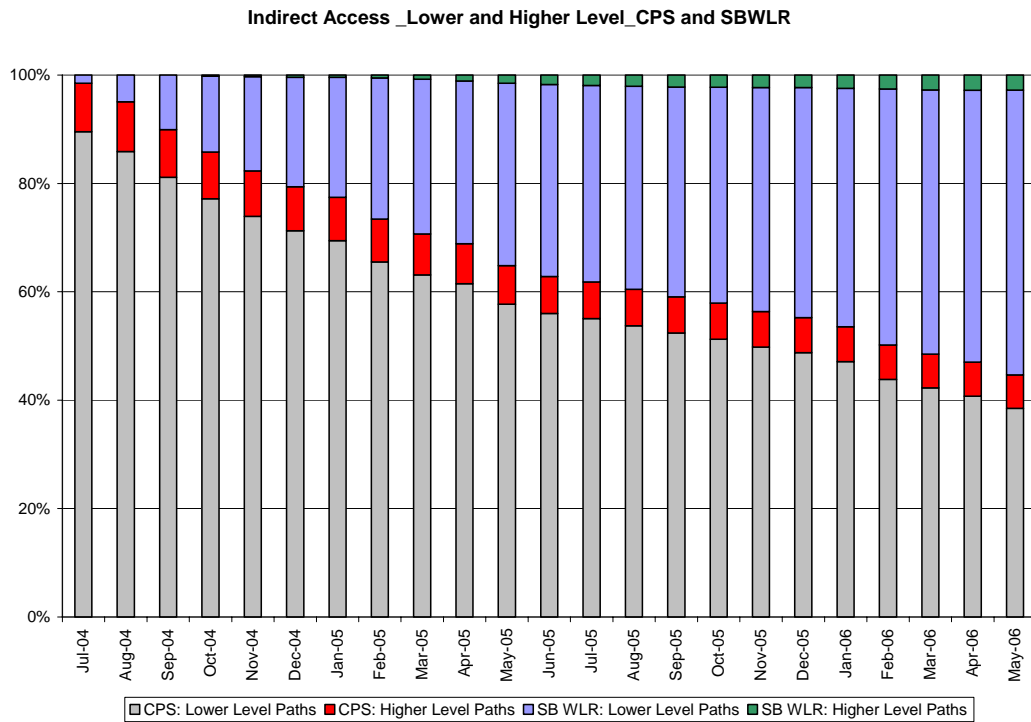


Figure 3.2: Take Up of CPS and SB-WLR²⁰.

3.21 Also, at the time of publication of this document there were thirteen CPS providers and seven providing services via SB-WLR²¹. Subsequent to the launch of SB-WLR, some operators have retained CPS-only offerings and some even began offering CPS only.²² Furthermore, consumer survey results²³ showed that 15% of corporates are

¹⁹ Public Switched Telephone Network – see annex D for a glossary of terms.

²⁰ Source: ComReg.

²¹ This does not include resellers.

²² It should be noted that SBWLR subscribers also acquire CPS in combination with line rental.

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provided with fixed line services by eircom *and* another provider. This may indicate that there is still a separate market for calls.

3.22 eircom offers a bundle of line rental and calls, marketed as “talktime”. This bundled package was introduced on 1 June 2004, and there were 52,000 packages sold by the end of June 2004. eircom announced that it had sold 238,000 Talktime packages by March 2005.²⁴

3.23 ComReg’s assessment is that both the OAOs’ SB-WLR product and eircom’s calls and access bundle have shown strong growth in the market. The preliminary conclusion therefore to be drawn from this analysis is that while the take up of single billing products has grown since their introduction, enough customers still buy the products separately, and enough operators still offer them separately, to render calls and access in separate markets.

Customer awareness

3.24 In June 2005²⁵ ComReg published a survey which showed that 75% of SMEs (Small and Medium-sized Enterprises) and 94% of large corporates were aware of single billing. More recent survey data²⁶ shows that switching activity has increased significantly, while only 16% of SMEs had switched provider in 2004, 45% had done so in 2006 (and 40% of corporates had switched in the same time period).

3.25 Awareness among residential users who were *not* currently using single billing remains relatively high. In response to the question of whether users were aware of single billing the following results were found among residential users.

Are you aware of SB_WLR?		
	Aware	Unaware
Q2 2005	41%	59%
Q1 2005	41%	59%
Q4 2004	50%	50%

Table 3.1: Survey Findings on Awareness of SB-WLR.

3.26 It also must be noted that the survey question was directed at customers who did not use SB-WLR, and as the penetration of SB-WLR increases, the pool of potential respondents decreases.

3.27 Examples of other indicators of awareness include:

- At Q1 2006²⁷ the main reason given by consumers for switching back to eircom was that “it was too much hassle to receive two bills”.
- In Q4 2005, those who do not avail of single billing cited lack of awareness as the main reason for not using the service.

²³ Millward Brown IMS – SME and Corporate ICT Research. Wave 3.

²⁴ eircom group plc, quarterly 1 results to 30 June 2004. 27 August 2004. Slide 10 and quarter 3 results to December 2005, slide 6 available at.

http://investorrelations.eircom.net/pdf/3rd_quarter_results_2005_presentation.pdf

²⁵ amárach Half 1 2005 survey

²⁶ Millward Brown IMS: May/June 2006. Over half of respondents had switched in the previous 12 months.

²⁷ amárach Q1 2006 survey.

3.28 ComReg's assessment of consumer survey data indicates that, as would be expected, overall awareness of single billing has increased since the time of the initial review. The main segment where lack of awareness remains an issue is amongst residential customers who have not used calls or access products supplied by operators other than circom.

Bundled services

3.29 A significant development since the time of the initial review is in operators offering bundles which include a broader range of services than access and calls, with some offering data and TV in the bundle as well²⁸. ComReg notes examples from other countries of plans to introduce bundles which would incorporate voice, data, TV and mobile²⁹. While the demand for calls and access bundles may be increasing, this does not automatically preclude a finding of separate markets for calls and access respectively³⁰. Despite the increase in availability and take-up of bundled packages, calls and access are still often purchased separately.

Preliminary Conclusion

3.30 ComReg has analysed patterns of change in the retail markets for fixed calls and access. The focus has been on assessing the extent to which the development of a combined calls and access product has merged the access and calls markets. It can be noted that SB-WLR is increasing as a proportion of all indirect access lines, and now represents over 50% of indirect access lines. Also, customer awareness of single billing has increased overall since the initial review. This would suggest that with increased awareness there is potential for the continued growth of SB-WLR. However, it should also be noted that indirect access makes up some 15% of all access paths, so that while the proportion of indirect access paths has grown, it is still a small part of the overall market.

3.31 This suggests that even if the price for calls or access sold separately were to increase by a small but significant amount it is unlikely that customers would switch in sufficient numbers to fixed calls/access *convergent products* such as to render that price increase unprofitable.

3.32 In the initial review, ComReg noted the trend towards bundling access and calls and this was re-examined in the current review. More recently, there is a trend towards offering bundles which are flexibly structured, and could include elements of access, calls, data and broadcast. Many operators offer a package which is customised. However, each element of the bundle (whether access, calls, data or TV) can be, and often is, bought separately. Even if the price of the access and calls elements sold separately were to increase by a small but significant amount, it is not clear that customers would switch in sufficient numbers to a *bundled product offering* such as to render it a close enough substitute.

3.33 In accordance with the Relevant Markets Recommendation, ComReg proposes to define separate markets for telephone services from a fixed location as distinct from the market for narrowband access.

²⁸ Examples include ntl and Magnet.

²⁹ Merger between virgin and ntl - see http://en.wikipedia.org/wiki/Fixed_mobile_convergence.

³⁰ This is supported by ECJ/CFI case law e.g. *Airtours v. Commission*.

Q. 3. Do you agree that retail calls and retail narrowband access are in separate markets? Please elaborate your response.

Are fixed access and mobile access in the same relevant market?

Introduction

3.34 The Recommendation on the Relevant Markets Recommendation states that:

“Calls from fixed locations to mobile telephones or indeed to other non-geographic locations are [likewise] not perceived by end users to be sufficiently substitutable to be considered in the same market in terms of demand. A user wishing to call an individual on a mobile phone is unlikely to consider a call to a fixed line number an equivalent. However, just as with geographic equivalents service providers providing one category of services can be expected to be in a position to purchase the wholesale elements that are needed including mobile termination if a hypothetical monopolist attempts to increase prices.”³¹

3.35 In the initial review, ComReg concluded that access from fixed locations and access from mobile locations were not in the same market. Fixed and mobile access were characterised as complementary products rather than as substitutes, in that consumers used both fixed and mobile access for telephony services, depending on where they were located.

- On the demand side, mobile access was generally more expensive than fixed access, and this affected demand substitution
- Functional differences, particularly the ability to deal with data, and the actual mobile functionality, indicated that there should be separate markets
- Supply side substitution in response to a small but permanent price increase was seen as unlikely

3.36 ComReg noted in the initial review that the potential for convergence may be increasing, and signalled that this would be kept under review. ComReg has noted the detailed submissions from respondents, and in addition to examining developments since the time of the initial review, has undertaken further analysis of change in the level of substitutability.

3.37 ComReg’ assessment of one operator’s submission which was provided as part of the initial review (which was particularly detailed) was that taken as a whole, the submission contended that mobile and fixed telephone services were weak substitutes. The analysis presented by the operator attempted to see whether mobile is a close substitute for fixed at the access level. It used data, predominantly drawn from OECD and EU sources, to model the growth of fixed line penetration as a function of a number of other variables³². The results showed that while mobile expenditure and fixed expenditure are indeed substitutes, the relationship is rather weak, with a 10% increase in mobile penetration leading to a 0.06% decrease in the level of fixed-line

³¹ See page 17.

³² Including the level of mobile penetration, GDP per capita, internet penetration, and the subscription rate (price) for fixed line access.

- penetration, and indeed this coefficient was not significant at the 5% level. As a result, the operator concluded that fixed and mobile products are weak substitutes at the access level.
- 3.38 Mobile telephony penetration rates have increased since the analysis described above was done [2003], so it is likely that the relationship has become stronger. However no currently available evidence suggests that fixed and mobile access are sufficiently close substitutes as to ensure that should prices of fixed line services rise by 5-10%, enough people would switch to mobile as to render this unprofitable for the fixed access operator.
- 3.39 Since the time of the initial review, there have been no decisions of either the Irish Competition Authority or the EU Commission to the effect that there are separate markets for fixed and mobile services. Indeed, recent merger decisions of the EU Commission have relied on the market definitions contained in the Recommendation on Relevant Markets³³. None of the recent decisions appear to have departed from the Vodafone *Airtouch* / *Mannesmann* decision³⁴ where the EU Commission, as in previous decisions³⁵, confirmed the existence of a distinct product market for the provision of mobile telecommunications services.
- 3.40 This position is very much reflected in Ireland, where, for example, the Competition Authority cleared *eircom's* acquisition of Meteor, and decided that there existed distinct product markets. The decision clearing the acquisition did however note the possibility of an emerging market for fixed/mobile convergent products³⁶.
- “The Competition Authority believes that the level of substitution has not reached the point where the different products can be considered to be in the same market. There is no evidence that the level of substitution has changed significantly since the most recent determinations by ComReg and the Commission that fixed line and mobile telecommunications services are in separate markets.”*
- 3.41 While most European NRAs (including those with a higher mobile penetration rate and lower fixed penetration rate than Ireland³⁷) have recognised, in their notifications to the European Commission, some level of fixed mobile substitution, none has concluded that there is a single market for fixed and mobile services³⁸.
- 3.42 In the initial consultation, ComReg analysed potential demand and supply side substitution of fixed and mobile access³⁹. It is considered that the conclusion on potential supply side substitution – that a mobile operator would not be likely to

³³ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

³⁴ Decision of 12 April, 2000 in case COMP/M.1795 - *Vodafone Airtouch / Mannesmann*.

³⁵ For example Decision of 13 October, 1999 in case COMP/M.1439 – *Telia / Telenor*, see paragraph 94.

³⁶ Merger determination of the Competition Authority (M/05/050). Proposed acquisition of Meteor Mobile Communications Limited by *eircom* Group plc 18 November, 2005.

³⁷ Portugal, Sweden, UK, Finland, Spain, Austria, Netherlands have a higher mobile penetration rates than Ireland - see Irish Communications Market: Quarterly Key Data- June 2006. ComReg Document Number: 06/28 for a comparative analysis of mobile penetration among Member States. Belgium, Spain, France, Italy, Austria, Portugal and Finland have lower fixed penetration rates than Ireland. See IPSOS report produced for the European Commission DG Information Society 2004 for a comparative analysis of fixed penetration.

³⁸ See CIRCA - Communication & Information Resource Centre Administrator.htm for Notifications and Comments from individual NRAs in respect of the relevant markets.

³⁹ See Market Analysis: review of the narrowband access markets (05/25) for analysis.

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switch to the supply of fixed access given a small but permanent price increase – remains valid. Supply side considerations are therefore not revisited in the current review, and the following analysis focuses on potential substitution on the demand side.

Demand-side considerations

3.43 In order to extend the analysis of possible substitution, ComReg has examined recent trends in the following areas :

- Trends in penetration;
- Functionality;
- Pricing; and
- Consumer behaviour.

Trends in penetration

3.44 As of August 2005, mobile penetration per capita was higher than fixed-line penetration per capita⁴⁰. In Ireland, fixed line penetration is relatively stable while mobile penetration is increasing⁴¹. Q1 2006 mobile data shows a penetration rate of 103% or approximately 4.3 million subscribers while there are 1.32 million PSTN and ISDN lines (business and residential subscribers). It should be noted that the pattern of take-up is that a household would generally have one fixed line, but could have as many mobile lines as there are people in the household, so that the potential penetration rate for mobile is considerably higher than that for fixed lines.

3.45 In response to the ‘Call for Input’⁴² one operator suggested that despite mobile operators’ marketing efforts to persuade subscribers to abandon their fixed connection, only now was there some limited evidence of this taking place in certain European countries.

3.46 ComReg does recognise a trend towards ‘mobile only’ households (from 12% in 2003 to 15% in 2004⁴³), however, ComReg also takes the view that this is not an indication of the market as a whole but rather substitution is taking place on the periphery, among certain consumer groups.

3.47 According to the amárach Q4 2005 survey results, fixed line subscriptions vary according to age group, geographical region, income group and whether or not respondents own or rent their property.

3.48 Based on analysis of quarterly ComReg surveys carried out in 2005, the average residential fixed line penetration is 72.5%. These surveys also indicate that 15-24 year olds, lower income groups, those in rented accommodation and students, are less likely to have a fixed line in their home. The charts below analyse fixed line penetration by specific demographic sub-sets of the residential market.

⁴⁰ Source: ComReg.

⁴¹ Source: comparative analysis of consumer survey amárach 2005

⁴² 2005 Market Analysis Data Direction. See the introductory text of this consultation document for details of the Call for Input.

⁴³ Source: IPSOS survey for the European Commission, 2004. To note: a 2005 publication is not available.

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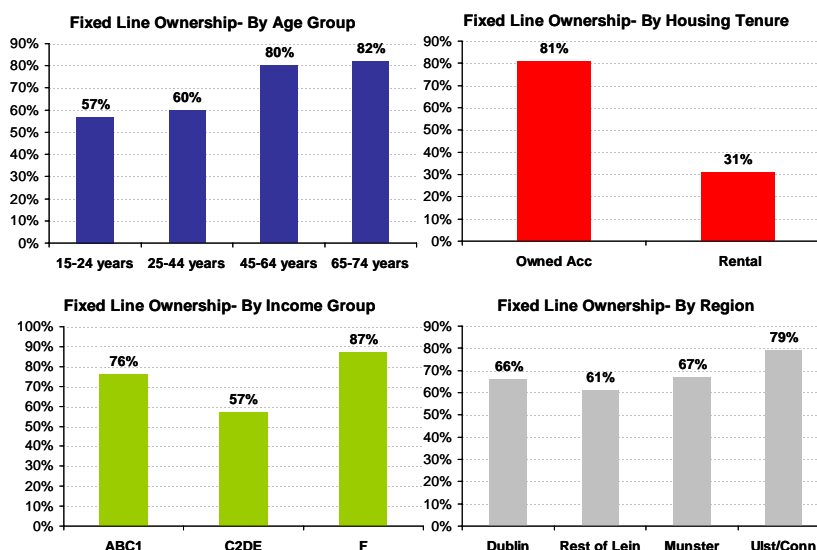


Figure 3.3: Demographics of Fixed Line Ownership

3.49 Survey results⁴⁴ showed that large households are less likely than small households to replace their landline with mobile connections, because more mobile phones would be required, thus incurring higher overall costs. This was confirmed by a survey⁴⁵ conducted for the EU in 2004, which showed a co-relation between single-person households and mobile-only households, but also between single-person households and households with no telephony access.

3.50 Households most likely to replace their fixed line with mobile connections are small households with relatively high incomes (because they can afford the convenience) and those with relatively low incomes (because of budget constraints). The former are likely to opt for mobile contracts, and the latter prepaid mobile accounts.

Functionality

3.51 ComReg has considered functional differences between fixed and mobile access which may impact on possible substitutability.

3.52 Evidence indicates consumers acquire a fixed narrowband access for *both* voice and narrowband data transmission, while mobile access is used primarily for voice⁴⁶. Further, where mobile data service are accessed this is mostly for SMSs⁴⁷. Only 4.7% of mobile subscribers access the Internet via their mobile,⁴⁸ which can be compared to 71% (of home Internet access) being provided via fixed lines.⁴⁹

3.53 For access to voice services, ComReg considers that fixed access does *not* provide the same functionality as mobile access. Fixed access is attached to a place, mobile services are attached to the person and can transfer with that person. This added

⁴⁴ Source Analysys report on Mass market voice, June 2005.

⁴⁵ IPSOS survey, as above.

⁴⁶ 4.7% of Internet access is via mobile according to the CSO, June 2005.

⁴⁷ Short Message Service.

⁴⁸ According to the last annual survey by the CSO, June 2005. Also, according to the Amárach Consulting survey dated December 2005, 68% of respondents with mobile phones have used none of these data services.

⁴⁹ 71% of households according to the Q4 2005 amárach survey (59% dial up and 12% ISDN) and 37% of SMEs and 19% of large corporates (over 100 employees_ according to our H2 2005 IMS Millward Brown survey.

