



Brussels, 17.9.2021  
C(2021) 6690 final

**COMMISSION DECISION**

**of 17.9.2021**

**pursuant to Article 32(6) of Directive (EU) 2018/1972  
(Withdrawal of notified draft measure)**

**Cases IE/2021/2332-2333: markets for retail fixed telephony services and wholesale fixed access and call origination in Ireland**

Only the English version is authentic

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code), and in particular Article 32(6) thereof<sup>1</sup>,

Having regard to the opening of the second phase of investigation pursuant to Article 32(4) of the Framework Directive on 19 July 2021,

Having regard to the additional information provided by the Ireland's national regulatory authority (NRA), Commission for Communications Regulation (ComReg) on 5 August 2021,

Having regard to the notice posted on the Commission's website on 23 July 2021, inviting third parties to submit observations on the Commission's serious doubts letter (the Notice),

Having regard to the opinion issued by the Body of European Regulators for Electronic Communications (BEREC) on 17 August 2021<sup>2</sup>.

Whereas:

## PROCEDURE

- (1) On 18 June 2021, the Commission registered a notification from the Ireland's national regulatory authority (NRA), Commission for Communications Regulation (ComReg)<sup>3</sup>, concerning the Irish markets for retail fixed telephony services and wholesale fixed access and call origination<sup>4</sup>.

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<sup>1</sup> OJ L 321, 17.12.2018, p. 36.

<sup>2</sup> BoR(2021)109.

<sup>3</sup> Under Article 32 of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the Code) (OJ L 321, 17.12.2018, p. 36).

<sup>4</sup> Corresponding to markets 1 and 2 in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007 Recommendation on Relevant Markets), (OJ L 344, 28.12.2007, p. 65). Since 2014, these markets have been removed from the list of the relevant markets that may warrant ex ante regulation which is contained in the currently applicable Commission Recommendation (EU) 2020/2245 of 18 December

- (2) On 25 June 2021, the Commission sent a request for information<sup>5</sup> to ComReg and received a reply on 30 June 2021.
- (3) On 19 July 2021, The Commission, pursuant to Article 32(4) of The Code informed ComReg and BEREC that it had serious doubts as to the compatibility of the draft measure with Union law (the serious doubts letter).<sup>6</sup>
- (4) On 23 July 2021, the Commission posted a notice on its website, inviting third parties to submit observations on the Commission's serious doubts letter. Six observations have been submitted to the Commission.
- (5) On 28 July 2021, the Commission held a virtual meeting with the BEREC Expert Working Group to discuss this case.
- (6) On 2 August 2021, the Commission sent an additional RFI to ComReg and received a response on 05 August 2021.
- (7) On 17 August 2021, the Commission received the opinion of BEREC.

## DESCRIPTION OF THE DRAFT MEASURE

- (8) ComReg analysed the market for retail fixed telephony services (RFTS) and the wholesale market for fixed access and call origination (FACO), and proposed to lift regulation from the RFTS market as well as from part of the FACO market.

### Background

- (9) The markets for RFTS and FACO in Ireland were previously notified to and assessed by the Commission under cases IE/2014/1629 and IE/2015/1746 respectively<sup>7</sup>.

#### *Retail fixed telephony services*

- (10) ComReg found three separate retail markets distinguishing between low-level and high-level voice access on the one hand, and between standalone and bundled access on the other. Each of these markets was national in scope. ComReg designated Eircom with significant market power (SMP) on the three relevant retail markets and imposed wholesale remedies in the form of an obligation to provide wholesale line rental (WLR) and carrier pre-selection (CPS). ComReg also imposed a retail price cap, and an obligation not to unreasonably bundle which encompassed a net revenue test (NRT), a measure aimed at avoiding a margin squeeze.
- (11) The Commission urged ComReg to (i) complete the assessment of the (upstream) market for call origination as soon as possible, (ii) notify the Commission, other NRAs and BEREC of it and (iii) reassess whether the notified markets still warranted *ex ante* regulation without any undue delay.

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2020 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with the Code (2020 Recommendation on Relevant Markets) (OJ L 439, 29.12.2020, p. 23–31).

<sup>5</sup> In accordance with Article 20(2) of the Code.

<sup>6</sup> C(2021)5450.

<sup>7</sup> C(2014) 5482 and C(2015) 5011.

- (12) The remedies imposed by ComReg under the 2014 Decision have been amended by the 2015 FACO Decision<sup>8</sup> and the 2018 Bundles Decision<sup>9</sup>. With the Bundles Decision, ComReg withdrew the obligation not to unreasonably bundle as imposed on the market for retail narrowband fixed access (in particular in the bundled low and high level voice access markets) and the related net revenue test. Again in 2018, the Commission urged ComReg to examine without undue delay whether, in light of retail developments and wholesale regulation in place, regulation in the retail access market was still proportionate.

#### *Fixed access and call origination*

- (13) In 2015, ComReg defined a wholesale market for fixed access and call origination comprising a fixed access or WLR component and a fixed call origination<sup>10</sup> component. As the FACO market was not listed in the Recommendation on Relevant Markets, ComReg carried out the three criteria test. It concluded that the test was still met.
- (14) ComReg designated Eircom as operator with SMP and imposed a full set of obligations.
- (15) The Commission reiterated its comment on the need to proceed with the review of the retail access market without undue delay.
- (16) In 2016 (Case IE/2016/1860<sup>11</sup>), ComReg amended the price control remedies related to SB-WLR. It also specified the two high-level margin squeeze obligations imposed on FACO.
- (17) The Commission commented on the need to review the retail access market, inviting ComReg to further monitor developments in the retail access market and to examine without undue delay whether, in light of retail developments, regulation in the retail access (and FACO) markets remained appropriate.
- (18) The 2018 Bundles Decision specified the cost orientation obligation in the FACO markets for wholesale voice/plain old telephone service (POTS) when it is sold with FTTC services.

### **Market definition**

#### *Retail fixed telephony services*

- (19) RFTS consist of both a retail fixed voice call component and a retail fixed voice access, or retail line rental, component. RFTS can be sold either on a standalone basis<sup>12</sup>, or provided together in a bundle with other retail services (principally broadband, mobile telephony or TV services)<sup>13</sup>. The incremental costs of adding RFTS to a bundle vary between service providers. However, offers with net savings, no or

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<sup>8</sup> Notified and assessed by the Commission under case IE/2015/1746, C(2015) 5011.

<sup>9</sup> Notified and assessed by the Commission under case IE/2018/2115, C(2018) 6788.

<sup>10</sup> FVCO is defined as calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection.

<sup>11</sup> C(2016) 3034.

<sup>12</sup> Only Eir and Pure Telecom offer RFTS as a standalone service.

<sup>13</sup> As of Q4 2020, 17% of all RFTS is sold as a standalone service while 83% of RFTS subscriptions are sold as part of a bundle with other services (such as TV, Broadband and/or mobile).

very little additional costs for adding RFTS to standalone broadband are widely available.<sup>14</sup> RFTS are provided over a copper network, in case of fixed narrowband access (FNA), including PSTN or ISDN<sup>15</sup>, based on the WLR. RFTS are also provided over a broadband<sup>16</sup> access path, e.g. FTTx or CaTV, by means of managed voice over Internet Protocol (VoIP).

- (20) As ComReg considers that there is a break in the chain of substitution between PSTN and ISDN BRA on the one hand, and ISDN FRA and ISDN PRA on the other, it distinguishes two distinct focal products for FNA RFTS, pertaining to low-volume and high-volume RFTS end users. Moreover, RFTS being provided as part of a bundle with NG broadband (particularly for managed VoIP), and a sizeable but declining number of standalone RFTS users, ComReg considers it appropriate to further delineate a standalone LL-RFTS market and a bundled LL-RFTS market.
- (21) Therefore, ComReg finds there are three relevant RFTS markets: (i) standalone LL-RFTS, (ii) bundled LL-RFTS, and (iii) HL-RFTS<sup>17</sup>.
- (22) ComReg finds that there is insufficient evidence to conclude on the presence of fixed-mobile substitution, and considers mobile telephony and RFTS as complementary rather than substitutes<sup>18</sup>.
- (23) Between Q3 2014 and Q4 2020, the total number of voice minutes (fixed and mobile together) has been overall stable, with the decline of 511.4 m fixed minutes being offset by an increase of 542.8 m mobile minutes.<sup>19</sup>

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<sup>14</sup> ComReg finds that broadband centric customers face little or no additional costs or even benefit from a discount when adding RFTS to the bundle. Pure Telecom is the only service provider which offers standalone RFTS at a cheaper price as opposed to when bundled with broadband. Pure Telecom has a market share for RFTS of 3.9%.

<sup>15</sup> Plain old telephony services (POTS) is a form of RFTS provided over fixed narrowband access (FNA). FNA describes Current Generation (CG) technology delivered entirely over copper access paths, and includes both PSTN and ISDN access paths.

<sup>16</sup> According to ComReg, broadband includes technologies consisting of a partial or full optical component (FTTC, or FTTP) and DOCSIS 3.0/3.1 used to deliver broadband over cable.

<sup>17</sup> Market 1a: a national Standalone Low-Level RFTS (Standalone LL-RFTS) market including RFTS delivered over PSTN and ISDN BRA and any Managed VoB delivered over NG Broadband on a standalone basis;

Market 1b: a national Bundled Low-Level RFTS (Bundled LL-RFTS) market including RFTS delivered over PSTN and ISDN BRA and Managed VoB delivered over (and with) NG Broadband on a bundled basis together with any of broadband, television or mobile services; and

Market 1c: a national High-Level RFTS (HL-RFTS) market including RFTS over ISDN FRA and PRA and any Hosted PBX or SIP Trunking forms of Managed VoIP delivered over NG Broadband, on a standalone basis or on a bundled basis together with any of broadband, television or mobile services.

<sup>18</sup> Regarding pricing of mobile calls, ComReg considers that, over the next 5 years, the presence of all-inclusive minutes and other services (data in the case of mobile telephony and broadband or TV in the case of RFTS) will render direct comparisons of fixed and mobile call costs challenging. ComReg also notes that residential end users have limited awareness of call costs. At the same time, it notes that end users perceive calls from mobile phones to be more expensive than calls from fixed lines for all call categories except calls to mobile phones. There are offers in which RFTS can be purchased at small additional costs to a broadband available in the market, i.e. Vodafone offers RFTS as a free add-on to broadband purchases, and Virgin Media offers RFTS/dual play for an extra EUR 3 per month on the price of its three standalone broadband packages.

