

## Annex 3: Updated Oxera report (24/69c)

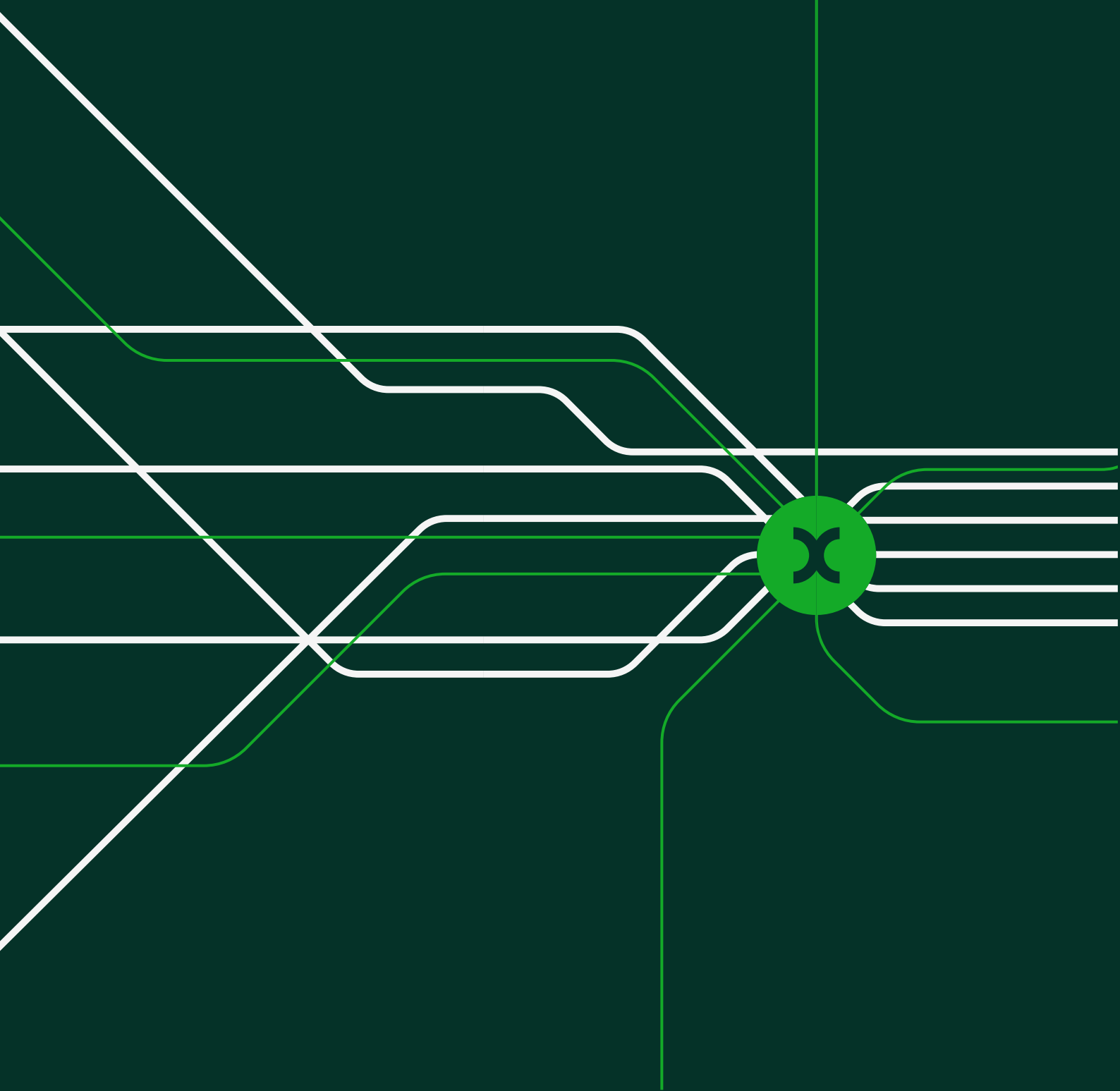
A 3.1 The Updated Oxera report (24/69c)

NON-CONFIDENTIAL

Oxera's review of Eircom Wholesale  
Notification 24-010 FTTH Discount: Updated  
report

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Prepared for ComReg

21 August 2024



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# 1 Introduction and summary

- 1.1 In Decision D05/24,<sup>1</sup> ComReg granted Eircom permission to apply Promotions or Discounts in respect of FTTH-based VUA services, subject to it receiving prior approval from ComReg.<sup>2</sup>
- 1.2 On 23 February 2024, Eircom submitted Wholesale Notification 2024-010 ('WN2024-010') to ComReg,<sup>3</sup> as required under its obligations as set out in Decision D05/24.<sup>4</sup> This was the first such notification submitted by Eircom to ComReg.
- 1.3 On 2 May 2024, Oxera provided a report to ComReg outlining our independent economic assessment of WN2024-010 (hereafter referred to as the 'Oxera Report').<sup>5</sup> Our assessments was conducted in line with the four criteria specified by ComReg in Decision D05/24.
- 1.4 In our assessment, we concluded that the first and third criteria specified in Decision D05/24 were satisfied. In particular, we found that:
- Eircom's FTTH VUA prices including the discount are above the Price Floor (although this will not necessarily remain the case over the maximum three-year period of the FTTH Tariff Proposal);<sup>6</sup>
  - the proposed discount does not contain any conditions or provisions that would be expected to lead to geographically differentiated prices.<sup>7</sup>
- 1.5 We concluded that the FTTH Tariff Proposal did not satisfy the second criterion: that the Promotion or Discount does not, in form or in effect, favour Eircom's retail arm.<sup>8</sup> We found that the restriction in the availability of the discount to own-customer

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<sup>1</sup> ComReg (2024), 'Market Reviews; Wholesale Local Access (WLA) provided at a fixed location; Wholesale Central Access (WCA) provided at a fixed location for mass-market products; ComReg 24/07; Decision D05/25', 18 January. Hereafter referred to as 'Decision D05/24'.

