Annex 4: Respondents' Submissions to Consultation 24/38 (24/69d)

A 4.1 Eircom (24/69d.1)

A 4.2 SIRO (24/69d.2)

A 4.3 Sky (24/69d.3)

A 4.4 VMI (including SPC Network report) (24/69d.4)

A 4.5 Vodafone (24/69d.5)

Eircom response to 24/38

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

ComReg Document: ComReg 24/38

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DOCUMENT CONTROL

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Accordingly, you are requested to contact a member of eir Group's Regulatory Strategy Team where there is a request by any party to have access to records which may contain any of the information herein and not to furnish any information before the eir Group has had an opportunity to consider the matter.

Response summary

eir welcomes ComReg's view that eir's FTTH Wholesale Discount offer meets the required criteria as set out in ComReg Decision D05/24 and ComReg's proposal to approve the offer.

The objective of eir's wholesale discount offer is to incentivise operators to actively plan and manage the migration of their existing copper based broadband subscribers to FTTH, as one way to increase the uptake of FTTH.

open eir operates in a dynamic market place and we intend to develop and consider future promotions, and discounts to stimulate/encourage retailers to migrate to FTTH in different ways, to encourage overall migration to FTTH in a dynamic wholesale market. In that regard we are pleased that ComReg's preliminary view is to approve this offer and it provides confidence to the business that, subject to the appropriate regulatory requirements, it can utilise the pricing flexibility provided by ComReg D05/24.

This wholesale discount offer was previously notified to ComReg in 2023 and open eir fully took on board comments made by ComReg/Oxera on that wholesale notification – in particular that "*…if ComReg does lift the ban on wholesale discounts and promotions and adopt the framework for review proposed in the WLA/WCA Consultation as part of a new decision, <u>a redesigned Offer 1 with a cap on the discounts for Eircom Retail such that the scheme does not favour it compared to other retail operators would not raise this</u>* <u>[advantage]</u> *<u>concern</u>*" [emphasis added].

In that respect, eir is unclear on the basis of the consultation by ComReg. ComReg D05/24 is clear that a consultation is only necessary where the impact on competition is unclear. Throughout the consultation ComReg has stated its view that the relevant criteria in ComReg D05/24 are met and does not raise any doubts regarding same. eir is disappointed that having undertaken a consultation, both ComReg and Oxera fail to adhere to the requirements of ComReg D05/24 which requires its assessment to be guided by the principles of competition law. This failure results in an over emphasis of the term "advantage" in its broadest sense. This leads to over simplified statements of potential advantage and potential harm without cogent analysis or assessment. Such simple in effect one tailed statements are not grounded by any economic analysis and are in no way guided by the principles of competition law to make appropriate conclusions thereon. This error is further compounded when the marginal benefit of up to 32 cents is not put into context of the retail market in Ireland. When this is done, even at a cursory level, ComReg rightly acknowledges in paragraph 52 of its Consultation that the "advantage" when applied to current retail pricing levels is not material.

eir considers an assessment based on competition law principles would provide further evidence of the immaterial impact of the discount offer on competition, and that it cannot be concluded that the offer provides an "advantage" to eir Retail.

Finally, there are significant legal issues with the current proposal which eir is directed to comply with in paragraph 4 of the Decision instrument. The language used in paragraph 4.2 is ambiguous, unclear and subjective. Paragraph 4.2 also constitutes a further specification of an existing price control obligation pursuant to ComReg D05/24 and therefore requires notification to the European Commission before it can be adopted by ComReg. In this submission, we propose an alternative way forward that does not require notification to the European Commission and is consistent with ComReg's existing statutory obligations.

eir expects that after consultation ComReg will confirm its initial conclusion that eir's FTTH proposal meets the four criteria under D05/24. eir considers this discount offer will be an essential first step in further increasing the take up of FTTH across Ireland, to meet Government and EU level objectives for full FTTH roll out.

eir's response to consultation 24/38

Below eir has provided responses to the four consultation points a) d).

a) The possibility/likelihood that the offer facilitates migration from legacy to modern networks and the reasons and data supporting the views expressed.

1. eir welcomes ComReg's recognition that our FTTH Wholesale Discount offer may incentivise operators to migrate their copper based customers to FTTH, and the offer meets the criteria set out in D05/24. eir considers it is clear that the proposed FTTH discount will encourage migration to modern networks, to meet Government targets as set out in the Digital Connectivity Strategy 2022[1] and the EU Digital Decade target 2030. The objective of the proposed discount is to incentivise operators to actively plan and manage the migration of their existing copper based broadband subscribers to FTTH. This will promote the deployment of high capacity fibre broadband on a national basis and reduce access costs for wholesale customers, whilst ensuring that there is robust and vigorous competition between wholesale network operators.

2. eir's FTTH discount offer will facilitate migration to FTTH as:
    - It will provide eir with the pricing flexibility required to off set uncertainty in demand for VHCNs in Ireland, and increase the viability of eir's commercial investment, as set out in the European Commission Gigabit Recommendation 2024.[2]
    - It will not limit roll out of FTTH on other networks. As the proposed offer is above the specified FTTH price floor specified by ComReg D05/24 it will not disincentivise other operators from rolling out VHCNs or competitively pricing their fibre networks.

[1] The Digital Connectivity Strategy 2022 sets out that all Irish households and businesses will be covered by a Gigabit network no later than 2028, and the EU Digital Decade targets that all European households are covered by a Gigabit network by 2030.

[2] Commission Recommendation of 6.2.2024 on the regulatory promotion of gigabit connectivity https://digital-strategy.ec.europa.eu/en/library/recommendation-regulatory-promotion-gigabit-connectivity

Pricing flexibility to off-set uncertainty in demand

3. The European Commission Gigabit Recommendation 2024 highlights that, "*where there are uncertainties regarding the rate of materialisation of demand for the provision of very high capacity services, it is important, in order to promote connectivity and access to, as well as take-up of VHCNs, to allow those operators investing in VHCNs a certain degree of pricing flexibility where sufficient competition safeguards are present*" (paragraph 26). This is also reflected in Recital 193 of the European Electronics Communication Code, "the Code", which states as a result of the uncertainty regarding the demand for NGA "*it is important in order to promote efficient investment and innovation to allow those operators investing in new or upgraded networks a certain degree of pricing flexibility.*"

4. Although roll out of FTTH in Ireland is increasing steadily, there still remains demand uncertainty for take up of FTTH as recognised by ComReg in its WLA market consultation 23/03.[3] eir notes that ComReg states that eir has provided "*no clear rationale for restricting the discount to own-customer upgrades*". However, eir has provided data to ComReg which clearly demonstrates that the [✂] network upgrade rate for all providers, [redacted], is very low and [redacted]. [redacted][✂]. In addition, take up rates of FTTH in Ireland are lower than in the EU27 and UK area, where the FTTH take up rate reached 52.7% in 2023.[4] Ireland's current FTTH take up rate is almost ten percentage points lower, as 45% of all premises with FTTH broadband available had an active FTTP service at the end of Q1 2024.[5]

[3] ComReg 23/03 January 2023 https://www.comreg.ie/?dlm_download=wla-wca-consultation
[4] EU39 reaches 70% FTTH/B coverage according to the FTTH Council Europe https://digital-strategy.ec.europa.eu/en/news/eu39-reaches-70-ftthb-coverage-according-ftth-council-europe#:~:text=FTTH%2FB%20coverage%20rate%20in,EU39%20region%20reached%20121%20million
[5] ComReg Quarterly Key Data Report Q1 2024 https://www.comreg.ie/publication/quarterly-key-data-report-q1-2024

[✂] Table 1 Migration to FTTH October 2023 April 2024

Migration from FTTC to FTTH Excluding eir Retail	Count	%
[redacted]	[redacted]	
[redacted]	[redacted]	[redacted]%
[redacted]	[redacted]	[redacted]%

Migration from FTTC to FTTH	Count	%
[redacted]	[redacted]	
[redacted]	[redacted]	[redacted]%
[redacted]	[redacted]	[redacted]%

[✂]

5. eir also notes that its FTTH discounts do not have to account for every migration scenario. eir intends to develop and consider future promotions and discounts to stimulate/encourage wholesale customers and retailers in different ways. For example, we may notify a more sophisticated promotion or discount in the future to target FTTH growth by retailers (e.g., “Upgraded from a different operator” per table above). This promotion/discount that has been notified is specifically to encourage operators to upgrade their existing base from copper to fibre. [✂] [redacted] [✂] As set out in eir’s letter on 16 May, and as eir has continued to explain to ComReg, “*it is open eir’s intention to develop future promotions and discounts. ComReg must recognise that during the timeframe of the notified proposal being in the market, open eir could design and notify further promotions that co-exist with the existing notified measure*”. Any additional discount offers will be notified to ComReg in line with the process under D05/24, and eir will continue to meet its pricing floor obligations under D05/24 irrespective of the number of discount offers it implements.

6. The Government's Digital Strategy 2022 recognises the roll out of FTTH will mostly be from commercial investment, and consequently eir's significant commercial investment in the fibre network in Ireland must remain viable. This viability is difficult to maintain when eir is subject to the restrictive price obligations under D05/24.

7. eir considers in this context, the FTTH discount proposal is necessary to offer some degree of pricing flexibility within the pricing regulatory obligations, and encourage take up of the networks we have invested in and ensure the viability of this investment.

8. The proposed FTTH discount is a strategic test of a useful tool for eir to use (the importance of which has been recognised by the European Commission since 2013), within the confines of pricing obligations under D05/24, to incentivise larger migrations to FTTH in the future. This is in line with the Gigabit Recommendation which states that, "*such pricing flexibility is necessary to enable SMP operators to test price points and conduct appropriate penetration pricing*" (paragraph 26). If the discount offer is approved, eir considers this will ultimately support the common goal of eir, ComReg, and the Government to facilitate the migration to modern infrastructure across Ireland.