<sup>19</sup> ComReg argues, that this observed stability is to some degree due to a spike in mobile minutes only in the wake of the COVID-19 pandemic, causing an increase in mobile consumption from Q2 2019 and onwards.

- (24) At present, 85% of the overall voice call minutes are mobile calls. Residential and business fixed voice minutes are decreasing, while mobile minutes are increasing. According to ComReg’s research, 96% of households are equipped with at least one mobile phone, which means that 4% or less of households are fixed only<sup>20</sup>, while 51% of households and 23% of businesses have transitioned to being mobile only households.<sup>21</sup>
- (25) ComReg highlights that the primary use of fixed lines of consumers is to call other fixed lines while mobiles are rather used to reach other mobiles, due to end users perceptions of higher prices of mobile to fixed or fixed to mobile calls. ComReg also refers to a 2019 residential market research showing that 68% of standalone LL-RFTS and 74% bundled LL-RFTS end users would not change behaviour in response to a SSNIP<sup>22</sup>. ComReg considers that SMEs are even more reluctant to engage in fixed-mobile substitution. ComReg also notes that while total fixed voice traffic has declined by 44% between Q3 2014 and Q4 2020, total fixed voice subscriptions have only declined by 10%<sup>23</sup>, and that 61% of all RFTS subscriptions continue to be delivered over FNA.
- (26) The relevant geographic markets are national. This is based on limited variations in the number and size of potential competitors geographically, the absence of sufficient evidence of differentiated pricing or marketing strategies on a sub-national basis and limited differences in demand characteristics across regions.

*Wholesale market for fixed access and call origination*

*Product market*

- (27) FACO is a wholesale input purchased by access seekers<sup>24</sup> which do not operate their own networks (or only have networks with limited geographic reach), and which ultimately allows for providing RFTS to end users. It is composed of a calling

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<sup>20</sup> ComReg relies on various surveys, i.a. the Mobile Consumer Experience (MCE) survey, based on 2 800 respondents and the 2019 residential market research, based on 2 011 face to face interviews.

<sup>21</sup> According to the Eurobarometer, 43% of households have transitioned to being mobile only. ComReg argues however that mobile calls quality could in some areas be insufficient. 4G coverage in rural parts of Ireland would frequently be at a level of “fair” or below. Ireland is characterised by higher than EU level average levels of rural population distributed in dispersed one-off housing, users experiencing loss of mobile signal in their homes, and poor mobile coverage.

<sup>22</sup> Small, significant, non-transitory increase in price.

<sup>23</sup> Moreover, according to ComReg’s market research, a further 9% of residential RFTS end users were likely to give up RFTS in the next twelve months.

<sup>24</sup> Taking together SB-WLR and WLV purchases, BT and Vodafone together account ██████████ of FACO purchases from Eircom. However, Eircom’s self-supply still accounts for the majority of Eircom FNA paths.

component for call conveyance (fixed voice call origination (FVCO)<sup>25</sup>) and a fixed access (FA) component WLR.<sup>26</sup>

- (28) According to ComReg, this market definition reflects:
- (1) the nature of retail demand for RFTS where line rental and calls are predominantly purchased by wholesale customers together from the same supplier; and
  - (2) the fact that it is not technically possible for a wholesale customer to purchase FA/WLR from one wholesale supplier and FVCO from another.
- (29) ComReg distinguishes between the High Level (HL) and the Low Level (LL) FACO markets, both including FVCO. The LL-FACO market comprises fixed narrowband access provided by means of PSTN and ISDN BRA. It also includes access and voice call origination provided over NG broadband<sup>27</sup> used as inputs to provide managed voice over broadband (VoB) to end consumers. The HL-FACO market comprises fixed narrowband access provided by means of ISDN FRA or ISDN PRA<sup>28</sup>, as well as access and voice call origination provided over NG broadband via hosted PBX or SIP Trunking.
- (30) In addition to the HL- and LL-FACO products (for which Eircom is the only provider in Ireland), the proposed markets include Eircom's self-supply, notably its notional supply of FACO via managed VoIP.
- (31) Self-supply over CaTV networks is proposed to be excluded from the FACO markets since a FACO product over a CaTV network does not exist and the only cable provider Virgin Media has no plans to offer it. ComReg considers that such a product is unlikely to appear even if Eircom's prices increase. Furthermore, the CaTV network does not allow for the coverage expected by access seekers since it lacks the ubiquity of Eircom's FACO product<sup>29</sup>.
- (32) ComReg has analysed whether:
- (i) White Label Voice (WLV)<sup>30</sup>(SB-WLR is an upstream input to WLV);
  - (ii) FACO potentially provided over Fixed Wireless Access (FWA);
  - (iii) FACO provided over very localised FTTP networks; or
  - (iv) FACO potentially provided over mobile telephony services

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<sup>25</sup> FVCO is defined as calls originated at a fixed location of an end-user which are conveyed and routed through any switching stages (or equivalent) up to a point of interconnection. This interconnection takes place at the primary, tandem, or double-tandem exchange associated with the FA, or in the case of NG broadband, at a fixed location of an end user which are conveyed and routed on an end-to-end basis over an IP network to a managed VoB VoIP platform (and to a Hosted PBX or SIP Trunking VoIP platform in the case of the HL-FACO). FVCO does not distinguish between types of telephone numbers called.

<sup>26</sup> The White Label Voice (WLV) service is not included in the market, as SB-WLR (within the FACO market), call origination and transit are inputs for the provision of WLV.

<sup>27</sup> Mirroring the retail market definition, broadband includes technologies consisting of a partial or full optical component (FTTC, or FTTP) and DOCSIS 3.0/3.1 used to deliver broadband over cable.

<sup>28</sup> The distinction between products included in the HL and LL FACO markets resides in the number of voice channels supported: 1 on PSTN, 2 on ISDN BRA, between 15 and 31 for ISDN FRA and PRA. For VoIP products, the number of voice channels is not fixed, but managed VoB offers numbers comparable to PSTN and ISDN BRA while hosted PBX or SIP Trunking offer numbers comparable to ISDN FRA and PRA.

<sup>29</sup> As of Q4 2020, Virgin Media had 42% (CaTV) network coverage.

<sup>30</sup> WLV is effectively a bundle including fixed access, fixed voice call origination and transit.

should be included in the FACO market due to the direct constraint or the indirect constraint (via competition at the retail level)<sup>31</sup> they exert on the market.

- (33) ComReg has concluded that none of the alternatives exert a constraint that would justify their inclusion in the FACO market.

#### *Geographic dimension*

- (34) For both LL- and HL-FACO markets, ComReg distinguishes two separate geographic markets, the Urban FACO markets and the Regional FACO markets. ComReg considers the exchange area (EA) as the appropriate unit of geographic assessment. ComReg found geographical differences in the:

- (i) entry conditions over time;
- (ii) number and size of potential competitors; and
- (iii) distribution of market shares.

- (35) Conversely, ComReg did not find differences in:

- (i) wholesale or retail pricing or marketing strategies; or
- (ii) demand characteristics between urban and regional areas.

- (36) ComReg considers that market shares are not sufficiently reliable indicators of differences in competitive conditions and places less weight on this indicator. In its view, the key determinant to assess different competitive conditions is the presence of NG networks.<sup>32</sup>

- (37) In particular, ComReg considers that it is likely that there will be geographical differences in the entry conditions over time based on the capability to provide, or the actual provision of, FACO<sup>33</sup> and RFTS over Eircom FTTx, SIRO<sup>34</sup>, and on a forward-looking basis NBI<sup>35</sup> networks, as well as the capability to provide RFTS through

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<sup>31</sup> For the assessment of indirect constraints, ComReg has performed a SSNIP test by looking at how a price increase at wholesale level would impact the behaviour of retail customers. ComReg has concluded that none of the alternatives would make enough customers change their behaviour to make a wholesale price increase unprofitable for Eircom, similarly as on the RFTS market. Moreover, there is a factor specific to the wholesale market, which is the fact that a wholesale price increase would likely have a diluted impact on retail prices since wholesale inputs only represent a part of the total costs of providing RFTS.

<sup>32</sup> Eircom is currently upgrading its FNA network to FTTx. According to ComReg, total VDSL and FTTP coverage measured by premises passed amounts to [80-85%], when network overlap is taken into account, on a national basis. Total VDSL and FTTP coverage falls to [60-65%] in the footprint of the Regional FACO Markets and rises to [90-95%] in the footprint of the Urban FACO Markets. As of Q4 2020 Eircom passed 2.1m premises with VDSL or FTTP. However, Eircom's VDSL and FTTP networks overlap in certain areas. When this overlap is taken into account, total Eircom VDSL +FTTP coverage, measured by premises passed, amounts to approximately 1.89 million premises.

<sup>33</sup> BT has also offered since 2019 a FACO product to Sky and Pure Telecom, delivered over wholesale NG broadband inputs purchased from Eircom and SIRO.

<sup>34</sup> SIRO is a joint venture between Vodafone and the electricity provider in Ireland. SIRO intends to roll out its network to [redacted] of premises in Ireland.

<sup>35</sup> National Broadband Ireland (NBI) aims to rollout in areas which are not commercially attractive due to low premises density and prospectively poor returns on investment. Its network is unlikely to overlap with other networks, but its deployment is slower than initially announced and covered only 4 000 premises as of April 2021 ([redacted]). Network build is in progress for a further [redacted] premises by the end of 2021.



managed VoIP over Virgin Media’s CaTV network<sup>36</sup>. ComReg has not included NBI in its geographical assessment given the very limited number of premises it covers. That said, it considers that this does not impact the outcome of the assessment.<sup>37</sup>

- (38) ComReg relies on an NG broadband coverage of 80% to define the EAs susceptible to deregulation. ComReg does not include in this threshold the coverage of Virgin Media’s cable network as Virgin does not provide merchant access to its cable network<sup>38</sup>. If an EA has less than 80% NG broadband coverage, all premises within such an area are included in the Regional FACO markets. The remaining premises (served by EAs where the NG coverage is 80% or more) are included in the Urban FACO markets. Under this criterion, ComReg identifies 699,724 premises within the Regional FACO markets, of which [REDACTED] are currently without NG broadband coverage. In its response to the Commission’s RFI of 2 August, ComReg provided a sensitivity analysis on the level of the threshold used to classify an EA as urban or regional according to the presented here:

**Change in Regional FACO Markets delineation from 70%-80%**

	70%	80%	Change (n)	Change (%)
EA	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Premises passed by wholesale NG broadband	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Premises not passed by wholesale NG broadband	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Total Premises</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

**Change in Urban FACO Markets delineation from 70%-80%**

	70%	80%	Change (n)	Change (%)
EA	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Premises passed by wholesale NG broadband	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Premises not passed by wholesale NG broadband	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<b>Total Premises</b>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

<sup>36</sup> For Virgin Media, this is only valid for LL-FACO market. ComReg also mentions that Virgin Media’s CaTV network is mainly present in urban areas and that Virgin Media does not sell wholesale access.