<sup>2</sup> Decision D05/24, Decision Instrument: Section 14.9.

<sup>3</sup> Eircom (2024), 'Pricing Statement of Compliance for CRD 994 – FTTH Review of Tariff Structures' (hereafter referred to as 'Eircom CRD 994').

<sup>4</sup> Decision D05/24, Decision Instrument: Section 4.11.

<sup>5</sup> Oxera (2024), 'Oxera's review of Eircom Wholesale Notification 24-010 FTTH Discount', 2 May 2024 (hereafter referred to as the 'Oxera Report').

<sup>6</sup> Oxera Report, Section 3.1.

<sup>7</sup> Oxera Report, Section 3.3.

<sup>8</sup> Oxera Report, Section 3.2.

upgrades would favour Eircom's retail arm, and would therefore be in breach of this criterion, in terms of both the 'form' and likely 'effect' of the offer.

- 1.6 We also concluded that the FTTH Tariff Proposal did not satisfy the fourth criterion: that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.<sup>9</sup> We considered that the criterion was satisfied in relation to the impact on network and wholesale competition, as: (i) it does not include volume-related, exclusivity and/or retroactive conditions; and (ii) the current Price Floor is respected. However, linked to our assessment of the second criterion, we had concerns that the FTTH Tariff Proposal could have a dampening effect on retail competition, through the restriction in the availability of the discount to own-customer upgrades only. Therefore, in light of our conclusion in respect of the impact on retail competition, we concluded that the fourth criterion was not satisfied.
- 1.7 On 24 May 2024, ComReg issued its Consultation and Draft Decision (ComReg 24/38).<sup>10</sup> This instigated a consultation period to gather views from stakeholders, which closed on 24 June 2024.<sup>11</sup>
- 1.8 On 31 May 2024, Eircom notified a further wholesale notification to ComReg (WN2024-021).<sup>12</sup>
- 1.9 On 5 July 2024, ComReg subsequently re-opened the ComReg 24/38 Consultation, to provide stakeholders with an opportunity to express views on WN2024-010 when considered in parallel with WN2024-021 (the 'Further Consultation').<sup>13</sup>
- 1.10 This report acts as an addendum to the assessment presented in the Oxera Report. In this addendum, we:

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<sup>9</sup> Oxera Report, Section 3.4.

<sup>10</sup> ComReg (2024), 'Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg Decision D05/24; Consultation and Draft Decision; ComReg 24/38' (hereafter referred to as 'ComReg 24/38').

<sup>11</sup> ComReg 24/38, para. 86.

<sup>12</sup> ComReg (2024), 'Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg Decision D05/24 (WN2024-010); Further Consultation following notification of a wholesale FTTH promotion (Wn2024-021); ComReg 24/57', 5 July, para. 2.

<sup>13</sup> ComReg 24/57, para. 7.

- provide a response to a number of economic arguments raised by the respondents to the ComReg 24/38 Consultation, and set out the extent to which these arguments and evidence lead us to alter our original conclusions;
- assess whether the introduction of WN2024-021 in parallel with WN2024-010 would lead to the mitigation or aggravation of any of the concerns that we identified with respect to WN2024-010, taking into account responses to the Further Consultation.

1.11 ComReg has not asked Oxera to undertake a full economic assessment of WN2024-021 on a standalone basis.

1.12 Overall, we maintain the conclusion set out in the Oxera Report, that WN2024-010 does not satisfy the second and fourth criteria specified in Decision D05/24.

1.13 As set out in the Oxera Report, and assessed again in this addendum, there does not appear to be a clear procompetitive rationale for the discount to be limited to own-customer upgrades, particularly when the potential effects on retail competition are considered. This is a concern shared by all respondents to the consultation, with the exception of Eircom.

1.14 We note that Eircom has also recognised that its position as having the largest FTTC retail base could provide its downstream arm with an advantage relative to other Access Seekers, and as such has suggested imposing a 'cap' on the number of lines that it can receive the discount on, to mitigate the impact. However, while Eircom's proposed cap may reduce the potential advantage that Eircom Retail could obtain, it is not sufficient to eliminate the concern. This is particularly the case when accounting for the fact that not all existing CGA or FTTC lines will be in scope of the Eircom FTTH footprint for the majority of the next three years, as this imposes a natural limit on the number of lines that can be upgraded to Eircom's FTTH network (the 'upgradable base'). For any scenario where the upgradable base of FTTC lines is below the capped number of lines, the cap is not binding on Eircom and is entirely ineffective at providing any constraint on the advantage to Eircom retail.

## 2 Responses to the ComReg 24/38 Consultation

### 2.1 Summary of respondent's positions

2.1 There were five respondents to the ComReg 24/38 Consultation: Eircom, Virgin Media (supported by a report produced by SPC Network), SIRO, Sky and Vodafone.

