

**BEREC Opinion on
Phase II investigation
pursuant to Article 32 of Directive (EU) 2018/1972:**

Cases IE/2021/2332-2333

**Market for access to the public telephone network at a fixed
location for residential and non-residential customers (M1/2007) in
Ireland**

**Market for call origination on the public telephone network provided
at a fixed location (M2/2007) in Ireland**

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1. Executive summary

On 18 June 2021, the Commission registered a notification from the Irish national regulatory authority (NRA), the Commission for Communications Regulation (ComReg), concerning the markets for retail fixed telephony services (RFTS) and wholesale fixed access and call origination (FACO) in Ireland.

In its draft measure, ComReg notifies national retail markets for fixed telephony services (stand-alone low level and retail bundles with low and high level telephony), and urban and regional wholesale markets for fixed telephony (both low and high level). The draft measure proposes to designate Eircom as having significant market power (SMP) in the relevant regional wholesale FACO market and proposes the imposition of a range of regulatory remedies on Eircom including access remedies, obligations of transparency, non-discrimination, price controls and accounting separation.

On 16 July 2021, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32 of Directive (EU) 2018/1972. The Commission's serious doubts concern ComReg's proposed market definition, the three criteria test and the SMP assessment.

Based on the analysis set out in this Opinion, BEREC considers 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. Furthermore, from a broader view, BEREC also shares the opinion of the Commission that the analysis lacks a forward-looking perspective (especially regarding this aspect of the SMP analysis). These assessments could be further substantiated. However, with regard to the product market definition of the RFTS and the FACO markets, the three criteria test as well as the major part of the SMP analysis, BEREC does not share the Commission's serious doubts.

2. Introduction

On 18 June 2021, the Commission registered a notification from the Irish national regulatory authority (NRA), the Commission for Communications Regulation (ComReg), concerning the markets for retail fixed telephony services and wholesale fixed access and call origination in Ireland.

On 25 June 2021, the Commission sent a request for information (RFI) to ComReg, to which ComReg responded on 30 June 2021.

The Commission initiated a phase II investigation, pursuant to Article 32 of Directive (EU) 2018/1972, with a serious doubts letter issuing on 16 July 2021. In accordance with Article 32 of Directive (EU) 2018/1972 its rules of procedure, on 22 July 2021 BEREC established a dedicated Expert Working Group (EWG) with the mandate to prepare an Opinion concerning the justification of the Commission's reservations (hereinafter serious doubts) in the aforementioned case.

Based on the reading of the information provided, the EWG agreed there was no requirement to send questions to ComReg in light of the information shared by both the Commission and

ComReg¹ with the EWG. On 28 July 2021, the EWG held a virtual meeting. This meeting included interviews with relevant colleagues from both ComReg and the Commission. The objective of the EWG was to reach a clear conclusion on whether or not the Commission's serious doubts are justified.

The EWG finalised its draft Opinion on 9 August 2021, with a final Opinion presented and adopted by a majority of the BEREC Board of Regulators on 17 August 2021. This Opinion is now issued by BEREC in accordance with Article 32 (5) of Directive (EU) 2018/1972.

3. Background

Previous notifications

The markets for retail fixed telephony services and fixed access and call origination in Ireland were previously notified to and assessed by the Commission under cases IE/2014/1629 and IE/2015/1746 respectively.

In 2015, ComReg defined a wholesale market for fixed access and call origination comprising a fixed access or Wholesale Line Rental (WLR) component and a fixed call origination component. As the FACO market was not listed in the Recommendation on Relevant Markets, ComReg carried out the three criteria test and concluded that the test was met. ComReg designated Eircom with SMP and imposed access, non-discrimination, transparency, price control and accounting separation obligations on it.

The Commission reiterated its comment on the need to proceed with the review of the retail access market without undue delay. In 2016 (Case IE/2016/1860), ComReg amended the price control remedies and specified two high-level margin squeeze obligations imposed on FACO.

The Commission also 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.

The 2018 Bundles Decision specified the cost orientation obligation in the FACO markets for wholesale voice/POTS when it is sold with FTTC services.