The discount will not create a disincentive to other providers to roll-out or price FTTH competitively to encourage take up

9. eir's FTTH discount will not create a disincentive for other providers to roll out fibre. eir is proposing the FTTH discount in compliance with its SMP pricing control obligations and access obligations under ComReg D05/24. In addition, the proposed FTTH discount is clear and easy for wholesale customers to understand, and will apply for a maximum period of three years.

10. As recognised by Oxera, the FTTH discount will be €1.38 (7%) above the current €19.12 price floor required under ComReg Decision D05/24, and €0.50 (2.5%) above the recently approved future €20.00 price floor. The FTTH discount is therefore not a disadvantage to other operators as the

pricing floor obligations are respected, and will continue to be respected over the three year discount period. eir notes Oxera's concern that eir can increase the FTTC based VUA price by CPI 0% under D05/24. However, eir would still need to meet its price obligations under D05/24 and respect the price floor.

11. eir's main competitors Siro and Virgin Media have already invested and committed to investing further in FTTH networks. As eir previously outlined in response to consultation 23/03, even if eir was successful in attracting wholesale customers at the expense of rivals due to discounts, SIRO and Virgin Media will have incurred the sunk cost of deploying networks and will have an incentive to fill them at competitive prices irrespective of eir's costs.[6]

12. The pricing flexibility generated from the FTTH discount offer could also promote migration to modern infrastructure through incentives in the retail market like lower prices for customers offered by RSPs. This is reflected in paragraph 26 of the EU Gigabit Recommendation, which outlines that pricing flexibility at the wholesale level will allow *"both the access seeker and the SMP operator's retail business to introduce price differentiation on to the retail broadband market to…improve the penetration of very high-speed broadband services"*. Increased competition in both the retail and wholesale markets will further incentivise customers to migrate to FTTH.

[6] Copenhagen Economics (March 2023) Proposed SMP Regulation of PIA and WLA in Ireland. An Economic Assessment Of ComReg's January 2023 Consultations.

b) ComReg's assessment that the Offer may advantage Eircom Retail but that this advantage would be immaterial

13. Based on the analysis undertaken, its results and applying those results to the characteristics of the market, it cannot be concluded that the FTTH discount would have a negative impact on competition or advantage eir Retail.

14. ComReg concludes in paragraph 54 of the consultation that the second criterion under 14.10 is met, on the basis that the advantage to eir Retail is not material and will not as such impact competition in the market. ComReg agrees with Oxera's findings that the discount offer may give eir Retail a marginal benefit of up to 32 cents per FTTH line in some upgrade scenarios but does not consider this material when compared to the current level of Retail FTTH Prices. ComReg goes further and outlines that *"the competitive advantage that Eircom Retail can actually realise from the Offer may be less than Oxera's analysis suggests,"* based on assumptions that underpin Oxera's analysis.

15. Crucially, having determined that the marginal benefit to eir Retail is just 32 cents (at a maximum)[7], both Oxera and ComReg fail to utilise this number and undertake the legally required assessment as set out in ComReg D05/24. Paragraph 9.566 (b) provides that ComReg must *"conduct its assessment [of the notified wholesale offer] guided by competition law principles"*. As a consequence both Oxera's and ComReg's assessment of whether there is an "advantage" is misguided and incomplete.

16. Oxera's report in particular fails to put the marginal benefit of 32 cent to eir Retail in context of the retail market. There is merely a single sentence that recommends that *"the significance of any such advantage that may be afforded should be considered against the level of current retail prices"*. ComReg rightly acknowledges in paragraph 52 of its Consultation that the "advantage", when applied to such retail pricing levels, is not material.

[7] Paragraph 52 of ComReg Consultation.

17. The marginal benefit of 32 cents is essentially parked from further assessment and instead Oxera posits that the form of wholesale offer itself means that retail competition departs from "*competition on the merits*" (paragraph 3.40) and "*can have the effect of protecting the market position of Eircom's retail arm by muting retail competition across Access Seekers*" (paragraph 3.41). Such grand theories of competition harm do not and cannot hold true when the marginal benefit to eir Retail is immaterial. To depart from competition on the merits with the consequence of protecting eir Retail's market position the "advantage" to eir Retail relative to an equally efficient operator would need to be material and the existing LRIC retail margin (pre discount) of using an equally efficient operator test would need to be negative (see paragraphs 22 and 26).

18. More importantly, had Oxera tested such theories against the characteristics of the retail market as guided by the principles of competition law (pursuant to ComReg D05/24) it would have concluded that its hypotheses are not well grounded.

19. Setting aside the requirement, to justify grounds for concern under competition law, that eir Retail needs to be dominant in the retail broadband market (no such dominance is identified in ComReg D05/24) — the principles of competition law provides a useful framework to assess Oxera's competition theory.

20. First, it is important to note that there are essentially 3 parties in the supply chain. open eir is a broadband wholesaler who makes FTTH available more generally and the notified proposed offer available to retailers. Retailers purchase from open eir (and other FTTH providers) to sell FTTH broadband to end users. End users do not interact with wholesalers and purchase their broadband through a retailer of their choice.

21. In terms of the "Wholesale" level it has been demonstrated and accepted by ComReg and Oxera that eir's proposed wholesale offer does not undermine infrastructure based competition. This means infrastructure based competitors have an incentive to continue to expand and roll out their

network. This is important in the context of competition at the Retail level but also consumer choice at the End user level.

22. At the "Retail" level the following are important market characteristics: a) ComReg D05/24 has established that there are a significant number of retail operators with varying market shares, market offerings and that the market is competitive; b) as ComReg's consultation [24/38] identifies in paragraph 53 *"Access Seekers can opt for an FTTH service provided by a non-Eircom FTTH network"*. There are also various wholesale FTTH agreements in the market including between Virgin Media and Siro (of which Vodafone is a 50% shareholder) and the reciprocal arrangement by Vodafone agreeing to wholesale from Virgin Media. Meaning that retailers, and in particular Vodafone, do not have an overwhelming incentive to promote the wholesale sales of open eir's FTTH service. Similarly, ComReg also notes *"the impact of restricting the Offer to upgrades to FTTH of an Access Seeker's own customers is unclear given the presence of network alternatives in many areas"*; c) Oxera's Part 3 Report as part of ComReg consultation 23/03 Section 5.18 established that eir's Retail margins are *"above the level that would indicate a desire to squeeze margins to the minimum allowed amount."* Consequently, the available retail margin 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 open eir; d) Retailers are unable to disregard the interests of End users. In other words, the making available of a wholesale offer does not mean that Retailers will be able to fully influence the purchasing decisions of End users. This is particularly important in the context of market characteristic a) where there are a large number of retailers with differentiated product offerings. As ComReg similarly identifies *"it is unlikely that an Access Seeker will be able to persuade all of its customers to upgrade from copper to FTTH"*.

23. "End users" have the following characteristics: they have countervailing buyer power and the freedom of switching retail providers based on their own interests and values.

24. Based on the above market characteristics using competition law principles as a framework it cannot be concluded that the offer provides an "advantage" to eir Retail. Oxera's summary position that the offer *"reduces incentives to acquire and upgrade rival customers and thus lock-in existing market shares and thereby protect the market position of Eircom's retail arm"* is not supported. Indeed, Oxera does not expand on these points and provides no analysis or cogent economic reasoning to support such claims using competition law principles.

25. The characteristics of Retailers and End users in the value chain demonstrate that there can be no presumption that the wholesale offer has the power to lock in existing retail market shares based on the form of the wholesale promotion.

26. First, as established, and as evident from the most recent eir Retail quarterly margin report March '24, the available retail margins using an equally efficient operator test are more than sufficient to target new and existing FTTH end users absent open eir's proposed wholesale offer. Therefore, Oxera is incorrect to suggest that the form of the wholesale offer reduces incentives to acquire and upgrade new customers to the extent that it locks in existing market shares. This fact is even starker when the estimated marginal benefit to eir Retail is merely (at a maximum) 32 cents per FTTH line. This represents less than [✂] [redacted]% [✂] of the current portfolio available retail margin using the regulated margin squeeze test and less than [✂] [redacted]% [✂] of the available margin for each of the top five flagship products. In order to dampen the incentive to acquire new customers the available LRIC margin at the retail level pre discount would need to be negative. This is not the case. Therefore, contrary to Oxera's statement, a retailer's strategy to acquire new or upgrade existing customers is not impacted by the proposed wholesale offer.

27. Second, due to the value chain, Retailers cannot disregard the interest of the final consumer (i.e., end user) – who may decide for example that they do not wish to move to FTTH with operator X; or that they do not wish to move to FTTH; or that they wish to move retailers; or that they decide to move to an alternative FTTH infrastructure or cable provider. As such, as established

using competition law principles, the form of the wholesale offer cannot provide "advantage" to eir Retail to the detriment of competition based on the characteristics of the market. In other words, it is not guaranteed that a Retailer including eir Retail will persuade its customers to move and qualify for the discount for each line in their respective base as the End user still has the ultimate choice of retailers and service offering. This means that the possible market share outcomes will be as a result of competition at the retail level and ultimately consumer choice. Indeed, the introduction of the cap by open eir (which only applies to eir Retail) means that eir Retail's full base will never qualify even at the outset. As ComReg notes in paragraph 40 *"there may also be an increase in the incentive for Access Seekers to compete for the significant active FTTC base that is not yet passed by Eircom's FTTH"* – in such a scenario eir's retail broadband market share would in fact decline all other things remaining equal.

28. Finally, competition law would note that the possible effect of the offer is that some end users may receive a better value proposition in the short term and that the contestability of those end users is not foreclosed at the retail level. Thus there are no adverse competition effects (noting too that upgrading FTTH end users can only be subject to a maximum 24 month contract). Therefore, it cannot be concluded, guided by competition law principles, that the open eir wholesale offer either in substance or form could have a material impact on competition – to the advantage of eir Retail and to the detriment of competition (note here that under competition law the purpose is to protect competition and not individual competitors) and End-users.