2.2 Eircom welcomed ComReg's proposal to approve the offer.<sup>14</sup> However, it argued that both ComReg's and Oxera's assessment was not based on competition law principles, yet doing so 'would provide further evidence of the immaterial impact of the discount on competition, and that it cannot be concluded that the offer provides an "advantage" to eir Retail'.<sup>15</sup>

2.3 Sky and Vodafone recognised that while wholesale discount schemes have the potential to generate benefits,<sup>16</sup> they both argued that the proposed discount scheme would have an adverse impact on retail competition and could provide Eircom with an advantage at the retail level.<sup>17</sup> They expressed concerns that the negative impact for retail competition would outweigh any possible benefit.<sup>18</sup> Sky and Vodafone's concerns stem from the limitation in the availability of the discount to own-customer upgrades (consistent with the position set out in the Oxera Report).<sup>19</sup> Both respondents considered that the proposed discount scheme is not acceptable in its current form.<sup>20</sup>

2.4 SIRO and Virgin Media also raised concerns over the impact of the proposed discounts scheme on competition. SIRO and Virgin Media raised the same concerns as Sky and Vodafone (and the Oxera Report), i.e. that the scheme would have an adverse impact on competition at the retail level and could favour

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<sup>14</sup> Eircom (2024), 'eir's Response to ComReg Consultation: Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg Decision D05/24', 24 June, p. 1 (hereafter referred to as 'Eircom Consultation Response').

<sup>15</sup> Eircom Consultation Response, p. 4.

<sup>16</sup> Sky (2024), 'Wholesale FTTH discount scheme notified by Eircom: Consultation Response to ComReg Draft Decision D05/24', June, p. 2 (hereafter referred to as 'Sky Consultation Response'); Vodafone (2023), 'Vodafone Response to Consultation', 24 June, pp. 2 and 4 (hereafter referred to as 'Vodafone Consultation Response').

<sup>17</sup> Sky Consultation Response, p. 2; Vodafone Consultation Response, pp. 2 and 4–6.

<sup>18</sup> Sky Consultation Response, p. 2; Vodafone Consultation Response, p. 2 and 4–6.

<sup>19</sup> Sky Consultation Response, p. 2; Vodafone Consultation Response, pp. 2 and 4–6.

<sup>20</sup> Sky Consultation Response, p. 3; Vodafone Consultation Response, p. 3.

Eircom's retail arm.<sup>21</sup> Both SIRO and Virgin Media also argued that the discount scheme will have an adverse effect on network investment and wholesale competition, despite prices remaining above the Price Floor.<sup>22</sup>

2.5 The range of arguments presented by the respondents can be grouped into two key issues on which we have focused our analysis. These relate to the potential for the FTTH Tariff Proposal to:

- favour Eircom's retail arm, in form or effect (in line with the second criterion of Decision D05/24);
- adversely affect investments by alternative operators or undermine competition across the value chain (in line with the fourth criterion of Decision D05/24).

2.6 Our analysis is restricted to these points given that the first criterion is clearly passed and no respondents raised concerns that the offer would give rise to geographic differentiation of prices, consistent with our view that the third criterion is also clearly passed. Furthermore, we do not comment on any legal or procedural issues, which are outside of the scope of this report.

## 2.2 Does the FTTH Tariff Proposal, in form or in effect, favour Eircom's retail arm?

2.7 As per Decision D05/24, the second criterion that must be satisfied is:<sup>23</sup>

ComReg [must be] satisfied that the Promotion or Discount does not, in form or in effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers

2.8 Our assessment of this criterion is presented in section 3.2 of the Oxera Report. We concluded that the FTTH Tariff Proposal in WN2024-010 did not satisfy this criterion. We considered that the form of the discount scheme alone, in particular the restriction

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<sup>21</sup> SIRO (2024), 'Response to Consultation on ComReg's Assessment of Eircom's FTTH Wholesale Discount Offer', 24 June, pp. 2–4 (hereafter referred to as 'SIRO Consultation Response'); Virgin Media (2024), 'Virgin Media response to ComReg's Consultation on a Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg D05/24 (Reference: ComReg 34/28', 24 June, pp. 3 and 5–6 (hereafter referred to as 'Virgin Media Consultation Response'); SPC Network (2024), 'Eircom's Wholesale FTTH Discount Scheme: Report for Virgin Media Ireland', June, Section 3 (hereafter referred to as 'SPC Network Report').

<sup>22</sup> SIRO Consultation Response, pp. 7–8; Virgin Media Consultation Response, pp. 3–5.

<sup>23</sup> Decision D05/24, Decision Instrument: Section 14.10.2.



in the availability of the discount to own customer upgrades to FTTH, could dampen retail competition and consequently lock-in existing retail fixed broadband market shares.<sup>24</sup> This would have the effect of protecting the market position of Eircom's retail arm.<sup>25</sup>

2.9 In addition, we concluded that the advantage to Eircom Retail could be compounded due to the fact that Eircom has the largest retail base of copper and FTTC lines eligible for the discount.<sup>26</sup> Our analysis of two illustrative scenarios suggested that Eircom could realise a higher cost saving per FTTH line than Sky or Vodafone,<sup>27</sup> and that Eircom's proposed cap was not sufficient to eliminate this concern.<sup>28</sup>

### 2.2.1 Consultation responses

2.10 Eircom stated that Decision D05/24 requires the assessment to be guided by competition law principles, and argued that our assessment of whether there was an advantage to Eircom was incomplete.<sup>29</sup> It argued that when using competition law principles as a framework for the assessment it cannot be concluded that the offer provides an 'advantage' to Eircom Retail.<sup>30</sup>

2.11 Eircom argued that in order to determine that the form of the offer undermined competition at the retail level (departing from competition on the merits), we would need to have found that the benefit to Eircom was material and that the 'existing LRIC margin (pre-discount) of using an equally efficient operator test would need to be negative'.<sup>31</sup> Eircom continued to argue that the available margins of an equally efficient operator in the retail market is sufficient to contest for new and existing end users, irrespective of the wholesale offer from Eircom.<sup>32</sup>

2.12 Eircom also stated that, 'to justify grounds for concern under competition law [...] Eir Retail needs to be dominant in the retail broadband market' and that ComReg had not found this.<sup>33</sup> It

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<sup>24</sup> Oxera Report, paras 3.16–3.18.