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- functionality resulting from the convenience of being able to make and receive calls ‘on the move’, suggests that fixed services are unlikely to act as a substitute for mobiles. However, mobile phones can be substitutable for fixed services since they have the same function as a fixed line but with a mobility element. This represents a fundamental difference between the two communications services.
- 3.54 ComReg has assessed the level of demand side substitution between fixed and mobile Internet access and the evidence shows that there is very little substitution between the two types of access. This is because the price of mobile data for an equivalent data speed is relatively high. Additionally, from the majority of handsets, only a fraction of the Internet is accessible and only part of this fraction is delivered because of the constraints of screen size on mobile telephones. Interactivity is also limited due to the small size keypad.
- 3.55 Taking a forward looking perspective, the level of functional substitution is likely to increase with technological developments of mobile package switched services⁵⁰. The current take up of 3G services is de minimis⁵¹.
- 3.56 Since the time of the initial review, there has been widespread interest in the idea of a converged fixed/mobile market. As there are currently no converged products or services available in the Irish market, ComReg must instead rely on a prospective assessment of the *likelihood* of a converged market developing within the next two years, the period of the review.
- 3.57 When operators were recently asked⁵² to identify the main areas of potential convergence between fixed and mobile services, it was suggested by one operator that a converged F-M market may develop in the future depending on the success of development of communications technology. However, they also noted that these products were not currently available in Ireland, nor was it clear when they would be developed, and what their specification and prices would be, and/or their target customers. The view was that any such fixed/mobile converged market was entirely speculative. It was noted that a number of operators were trialling services, but none claimed that service would be launched commercially within the next two years⁵³ and that ComReg has recently published a consultation on Geographic Number Allocations for Hybrid Fixed-Mobile Telecoms Services⁵⁴.

Pricing

- 3.58 It is difficult to directly compare the cost of fixed access with the cost of mobile access, as mobile access is generally sold either as a bundle of access and calls, or as a pre-paid service which does not incur an identified access charge. (It should be noted that over 76%⁵⁵ of all mobiles are pre-paid). Mobile handsets are generally subsidised by the mobile operator and indeed there is not a direct retail charge for connection to the network. This differs to the pricing of fixed access, which has generally a separate connection fee which is relatively high.

⁵⁰ GPRS (General Packet Radio Service) and UMTS (Universal Mobile Telecommunications Systems).

⁵¹ Around 4.2% of mobile phone users according to the last Amárach Q4, 2005 survey (7% of 60%). Vodafone press release reported over 200,000 subscribers by the end of 2005

⁵² 2005 Market Analysis Data Direction – Issued by ComReg in October 2005 to all ECN and ECS providers.

⁵³ Submission provided October 2005.

⁵⁴ ComReg Document Number 06/33.

⁵⁵ Irish Communications Market: Quarterly Key Data -March 2006. Reference Number 06/28.

3.59 Access and call services are inextricably linked, for a person to make a call, they must have access. The tariff structures for fixed and pre paid mobile services are different in structure. In Ireland for fixed services a consumer must pay a monthly line rental of €24.18. Beyond this, the variable cost - the cost of the actual call - is relatively low. Therefore the marginal cost will be lower for consumers who make a higher volume of calls. This is because the fixed cost - the line rental - is spread over a larger number of minutes. This can be compared to a pre paid mobile service tariff structure, where the access and call tariffs are bundled. Therefore, if a consumer makes a very low number of calls, a pre paid mobile bundle may be lower in cost than fixed line rental. However, in such cases the vulnerable user scheme, (which is aimed at low volume users as opposed to susceptible ones)⁵⁶ is available to those who make very low volumes of fixed calls at low rates.

3.60 It is important to note that a fixed connection is not limited to voice services only but offers access to data services also.

Consumer behaviour

3.61 From discussions with industry parties, ComReg has identified that some consumers see that the calling experience from a fixed line as opposed to a mobile is differentiated. ComReg suggests that some consumers will be slower to switch away from their fixed channels as a result of tacit benefits associated with their fixed line e.g. comfort with existing technology and a lack of interest in new communication developments, privacy in making a call and projecting a sense of stability and security to customers.

3.62 Most importantly, survey results show consumers perceive there to be difference between mobile and fixed access, results show that 63% of home telephone users did not believe their mobile was a substitute for a fixed line phone⁵⁷.

3.63 Furthermore, consumer survey findings⁵⁸ suggest there are distinct call patterns from fixed and mobile hand sets. Consumers are more likely to make a call from a mobile for shorter calls⁵⁹. For a five minute call – as opposed to a two minute call - respondents were more likely to call from a landline and less likely to call from a mobile. Also respondents were more likely to use their mobile to call another mobile.

Preliminary Conclusion

3.64 ComReg has carried out a detailed assessment of any developments in the market which would impact on the substitutability of fixed and mobile access. Since the time of the first review, the market has been characterised by an increase in mobile penetration, while the number of fixed lines has remained fairly stable. Analysis of the data suggests that while some of this may be due to mobile access substituting for fixed access (that is, customers giving up a fixed line in favour of mobile only), some

⁵⁶ In June 2003 the cap of CPI on the lower quartile bill was removed on the understanding that eircom's proposed Vulnerable User Scheme would be introduced. A cap of CPI was placed on the median Vulnerable User Scheme bill, which includes PSTN access and some call types. This ensures that the median bill of customers who avail of the scheme will not increase by more than inflation. Persons on the VUS account for approximately 1% of total fixed line subscribers.

⁵⁷ amárach Consulting Wave 4, 2005.

⁵⁸ amárach Consulting, April 2006

⁵⁹ Source: Survey data. amárach April 2006.

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is due to the different natures of the access forms, such that households are likely to have one fixed line but potentially several mobile lines.

- 3.65 ComReg does not consider that fixed and mobile access are strong functional substitutes. Mobile is used primarily for voice, with mobile data used primarily for SMS. Fixed is used for voice and internet access. The mobility element associated with mobile also indicates a lack of a sufficiently high degree of functional substitutability.
- 3.66 The introduction and widespread dissemination of converged fixed and mobile products and services in the Irish market could change this conclusion over time, but according to the views of operators, this is not likely to occur within the timeframe of this review. Having examined the relevant factors this is a view which ComReg would concur.
- 3.67 For these reasons, ComReg's preliminary conclusion is that, at this time, fixed and mobile access are not strong substitutes, and so are not in the same relevant market.

Q. 4. Do you agree that fixed narrowband access and mobile access services do not currently belong in the same relevant market? Please elaborate your response.

Are all forms of fixed narrowband access in the same market?

Introduction

- 3.68 In the initial review, ComReg proposed that fixed retail access to the public telephone network included two relevant markets:
1. **Lower Level Access** – including services over public switched telephone network (PSTN), narrowband fixed wireless access (FWA) and ISDN basic rate access (BRA);
 2. **Higher Level Access** – including services over ISDN fractional rate access (FRA) and primary rate access (PRA).

3.69 This was because:

Demand- side considerations

- While basic rate ISDN, narrowband FWA and PSTN access are functionally substitutable, these access types are not functionally substitutable with ISDN FRA and PRA. For ISDN PRA and ISDN FRA, while these services share overall functionality with analogue access and basic rate ISDN, the larger number of channels means that additional network equipment - a PBX⁶⁰ - is required to switch calls on the customer's side of the network termination point. Supplementary services can be used with a PBX to allow certain additional facilities often associated with private networking;

⁶⁰ Private Branch Exchange.

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- A rise in the price of analogue fixed line access could lead to customers deciding to use alternatives for PSTN access, either from other operators or via ISDN BRA. The pricing differences between higher level ISDN access and other PSTN access services suggest that the price of PSTN lines does not constrain the price of higher level ISDN access services;

Supply-side considerations

- The economics of supply are such that the supply of BRA is more similar to PSTN access than it is to the supply of ISDN FRA and PRA products (which offer a greater number of lines). This is because the supply of higher rate ISDN is predominantly via direct access to customers. This leads ComReg to believe that higher rate ISDN access is a separate market on the supply side.

3.70 Since the time of the last review, there have been no significant changes in the forms of access in the market. The pricing of access services has remained unchanged. ComReg therefore proposes to maintain the distinction between lower and higher level access.

3.71 In the current consultation of the Relevant Markets Recommendation⁶¹, the Commission support the approach of defining the market in terms of access products. They state⁶² that since similar products (in particular PSTN access lines) are often used by residential and non residential users, suppliers to non residential users could generally divert their supplies to residential customers should prices to residential customers rise and vice versa. On that basis the Commission propose to define one single market for residential and non residential access, and that on the basis of national circumstances distinct markets for different types of access lines⁶³ are appropriate.

Preliminary conclusion

3.72 ComReg maintains that it is correct to define two narrowband access markets, one for lower level access and the other for higher level access.

**Q. 5. Do you agree that there are distinct markets for retail fixed lower level narrowband access and for retail fixed higher level narrowband access?
Please detail your response.**

Are there separate relevant markets for residential and non-residential customers?

3.73 In the initial review, ComReg suggested that its separation of the markets for higher and lower level access usefully captured the different needs of larger and smaller users of access, primarily by defining them in terms of the services they use, rather than in terms of other features that they may have in common. It was noted that consumers in the higher level access market were likely to be non-residential users, while the lower level access market contained residential and non-residential users. ComReg concluded that it was more appropriate to define the market in terms of product type

⁶¹ Public consultation on a draft commission recommendation on relevant product and service Markets. Brussels, 28 June 2006 SEC(2006) 837.

⁶² see page 20.

⁶³ For PSTN, ISDN BRA, ISDN FRA and ISDN PRA.

- rather than user type, and that residential and non-residential access were not in separate markets.
- 3.74 It should be noted that a consideration of separate markets for residential and non-residential users is only relevant in the lower level access market, as the higher level retail access market contains only business customers. The analysis carried out for this review indicates that there is still no differentiation between residential and non-residential users in terms of pricing for connection or rental.
- 3.75 ComReg's analysis of business and residential customers acquiring fixed access in the lower level retail access market indicated that there is no differentiation in terms of pricing for connection or rental, and there is little differentiation in the conditions of supply. Additionally, ComReg notes that residential and non residential access is functionally homogeneous in terms of quality of service. The economics of supplying business and residential customers suggest that it is relatively simple for a supplier to supply both, in response to a hypothetical price increase for one type of customer.
- 3.76 It can be noted that demand considerations for access differ from demand for calls. For example, a small business customer would buy access in the same way, on the same terms and for the same purpose as a residential customer. However, the calling pattern of a small business customer may be very different to that of a residential customer, and the types of call packages supplied may reflect this difference. Accordingly, while ComReg has proposed separate markets for residential and non-residential calls customers, it is not appropriate to do this in the access market.
- 3.77 ComReg suggests that its separation of the markets by product type (as discussed above in the analysis of whether all forms of fixed narrowband are in the same market) rather than user type is more appropriate in the context of the Irish access market.
- 3.78 ComReg therefore proposes to maintain a single market for residential and non-residential customers. As outlined above, the European Commission supports this approach in their current consultation on the Relevant Markets Recommendation⁶⁴.

Q. 6. Do you agree that it is inappropriate to further divide the lower level market into residential and non residential markets? Please detail your response.

What is the geographic scope of the market?

- 3.79 In the initial review ComReg noted that the conditions of supply of access services are homogeneous across Ireland. In particular, while the access services provided by some entities other than eircom are not available across the whole of Ireland, they all compete with eircom's access services where they are available. eircom's access services are provided on the same terms and conditions, including price, across Ireland. ComReg adds that the General Authorisation⁶⁵, which is required of any undertaking which intends to provide an electronic communications network or service in Ireland, is national in scope. As a result, any operator authorised to provide access services can do so on a national basis which would suggest a national market.

⁶⁴ Public consultation on a draft commission recommendation on relevant product and service Markets. Brussels, 28 June 2006 SEC(2006) 837.

⁶⁵ European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2003.

- 3.80 In response to the ‘Call for Input’ one operator contended that in the period since the initial review there is an increasing incidence of property developers entering into what it described as ‘exclusive agreements’ for operators to provide access networks. It was suggested that there were agreements with property developers for the purpose of providing customised access and call services, which also precluded other operators from servicing customers located in these developments which should be viewed as being sub-geographic markets. It was suggested that sub-markets should be defined, and that the delineation of the market should be where there are no competing sources of supply, i.e. the scope of the OAO’s network.
- 3.81 Following established European case law and guidance, ComReg approaches the definition of the relevant geographic market by identifying “*a clearly defined geographic area in which [the product] is marketed and where the conditions of competition are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated*”⁶⁶ and “*which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*”⁶⁷.
- 3.82 Similar to product market definition, defining relevant geographic markets involves first identifying possible demand and supply side substitutes for the relevant or focal area by way of the hypothetical monopolist test. In that regard, ComReg considers whether a price increase by a hypothetical monopolist of a property development where it has exclusive access infrastructure would induce customers to switch to access providers located outside the relevant area/development or if providers located elsewhere could easily switch to supplying customers in the relevant area/development. If such demand/supply side substitution is possible and likely to occur in response to small price changes, then it is appropriate to expand the scope of the geographic market.
- 3.83 There is a significant level of uncertainty, however, regarding the actual level of “exclusivity” conferred by these agreements and the nature of any corresponding constraints on demand and supply-side substitution from/to these developments. The hypothetical monopolist test is accordingly difficult to apply here. Notwithstanding this, it is also possible to determine the boundaries of the geographic market by looking at pricing and other commercial behaviour and identifying whether common pricing constraints apply across different areas such that they should be included in the same geographic market. Even if it is not clear that demand and supply side substitution could take place from/to these developments, the conditions of competition across different areas may nonetheless be sufficiently similar for them to be categorised as forming part of the same relevant geographic market.
- 3.84 A key issue which would indicate that the market for retail narrowband access is likely to be national is that some operators who have entered into these agreements appear to set prices and market their service offerings on a national basis, regardless of the cost of provision in an individual development. Billing and marketing systems would also appear to pose an obstacle to certain operators offering a more localised pricing policy. The relatively low incidence of exclusive agreements would further suggest that any costly changes to billing and marketing systems may not be practical for these operators at present. As outlined above, the operators also have general authorisations to operate throughout the State there is nothing to prevent an operator from operating on a national basis.

⁶⁶ *United Brands v. Commission*, Case 27/76 [1978] ECR 207, [1987] 1 CMLR 429, para . 11.

⁶⁷ European Commission, Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5, para. 8.

3.85 On that basis, while the exclusive contracts might limit customers in a particular development switching to suppliers located in other areas or suppliers located in other areas switching to a particular development in response to a 5-10% price increase⁶⁸, it is still not clear that competitive conditions are sufficiently different in those developments for them to be considered as separate geographic markets. It would appear from the information provided to ComReg to date that service offerings, pricing behaviour and marketing arrangements within these developments are largely determined at the national level. This is further reinforced by the fact there appear to be certain obstacles to these operators switching to a more localised pricing policy, e.g., in terms of marketing and billing arrangements. It is also possible that any operator that attempted to offer higher prices in a specific area would suffer negative media exposure, which might have a negative effect on its brand. Accordingly, this makes it less likely that such differential prices would occur.

3.86 Given that the competitive conditions in these developments do not appear to be sufficiently distinct from the national market and that the operators engaging in these agreements appear to determine their commercial terms and conditions largely at the national level, ComReg is of the view that the relevant geographic market is likely to be national.

3.87 While ComReg does not believe that the issue of exclusive access involves any exertion of market power, it will keep this under review as it may have implications in respect to consumer choice and service levels.

Preliminary Conclusion

3.88 From discussions with operators to date, ComReg makes the following observations:

- The incidence of exclusive access agreements between property developers and operators for the purposes of providing access networks in particular developments would appear relatively low and the level of exclusivity conferred by these agreements is uncertain;
- Even if it is not clear that demand and supply-side substitution could take place from/to these developments in response to small price changes, it is still not clear that competitive conditions are sufficiently different in those developments from those that apply nationally for them to be considered as separate or sub-geographic markets.
- Service offerings, pricing behaviour and marketing arrangements within these developments appear to be largely determined at the national level and there are constraints to operators determining these factors on a more localised basis.

3.89 ComReg's preliminary conclusion is that the relevant geographical market is Ireland.

Q.7. Do you agree that the relevant geographic market for the retail narrowband access markets is Ireland? Please expand in your response.

Overall conclusions on market definition

3.90 The analysis which has been carried out indicates that :

⁶⁸ It should be noted, however, that such restrictions on demand and supply side substitution have not been sufficiently demonstrated to date.

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- **Fixed access and fixed calls are not in the same relevant market;**
- **Fixed access and mobile access are not in the same relevant market;**
- **All forms of fixed narrowband access are not in the same market;**
- **Residential and non-residential customers are in the same market; and**
- **The geographic scope of the market is Ireland.**

3.91 ComReg proposes to maintain its market definition from the initial review, that fixed retail access to the public telephone network includes two relevant markets:

1. Lower Level Access – including services over PSTN (public switched telephone network), narrowband FWA (fixed wireless access) and ISDN BRA (basic rate access);

2. Higher Level Access – including services over ISDN FRA (fractional rate access) and PRA (primary rate access).

3.92 ComReg's preliminary conclusion is that the geographical scope of both markets is Ireland.

Q. 8. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response.

4 Relevant Market Analysis

Introduction

- 4.1 Having defined the scope of the relevant product and geographic markets, ComReg must assess the level of competition within each market. An undertaking will be deemed to have Significant Market power (SMP) if it is in a position of economic strength affording it the power to behave independently of competitors, customers and ultimately consumers.
- 4.2 In the initial review ComReg presented a detailed analysis of the relevant markets, and assessed the state of competition on the relevant markets. In this document, the focus is on any development in the markets since the time of the initial review.

Background

- 4.3 Access to the telephone network may be offered:

Directly, where the customer is connected directly to the operator's network. eircom is the largest provider in the direct access market, and is the only operator offering ubiquitous access throughout the country (which is a combination of copper, FWA and Fibre). Other owners of access networks offering direct access are the two significant cable operators (ntl Ireland and Chorus which are owned by UPC Broadband) and OAOs offering direct connection and calls to particular types of customer, mainly large businesses⁶⁹.

- 4.4 ComReg considers that access via LLU⁷⁰ is a form of direct access, which is the process where an incumbent operator makes its local network (the connection from the customer's premises to the telephone exchange) available to other companies. Operators are then able to upgrade individual lines to offer services direct to the customer. Where the local loop has been unbundled, it is generally for the provision of broadband services, and not narrowband access only. From the information available to ComReg no operator currently provides higher level narrowband access via LLU.
- 4.5 However, local loop unbundling requires time and high investments, a large portion of which are sunk. Moreover, OAOs in principle do not unbundle local loops to provide narrowband access only. Local loop unbundling therefore does not remove the high and non-transitory barriers to enter the retail access market at a fixed location, nor does it make this market tend towards effective competition.