Current notification and the Commission's serious doubts

Current notification

ComReg defined a national market for RFTS that consists of both a retail voice component and retail fixed access (retail line rental), component. RFTS can be sold either on a standalone basis, or provided together in a bundle with other retail services (principally broadband, mobile telephony or TV services). RFTS are provided over a copper network, in case of fixed

¹ In advance of the 28 July meeting, ComReg shared several documents with the EWG (for clarification purposes), which were also shared with the Commission.

narrowband access, including PSTN or ISDN, based on WLR. RFTS are also provided over a broadband access path, e.g. FttX or CaTV, by means of managed voice over IP.

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. ComReg also considers it appropriate to further delineate a standalone LL-RFTS market and a bundled LL-RFTS market. Thereby, ComReg finds three relevant markets: (i) standalone low-level RFTS (including PSTN and ISDN BRA), (ii) bundled LL-RFTS and (iii) high-level-RFTS (including ISDN FRA and ISDN PRA). The relevant geographic markets are national.

FACO is a wholesale input purchased by access seekers, which ultimately permits the provision of RFTS to end-users. It is composed of a calling component for call conveyance (fixed voice call origination - FVCO) and a fixed access component WLR.

ComReg distinguishes between the High Level (HL) and 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 Next Generation broadband used as inputs to provide managed voice over broadband (VoB) to end-users. The HL-FACO market comprises fixed narrowband access provided by means of ISDN FRA or ISDN PRA, as well as access and voice origination provided over NG broadband via hosted PBX or SIP Trunking.

For both LL- and HL-FACO markets, ComReg distinguishes two separate geographical markets, the Urban FACO markets and the Regional FACO markets.

ComReg concludes that the identified RFTS markets only fulfil the third criteria of the three criteria test. Regulation is therefore no longer desirable on these markets and ComReg therefore proposes to withdraw all existing remedies.

With respect to the Urban FACO market, ComReg concludes that it does not fulfil two of the three cumulative criteria that warrant regulation. ComReg therefore proposes to deregulate the market and withdraw all existing remedies.

With respect to the Regional FACO market, ComReg concludes that all three criteria are fulfilled, thereby considering the Regional FACO market susceptible to ex ante regulation.

ComReg proposes to designate Eircom as an SMP operator in both the regional LL-FACO and the regional HL-FACO markets. ComReg notes that Eircom has kept a very high market share in each market over time (■■% - ■■%). ComReg also used other criteria to designate Eircom as an SMP operator.

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) obligations on providing a statement of compliance.

ComReg proposes to conduct a mid-term assessment within 2 years of the adoption of its decision, in order to update regulation in light of the progress made in fibre deployments.

Commission's serious doubts

The Commission has serious doubts as to whether the notified draft measure is compatible with European Union law and considers that it could create barriers to the internal market for the following reasons:

- lack of sufficient evidence supporting the finding of a market for RFTS and FACO;
- incorrect definition of a separate geographic market for Regional FACO;
- lack of sufficient evidence supporting the finding that the three criteria test is met for the Regional FACO market and
- lack of sufficient evidence to support the finding of SMP in the Regional FACO market.

These serious doubts are set out in more detail in the next section of this document.

In light of the serious doubts, the Commission does not assess the proposed remedies as the market definition and the SMP assessment naturally affect the proportionality assessment of the remedies to be imposed. However, the Commission notes that Eircom offered commitments to ComReg with the aim of addressing ComReg's concerns and thereby avoiding ex ante regulatory obligations in the Regional FACO markets.

The Commission considers that NRAs should consider the role of voluntary commitments when assessing the proportionality of regulation of a legacy product, such as wholesale line rental, in a market, which for a long time has not been considered susceptible to ex ante regulation at Union level and has already been deregulated in most Member States.

BEREC is not required to give an opinion on the Commission's additional comments referring to issues not subject to the serious doubts expressed.