<sup>25</sup> Oxera Report, para. 3.18.

<sup>26</sup> Oxera Report, para. 3.19.

<sup>27</sup> Oxera Report, paras 3.20–3.30.

<sup>28</sup> Oxera Report, paras 3.31–3.36.

<sup>29</sup> Eircom Consultation Response, paras 15 and 24.

<sup>30</sup> Eircom Consultation Response, para. 24.

<sup>31</sup> Eircom Consultation Response, para. 17.

<sup>32</sup> Eircom Consultation Response, para. 22.

<sup>33</sup> Eircom Consultation Response, para. 19.

also argued that we failed to account for important retail market characteristics and the nature of the broadband value chain.<sup>34</sup> In this regard, Eircom disagreed with our conclusion that the form of the offer reduces the incentives to acquire and upgrade customers and locks in market shares, claiming that retailer's strategies to acquire or upgrade customers would not be affected by the wholesale offer.<sup>35</sup>

- 2.13 In contrast, the points raised in relation to this criterion by Sky and Vodafone were broadly aligned with those set out in the Oxera Report.
- 2.14 Sky argued that the 'offer in its current form represents a direct threat to vigorous retail competition' and 'has the potential to act as a disincentive for operators to compete for competitors' copper customers'.<sup>36</sup> Vodafone argued that that proposed discount scheme would dampen retail competition for current retail copper-based customers—by reducing the competitive intensity for these customers—and favour Eircom's position in the retail market.<sup>37</sup>
- 2.15 Sky and Vodafone attributed this dampening effect on competition in the retail market to the restriction of the discount to own customer upgrades, i.e. because retail providers only obtain the discount in respect of their own copper and fibre customers, but not in the case where they win from a rival and upgrade them to FTTH in the process.<sup>38</sup> Vodafone also noted that this advantage would persist in respect of upgraded FTTH customers during the period for which they generate the discount for the retail provider.<sup>39</sup>
- 2.16 Sky and Vodafone expressed that the proposed discount scheme in effect penalised operators that have been more effective at migrating customers from copper-based services to FTTH services to date.<sup>40</sup> Both operators argued that they will face the higher wholesale prices for the customers already upgraded to FTTH, than those faced by operators that have been slow to migrate customers to FTTH, as the latter will

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<sup>34</sup> Eircom Consultation Response, paras 22–25 and 25.

<sup>35</sup> Eircom Consultation Response, para. 26.

<sup>36</sup> Sky Consultation Response, p. 2.

<sup>37</sup> Vodafone Consultation Response, p. 2 and pp. 4–6.

<sup>38</sup> Sky Consultation Response, p. 2; Vodafone Consultation Response, pp. 4–5.

<sup>39</sup> Vodafone Consultation Response, pp. 4–5.

<sup>40</sup> Sky Consultation Response, p. 3; Vodafone Consultation Response, p. 5.

benefit from lower wholesale prices under the proposed discount scheme.<sup>41</sup> In this regard, Eircom Retail stands to benefit more from the offer than other retail service providers.

2.17 SIRO, which operates as a wholesale network provider, and Virgin Media (supported by SPC Network), which operates as a vertically-integrated provider, also raised concerns that Eircom Retail would benefit and that the scheme could dampen competition at the retail level.<sup>42</sup>

2.18 SIRO argued that operators with fewer existing copper-based customers will find it harder to compete as they would not be able to match the scale of discounts that Eircom Retail can apply (by virtue of Eircom Retail's larger legacy base).<sup>43</sup> SIRO argued that the cap proposed by Eircom was not sufficient to address the concerns, and that the potential cost advantage Eircom Retail could achieve would be material.<sup>44</sup>

2.19 SPC Network, on behalf of Virgin Media, noted that Access Seekers would only benefit from the discount in respect of their own-customer upgrades and argued that, if they are able to retain the discount (as additional profit), they would focus on upgrading their own customers to FTTH, which risks softening retail competition.<sup>45</sup> SPC Network noted that, in this context, Eircom has the largest market share. SPC Network also conducted similar illustrative calculations to those presented in the Oxera Report, and found that Eircom received a higher average discount per line, which it considered material.<sup>46</sup>

### 2.2.2 Oxera response

2.20 The regulation restricting Eircom's ability to introduce wholesale promotions and discounts is grounded in the finding that Eircom holds significant market power (SMP) in the Commercial NG WLA Market.<sup>47</sup> It is not required to show that Eircom is dominant in the retail market before reaching any conclusions in relation to concerns of distortion of retail market competition by a vertically integrated entity with SMP at the wholesale level.

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<sup>41</sup> Sky Consultation Response, p. 3; Vodafone Consultation Response, p. 5.

<sup>42</sup> SIRO Consultation Response, pp. 2–4; Virgin Media Consultation Response, p. 5–6; SPC Network Report, Sections 2 and 3.