<sup>37</sup> In its response to the Commission’s RFI of 2 August, ComReg further clarified that NBI has confirmed its roll out plans to approx. [REDACTED] premise until 2023, [REDACTED]

[REDACTED] ComReg notes that the Department of Communications has recently issued a request to NBI to accelerate rollout, completing all deliverables within five years rather than seven. NBI has not yet confirmed that it will be in a position to accede to this request, pending detail technical, commercial, and financial analysis.

<sup>38</sup> As Virgin Media is active on the LL-FACO Market on a self-supply basis only, ComReg considers that Virgin Media presence at an EA, on its own or in the absence of 80% wholesale NG Broadband coverage, is unlikely to generate sufficiently different competitive conditions in the provision of LL-FACO. This is because, in a scenario where, for example, only Eircom FNA and Virgin Media were present at an EA, there would be no possibility for an access seeker offering Managed VoIP on the basis of wholesale inputs at that EA. ComReg therefore considers that this EA would effectively be akin to a duopoly.

- (39) The Urban FACO market comprises 407 exchange areas where the 80% NG coverage is met, whereas the Regional FACO market comprises 795 exchange areas<sup>39</sup> where the 80% NG coverage is not met.<sup>40</sup>

### Three criteria test

#### Retail fixed telephony services

##### *High barriers to entry*

- (40) ComReg finds that the identified RFTS markets are no longer characterised by high barriers to entry after analysing the following legal and structural barriers to entry:
- (a) overall size of incumbent and control of infrastructure that is not easily replicable;
  - (b) sunk costs;
  - (c) economies of scale, scope and density; and
  - (d) vertical integration.
- (41) ComReg bases its reasoning on the ability of competitors to provide RFTS via Virgin Media’s network or via regulation of upstream markets (FACO, WCA and WLA), on the fact that while Eircom benefits from economies of scale, these do not constitute high and non-transitory barriers to entry, and on the fact that RFTS are often provided in bundles, thus allowing to spread sunk costs on various products. ComReg notes, however, that while barriers to entry on the market of RFTS have been eroded, including for standalone RFTS, RFTS is now to a large extent provided as part of a bundle. Therefore, new entries would likely happen on the bundled RFTS market rather than on the standalone RFTS market.

##### *Tendency towards effective competition*

- (42) ComReg finds that all identified RFTS markets present a tendency towards effective competition after analysing whether:
- (a) there are observable trends towards effective competition;
  - (b) service providers other than Eircom are in a position to enter the RFTS market to the extent that they would be able to effectively compete with the

<sup>39</sup> In the Regional FACO market there are 699 724 premises (which account for 31% total premises in Ireland), of which 91% are residential premises and the remaining 9% are business premises, ComReg notes that the number of total premises in the Regional FACO markets which are not served by NG broadband, and therefore could only be served by SB-WLR (or WLV) equates to approximately 271 083 as at Q4 2020, or 39% of all premises in the Regional FACO markets.

<sup>40</sup> Differences in competitive conditions by EA, applying 80% coverage criterion, Q4 2020

FACO Markets	N, of EAs	Premises in EAs	% Total premises	Total RFTS lines in EAs	% Total RFTS lines	Total SB-WLR lines in EAs	Total FACO (SB-WLR) lines
Urban	407	1 573 582	69%	1 076 521	74%	672 364	72%
Regional	795	699 724	31%	376 165	26%	259 965	28%
<b>Total</b>	<b>1,202</b>	<b>2 273 306</b>	<b>100%</b>	<b>1 452 686</b>	<b>100%</b>	<b>932 329</b>	<b>100%</b>

incumbent<sup>41</sup>;

(c) any expected or foreseeable technological and economic developments are likely to impact on competition within the time period of the market review.

- (43) ComReg notes that on the standalone LL-RFTS market, Eircom's share has fallen and customers are moving to the bundled LL-RFTS market.<sup>42</sup> The latter, as well as the HL-RFTS market, are characterised by greater levels of competition generated by availability of broadband bundles, where NG broadband rollout has occurred, via purchases of WLA or WCA from Eircom (regulated), SIRO or – on a forward-looking basis – NBI.
- (44) Eircom's RFTS market share (by revenues) declined from 46.5% in Q3 2014 to 38.7% in Q4 2020. In terms of subscriptions<sup>43</sup>, as of Q4 2020, RFTS market shares were as follows: Eircom 40.3% (declined from 42.6% in Q3 2014), Virgin Media 22.6%, Vodafone and Sky both 13.6%, Pure Telecom 3.9%.<sup>44</sup>
- (45) Since 2014, per capita mobile phone penetration continues to exceed 100%. Total RFTS subscriptions declined by 10% in the same period. Revenues attributable to RFTS traffic have fallen by 23%, while volumes of traffic minutes have fallen by 44%. Mobile voice traffic and revenue have continued to increase, by 25% in the case of revenue, and 18% in the case of traffic.

#### *Sufficiency of competition law*

- (46) ComReg considers that competition law alone is insufficient to address potential competition issues on the RFTS markets, in particular due to the length of the procedure.

#### *Conclusion on the 3CT*

- (47) ComReg concludes that the identified RFTS markets only fulfil one of the three criteria. Regulation is therefore no longer justified on these markets and ComReg therefore proposes to withdraw all existing remedies.

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<sup>41</sup> Eircom, the only direct supplier of ubiquitous RFTS, and Virgin Media (with 42% network coverage) provide RFTS almost only based on their own networks. Magnet and Digiweb offer also direct retail level access on their own FTTx access networks (although geographically limited) as well as over WLA purchased from Eircom and SIRO. Vodafone and Sky Ireland offer a managed VoB home phone service by purchasing broadband inputs (wholesale local access (WLA) products) from Eircom or SIRO (Sky purchases WLV from BT). Vodafone purchases WLV and SB-WLR from Eircom. Sky and Pure Telecom are pure resellers. Imagine and other operators, e.g. Digiweb, offer managed VoB over FWA (8.2% of managed VoB based RFTS is provided over FWA).

<sup>42</sup> Standalone RFTS end users as of Q4 2020 constitute 17% of total RFTS subscriptions (226,489), but have declined significantly (from 600 000 in 2014). However, ComReg notes that even where NG broadband capable of delivering Bundled LL-RFTS is available, it is likely that some end users will continue to purchase Standalone LL-RFTS instead, even where there is no price difference between Bundled LL-RFTS and Standalone LL-RFTS. The rate of decline of Standalone LL-RFTS subscriptions may also not occur in the future at the same pace as to date.

<sup>43</sup> A single subscription may include more than one line, e.g. business subscriptions. A line may include more than one channel/path, e.g. ISDN FRA.

<sup>44</sup> In its response to the Commission's RFI from 2 August, ComReg further reported that the market share of Eircom in the regional FACO market has declined from [55-60%] to [50-55%] between Q4 of 2019 and Q1 2021.

## Urban FACO

### *High barriers to entry*

- (48) ComReg finds that the Urban FACO market is no longer characterised by high barriers to entry, based on the analysis of the following elements:
- (a) the control by Eircom of an infrastructure that is difficult for a new entrant to replicate;
  - (b) economies of scale, scope and density;
  - (c) sunk costs; and
  - (d) the potential presence of capacity constraints for alternative service providers.
- (49) ComReg notes the presence of competitors despite Eircom's control of an infrastructure that is not easily duplicated and the presence of sunk costs, therefore proving that they have overcome potential barriers to entry.

### *Tendency towards effective competition*

- (50) ComReg concludes that the Urban FACO market tends towards effective competition<sup>45</sup> after analysing whether:
- (a) there are observable trends towards effective competition;
  - (b) service providers other than Eircom are in a position to enter the Urban FACO market to the extent that they would be able to effectively compete with the incumbent;
  - (c) any expected or foreseeable technological and economic development is likely to impact on competition within the time period of the market review.
- (51) ComReg bases its conclusion mainly on the presence of indirect constraints generated at retail level, rather than effective direct demand-side constraints. Where NG broadband rollout has occurred, service providers are able to offer a suite of services to end users, including managed VoIP, based on purchases of WLA or WCA from Eircom, or SIRO (together with Virgin Media on a self-supply based on the Urban LL-FACO Market), and can therefore avoid the costs of purchasing FNA FACO from Eircom. Indeed, where NG broadband is available at the premises and provided access seekers have the necessary managed VoIP infrastructure, access seekers are capable of providing RFTS based on Eircom NG broadband.<sup>46</sup>

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<sup>45</sup> At national level, FACO line volumes have decreased by 20.8% during the period, mainly driven by PSTN WLR decreases, Eircom's FACO FNA revenues have decreased by 29.6% during the period, again, mainly driven by PSTN WLR decreases.

<sup>46</sup> ComReg clarified in its response to the Commission's RFI of 2 August that Eircom NG broadband is not available nationally, Data available to ComReg indicate that, as of June 2021, Eircom has fully deployed NG to [REDACTED], No deployment has taken place at some EAs, while in other EAs, only partial deployment has occurred, Accordingly, neither Eircom NG WLA (VUA) nor Eircom NG WCA (Bitstream Plus) is available at all EAs, or at all premises within certain EAs, Access Seekers therefore do not have the capacity to deliver Managed VoIP RFTS using Eircom NG inputs on a ubiquitous basis nationally, ComReg data indicated that, of [REDACTED] bundles which include an RFTS component, [REDACTED] rely on WLR for the RFTS component.

### *Sufficiency of competition law*

- (52) ComReg considers that *ex-post* competition law alone is insufficient to address potential market failures in the Urban FACO market.

### *Conclusion on the 3CT*

- (53) ComReg concludes that the Urban FACO market does not fulfil two of the three cumulative criteria that warrant regulation. ComReg therefore proposes to deregulate the market and to withdraw all existing remedies subject to a 9 to 18 month sunset period<sup>47</sup>.