4. Assessment of the serious doubts

On 16 July 2021, the Commission sent a serious doubts letter opening a phase II investigation pursuant to Article 32 of Directive (EU) 2018/1972. The Commission's doubts concern compliance with Article 3 of the European Electronic Communications Code, in particular:

4.1 Lack of sufficient evidence supporting the finding of a market for RFTS and FACO

Concerns of the Commission

The Commission considers that further investigation is needed as ComReg's assessment on the scope of the retail market is leading it to underestimate the role of mobile voice calls as an indirect competitive constraint when analysing the scope of the wholesale FACO² markets. The Commission refers to the per capita mobile phone penetration in Ireland, which exceeds

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

100%, and the 4G coverage in Ireland currently amounting to 97.5% of households in rural areas, which in combination with a substantial decrease in fixed penetration would indicate fixed-mobile substitution. The Commission also notes that ComReg's argument on insufficient quality mainly focuses on poor quality indoors, and it finds ComReg's evidence of poor quality overall insufficiently convincing.

Furthermore, the Commission notes that there are mobile plans offering unlimited voice calls, on a standalone basis or in bundles with mobile data, for prices comparable or even lower than fixed subscriptions to RFTS on a standalone basis or in bundles with broadband.

Views of ComReg

Due to the complicated bundling offers available, it is more and more difficult to compare the prices of stand-alone telephony services. Therefore, the general customer perception is an important point in ComReg's analysis. Research indicates that there is a general perception among households with RFTS that mobile phones are more expensive for most call types than RFTS. It also shows a difference in calling behaviour between fixed and mobile usage, influenced by the perception of cost.

The total number of RFTS subscriptions has decreased by just over 10% between Q3 2014 and Q4 2020. Hence, ComReg finds that the evidence suggests that end-users consider RFTS and mobile telephony services (MTS) to be complementary rather than directly substitutable for each other.

According to ComReg, for a mobile phone to become a substitute for a fixed telephone, the end-user should be able to use it indoors. ComReg's research shows that a significant percentage of end-users have daily experiences of loss of voice/text signal throughout the entire home (48%) and in specific rooms (59%). Loss of signal throughout the home for voice call and texts was highest in rural areas.

Regarding the indirect constraint placed on the wholesale FACO markets due to mobile calls, ComReg has performed a SSNIP-test for two scenarios, which would be likely to have different effects on the profitability of a SSNIP in FACO, given the relative differences in charges for the WLR and FVCO components. ComReg assumes that RFTS end users will be less likely to respond to a diluted 2.5% to 5% increase in the price of RFTS, arising from pass through of a SSNIP of FACO, than a direct 10% RFTS price increase. Accordingly, ComReg considers that it is unlikely that the proportion of end users switching to MTS in response to a SSNIP of FACO would exceed the relevant Critical Loss Values. ComReg's conclusion is supported by results from its market research in 2019. ComReg concludes that retail MTS is not likely to exert a sufficiently effective indirect constraint, such that it warrants inclusion in the FACO Markets.

Based on the available evidence, and after a thorough analysis, ComReg has concluded that mobile voice telephony is not a substitute for RFTS in Ireland.

BEREC's Assessment

BEREC notes that ComReg has largely based its assessment of fixed-mobile substitution on the results of its own market research. The research supports ComReg's conclusions.

BEREC understands the emphasis on the end-user perception, and finds the focus on the indoor call quality to be logical and convincing. BEREC considers that ComReg has also taken the indirect constraint placed by mobile services into full account.

BEREC finds that ComReg has presented sufficient evidence supporting the finding of a market for RFTS and FACO, and therefore considers the Commission's serious doubts to be not justified.

4.2 Incorrect definition of a separate geographic market for Regional FACO

Concerns of the Commission

In its draft measure, ComReg proposed to define a Regional FACO market by using an 80% NG coverage threshold. Considering that this threshold is much higher than those used by other NRAs, including ComReg, on various other markets, the Commission deems that this threshold is excessively conservative. The Commission also points out that the threshold chosen by ComReg lacks robustness, as it is extremely sensitive to limited variations. According to the Commission, with an 80% threshold, the Regional FACO market includes 795 Exchange Areas covering almost 700,000 premises whereas with a 70% threshold, the same market would only include [REDACTED] Exchange Areas covering [REDACTED] premises.

Additionally, the Commission states that ComReg did not consider (quantitatively, for its geographic market definition) the competitive pressure exercised by Virgin Media's cable network and therefore has not analysed the various competitive pressures exerted on the potential SMP operators as a whole.