29. eir notes that ComReg consultation also concludes in paragraph 54 and 61 that neither the substance or the form of the wholesale discount provides an advantage to eir Retail.

c) The operative part of the proposed decision (Section 5 above), including in particular paragraphs 4.1 and 4.2 of the Draft Decision Instrument which ComReg proposes would form part of the approval.

30. eir notes that paragraph 4.1 is already an existing price control obligation under ComReg D05/24 and is therefore superfluous. ComReg D05/24 section 14.10.1 states:

"The proposed price taking account of any Promotion or Discount <u>remains</u> above the Price Floor calculated in accordance with Section 14.6.1" [emphasis added].

31. Accordingly, eir has focused its response on paragraph 4.2.

Significant legal issues with current proposal

32. Unlike paragraph 4.1, paragraph 4.2 is not an existing obligation pursuant to ComReg D05/24. As currently written in substance and form paragraph 4.2 is a further specification of the existing price control obligation. As currently worded paragraph 4.2 broadens the four criteria set out in Section 14.10 and specifically goes further than the obligation in section 14.10.2 of ComReg D05/24. While ComReg seeks to position paragraph 4.2 as merely facilitating the compliance of 14.10.2 this is simply not the case due to the wording of the existing price control obligation. In that regard, it is important to remember that section 14.10.2 is a pre condition to ComReg approving a proposed wholesale discount. As set out in section 14.9 "*<u>prior approval</u> of ComReg which approval ComReg may grant…<u>where the conditions set out in Section 14.10 are met</u>*" [emphasis added]. Importantly, section 14.10.2 is also written in the past tense "*<u>ComReg is satisfied</u> that the Promotion or Discount <u>does not</u>, in form or effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers*" [emphasis added]. This is consistent with section 14.10.3 and section 14.10.4 which are also written in the past tense. This is unlike section 14.10.1 (the same as paragraph 4.1 of Decision Instrument in the consultation paper) which is written in the

conditional tense that the *"Discount <u>remains</u> above the price floor"* [emphasis added].

33. As such, the granting of approval by ComReg requires that section 14.10.2 has been met before launch. In the Consultation, in paragraph 62, ComReg's preliminary view is that section 14.10.2 is met based on inter alia various future FTTH migration scenarios. In other words, ComReg has considered a number of future scenarios and that there is no evidence to suggest that 14.10.2 is not met. However, in paragraph 4.2 ComReg is now seeking a further obligation by imposing an ex post obligation. Therefore, paragraph 4.2 is a different and new obligation to those specified in section 14.10. Consistent with ComReg's statutory and legal obligations ComReg must notify such further obligations to the European Commission pursuant to Regulation 50 of the European Union (Electronic Communications Code) Regulations 2022 ("the Code Regulations").

34. Separately, as currently drafted paragraph 4.2 contains ambiguous and subjective text. eir is entitled to regulatory and legal certainty. As such, substantial tranches of the proposed text needs to be clarified before ComReg can "direct" eir in respect of this obligation. For example, paragraph 4.2 states that *"Eircom is hereby directed to ensure that the average wholesale discount available to Eircom Retail….does not provide a <u>material advantage</u>"* [emphasis added]. No guidance is provided in respect to what "material advantage" means. See also paragraph 42.

35. This terminology becomes even more problematic and unclear when read in conjunction with the phrases *"and is <u>comparable</u> to the average wholesale discount…available to an Access Seeker"* [emphasis added]. The condition of being "available" has already been satisfied (see Oxera Report paragraph 3.11). No further guidance is provided to what the term "comparable" or "available" means. Such terminology is completely subjective as to its meaning and provides no legal comfort.

36. Finally, when read altogether *"Eircom is hereby directed to ensure that… that the average wholesale discount available to Eircom Retail….does not*

provide a material advantage and is comparable to the average wholesale discount…available to an Access Seeker with a smaller copper base than Eircom's". eir notes that as Access Seekers or "Retailers" (as we use in response to Question b)) have different and varying existing copper bases on open eir's network. As identified by ComReg and Oxera, eir Retail has the largest copper base of all the Access Seekers. Therefore, as currently drafted this further specification of an existing obligation on Eircom must be conducted with reference to all eir Retail's competitors. Such a comparator is not consistent with competition law principles or the FTTP MST – which use an equally efficient operator test.

37. In addition, eir notes that no reference is made in paragraph 4.2 to the proposed cap to limit the number of eir Retail's FTTC lines that could qualify for this wholesale promotion.

38. Finally, as set out in paragraph 9.566, ComReg's assessment of the offer must be guided by competition law principles. Accordingly, any ex post review pursuant to Paragraph 6 of the proposed Decision Instrument must accordingly include reference to "competition law principles".

39. For the reasons set out below, eir does not consider that paragraph 4.2 as a further specification of an existing price control obligation is necessary and that eir's alternative proposal provides a better way forward (which would not require notification to the EC). For ease of the reader, the following headings are used for the respective sections:

   a. The retail FTTP MST is not an appropriate benchmark;
   b. The purpose of the obligation is unclear; and
   c. A better approach.

The retail FTTP MST is not an appropriate benchmark

40. For ease of reference, paragraph 4.2 states that "*Eircom is hereby directed to ensure that…the average wholesale discount available to Eircom Retail, calculated by reference to the forecast of average wholesale discount*

across the 42 months of the ACL for Eircom Retail in the FTTP MST…does not provide a material advantage…".

41. The FTTP MST implements a forward looking DCF based on inter alia the wholesale network input cost for each FTTP profile speed. It is likely that either a) the FTTP MST test will be initially based on a likely estimate of the lines that may qualify for the wholesale discount; or b) the FTTP MST test will not initially use an estimate of the likely discount and simply assume there is no discount available. Either way, over time, the updated FTTP MSTs will use a forecast weighted average wholesale network cost less the forecasted wholesale discounts used in the FTTP MST and this will be informed by actual performance run rates in accordance with the "Forecasted Wholesale Network Input (WNI)" definition pursuant to ComReg D05/24. A forecast of the wholesale network input cost (less forecasted wholesale discounts) for Retailers does not form part of the current FTTP MST. eir notes that paragraph 4.2 appears to require some level of forecasting of the "average wholesale discount…available to an Access Seeker…across the same time period". It is not appropriate for eir Retail to forecast what such an average input cost is or what the forecast discount is likely to be for competitors with a "smaller copper base" – noting in particular, that due to the various regulatory governance structures in place, eir Retail does not have access to historical information or otherwise, in order to make such an estimate, as this is confidential regulated information. As noted above, consideration of a "smaller copper base" is not consistent with competition law principles.

42. For reasons, set out in eir's response to Question b, there may be a variety of reasons why Retailers (including eir Retail) may not qualify for the discount for End Users. However, unlike other Retailers, eir Retail is solely reliant on wholesale inputs from open eir in the Commercial Area. Therefore, unlike eir Retail, Retailers like Vodafone may purchase from a range of FTTH infrastructure providers (such as Siro and VM) and accordingly their wholesale input will vary accordingly based on a blended view of input costs from other wholesalers – this may equally result in their open eir average wholesale discount (including discount), all other things remaining equal, staying stable. As ComReg notes in paragraph 60 "*any reduction on retail*

competition on Eircom's network may be compensated for by increased retail competition across all networks. In other words, ComReg would expect that any potential advantage to Eircom Retail from the restriction to own-customer upgrades on the Eircom network will be lessened by the fact that Access Seekers will have, in a significant number of cases, the option to use an FTTH provider other than eircom". As such, while the level of discount may vary for operators this does not mean that eir Retail is favoured by the discount and this cannot be determined merely by comparing average wholesale discounts (which paragraph 4.2 seeks to do). Equally and also likely scenarios that will influence Retailers' average FTTP wholesale input cost from open eir will be the strategic options it seeks to pursue (i.e., making their copper retail propositions more attractive etc.) or migrating their existing copper based customers to FTTH Bitstream – this would also mean that their average wholesale input FTTH VUA cost would remain unchanged – and their discount accordingly would be reflective of same. Note the FTTP MST only takes into account the FTTH VUA discount – consistent with ComReg D05/24. As the FTTH Bitstream market is deregulated pursuant to ComReg D05/24, ComReg can only intervene using its concurrent competition authority powers – as such, the basis of comparing eir Retail's average wholesale discount to Retailers average FTTH VUA discount and FTTH Bitstream discount is inappropriate from an ex ante regulatory perspective but equally it would not provide a full view comparative if FTTH Bitstream discounts were excluded. This mixing of regulated and unregulated products for which Eircom has the onus to interpret and is directed to comply with is therefore extremely problematic.

43. Consequently, to compare eir Retail's average wholesale discount to ensure it is not "a material advantage" and is "comparable" to operators with a "smaller copper base" to ensure compliance with the obligation is far ranging under various scenarios and considerations – none of which ComReg has identified as being determinative of compliance or otherwise when assessing ex post. It would not be clear on the face of it, under any of these illustrative examples set out in paragraph 41, whether eir Retail has "a material advantage" relative to other "smaller copper base" competitors

which would be a cause for concern using competition law principles without undertaking deep analysis and a market assessment.

44. eir submits that ComReg is best placed to monitor the developments in the market and to assess whether it wishes to intervene, using competition law principles.

The purpose of the obligation is unclear

45. ComReg notes in paragraph 52 that "*ComReg agrees with Oxera's findings that the Offer may give Eircom Retail a marginal benefit of up to 32 cents per FTTH line in some upgrade scenarios, we do not consider this to be material*". In addition, ComReg notes in paragraph 52 that "*Oxera's analysis relies on simplified assumptions, such as assuming each Access Seeker can upgrade all of its existing copper base that is passed by Eircom's FTTH network in each scenario*". Therefore, ComReg already has visibility of the maximum benefit that could be derived to eir Retail in various scenario conditions and concluded in paragraph 54 that "*the second criterion is met, on the basis that the advantage to Eircom Retail is not material and will not as such impact competition in the market, and subject to that advantage remaining so for all the time that the Offer is in place*".