## **Regional FACO**

### *High barriers to entry*

- (54) ComReg finds that the Regional FACO market remains characterised by high barriers to entry, based on:
- (a) Eircom's control over infrastructure that is difficult for a new entrant to replicate;
  - (b) economies of scale, scope and density;
  - (c) sunk costs;
  - (d) the potential capacity constraints for alternative service providers; and
  - (e) the advantages of vertical integration.
- (55) As opposed to the Urban FACO market, ComReg considers that the competition arising from indirect retail constraints due to the presence of NG broadband at EAs is insufficient on the Regional FACO market<sup>48</sup>. ComReg considers that a potential entrant could buy Virtual Unbundled Local Access (VULA) or Bitstream Plus, where available. However, it would still incur sunk costs to build a VoIP platform as an input to the FVCO or RFTS component of the managed VoIP service, and to integrate this platform into existing billing and order management systems. Moreover, access seekers are currently heavily reliant on Eircom's FNA network to deliver FACO, particularly in the Regional FACO markets.

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<sup>47</sup> ComReg argues that such sunset periods would be justified by the need to migrate from FNA to NG-based FACO products.

<sup>48</sup> In the Regional FACO market, as of Q4 2019, there were 107 822 premises served by FACO lines (SB-WLR and WLV) purchased from Eircom, out of which 65 689 premises (61%) were also passed with NG broadband, whereas 42 133 premises (39%) were only passed with SB-WLR. Those 42 133 premises account for 14% of all retail fixed telephony lines in Regional FACO markets. When direct access paths are also taken into account (i.e. Eircom's self-supply), a total of 34% of premises in the Regional FACO markets are not passed by NG broadband. Moreover, Eircom is the sole wholesale NG broadband operator present at 743 (93%) EAs which fall into the footprint of the Regional FACO markets.

### *Tendency towards effective competition*

- (56) ComReg concludes that the Regional FACO market does not tend towards effective competition<sup>49</sup>, after analysing whether:
- (1) there are observable trends towards effective competition;
  - (2) service providers other than Eircom are in a position to enter the Regional FACO market to the extent that they would be able to compete effectively with the incumbent<sup>50,51</sup>; and
  - (3) any expected or foreseeable technological and economic developments are likely to affect competition within the time period of the market review.

### *Sufficiency of competition law*

- (57) ComReg considers *ex post* competition law alone is insufficient to address potential market failures in the Regional FACO market.

### *Conclusion on the 3CT*

- (58) ComReg concludes that all three criteria are fulfilled, thereby considering the Regional FACO markets susceptible to *ex ante* regulation.

## **Finding of significant market power**

### **Regional FACO markets**

- (59) ComReg proposes to designate Eircom as an SMP operator in both the LL- and HL-regional FACO markets. ComReg notes that Eircom has kept a very high market share in each market over time. In 2019, Eircom had [95-100%] market share on the provision of fixed narrowband FACO. Even after BT's limited entry into the FACO market, Eircom still holds a [95-100%] market share. If the self-supply of vertically-integrated RFTS service providers using LL-FACO inputs, and the purchase by RFTS service providers of non-FACO wholesale inputs is included in the regional LL-FACO market, Eircom would have a market share of [65-70%]. Regarding the HL-FACO markets, even if both

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<sup>49</sup> Although ComReg does not have data to determine the exact number of mobile- or fixed only households in the Regional FACO market, the data available suggest that 54% of end users in the Regional FACO market have a RFTS service.

<sup>50</sup> ComReg is not aware of any service provider which is materially active in the self-supply of RFTS by means of LLU, nor is ComReg aware of any service provider that has plans to do this. Overall, while it may be technically feasible to use LLU to provide RFTS, ComReg does not consider that LLU could be used effectively by access seekers to provide FNA RFTS, given (i) the limited geographic footprint for LLU; (ii) the ongoing decline in LLU usage; and (iii) that investment is more likely to be made in managed VoIP platforms. ComReg adds that the number of LLU lines in use has declined significantly, from 68 262 in Q3 2015 to 17 089 in Q4 2020. As of Q1 2021, there were 15 591 LLU lines, of which 1 718 are fully unbundled lines, while 13 873 were shared lines. In ComReg's view, this strongly suggests that LLU is used mainly to provide retail broadband services rather than RFTS. The predominant wholesale access products that are in use are VULA and Bitstream. Furthermore, ComReg notes that BT accounts for [90-95%] of LLU purchases as of Q1 2021, which relate predominantly to the Urban FACO area. Regional FACO markets account for [15-20%] of total managed VoIP lines.

<sup>51</sup> ComReg explains that current generation bitstream is not suitable for self-supply FACO, as due its design and characteristics it does not allow for traffic prioritisation. This means that in case of data congestion, the quality of the voice traffic would not be guaranteed.

the self-supply of vertically-integrated RFTS suppliers using HL-FACO inputs, and the purchase by RFTS suppliers of non-FACO wholesale inputs were included within the regional HL-FACO market, Eircom would have a high and stable market share of [75-80%]. As of Q4 2020, Eircom accounts for 40% of all RFTS subscriptions, similar to its market share at the time of the 2015 FACO Decision.

- (60) Other criteria used by ComReg to designate Eircom as an SMP operator in each of the FACO markets are:
- (1) relative strength of existing competitors;
  - (2) indirect constraints;
  - (3) pricing behavior;
  - (4) control of infrastructure not easily duplicated;
  - (5) overall strength of potential competitors; and
  - (6) lack of countervailing buyer power.
- (61) In particular, ComReg considers that the lack of effective indirect pricing constraints, and the absence of notable evidence of competition materially affecting Eircom's pricing behaviour are indicative of Eircom holding a position of SMP<sup>52</sup>. Regarding potential competition, ComReg considers that alternative RFTS providers, including Virgin Media and SIRO are unlikely to enter this market as they would incur significant sunk costs. Given the lower incidence of NG broadband coverage in these markets, it is unlikely that managed VoIP would be deployed to such an extent that it could effectively constrain Eircom's SMP. NBI's delayed deployment of managed VoIP makes its availability too uncertain to offer sufficiently strong potential competition in the Regional FACO markets. Regarding lack of countervailing buyer power, Eircom's downstream retail arm is the largest buyer of FACO, while Vodafone and BT together account for considerably less than Eircom's own purchases on the Regional LL-FACO market.

### **Regulatory remedies in the Regional FACO markets**

- (62) In the Regional FACO markets, ComReg proposes that the following remedies be imposed:
- i. access obligation;
  - ii. non-discrimination;
  - iii. transparency;
  - iv. price control and cost-accounting obligations;
  - v. accounting separation; and
  - vi. obligation to provide a statement of compliance (SoC).
- (63) The latter remedy requires Eircom to identify and provide information on how it manages risks of non-compliance with the SMP obligations. Eircom is further required to publish the SoC on its website.

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<sup>52</sup> In this context, in its reply to the Commission RFI, ComReg informed the Commission that, on 30 June 2021, Eircom notified it of a proposed EUR 6 price increase for standalone RFTS customers and RFTS customers in non-FTTH bundles, which will apply from 1 September 2021.

- (64) According to ComReg, the defined set of remedies restricts Eircom's ability and incentives to engage in exploitative or exclusionary behaviour. To a large extent, the proposed remedies imposed are identical to the ones they would replace, albeit the current remedies in force since the 2015 FACO decision that apply to the national FACO market.
- (65) In April 2021, Eircom offered a (revised<sup>53</sup>) set of voluntary commitments to last for 5 years. In the absence of any regulation, Eircom would continue to offer access to FNA FACO products in a fair, reasonable and timely manner, except for access to a proposed business-to-business market, until Eircom or NBI FTTP becomes available to the premises. Commitments on non-discrimination and transparency mirrored the proposed remedies, but excluded a SoC and the requirement to respect KPIs. Finally, cost accounting systems regarding FACO products were consistent with ComReg's proposed remedy, except that the relevant provisions on pricing would be replaced by agreed maximum pricing provisions for a range of FACO products.
- (66) ComReg argued that it lacks a legal basis to make the commitments binding, as provided for in Article 79 of the Code, as the Code has yet to be transposed into Irish law. Nevertheless, ComReg engaged with Eircom and assessed its commitments, but considered them insufficient to address all of its competitive concerns in the Regional FACO markets. In particular, ComReg considers Eircom's proposal to no longer provide access once a premise is passed by NG network, means that end users with existing FNA FACO products would be locked into their existing service provider. ComReg also states that if KPIs and a SoC are not provided, it would not be able to measure Eircom's compliance with its non-discrimination commitment.
- (67) ComReg proposed to conduct a mid-term assessment within 2 years of the adoption of this decision, in order to update regulation in light of the progress made in fibre deployments.

## **THE COMMISSION'S SERIOUS DOUBTS**

- (68) On 19 July 2021, the Commission, pursuant to Article 32(6) of the Code, informed ComReg and BEREC that it had serious doubts as to the compatibility of the draft measure with Union law. The Commission found that based on the information available at that stage, ComReg's product market definition, geographic market definition, conclusion that the three criteria test is met, and SMP assessment, are not in accordance with the principles of competition law.
- (69) The Commission considered that the Irish market is characterized by a high mobile phone penetration per capita and a 4G mobile coverage close to 100%. Mobile call subscriptions are available at comparable (and in some cases lower) prices than fixed call subscriptions. In the period since the last market analysis there has been a visible shift from fixed to mobile calls, which currently constitute a large majority of voice calls in Ireland. In view of these indications of substitutability of fixed calls by mobile calls, the Commission had serious doubts that mobile calls should be excluded from the retail product market definition, and was of the view that ComReg had failed to appropriately take into account the indirect constraint represented at wholesale level by mobile calls.

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<sup>53</sup> A first set of commitments were offered in February 2020 before ComReg's draft market analysis was submitted to public consultation, therefore before Eircom knew about the proposed regulation.