Views of ComReg

ComReg explains that the presence of NG broadband is a decisive factor in whether the FACO markets are competitive or not. While ComReg confirms that the threshold defined in its market analysis is sensitive to variations, ComReg explains that there is a linear relationship between the percentage of the threshold and the number of Exchange Areas in each market.

ComReg also considers that the Commission has not explained, regarding its concern about the robustness of the threshold, the criteria, which would make any threshold defined by ComReg more robust and whether the Commission would have considered other potential thresholds as sufficiently robust. On the contrary, ComReg considers that if a lower threshold is applied, the chosen threshold would suffer from the same problems of robustness issued by the Commission.

Finally, even though ComReg recognises the competitive pressure exerted by the cable operator Virgin Media, ComReg considers that Virgin Media is active on the LL-FACO market on a self-supply basis only. Thus, ComReg cannot find any reasons that support the Commission's assertion that the application of the 80% coverage threshold and the exclusion of Virgin Media from that threshold amounts to the definition of individual geographic markets at the premises level.

BEREC's Assessment

First, BEREC notes that, according to the Commission's guidelines on market analysis, the area covered by a network is generally one of the main criteria to determine the geographical scope of any relevant market.³ In principle, the area covered by a network is an area where all premises are connected to the respective network. Two networks fully overlap when the coverage of both networks in the area concerned equals 100 %, meaning both networks are parallel. However, network deployments are often patchy and competitive pressure stemming from an alternative network is normally not strictly confined to the precise borders of the respective network.

Therefore, NRAs often apply thresholds below 100% as coverage criteria in order to assess the homogeneity of competitive conditions between different geographic areas. For example, most but not all premises of a municipality might be covered by at least one alternative network in addition to the incumbent's network. Depending on the competitive pressure exerted by the alternative network, the whole municipality might be identified as more competitive compared to other municipalities (e.g. municipalities only covered by the incumbent's network).

Furthermore, the growth of network footprints over time might be considered by the NRA, where appropriate. Such factors provide the reasoning for an NRA to set a threshold below 100% for coverage.⁴ BEREC does not share the Commission's view that a threshold of 80 % for the coverage criteria can in itself be regarded as conservative. Even though a coverage threshold could be applied as one criterion for the definition of this specific geographic market, neither ComReg nor the Commission have been able to explain which threshold shall be retained in order to be considered sufficient. On this matter, ComReg has not given a clear and precise explanation behind its choice of a threshold of 80%.

While ComReg outlined why it distinguished differences in competitive conditions in the defined geographic areas according to the single criterion of NG Broadband presence and some indication that there might be a certain difference of the areas below and above the threshold can be found, a systematic difference in competitive conditions is not clearly demonstrated. BEREC is therefore not able to assess whether this exact threshold leads to a correct identification of competitively homogeneous areas. Hence, even if the regional market analysis might prove to be correct in case of further substantiation, it cannot be ruled out that the regional market analysis is incorrect.

BEREC notes that the Commission did not explain to both ComReg and BEREC how the threshold should be determined, or at least which criteria, to use to define this threshold, in order for it to be considered sufficient for the market definition. This creates a lack of clarity and uncertainty. In conclusion, without any information given by either ComReg or the Commission, BEREC is not in a position to judge whether the threshold chosen by ComReg for its market definition is valid or not and, thus, has concerns regarding the lack of substantiation of the threshold.

³ "In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined based on two main criteria: the area covered by a network and the existence of legal and other regulatory instruments", Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services, (2018/C 159/01), paragraph 51.

⁴ BEREC observes considerable variations regarding the thresholds adopted by different NRAs according to the specific market circumstances assessed, see BEREC Report on the application of the Common Position on geographic aspects of market analysis (BoR (18) 213), p. 18.