Indirectly, where wholesale inputs are used to offer access services. Products such as single billing wholesale line rental (SB-WLR) mean that, while ownership of assets may not change, access services can be offered to end users by a third party.

- 4.6 In terms of direct access, ComReg recognised in the initial review that development of new or upgraded infrastructure, and the development of products such as LLU, together with increased use of services such as Voice over Internet Protocol (VoIP) and broadband, could eventually have an impact on the level of competition in the

⁶⁹ Neither cable operators currently offer direct access to narrowband or voice services extensively, other than ntl offering direct access to ISDN PRA.

⁷⁰ Local Loop Unbundling – see annex D for a glossary of terms.

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- market. The current review will assess whether change in the supply of direct access has been significant in the period since the initial review.
- 4.7 At the time of the initial review, indirect access products had recently been launched in the market. ComReg recognised the potential for these products to impact on competition in the retail narrowband access markets through facilitating the provision of access and calls from one operator with single billing. ComReg recognises the need to examine what impact indirect access products have had on the market since the time of the initial review, and to assess whether and to what extent they now act to constrain eircom's pricing behaviour.

Market Structure

Market share

- 4.8 In the *SMP Guidelines*, it is clear that although a high market share alone is not sufficient to establish the possession of significant market power, it is unlikely that a firm will be dominant without a large market share. The *SMP Guidelines* note further that:
- "...very large market shares – in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position"*⁷¹
- 4.9 However, ComReg recognises that large market shares are not in themselves sufficient to form the basis of a finding of SMP and that other factors that contribute to SMP (and indeed offset it) must also be taken into account. Therefore, ComReg does not view the existence of large market shares as being determinative of the question of whether or not SMP exists in the relevant market.
- 4.10 It is important to consider the changes to market shares over time, as this will indicate trends in the market and will contribute to an assessment of whether or not the market may tend towards effective competition over the period of this review. Accordingly, ComReg has analysed market share data from the time of the initial review to the present, and the view of past market developments is therefore based on a time period of around four years.

Market share: lower level narrowband access

- 4.11 Market share data is presented in the presence of wholesale regulation and includes lines provided via SB-WLR. Before the introduction of SB-WLR, eircom's share of the lower level retail access market had remained at over 99% for several years. As shown in Figure 4.1 below, eircom's market share started to decline from the end of 2004, and by the end of March 2006 it was just over 89%.

⁷¹ At paragraph 75.

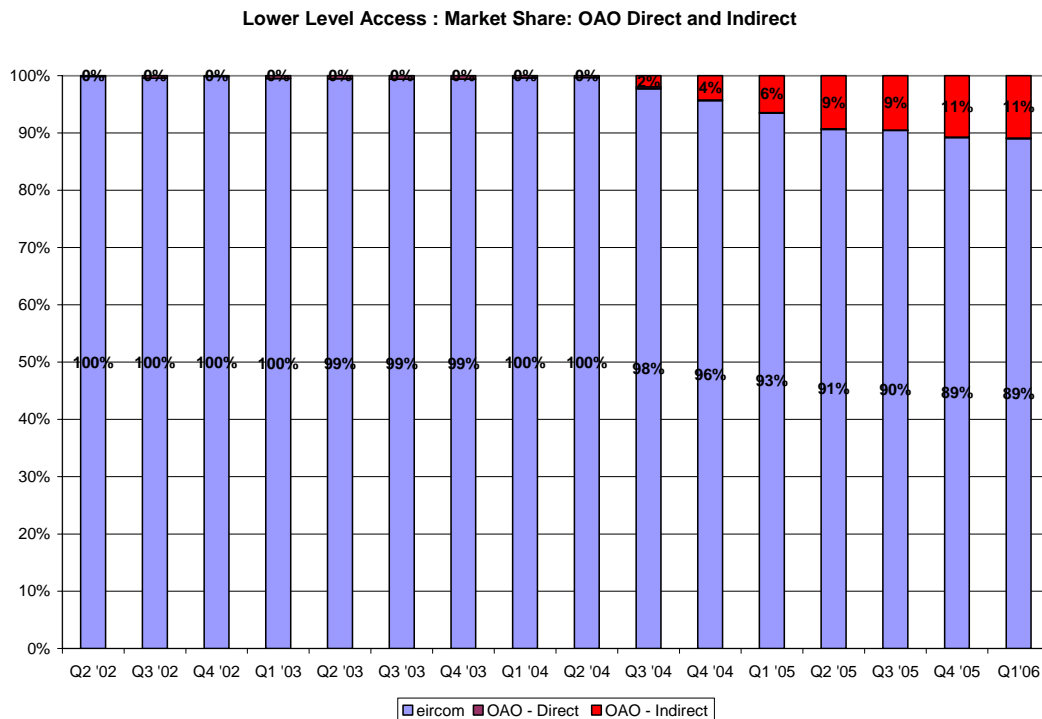


Figure 4.1: Market Share; Lower Level Retail Access Market (Including direct and indirect access).

4.12 Over the same period, OAO market share associated with direct access has decreased, with over 8,700 access paths at the beginning of 2003, falling to just over 1,500 by the end of March 2006. The decline in access lines was primarily due to a fall in take up of ISDN BRA, Chorus' FWA licence being withdrawn and the cessation of direct cable access for PSTN and ISDN BRA by ntl.

4.13 Analysis of market share data indicates an initial rapid take-up of SB-WLR as operators migrated customers from CPS, with slower overall growth in the second half of 2005. It is noted that the analysis is carried out in the presence of regulation.

Market share: higher level access

4.14 A similar pattern of market share behaviour in the higher level retail access market can be observed, as shown in Figure 4.2 below. In early 2004, eircom's share on a channel basis of the higher level narrowband access market was just over 77% and had not fallen below 70% in the preceding four years. During 2004, eircom's share dropped to approximately 69% and has remained around that level through 2005.

4.15 However, the reduction in eircom's market share in the higher level retail access market is due to a combination of the take-up of SB-WLR, and an increase in direct connection in the period since the last review. As would be expected, the cost differences in supply of multiple lines mean that while direct connection is negligible in the lower level retail access market, the proportion of OAO customers connected directly in the higher level retail access market has increased. As shown in Figure 4.2 below, SB-WLR now accounts for around 5% of the higher level retail access market, while direct connection has increased from around 21% of the market at the beginning of 2004, to approximately 26% by the end of March 2006. Nevertheless, while OAOs continue to build and or maintain competing infrastructure, in view of the high barriers to entry, their direct access market share since March 2004 has been fluctuating in the region of 24%. In light of the foregoing it is unlikely that OAOs

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share of direct access will increase significantly in the period of the review. From the information available to ComReg no operator currently provides higher level access via ULL, therefore all direct access is over OAO own build. This suggests that the introduction of SB-WLR has not substituted for OAO direct access customers, but has increased the overall OAO share of the market.

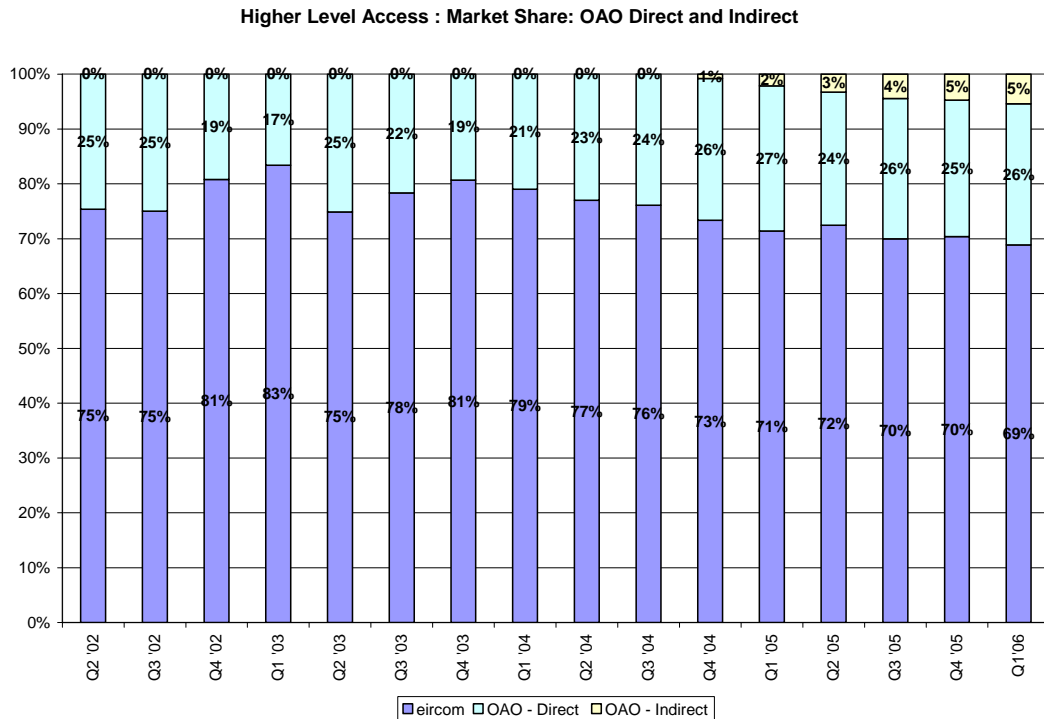


Figure 4.2: market share; Higher Level Retail Access Market (Including direct and indirect access).

Ability to price independently

4.16 The table below gives a brief overview of developments with respect to the prices of eircom’s lower and higher level access.

Services	2003	2004	2005	% change nominal Feb 03 – Feb 06
Rental PSTN	17.5%	5%	0%	23.3%
Rental ISDN	0%	0%	0%	0%
Connection PSTN	0%	0%	-6.5%	-6.5%
Connection ISDN	0%	0%	0%	0%

Table 4.1: Overview of percentage price change of currently capped services

4.17 There have been significant increases in price of PSTN line rental. Enabling full rebalancing in line with European regulatory requirements has resulted in significant increases for PSTN line rental over a period of one year from March 2003 to February 2004 which amounted to around 23 percent.

4.18 All notified price amendments to ComReg on the part of eircom associated with in relation to higher level access (ISDN FRA and PRA line rentals and connections) since 2002 relate either to temporary promotions or supplementary service charges. The standard nominal prices of higher level access products remained unchanged in the period. Nonetheless, as ISDN FRA and PRA line rentals and connections prices

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did not increase in line with annual inflation and / or the consumer price index this represents a aggregate real reduction for the consumer of prices. These decreases have only amounted to 12.8% (which reflects accumulated overall CPI) over a period of four years (between 2002 and 2005).

4.19 The above analysis of pricing developments would indicate that eircom is not being constrained by its competitors in either the higher or lower level access market.

Existing competition

4.20 The analysis of market share indicated that, at the end of March 2006, eircom's share of the lower level retail access market was 89%, and that its share of the higher level retail access market was 69%.

4.21 Direct access is offered by some OAOs, almost exclusively in the higher level retail access market. A total of five operators provide ISDN FRA and PRA by direct access, and the largest are eircom, BT Ireland, energis and ntl. Direct access may be provided by direct build, cable, fibre, wireless or via LLU (however ComReg is not aware of any operator providing higher level access via LLU at present).

4.22 For indirect access, a key change in the structure of the market since the time of the last review has been the development of SB-WLR. This allows an operator to offer customers a calls and access bundle with a single bill. The same group of OAOs offer indirect access products in the lower and higher level retail access markets, although their emphasis may differ, and consequently their significance in each market is different. The main purchasers of SB-WLR are BT Ireland, Smart Telecom, Cable & Wireless, Access Telecom, Talk Talk, Verizon Business and Energis⁷². In addition, resellers may purchase indirect access from OAOs and sell on to end-users. No operator other than eircom has more than 5% market share of the lower level access market.

4.23 During 2005, the number of SB-WLR lines has increased in both markets, while the number of paths associated with CPS has decreased. This is consistent with operators migrating customers from CPS to SB-WLR. ComReg would expect that this trend will continue, with an increase in SB-WLR, but possibly at the expense of a CPS only service, as OAOs continue to migrate customers to single billing.

4.24 Looking at the trends in the market so far, it is likely that any competitive pressure in the lower level retail access market arising through direct access will be via LLU⁷³ rather than from the alternatives listed above. This is due to the economics of supplying customers who require one or two lines. However it is unlikely that a growth in the numbers of LLU customers will fully negate the requirement for a SB-WLR product. SB-WLR can enable an operator to extend its reach to the rural and suburban areas whereas initially LLU penetration is likely to be focussed around the large exchange areas in big cities and town centres. It is likely that a larger operator that wanted to offer service with national coverage would require a combination of wholesale inputs including SB-WLR. Further there are considerable barriers to entry into the voice market associated with LLU⁷⁴ in terms of time and costs to provide physical connectivity to each of those exchanges.

⁷² In August 2005,, C&W acquired Energis, but data is still provided separately.

⁷³ LLU has been mandated by Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops. Document number 04/70.

⁷⁴ ULMP – Fully Unbundled Local Metallic Path

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4.25 LLU has been predominantly used to date for the provision of broadband access. ComReg notes that operators are now offering bundled voice and broadband services. While there has been recent growth in the LLU market, (approximately 9,300 lines at the end of March 2006), it is unlikely that retail narrowband lower or higher level access services provided by OAOs over LLU will offer sufficient potential competition to act as a competitive constraint on eircom over the timeframe of the review. ComReg will however monitor the impact of LLU (ULMP) on the relevant markets, and revisit its analysis if necessary.

Preliminary Conclusion

4.26 Taking together the initial review and its updated analysis, ComReg has assessed market shares over the past five years, for the lower and higher level fixed narrowband retail access markets. eircom's market share has declined in both markets. In the lower level retail access market, this is largely because of the introduction and development of indirect access products. In the higher level retail access market, eircom's share has declined due to an increase in direct connection combined with the introduction of indirect access. Nevertheless, while OAOs continue to build and or maintain competing infrastructure, in view of the high barriers to entry, their direct access market share since March 2004 has been fluctuating in the region of 24%. Furthermore, it must be noted that eircom's market share has remained above 89% in the lower level access market since the initial, review and above 69% in the higher level retail access market, and that in both markets, the initial reduction on the introduction of SB-WLR has slowed.

4.27 It should also be noted that this analysis of market share has been carried out in the presence of regulation. In the absence of regulation, eircom's market share in the lower level retail access market would be close to 100%, and in the higher level retail access market would be 74%.

4.28 An assessment of existing competition would indicate that, to a sufficient extent, eircom is in a position to act independently, of its competitors and consumers.

Barriers to entry and potential competition

4.29 The last section demonstrated that eircom has a high and stable market share in the lower and higher level retail fixed access markets. However, while the high market shares are suggestive of market power, it is important that an overall analysis is carried out in order to determine if eircom can act independently of its competitors and customers in the access markets.

4.30 In the initial review, ComReg analysed actual and potential barriers to entry in the fixed access markets. ComReg has now developed this analysis further, both to take account of developments in the market in the intervening period.

4.31 In order to assess the potential for a new entrant to come into the fixed access markets and act to constrain eircom, ComReg has analysed barriers to entry associated with economies of scale, scope and density, control of infrastructure not easily replicated, and with vertical integration.

Economies of scale, scope and density

4.32 According to the Explanatory Memorandum accompanying the Relevant Markets Recommendation :

“...high structural barriers may be found to exist when the market is characterised by substantial economies of scale, scope and density and high sunk costs. Such barriers can still be identified with respect to the widespread deployment and/or provision of local access networks to fixed locations”⁷⁵.

- 4.33 Economies of scale generally refer to the cost advantage which a large-scale operator may have over a smaller operator in the situation where the marginal cost of production decreases as output quantity increases. Economies of scope refer to the potential efficiencies which may be gained through supplying a range of goods and services, while economies of density refer to potential efficiencies associated with supplying customers who are geographically concentrated.
- 4.34 Should an operator decide to enter the market via direct access, it would require significant investment in an electronic communications network. Most of this will be sunk costs, as such costs will not be recoverable if the entrant decides to, or is forced to, exit the market. Significant sunk costs create an asymmetry in the market. A potential entrant has to consider whether prices would be high enough to recover sunk costs.
- 4.35 It can be noted that the theoretical economic literature generally agrees that there are economies of scale, scope and density in the access network under monopoly –or close to monopoly - supply conditions⁷⁶. Discussing the economies of established national networks, they note that for some network elements, in particular local loop, the cost of duplicating an incumbent’s facility may be prohibitively high. Further, a new entrant must often cover a much higher long-run total service incremental cost, which has to be recovered from a smaller customer base. Another advantage arises from vertical integration, where the incumbent can achieve economies through its ownership of local, national and international networks, and from areas such as network planning, operations and maintenance.
- 4.36 There is a general consensus from quantitative analysis that network size can reach a point where additional participation does not increase the value to participants, and beyond this point, increases in scale are no longer advantageous to the operator. This suggests that there are decreasing returns to scale. It should be noted that several empirical studies⁷⁷ have been carried out in different countries, but are generally beset with methodological and data problems. ComReg is therefore aware that quantitative analysis on this subject may not always be conclusive. A study which was carried out recently⁷⁸ attempted to quantify the point at which scale economies dropped off. This study suggests that the relative impact of size is greater for smaller operators, and proposed that economies of scale started to have a reduced impact at around one million lines. This means that, for example, the relative cost difference for operators

⁷⁵ Commission Recommendation, 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 communication networks and services page 10.

⁷⁶ See for example, the World Bank’s “Telecommunications Regulation Handbook” ed by McCarthy Tetrault.

⁷⁷ For example, Armstrong, M., Cowan, S. and Vickers, J. (1998), Fuss, M. A. and Waverman, L. (2002) M. E., Majumdar, S. K., and Vogelsang, I. (eds.) Elsevier Science B.V, Fuss, M. A. and Waverman, L. (1977) Fuss, M. A. and Waverman, L. (1981) Fuss, M. A. and Waverman, L. (1981); Elixmann, D. (1990) Bad Honnef, Germany, April, Ida, T. (2002) ‘Cave, M.E., Majumdar, S.K. , and Vogelsang, I. (2002) S. K. , and Vogelsang, I. Liebowitz, S. J. and Margolis, S. E. (2002) Chou, D. and Shy, O. (1990) Church, J. and Gandal, N. (1993) Katz, M. L. and Shapiro, C. (1986) ‘Farrell, J. and Saloner, G. (1992)

⁷⁸ Applying the EU Regulatory Framework in Microstates, Ovum and Indepen, 2005.