- (70) Regarding the geographic market definition, ComReg considered that an NG coverage of below 80% (excluding NBI and Virgin Media’s cable network) was insufficient to exert competitive pressure on Eircom’s FACO products and therefore decided to define two geographic markets based on this threshold. The Commission considered that this criterion alone lacked robustness, as it was highly sensitive to moderate variations. The Commission also considered that this criterion seemed overly conservative, as it leads to imposition of a full set of remedies in a geographic market where, according to ComReg itself, 61% of households do not need regulation. The Commission therefore expressed serious doubts on whether ComReg had correctly defined the geographical boundaries of the markets.
- (71) Further to this, according to the Commission, ComReg’s erroneous product and geographic market definitions have led it to overestimate barriers to entry and underestimate tendency towards competition on the wholesale FACO market. The Commission therefore had serious doubts also as to whether the FACO market would pass the three criteria test given an appropriate market definition.
- (72) Finally, for similar reasons, the Commission considered that ComReg had overestimated Eircom’s market power on the wholesale FACO market. The Commission therefore had serious doubts as to whether Eircom indeed enjoyed significant market power on this market.
- (73) Therefore, the Commission considered that there was the need to open an in-depth investigation into the abovementioned aspects of the FACO market review.

## **OBSERVATIONS SUBMITTED BY THIRD PARTIES**

- (74) In response to its serious doubts letter, the Commission has received third party observations from Eircom<sup>54</sup>, Alto<sup>55</sup>, Vodafone Ireland (Vodafone), Three Ireland (Three), Sky Ireland (Sky) and BT Ireland (BT).

### ***Eircom***

- (75) Eircom welcomes the Commission’s serious doubts. Eircom highlights that the market has already been taken off the list of markets recommended for *ex-ante* regulation at EU level in 2014, based on the recognition that the functionalities of the mobile network and convergence of services such as Wifi Calling<sup>56</sup> and managed voice over broadband (VoB) — despite being different technologies — have the same economic and functional characteristics as traditional legacy FACO, and due to competitive pressure exerted by alternative platforms such as cable and FWA.
- (76) Eircom agrees with the Commission that ComReg’s market assessment of the retail market leads to an underestimation of the role of mobile voice calls. Eircom points to a report of Copenhagen Economics, suggesting that mobile is already an established alternative to fixed voice services. Eircom claims that [95-100%] of premises in the ComReg defined Regional FACO area should have good 3G/4G coverage from Eircom alone<sup>57</sup>. The importance of mobile voice calls for the market would be further

<sup>54</sup> Eircom is the historical incumbent operator.

<sup>55</sup> Alto is an association of alternative operators. Vodafone, Three, Sky and BT are members of Alto.

<sup>56</sup> Wifi calling is a technology through which end users can use their smartphone to call over a Wifi connection. This can assist in overcoming issues around mobile network coverage in the indoor environment.

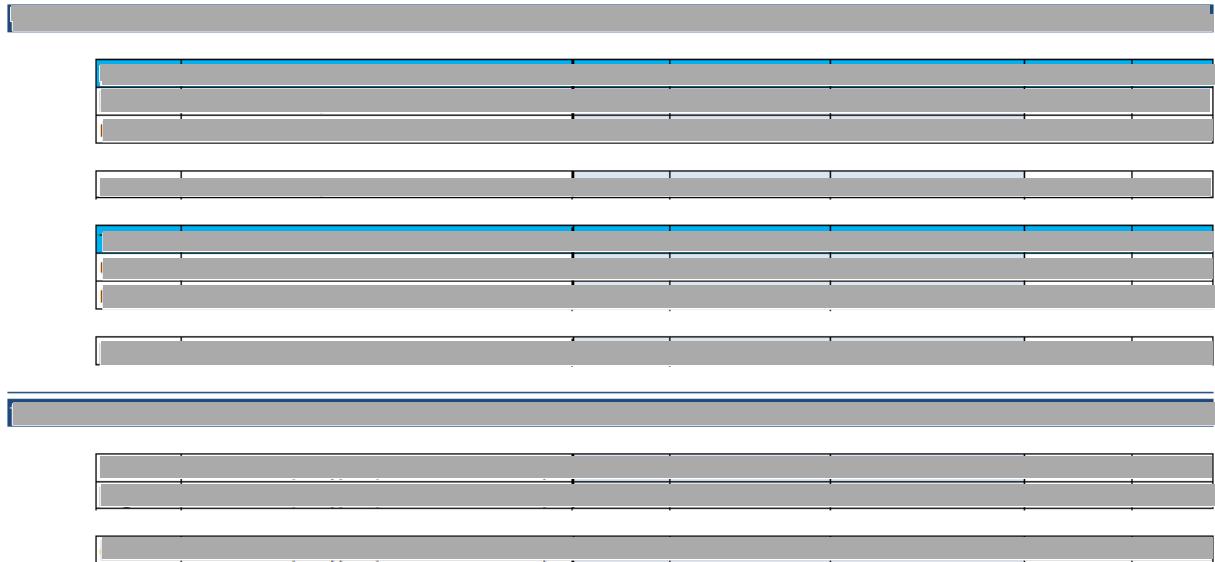
<sup>57</sup> Suggesting that the figure will be higher if other mobile networks are included.

underlined by the significant number of unused fixed voice lines. Indeed, Eircom provided usage data of their own RFTS users, suggesting that more than [40-45%] of Eircom's fixed lines (both standalone voice and/or included in bundles) do not produce any traffic. According to Eircom, the number is going up to [45-50%] in the area of the regional FACO market, when broadband is included in the bundle.<sup>58</sup>

- (77) Moreover, very attractive and affordable offers for mobile services are available from all major network operators in Ireland, including offers by sub-brands of those operators.
- (78) Eircom further argues that ComReg's assessment underestimated the role of alternative operators providing Managed VoB, based on regulated wholesale inputs for broadband access. In that regard, Eircom agrees with the Commission that the 80% threshold of NG network presence is excessively conservative and that the 80% threshold fails to take account the availability of NG coverage at certain premises within a given exchange area, and therefore countervailing buying power, below that threshold. The retail market is national in scope given nationwide pricing schemes by all operators. In that market setting, the smaller the number of premises without an alternative to traditional fixed calling, the less profitable it would be for Eircom to raise both wholesale and retail prices to the detriment of consumers. Eircom strongly believes that ComReg has erroneously defined a market which is too narrow for SMP regulation to be justified.
- (79) Eircom welcomes the Commission's view that if the FACO market were correctly defined, the 3 criteria test would likely not be met and that ComReg's assessment is not sufficiently forward looking, in particular with respect to NBI rollout.

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<sup>58</sup> Source: Eircom Submission.



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The Commission requested ComReg's view on these data both in the RFI of 25 June and the RFI of 2 August 2021. ComReg was not in a position to verify the data. However, in the notified measure, ComReg argues that according to the 2019 Residential Market Research, within the respondents subgroup of RFTS subscribers, 37% reported using fixed telephony daily to make calls (Very Frequently and Frequently), 28% several times a week, 30% less frequently and 4% never using it and that the frequency of outgoing call use was also higher amongst those living in rural and suburban areas.

- (80) Finally, Eircom argues that the proposed sunset periods are excessive and unjustified, given that all major retail players have already developed VoIP capabilities.

***Alto***

- (81) Alto broadly disagreed with the Commission’s serious doubts and supports ComReg’s proposed approach.
- (82) Alto disagrees with the Commission’s view that mobile voice calls exert direct or indirect constraints on FACO and reiterates its position, previously expressed in its letter of 16 July 2021, that mobile calls markets should have no place in the assessment of the Commission. In Alto’s view, there is insufficient evidence to conclude as to the existence of fixed-mobile substitution. Mobile and fixed voice services are complementary rather than substitutes. Continued demand for fixed voice services in the Irish market is evidence for the distinct need for such services. It considered that the Commission’s analysis was therefore insufficient to refute ComReg’s conclusions on the matter.
- (83) Alto disagrees with the Commission’s view that the 80% threshold might be excessively conservative and acknowledges that the threshold used by ComReg is deployed to protect end users. The Irish market still relies heavily on WLR. Moreover, there are problems with respect to bulk migration of customers from WLR towards NG technologies. Alto argues that Eircom’s commitment to the government for NG rollout is limited to circa 340 000 premises passed and that even where NG services are available, customers may have to incur significant costs to connect to the new network. There would be a significant gap between premises passed and actual take-up of NG services.
- (84) With regard to the commitments offered by Eircom, Alto agrees with the Commission’s position on the applicability of the Code as a matter of law. However Alto suggests that the Commission and BEREC should take account of “various irregular regulatory governance and compliance issues apparent in the Irish market” and the absence of national law and enforcement parameters.
- (85) With regards to the NBP, Alto calls for an extremely cautious and conservative approach due to expected delays, expected issues related to copper switch off and issues surrounding a lack of wholesale migration facilities provided by Eircom.
- (86) Alto believes that a veto decision by the Commission would result in unnecessary uncertainty and agrees with ComReg’s proposed approach of a mid-term assessment while continuing to apply an 80% exchange coverage threshold in determining whether obligations are withdrawn.

***Vodafone***

- (87) Vodafone broadly supports ComReg’s finding in the draft measure.
- (88) Vodafone flags particular concerns about the absence of efficient and cost effective bulk migration options and the impact of deregulation on Vodafone’s customers which rely on specific PSTN based services (e.g. such as alarms). It would be too early for deregulation of the market in its entirety. There would be no option of migrating customers to alternative VoIP based services where no NG services exist.

- (89) As regards fixed mobile substitution, Vodafone flags the importance of maintaining a fixed line in case of an emergency or for specific emergency services<sup>59</sup>.
- (90) Vodafone acknowledges a WLR line and revenue reduction due to a shrinking FACO market which is attributed mainly to NG rollout. NG based services are also expected to increase in the upcoming regulatory period, including in rural areas. However, Vodafone argues that maintaining regulation for the coming 3-4 years would be critical while NBI roll out continues and future access options and rules related to copper switch off become clearer. Vodafone further argues that deregulation would enable Eircom to exclude other operators as competitors in national business and government bids if alternative operators lack the ability to offer fixed line services for rural locations of those customers.
- (91) Vodafone further points out that commercial negotiations with Eircom might be difficult as Eircom would be the sole operator able to provide legacy WLR services.

### *Three*

- (92) Three does not share the concerns set out in the Commission's serious doubts letter and argues that the Commission should withdraw its reservations.
- (93) Three argues that the Commission's conclusion on a strong tendency towards mobile-fixed substitution would not be sufficiently robust, as there could be a number of factors causing the observed shifts in traffic volumes and notes that there would be continued demand for fixed voice access services in the Irish market.
- (94) Three further suggests that the voluntary commitment by Eircom would be insufficient as it would lack KPIs and would fall short of the EoI standard.
- (95) Three acknowledges that there is a significant level of change in the fixed telecoms market expected to occur in the short to medium term. However, Three argues that ComReg should maintain an *ex-ante* regulatory basis to intervene on matters relating to in particular wholesale migration facilities and QoS.
- (96) Three considers that ComReg reached an appropriate balance by proposing to lift regulation in the urban FACO market while maintaining regulation in the rural market.