Additionally, BEREC is of the opinion, based on both the Commission's guidelines on market analysis and BEREC's Common Position on geographical markets⁵, that ComReg should not have used only one criterion based on NG coverage, which appears as not sufficient, to define its FACO market. In fact, the use of other criteria on given Exchange Areas, such as the number of operators offering fixed telephony through a FACO offer or the number of users (residential and non-residential) using fixed telephony, would have helped ComReg to further substantiate its regional market definition, which would have met the Commission's requirements. Moreover, other NRAs often applied different criteria in addition to coverage, such as market shares of the incumbent or of competitors and variations of such market shares to foster their allocation of geographic areas to a certain (sub)market.⁶

Finally, BEREC confirms that ComReg should have included Virgin Media's cable coverage regarding its criterion used to define its geographic analysis as explained on BEREC's Common Position on geographic aspects of market analysis⁷. However, BEREC notes that cable networks are mainly deployed in urban areas and that it is questionable whether the inclusion of these networks would have produced any significant effect on the number of premises concerned by the market definition. This point of view is confirmed by the assertion of ComReg which indicates that the addition of Virgin Media's presence on the 80% threshold would have resulted in adding at a maximum only ■ new Exchange Areas on the Urban FACO Market regarding the 795 Exchange Areas already included in the Urban FACO Market.

In conclusion, with regard to the previous paragraphs, BEREC is of the opinion that ComReg could provide further reasoning to its geographic market definition. On the other hand, BEREC does not see any evidence that the threshold for network coverage applied in the geographic market analysis might not be suitable. Therefore, BEREC partially shares the Commission's doubts regarding the geographic definition of the FACO market.

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

Concerns of the Commission

The Commission expresses concerns that the three criteria test would pass on the Regional FACO Markets, assessing market developments on these shrinking markets on a forward-looking basis, if ComReg (a) included mobile-originated calls in its relevant market, and (b) relied on a more proportionate coverage criterion for NG broadband.

⁵ "A segmentation based on a single criterion (e.g. the number of operators) will usually be not appropriate", BEREC Common Position on geographic aspects of market analysis (definition and remedies), BoR (14) 73, paragraph 130.

⁶ See BEREC Report on the application of the Common Position on geographic aspects of market analysis (BoR (18) 213), p. 18.

⁷ "If, for example, an incumbent DSL operator competes with a cable operator in city A and with another cable operator in city B, should the two cities form a single geographical market or not? BEREC is of the opinion that the homogeneity of competitive conditions should be the decisive criterion and not the identity of the alternative operator. This means that, if the analysis of the criteria mentioned above indicates that competitive conditions are similar, cities A and B should form a single geographical market", BEREC Common Position on geographic aspects of market analysis (definition and remedies), BoR (14) 73, paragraph 130.

Furthermore, the Commission considers that, similar to Urban FACO, with less narrowly defined products and geographic FACO markets, and a forward-looking analysis taking all market developments and competitive constraints into account, ComReg's Regional FACO Market three criteria test would likely fail, as regards Criteria 1 and 2.

Views of ComReg

ComReg explains that it dealt with this issue raised by the Commission in its draft. For further information, see also the summary above (sections 4.1 and 4.2).

BEREC's Assessment

First, BEREC notes that both fixed-mobile substitution and the coverage criterion for NG broadband, on which the Commission grounded its serious doubts on the three criteria test, were already raised in the Commission's serious doubts when analysing the "Lack of sufficient evidence supporting the finding of a market for RFTS and FACO" and the "Incorrect definition of a separate geographic market for Regional FACO".

As to whether the market should be defined narrowly or more broadly, BEREC considers that it should be based on several factors such as the technical specifications of the products, the observed patterns of wholesale and retail demand substitution, as well as the extent of indirect constraints. Thus, the Commission's consideration is difficult to evaluate in practice.

In conclusion, BEREC is of the view that the Commission has not put forward sufficient reasons to doubt ComReg's three criteria test. Consequently, BEREC does not agree with the Commission's serious doubt regarding ComReg's three criteria test within the relevant wholesale Regional FACO Markets.

4.4 Lack of sufficient evidence to support the finding of SMP in the Regional FACO market

4.4.1 Close relation of the three criteria test and the SMP determination

Concerns of the Commission

The Commission sets out a reminder, regarding its SMP finding, that, based on Articles 68(2) and 3(4)(f) of the Code, NRAs have to follow the principle of proportionality by only imposing ex ante regulatory obligations to the extent needed to secure effective and sustainable competition in the interest of end users, and sets out several concerns.

One of the Commission's main concerns relates to ComReg's narrow definition of the relevant market, in both its product and geographic dimension. The Commission is of the opinion that the three criteria test would not have been met if ComReg had included calls originating in mobile communication networks in the market and had chosen a more reliable coverage threshold for NG broadband. Due to the close relation of the three criteria test and the SMP determination, the factors considered by ComReg consequently would also not allow for the assignment of SMP to Eircom.