46. eir submits that it is therefore unclear what the purpose of the further obligation is in paragraph 4.2. Any resulting fluctuations over time are merely the natural outcomes of competitive dynamics. ComReg has already determined that in the hypothetical counterfactual where all lines are upgraded that the "*advantage to Eircom Retail is not material*". The observed outcomes therefore represent the competitive market outcomes that are possible — including over time. In other words, the test conducted by Oxera using various scenarios contains at its heart the assumption that removes natural market characteristics (e.g., end users interests may diverge from retailers desired outcomes, retailers strategy may be to maintain its copper base, see also eir's response to question b). Based on the outcome of such scenarios, ComReg considers that section 14.10.2 is met. It is important to remember that the conditionality of section 14.10.2 is also written in the

past tense, "*ComReg is satisfied that the Promotion or Discount does not, in form or effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers*" [emphasis added]. Therefore, absent natural market characteristics, ComReg is satisfied that the test is passed. It is correct to remove natural market characteristics in performing such analysis – however, as noted in Question b) it is then necessary as a next step to analyse those outcomes using competition law principles.

47. The observations made in seeking to compare eir Retail's average wholesale discount to those of other operators are the result of a wide ranging set of characteristics and market dynamics for which eir has no control. More importantly, ComReg is seeking, in paragraph 4.2, for Eircom to maintain compliance and to somehow disentangle the various market influences (for which eir has no ability to measure) to ensure that the offer "*does not provide a material advantage*". eir submits that the purpose of the ex post obligation is therefore unclear as there is no basis to determine compliance or otherwise and is therefore more likely to result in potential regulatory intervention and regulatory failure.

A better approach

48. As noted in paragraph 44, ComReg is best placed to monitor developments in the retail market including gathering information using its statutory information powers and interrogate Retailers' strategy and retail propositions to consider, guided by the principles of competition law, whether it needs to intervene – which could include (subject to appropriate consultation etc.) inter alia issuing a direction to open eir to remove the wholesale offer.

49. eir proposes that it provides information to ComReg for the duration of the offer remaining in the market. This information will consider a six month period and detail the numerical total qualifying lines per operator (including eir Retail) that are availing of the promotion for that period. Due to market dynamics the actual uptake of lines that qualify may change over time.

50. This type of monitoring report is consistent with ComReg's existing obligations and is not a further specification of an existing obligation on Eircom, unlike the obligation as proposed by paragraph 4.2. As such, this requirement does not require EC notification.

d) Any other comments in respect of ComReg's assessment and proposed approval.

51. eir has set out below additional comments on the analysis and consultation procedure:

- ComReg's review process is not in line with requirements under D05/24.
- It is not clear why a consultation on eir's FTTH discount was necessary.

ComReg's review process is not in line with requirements under D05/24

52. eir considers that ComReg did not follow the process to review of FTTH discount notifications exactly as set out under ComReg Decision D05/24.

53. First, ComReg did not "*conduct its assessment guided by competition law principles*" as required under paragraph 9.566 of D05/24. eir has outlined in response to Question c) the incompleteness of ComReg's/Oxera's assessment.

54. Second, eir considers that ComReg did not provide adequate notice of intention to consult as required in paragraph 9.566 of D05/24 "*[i]f a proposal requires input to be sought from stakeholders, <u>then Eircom will be informed of such without delay</u>, and ComReg will publish the offer on its website for consultation with stakeholders*" [emphasis added]. ComReg notified eir of its intention to consult eight working days before issuing the consultation, when nearly 3 months had passed since eir's notification to ComReg.

55. Given the importance of the discount notification assessment process in granting eir the required pricing flexibility to encourage take up of FTTH, eir considers ComReg should follow the discount approval procedure as set out in D05/24. ComReg is required to adopt a consistent approach to regulation as a general obligation under Regulation 4(5) of the Code Regulations 2022. This consistent approach with the process under D05/24 will ensure that all stakeholders are clear on the stages of the review process, and eir is clear that its discount will be correctly reviewed based on competition principles.

It is not clear why a consultation on eir's FTTH discount was necessary.

56. Under D05/24 there are three clear outcomes of ComReg's assessment of a FTTH price discount as set out in paragraph 9.566, "*the proposal will be deemed acceptable (i.e. Eircom can launch it); or not acceptable (i.e. Eircom cannot launch it); or the proposal may contain aspects of concern to ComReg <u>where the impact on competition is unclear</u> and may require input to be sought from stakeholders*" [emphasis added]. Throughout the consultation document ComReg has confirmed that eir's proposal meets the four criteria (as required under paragraph 14.10 of D05/24). Therefore, it is unclear why ComReg has issued a consultation as it contradicts the requirements of paragraph 9.566.

57. In paragraph 54 of the Consultation ComReg states "*ComReg proposes accordingly to find that the second criterion is met, on the basis that the advantage to Eircom Retail is not material and will not as such impact competition in the market, and subject to that advantage remaining so for all the time that the Offer is in place*". In paragraph 61 ComReg states "*ComReg does not expect that the 'form' of the Offer will restrict retail competition to an extent that would provide a material benefit that favours Eircom's Retail Arm*". Paragraph 62 re affirms that "*ComReg is satisfied that the second criterion is met.*"

58. Consequently, eir is unclear as to why ComReg has then contradicted itself in paragraph 80 of the Consultation by stating in isolation that, "*ComReg considers further that having regard to the structure and form of the discount, the amount being discounted and the length of the offer, that the Offer could have a <u>significant impact</u> on the market and that it is appropriate to consult on its proposed decision to approve*" [emphasis added]. ComReg earlier in its consultation document confirms throughout that the offer will not have a material impact on competition <u>after</u> assessing all the various inputs including from Oxera. Therefore, the statement of having "significant impact" is unsupported by ComReg's own position and preliminary view throughout the Consultation As such, consistent with

ComReg D05/24, there is no basis for ComReg to have conducted the consultation.

59. In addition, eir considers that ComReg may have unnecessarily prolonged the assessment of its FTTH discount offer by issuing a consultation, as ComReg has stated all four criteria under paragraph 14.10 of D05/24 are met. eir notes that in paragraph 9.565 of its response to consultation 23/03 (on the WLA market review[8]), ComReg acknowledged that it would not be appropriate for it to engage in an "unnecessary process" of consultation and that it would endeavour to undertake its assessment as quickly as practicable.

60. ComReg has already reviewed the discount notification subject to consultation (notification under review Wholesale Notification 2024 010) in a previously submitted notification, which directly mirrors Wholesale Notification 23 020 (previous notification), except for the introduction of a cap and a maximum offer period. These two additions were made based on ComReg/Oxera feedback, which eir took in good faith and made the necessary adjustments. eir highlights the points it made in response to consultation 23/03 on the WLA market review regarding the negative impact on eir's ability to competitively price if its discounts are delayed by an unnecessarily long review period. eir first notified the revised Wholesale Notification 2024 010 in February 2024. The best case scenario now facing eir is that it can issue its discount in October 2024 (depending if ComReg meets its 26 July 2024 deadline to make a final decision), 8 months after notifying the Wholesale notification 2024 010.

61. ComReg's consultation on eir's FTTH discount offer provides eir's infrastructure based competitors with additional notice on top of the standard two month notification period required under D05/24. eir understands the importance of the transparency of discount offers in line with D05/24, however the consultation period, and review period following

[8] ComReg 24/07 Market Reviews Wholesale Local Access (WLA) provided at a fixed location Wholesale Central Access (WCA) provided at a fixed location for mass-market products Non-Confidential Response to Consultation and Final Decision.

consultation, will provide eir's infrastructure based competitors additional time to plan offers to counter and undercut eir's FTTH discount. In the example outlined above, eir's infrastructure based competitors will have had advanced notice of eir's discount for approximately 5 months of the 8 month review period (from late May 2024 to some point in October 2024). ComReg must consider this advantage of additional notice for eir's infrastructure based competitors when deciding whether it is necessary to consult on FTTH discount offers, so as not to unnecessarily disadvantage eir against its infrastructure based competitors by undertaking a consultation without clear evidence of its requirement.

62. Finally, if ComReg consults on future discount offers, when there is a clear need for consultation in line with D05/24, eir considers a one month notice period following a ComReg decision (instead of the two proposed in this consultation) would be sufficient notice to operators of an eir discount offer. This would provide two months' notice for operators at a minimum, in any event, as there would be a one month notice period (assuming ComReg approval) on top of the minimum 30 day consultation period, and in addition, to the time ComReg takes to review the consultation responses and issue a final decision. A positive preliminary view would allow Retailers to prepare any campaigns during the consultation period, and provide a further month to amend/ratify the campaign following any decision from ComReg. Infrastructure based operators would have a minimum of two months advance notice irrespective of consultation period or otherwise.

SIRO response to 24/38

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24th June 2024

BY EMAIL

Response to Consultation on ComReg's Assessment of Eircom's FTTH Wholesale Discount Offer

Dear Sir/Madam,

We at SIRO, an emerging FTTH network operator in Ireland, appreciate the opportunity to provide our response to ComReg's assessment of Eircom's proposed FTTH wholesale discount scheme. We have significant concerns regarding the proposal and its potential impact on competition, investment, and consumer choice. Below, we address the specific matters highlighted in the consultation:

a) Migration from Legacy to Modern Networks

<u>Concerns:</u>

While the proposed discount is purported to facilitate migration from legacy copper networks to FTTH, the approach of using such a scheme and the proposed structure of the discount scheme SIRO believes is flawed.

This proposal needs to be seen in the context of multiple pricing and promotional manoeuvres by Eir targeting emerging competitive infrastructure providers, which together are designed to squeeze out competing investment in the sector.

These attacks include *inter alia* predatory pricing and promotions at a retail level, which due to the vertically integrated nature of Eircom, arguable fall foul of the Margin Squeeze Test obligations of the company; elimination of installation charges after multiple rounds of price reductions; as well as price signalling behaviour with premature announcements of discount scheme proposals.