<sup>43</sup> SIRO Consultation Response, pp. 2–4.

<sup>44</sup> SIRO Consultation Response, pp. 2–4.

<sup>45</sup> SPC Network Report, paras 5–7.

<sup>46</sup> SPC Network Report, Section 3.

<sup>47</sup> Decision D05/24, paras 9.503 and 9.523.

Indeed, one of the fundamental competition concerns that the regulatory framework seeks to address is that Eircom could leverage its SMP at the wholesale level into the retail market by introduction promotions or discounts that could favour certain Access Seekers, including its own downstream retail arm.<sup>48</sup>

- 2.21 Given the relevant test under this criterion is that 'the Promotion or Discounts does not, in form or effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers',<sup>49</sup> we maintain that this criterion is not satisfied.
- 2.22 The structure of the proposed discount scheme has the potential to favour Eircom's retail arm both in its form and through the potential effects.
- 2.23 Specifically the restriction in the availability of the discount to operators' own-customer copper and FTTC upgrades, has an impact on the nature or competition at the retail level. Namely, at the margin, Access Seekers will prefer to upgrade their own customers and thus will be less willing and able to compete for winning rival's legacy customers at the retail level and migrate them in the process. This reduces the competitive intensity for current retail copper-based customers, thus favouring Eircom's position in the retail market by limiting competition for its legacy base, and consequentially locking in existing retail fixed broadband market shares. This advantage could persist in respect of upgraded FTTH customers during the period for which they generate the discount for the retail provider.
- 2.24 We acknowledge Eircom's arguments that there are many retail operators with varying market shares and offerings,<sup>50</sup> and that end users have the freedom to switch providers based on their own preferences.<sup>51</sup> However, these factors do not obviate the core competition concerns that stem from the form of the discount: namely that its structure could protect Eircom's retail market position through a dampening of retail competition. As we set out in the Oxera Report, the advantage to Eircom Retail could be compounded because Eircom has the largest retail base of copper and FTTC lines which are eligible for the

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<sup>48</sup> Decision D05/24, paras 9.503 and 9.523.

<sup>49</sup> Decision D05/24, Decision Instrument: Section 14.10.2.

<sup>50</sup> Eircom Consultation Response, para. 22.

<sup>51</sup> Eircom Consultation Response, paras 23 and 27.

discount, and thus Eircom retail could obtain a higher average cost saving per FTTH line than its rivals.

2.25 Importantly, we note that at the time of notifying this offer, Eircom itself recognised that its position of having the largest FTTC retail base would mean that its downstream arm could be favoured relative to other Access Seekers, and as such proposed a cap on the number of eligible lines which sought to address this concern.<sup>52</sup>

2.26 However, our analysis in the Oxera Report showed that this cap was ineffective at fully alleviating this concern and thus, the effect still stands.<sup>53</sup> In particular, our illustrative analysis demonstrated that, given the mix of subscribers across copper, FTTC and FTTH technologies, Eircom could potentially realise a higher average cost saving per FTTH line than Sky or Vodafone even with the proposed cap on the number of FTTC lines Eircom can upgrade.<sup>54</sup> Thus, the proposed cap is ineffective at addressing the concerns identified.

2.27 Eircom states that Oxera did not assess the 'materiality' of any such advantage in line with competition law principles. However, we note that the assessment criteria set out in Decision D05/24 does not require an assessment of 'materiality'. It only requires that an advantage to Eircom's retail arm exists in form or in effect, and this was the focus of our assessment and the conclusions we stated, which we maintain.

2.28 Our conclusion remains that this second criterion is not met.

### 2.2.3 Conclusion

2.29 Having considered the consultation responses, we maintain our position that the second criterion is not satisfied given that the FTTH Tariff Proposal could favour Eircom's retail arm in form and in effect. This is based on our finding that:

- the restriction in the availability of the discount to operators' own-customer copper and FTTC upgrades has the potential to

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<sup>52</sup> Eircom CRD 994, p. 4.

<sup>53</sup> Oxera Report, paras 3.29–3.36.

protect the market position of Eircom by muting retail competition across Access Seekers;

- this concern is compounded by the fact that Eircom has the largest base of copper/FTTC customers eligible for the discount. Indeed, our illustrative analysis demonstrates that there are scenarios in which Eircom could achieve a higher discount per FTTH line than other Access Seekers, even after taking account of Eircom's proposed cap on the number of eligible FTTC lines.

## 2.3 Would the FTTH Tariff Proposal adversely affect investments by alternative operators or undermine competition?

2.30 As per Decision D05/24, the fourth criterion that must be satisfied is:<sup>55</sup>

ComReg [must be] satisfied that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.

2.31 Our assessment of this criterion is presented in section 3.4 of the Oxera report. We concluded that the FTTH Tariff Proposal did not include volume-related, exclusivity and/or retroactive conditions,<sup>56</sup> and that the current Price Floor is respected by the FTTH Tariff Proposal.<sup>57</sup> Therefore, we concluded that this criterion is satisfied in relation to the impact on **network and wholesale** competition.

2.32 However, as described in section 3.2 of the Oxera Report and above, we identified concerns that the structure of the offer could have an adverse impact on **retail** competition, and therefore this criterion was not satisfied.