Views of ComReg

ComReg explains that it dealt with this issue raised by the Commission in its draft. For further information, see also the summary above (sections 4.1 and 4.2).

BEREC's Assessment

Regarding this issue, BEREC notes that the Commission already raised its doubts regarding the market definition in relation to this topic. For this reason, BEREC refers to its statements made above (section 4.1). Shortcomings in ComReg's determination of significant market power, in the first place, would have to be identified by an evaluation of the actual determination of the product and geographic market instead of the market definition as it should be according to the Commission's point of view. Since the NRA based its SMP finding on its market definition the SMP finding has to be congruent to that definition. In this case the market definition did not lead to an incorrect actual SMP finding.

4.4.2 Declining of FACO Market. Potential competition and bundling.

Concerns of the Commission

The Commission acknowledges that ComReg based its SMP finding on Eircom having high market shares, the lack of indirect pricing constraints, insufficient potential competition and countervailing buyer power but notes that, at the same time, ComReg's argumentation lacks the sufficient inclusion of the fact that the market shrunk steadily during the last years. From 2015 – 2020 the revenues of Eircom decreased by █%-█% and the total number of FACO lines decreased by █%-█%. Furthermore, the Commission criticises ComReg's evaluation of constraints by the existence of potential competitors. It stresses that some entry has occurred or is likely to occur in the market, which affects the restraints by potential competition. The Commission bases this on the fact that approximately 83% of customers at national level would have a fixed telephone service provided as part of a bundle, with the fixed component sometimes even provided free of charge. In this context, the Commission states that in over 60% of the regional FACO markets Eircom's market power could already be constrained by potential or actual competitors that entered or may enter based on their own infrastructure or regulated input from the upstream markets.

Furthermore, the Commission assumes that Eircom would rather not raise prices for the number of premises in the Regional FACO Markets, which are not served by NG broadband and could therefore only be served by SB-WLR (or White Label Voice), since they would make up only a small proportion of the market. The Commission bases this on the figures of Q4 2020, which only account for █%-█% of all premises in these markets. A price increase in all Exchange Areas and premises located in the Regional FACO Markets, would furthermore lead to Eircom risking to lose customers who could switch to Managed VoIP, where NG Broadband is available, or who may decide to rely only on a mobile phone.

Views of ComReg

ComReg explains that the Regional FACO Markets still consist of almost 700,000 premises and more than 375,000 RFTS lines, which remain a substantial portion of the overall market (31% of all premises in Ireland) and require appropriate analysis. ComReg also states that they considered other factors despite the market shares, namely:

- Existing competition: vertical integration, relative strength of existing competitors, barriers to expansion, indirect constraints and pricing behaviour;

- Potential competition: including control of infrastructure, technological advantages, barriers to entry, overall strengths of potential competitors and
- Strength of any countervailing buying power.

ComReg concluded that it is unlikely that any access seeker (absent regulation) could effectively compete with Eircom in this market. For the point of coverage with bundled products, ComReg explains that 39% of the Regional FACO Market is not covered by NG Broadband. Therefore, it is not correct that those end users could obtain any NG Broadband bundle with a RFTS component. ComReg also states that the Commission did not provide any evidence to substantiate its claim that in over 60% of the Regional FACO Markets, Eircom's market power could be constrained.

Regarding the consideration of the market size and continuous shrinking, ComReg indicates that it was unaware of any guidance or legislation, which permits an NRA to not assess markets below some level of significance.

ComReg emphasises that 39% of premises are not served by NG broadband on the Regional FACO Markets; consequently, no viable alternative to current generation fixed network access (CG FNA) FACO services existed. Besides, the SSNIP has shown that even a high amount of end users who had the capacity to switch to NGA Networks would refuse to do so.

Furthermore, ComReg replies to the Commission's bundle argument by stating that highlighting the possibility of end users to obtain RFTS free of charge would not reflect the actual realities of the relevant FACO Markets or end user capability, or indeed propensity, to purchase bundles with an RFTS component as a free add-on.