If the discount is approved in the context of a broader copper switch-off, it should be implemented in a way that does not favour any single operator. Regulatory neutrality is crucial to ensure that the transition from copper to fibre is fair and does not disproportionately benefit Eir due to its incumbency. From a practical perspective, there is a cost to this scheme, and SIRO believes that a discount scheme is not the most effective way to spend that money, to drive migration from legacy to modern networks. There are clearly alternative approaches that would be as or more effective, including:

1. Publication of Copper Phase Out Dates for every home in the State committed to in their roll-out plan
2. Material increases in CGA and FTTC pricing
3. A public awareness scheme on the benefits of FTTH

Moreover, Eir have themselves demonstrated by way of their success in connection rates in their rural 360,000 area, that high fibre take-up rates are achievable even without a discount scheme in place, while restricted by an installation fee.

Furthermore, in light of experience across Europe, there is no demonstrable FTTH take up problem for Eir that is clearly co-related to the lack of a discount scheme. Evidence across Europe shows that take up levels are principally co-related to time since premises passed, and given the relatively recent build of their network, aspiring to higher take up at this stage is arguably not consistent with legitimate expectations. Notwithstanding this, Eir has demonstrated an industry leading connection rate of 35.7% increasing consistently quarter on quarter without the benefit of a discount scheme.

This scheme appears to have been constructed not to drive migrations but rather to shore up the connection rate and market challenges faced by Eir retail.

<u>Supporting Data and Reasoning:</u>

- Competitive Lock-in: The structure of the discount scheme helps Eircom lock in its existing customer base while making it more challenging for competitors to entice customers away from Eircom. This could slow down the overall market transition to FTTH by reducing the competitive pressure on Eircom to accelerate its FTTH rollout.
- Customer Churn and Choice: Customers should have the freedom to choose the best service provider without being penalised by restrictive discount schemes. The proposed discount could reduce the attractiveness of switching providers, thereby limiting consumer choice and freedom of transferability between service providers.

b) ComReg's Assessment of Advantage to Eircom Retail

<u>Concerns:</u>
ComReg's assessment that the advantage to Eircom Retail is immaterial is, in our view, inaccurate and underestimates the potential for competitive harm.

<u>Supporting Data and Reasoning:</u>

- Relative Benefit to Eircom Retail: The proposed cap on Eircom Retail's FTTC lines eligible for the discount does not sufficiently mitigate the advantage it gains due to its large existing copper customer base. Oxera's report indicates that Eircom Retail would still gain a significant cost advantage over rivals, especially given the phased nature of the FTTH rollout.
- Materiality of the Advantage: Even a small cost advantage can have a material impact in a highly competitive market. A €3 monthly discount can translate into a significant competitive edge when aggregated across Eircom's large customer base. This could

lead to a scenario where Eircom can sustain lower retail prices, undermining competitors' ability to compete effectively.

- Price Floor Concerns: There is a risk that future increases in FTTC VUA prices, aligned with CPI adjustments, could bring the discounted FTTH prices below the price floor, leading to potential margin squeeze issues.
- Negligible Impact of the Cap: The cap set by Eircom at 1.32 times the size of the second largest FTTC customer base still allows Eircom Retail to benefit significantly due to its already dominant position in the market. Even with the cap, Eircom Retail can still upgrade a larger number of customers at a discounted rate compared to its competitors, preserving its competitive edge.

    - Disproportionate Impact on Smaller Operators:

        - Smaller operators with fewer existing copper-based customers will find it harder to compete, as they cannot match the scale of discounts Eircom Retail can apply.
        - The cap does not level the playing field but rather perpetuates the existing imbalance, as Eircom Retail's larger base allows it to benefit more from the discounts.

    - Marginal Cost Savings Remain Significant:

        - Oxera's analysis suggests that even with the cap, Eircom Retail could achieve a cost advantage of up to 32 cents per FTTH line in some scenarios.
        - This marginal cost saving can translate into significant competitive advantages in terms of pricing and marketing, impacting rivals' ability to compete effectively.

    - Incomplete Coverage and Customer Base Dynamics:

        - The cap does not account for the fact that not all FTTC lines will be upgraded to FTTH within the timeframe of the offer.
        - Eircom Retail, with its larger FTTC customer base, will still upgrade more lines than its competitors, maintaining a substantial competitive advantage even with the cap in place.

    - Lack of Parity Across All Customer Bases:

        - The cap applies only to FTTC lines and not to CGA lines, allowing Eircom Retail to potentially exploit its large CGA customer base without similar restrictions.
        - This selective application of the cap results in an uneven competitive landscape, favouring Eircom Retail disproportionately.

    - Delayed Impact of FTTH Rollout:

        - Eircom's FTTH rollout will take years to cover all premises currently served by FTTC, meaning that the cap does not fully mitigate Eircom Retail's advantage during the transition period.
        - Competitors with smaller customer bases will face ongoing disadvantages as Eircom continues to upgrade a significant number of its customers under the capped discount scheme.

- Monitoring and Enforcement Challenges:
    - Ensuring compliance with the cap and verifying that Eircom Retail does not exceed its allowed number of discounted upgrades presents significant monitoring and enforcement challenges.
    - Without rigorous oversight, Eircom Retail could still find ways to benefit beyond the intended limitations of the cap.

The proposed cap of 1.32 times the second largest FTTC customer base does not sufficiently mitigate the competitive harm because it fails to address the fundamental imbalance created by Eircom Retail's dominant market position. The cap does not level the playing field but instead allows Eircom to maintain and potentially enhance its competitive advantage, thereby undermining the goals of promoting fair competition and consumer choice in the Irish market.

ComReg should consider implementing a more stringent cap or alternative measures that truly equalise the competitive opportunities for all market players. The 1.32 cap should be in reference to actual take-up of the promotion by Sky/VF; this would eliminate most of the concerns around Eir Retail being favoured. Additionally, the Cap should be across all copper including CGA, not just FTTC

c) Operative Part of the Proposed Decision

<u>Concerns:</u>
Sections 4.1 and 4.2 of the Draft Decision Instrument raise several issues.

<u>Supporting Data and Reasoning:</u>

- Monitoring and Compliance: While ensuring that the discounted price remains above the price floor is necessary, ongoing frequent monitoring will be crucial. Eircom's ability to adjust FTTC VUA prices could create a scenario where the discounted FTTH prices inadvertently fall below the price floor without timely adjustments to the FTTH list price.
- Unclear Provisions: The requirement that the average wholesale discount should not provide a material advantage to Eircom Retail is vague. Clearer guidelines and robust monitoring mechanisms are needed for transparency and to ensure compliance and prevent any unintended competitive distortions.

<u>Recommendations:</u>

Concerns About Ensuring Genuine Migrations:

a) Avoiding False "Ticking of Upgrade Box":

- There is a risk that agents or automated systems could falsely mark an upgrade as completed without an actual migration.
- Measures should be put in place to verify that the migration has genuinely occurred.

b) Acceptable Order Types:

- Define clear and acceptable order types for migration, ensuring that only legitimate upgrades qualify for the discount.

- These order types should include detailed criteria that must be met for an upgrade to be recognised as valid.

c) Verification of Genuine Upgrades:

- Ensure that the upgrade involves the same customer, operator, and physical premises.
- Criteria for verification could include:
    - Same account number and billing details.
    - Same Address ID (ARD).
    - Verification of physical installation at the same premises.

d) Preventing Straw-Man Copper Orders:

- To avoid scenarios where a copper line is briefly activated just to qualify for an upgrade, a minimum service period for copper lines should be enforced.
- Service should be active for at least three months before they are eligible for an upgrade discount.

Difficulty of Monitoring and Complaint Evidence:

a) Hard to Find Evidence:

- It's challenging for third parties to detect and provide evidence of non-genuine migrations.
- This makes it difficult for competitors to lodge complaints and for regulators to verify such complaints ex-post.

b) Need for Active Monitoring by ComReg:

- Instead of relying on ex-post complaints, ComReg should actively monitor the migration process.
- Monitoring could include:
    - Random audits of migrations to ensure compliance.
    - Regular reporting by Eircom on upgrades, including detailed data that can be cross verified.
    - Use of data analytics to detect patterns indicative of non-genuine migrations.

Conclusion and Recommendations:

To ensure a fair competitive environment and genuine migrations from copper to FTTH, we recommend the following:

- Comprehensive Product List: ComReg should provide a detailed list of existing products eligible for the discount to prevent ambiguity and exploitation.
- Verification Measures: Implement stringent verification measures to ensure that migrations are genuine, including verifying the same customer, operator, and premises.
- Minimum Service Period: Enforce a minimum service period of three months for copper lines before they qualify for an upgrade discount to prevent straw-man orders.
- Active Monitoring: ComReg should take an active role in monitoring migrations, conducting random audits, and analysing migration data to prevent and detect fraudulent activities.

By addressing these concerns, we can ensure that the migration process is fair, genuine, and does not confer an undue advantage to Eir Retail, thereby fostering a healthier competitive environment in the telecom market.

d) Other Comments

<u>**ComReg's rejection of the Oxera Findings:**</u>

Despite Oxera's findings suggesting potential competitive concerns, ComReg has rejected these findings without providing robust reasoning. This lack of justification undermines the credibility of the process and the determination approving the discount scheme.

Eir Retail has been the least successful in upgrading their customer lines to FTTH. The timing of this discount scheme appears designed to facilitate them as the least successful operator and providing Eir Retail an undue advantage by incentivising their lagging migration efforts.

Eir Retail competitors have already, on multiple occasion, engaged with their copper base to prompt migration activity, and arguably the benefit of the discount will not be as effective to promote migrations for them, as it will be for Eir Retail who have not 'farmed' their base copper to fibre migration opportunity to the same extent.