- with between one million and two million lines is not as significant as the difference between a quarter of a million and one million.
- 4.37 When this is placed in the context of the Irish market, it would suggest that eircom does not achieve significant economies of scale above one million lines, but would achieve economies of scale up to that level. This can be compared with OAOs, the largest of which has just over 43,500 direct access channels, and are therefore nowhere near to being able to achieve economies of scale which compare with eircom. In other words, in the size band in which OAOs would be operating, eircom achieves economies of scale and OAOs do not.
- 4.38 ComReg notes that one respondent to the initial review suggested that the effects of economies of scale, scope and density may be negated by the role of mobile operators competing in access, and also by the obligation on the incumbent to provide universal service. ComReg has carefully considered both of these issues. On the extent to which mobile operators would negate the effects of economies of scale, scope and density, the argument depends on fixed and mobile calls being seen as substitutes. ComReg has argued strongly that, over the period of this review, fixed and mobile calls are not sufficiently close substitutes to be considered as part of the same relevant product market.
- 4.39 With regard to the impact of universal service obligations on eircom's economies of scale, scope and density it can be noted that eircom is protected against any 'extreme' cases of requests for connection by a limit of €7,000 on any individual connection⁷⁹. This means that, in what could only be a very small number of potential cases, a customer in a location which is difficult to serve would pay all the excess if the cost of connection was more than €7000.
- 4.40 However in Ireland the legislation⁸⁰ is in place for an operator with universal service obligations to request funding to service these obligations should the cost represent an unfair burden. Indeed, the universal service obligation arguably brings collateral benefits to eircom, for example ubiquity of service and maintenance of brand awareness.
- 4.41 Regarding retail access to the public telephone network at a fixed location, the only wholesale regulation (this analysis is absent SB-WLR) that could potentially impact on competition in this market is local loop unbundling, as local loop unbundling enables new entrants to provide narrowband access services to retail customers. However, local loop unbundling requires time and high investments, a large portion of which are sunk. Moreover, new entrants in principle do not unbundle local loops to provide narrowband access only. Local loop unbundling therefore does not remove the high and non-transitory barriers to enter the retail access market at a fixed location, nor does it make this market tend towards effective competition. Even in combination with the development of other infrastructures such as cable and fibre-to-the home, such a tendency is not envisaged yet on a European basis. Therefore, even in the presence of wholesale regulation, the retail market for access to the public telephone network at a fixed location remains susceptible to ex ante regulation.

⁷⁹ Universal Service Requirements: Provision of access at a fixed location - connection to public telephone network and provision of functional internet access. Reference Number : 05/70.

⁸⁰ European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 (which transpose Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.) Regulation 11 addresses the cost of the universal service to the designated undertaking.

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4.42 ComReg's preliminary conclusions are therefore that while regulatory intervention has helped to somewhat reduce the barriers associated with economies of scale and scope for OAOs wishing to enter the fixed access markets, it is likely that eircom's dominance of the markets continues.

Control of infrastructure not easily replicated

4.43 It was noted in the initial review that, economically, it is not feasible for any other operator to replicate eircom's access network. At the end of 2005, there were just over 1.7 million PSTN and ISDN access channels in the Irish market.

4.44 Analysis of data since the time of the initial review up until the present indicates that the proportion of direct access offered by OAOs has increased in the higher level retail access market, but remains negligible in the lower level retail access market.

4.45 In the lower level access market, direct provision via cable or indeed FWA is minimal. From the evidence available to ComReg, direct access providers (via cable or FWA) primarily invest in these networks for the provision of television and/or broadband data services with voice as a possible add-on.

4.46 With regard to its assessment of direct access, ComReg also considers the impact of the Metropolitan Area Networks (MANs), the Government funded telecommunication networks. ComReg notes that the owners of these networks (local authorities) and their management entity (E-net) operate at the wholesale level and do not (nor plan to) provide services to retail customers directly. Furthermore, the MANs provide direct local access only in very limited cases. However, it is recognised that the availability of alternative infrastructure may have a positive impact on the competitive dynamics at the wholesale level (by lowering barriers to entry for OAOs) which may also impact the retail narrowband access markets. However, this is unlikely to be significant over the period of the review as the take up of circuits on the MANs was de minimis at the time of publication.

4.47 Furthermore, while it may be that the MANs which are proposed in a number of towns will provide a partial level of competition, they will not replicate eircom's ubiquitous network.

Vertical integration

4.48 eircom is vertically integrated, in that it is active at the wholesale and retail levels. *The Guidelines* note that vertical integration is one criterion which can be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers.

4.49 An organisation which is dominant at the wholesale level of a market has the opportunity, if dominant upstream, to leverage market power into downstream markets, and thereby has the potential to adversely affect competition. In the case of the retail fixed access markets, the relevant upstream market would be that associated with obtaining wholesale inputs, and in ensuring that wholesale inputs are available at competitive prices. Relevant wholesale markets were reviewed in the Market Analysis: Wholesale Unbundled Access⁸¹ where the finding was that eircom had SMP

⁸¹ Market Analysis Wholesale Unbundled Access. Designation of SMP and Decision on Obligations Reference Number : 04/70Decision Notice D8/04.

in the market for Wholesale Unbundled Access, and in the Market Analysis: Interconnection⁸².

4.50 A vertically integrated operator may enjoy significant efficiencies arising from its presence in the upstream and downstream markets. This may constitute a barrier to entry in that a new entrant may perceive a need to enter the wholesale and retail markets in order to pose a competitive threat. Further, the dependence of downstream competitors on upstream inputs supplied by a vertically-integrated operator means that the incumbent could affect the competitive conditions in the downstream market, and this could act as a disincentive to new entry.

4.51 ComReg concludes on a preliminary basis that eircom's vertical integration and proposed dominance in upstream markets would act to deter market entry.

Preliminary Conclusion

4.52 ComReg has assessed barriers to entry in the markets for retail fixed narrowband access – both higher and lower level.

4.53 ComReg has reviewed the potential barriers constituted by economies of scale, scope and density, and concludes that the high cost of entry to the local access market constitutes a potential barrier to entry.

4.54 ComReg's preliminary conclusion is that in the retail fixed access markets, barriers to entry persist. Eircom is not likely to be constrained by a new entrant, particularly because of barriers associated with economies of scale scope and density, with vertical integration, and with control of infrastructure not easily replicated.

Countervailing Buyer Power

4.55 One of the potential constraints on a supplier's market power is the strength of buyers and the structure of the buyers' side of the market. This could occur, for example, if a particular purchaser were sufficiently important to its supplier to influence the price it was charged. The conditions where it might be expected to observe countervailing buyer power could be when a customer accounts for a large proportion of the supplier's total output, and is well-informed about alternative sources of supply, and is able to switch to other suppliers at little cost to itself. It may even be that the customer is able to self-supply the relevant product. ComReg must assess the effect that these alternatives have in constraining eircom's pricing behaviour by acting as an alternative for customers exercising their buyer power.

4.56 On the basis of these conditions, countervailing buyer power could only be considered as a potential issue for a very small number of very large companies. It cannot be seen as a relevant consideration in the lower level access market. ComReg must therefore assess CBP in relation to non residential users more specifically those with high spend or high numbers of employees (which is most likely to be Corporates and Government agencies) rather than SoHos and SMEs.

4.57 ComReg suggests that even if corporate purchasers were in a position to exert bargaining power upon operators, these purchasers do not represent a sufficient influence to diminish eircom's market power in the higher level retail access market in

⁸² Market Analysis - Interconnection Markets, Response to Consultation and Consultation on Draft Decisions – Document 05/37.

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- its entirety. The data available to ComReg would suggest that companies with more than 100 employees represent just less than 5% of total fixed line voice spend.
- 4.58 In the initial review, two respondents suggested that the existence of countervailing buyer power was a major issue in the retail narrowband access markets, particularly amongst the largest companies in the higher narrowband level access market. This view was restated and elaborated in the response to the 'Call for Input' to this updated review.
- 4.59 The question is whether the behaviour of very large companies is sufficient to constrain eircom's pricing behaviour, and if so, whether this happens to an extent which would negate or reduce a dominant position.
- 4.60 The argument which was advanced was that very large customers typically tender for telecommunications services, and could insist that contracts are held to a minimum term. Further, it was alleged that the tendering process often requested a single voice and data package, and that competing suppliers would discount their voice prices to win a data contract. The largest customers were seen as able to insist on a bespoke solution. It can be noted that the evidence which was provided for this referred to one specific case, supplemented by general observations.
- 4.61 ComReg believes that, in the higher level fixed access market, the barriers to switching supplier have been declining since the time of the last review. Survey data shows that companies with over 100 employees are most likely to have switched their supplier for fixed line services⁸³. It is clear that the awareness of alternative sources of supply has increased, and that it is relatively easy to make the change.
- 4.62 However, eircom's market share remains high and stable. Survey data⁸⁴ would indicate that eircom share is spread across all businesses, even those companies with 100+ employees (who are claimed to be in a position to exert countervailing bargaining power). When asked who their provider of calls was, in most categories of businesses (whether grouped by number of employees or spend) over 70% said that eircom was their supplier. Furthermore, as part of the market analysis data collection, data received showed that eircom's top ten customers' voice spend was significantly higher than other operators. This would indicate that even for high end customers, eircom competes successfully. This was also true when the customer base was analyzed by business type (e.g. public body or multi national organization)
- 4.63 If CBP were being exercised in this market, ComReg would expect to see more evidence of customers switching supplier, and more especially, more evidence of prices being reduced in response to the threat of switching⁸⁵. This does not seem to be the case.

Preliminary conclusion

- 4.64 ComReg does not believe that the existence of competitive tendering to a proportion of customers 'proves' CBP, and nor does the introduction of fixed term contracts. Rather, it is an indication that, in some segments of the market, there is a tendency towards competition. The behaviour which was described to ComReg could be seen as a feature of any market which has more than one player in it. The potential for CBP is

⁸³ May/June 2006, Millward Brown IMS. SME and Corporate ICT Research Wave 3.

⁸⁴ Amarach Business Survey - Wave 1 and wave 2 2006.

⁸⁵ While there have been real price decreases for higher and lower level narrowband access, there have been no nominal price decreases in response to competitors price movements.

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limited to a very small number of companies. Given that their purchasing is on an individual basis, it is difficult to see how any one customer could be significant enough to constrain eircom's pricing behaviour. The evaluation of CBP would have to be done on a case-by-case basis, and perhaps even on a contract-by-contract basis.

Overall conclusion on market analysis

- 4.65 In this updated review, ComReg has analysed developments in the structure of the market, and has examined factors such as countervailing buyer power and barriers to switching which may reduce the impact of eircom's potential SMP. It can be noted that in key areas where the barriers to entry have demonstrably been reduced, this has largely come about because of regulatory intervention. The success of SB-WLR since its launch shows the impact which an indirect access product can have in both the higher and lower level retail access markets. However, SB-WLR was mandated, and is supported by a series of regulatory measures.
- 4.66 ComReg has noted that eircom's high market share in both the lower and higher level access markets has not been appreciably mitigated by other factors. Despite regulation, eircom's dominance of the market persists. As a result of this analysis, ComReg's preliminary conclusion is that eircom has SMP in both the higher and lower level access markets.

<p>Q. 9. Do you agree with the above preliminary conclusions regarding market analysis? Please provide a reasoned response.</p>
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5 Proposed Designation of Undertakings with Significant Market Power

5.1 Having regard to the sections above, particularly sections 3 and 4, ComReg is of the view that, in accordance with the *Framework Regulations*:

- eircom Ltd should be designated as having SMP in the fixed retail market for **Lower Level Narrowband Access** to the public telephone network.
- eircom Ltd should be designated as having SMP in the fixed retail market for **Higher Level Narrowband Access** to the public telephone network.

5.2 A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

6 Proposed Market Remedies

Introduction

- 6.1 The initial review ⁸⁶ outlined the basis for the set of remedies proposed by ComReg.
- 6.2 ComReg is obliged, under Regulation 9(1) of the Access Regulations, where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the *Framework Regulations*, to impose on such an operator some of the obligations set out in Regulations 10 to 14 of the *Access Regulations* as ComReg considers appropriate.
- 6.3 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the *Framework Regulations*, that a given retail market identified in accordance with Regulation 26 of the *Framework Regulations* is not effectively competitive, ComReg is obliged to designate an undertaking under Regulation 27(4) of the *Framework Regulations* as having significant power on a given retail market.
- 6.4 Regulation 14 of the *Universal Service Regulations*⁸⁷, allows ComReg, where it concludes that obligations imposed under the Access Regulations and/or Regulation 16 of the Universal Service Regulations would not result in the achievement of the objectives set out in section 12 of the Communications Regulation Act, 2002, to impose such obligations as it considers appropriate to achieve those objectives.
- 6.5 In this review, ComReg has revisited its analysis of the retail access markets, and has taken into account change in the market since the time of the last review. This section goes on to assess any changes in the competition problems which were previously identified, and in the light of this assessment, to propose remedies for any market failure.

Competition Problems in the retail narrowband access markets

- 6.6 In the initial review, ComReg outlined actual and potential competition problems in the retail access markets. The approach which was taken to the assessment of competition problems was forward-looking, and followed the recommendations of the *SMP Guidelines*. ComReg must carry out the assessment on competition problems, in the absence of regulation. While evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation. Therefore, ComReg considers that the justification for considering *ex ante* remedies must be broader than if solely based on demonstrable acts of past behaviour. ComReg instead has to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis.
- 6.7 The analysis has proposed that eircom should be designated with SMP. ComReg suggests that this is a key difference in approach between *ex ante* and *ex post* analysis, and ComReg notes that its approach is similar to that of other NRAs as evident from their notifications to the European Commission.

⁸⁶ Market Analysis: Retail Narrowband Access Markets (04/94 and 05/25).

⁸⁷ Which transposes Article 17 of the Universal Service Directive into national law.

6.8 In this review, the concern is to examine development in the market since the time of the initial review, and to consider whether the types of competition problems identified are still evident.

6.9 According to settled case law,

“ dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”⁸⁸

6.10 An undertaking which is dominant has the potential ability to influence a range of competition parameters, including prices, innovation, output and the variety or quality of goods and services. Absent regulation, a dominant firm would rationally have the incentive to raise prices, as there would be no competitive pressure to prevent this. In addition, a firm which was dominant in an upstream market could use its market power to leverage into a downstream market. A firm which was dominant in one market could attempt to leverage power horizontally into a related market.

6.11 It is however important to note that in any discussion of competition problems and of the incentives for an operator to exert its SMP, it is not necessary for ComReg to point to examples of abuse that have occurred. While such examples would be corroborative, the nature of ex ante regulation is that it is concerned with guarding against this in advance.

6.12 In the initial review ComReg described the types of competition problem which may arise in the retail access markets, and provided examples of these problems in the Irish markets. This review draws on the previous analysis, and focuses on assessing any changes in the nature of the competition problems from the time of the initial review.

Vertical leveraging

6.13 Vertical leveraging arises where an operator has dominance at a wholesale level and can potentially transfer this power into the retail markets. In the retail access markets, a vertically-integrated SMP operator has control of the wholesale inputs necessary for an entrant to offer an access service, and is in a position to control the use of these inputs and so affect the competitive conditions in the downstream retail markets.

6.14 In the initial review, ComReg outlined actual and potential ways in which this could happen, and characterised vertical leverage in terms of:

- denial of access;
- leveraging by non-price means;
- leveraging by means of pricing.

Denial of access

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

⁸⁸ DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, Dec 2005.

- 6.16 eircom's continuing high market share in both markets, and the limited existence of other factors which would act to significantly dilute eircom's potential market power within the timeframe of the review, would suggest that competition problems persist. This indicates a continuing need for regulatory intervention and the need to create an environment where OAOs can obtain the necessary wholesale components on appropriate terms. It is ComReg's view that the provision of CPS and SB-WLR products are necessary to ensure that operators and resellers of OAO products can enter the market by availing of eircom's infrastructure. Certain regulatory safeguards would be required over the period of the review in order to do this.
- 6.17 In the initial review the specific examples given in illustrating the competition problems were focused largely on the development and implementation phases of the SB-WLR product. This product has been in the market now for two years. The focus of the issues for the industry has shifted from ensuring the basic availability of the SB-WLR product to concerns around its implementation and development, in particular the requirement for open and transparent processes to support product development and service assurance.

Leveraging by non-price means

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

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- addressed then there is scope for eircom's requirements to be the main driver for product development and so discriminate against the OAOs. In addition the lack of communication regarding product and IT development means that there is a risk that OAOs will suffer a sufficient delay in implementing changes that might have already been implemented by eircom retail.
- 6.22 Further concerns arise in the case of service delivery where, due to a lack of visibility of the guarantee provided to eircom Retail it has not been easy for OAOs to be confident that eircom retail does not benefit from a better quality of service than that provided to OAOs. Such an asymmetry of information makes it more difficult for OAO's to compete with eircom at the retail level. One example of this was where eircom retail was able to provide a retail customer service commitment superior to that provided via the corresponding wholesale SLA.
- 6.23 ComReg is of the view that these problems can be addressed by obligations at the wholesale level in relation to transparency and non- discrimination.

Horizontal leveraging

- 6.24 Horizontal leveraging involves an undertaking which is dominant in one market using its market power to exert undue influence in other markets. Examples of this in respect of an operator that is dominant in the retail narrowband access market would be exerting influence in the retail calls market or potentially into the provision of retail broadband services.
- 6.25 eircom's position as a vertically integrated operator (as discussed above) and dominance in the retail access markets means that, absent regulation, it would have the potential and the incentive to leverage market power into related markets (both horizontally and vertically linked).
- 6.26 As discussed, eircom's dominance in the retail access markets, requires access to a SB-WLR product to overcome the barrier to entry into the access markets. However, in the current SB-WLR product, ComReg has observed actual problems associated with the coexistence of this product with other wholesale or retail products relating to other markets, such as the Line Share (LS) product (used to provide broadband services). A specific example of a problem which has been observed was the inability to order the SB-WLR product when another operator was providing a retail service using LS to the customer on the same line, and vice versa. ComReg notes that while LS and SB-WLR are now available in combination, ComReg considers that the time taken by eircom to implement it was inappropriate. Other issues have also been identified such as the development of processes to move from a combination of SB-WLR and LS products to a fully unbundled LLU product in some circumstances.
- 6.27 Whilst eircom has facilitated some product combinations and migrations through industry processes, a number of requests from operators have not currently been facilitated; these include requests to enable efficient migration from the SB-WLR/LS combination of products to a wholesale ULMP product and similarly from a SB-WLR/Bitstream product to a wholesale ULMP product. These limitations, based on constraints to the SB-WLR product restrict the ability of operators to offer products in other markets.
- 6.28 A decision by an OAO to change the wholesale product used to provide retail narrowband access services (which may be characterised by an OAO moving to a different rung of the investment ladder) or to acquire from another service provider a customer currently served via different infrastructure can require a physical change to the network used, using local loop unbundling. To facilitate sustainable competition it

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- is essential that such a change is seamless, involving high quality processes which ensure that the retail user experience is unaffected by such a change. It is essential that the change of wholesale product used to provide retail access does not impact upon the end user, as retail competition and end-user choice is likely to be significantly affected by the quality of such processes upstream.
- 6.29 ComReg proposes that the coexistence and migration (to and from) SB-WLR should be provided to OAOs in a non discriminatory manner and that the end user experience should be unaffected by the design of the wholesale product.
- 6.30 A further example of horizontal leveraging would be where eircom uses information held about customers in respect of the retail access market , such as customer account numbers to facilitate sales in the calls market when such information is not always as readily available to other operators.