### 2.3.1 Consultation responses

2.33 Virgin Media expressed concerns that 'this discount scheme will harm the evolution of network-based competition and damage nascent competition from wholesale providers such as Virgin Media'.<sup>58</sup> SPC Network, on behalf of Virgin Media, argued that a price above an SMP operator's own costs can be exclusionary and that this should not be included as a safe harbour.<sup>59</sup>

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<sup>55</sup> Decision D05/24, Decision Instrument: Section 14.10.4.

<sup>56</sup> Oxera Report, paras 3.49–3.52.

<sup>57</sup> Oxera Report, paras 3.53–3.59.

<sup>58</sup> Virgin Media Consultation Response, p. 5.

<sup>59</sup> SPC Network Report, para. 27.

- 2.34 SIRO also argued that alternative networks, such as SIRO, face higher costs of capital and are subsequently 'more sensitive to these discounts and may not be able to sustain similar offers, leading to predatory pricing concerns where Eir can afford to sacrifice revenue in the short to medium term to undermine competitors'.<sup>60</sup>
- 2.35 SIRO also argued that the discount scheme would impose financial strain on its own network rollout and submitted a stylised model which it suggests shows that 'it would be uneconomical for SIRO to extend the existing footprint any further' if the FTTH Tariff Proposal was approved and SIRO's ARPU per connection was consequentially reduced to €20.<sup>61</sup>
- 2.36 SIRO also expressed concerns over the three-year term of the FTTH Tariff Proposal, arguing it is excessively long and strategically designed to entrench its market dominance during a critical period when competitive network builds, like those by SIRO, are set to complete within the next 3 to 4 years'.<sup>62</sup> It argued that the three-year term will have loyalty-inducing effects.<sup>63</sup>
- 2.37 Eircom argued that there is likely no impact on rival wholesale operators, stating: 'SIRO and VM have already invested and committed to investing further in FTTH networks... even if eir was successful in attracting wholesale customers at the expense of rivals due to discounts, SIRO and VM will have incurred the sunk costs of deploying networks and will have an incentive to fill them at competitive prices irrespective of eir's costs...'<sup>64</sup>

### 2.3.2 Oxera response

- 2.38 While the specific arguments made by Virgin Media (and SPC Network on its behalf) and SIRO differ slightly in substance, both respondents make the same core argument that alternative network investment and wholesale competition could be adversely affected, even where Eircom's FTTH prices including the discount are above the specified Price Floor. This is premised on an assumption that the Price Floor is set at a level that

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<sup>60</sup> SIRO Consultation Response, p. 6.

<sup>61</sup> SIRO Consultation Response, p. 7–8 and Annex 1.

<sup>62</sup> SIRO Consultation Response, p. 6.

<sup>63</sup> SIRO Consultation Response, p. 7.

<sup>64</sup> Eircom Consultation Response, para. 11.

represents Eircom's costs, not those of an alternative network operator, which may be higher.

- 2.39 It is reasonable to assume that Eircom will face lower costs of provision than alternative network operators, given its scale and its ability to reuse existing infrastructure, such that a price set at the level of Eircom's (unit) costs may not be replicable by an alternative wholesale network operator. In the economic reports we provided to ComReg in support of Decision D05/24, we recommended that, in setting a Price Floor for FTTH prices, ComReg would ideally assess price levels against the deployment costs indicated in a BU LRIC+ model for the provision of FTTH services.<sup>65</sup> Having a Price Floor set with reference to the outputs of such a model could ensure that an efficient operator would be capable of competing with Eircom at this price level, consistent with ComReg's policy objectives.<sup>66</sup>
- 2.40 While we understand ComReg is in the process of developing a detailed FTTH cost model, it is not available for the purposes of assessing the FTTH Tariff Proposal in WN2024-010.
- 2.41 Therefore, the assessment needs to be made in line with the available evidence, which is the Price Floor specified in D05/24, or robust evidence from alternative network operators that the proposed price will undermine their investment case.
- 2.42 In this regard it is important to note that the level of the Price Floor (set with reference to the FTTC VUA price) is not intended to be an accurate measure of Eircom's costs of providing its FTTH VUA services. The FTTC VUA price is the output of a bottom-up cost model, which values the network based on the costs an operator would incur in deploying an FTTC network today, in order to encourage new entrants where network competition is viable.<sup>67</sup>
- 2.43 Furthermore, in setting the FTTH VUA Price Floor equal to the FTTC VUA price, ComReg stated:<sup>68</sup>

**Adopting a price floor for FTTP VUA that references FTTC VUA prices, which have formed the basis of build-or-buy decisions for FTTP**

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<sup>65</sup> Oxera (2022), 'WCA/WLA market review: Oxera report: Part 1', 16 December, para. 5.20.

<sup>66</sup> Oxera (2022), 'WCA/WLA market review: Oxera report: Part 1', 16 December, para. 5.20.

<sup>67</sup> Decision D05/24, para. 9.347.

<sup>68</sup> Decision D05/24, para. 9.475.