In the context of the vertically integrated nature of Eir, at a wholesale level Eir, being an incumbent with more resources, has greater flexibility to absorb revenue losses from such discounts. Rivals like SIRO, which face higher costs of capital, are 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. Competitors with less financial backing face higher costs to mitigate risks, making it harder for them to compete on equal footing with Eir.

Eir has incumbency infrastructure advantages that lower their cost of entry to FTTH. The discount scheme, therefore, could have an exclusionary effect on competitive network investment, as rivals cannot match the leverage Eir can extract due to their entrenched market position and resources.

In summary, the proposed Eir discount scheme presents several significant concerns. It locks in the current market structure, provides disproportionate benefits to Eir due to their large customer base, and leverages their incumbency advantages to create an exclusionary effect on competition.

SIRO believes that ComReg's dismissal of Oxera's findings without substantial reasoning undermines the approval of this scheme and ComReg should reconsult and reject the discount scheme proposal on the basis of the disproportionate benefit to Eir.

<u>**Term of the Discount:**</u>

Concern:

The three-year discount term proposed by Eircom 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. This tight window is crucial for establishing competitive footholds; however, Eircom's discount scheme effectively locks up customers for the entire period, preventing them from switching to alternative providers, hence undermining SIRO's network investment. This not only solidifies Eircom's dominance but also severely squeezes SIRO out of the market by undermining its ability to attract customers during the key phase of its network expansion, thereby stifling competition and innovation in the Irish telecoms sector.

a) Length of the Discount Period:

- The proposed three-year term for the discount is too long and will have loyalty-inducing effects.
- A shorter discount period would mitigate the risk of creating a loyalty effect that dissuades customers from switching to alternative providers.

b) Impact on FTTH-to-FTTH Migrations:

- By 2026, FTTH to FTTH migrations will likely become a significant source of wholesale competition.
- A long-term discount scheme could impede this natural competitive evolution by locking customers into Eircom's network for long periods.
- It is crucial to reduce the term of the discount to prevent long-term loyalty effects that stifle competition in the burgeoning FTTH market.

Recommendations:

- Shorten the discount term to one year or less to avoid creating undue loyalty and allow for a more dynamic competitive landscape.
- Ensure that discounts are structured to encourage genuine migrations without unduly influencing customer retention or acquisition strategies.

<u>Risks to Competitive Network Build, including SIRO's, if ComReg Approves Eircom's Discount Scheme</u>

1. Financial Strain on SIRO's Network Rollout:

a) Increased Competitive Pressure:

- The approval of Eircom's discount scheme would place substantial financial pressure on SIRO to match or exceed the discounted prices offered by Eircom. This necessitates significant countering expenditure on marketing and customer acquisition incentives, diverting funds from network expansion.

b) Resource Allocation:

- Limited financial resources mean SIRO must prioritise its spending. The need to compete with Eircom’s aggressive discounting could force SIRO to reallocate funds from network build-out to promotional activities, slowing down its overall deployment plans. This could lead to fewer homes and businesses being connected to SIRO’s network within the planned timelines and hence undermine competition in the market.

c) Increased Costs of Capital:

- Competitive pressure to reduce prices can lead to lower profit margins, which may affect SIRO’s financial attractiveness to investors. Higher perceived risks could result in increased costs of capital, further limiting SIRO’s ability to invest in network expansion.

[✂ [redacted]

[redacted]

[redacted]

[redacted]

- [redacted]

- [redacted]

- [redacted]

- [redacted]

[redacted]
✂]

2. Impact on Network Coverage and Service Availability:

a) Slower Expansion Rates:

- With constrained financial resources, SIRO's rate of network expansion would likely slow down. The need to offer competitive discounts would reduce the available budget for extending fibre coverage to new areas, particularly rural and underserved regions, which are more expensive to connect.

b) Uneven Coverage:

- SIRO may be forced to prioritise high-density, urban areas where customer acquisition costs are lower, leaving rural and less densely populated areas underserved. This undermines the EU and Government goal of providing widespread high-speed broadband access to urban and regional areas and exacerbates the digital divide.

3. Reduced Incentives for Innovation and Quality Improvement:

a) Short-Term Focus:

- To counteract Eircom’s discount scheme, SIRO might adopt a short-term focus on price competition rather than long-term strategic investments in technology and service quality improvements. This could stifle innovation and reduce the overall quality of broadband services available to consumers.

b) Compromised Service Offerings:

- To maintain competitive pricing, SIRO might have to cut costs in other areas, potentially leading to compromised customer service, reduced investment in advanced network features, and slower technological upgrades. This ultimately harms consumers who benefit from robust competition driving service enhancements.

4. Market Entrenchment of the Incumbent:

a) Strengthening Eircom’s Dominance:

- The discount scheme would enable Eircom to leverage its existing customer base and financial resources to lock in customers, making it difficult for competitors to gain market share. Eircom's ability to offer significant discounts for customer upgrades would cement its market position, deterring new entrants and marginalising smaller competitors.

b) Barriers to Entry and Expansion:

- The anti-competitive nature of the discount scheme creates high barriers to entry and expansion for alternative network providers. New entrants and smaller competitors like SIRO would find it challenging to attract investment and achieve the scale needed to compete effectively against Eircom’s entrenched market presence.

5. Long-Term Competitive Harm:

a) Erosion of Market Diversity:

- The reduction in competitive network build activities leads to decreased market diversity. A market dominated by a single incumbent provider results in fewer choices for consumers, higher prices in the long run, and less motivation for the incumbent to maintain high standards of service quality, as we have seen over the past two decades.

b) Regulatory and Economic Risks:

- A less competitive market poses significant risks to the overall regulatory framework designed to promote fair competition and consumer welfare. It could also have broader economic implications, stifling innovation, reducing investment in telecommunications infrastructure, and hindering economic growth driven by high-speed internet access.

<u>Mechanisms to protect Alternative Network Investment</u>

ComReg should ensure mechanisms with an effect equivalent to prohibiting an Eir discount scheme in areas where an alternative competing network (“altnet”) has already built infrastructure, ComReg can consider several regulatory mechanisms designed to maintain fair competition and prevent anti-competitive behaviour. These mechanisms can ensure that Eircom's discount schemes do not unfairly undermine the investments and competitive opportunities of altnets. For example:

1. Geographic Restriction Mechanism - Exclusion Zones:

- Define and enforce geographic exclusion zones where Eircom is prohibited from offering discount schemes. These zones would be established in areas where altnets like SIRO have built or are actively building infrastructure.

2. Cost-based Pricing discounting:

- Implement cost-based pricing regulations that require discounts to reflect genuine cost savings rather than strategic pricing aimed at undercutting competitors.

3. Market Share Caps:

- Introduce market share caps in specific geographic areas, limiting Eircom's ability to offer discounts if their market share exceeds a certain percentage. This would prevent monopolistic practices in regions where altnets operate. This would be in line with restricting discounting to areas where Eir can demonstrate a continued investment risk.

4. Competitive Safeguards:

- Establish competitive safeguards that trigger restrictions on discount schemes if Eircom's market behaviour threatens to reduce competition significantly.

5. Time-limited Discounts:

- Impose a 12-month sunset clause on any approved discount schemes, requiring annual review and renewal based on market conditions and competitive impact. Discount scheme must fall unless evidence is established that the scheme does not harm altnet viability.

6. Establish Altnet Protection Zones

- Designate specific protection zones around areas with significant altnet investment, where discount schemes by Eircom are either prohibited or heavily restricted to prevent undermining altnet efforts.

7. Investment Recognition:

- Formally recognise areas with substantial altnet investment and grant them protected status, ensuring that regulatory measures prioritise the sustainability of these networks.

8. Consumer Protection Measures - Transparent Communication:

- Require transparent communication to consumers about the availability of alternative providers in their area to prevent misleading offers that could lock customers into Eircom’s network unfairly.

- Require notification to consumers in their monthly bills that their retailer is in receipt of a ComReg sanctioned discount scheme subventing the cost of their connection.

Implementing these mechanisms would help ComReg mitigate the impact of Eircom from deploying anti-competitive discount schemes in areas where altnets have built infrastructure. These measures would protect the investments and competitive viability of altnets, fostering a healthy, competitive market environment that benefits consumers through better service quality, innovation, and fair pricing.

Conclusion

In conclusion, while we support the goal of transitioning to FTTH, the proposed discount scheme in its current form is anti-competitive and favours the incumbent operator, Eircom. Similarly, allowing transfers of customers who switch to FTTH would increase the potential disproportionate benefit to Eir. Given Eir's large existing customer base, they stand to gain even more from such a discount scheme, exacerbating their competitive advantage.

We urge ComReg to reconsider its assessment, taking into account the significant competitive and consumer harms that may arise. A more balanced approach that fosters competition and consumer choice is necessary to ensure the long-term health of the Irish telecoms market.

If ComReg approves Eircom's proposed discount scheme, the risks to competitive network builds such as SIRO's are substantial and multifaceted. SIRO's ability to expand its network will be significantly hampered by the need to divert limited resources to counteract Eircom's predatory pricing strategy. This will slow down the deployment of FTTH infrastructure, especially in black-spot areas, and reduce the overall competitiveness of the market.

The approval of the discount scheme would not only entrench Eircom's dominant position but also diminish incentives for innovation and quality improvements, ultimately harming consumers and the broader telecoms market. Therefore, it is crucial for ComReg to consider these risks and take steps to ensure a fair and competitive environment that encourages investment in new and expanding network infrastructure.

Yours sincerely

No signature as sent by email
[✂ [redacted] ✂]
Regulatory Affairs Manager
For and on behalf of SIRO

Annex 1

[✂ [redacted] ✂]

Sky response to 24/38

Wholesale FTTH discount scheme notified by Eircom

Consultation Response to ComReg Draft Decision D05/24

June 2024

Sky Ireland (hereafter 'Sky') welcomes the opportunity to respond to ComReg's Consultation on Eircom's FTTH wholesale discount offer.

While Sky can see the benefit of a wholesale discount offer in the market, we have serious concerns that any benefits stemming from this offer would potentially fail to outweigh the negative impact for retail competition and switching, if not amended from its current proposed form.