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

Principles in selecting remedies

- 6.31 In the initial review, ComReg noted its obligations under the Framework Regulations, the Access Regulations and the Universal Service Regulations in relation to market assessment and the imposition of remedies. Given the identified actual and potential competition problems arising from SMP in the retail access market, ComReg is obliged to impose obligations on undertakings identified as having significant power in that market. ComReg does not believe that, within the period of this review, there will be sufficiently significant developments which will prevent eircom from acting independently from its competitors. Accordingly, ComReg proposes to impose appropriate obligations on the SMP operator that ComReg believes will encourage efficient investment and innovation, protect consumers and further promote competition in the retail access markets.
- 6.32 Where problems have been identified in specific markets and an undertaking(s) has been designated as having SMP, ComReg will select remedies based on the nature of the problem identified. Where possible, consideration will be given to a range of remedies so that the least burdensome effective remedy can be selected thus conforming to the principle of proportionality. In the initial consultation (04/94) ComReg presented alternative regulatory options to address identified competition problems. This included a discussion of less onerous alternatives and why these would not achieve ComReg's objectives and a discussion of more onerous alternatives and why they would be disproportionate or overly burdensome. In the response to consultation (05/25), ComReg adopted a preferred option. The current review focuses upon the preferred option and assesses whether market conditions justify an amendment to these proposals.
- 6.33 In choosing remedies, ComReg has also taken account of their potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg has conducted, *inter alia*, a Regulatory Impact Assessment (see section seven) in accordance with the Ministerial Direction (issued by the Minister for Communications Marine & Natural Resources in accordance with section 13 of the Communications Regulation Act, 2002) published in February 2003.

- 6.34 Finally, the remedies chosen will be incentive compatible. This means that the remedies will be selected and designed in a manner that ensures compliance with regulation outweighs the benefits of evasion. Remedies must be based on the nature of the problem identified, proportionate and justified in light of the objectives set out in S.12 of the Communications Regulation Act, 2002.
- 6.35 ComReg is obliged, where a designation of SMP has been proposed, to impose at least one obligation⁸⁹. Therefore some form of ex ante regulation is required.

Remedies Proposed

- 6.36 In this document, ComReg has arrived at the preliminary conclusion that eircom has SMP in both the higher and lower level retail narrowband access markets, and that this may give rise to a range of problems associated with single market dominance, such as excessive pricing, vertical and horizontal leveraging.
- 6.37 In considering what remedies are warranted, it is important to firstly examine the extent to which wholesale remedies are sufficient to address the competition problems which have been identified. Only if the wholesale remedies are considered insufficient should any additional remedies at the retail level be considered.

Wholesale remedies

- 6.38 In this updated review of the narrowband retail access markets, ComReg's analysis has concluded that replication of eircom's access network is not a feasible option. This suggests that remedies should be designed in the first instance to provide OAOs with sufficient access to wholesale inputs, so that equivalent retail services may be offered using eircom's network.
- 6.39 In considering appropriate wholesale remedies, it is ComReg's view that the analysis of the retail access markets clearly justifies the need for a single billing product consisting of calls and access.
- 6.40 ComReg's consideration of remedies are discussed below in terms of :
- a) Continuing need for wholesale products;
 - b) Regulatory intervention in product development and implementation;
 - c) Supporting remedies to these wholesale remedies.

(a) Continuing need for wholesale products

- 6.41 Given the finding of SMP in the retail fixed access markets, ComReg is obliged to impose obligations to ensure that subscribers of the SMP operator have access to CA/CS and CPS.
- 6.42 Regulation 16 (1) of the *Universal Service Regulations* makes it mandatory for ComReg to impose an obligation for the purpose of enabling subscribers to access the services of any interconnected provider of publicly available telephone services -
- (a) On a call-by-call basis by dialling a carrier selection code, and
 - (b) By means of pre-selection, with a facility to over-ride any pre-selected choice on a call-by-call basis by dialling a carrier selection code.

⁸⁹ See The Guidelines paragraphs 21 and 114.

6.43 ComReg therefore notes that it has no legal discretion with regard to the imposition of obligations for the purpose of ensuring the SMP operator's subscribers can access CA/CS and CPS⁹⁰.

6.44 CA/CS and CPS are wholesale remedies to address specific competition problems within the retail markets. The requirement for CA/CS and CPS is a mandated obligation within the Universal Service Regulations for indirect access products in the fixed access market. The CPS product as it stands now has been defined as per the current suite of industry agreed documentation in order to give effect to Regulation 16 (1) of the Universal Service Regulations.

Preliminary Conclusion

In line with Universal Service Regulation 16(1) ComReg proposes to maintain obligations on the SMP operator to ensure that its subscribers have access to CA/CS and CPS.

6.45 In the initial review ComReg proposed that eircom should be obliged to provide a SB-WLR product at the wholesale level for the provision of a single billing retail offer to consumers in accordance with requirements as determined by ComReg.

6.46 ComReg believes that the market analysis and identification of competition problems carried out in the market review indicate a clear need for the continuation of SB-WLR as a remedy in the market for fixed lower level narrowband access market and the market for fixed higher level narrowband access. ComReg noted in the assessment of SMP that the level of competition in the higher level retail access market is greater than that in the lower level retail access market. However, it is proposed that competitive conditions in both markets continue to require the provision of the wholesale elements necessary to offer a single billing product.

6.47 In order that the SB-WLR product can continue to be offered and developed in accordance with industry agreed requirements, ComReg proposes to require eircom to provide a SB-WLR offering. An access remedy is the only remedy which allows OAOs to make reasonable requests for products according to their specifications.

Preliminary Conclusion

⁹⁰ Carrier Access (CA), Carrier Select (CS) and Carrier Pre Select (CPS).

ComReg proposes to impose obligations on the SMP operator under the Access Regulations to ensure that a SB-WLR product will continue to be offered and its detailed development should be supported with both a non-discrimination and transparency obligation

Q. 11. Do you agree that eircom should be obliged to offer a SB-WLR product in line with requirements as determined by ComReg, under the obligations of the Access Regulations? Please detail your response

(b) Requirement for regulatory intervention in product development and implementation

Carrier Pre Select

6.48 CPS was mandated in Ireland in 2000 and to ensure the proper functioning of the CPS product, ComReg has found it necessary to intervene on a number of occasions to address various competition problems of the type described earlier in this section. ComReg believes that, in addition to the imposition of the obligation for CA/CS and CPS on eircom, it is necessary to ensure continuity in relation to the provision of CA/CS and CPS by eircom. ComReg therefore proposes that eircom be required to continue to comply with the various requirements imposed on it, as set out in the current suite of industry agreed product documentation (as amended) which deals with the following key product areas:

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

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

6.50 ComReg explained in the current consultation document that it considers failure to impose obligations on eircom would mean that the effective operation of CPS in the market would be limited, and, accordingly, the ability of subscribers to avail of CPS services would be greatly hindered. This in turn would mean that ComReg would be failing to give effect to, and defeating the purpose and intention of, Regulation 16 of the *Universal Service Regulations*.

6.51 While the implementation of the *Universal Service Regulations* makes provisions for obligations in respect of transparency and non-discrimination at the retail level, with reference to specific end users, ComReg believes that further obligations are required in relation to the inter-operator transactions and processes required to provide CPS facilities. These are detailed below.

Wholesale Line Rental

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

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

6.53 Each of these obligations is considered in turn.

(i) Access to wholesale products

6.54 In order to avail of SB-WLR, OAOs need to acquire the relevant wholesale products as currently set out in Service Schedule 401 of eircom's Reference Interconnect Offer (RIO)⁹¹, as amended from time to time. ComReg considers that these products are an essential requirement for the provision of SB-WLR and proposes, pursuant to Regulation 13 of the Access Regulations, that eircom be required to provide such access.

Preliminary Conclusion

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

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

(ii) Open access

6.55 ComReg considers that, insofar as it is required to provide access, the SMP operator should also grant open access to relevant information, technical interfaces, protocols, or other key technologies, and should be required to provide such OSS⁹² or similar software necessary to ensure fair competition in the provision of services.

6.56 It is considered that while a SB-WLR product has been made available, inadequacies in the provision have resulted in many referrals to ComReg. ComReg considers that it is the quality of wholesale inputs that determines the operational detail which enables the OAO to develop a viable customer proposition. This issue also needs to be considered in the context of an obligation of non-discrimination.

6.57 In proposing these measures ComReg has considered the incentives to the SMP operator to engage in discriminatory behaviour. ComReg considers that there is sufficient potential advantage to the SMP operator in restricting access to relevant

⁹¹ see http://www.eircomwholesale.ie/regulatory/reg_details.asp?id=37

⁹² Operational Support Systems.

- information, interfaces, protocols and key technologies, and restricting the OAOs ability to influence the product development process.
- 6.58 ComReg notes that the remedies proposed are without prejudice to the co-operative developments which may happen from time to time and the positive bilateral support which eircom may provide to OAOs through a launch period etc.

Preliminary Conclusion

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

Q. 13. Do you agree that the SMP operator should be required to grant open access to relevant information, technical interfaces, protocols, or other key technologies and should also be required to provide such OSS or similar software necessary to ensure fair competition in the provision of SB-WLR services? Please detail your response.

(iii) Withdrawal of Access

- 6.59 ComReg proposes to impose the obligation on eircom not to unreasonably withdraw access to facilities already granted. This remedy continues to be required to ensure that OAOs have the certainty to provide retail services to the marketplace and so compete with eircom and in turn ensure that consumers have certainty in the delivery of services.
- 6.60 ComReg notes that there are circumstances where it may be desirable to withdraw access to facilities, for example when a facility is no longer needed and it is an undue burden on eircom to maintain it. ComReg therefore proposes to qualify the obligation on eircom not to withdraw access to facilities already granted, where there exists a clearly defined objective justification. In this regard it would be a matter for eircom to demonstrate that such an objective justification actually exists. Thus withdrawal would be subject to prior ComReg approval which would only be granted following appropriate consultation.
- 6.61 It was recommended by one operator that the concept of using *Consents* (as proposed in the consultation on financial reporting obligations for SMP operators⁹³) should be applied similarly to the withdrawal of access to facilities, whereby the SMP operator would issue a notice to ComReg indicating their request in writing and justifying their reasoning. The concept of *Consents*, as proposed in the case of financial reporting obligations, did not involve any consultation process and may not be appropriate in this context since operators would be directly affected without being given sufficient opportunity to put forward their viewpoint on the matter.

⁹³ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18).

Preliminary Conclusion

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

**Q. 14. Do you agree that the SMP operator should be required not to withdraw access to facilities already granted, save without prior ComReg approval?
Please detail your response.**

(c) Supporting remedies for CPS and SB-WLR

6.62 In the initial review, ComReg outlined a view that it was not sufficient to simply mandate the requirement to ensure the existence of the necessary wholesale inputs. There was a continuing concern with how these inputs were provided in terms of quality, timeliness and scope. ComReg therefore proposed a set of supporting obligations designed to assist in the implementation and development of indirect access products.

6.63 Given the success of SB-WLR and CPS in the period since the initial review, ComReg has considered whether there may be scope to withdraw some supporting obligations. Such a decision would need to be based on evidence that the market closer to being effectively competitive. This updated review has considered changes in the market since the time of the previous work, and has established that the core competition problems previously identified persist, although ComReg has illustrated how the expression of these problems has shifted to reflect the more mature product requirements. ComReg, having assessed the evidence, is of the preliminary view that the market appears not to be effectively competitive and considers that there remains sufficient incentive for eircom to act in a manner which mitigates against fair and competitive conditions for OAOs. ComReg also considers that as the CPS product forms a fundamental element of the SB-WLR product, the industry requirements and regulatory justification for supporting remedies is applicable to both the CPS and SB-WLR products.

6.64 In support of the obligations for CPS and SB-WLR as outlined above, ComReg has concluded that there are a number of additional obligations required which are necessary to fully address the competition problems identified. ComReg considers that each of the following remedies is necessitated:

- Non-discrimination
- Transparency;
- Price control;
- Accounting separation;
- Cost accounting systems.

Non - Discrimination

6.65 ComReg proposes to impose a non-discrimination obligation on the SMP operator. It should be stressed that ComReg is concerned with instances of discrimination that ordinarily have no objective justification. A non-discrimination obligation is the

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appropriate remedy to target competition problems such as withholding of information, delaying tactics, undue requirements, low or discriminatory service or product quality, strategic design of product in a manner that disadvantages competitors, and discriminatory use of information.

6.66 The key elements are as follows:

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

Preliminary Conclusion

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

Q. 15. Do you agree that obligations of non-discrimination should be imposed on the SMP operator? Please detail your response, making references to ComReg's interpretation of such an obligation set out above.

Approach to SLAs

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

6.68 The provision of SLAs and consistent and timely reporting on service levels is essential to demonstrate that eircom is providing at least equivalent conditions between its downstream retail affiliate and OAOs.

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

Preliminary Conclusion

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

Q. 16. Do you agree with the approach to Service Level Agreements for access obligations set out above? Are there any other conditions which should be attached to the proposed obligations? Please detail any response.

Transparency

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

Transparency in support of non discrimination

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

Preliminary Conclusion

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

Q. 17. Do you agree that an obligation of transparency should be imposed on the SMP operator? Please detail your response.

Approach to product documentation

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

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

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

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

6.79 ComReg believes that this obligation should be maintained. Regulation 10 (3) of the Access Regulations allows ComReg to specify the precise information to be made available, the level of detail required and the manner of publication. ComReg also notes that the product documentation does not in anyway constrain the obligation and expects that any new offerings developed pursuant to Regulations 11 and 13 of the Access Regulations should also be detailed in the appropriate documentation.

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

Preliminary Conclusion

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

Q. 18. Do you believe that the current product documentation (including RIOs) should be maintained in respect of the CPS and SB-WLR products and that any new documentation should be developed in accordance with regulations 10 to 13 of the Access Regulations?

Approach to CPS and WLR Code of Practice

6.81 In May 1999, ComReg (then the ODTR) issued a decision notice⁹⁴ ‘Introducing Carrier Pre Selection in Ireland’. This Decision Notice was issued pursuant to the European Communities (Interconnection in Telecommunications) Regulations, 1998 (SI 15 of 1998), as amended by the European Communities (Interconnection in Telecommunications) (Amendment) Regulations, 1999 (SI 249 of 1999).

6.82 The Decision Notice directed that CPS committee should develop an industry Code of Practice for CPS to ensure that operators develop adequate customer information and consumer protection procedures to assist the public in understanding the choices they have, and how the new CPS services would work. The Code of Practice ‘the Code’ would also protect customers from potential operator misuse of the CPS facility, most notably ‘slamming’⁹⁵. Slamming is not a practice in which reputable operators engage but nevertheless safeguards do need to be put in place. The Code was binding on all parties engaged in CPS and addressed the following areas of consumer interaction :-

- customer contracts
- use of customer information and win-back activities
- promotion of CPS
- the order handling process

⁹⁴ Document Number 99/29 and Decision Number D2/99.

⁹⁵ Slamming means any activity undertaken by an Operator that dishonestly attempts to initiate a service change without the explicit permission of the customer.

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- billing and bill payment
- fraud and bad debt
- complaint and inquiry handling

6.83 In the decision notice D13/02 (as supplemented by D2/03) eircom was required to offer CPS Single Billing products and allow operators to offer a single bill to end users. A code of practice was developed by industry for the SB-WLR product to address the same issues of consumer protection. This code of practice, the ‘Code of Practice for Single Billing’ was an extension of the CPS code and any operator wishing to provide SB-WLR was also required to sign the ‘Code of Practice for Single Billing’.

6.84 As the Code is based upon the legislative provisions of the Old Framework, it will fall away following the market review and the imposition of any SMP obligations under the review (Regulation 8 of the Access Regulations). Obligations which result from a market review can only be applied to an SMP operator. On the other hand, for the Code to be operational it should apply to all operators.

6.85 While the Code of Practice deals with a range of consumer issues, ComReg considers that the clause pertaining to slamming is of particular importance in protecting consumers. ComReg believes that barriers to switching have diminished since the time which the Code was first introduced. Evidence supporting this view was presented in Section 3 of this paper. However it is not clear whether barriers have diminished to a sufficient degree to preclude the need for a ‘winback’ provision which prevents a losing operator⁹⁶ from contacting the consumer for a given period. This was aimed at allowing the gaining operator⁹⁷ to offer access and enabling the consumer to have sufficient time to evaluate the service.

6.86 In terms of winback, eircom has been effective. The table below, reproduced from eircom’s 2006 results presentation⁹⁸, provides detail on the numbers of customers who returned to eircom in 2005. For the year eircom indicated that it had won back almost 82% of the customers that it had lost in the past to OAOs (Other Authorised Operators).

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

Table 6.1: eircom winback

6.87 Regulation 5 of the Access Regulations also provides that an undertaking (which includes non SMP operators) shall not pass any information (i.e. information obtained from another undertaking before, during or after the process of negotiating access or interconnection arrangements) on to any other party, in particular, other departments, subsidiaries or partners of the undertaking for whom such information could provide a competitive advantage. The undertaking must use the information solely for the purpose for which it was supplied. Furthermore, by virtue of data protection

⁹⁶ The losing operator is the Operator which provided CPS Services to the customer prior to the customer electing to change to the Gaining Operator.

⁹⁷ The gaining operator is the Operator which the customer has chosen to provide CPS Service in the future.

⁹⁸ Source: eircom presentation on preliminary 2006 results, 15 May 2006.

legislation, there are certain restrictions as to how a company such as eircom may use the personal data of a customer, once that customer has ceased to have any contractual relationship with eircom (because it no longer obtains a calls service or rents a phone line from eircom).

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

Q. 19. Do you believe that the win back provisions of the Code of Practice are achieving the objectives for which they were intended? Can you identify any problems that the withdrawal of the Code of Practice would create? Please substantiate your answer.