### *Sky*

- (97) In its submission, Sky highlights in particular practical issues related to migrating customers, such as lack of readily available alternatives, poor quality of data which lead to a high percentage of order failures, overall issues with the reliability of market data, no availability of an automated process to migrate customers from SB-WLR and broadband to NG broadband and complexities and costs of interconnection at network exchanges.
- (98) As regards the voluntary commitment offered by Eircom, Sky points out that it lacks KPIs or any statement of compliance.
- (99) Sky further claims that there had been past issues related to compliance of Eircom with its commitments and would therefore be wary of the voluntary commitments of Eircom in the context of the draft measure.
- (100) As regards the role of mobile voice services, Sky suggests that while there may be 4G data coverage in an area this does not equate to quality coverage for voice calls and

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<sup>59</sup> i.e. Burglar alarms and personal safety devices.

that many consumers in rural areas in Ireland would continue to choose to pay for a fixed landline as well as having a mobile phone. This issue would be particularly relevant for vulnerable consumers who require the security of a fixed line. Moreover Sky argues that indoor quality for mobile calls may be not sufficient in certain areas and that during the Covid pandemic traffic from residential fixed landlines increased.

**BT**

- (101) BT also expresses concerns with the Commission's serious doubts and its position that rural and semi-rural areas should also be deregulated. BT expresses concerns that the NBI project will face challenges and that it would therefore be appropriate to focus on achieved rollout rather than deployment plans. BT argues that deregulation now could stifle existing competition.
- (102) As regards the voluntary commitment of Eircom, BT expresses concerns about ComReg's possibilities to enforce such commitments and highlights that according to ComReg the commitments are insufficient to address the competition issues.
- (103) BT further points out the need for effective bulk migration of customers from WLR to NG VoIP solutions. Such solution was, according to BT, recently mandated by ComReg through a combination of a Directive to Eircom and additional regulation within the proposed FACO regulatory framework. BT argues that the Commission's serious doubts would therefore have the potential to significantly delay the migration away from WLR.
- (104) BT supports the 80% threshold, arguing that a lower threshold would create more problems due to specificities of the Irish market such as the high number of dispersed single houses.
- (105) BT argues that large scale migration from WLR to NG VoIP will not be available until 2022. Therefore, deregulation of the voice market would create an environment that might drive customers to the incumbent as alternative operators could struggle to compete.

**BEREC OPINION**

- (106) On 17 August 2021, BEREC issued its opinion on the Commission's serious doubts letter.<sup>60</sup>
- (107) BEREC considered that the Commission's serious doubts are partially justified, namely with regard to the substantiation of the geographic market definition, in particular the regional FACO market and the lack of a forward-looking perspective (especially regarding the aspect of the SMP analysis). However, with regard to the product market definition of the RFTS and the FACO markets, the three criteria test as well as most part of the SMP analysis, BEREC did not share the Commission's serious doubts.
- (108) As regards the role of mobile as a direct or indirect constraint for RFTS, BEREC considers that ComReg was right to base itself on its own market research, which would support its conclusions, and that the focus on end-user perception and indoor call quality was understandable. Therefore BEREC considers that indirect constraints stemming from mobile services were taken into full account by ComReg.

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<sup>60</sup> BoR(21)109.

- (109) As regards the 80% NG coverage threshold for the delineation between regional and urban FACO, BEREC considers that in itself, this threshold cannot be regarded as conservative. BEREC further considers that there are no clear and precise explanations for the concrete threshold and that it cannot be ruled out, based on the information available, that the regional market analysis is incorrect. BEREC therefore has concerns regarding the lack of substantiation of the threshold. BEREC further argues that ComReg should not have used only one criterion and that the criterion of NG coverage appears insufficient to properly delineate the regional and urban FACO markets. Moreover, ComReg should have considered also additional criteria to properly define the market and further should have included Virgin Media's network coverage in its analysis of the geographic extent of the market.<sup>61</sup>
- (110) BEREC rejects the Commission's position that an incorrect market definition would also render the 3 criteria test – and SMP assessment incorrect. According to BEREC, NRAs should base the subsequent steps of the analysis on the market as defined by the NRA, and potential errors in the market definition should not lead to the questioning of the outcome of the SMP assessment. Furthermore, in the current case BEREC argues that ComReg came to a reasonable conclusion as regards the SMP finding, based on the market definition and analysis done by ComReg, not the definition suggested by the Commission. In that regard BEREC argues that the exclusion of mobile telephony from the scope of the relevant market, justifies a conclusion to disregard it as a direct or indirect constraint at the SMP stage of the analysis and that *“the conclusion that a high mobile penetration rate in a country can automatically also be assumed to result in indirect competitive pressure on the fixed telephony service is not clear cut”*<sup>62</sup>.
- (111) BEREC acknowledges the Commission's argument that a high percentage of end users of RFTS subscriptions are already not using the service and might therefore be inclined to discontinue the service in case of a price increase. However, BEREC argues that such user behaviour would only cause the market to further shrink which would lead to Eircom maintaining or even increasing its market power.
- (112) As regards the universal service obligations (USO) of Eircom, BEREC points out that this might indeed partially protect end users. However, it would only be relevant for Eircom end users and the USO would not protect against wholesale price increases which would have to be passed on to the customers of access seekers, hence likely leading to switching of customers to Eircom.
- (113) Finally, as regards the identified lack of a forward-looking perspective of ComReg's analysis, BEREC supports the Commission's doubts. The possibility to carry out a mid-term review does not exempt ComReg from carrying out a thorough forward-looking analysis and the probable need for a mid-term review might suggest that the analysis lacks a forward-looking perspective, since the market analysis should also evaluate the development at least two to three years into the future. The underlying data should provide adequate information to decide whether ComReg can anticipate a certain expansion in NG coverage which might suffice to already deregulate other geographic units of the Regional FACO markets or not.

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<sup>61</sup> BEREC acknowledges that the inclusion of Virgin Media's coverage would have caused only small changes to the geographic market delineation given that the cable network is mainly deployed in urban areas.

<sup>62</sup> BoR 21 (109), page 13.

## ASSESSMENT

- (114) Under Article 32(4)(a) of the Code, where the intended measure aims at defining a relevant market which differs from those defined in the Recommendation on Relevant Markets in accordance with Article 64(3) of the Code and would affect trade between Member States, and the Commission has indicated to the NRA that it considers that the draft measure would create a barrier to the internal market or if it has serious doubts as to its compatibility with Union law and, in particular, the objectives referred to in Article 3 of the Code, the draft measure shall not be adopted for a further two months. Under Article 32(6) of the Code, within this two-month period, the Commission may take a decision requiring the NRA concerned to withdraw the draft measure and/or to take a decision to lift its reservations expressed in the serious doubts letter.
- (115) According to Article 67(2) of the Code, where a NRA conducts the analysis required by paragraph 1, it shall consider developments from a forward-looking perspective in the absence of regulation, and taking into account, among other things, market developments affecting the likelihood of the relevant market tending towards effective competition, and all relevant competitive constraints, at the wholesale and retail levels, irrespective of whether the sources of such constraints are considered to be electronic communications networks, electronic communications services, or other types of services or applications which are comparable from the perspective of the end-user, and irrespective of whether such constraints are part of the relevant market.
- (116) Under Article 3(2) of the Code, NRAs must (i) promote competition in the provision of electronic communications services, including infrastructure-based competition; and (ii) contribute to the development of the internal market by:
- removing remaining obstacles to and facilitating convergent conditions for investment in electronic communications networks and services and
  - removing remaining obstacles to and facilitating convergent conditions in the provision of electronic communications networks and services.
- (117) The assessment below follows the order of the analysis and does not indicate a hierarchy of the arguments presented.

### **Product market definition of the RFTS and FACO market not sufficiently supported by evidence**

#### ***Compliance with Article 64(3) and 67 of the Code***

- (118) The Commission considers that the product market definition of the RFTS and FACO market in the draft measure are insufficiently grounded by the market investigation carried out by ComReg. The draft measure concerns the definition of a market differing from those defined in the Recommendation on Relevant Markets referred to in Article 64(1) of the Code. The Recommendation identifies those product and service markets within the electronic communications sector the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Code. According to Article 64(3) of the Code, NRAs must, taking utmost account of the Recommendation and the SMP guidelines, define relevant markets appropriate to national circumstances, in line with principles of competition law.
- (119) The per capita mobile phone penetration in Ireland continues to exceed 100%. In this respect, the Explanatory Note to the 2014 Recommendation on relevant markets states that mobile-fixed substitution may already be more clearly established in some

markets, notably where fixed penetration has decreased substantially in favour of mobile, and mobile network coverage is close to 100%. Furthermore, the Commission notes the availability of mobile plans offering unlimited voice calls for prices comparable or even lower than fixed subscriptions to RFTS. Further indicators used in analysing fixed-mobile substitution are price convergence and behavioural patterns, such as:

- (1) the convergence between the average duration of fixed and mobile calls;
  - (2) the perception and comparison of the quality of calls on the mobile and fixed networks.
- (120) ComReg considers that the evidence available is insufficient to conclude whether or not fixed-mobile substitution is present, and considers mobile telephony and RFTS as complementary rather than substitutes. For its finding, ComReg relies on the comparatively slow decline of RFTS subscriptions (-10%) and the finding that 46% of households continue to make use of both RFTS and mobile telephony. ComReg also points to its 2019 residential market research based on 2 011 interviews, which shows that 68% of Standalone LL-RFTS and 74% of Bundled LL-RFTS end users would not change their behaviour in response to a SSNIP. Of respondents who indicated that they would change their behaviour, there was no clear evidence in favour of a switch towards mobile telephony. ComReg acknowledges, however, the small sample size of the survey. Moreover ComReg suggests that an end-user perception of higher costs of mobile calls would remain and that, in particular, indoor call quality might be insufficient in some areas.
- (121) BEREC, in its opinion supports ComReg's position, in particular highlighting that ComReg was justified in relying on its market research. Moreover, BEREC argues that a conclusion that a high mobile penetration rate in a country could automatically also be assumed to result in indirect competitive pressure on the fixed telephony service is not clear cut.
- (122) The Commission agrees that market research can be an important input to inform market analysis and that end-user perception is a relevant factor to assess user behaviour. The Commission further agrees that a high mobile penetration rate in itself is not conclusive on the question of whether products are complementary or substitutes. However, the Commission considers that ComReg has not sufficiently analysed a number of factors (e.g. availability, pricing, intended use, adoption) in particular available usage data<sup>63</sup> which may lead to a different conclusion and that the Commission's serious doubts were not merely based on a high mobile penetration rate.
- (123) It cannot be excluded that shifting volumes of traffic from fixed to mobile calls might be indicative of a greater degree of mobile-fixed substitution than ComReg has recognised and thus more analysis may be required. Furthermore, based on ComReg's surveys, there is seemingly limited use of RFTS among those end users who have an RFTS subscription (i.e. a fixed telephony line). Of those end users with a standalone RFTS subscription, 32% would change or consider changing behaviour in response to a 10% price increase, thereby potentially rendering such an increase unprofitable for the incumbent.