- 2.47 Therefore, in the absence of a detailed FTTH cost model, and in the absence of robust evidence from alternative network operators that their own costs of provision is above the FTTH VUA Price Floor, the primary reference point against which to assess price levels is the FTTH VUA Price Floor, in Decision D05/24. This is the exercise we carried out in the Oxera Report which found that the discounted price was above the Price Floor.
- 2.48 Further, our assessment in the Oxera Report adopted a conservative approach which compared the cheapest Eircom FTTH VUA price including the discount against the Price Floor. In practice, Eircom and other alternative wholesale providers will supply a range of wholesale services, which will include more expensive services, for example for higher bandwidth services.
- 2.49 Since wholesale operators will recover their costs across the portfolio of wholesale inputs supplied, which have different prices, a further exercise could be carried out to assess the average Eircom FTTH VUA price including the discount, taking into account the mix of wholesale inputs it supplies. While we have not conducted such an exercise, given that we found even the cheapest input price is above the Price Floor, we note that the resulting average price would be higher. Given this would more accurately reflect the revenues generated by Eircom and similarly alternative networks, this further mitigates the concern that the FTTH Tariff Proposal would undermine alternative network investment.
- 2.50 On this basis, we do not consider that the arguments and evidence received during the consultation process indicates that alternative network investment or wholesale competition would be undermined.
- 2.51 With respect to other arguments made in the consultation responses, we disagree with SIRO's argument that the length of the discount could have loyalty-inducing effects. We recognise that, in theory, long-term discounts have the capacity to compound loyalty-inducing effects created by other conditions, such as volume-related or exclusivity discounts. However, concerns over the duration of a discount typically relate to scenarios where a customer is required to sign-up to a long-

term contract upfront to receive the discount, and could face penalties if it wishes to exit the agreement.

2.52 In this case, Access Seekers would benefit from the discount for the duration that the eligible line remains on Eircom's network but are free to switch away if they choose to. Provided that rivals are able to credibly compete with the Eircom offer, this further mitigates concerns related to the duration of the discount. As discussed above, we have not seen robust evidence that the level of Eircom's prices including the discount will undermine investment by alternative networks. Therefore, alternative networks should be able to compete against Eircom's discounted FTTH prices, which mitigates the concerns over any loyalty-enhancing effects (particularly in the absence of other forms of conditionality).

2.53 Finally, regarding Eircom's argument that 'even if' it was successful in attracting wholesale customers at the expense of rivals due to discounts, SIRO and Virgin Media would be willing to set prices that ignore the sunk costs of network investment incurred to date<sup>72</sup> our view is that this argument ignores the impact of the offer on whether rival wholesalers would choose to enter/expand into new areas. This would take into account recovery of all costs, including costs which could be considered 'sunk' from Eircom's perspective (as it may have already rolled out a network in an area), but are relevant for the investment decision of alternative network operators. Indeed, the purpose of a Price Floor is to prevent harm arising from Eircom setting FTTH VUA prices below costs such that this would prevent entry or expansion of rival wholesale network operators. As all operators are expected to continue to invest in network expansion and/or upgrades throughout this period, Eircom's assertion that sunk costs do not matter for the assessment of the impact of the offer on network competition is incorrect.

### 2.3.3 Conclusion

2.54 Having considered the consultation responses, we maintain our position that the fourth criterion is satisfied specifically in relation to the impact on networks and/or wholesale competition based on our findings that:

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<sup>72</sup> Eircom Response, p. 7, para. 11.

- the FTTH Tariff Proposal did not include volume-related, exclusivity and/or retroactive conditions;
- the discounted price for WN2024-010 is above FTTH VUA Price Floor specified in Decision D05/24;
- we have not seen robust evidence that the costs of provision by alternative network operators is above the FTTH VUA Price Floor

2.55 However, as set out in the Oxera Report, and in section 2.1 above, we continue to have concerns that the structure of the offer could have an adverse impact on retail competition.

2.56 Therefore, in light of our conclusion in respect of the impact on retail competition, we do not consider that the fourth criterion is satisfied.

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## 3 Responses to the Further Consultation

- 3.1 On 31 May 2024, following the publication of ComReg's Consultation and Draft Decision in respect of WN2024-010, Eircom notified a further wholesale notification to ComReg (WN2024-021). Box 3.1 below summarises the key elements of the offer in WN2024-021.



### Box 3.1 Summary of the proposed offer in WN2024-021

WN2024 is a promotional offer that applies to Eircom's FTTH VUA 1Gbps service (and the equivalent Bitstream service). The offer provides a €2 price reduction on the monthly rental for 24 months, reducing the monthly rental price for the FTTH VUA 1Gbps service from €28.50 to €26.50 per month.

The discount is available to connections made during a six month period (which Eircom proposes to be 1 November 2024 to 30 April 2025). The discount applies to all new connections and upgrades to the FTTH VUA 1Gbps service, but not to existing customers taking this service.

If an Access Seeker downgrades a customer, or migrates a customer from a rival Access Seeker that is already taking the FTTH VUA 1Gbps service on Eircom's wholesale network, it will not be eligible for the discount on that customer.

The offer under WN2024-021 can be used in conjunction with other discounts and promotions, including WN2024-010.

If an Access Seeker were to benefit from the discounts available under WN2024-010 and WN2024-021, it would receive a total discount of €5 per connection. This would reduce the monthly rental price for the FTTH VUA 1Gbps service from €28.50 to €23.50 per month. The eligibility restrictions on for WN2024-021 would continue to apply if used in conjunction with other promotions or discounts.

Source: Oxera based on: ComReg 24/57, paras 2–4 and Annex A1.2.

3.2 In ComReg 24/57, ComReg explained that it has not identified any concerns with WN2024-021 on a standalone basis,<sup>73</sup> and that it does not intend to conduct a separate consultation in respect of its assessment of the promotion notified under WN2024-021.<sup>74</sup>

3.3 However, it considered that, given WN2024-021 could be cumulated with WN2024-010, 'Access Seekers should be given the opportunity to offer further views and information and data in respect of the discount scheme (WN2024-010) in the knowledge that the promotion notified under WN2024-021 may also apply for part of the time that the discount scheme would be operational'.<sup>75</sup> Therefore, ComReg re-opened Consultation under ComReg 24/38.<sup>76</sup>

### 3.1 Further Consultation responses

3.4 There were four respondents to the Further Consultation:

Eircom, Virgin Media (supported by a report produced by SPC Network), SIRO, and Vodafone.