Approach to price amendments

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

publication of interim prices with subsequent publication of final prices once available.

Preliminary Conclusion

ComReg proposes to formalise current practice and, in circumstances where a retail minus price control is in place, oblige eircom to publish changes to wholesale prices 15 working days before they come into effect. Eircom will be required to notify ComReg of details of changes to wholesale prices 5 working days before publication (i.e. 20 working days before they come into effect).

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

Price Control

CPS

- 6.95 ComReg notes that the mandated remedy for CA/CS and CPS within the *Universal Service Regulations* imposes the obligation on the SMP operator to ensure that pricing for access and interconnection related to the provision of CA/CS and/or CPS facilities is cost oriented. Input prices for CPS are currently governed by the Interconnect Regulations and are subject to review, as part of the Interconnection Market Review⁹⁹.

SB-WLR

- 6.96 ComReg has justified the imposition of SB-WLR above. In mandating a wholesale charge for line rental, the mechanism must support a competitive product, and must provide incentives for investment. Research indicates that the wrong price signals might either frustrate investment of operators, and the potential to build sustainable competition, or lead to a situation where positive effects on competition will not emerge because the product may not be competitive¹⁰⁰.
- 6.97 ComReg suggests that setting an access price is a function of encouraging efficient entry and preserving the incentive to invest. Access prices that are too high could exclude efficient entrants and access prices that are too low could enable inefficient firms to enter and undermine long-term investment in the market. It is important that the need to encourage long-term investment is balanced by the requirement to promote entry into down stream markets. Therefore careful consideration must be given to the calculation of the minus element.¹⁰¹

⁹⁹ Market Analysis - Interconnection Markets, Response to Consultation and Consultation on Draft Decisions. 05/37a.

¹⁰⁰ Yankee Group. WLR Regulatory Developments – September 2005.

¹⁰¹ Analysis of wholesale line rental (WLR), conducted by WIK as part of the analysis of the market for fixed telephony. 10/27/2004.

- 6.98 ComReg has considered two forms of price control which can be used to encourage efficient entry and preserve the incentive to enter:
- Cost orientation on the basis of forward looking long run incremental costs (FL-LRIC¹⁰²); and
 - Retail minus.
- 6.99 At the beginning of June 2003, ComReg set the price for SB-WLR at retail minus 8.5%¹⁰³. In April 2004 access to eircom's SB-WLR product was set at retail price less 10%¹⁰⁴.
- 6.100 ComReg suggests that to preserve incentives for investment, a retail minus price control should be maintained. The current price control of retail minus 10% was set at the time to be a reasonable contribution towards retail costs of other operators availing of this product while also allowing for a margin.
- 6.101 ComReg has considered the effectiveness of SB-WLR and take up relative to other member states¹⁰⁵. Since the launch of SB-WLR there has been¹⁰⁶:
- significant migration from CPS to SB-WLR;
 - an increase in the number of operators (including resellers) providing retail services via SB-WLR;
 - an increase in the number of lines purchased by OAOs and
 - an increase in the take-up of LLU.
- 6.102 These factors coupled with decreasing market shares for eircom in the lower and higher level retail access markets suggest that an appropriate price point has been achieved and it is ComReg's view that the continuation of the current price point will encourage further take up. Currently, it is ComReg's view that the contribution available above the wholesale cost is sufficient to incentivise operators to continue with SB-WLR.
- 6.103 Furthermore, maintaining retail minus at 10% preserves certainty and predictability as regards prices until such time as ComReg notes a significant change in market circumstance or take up of SB-WLR that intervention is required, at which point a detailed consultation will be carried out.
- 6.104 In response to the initial review, a number of operators requested that a higher margin should be considered. At this point, ComReg is of the view that this is inappropriate and suggests that a higher margin may encourage inefficient entry and communicate the wrong signal in relation to the take up other forms of infrastructure-based competition for the provision of narrowband access and other retail services.
- 6.105 ComReg believes that SB-WLR has not reached saturation to date and that there is sufficient justification for its imposition. ComReg notes that in the higher level retail

¹⁰² Forward looking Long Run Incremental Cost.

¹⁰³ Reference Number : 03/24. Wholesale Line Rental - Pricing Issues.

¹⁰⁴ Reference Number : 04/34 Wholesale Line Rental - Pricing Issues, Margin.

¹⁰⁵ Source: internal ComReg data and The Status of Wholesale Line Rental in Europe, Ovum, September 2005. Analysys: Wholesale line rental: a hedge against unbundlers? June 2005.

¹⁰⁶ This data is presented in section six of this consultation paper. At the end of May SB WLR accounted for approximately 55% of all indirect access lines.

access market SB-WLR has not supplanted direct access and this helps to confirm the approach to the market.

Preliminary Conclusion

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

Q. 21. ComReg proposes that prices set on the basis of FL-LRIC would not be appropriate in the period of this review. Do you agree with this position?

Q. 22. ComReg proposes to continue with the application of the retail minus price control for SB-WLR for the period of this review. Do you agree with this position? Please provide reasons for your answer.

Accounting Separation

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

Preliminary Conclusion

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

Q. 23. Do you agree that the obligations of accounting separation currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.

Cost Accounting Systems

- 6.112 ComReg considers that the obligation of cost accounting systems supports the obligations of price control and accounting separation. ComReg does not consider that this obligation will constitute an unreasonable burden on eircom, as the organisation already has management accounting systems in place to support internal business decision making.
- 6.113 ComReg is currently consulting further on this issue in more detail in a consultation on Accounting Separation and Cost Accounting¹⁰⁷. In the interim ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it until such time as any further consultations are completed.

Preliminary Conclusion

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

Q. 24. Do you agree that the obligations of cost accounting currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.

Regulatory Controls on Retail Markets

Introduction

- 6.114 In the initial review, it was proposed that wholesale measures were necessary but not sufficient to address competition problems in the retail access markets. The case was made that additional retail measures were needed. The retail measures which were proposed included price controls, and obligations relating to non-discrimination, transparency, not unreasonably bundling and cost accounting.
- 6.115 This updated review has considered the impact of changes in the market, and has noted the successful development of SB-WLR, which together with CPS has stimulated some level of competition in the retail markets. At the end of March 2006, SB-WLR accounted for 11% and 5% of lower and higher level access lines respectively. However, in spite of the strong growth of this product, eircom has retained market power in the provision of access to end users, and this is the case for higher and lower level access.

¹⁰⁷ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

6.116 The previous section outlined ComReg's analysis of the wholesale remedies necessary to address the competition problems it has identified. It is ComReg's view that many of the problems identified persist in spite of the successful launch of SB-WLR, and accordingly there remains the need to consider additional remedies at the retail level. In order to prevent eircom from exploiting its advantages and blocking entry to new operators by using its market power, ComReg needs to intervene where appropriate at the wholesale and retail levels.

6.117 ComReg has considered potential retail remedies under the following headings:

- Price control;
- Discrimination;
- Transparency;
- Bundling;
- Cost accounting.

Price control

6.118 Currently the main controls in place that prevent excessive pricing and protect consumers are the retail price cap and the obligation of cost-orientation. An overall basket price cap (on access and domestic calls considered together) of CPI – 0% has been imposed on eircom since February 2003. The maximum average price increase of the services subject to the price cap, notably access (connection and rentals) and domestic calls (residential and non-residential customers) is the rate of inflation. The principal objective for imposition of a price cap is to protect consumers in circumstances where the competitive process is not operating effectively.

6.119 ComReg has completed a full analysis of each access market (lower and higher level access) to determine if eircom can act to an appreciable extent independently of its competitors and customers. It provisionally concludes that competition in these relevant markets does not yet appear effective. The main concern arising from a finding of SMP in retail markets is the ability of eircom, identified as an SMP provider, to set and/or maintain prices at a level higher than they would be if competition were effective. In the absence of competitive pressure, a firm with market power will be able to sustain prices above cost to the detriment of consumers. Therefore a key objective of a retail price cap on lower and/or higher level access services, if necessary, is to provide consumers with protection against any potential exploitation of market power, such as excessive pricing.

6.120 A price cap on fixed retail narrowband access markets, if any, will constitute a remedy flowing from Regulation 14 of the Universal Service Regulations. In summary, ComReg proposes that the principal objectives for a price cap should be:

- to ensure that the prices charged by dominant operators to all customers are brought closer to competitive prices than they would be in the absence of price controls;
- to encourage the rapid development of effective competition in the supply of telecommunications services; and
- to achieve the above by the least intrusive means.

6.121 On the basis of the market analysis, ComReg believes it is appropriate to consult on the possible scenarios for applying retail price controls (RPC) to identified retail access markets in order to determine the most appropriate and proportionate regulatory response as a result of any Significant Market Power ("SMP") designation

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that might be made following the retail access market consultation. ComReg considers that some form of a retail price cap continues to be needed to prevent eircom from exploiting its market power as competition develops. ComReg is issuing shortly a consultation on a retail price cap as a potential remedy on fixed narrowband access markets and should be read in conjunction with this document. That consultation will explain why ComReg takes the provisional view that some form of a retail price cap continues to be necessary for at least some of the retail services provided by eircom in fixed narrowband access markets. It introduces some of the main issues and asks respondents for their initial views.

Preliminary conclusion

For the purposes of this market review, ComReg considers that some form of a retail price control measure may still be required in the retail access markets where eircom has SMP. The current price cap order is maintained pending the final outcome of the market review process.

Cost Orientation for Retail Prices

- 6.122 In the initial review, it was noted that, while the price cap addresses the upper limit of pricing for a basket of services including access and calls, cost-orientation is a more general obligation that can prevent the SMP operator from charging excessive prices for specific services such as line rental. A cost-orientation obligation could also help to ensure that an SMP operator does not attempt to restrict market entry or eliminate competition by charging unreasonably low prices that may harm competition.
- 6.123 ComReg has considered further the need for a specific cost-orientation obligation at a retail level, in particular within the context of the overall suite of proposed wholesale and retail remedies. It is suggested that a separate obligation relating to retail price cost orientation would be superfluous at this time, and that the competition problem and regulatory objectives would best be addressed by the proposed wholesale measures. As a result, ComReg suggests that in light of other obligations the existing obligation is unjustified and disproportionate and therefore should be withdrawn.

Preliminary Conclusion

ComReg proposes to withdraw the requirement for cost orientation of retail prices.

Q. 25. Do you agree with the proposal to withdraw the requirement for cost orientation of retail prices?

Obligation not to show undue preference to specific end-users

- 6.124 There is a risk that an undertaking with SMP may use market power to apply dissimilar conditions to transactions which are equivalent. This could be, for example, in the form of price offers, or information, or conditions of supply. A dominant undertaking always can increase its profits by setting an excessive price and thus may have an incentive to do so. ComReg suggests that eircom is in a position to sort its customers and could potentially offer more favourable pricing or conditions to certain users. In such a situation the SMP operator may be able to leverage market power

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- from and to different types of users. These may include the targeting of discount schemes or other terms and conditions at parts of the market that are, or are more likely to become, more competitive. The Universal Service Regulations enable ComReg, in appropriate circumstances, to require SMP operators not to show undue preference to specific end-users.
- 6.125 The obligation not to show undue preference to specific end-users prevents an operator with SMP from charging differing prices in markets, depending on the competitive conditions of the market and price sensitivity to products in the markets. Alternatively the SMP operator may have an incentive to differentiate its conditions of supply which are not equivalent.
- 6.126 ComReg notes that an obligation not to show undue preference to specific end-users does not mean that the SMP operator must offer identical terms and conditions to every customer, but rather that any differences must be justified in an objective way. ComReg proposes that the prohibition on discrimination would apply to any differences that may have the effect of harming competition in light of the goals of the Communications Act; this will be assessed on a case by case basis. This would apply to the current market and to emerging competition in the market. The obligation will be supported by the retail transparency obligation, where eircom is obliged to pre-notify changes to changes in its tariffs to ComReg.
- 6.127 ComReg proposes that the emergent state of competition in the access markets indicates that ex post regulation alone will not be sufficient, and that there will be a requirement for an obligation not to show undue preference to specific end-users for the lifetime of this review. It was noted also that measures which are taken at the wholesale level may not prevent undue discrimination at the retail level.

Preliminary Conclusion

Given the emergent state of competition in the markets for retail access, it is proposed that the SMP operator will be subject to an obligation not to show undue preference to specific end-users.

Q. 26. Do you agree that the eircom will be subject to an obligation not to show undue preference to specific end-users?

Transparency: Publication and notification of terms and conditions

- 6.128 In accordance with Regulation 18 of the *Universal Service Regulations*, ComReg has a role in ensuring that transparent and up to date information on applicable prices and tariffs is available to end-users and consumers. ComReg may specify information to be published such as the standard tariffs covering access, usage charges, discounts and special/targeted tariff schemes. ComReg has already directed on printed tariff information and tariff information on websites in ComReg document 03/86. Accordingly, a service provider shall provide tariff information in response to a reasonable consumer request and provide a direct link from the homepage of their website into the tariff information section of their website.
- 6.129 In the initial review, ComReg reviewed whether additional transparency obligations other than the general requirement to publish (standard terms and conditions together with the applicable tariffs) needed to be imposed on eircom which was designated

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- with SMP in the retail access markets. At present, eircom notifies ComReg and publishes any changes to retail tariffs, terms and conditions 15 working days before they come into effect. Current practice is that eircom has usually (and voluntarily) provided an additional 5 working days' notification to ComReg before publication. eircom was obliged to supply such services at the published prices and in accordance with the published terms and conditions. This allowed ComReg to monitor compliance with principles of transparency, cost orientation and non discrimination.
- 6.130 The obligation of transparency is not confined to the publication of tariffs. Publication without implementation of what is published would not be in accordance with the transparency requirement. In that regard, it is proposed that eircom will be required, in respect of lower and higher level access, to supply services only
- at those prices published in accordance with those obligations described above; and
 - in accordance with any other terms and conditions for the relevant services published in accordance with Regulation 18 of *the Universal Service Regulations*.
- 6.131 In this market review, ComReg has noted a degree of change in the access markets. It is ComReg's view that there is no longer justification for requiring advance publication of changes to tariffs, terms and conditions in the retail access markets. ComReg therefore proposes to withdraw the obligation to publish retail changes before they come into effect. Public notice of changes to retail prices, terms and conditions should be given on the day they come into effect in eircom's public offices and on the eircom website. ComReg does not consider it necessary to request wider publication of changes¹⁰⁸.
- 6.132 ComReg is obliged under the USO Reg 8 (1), change to USR "Affordability of tariffs", to monitor the evolution and level of retail tariffs provided by designated undertakings. In order to fulfil this obligation, it is proposed that eircom notify ComReg 5 working days in advance of publishing changes. ComReg suggests that this constitutes no extra burden on eircom, and allows ComReg to monitor changes and ensure compliance with the principles of transparency and non-discrimination.
- 6.133 ComReg would expect the SMP operator to ensure that planned changes to terms and conditions are fully compliant with all regulatory obligations prior to notification to ComReg and may require an immediate explanation from the operator of how the changes are compliant at any time following notification.

¹⁰⁸ Currently, changes are required to be published also in *Iris Oifigiuil* and a national newspaper.

It is proposed that:

- **The SMP operator should be obliged to publish changes to retail prices, terms and conditions in the lower and higher level access markets when they come into effect.**
- **The obligation that the SMP operator should publish changes in its public offices and web site should be retained.**
- **The SMP operator should be obliged to notify ComReg 5 working days in advance of the publication of any changes to retail prices, terms and conditions.**

Q. 27. Do you agree with ComReg's proposed approach to SMP transparency, notification and publication obligations? Please explain the reasons for your answers.

Retail Bundling

- 6.134 ComReg is considering imposing an obligation not to unreasonably bundle services via Regulation 14 of the *Universal Service Regulations*.¹⁰⁹ ComReg suggests that a reason for considering this as a possible remedy is that while bundling has the potential to provide net benefits to end users, it can also in certain circumstances be used to foreclose the market and/or dampen competition.
- 6.135 ComReg acknowledges that the bundling of end-user services can be, and usually is, welfare-enhancing. Bundling is not anti-competitive *per se*, and indeed may generate significant efficiencies for consumers, e.g., in terms of lower prices, increased choice, lower transaction costs, etc. Consumers may value receiving multiple services from one provider and with only one bill. Also, the price of a bundle will generally be less than buying the elements individually, and this price may simply reflect productive efficiencies that should be encouraged.
- 6.136 However, bundling can have some negative consequences. First, there may be potential for operators, notably dominant operators, to leverage strong market and branding positions and to use bundling strategies for anti competitive reasons. This may allow an operator already dominant in one market to lever its dominance into closely related markets. For instance, *eircom* might offer access bundled with a package of free, or heavily discounted, call minutes (including both fixed and mobile calls). In that context, and where alternative suppliers are constrained in building the same kind of bundles as the incumbent operator, the bundling of retail products can potentially distort competition by leveraging into closely related markets and by distorting pricing in such markets.
- 6.137 Bundling can also be used to protect dominance in the access market. The inability of new entrants to compete profitably with the dominant operator's bundled offerings may increase entry barriers in the access market. This will make entry from operators in related markets (for instance, the mobile market) more difficult.

¹⁰⁹ Which transposes Article 17 (2) of the Universal Services Directive,

- 6.138 Second, there is some risk that *eircom* may induce a margin squeeze through bundled pricing. This occurs when equally, or more, efficient operators are unable to replicate profitably *eircom*'s bundled offering, and are effectively foreclosed from competing with *eircom* in respect of its bundled products. Also, when certain products are bundled together then it may be difficult to distinguish the relevant price/cost of each input, which may create problems in ensuring that the dominant operator is complying with its wholesale obligations. This is particularly important when *eircom* is also supplying the wholesale inputs that allow other operators to compete in the access market. It is important that the price differences, including discounts, between bundled services and services offered separately should be transparent, objectively justified, and reflect underlying costs.
- 6.139 These concerns are such that ComReg is considering imposing a requirement not to unreasonably bundle. This requirement would be applied in the belief that the competition concerns referred to above would not be adequately dealt with by purely wholesale measures. First, it does seem clear that consumers should be allowed purchase any element of the bundle separately. Restricting such freedom will limit consumer choice, and would also cut across the requirements of the USO Regulations. Therefore ComReg proposes that all services sold as part of a bundle should be available for consumers to buy separately should they wish to. This should also enable alternative operators to compete on one aspect of a bundle rather than the bundle as a whole and thus help facilitate new entry.
- 6.140 Other aspects of this requirement could include the dominant operator pre-notifying ComReg of new bundles, which ComReg would then assess, on a case-by-case basis, whether the bundle had any anti-competitive effect. The timelines required for pre-notification would be the same as those in the general transparency obligation set out above. This would require:
- The dominant operator to publish changes to retail prices, terms and conditions of bundles which include narrowband access products when they come into effect;
 - The dominant operator to publish changes in its public offices and web site;
 - The dominant operator to notify ComReg 5 working days in advance of the publication of any changes to retail prices, terms and conditions.
- 6.141 ComReg re-iterates that it sees that bundling is generally pro-consumer. However, there may be a need for some obligation to prevent it being used for anti-competitive purposes. ComReg may consult further, or issue further guidelines, on this issue, depending upon the result of this consultation.