The ability for Eircom to offer wholesale discounts and promotions in the market has the potential to engender greater competition between wholesale operators and, ultimately, better consumer outcomes. However, Eircom's dominant position in the market requires that any offer must have appropriate safeguards in place to protect competition in both the wholesale and retail markets.

On that basis, this offer in its current format represents a direct threat to vigorous retail competition. It has the potential to act as a disincentive for operators to compete for competitors' copper customers – at a time where a key objective of ComReg, as set out in its Strategy Statement 2023 to 2025, is to encourage switching in the market. This negative impact stems from the proposed limitation that Eircom has imposed on the offer that the discount can only be availed of by operators for their own customers, and that it cannot apply in instances where an operator wins a copper customer from another operator and in the process upgrades them to FTTH.

This limitation also goes against the objective of copper switch off (CSO) which is also a key objective in the ComReg Strategy Statement. The industry should be encouraged to upgrade customers from legacy products when they are switching. This limitation will however encourage access seekers to keep customers on legacy products when switching and then at a later stage seek to upgrade them to FTTH. This is both highly inefficient and will inevitably result in a slower CSO process then in the alternative scenario where the offer was not restricted to retail operators existing customers.

As the Oxera report commissioned by ComReg[1] and ComReg itself points out[2] there is no clear pro-competitive rationale provided for this limitation. It can only be assumed therefore that due to Eir Retail's disproportionately large copper base, this limitation exists to suit Eir's overall commercial objectives and **provide them an advantage** relative to their competitors**.** Although ComReg suggests that the impact of this for Eir would be immaterial (and we do not necessarily agree that it's immaterial), the impact for the wider industry must also be taken into consideration. ComReg cannot ignore that this offer in its current format directly conflicts with **ComReg's own objectives to encourage switching and to move customers off legacy products and services as quickly and efficiently as possible.**

Furthermore, the original rationale that Eircom provided for this limitation was based on their incorrect assumption that access seekers were more likely to upgrade customers they 'win' rather than their own customer base. However, as ComReg correctly highlights, this is incorrect and the actual data proves that in fact the opposite is true – that operators are more likely to upgrade their own customers. If Eircom have stipulated a limitation within this wholesale discount offer that has subsequently been proven to not be correct, it is unclear why this limitation is still in place.

[1] Oxera Report, paragraph 1.10.

[2] ComReg 24/38 Consultation and Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg Decision D05/24, paragraph 35

Sky has [✂[redacted] ✂]
Without the ability to avail of this offer for all customers whether current or future, Sky will effectively find itself punished for proactively upgrading our base while operators who have been slower to upgrade their customers to better performing products will be rewarded. We find this both puzzling and concerning, particularly when we consider we were acting in line with both (frequently repeated) Government and Comreg policy by proactively upgrading our customers during this period.

It is also unclear how the limitation on the offer facilitates the migration from legacy to modern networks when **it is clear the incentive that is particularly required is not for access seekers to upgrade their own customers but instead for access seekers to upgrade the customers they win –** however this offer currently disincentivises operators to focus on the latter.

In summary, our key concerns with the Eircom's FTTH proposal are as follows:

1. The Discount can only be availed by Operators for their own customers. We believe there is a risk that Industry will change their business rules and will not upgrade customers to Open Eir FTTH during the switching process.
2. The Discount does not travel with the customer. Operators that upgrade their customers within this promotion gain the discount for 3 years and can use this promotion to fund offers that prevent switching. We believe that the discount should remain with the Eircode for the period of 3 years even if the customer moves provider.
3. The Cap on Eir is not sufficient. The proposed Cap does not take account of the current and likely overlap between copper and Open Eir FTTH. We believe the Cap is further reduced by a factor of the ratio of the overlap of FTTH to Copper to copper on 31st Dec 2023 (the point in time the Cap was calculated).
4. The true cost to Eircom will be limited as most of the upgrades will likely be done by their Retail arm. This effectively means the cost to Eir will be wooden dollars but at the same time it gives them significant Retail pricing power.

In closing, we note that, in accordance with ComReg Decision D05/24, Eircom is not permitted to apply any discounts or promotions in respect of FTTP-based VUA unless approved by ComReg. As part of that approval process, under ComReg's own rules, ComReg must be satisfied that the promotion or discount does not, in form or in effect, favour Eircom's retail arm and that the promotion or discount will not adversely undermine competition. ComReg and Oxera both agree that Eircom's retail arm will be favoured, and Sky agrees with this position. We cannot see any reason for not applying the discount when an access seeker acquires a copper customer from another access seeker and upgrades them to FTTH, other than it commercially benefits Eircom (as stated above). We also believe this will adversely impact competition for the reasons set out above on the impact on switching. We therefore fail to see how this can be approved by ComReg in its present form.

-ENDS-

VMI response to 24/38 (including SPC Network report)

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 24/38)

24 June 2024

Non-Confidential Version

Foreword

This is the Virgin Media Ireland Limited ('Virgin Media') response to ComReg's Consultation on a proposed draft decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg D05/24. (Reference ComReg 24/38)

This response is non-confidential.

1. Virgin Media Response

- Virgin Media welcomes the opportunity to respond to ComReg's Consultation *"Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg D05/24"* (ComReg 24/38).

- This consultation raises serious concerns for Virgin Media given that the proposed discount scheme unfairly benefits Eircom Limited (the SMP operator) over all other operators in the market place. A fact that is recognised by ComReg and ComReg's own consultants Oxera.

- The discount scheme fails ComReg's own test for the approval of Promotions or Discounts as set out in Decision D04/25, as it:

  (i) favours Eircom's retail arm; and
  (ii) *will adversely affect investments by Undertakings or undermine competition*.

  Notwithstanding that this is the case, we are disappointed to see that ComReg proposes to consider the impacts not material in the case of (i) above and concludes in the case of (ii) that there is no negative impact for investments by undertakings. We believe ComReg's conclusions are not correct.

- ComReg should be aware that approval of this scheme could trigger a Liberty Global review of the current investment case for our network FTTH upgrade programme. Negative impacts for investments is therefore very real.

- Virgin Media is surprised and concerned by ComReg's findings that there are no negative impacts for investments from such a scheme, particularly given ComReg's own stated objective of ***encouraging infrastructure based competition***. Approving this discount scheme does not encourage infrastructure based competition.

- Virgin Media very much welcomed ComReg WLA/WCA Decision (ComReg D04/25). This Decision promotes investment and wholesale competition. In the event this discount scheme is approved it will represent a disconnect from ComReg's positioning in D04/25, undermining both investment and wholesale competition.

- This discount scheme is portrayed by Eircom as encouraging copper switch off. This is flawed in our view for a number of reasons (lock in of existing market structure (contrary to competition and the existing legislative framework for migration from legacy infrastructure which does not provide for discounting by the SMP operator to facilitate copper switch off):

- Regulation 63 of the European Union (Electronic Communications Code) Regulations 2022, transposes Article 81 of the European Electronic Communications Code. Regulation 63 provides clear terms for dealing with migrations from legacy infrastructure[1]. These terms do not include discounting by the SMP operator.

- The Gigabyte Recommendation[2] is persuasive here. It makes reference to wholesale pricing envisaging potential for **an increase** in wholesale copper prices to take into account the economic inefficiencies resulting from maintaining two networks in parallel and incentivise end-users and access seekers to migrate to the VHCN before the switch-off of services on the legacy network.

  "*NRAs may do that by allowing the SMP operator to* ***increase*** *the prices of copper wholesale access products in areas where the wholesale and retail customers present on the copper network effectively have the possibility to migrate to a VHCN. That would make it possible to take into account the economic inefficiencies resulting from maintaining two networks in parallel, in order to incentivise the SMP operator of the legacy network to present a decommissioning plan and effectively proceed to decommissioning as soon as possible. By potentially bringing copper prices closer to VHCN prices, that would also incentivise end-users and access seekers to migrate to the VHCN before the switch-off of services on the legacy network.*

  That ***price increase*** *should be a transitory measure, subject to a binding and enforceable commitment from the SMP operator to decommission its copper network, which would apply only in areas where the notice period for the copper switch-off has started.*"

- Virgin Media believes a targeted copper switch off public campaign is needed to ensure consumers are made aware of the implications of a move away from copper. No such information campaign has occurred. This is very surprising as this is not the first time a technology switch off has occurred. Similar communications took place for analogue switch off with all parties impacted working to an end date and communicating with their customers and the public generally about what was happening, what the impact for them was and what they needed to do to make sure there were no negative impacts for them.

[1] Regulation 63 of the European Union (Electronic Communications Code) Regulations 2022 and Article 81 The European Electronic Communications Code EECC Directive (EU) 2018/1972 (the Code)

[2] COMMISSION RECOMMENDATION of 6.2.2024 on the regulatory promotion of gigabit connectivity (paras 74 and 75)

- Copper switch off must be managed in a regulatory neutral way and not in a manner where the SMP operator can offer a discount locking in its own market share with resultant adverse consequences for competition and investment.

- Material progress can be made over the coming years in the development of infrastructure / network-based competition in fixed wholesale markets <u>and</u> in the proliferation of FTTP across the state. If successful, these outcomes will confer benefits to consumers in terms of choice, price, and innovation and to Ireland in terms of competitiveness and productivity. This can only be achieved with a regulatory framework that promotes legal certainty and fair competition. ComReg risks undermining this progress should it approve this discount scheme.

- Virgin Media is playing a very positive role in the development of broadband in Ireland. For this to continue, the regulatory environment needs to be clear and certain. Virgin Media requires a regulatory environment that incentivises investment in VHCNs while ensuring that competition is allowed to develop, for the good of the market.

- Virgin Media is extremely concerned that this discount scheme will harm the evolution of network-based competition and damage nascent competition from wholesale providers such as Virgin Media.