3.5 Respondents re-stated many of the same points concerning WN2024-010 that were made in response to the ComReg's first consultation. SIRO, Virgin Media and Vodafone argued that the availability of WN2024-021 would not mitigate the original concerns expressed with regards to WN2024-010.<sup>77</sup>

3.6 There was limited additional evidence that the introduction of WN2024-021 would exacerbate the concerns raised with respect to WN2024-010. However, SPC Network, on behalf of Virgin Media, argued that its concerns with respect to WN2024-010 are made greater by WN2024-021, in particular where the two discounts are cumulatively applied.<sup>78</sup> Specifically, SPC Network argued WN202-021 would increase its concerns with respect to the discounts by: locking in the existing market structure for wholesale and retail FTTH;<sup>79</sup> favouring Eircom's retail arm;<sup>80</sup> and adversely affecting investment by alternative networks.<sup>81</sup>

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<sup>73</sup> ComReg 24/57, para. 5.

<sup>74</sup> ComReg 24/57, para. 8.

<sup>75</sup> ComReg 24/57, para. 6.

<sup>76</sup> ComReg 24/57, para. 7.

<sup>77</sup> SIRO Response to the Further Consultation, para. 5.1; Virgin Media Response for the Further Consultation, para. 1.6; Vodafone Response to the Further Consultation, para. p. 2.

<sup>78</sup> SPC Network Second Report, para. 39.

<sup>79</sup> SPC Network Second Report, para. 40.

<sup>80</sup> SPC Network Second Report, paras 41–43.

<sup>81</sup> SPC Network Second Report, para. 44.

## 3.2 Oxera response

3.7 Overall, we do not consider that the introduction of WN2024-021 substantively affects our assessment of WN2024-010 in relation to the criteria specified in Decision D05/24. In particular, we do not consider that the implementation of WN2024-021 alongside WN2024-010 would, in any way, mitigate the concerns we have set out in relation to WN2024-010 assessed on a standalone basis, nor have we seen robust evidence that these concerns would be exacerbated. Therefore, our conclusions on the impact of WN2024-010 set out in the Oxera Report and above remain unchanged.

3.8 First, we maintain our view that even with WN2024-021 in place in parallel, WN2024-010 would still have the effect of dampening retail competition and, owing to Eircom having the largest copper and FTTC subscriber base, the form of the offer favours Eircom's retail arm. However, it is not clear that these concerns would be exacerbated by WN2024-021, as suggested by SPC Network. This is because, if the two discounts were to be used cumulatively, a retail operator would be facing a choice of upgrading its own customer from legacy services to one based on a FTTH VUA 1Gbps offer (with a €5 discount) or upgrading a legacy customer from another rival to a services based on a FTTH VUA 1Gbps offer (with a €2 discount). In this regard, it would still see €3 cost advantage at the margin in respect of its own customer upgrades to the FTTH VUA 1Gbps service.<sup>82</sup>

3.9 Second, having regard to WN2024-021, we maintain our view that the WN2024-010 could favour Eircom's retail arm in terms of the potential effect. Given the illustrative nature of the analysis we presented, and the fact the WN2024-021 applies to a specific bandwidth and can be used cumulatively only in specific circumstances, we have not sought to update our analysis to reflect this. However, we do not consider that the introduction of WN2024-021 would eliminate this potential effect, given

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<sup>82</sup> Suppose Eircom Retail is supplying a customer with an FTTC service. If it upgrades this customer to an FTTH 1Gbps service, it could obtain a total combined discount of €5 per month. However, a rival retail operator would only be able to obtain a discount of €2 per month if it were able to win this customer from Eircom and in the process upgrade them to an FTTH 1Gbps service. This is because it would not be able to also avail the €3 discount under WN2024-010 (as this would not be considered as an own-customer upgrade). Therefore, each retail would maintain a €3 cost advantage at the margin in respect of its own customers upgrade to an FTTH 1Gbps service.

Eircom's mix of retail subscribers across the different technologies.<sup>83</sup>

- 3.10 Third, we recognise that the additional discount offered under WN2024-021 could make alternative networks' business cases more challenging, as they face even lower wholesale prices in the market. However, as the price of the FTTH VUA 1Gbps service remains above the Price Floor with both discounts cumulatively applied, and that WN2024-021 does not include any volume-related, exclusivity and/or retroactive conditions, our position on whether WN2024-010 adversely affects investment by alternative networks or wholesale competition is not affected by WN2024-021.

### 3.3 Conclusion

- 3.11 Overall, we do not consider that the introduction of WN2024-021 substantively affects our assessment of WN2024-010 in relation to the criteria specified in Decision D05/24. We maintain that WN2024-010 does not satisfy all the required criteria of D05/24, and therefore does not pass the requirements for the offer to be approved.

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<sup>83</sup> As presented in the Oxera Report, Eircom retail supplies: [§< █████ §<] FTTH lines; [§< █████ §<] FTTC lines; [§< █████ §<] CGA lines (Oxera Report, Table 3.1). This suggests that [§< █████ §<] % of Eircom's total retail lines are CGA or FTTC. These figures relate to those stated in ComReg QKDR Q4 2023.



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