On the one hand, those end users living in the 39% of the Regional FACO Markets, which were not covered by NG Broadband, could not obtain any NG Broadband bundle with a free RFTS component. On the other hand, amongst the four alternative operators on the market, namely BT, Sky, Virgin Media and Vodafone (along with Eircom, comprising 90% of the market as of Q4 2020), only Vodafone would offer a bundle with a free RFTS component. Since Vodafone would currently only hold about █% market share in the Regional FACO Markets, this was the maximum amount of end users capable of purchasing a bundle with a free RFTS component, provided that all of Vodafone's end users purchased that specific option. Beyond this, the Commission did not provide any evidence to substantiate its claim that in over 60% of the Regional FACO Market, Eircom's market power could already be constrained by potential or actual competitors that entered or may enter based on their own infrastructure or regulated inputs from the upstream markets (i.e. WLA and WCA).

BEREC's Assessment

In this context, BEREC is of the opinion that a determination of SMP based on the various criteria by ComReg is sufficient. Even though ComReg might have taken market developments further into account,⁸ the size of the geographic market (31% of premises) indicates that a substantial part of the market would still be affected.

⁸ The Recommendation on Relevant Markets and the SMP Guidelines as well as the accompanying Explanatory Notes suggest the reliance on criteria other than the market share where suitable, which seems appropriate in a declining market where mainly the SMP operator offers a service because it is not attractive for others to supply said service.

Regarding the claim of market entry and pressure by (potential) competitors due to 83% coverage of bundled products on a national level, BEREC agrees with ComReg that the Commission's line of argumentation disregards the national particularities.⁹ Moreover, it disregards ComReg's actual geographic market definition. As stated before, the assessment of the SMP finding should be based on the definition and analysis done by ComReg, not the definition suggested by the Commission. Therefore, BEREC is of the opinion that this argument is not relevant to this topic. Against this background, it is the opinion of BEREC that ComReg came to a reasonable conclusion.

4.4.3 High mobile penetration rate

Concerns of the Commission

The Commission considers that, in a situation where mobile penetration exceeds 100%, Eircom would have a limited ability to increase prices in the regional FACO markets due to the indirect constraints posed by mobile calls.

View of ComReg

ComReg states that, having analysed the available evidence, mobile telephony has no material capacity to constrain pricing behaviour in the Regional FACO Markets.

BEREC's Assessment

BEREC notes that if the analysis determines that mobile telephony is not part of the market and does not create indirect pressure, an SMP finding that does not take these points into account may be justified. This is, again, no argument for doubts concerning the SMP finding. Furthermore, 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.

4.4.4 Discontinue tendency of RFTS end user's subscriptions

Concerns of the Commission

The Commission also posits that since a high percentage of end users' RFTS subscriptions were already not being used it was likely that these end users would discontinue their subscription if prices increased. A decline of RFTS subscriptions in the Regional Exchange Areas was especially expected because 91% of premises were residential, which traditionally would be more inclined to abandon RFTS compared to businesses.

View of ComReg

ComReg states that the evidential basis of the Commission's assumption was not clear. In fact, ComReg's SSNIP analysis even contradicts it. According to ComReg's 2019 Residential Market Research, only 31% of respondents would have indicated their willingness to change their behaviour in response to a €4 SSNIP. A minority of these (32%) had said that they would cancel their subscription. 53% of respondents even actively indicated that they would retain their subscription but perhaps alter their behaviour. In addition, 93% of rural end users and

⁹ For example, the possibility of end users in regions without or limited NG broadband coverage and the actual offer of RFTS as a free component on retail level.

89% of suburban end users indicated that they were unlikely to give up their landline in the next 12 months. ComReg specifies the corresponding figure for urban respondents is 63%.

Furthermore, even if only about 9% of the premises in the Regional FACO Markets were commercial premises, these were extensively affected by potential deregulation, whereby a higher weight would have to be attributed to these businesses in the course of the assessment. The results of ComReg's SME Market Research showed that these commercial end-users, effectively, were abandoned in case of deregulation, in line with the 68% of residential end users who had stated that they would not switch to another SP due to an increase in price.