Preliminary Conclusion

- (a) The SMP operator is required to offer all retail narrowband access services as stand-alone products.**
- (b) ComReg would also like views as to whether the SMP operator should be required to pre-notify the introduction of new bundles which include narrowband access services.**

Q. 28. Question: Do you agree with the general approach to bundling taken in this sub-section? Do you agree that an obligation should be placed on the SMP operator to ensure services are not unreasonably bundled? If, instead, your view is that ComReg should forebear, please explain what alternative remedies could mitigate any negative impacts of bundling. Please explain the reasons for your answers.

Cost accounting

- 6.142 The *Universal Service Regulations* provide that ComReg must ensure that, where an undertaking is subject to retail tariff regulation or other retail controls, the necessary and appropriate cost systems are implemented. ComReg may specify the format and accounting methodology to be used, and must cause a statement of compliance to be published annually. Overall compliance with the cost accounting system should be verified by ComReg or another suitably qualified independent body.
- 6.143 A cost accounting system is a set of rules to ensure the attribution and allocation of revenues, costs, assets, liabilities and capital employed to individual activities and services. More precisely, it is a means of establishing a recordkeeping mechanism, keeping tracks of costs. This results in a transparent illustration of the relationship between costs and prices, as the system should be able to analyse costs to a greater level of granularity in order to ensure that costs allocated to regulated services do not result in cross subsidies, excessive prices and, in general, that costs are efficiently incurred.
- 6.144 ComReg is currently consulting further on this issue in more detail in a consultation on Accounting Separation and Cost Accounting¹¹⁰. In the interim ComReg is proposing to continue to require eircom to maintain in place its current cost accounting systems and to continue to comply with the requirements relating to separated accounts currently applicable to it until such time as any further consultations are completed.
- 6.145 ComReg maintains its position that, without the information which can be supplied from appropriately separated accounts, and without cost accounting systems which can suitably relate costs to products and services, it is not possible to fulfil the obligation of non-discrimination.

Preliminary Conclusion

¹¹⁰ Consultation on the Proposed Financial Reporting Obligations for Fixed Dominant Operators having Accounting Separation and/or Cost Accounting Obligations. (ComReg 05/18)

It is proposed that the existing level of cost accounting systems and accounting separation obligations should be maintained, pending the outcome of further consultation on accounting systems and associated methodologies for their support.

Q. 29. Do you agree that an obligation should be placed on the SMP operator to maintain the existing level of cost accounting systems and accounting separation obligations pending the outcome of further consultation?

7 Regulatory Impact Assessment

Introduction

- 7.1 This Regulatory Impact Assessment (RIA) analyses whether the obligations placed on the operator designated with SMP are proportionate to the objectives and benefits resulting from these obligations.
- 7.2 In the analysis below ComReg has grouped the obligations into wholesale and retail.

Wholesale Remedies

- 7.3 The proposed wholesale obligations are:
- Mandating Access to SB-WLR and carrier pre-selection under the Universal Service Regulations;
 - Non-discrimination by the SMP operator to ensure equivalent conditions are in place as to its treatment of other undertakings in SB-WLR and carrier pre-selection (CPS);
 - Transparency of tariffs for SB-WLR and CPS;
 - Price Control of SB-WLR re a retail minus methodology; and
 - Cost accounting and accounting separation, pending the outcome of a further consultation on accounting systems and methodologies.
- 7.4 Each of these obligations is considered in turn. It is noted that the EU Framework requires ComReg to apply remedies when SMP is found, so the option of forbearing from any remedies is not something ComReg can consider.
- 7.5 **Mandating Access:** Given *eircom* owns the PSTN network, the option of not mandating access would permit a return to the monopoly outcome of one supplier being the only provider of retail access. This would further entrench the dominance of the SMP operator, and permit a return to full monopoly pricing. The introduction of competition to the sector has seen a downward trend in prices, with consequent gains for consumers. Given both SB-WLR and CPS are now well-established products in common use by a large number of operators, the provision of such products does not impose substantial regulatory costs, and should be easily exceeded by the benefits of enhanced competition.
- 7.6 **Non-discrimination:** This obligation is related to the access remedy, and tries to ensure that a vertically-integrated firm does not favour its own retail division when supply wholesale products. Again, this obligation is necessary to ensure competition, as without it the SMP operator could offer inferior wholesale products to its retail competitors, thus strengthening its dominance in the downstream market, and thus allowing competition with corresponding benefits. The regulatory costs of this are not excessive, as this obligation is essentially behavioural and will not incur significant expense by the SMP operator.
- 7.7 **Transparency:** This condition is to ensure that all operators are able to understand the tariff structures offered to them by the SMP operator, thus ensuring their ability to compete in the retail market. Again, the regulatory burden of meeting this obligation is relatively limited.
- 7.8 **Price-control:** In order to allow competition to flourish in the retail sector, the price at which SB-WLR and CPS are offered to other operators must be similar to their underlying cost, otherwise the SMP operator could charge a monopoly price, which would limit competition in the retail sector. Accordingly, the option of not

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- implementing a wholesale price control is not reasonable, as such an option would have a strong negative effect on consumers. Again, the direct regulatory costs of implementing such this obligation are limited, and indeed, the methodology chosen by ComReg is less burdensome than the calculation of a formal cost-based price.
- 7.9 **Cost accounting and accounting separation:** ComReg considers these obligations are necessary to monitor the cost orientation obligation, ensure appropriate cost recovery mechanisms, monitor margin squeeze issues and retail tariff controls. In addition the accounting separation obligation can further support the transparency and non-discrimination obligations. In order to demonstrate the cost orientation of a service or product, it is necessary for eircom to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. If ComReg were not to impose these obligations, it (and other interested parties) would not have any means of ensuring the cost orientation of prices, monitoring price controls or dealing with margin squeeze issues.
- 7.10 ComReg considers the marginal costs of compliance with these obligations would be minimal as eircom already prepare and publish regulatory financial statements and have cost accounting systems in place to comply with this obligation. However ComReg accepts there may be further incremental cost for eircom in redesigning its systems and reporting structure in line with the requirements of the new directives. ComReg considers that these costs would be minimal and in any case the benefits would outweigh these incremental costs.

Regulatory Controls on Retail Markets

- 7.11 The proposed retail remedies are:
- A possible price cap on retail access;
 - The removal of the existing obligation for retail cost orientation;
 - Not showing undue preference to end-users;
 - Removal of the obligation to publish all changes to prices fifteen days in advance while proposing an obligation that ComReg should be notified five days before changes come into effect
 - An obligation not to unreasonably bundle;
 - Cost accounting and accounting separation.
- 7.12 Each of these obligations is considered in turn.
- 7.13 **Price Cap:** The paper details some of the issues surrounding the obligation of a retail price control. However, a separate consultation paper on this is being issued, and the regulatory impact of any such order will be considered there.
- 7.14 **Removing retail cost orientation:** it is proposed that this current obligation be removed, which should diminish the overall regulatory burden. Any issues associated with any possible increase in retail prices should be dealt with by any retail price cap, if needed.
- 7.15 **No undue preference to end-users:** This protects consumers from being unreasonably discriminated against. It does not involve any significant regulatory cost.

- 7.16 **Transparency:** Previously the SMP operator was required to notify ComReg 20 days in advance of proposed changes to prices, while publishing changes 15 days in advance to everyone else. ComReg feels that this obligation is now no longer necessary, and proposed to lighten any regulatory burden by ensuring that ComReg is notified 5 days in advance of changes to all retail access prices, and that all other operators are informed by publication of price changes on the day they occur. This reduces any constraint on the SMP operator significantly, while still ensuring competitors will be able to react to any price changes.
- 7.17 **Bundling:** ComReg proposes to impose a specific obligation in respect to bundling of higher and lower level access products.
- 7.18 **Cost Accounting:** ComReg considers this obligation is necessary to ensure appropriate cost recovery mechanisms, monitor pricing issues and retail tariff controls. In order to do this, it is necessary for eircom to establish cost accounting systems that capture, identify, value and attribute relevant costs to its services and products in accordance with agreed regulatory accounting principles, such as cost causality. If ComReg were not to impose this obligation, it (and other interested parties) would not have any means of ensuring the monitoring of price controls or dealing with margin squeeze issues.
- 7.19 ComReg considers the marginal costs of compliance with these obligations would be minimal as eircom already prepare and publish regulatory financial statements and have cost accounting systems in place to comply with this obligation. However ComReg accepts there may be further incremental cost for eircom in redesigning its systems and reporting structure in line with the requirements of the new directives. ComReg considers that these costs would be minimal and in any case the benefits would outweigh these incremental costs.

Preliminary conclusion

- 7.20 Overall, ComReg is satisfied that the obligations are proportionate, and indeed represent a diminishing of the obligations currently imposed on *eircom*. The remedies that remain are necessary to achieve ComReg's goals of enhancing competition and protecting consumers. Although they place requirements on the SMP operator to provide access in a reasonable manner, and thus do limit its commercial freedom somewhat, this is necessary to allow for competition, and is absolutely common practice throughout the EU. As such, any behavioural restrictions on the SMP operator will be more than made up for by the benefits to other operators and, ultimately, consumers. And the vast majority of the obligations do not impose direct regulatory costs on the SMP operator; there will be some costs associated with compliance and monitoring, but they are relatively limited.

Q. 30. Respondents are asked to provide views on whether the remedies in section 6 of this consultation paper are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impact of these remedies on end-users, competition, the internal single market and technological neutrality

Annex A: Draft Decision Instrument

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

[DRAFT] DECISION INSTRUMENT

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This decision instrument relates to the markets for higher and lower level retail access from a fixed location¹¹¹ and is made by the Commission for Communications Regulation (“ComReg”):

- i. Having had regard to ss 10 and 12 of the Communications Regulations Act 2002;
- ii. Having taken account, of its functions under Regulation 6 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003¹¹²;
- iii. Having (where appropriate) complied with the Policy Directions made by the Minister¹¹³;
- iv. Having taken the utmost account of the EU Commission’s Recommendation¹¹⁴ and the SMP Guidelines¹¹⁵;
- v. Having had regard to the market definition, market analysis and reasoning conducted by ComReg in [●] the analysis and reasoning set out in document No. and the reasoning and individual decisions set out previously in this document, each of which form part of and shall be construed with this decision instrument;

¹¹¹ Higher Level Access – including services over ISDN FRA and PRA. Lower Level Access – including services over PSTN, cable connection for telephony, narrowband FWA and ISDN BRA.

¹¹² S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

¹¹³ Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February 2003 and 26 March 2004.

¹¹⁴ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

¹¹⁵ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

- vi. Having taken account of the submissions received in relation to document No. [●]; and
- vii. Pursuant to Regulations 27 (4) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003¹¹⁶, Regulations 14 and 16 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003¹¹⁷ and Regulations 9, 10, 11, 12, 13 and 14 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003¹¹⁸.

2 MARKET DEFINITION

- 2.1 Pursuant to Regulation 26 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, the markets in this decision instrument are defined as the markets for higher and lower level retail access from a fixed location ("the Markets") and differ from any defined in the EU Commission's Recommendation.
- 2.2 Pursuant to Regulation 26 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, the relevant geographic area within the State for the Markets is defined as Ireland.

3 DESIGNATION OF SIGNIFICANT MARKET POWER ("SMP")

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

4 SMP OBLIGATIONS

- 4.1 ComReg is imposing certain obligations on eircom in accordance with Regulations 9, 10, 11, 12, 13 and 14 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, and Regulations 14 and 16 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003, as set out further below.

5 WHOLESALE OBLIGATIONS: CARRIER SELECTION AND PRE-SELECTION

Carrier selection and pre-selection

- 5.1 Pursuant to Regulation 16 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights)

¹¹⁶ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

¹¹⁷ S.I. No. 308 of 2003 the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003 which transposes Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

¹¹⁸ S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

Regulations 2003¹¹⁹, eircom shall enable its subscribers to access the services of interconnected providers of publicly available telephone services:

- i. On a call by call basis by dialing a carrier selection code; and
- ii. By means of pre-selection, with a facility to over-ride any pre-selected choice on a call-by-call basis by dialing a carrier selection code.

Cost orientation of prices

- 5.2 As required by Regulation 16 (3) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003, eircom shall ensure that its pricing for access and interconnection related to the provision of the facilities referred to in section 5.1 is cost oriented and that direct charges to its subscribers, if any, do not act as a disincentive for the use of those facilities¹²⁰.
- 5.3 Without prejudice to the generality of sections 5.1 and 5.2, all of the obligations in relation to provision of those facilities referred to in section 5.1, applicable to eircom immediately prior to the effective date of this decision instrument, shall be maintained in their entirety and eircom shall comply with those obligations. Without prejudice to the generality of the foregoing and, for the avoidance of doubt, this includes the continued provision of those facilities referred to in section 5.2, of the type, and in accordance with the processes, described in the eircom Reference Interconnect Offer – Annex C -Service Schedule 120.¹²¹

Undue preference

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

Transparency

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

¹¹⁹ ComReg has no discretion not to impose this obligation once it determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a relevant market consisting of the provision of connection to and use of the public telephone network at a fixed location is not effectively competitive.

¹²⁰ This obligation is imposed directly by Regulation 16 (3) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003.

¹²¹ As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

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

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

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

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

SLAs

5.8 eircom shall conclude legally binding SLAs with OAOs in respect of those facilities referred to in section 5.1.

5.9 eircom shall publish all SLAs concluded (and as from time to time amended) in accordance with this decision instrument.

Publication of RO

5.10 eircom shall publish a RO for those facilities referred to in section 5.1 and that reference offer shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and such offer shall include:

- i. A description of the relevant offerings broken down into components according to market needs; and
- ii. A description of the associated terms and conditions, including prices.

Accounting separation

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

- D5/99 – Accounting Separation and Publication of Financial Information for Telecommunication Operators.

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

6 WHOLESALE OBLIGATIONS: WHOLESALE LINE RENTAL

Access

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

Wholesale line rental

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

- i. eircom Reference Interconnect Offer – Annex C -Service Schedule 401¹²²;
- ii. Single Billing through Wholesale Line Rental Code of Practice Version 1.2:
123

¹²² As published at <http://www.eircomwholesale.ie/dynamic/pdf/rioumv3.12.pdf> and as amended from time to time in accordance with agreed processes.

- iii. Single Billing through Wholesale Line Rental Service Level Agreement 31/03/04.¹²⁴
 - iv. Single Billing through Wholesale Line Rental Product Description Version M.¹²⁵ and
 - v. Single Billing through Wholesale Line Rental Interoperator Process Manual Version 3.1.¹²⁶
- 6.3 All of the obligations in relation to provision of those facilities referred to in section 6.2, applicable to eircom immediately prior to the effective date of this decision instrument, shall be maintained in their entirety and eircom shall comply with those obligations. Without limiting the generality of the foregoing, eircom shall continue to comply with, *inter alia*, the various requirements described in the following Decision Notices previously issued by ComReg:
- i. D13/02 - CPS in Ireland 2002;
 - ii. D2/03 - Implementation of CPS Single Billing Products: Wholesale Line Rental;
 - iii. (SB-WLR), Agency Rebilling (SB-AR), Wholesale Ancillary Services (WAS);
 - iv. D9/03 - Implementation of CPS Single Billing Products – Wholesale Line Rental and Agency Rebilling Updating of Timetable and Formalisation of Product Descriptions; and
 - v. D4/04 - SB-WLR – Requirements for 31 March 2004 Launch Date.

Additional SB-WLR obligations

- 6.4 Without prejudice to the generality of sections 6.1 and 6.2, eircom shall in relation to those services referred to in section 6.2:
- i. Pursuant to Regulation 13 (2) (c) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, not withdraw access to facilities granted without the prior approval of ComReg;
 - ii. Pursuant to Regulation 13 (2) (e) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services; and

¹²³ As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrcopy1.2.pdf> and as amended from time to time in accordance with agreed processes.

¹²⁴ As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrsla.pdf> and as amended from time to time in accordance with agreed processes.

¹²⁵ As published at <http://www.eircomwholesale.ie/dynamic/pdf/wlrproddeseversionm.pdf> and as amended from time to time in accordance with agreed processes.

¹²⁶ As published at <http://www.eircomwholesale.ie/dynamic/pdf/sbwlrinterprocmualv.3.1.pdf> and as amended from time to time in accordance with agreed processes.

- iii. Pursuant to Regulation 13 (2) (h) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services.

Non-discrimination

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

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

- i. Provide a wholesale equivalent for retail offerings offered by eircom in the Markets;
- ii. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as eircom provides for its own services or those of its subsidiaries or partners; and
- iii. Ensure that information and services are provided to OAOs according to timescales, on a basis, and of a quality, which are at least equivalent to those provided to eircom's retail arm and associates.

Transparency

6.7 eircom shall, in furtherance of its obligations under sections 6.5 and 6.6 and for the purpose of ComReg monitoring compliance with those obligations, ensure that it is transparent in relation to interconnection, access or both interconnection and access.

6.8 Without prejudice to the generality of the obligation in section 6.7, eircom shall:

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

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

Publication of reference offer ("RO")

6.9 Pursuant to Regulation 10 (2) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall publish and keep updated a RO in respect of the services and facilities referred to in section 6.2 that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested.

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eircom shall also ensure that the RO includes a description of the relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices.

- 6.10 Pursuant to Regulation 10 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall make public such information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 6.2, as specified by ComReg from time to time.

Service level agreements (“SLAs”)

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

Retail minus pricing

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

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

Accounting separation and cost accounting

- 6.14 Pursuant to Regulation 14 (1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, eircom shall have an obligation to make transparent its wholesale prices and its internal transfer prices by maintaining separated accounts in respect of wholesale line rental. All of the obligations in relation to accounting separation applying to eircom in force immediately prior to the effective date of this decision instrument in respect of access and interconnection related to the provision of the facilities referred to in

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section 6.2, shall be maintained in their entirety and eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this decision instrument, eircom shall continue to comply with *inter alia*, the obligations described in the following Decision Notices previously issued by ComReg:

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

7 RETAIL CONTROLS ON THE MARKETS¹²⁷

Undue preference

7.1 Pursuant to Regulation 14 (2) (c) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users’ Rights) Regulations 2003, eircom shall not show undue preference to specific end-users.¹²⁸

¹²⁷ ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations that the Market is not effectively competitive and has concluded that obligations imposed under the Access Regulations or Regulation 16 of the Universal Service Regulations would not achieve the objectives set out in s 12 of the Communications Regulations Act 2002.