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<sup>63</sup> The overall number of voice call minutes remained very stable between 2014 and 2020. Fixed voice minutes dropped by 43%, business fixed voice minutes dropped by 45% and mobile voice minutes increase by 18% during that time-frame. 85% of overall voice call minutes stem from mobile calls today. Only 54% of end users in the Regional FACO Market still have RFTS service.



- (124) A significant number of Irish households (51%) and businesses (23%) have already unsubscribed from RFTS and solely make use of a mobile service and of the remainder, a significant number retain the RFTS line, but solely use their mobile service for their voice call needs<sup>64</sup>.
- (125) Also, the relatively mild decline of the number of RFTS subscriptions is in itself not sufficient evidence to suggest that end-users are reluctant to give up their fixed line in favour of mobile services, in particular in a situation where the vast majority of RFTS subscriptions are part of a bundle and if adding RFTS to the bundle can result in net savings or comes at no or very small additional costs.<sup>65</sup> The Commission considers that the data calls for a deeper analysis, because it may suggest that the number of active RFTS lines in itself does not provide sufficiently reliable information about the importance of maintaining a RFTS line subscriptions for customers.
- (126) Overall, the Commission considers that the evidence from the draft measure and additional information provided by third parties is insufficiently conclusive to allow ComReg to deduce that mobile calls do not place sufficient competitive constraints on RFTS services, particularly in a forward-looking perspective. The Commission acknowledges that there are a number of factors, as indicated above, which still may make mobile calls an imperfect substitute for a non-negligible group of consumers in some circumstances.
- (127) The Commission considers that ComReg failed to sufficiently analyse the relevant evidence, some of which may, suggest substitutability of fixed to mobile. As a result, there is uncertainty as to whether the market, as defined in the draft measure, is correctly defined in accordance with the principles of competition law.

### **Incorrect geographical market definition of the markets for FACO**

#### ***Compliance with Articles 64(3) and 67(1) and (2) of the Code***

- (128) The Commission further considers that the geographical market definition of the FACO markets is not compliant with competition law and not sufficiently forward looking.
- (129) When defining relevant markets in accordance with Article 64(3) of the Code, national regulatory authorities should identify geographic areas where the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different, having particular regard to the question whether the potential operator having significant market power acts uniformly across its network area or whether it faces appreciably different conditions of competition to a degree that its activities are constrained in some areas but not in others. The geographic unit should be (a) of an appropriate size, (b) able to reflect the network structure of all relevant operators, and (c) have clear and stable boundaries over time. National regulatory authorities should assess competitive conditions in a forward-looking manner, by looking at structural and behavioural indicators, taking into account in particular, in line with Article 64(3) of the Code, the importance of infrastructure-based competition. Such indicators can be *inter alia* the networks footprint, the number of competing networks, their

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<sup>64</sup> See table in footnote 58 for Eircom customers.

<sup>65</sup> Only Pure telecom offers a phone only service at substantially lower price than the bundle product.

respective market shares, trends in market shares, localized or uniform pricing behaviour, characteristics of demands and customer switching and churn.<sup>66</sup>

- (130) ComReg argues that the presence of NG broadband is a decisive factor in whether the FACO markets are competitive or not. On this basis, it proposes to define a Regional FACO market by using an 80% NG coverage threshold. Even excluding considerations on fixed-mobile substitutability, the Commission is of the view that the reference to the NG broadband penetration as an indicator for the determination of the state of competition in the FACO market is of limited relevance and can at best be used as secondary indicator. Moreover, the chosen threshold is excessively conservative and lacking robustness, being extremely sensitive to limited variations.
- (131) First, the NG broadband is functionally very much different from the fixed voice telephony services, and its penetration and availability has little practical implications for the assessment of competition in the FACO market. The Commission questions that NG broadband is required to provide Voice-over-broadband services of the same quality as in the fixed telephony networks. Further to that, while the Commission recognizes that such services have not emerged so far in Ireland over the narrowband broadband (ADSL, VDSL) this is not due to lack of or limited technical possibilities, but rather due to the lack of interest. Finally, all the constraints and limitations related to VoB over NG broadband networks (e.g. powering of the equipment, failure during power outages, new end-user equipment, voice quality etc) equally apply to the VoB over narrowband, hence it cannot be made a distinguishing factor for the purpose of the FACO market definition.
- (132) Secondly, the proposed threshold is much higher than those used by other NRAs, including ComReg, on various other markets, in particular markets 3a, 3b and 4 as described in the 2014 Recommendation,<sup>67</sup> where the relevance of NG penetration is indeed relevant. While these markets and their analysis, as mentioned by ComReg, are different from the FACO market, the reference to such thresholds intends to capture the presence of alternative infrastructure that alternative operators can use effectively to provide retail services and the ability of the SMP operator to profitably increase prices in the relevant area.
- (133) The Commission also considers that the chosen threshold is not sufficiently substantiated, does not lead to sufficiently stable results over time and leads to overregulation. Indeed ComReg, based on the 80% coverage criterion found that the regional FACO market includes 795 EAs covering 699 724 premises, of which only 271 083 are actually without NG broadband coverage. Moving the threshold from 70 to 80% increases to total the number of regulated premises by 56% with only a very limited number of households needing this regulation given the lack of NG. Specifically, moving from 70 to 80% increased the number of regulated premises by a total of [REDACTED], out of which [REDACTED] premises are covered by NG broadband.
- (134) As a result, both of this very high threshold and of the fact that a large number of EAs included in the Regional FACO market are only slightly below the threshold, the Regional FACO market as defined by ComReg includes only [35-40%] of premises that are not passed with NG networks and are considered as needing regulation. Especially for the 71-80% coverage group, only one out of four premises within the regulated market

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<sup>66</sup> 2020 Recommendation on Relevant Markets, recital 35-38.

<sup>67</sup> See table 2, p. 18 of the staff working document accompanying the 2020 Recommendation on Relevant Markets.

is actually without NG broadband coverage. Such an approach seems disproportionate. Regulating four households to ensure competition in FACO services for just one of them appears at odds with the overall objective of both the Code and the recent Recommendation on relevant markets, which require regulation to be proportionate, limited where necessary to addressing an identified retail market problem.

- (135) The Commission further considers that while ComReg has recognised the competitive pressure exerted by Virgin Media’s cable network, this has not been taken into account quantitatively for the geographic market definition (nor for the definition of remedies). ComReg justifies this by arguing that Virgin Media is active on the LL-FACO market on a self-supply basis only. Thus, in a scenario where, for example, only Eircom FNA and Virgin Media were present at an EA, an access seeker would not have the chance to offer managed VoIP based on wholesale inputs at that EA, therefore the EA would effectively become a duopoly. This approach assumes already at the market definition stage that one and not the other operator will be required by ex ante regulation to offer wholesale access. The Commission considers that the presence of all NG networks, including cable, should have been taken into account. The Commission acknowledges in that regard, that the cable network has significant overlaps with the urban FACO market. It is however not identical and therefore the regulatory outcome is not the same. The Commission further considers that when assessing competitive conditions, the various competitive pressures exerted on the potential SMP operators have to be analysed as a whole, not in isolation. In this respect, ComReg’s approach, as shown by an extreme scenario where only Eircom and Virgin would be present at an EA, equates to looking at each premises as a geographic market on its own. Therefore, it seems to contradict its overall approach to the geographic market definition.
- (136) BEREC shares the Commission’s concerns regarding the robustness of the 80% NG coverage criterion and suggested in its opinion that ComReg should have based its analysis also on other relevant criteria. Moreover, according to BEREC, ComReg should have included Virgin Media’s coverage regarding its criterion used to define its geographic analysis.
- (137) Therefore, the Commission considers that the geographic market definition does not reflect the network structure of all relevant operators, and does not have sufficiently clear and stable boundaries over time, in particular due to the lack of robustness and volatility of the 80% coverage criterion.