BEREC's Assessment

BEREC is of the opinion that the Commission's line of argumentation falls short in this context. Even if residential users would discontinue their subscriptions, the market would only decline further, which might either maintain Eircom's high market shares or even raise these market shares, since in this particular case, it seems unlikely that new suppliers will appear on the retail level. Therefore, differing market shares cannot necessarily be deduced from the potential willingness to abandon subscriptions. Furthermore, Access Seekers would also be affected by cancellations. Beyond this, ComReg based its decision on an assessment of the end users' behaviour and evaluated several criteria, so the results of the Draft Decision regarding consumer behaviour do not seem deficient.

4.4.5 USO protection

Concerns of the Commission

The Commission also recalls Eircom's obligation to provide geographically averaged pricing for a standalone publicly available telephone service under the Universal Service Obligation. From the Commission's perspective, this obligation would make it unlikely for Eircom to discriminate against end users located in the Regional FACO markets. This mechanism would therefore also contribute to end user protection in premises not covered by NGA networks.

View of ComReg

ComReg argues that the addressed Universal Service Obligation is not suitable to fix the competition problems. It does not induce ISDN-Services and does not make any statement about the absolute price of retail fixed voice access (RFVA). ComReg also highlights that the USO does not take effect in favour of the Access Seekers, especially not where Eircom would not have increased the price of FACO self-supply to its own retail arm and that the USO only applies to standalone LL-RFTS. Therefore, the more bundled purchases increases the more end users would no longer be protected by this measure.

BEREC's Assessment

In this context, BEREC is of the opinion that end users might be partially protected by USO against increased prices but the influence on the wholesale FACO markets should be minimal. This mechanism only affects Eircom's end users. Since end users of Access Seekers do not obtain their telephone service from Eircom, the Universal Service Obligation does not protect these end users, so that price increases on the wholesale market could and would (to a certain extent) be passed on. The probable scenario would then be that these end users switch operators to the cheaper one – which is most likely Eircom.

Hence, relying solely on USO would, in the end, reinforce Eircom's SMP. In light of this, ComReg's reply is plausible.

4.4.6 Lack of a forward-looking perspective

Concerns of the Commission

Finally, the Commission takes issue with the lack of a forward-looking perspective in ComReg's analysis. In this context, the Commission does not contest in itself the possibility for ComReg to plan 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. However, the Commission asserts that such a mid-term review does not exempt ComReg from carrying out a forward-looking assessment in the current market review. The Commission indicates that it is still necessary to base forecasts on sufficient information and to evaluate these in the light of future perspectives.

As an example, the Commission names NBI's ongoing deployments based on the State aid-funded National Broadband Plan. Additionally, the Commission considers that the mid-term review should be based on a predetermined set of criteria provided in the current market review. According to the Commission, this would allow for a transparent and periodic deregulation of the concerned exchange areas.

View of ComReg

ComReg explains that it did carry out a forward-looking analysis. In particular, with regard to the State aid-funded National Broadband Plan, it stated that at the time of their analysis it was not sufficiently certain what the result would be. Because of this uncertainty, ComReg wants to conduct the mid-term analysis in two years to see whether the circumstances have changed.

BEREC's Assessment

Regarding this issue, BEREC can relate to the Commission's doubts. It acknowledges 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. Such future assessments and the continuance of an analysis and corresponding regulation for about three years shall especially provide for legal certainty and planning reliability. The underlying data should provide adequate information to decide whether ComReg can anticipate a certain expansion in NGA coverage, by the incumbent or its competitors, which might suffice to already deregulate other geographic units of the Regional FACO markets or not.

5. Conclusions

Based on the analysis set out in section 4 above, BEREC considers that the Commission's serious doubts regarding the finding of a market for RFTS and FACO are not justified. Furthermore, BEREC finds the serious doubts regarding the three criteria test and most of the SMP assessment not justified. However, BEREC finds that the Commission's serious doubts as to the substantiation of the geographic market analysis and the lack of a forward-looking perspective are justified. Even though BEREC cannot conclude that this substantiation would lead to a different outcome regarding the geographic market definition and ultimately the outcome of the market analysis.

Therefore, BEREC's overall conclusion is that the Commission's serious doubts regarding the draft decision of the Irish national regulatory authority, ComReg, as expressed in the Commission's letter, dated 16 July 2021, are partially justified.