¹²⁸ The term “undue preference” means that any scheme which is introduced must not discriminate between similar users. Therefore, consumers which are of a comparable status should be charged the same prices. However, it is not discriminatory to apply different charges to consumers in different circumstances. In short, as long as there are objectively justifiable reasons for applying different tariff structures to different types of consumers, such a scheme will not be discriminatory. Objectively justifiable reasons could include lower tariffs for vulnerable consumers, such as the elderly and disabled, who have little or no income and who need a telephone connection to contact carers in the event of an emergency. Therefore, an allowance for vulnerable users, which is based on objective criteria and applied equally to all users in similar or comparable circumstances, fulfils the requirement of non-discrimination.

Transparency

- 7.2 Pursuant to Regulation 14 (1) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003, eircom shall notify ComReg at least 5 (five) working days in advance of proposed changes to the terms and conditions of supply of calls within the Markets. In this section, the expression "working day" means any day other than Saturday, Sunday, a bank holiday or a public holiday.
- 7.3 eircom shall publish its public offices and on its relevant website, all changes in to terms and conditions of supply when such changes come into effect.
- 7.4 eircom shall, in respect of services within the Markets, supply such services only at the published price.
- 7.5 eircom shall ensure that transparent information in relation to applicable prices and tariffs and standard terms and conditions in respect of access to and use of publicly available telephone services is available to end users and consumers and published, pursuant to Regulation 18 (1) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003.

Cost accounting

- 7.6 Pursuant to Regulation 14 (5) of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003¹²⁹, eircom shall operate and maintain a cost accounting system that is:
- i. Based on generally accepted accounting practices;
 - ii. Suitable for ensuring compliance with the obligations imposed under section 7; and
 - iii. Is capable of verification by ComReg.
- 7.7 eircom shall continue to comply with the obligations in relation to cost accounting applicable to it immediately prior to the effective date of this decision instrument, until such time as ComReg makes a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations.

Accounting separation

- 7.8 eircom shall maintain separated accounts. All of the obligations in relation to accounting separation applying to eircom in force immediately prior to the effective date of this decision instrument, shall be maintained in their entirety and eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and

¹²⁹ This obligation is automatically mandated once regulatory controls markets under Regulation 14 of the European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2003, are imposed on a retail market.

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implementation of accounting separation obligations and cost accounting obligations. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this decision instrument, eircom shall continue to comply with inter alia, the obligations described in the following Decision Notices previously issued by ComReg:

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

Unreasonable bundling

7.9 Eircom shall not unreasonably bundle services¹³⁰.

7.10 Without prejudice to the generality of section 7.9, where Eircom offers a number of services in a bundle, it shall ensure that end-users are able to purchase an individual service included in such bundle without purchasing the entire bundle of services and that tariffs for such individual services reflect the principle that end users should not be required to pay for facilities which are not necessary for the service requested.

8 WITHDRAWAL OF CERTAIN OBLIGATIONS

8.1 The obligations previously imposed upon eircom with respect to cost orientation of prices for retail services in the markets for the provision of connection to and use of the public telephone network at fixed locations, referred to in Annex I (1) of Directive 2002/21/EC¹³¹ and Directive 2002/22/EC¹³² are withdrawn as of the effective date of this decision instrument.

¹³⁰ What is defined as an unreasonable bundle is outlined in paragraphs 6.135- 6.142 of this consultation paper.

¹³¹ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

9 STATUTORY POWERS NOT AFFECTED

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

10 EFFECTIVE DATE

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

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

¹³² Directive 2002/22/EC of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services.

Annex B: Glossary of Terms

Access Line	A circuit that connects a subscriber to a switching centre.
Analogue	The direct representation of a waveform, as opposed to digital which is a coded representation. An analogue signal is one that varies continuously (eg. Sound waves). Analog signals vary along two parameters, amplitude (strength) and frequency (tone). The unit of measurement is the Hertz, or cycle per second.
Bandwidth	The physical characteristic of a telecommunications system that indicates the speed at which information can be transferred. In analogue systems, it is measured in cycles per second (Hertz) and in digital systems in binary bits per second. (Bit/s).
Bits per second	Basic unit of measurement for serial data transmission capacity; abbreviated as K bps, or kilobit/s for thousands of bits per second; M bps or megabit/s for millions of bits per second; G bps, or gigabit/s for billions of bits per second; T bps or terabit/s or trillions of bits per second.
Broadband	A service or connection allowing a considerable amount of information to be conveyed, such as television pictures. Generally defined as a bandwidth > 2Mbit/s Broadband Integrated Services Digital Network (B-ISDN). The capability to integrate any type of communications signals (voice, data, image or multimedia) and carry them over a single broadband channel of 150-mbps and above, 4k (B-ISDN) regardless of their content.
Cable Modem	A cable modem is a device that enables a PC to be linked to a local cable TV line for internet/data services.
Carrier Pre-selection (CPS)	The facility offered to customers which allows them to opt for certain defined classes of call to be carried by an operator selected in advance (and having a contract with the customer), without having to dial a routing prefix or follow any other different procedure to invoke such routing.
Dial-up	Connections made to a data network using the switched network to provide a voice band or data bearer.
Digital	The coded representation of a waveform by, for example, binary digits in the form of pulses of light, as opposed to analogue which is the direct representation of a waveform.
Digital Subscriber Line (DSL)	A family of technologies generically referred to as DSL or xDSL, which are capable of transforming a normal telephone line into a high-speed digital line. These include ADSL (Asymmetric DSL), SDSL (Symmetric DSL), HDSL (High data rate DSL) and VDSL (Very high data rate DSL). DSL enabled lines are capable of supporting services such as fast Internet access and video or TV on-demand.
Direct Access	The situation where a customer is directly connected to a telecommunications operator by a wire, fibre-optic or radio link to connect that customer to the public telecommunication network. This includes access via LLU.
Directory Enquiry Service (DQ)	Directory information service which is operator assisted and involves the operator looking up entries on a database.
Fibre Optic Cable	A transmission medium that uses glass or plastic fibres rather than copper wire to transport data or voice signals. The signal is imposed on the fibres via pulses (modulation) of light from a laser or a light-emitting diode (LED). Because of its high bandwidth and lack of susceptibility of interference, fibre-optic cable is used in long-haul or noisy applications.

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Fixed telephone Services	Means the provision to end-users at fixed locations of a service for the originating and receiving of national and international calls, including voice telephony services and may include, in addition, access to emergency 112 services, the provision of operator assistance, directory services, provision of public pay telephones, provision of service under special terms or provision of special facilities for customers with disabilities or with special social needs but does not include value added services provided over the public telephone system.
Flat Rate Internet Access (FRIACO)	The provision of a Flat Rate Internet Access Call Origination via a wholesale un-metered Internet access product.
Fixed Wireless Access (FWA)	A system that connects subscribers to the public switched telephone network (PSTN) using radio signals as a substitute for copper wires for all or apart of the connection between the subscriber and the switch.
Indirect Access	Where a customer's call is routed and billed through operator A's network even though the call originated from the network of operator B. It is the generic term for both easy access and equal access.
Integrated Services Digital Network (ISDN)	A network based on the existing digital PSTN which provides digital links to customers and end to end digital connectivity between them. ISDN2 provides a maximum bandwidth of 128kbit/s.
Interconnection services	Services provided by one telecommunications organisation to another for the purpose of the conveyance of messages and information between the two systems and including any ancillary services necessary for the provision and maintenance of such services.
Internet protocol (IP)	Packet data protocol used for routing and carriage of messages across the internet.
Internet telephony	A specific type of VoIP service that uses the public Internet to carry the IP traffic (also referred to as Voice over the Internet).
ISP	Internet Service Provider
Leased line	A leased line is a telephone line that has been leased for private use. In some contexts, it's called a <i>dedicated</i> line. A leased line is usually contrasted with a <i>switched line</i> or <i>dial-up line</i> .
Local Loop	The access network connection between a customer's premises and the local exchange. This usually takes the form of a pair of copper wires.
Local Loop unbundling (LLU)	LLU was mandated by the EU in December 2000. It requires those operators designated as having significant market power) to make their local networks (i.e. the telephone lines that run from a customer's premises to the local telephone exchange) available to other telecommunications companies.
Mediated service	Service where a service provider acts as a mediator to manage the communications capability between end-points by providing call set-up, connection, termination and party identification features, often generating or modifying dialling, signalling, switching, addressing or routing functions for the end-user.
Modem	A device which converts digital signals from a data-transmitting terminal into modulated analogue signals which can be carried by a public telephone network.
Narrowband	A service or connection allowing only a limited amount of information to be conveyed, such as for telephony. This compares with broadband which allows a considerable amount of information to be conveyed.
Originating network	The network to which a caller who makes a call is directly connected.

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Other Authorised Operators (OAOs)	Companies, other than eircom, which operate telecommunications systems.
Premium rate services (PRS)	Services, including recorded information and live conversation, run by independent service providers. All calls to these companies are charged at a higher rate than ordinary calls to cover the companies' costs in providing the content of the call and the operator's cost for the special network facilities needed.
Private circuits	Point-to-point circuits for customers exclusive use covering speech, data or image communications.
Public switched telephone network (PSTN)	The telecommunications networks of the major operators, on which calls can be made to all customers of all PSTNs.
Public telecommunications network	A telecommunications network used, in whole or in part, for the provision of publicly available telecommunications services.
Resellers	Service Providers who do not have their own network.
Switch	Relates to a telecommunications network comprising at least one exchange and capable of routing signals and messages from one line to all other lines comprised in the network.
Telecommunications	Conveyance of speech, music and other sounds, visual images or signals by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical means.
Third generation mobile systems (3G)	A European 3G mobile communications system provides an enhanced range of multimedia services (e.g. high speed Internet access).
Transit	A transit service is a conveyance service provided by a network between two points of interconnection. It is, therefore, a service that links two networks that are not in themselves interconnected.
Voice over Internet protocol (VoIP)	The generic name for the transport of voice traffic using Internet Protocol (IP) technology. The VoIP traffic can be carried on a private managed network or the public Internet (see Internet telephony) or a combination of both. Some organisations use the term 'IP telephony' interchangeably with 'VoIP'.
Voice telephony service	A service available to the public for the commercial provision of direct transport of real-time speech via the public switched network or networks such that any user can use equipment connected to a network termination point at a fixed location to communicate with another user of equipment connected to another termination point.
Virtual private network (VPN)	These are used by a company or private group to make inter-site connections either for telephone speech or data as if there were dedicated leased lines between these sites. The equipment used is located within the public telecommunications operators' premises and forms an integral part of the public network but is software-partitioned to allow for a genuinely private network
Wireless Local Area Networks (WLAN)	Also known as 'hotspot' services. A WLAN access point provides Internet connection and virtual private network (VPN) access from a given location e.g. public places, such as airports, hotels, and coffee shops. Access is facilitated via the user's own portable computer.

Annex C: Consultation Questions

- Q. 1. Are there additional factors that in your opinion require analysis by ComReg. If yes, please indicate precisely what they are. In respect of the factors analysed, is there additional analysis that in your opinion must be carried out. If yes, please indicate precisely what that is.....7
- Q. 2. Do you agree with the scope of the review? Please substantiate your answer. 9
- Q. 3. Do you agree that retail calls and retail narrowband access are in separate markets? Please elaborate your response.14
- Q. 4. Do you agree that fixed narrowband access and mobile access services do not currently belong in the same relevant market? Please elaborate your response.....20
- Q. 5. Do you agree that there are distinct markets for retail fixed lower level narrowband access and for retail fixed higher level narrowband access? Please detail your response.21
- Q. 6. Do you agree that it is inappropriate to further divide the lower level market into residential and non residential markets? Please detail your response. 22
- Q. 7. Do you agree that the relevant geographic market for the retail narrowband access markets is Ireland? Please expand in your response.....24
- Q. 8. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response.....25
- Q. 9. Do you agree with the above preliminary conclusions regarding market analysis? Please provide a reasoned response.37
- Q. 10. Do you agree with the competition problems identified by ComReg, as outlined above? Please provide evidence in support of your response.43
- Q. 11. Do you agree that eircom should be obliged to offer a SB-WLR product in line with requirements as determined by ComReg, under the obligations of the Access Regulations? Please detail your response.....46
- Q. 12. Do you agree that an access obligation should be imposed on the SMP operator pursuant to Regulation 13 of the Access Regulations? Do you agree that this access obligation should mandate Wholesale Line Rental? Please detail your response.....47
- Q. 13. Do you agree that the SMP operator should be required to grant open access to relevant information, technical interfaces, protocols, or other key technologies and should also be required to provide such OSS or similar software necessary to ensure fair competition in the provision of SB-WLR services? Please detail your response.48
- Q. 14. Do you agree that the SMP operator should be required not to withdraw access to facilities already granted, save without prior ComReg approval? Please detail your response.49
- Q. 15. Do you agree that obligations of non-discrimination should be imposed on the SMP operator? Please detail your response, making references to ComReg's interpretation of such an obligation set out above.50

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- Q. 16. Do you agree with the approach to Service Level Agreements for access obligations set out above? Are there any other conditions which should be attached to the proposed obligations? Please detail any response.....51
- Q. 17. Do you agree that an obligation of transparency should be imposed on the SMP operator? Please detail your response.....52
- Q. 18. Do you believe that the current product documentation (including RIOs) should be maintained in respect of the CPS and SB-WLR products and that any new documentation should be developed in accordance with regulations 10 to 13 of the Access Regulations?.....53
- Q. 19. Do you believe that the win back provisions of the Code of Practice are achieving the objectives for which they were intended? Can you identify any problems that the withdrawal of the Code of Practice would create? Please substantiate your answer.55
- Q. 20. Do you believe that it is correct to formalise current practice and oblige eircom to publish changes to wholesale prices 15 working days before they come into effect. It is proposed that the obligations will also require eircom to notify ComReg of changes to wholesale prices 5 working days before publication (i.e. 20 working days before they come into effect).56
- Q. 21. ComReg proposes that prices set on the basis of FL-LRIC would not be appropriate in the period of this review. Do you agree with this position?.....58
- Q. 22. ComReg proposes to continue with the application of the retail minus price control for SB-WLR for the period of this review. Do you agree with this position? Please provide reasons for your answer.....58
- Q. 23. Do you agree that the obligations of accounting separation currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.59
- Q. 24. Do you agree that the obligations of cost accounting currently imposed on eircom should be maintained, subject to further consultation? Please detail your response.....59
- Q. 25. Do you agree with the proposal to withdraw the requirement for cost orientation of retail prices?61
- Q. 26. Do you agree that the eircom will be subject to an obligation not to show undue preference to specific end-users?.....62
- Q. 27. Do you agree with ComReg's proposed approach to SMP transparency, notification and publication obligations? Please explain the reasons for your answers.64
- Q. 28. Question: Do you agree with the general approach to bundling taken in this sub-section? Do you agree that an obligation should be placed on the SMP operator to ensure services are not unreasonably bundled? If, instead, your view is that ComReg should forebear, please explain what alternative remedies could mitigate any negative impacts of bundling. Please explain the reasons for your answers.66
- Q. 29. Do you agree that an obligation should be placed on the SMP operator to maintain the existing level of cost accounting systems and accounting separation obligations pending the outcome of further consultation?67

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Q. 30. Respondents are asked to provide views on whether the remedies in section 6 of this consultation paper are proportionate and justified and offer views on what factors ComReg should consider in completing its Regulatory Impact Assessment in terms of the impact of these remedies on end-users, competition, the internal single market and technological neutrality.....70

Annex D: Other SMP Criteria

In paragraph 78 of the *SMP Guidelines*, it is stated that ComReg should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. It is suggested that the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others:

SMP Criterion	Explanation of Criterion	ComReg's assessment
Overall size of the undertaking.	This refers to the potential advantages, and the sustainability of those advantages, that may arise from the large size of an undertaking relative to its competitors.	ComReg suggests that the advantages which eircom enjoys as a result of its larger size are more appropriately considered under economies of scale, which is considered in the consultation paper.
Control of infrastructure not easily duplicated.	This is considered in further detail in the consultation paper.	This is considered in further detail in the consultation paper.
Technological advantages or superiority.	Such advantages may represent a barrier to entry as well as an advantage over existing competitors due to lower production costs or product differentiation.	ComReg considers that eircom does not have any advantage over its competitors in relation to the technology upon which retail narrowband access is provided over. Further, ComReg is of the view that by virtue of the market definition there is no potential competition in the market and therefore whether there are technological advantages is not of relevance.
Absence of or low countervailing buying power.	This is considered in further detail in the consultation paper.	This is considered in further detail in the consultation paper
Easy or privileged access to capital markets/financial resources.	Easy or privileged access to capital markets may represent a barrier to entry as well as an advantage over existing competitors.	ComReg does not consider that this constitutes a significant advantage over others, as a many of its competitors are affiliated companies belonging larger groups and thus have access to resources.
Economies of scale.	This is considered in further detail in the consultation paper under potential	This is considered in further detail in the consultation paper.

	competition.	
Economies of scope.	This is considered in further detail in the consultation paper under potential competition.	This is considered in further detail in the consultation paper.
Vertical integration.	This is considered in further detail in the consultation paper under potential competition.	This is considered in further detail in the consultation paper.
A highly developed distribution and sales network.	A well-developed distribution systems may be costly to replicate and maintain, and may even be incapable of duplication. They may represent a barrier to entry as well as an advantage over existing competitors.	ComReg does not consider that eircom has a considerable advantage over its competitors in respect to its distribution and sale networks. Further, ComReg suggests that there are not significant barriers which would prevent other operators replicating eircom's distribution and sale network.
Absence of potential competition.	This is considered in further detail in the consultation paper.	This is considered in further detail in the consultation paper.
Barriers to expansion.	While growth and expansion is easier to achieve for individual firms (and in particular for new entrants) in growing markets, it might be inhibited in mature, saturated markets, where customers are already locked in with a certain supplier and have to be induced to switch.	ComReg believes that while there are barriers to entry into the retail access markets, eircom does not enjoy market power as a result to barriers to expansion. Switching barriers are sufficiently low and survey data would indicate that consumers do switch to indicate that consumers are not locked in.