#### **Need for forward-looking assessment**

##### ***67(2) of the Code***

- (138) The Commission further considers that the draft measure is not sufficiently forward looking as required by Article 67(2) of the Code.
- (139) The Commission notes ComReg’s proposal to conduct a mid-term assessment within 2 years from the adoption of this decision, in order to update regulations in light of the progress made in fibre deployments. In this respect, the Commission does not contest the possibility or even usefulness of a mid-term assessment of the market, in particular due to the fast changing market environment, but considers that ComReg’s notified draft measure should already at this stage be based on a forward-looking analysis as required by Article 67(2) of the Code. In the staff working document accompanying the 2020 Recommendation on Relevant Markets, the Commission stated: “*As ex ante regulation addresses the lack of effective competition that is expected to persist over a time horizon in accordance with the duration of the review period, NRAs’ market*

*analyses have to be forward-looking.”<sup>68</sup> Moreover, “a tendency towards effective competition does not necessarily imply that the market will reach the status of effective competition within the period of review. It simply means that there is clear evidence of dynamics in the market within that period, which indicates that the status of effective competition will be reached in the foreseeable future without ex ante regulation in the market concerned.”<sup>69</sup>*

- (140) ComReg should in particular take into account ongoing commercial NG deployments and also in view of NBI’s ongoing deployments based on the State aid-funded National Broadband Plan. Although, according to the information provided by ComReg, NBI has as of now not had an impact on the area of the regional FACO market, the Commission notes that, as confirmed by ComReg in its response to the Commission’s RFI of 2 August, the Irish Department of Communication’s recently requested NBI to further accelerate its roll out and to complete all deliverables within five years rather than seven.<sup>70</sup> Based on sufficiently reliable deployment plans of operators and/or NBI, ComReg should have assessed if some areas, which may currently not meet the criteria for deregulation will meet the criteria during the market review period and therefore may already now justify deregulation.
- (141) In addition, the Commission considers that such a mid-term review should be based on a predetermined set of criteria. This would allow for a transparent and periodic deregulation of those EAs which meet the criteria, thereby ensuring a flexible, proportionate and transparent approach.
- (142) In that regard, the Commission agrees with BEREC which points out that “a mid-term review can be one of the means to address future circumstances, which are not foreseeable at the time of the initial assessment. ComReg therefore does have the possibility to already consider and propose such review in relation to its analysis. In its current market analysis ComReg indicates, that it would base the geographic market definition in the mid-term review on the very same two-fold assessment as it did now. The geographic market would therefore be analysed according to the present criteria in the first step and then the geographic units would be assigned by the 80% threshold. Nevertheless, this possibility of conducting a mid-term review does not exempt ComReg to carry out a thorough forward-looking analysis. The probable need of a mid-term review in itself may suggest a lack of a forward-looking perspective, since the market analysis should also evaluate the development over at least two or three years into the future.”<sup>71</sup>
- (143) The Commission considers that ComReg has not sufficiently taken into account clear competitive dynamics in the market, namely increasing substitution of RFTS by mobile calls and ongoing or potentially even accelerating NG deployments in the draft measure.

**Lack of sufficient evidence supporting the finding that the three criteria test is met for the Regional FACO market**

***67(1) of the Code***

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<sup>68</sup> See, SWD(2020) 337 final of 18 December 2020, page 9.

<sup>69</sup> See, SWD(2020) 337 final of 18 December 2020, page 13.

<sup>70</sup> NBI has not yet confirmed that it will be in a position to accede to this request, pending a detailed technical, commercial, and financial analysis.

<sup>71</sup> BoR(21)109, page 15.

- (144) In its serious doubts letter, the Commission expressed serious doubts that all three criteria are met in the case of Regional FACO markets. The FACO markets are not deemed susceptible to ex ante regulation at Union level and have not been so since 2014. Moreover, in the case of the Urban FACO markets, ComReg concludes that the three criteria test is no longer met. The Commission considers that differently defined FACO markets, and a sufficiently forward-looking assessment as described above, taking all market developments and competitive constraints into account, should have affected ComReg's conclusion on the three criteria test for the regional FACO market.
- (145) The Commission laid out the approach towards assessing the tendency towards effective competition in its staff working document accompanying the 2020 Recommendation on Relevant Markets. The analysis should in particular focus on market dynamics, which may be affected by technological developments or the convergence of products and markets. *“The presence of infrastructures that are based on different technologies but that offer products that are substitutable for end users can also alter competitive dynamics across the supply chain, including competition on price, choice and quality. Indeed, indirect competitive pressures on operators need not necessarily derive from other comparable operators, but may be exercised by undertakings that, while adopting different business models, are able to supply products that can be regarded as an alternative by end users.”*<sup>72</sup>
- (146) In this context, the Commission notes that mobile voice calls appear to increasingly exercise a constraint on the pricing of fixed voice calls.
- (147) Volumes of fixed voice traffic have been steadily shifting to mobile calls since 2007 (based on data presented in this and in the previous market review by ComReg). While the overall number of residential call minutes remained very stable, residential fixed voice minutes dropped by 43% and business fixed voice minutes by 45% between 2014 and 2020, while mobile voice minutes increased by 18% (having already started at a significantly higher volume in 2014). In absolute terms, the decrease in fixed minutes is matched by a similar increase in mobile.
- (148) Moreover, mobile penetration exceeds 100%, mobile calls account for the overwhelming majority of voice call minutes and approximately 46% of households in the regional FACO market do not have a RFTS line (which could lead to the reasonable assumption that the remaining 46% comprises mobile-only households). In addition, of the remaining active RFTS lines a significant number is not used, which might suggest that in the future some of them will discontinue this service.
- (149) According to Commission data, 4G mobile broadband coverage in Ireland amounted to 99% of households overall and 97.5% of households in rural areas in 2020. At present, 85% of the overall voice call minutes are mobile calls. Residential and business fixed voice minutes are decreasing, while mobile minutes are increasing. According to ComReg's research, 96% of households are equipped with at least one mobile phone, which means that 4% or less of households are fixed only, while 51% of households and 23% of businesses have transitioned to being mobile only households.
- (150) BEREC argues that errors at the market definition stage of the analysis should not be raised again at the three criteria test and SMP stage of the market analysis. According to BEREC, NRAs would need to base the subsequent steps of the analysis on the

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<sup>72</sup> SWD(2020) 337 of 18 December 2020, page 13.

market as defined, and subsequently the Commission should be limited in its assessment to the market as defined by the NRA.

- (151) The Commission disagrees with BEREC's view. Market definition, three criteria test and SMP assessment are subsequent stages of an analysis which build on each other. Therefore, if a product and/or geographic market is not properly defined, it may effect the validity of the findings at the subsequent stages of the analysis.
- (152) Moreover, even if one were to agree that constraints posed by mobile calls may be insufficient to include mobile calls in the RFTS market, there is still a relevance of mobile calls for the three criteria assessment, in particular the first and the second criteria. Indeed, the Commission determined already in 2014 that "*even where perfect substitution is not found, mobile may exert pressure on fixed to the extent that fixed operators are constrained in their price setting, which then should be duly taken into account in the three criteria assessment or SMP analysis*".<sup>73</sup>

### **Insufficient evidence for a finding of SMP in the regional FACO market**

#### ***Article 63(2) and 68(2) of the Code***

- (153) ComReg's finding of SMP on the Regional FACO market is based mainly on Eircom having high market shares, the lack of indirect pricing constraints, insufficient potential competition and lack of countervailing buyer power.
- (154) However, the Commission considers from the outset that ComReg's analysis is insufficiently forward-looking. This has led ComReg to over-estimate Eircom's market power going forward. The flaws in the analysis of the geographical market in particular render the assessment of SMP on such a market firstly moot and secondly in any event uncertain.
- (155) The Commission first underlines that the FACO markets have significantly shrunk over recent years. Eircom's FACO FNA revenues decreased by [25-30%] over the 2015-2020 period. Moreover, the total number of FACO lines provided to both Eircom's retail business and to other service providers decreased by [20-25%] between 2015 and 2020, mainly driven by a decrease in PSTN WLR. In this market environment, it is not obvious that from a forward-looking perspective, Eircom, despite its relatively high market shares on the markets as defined by ComReg, is able to continue to behave independently of its competitors, competing technologies and ultimately its consumers. It is also questionable whether in practice it has an incentive to do so.
- (156) Secondly, 61% of premises in the Regional FACO market are passed by NG networks and would thus have the possibility, as ComReg itself accepts for the urban markets, to switch to VoIP products, based on a regulated input, if Eircom was to increase its prices on the wholesale FACO market. The Commission notes that this number is expected to increase in the upcoming regulatory period as operators progress in their new network deployments. Moreover, a large number of customers in the regional FACO market would also have the possibility to switch to mobile voice services. In that regard, BEREC argues that the exclusion of mobile as a direct or indirect constraint at the market definition stage may justify not to take those constraints into account at the SMP stage of the analysis. Whilst the Commission acknowledges BEREC's view, it points out that the NRA is required to take a forward-looking

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<sup>73</sup> See Commission Staff Working Document, accompanying the Commission 2014 Recommendation on relevant markets of 9 October 2014, SWD(2014) 298, page 22.

perspective as noted in the section of the staff working document to the 2014 SMP guidelines quoted above. The Commission further recalls that even if NRAs consider that constraints coming from products and services are not sufficiently strong to render the retail market effectively competitive or to act as indirect constraints for the provision of wholesale services at present, potential constraints should still be assessed at the SMP assessment stage in order to fulfil the criterion of a sufficiently forward-looking analysis. The Commission therefore considers that a price increase may not ultimately be profitable for Eircom, since even its current pricing behaviour needs to factor in these likely future scenarios and so cannot simply be opportunistic in the short term.

- (157) Thirdly, in the Regional FACO markets, 91% of premises are residential, which are likely to be less disinclined to abandon a fixed retail line than businesses.
- (158) Finally, the Commission recalls that Eircom is obliged to provide geographically averaged pricing for a standalone publicly available telephone service under the Universal Service Obligation. Although the purpose of this obligation is not to protect competition in wholesale markets, it would make it unlikely for Eircom to discriminate against end users located in the Regional FACO markets. Therefore, this would help protect those end users located in premises not covered by NG networks.
- (159) The Commission therefore considers that the evidence provided in the draft measure is insufficient to conclude that Eircom holds SMP, i.e. a position of economic strength that affords it the possibility to behave to an appreciable extent independently of competitors, customers and ultimately consumers, given the need for a sufficiently forward-looking analysis.

## CONCLUSION

- (160) It follows from the above that ComReg's definition of geographic scope of the market is not in accordance with the competition law principles and is not compatible with EU law, in particular Articles 64(3) and 67 of the Code.
- (161) With regard to the scope of the product market definition and the potential inclusion of mobile telephony within the relevant market the Commission considers that, regardless of the conclusion on this point, the constraints posed by mobile telephony have not been sufficiently considered, particularly in a forward-looking perspective within which the market may tend towards effective competition. The insufficiently forward-looking approach renders ComReg's conclusion as to the three criteria and the finding of SMP insufficiently substantiated, contrary to Article 67 of the Code.

HAS ADOPTED THIS DECISION:

### *Article 1*

ComReg shall withdraw the draft measure notified to the Commission on 18 June 2021 and registered under case number IE/2021/2332-2333.

*Article 2*

Pursuant to Article 32(7) of the Code, ComReg shall re-notify a draft measure concerning the markets for retail fixed telephony services and wholesale fixed access and call origination in Ireland, having regard to the Commission's present decision.

This Decision is addressed to ComReg.

Commission for Communications Regulation (ComReg)

One Dockland Central, Guild Street

D01 E4X0 Dublin 1

Ireland

Done at Brussels, 17.9.2021

*For the Commission*

*Thierry BRETON*

*Member of the Commission*