- Given the critical potential impacts for Virgin Media, Virgin Media has commissioned a report by the economic consultants SPC Network. This is an integral part of our response. Virgin Media would therefore urge ComReg to carefully consider all elements of SPC's report which is included in Section 2 below.

- SPC like Oxera find that there is a material benefit to Eircom retail. The scheme will lock in the existing market and if allowed to go ahead in its current guise will have negative consequences for network based competition. SPC believe that ComReg's is incorrect to simply dismiss Oxera's findings as being not material without providing adequate reasoning to support such a claim.

- In the event ComReg are still minded to approve this scheme (notwithstanding Virgin Media and we suspect others in the industry's serious concerns) ComReg should only do so by taking into account the constructive proposals that SPC make on a Cap that offers some protections, helping to minimise negative outcomes.

- Any Decision ComReg makes here must also look at the chilling impacts on the market of discount schemes generally if this scheme is approved (taking account of SPC's comments on the CAP, which as currently proposed does not work). ComReg must look at ring fencing the scheme in terms of active monitoring to ensure compliance and safeguards. This is to avoid constant drip feeding of discount schemes to the market with knock on impacts for other Access Seekers and legal certainty for investors.

- Virgin Media has serious concerns around margin squeeze where the ability to make a rate of return is seriously undermined by this scheme, noting that Eircom Limited is a vertically integrated company who has waived its connection charges and engaged in previous discounting. The Decision takes no account of the adverse financial consequences that a €0 rated connection charge has on a nascent wholesale provider. This must be considered in more depth together with margin squeeze implications.

- For the reasons set out above and which SPC in its report goes into in considerable detail this scheme should not be approved.

- The SPC report is an integral part of Virgin Media's response and we believe it is of the utmost importance that ComReg take account of its findings.

2. SPC Report

The SPC report will be sent as a separate attachment with Virgin Media's response.

Eircom's Wholesale FTTH Discount Scheme

Report for Virgin Media Ireland

June 2024

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About SPC Network

SPC Network was founded in 2003 and has worked for over 50 clients worldwide. We undertake Strategic Policy Development in platform and networked industries, by combining the knowledge of our consultants with specific and valuable skills to ensure rigorous analysis and exceptional advice. Our core consultancy team and network of partners have substantial experience in industry and consulting meaning that we understand the practical issues and challenges facing the market. Through advanced academic training, we have developed the key skills and rigorous approach needed to support our clients in the policy debate.

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1 INTRODUCTION

1. ComReg has launched a consultation on a proposed wholesale price offer by Eircom of a €3.00 discount from the monthly wholesale rental price for FTTH to existing Access Seekers on Eircom's network (primarily Eircom Retail, Sky and Vodafone) for a period of three years. The discount would only be available for lines that are upgraded from copper (Current Generation Access (CGA) and Fibre to the Cabinet (FTTC)) to Fibre to the Home (FTTH) for an existing end user customer of the Access Seeker.
2. ComReg proposes to accept the discount scheme and has asked for comments on its reasoning for so doing by Monday 24th June. Virgin Media Ireland (VMI) has asked SPC Network to provide its comments on the proposed scheme, taking account of ComReg's Strategy Statement[1] and the recent Decision on the Wholesale Local Access (WLA) and Wholesale Central Access (WCA) market review, in which Eircom is found to have Significant Market Power (SMP) in the relevant markets.[2]
3. Having reviewed the ComReg consultation[3] (the Consultation) and the accompanying report by Oxera[4] (the Oxera Report) we have come to the following conclusions about the proposed discount scheme.
    - It risks locking-in the existing market structure for wholesale and retail FTTH.
    - It favours Access Seekers who currently have a smaller proportion of FTTH customers as those operators obtain a greater average discount than others. As Eircom has the smallest proportion of FTTH customers, the proposed scheme discriminates in favour of Eircom.
    - It will adversely affect investments by other undertakings by lowering the value of their networks and placing at risk their ability to earn a return on their efficient investment – which is contrary to both the Strategy Statement and the WLA/WCA

1 ComReg *Electronic Communications Strategy Statement 2021-2023*
2 ComReg Decision D05/24
3 ComReg 24/38 Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg Decision D05/24.
4 Oxera's review of Eircom Wholesale Notification 24-010 FTTH Discount

Decision that promotes market entry at wholesale level and sets a wholesale price floor to prevent from market foreclosure by Eircom.

4. Each of these concerns is discussed in the following sections. We then make a proposal for how the discount scheme could be amended to remove any advantage for Eircom at the retail level, whilst maintaining the incentive for Access Seekers to (including Eircom Retail) to migrate customers from copper to fibre.

2 LOCKING IN THE MARKET STRUCTURE

5. The proposed discount scheme is only available to an Access Seeker when it upgrades an existing CGA or FTTC customer FTTH on the Eircom network. An Access Seeker who wins a customer from another service provider, either using wholesale access from Eircom or another network, does not benefit from the discount.

6. At paragraph 72(b) of the Consultation, Comreg reports that Eircom contends that the wholesale offer "would be expected to only modestly reduce consumer prices". Assuming this is the case, this suggests that Access Seekers would be able to retain much of the discount for themselves and not pass it on to customers. If this is the case, and Access Seekers are able not to pass on the discount to consumers, then this gives them a strong incentive to focus their sales effort on upgrading existing customers rather than competing to win over new customer from other retail providers.

7. Thus, this proposed discount scheme runs the risk of softening competition in the retail market and locking-in the existing market structure in which, of course, Eircom has the largest market share.

8. The Oxera Report suggests the same results. At paragraph 3.41 it states:

   "Therefore, there does not appear to be a clear pro-competitive rationale for the discount to be limited to own-customer upgrades. <u>In fact, this condition can have the effect of protecting the market position of Eircom's retail arm</u> by muting retail competition across Access Seekers by making it more difficult to compete on price for the acquisition and upgrade of legacy customers" (Emphasis added).

9. We do not believe it is the job of a regulator to allow a vertically integrated company that enjoys a position of SMP at the wholesale level to implement a discount that, in the words of

ComReg's own advisors, protects the market position of Eircom's retail arm. Allowing this discount appears contrary to the 2024 ComReg's Decision 05/24 that aims to foster competition and promote consumer welfare. If ComReg is to allow such an outcome it should provide a detailed explanation of its reasons, which it does not do.

3 MATERIAL ADVANTAGE TO EIRCOM RETAIL

10. ComReg has again rejected the advice of Oxera concerning the financial advantage to Eircom of the proposed discount scheme and again does not provide good arguments for so doing.

11. Oxera calculates the benefit of the largest three retailers using the Eircom network: Eircom, Vodafone and Sky and finds that, due to Eircom having a smaller proportion of FTTH customer on its network, it benefits more than its rivals.

12. Oxera's calculations are redacted, however, they state that they have assessed the potential wholesale cost saving per line by assuming that each Access Seeker distributes the value of the cost savings from upgraded lines across their entire FTTH customer base. According to Oxera this scenario is consistent with observed retail pricing strategies.[5]

13. We have undertaken our own calculation of the average discount per line using data from ComReg's quarterly data report at Quarter 1 2024, shown in the table below.[6] We recognise that this calculation is approximate as we do not have access to same confidential information as ComReg. Nevertheless, the findings are instructive.

	Total Broadband Lines	FTTH Lines	FTTH share of total	Average Discount per line	
				100% of lines	69% of lines
Eircom	464,000	140,000	30.2%	€2.09	€ 1.69
Vodafone	329,000	126,000	38.3%	€1.85	€ 1.33
Sky	258,000	102,000	39.5%	€1.81	€ 1.28

14. Table 2 of the ComReg quarterly report shows a total of 1,661,534 fixed broadband lines across all technologies and Figure 3 shows the market share of each operator. From that we calculate the total fixed broadband lines per operator (column 2). Similarly Figure 6 shows

[5] Oxera Report para. 3.21

[6] ComReg (2024) Irish Communications Market: Summary: Quarterly Key Data Report Data as of Q1 2024

the FTTP network roll-out by Eircom and Figure 3 shows the market share on FTTP, which we used to calculate the FTTH lines (column 3). We then use both resulting numbers to calculate share of total lines that are on FTTH for each operator (column 4). It can clearly be seen from this that Eircom Retail has been the least successful at upgrading their customers' lines to FTTH.

15. To calculate the average discount per line (columns 5 & 6), we assume all operators upgrade the number of lines needed to so that each operator has 100% and 69% of their total broadband lines on FTTH. These are the same proportions used by Oxera. The average discount per line is calculated using the following formula for each operator:

$$Average\ discount\ per\ FTTH\ line = \frac{Upgraded\ lines\ x\ €3.00}{Total\ FTTH\ Lines}$$

16. As can be seen in the table, Eircom is the greatest beneficiary receiving an average discount €2.09 and €1.69, which is €0.24 and €0.36 larger than their nearest rival, Vodafone.

17. Eircom has proposed to overcome this advantage by imposing a cap on the number of Eircom FTTC lines that are eligible for the discount set at 1.32 times the size of the second largest FTTC customer within Eircom's wholesale network.[7] Eircom says that this cap will mitigate any undue competitive advantage that Eircom might gain from its large FTTC customer base.[8]

18. Oxera undertakes its own examination of the cap and concludes that the proposed cap may reduce but does not eliminate the potential advantage for Eircom and that because Eircom's target is unlikely to achieve 100% coverage target before 2026 "*Eircom is likely to have an advantage over other retailers for the majority of the period for which the cap is available*" (para 3.35). Oxera explains that "*we observe these outcomes because the proposed cap is determined by a multiplier rule which does not, <u>by design</u>, ensure Eircom's retail arm does not gain an advantage relative to other Access Seekers across different potential scenarios*" (para. 3.36, emphasis added).

[7] Eircom's justification for a multiplier of 1.32 is that it is based on Eircom's retail market share in December 2023 (Consultation para. 44). However, this does not reflect the number reported by ComReg at that time which is 27.8% (Quarterly Key Data Report: Q4 2023).

[8] Consultation: Paras 44 and 45.

19. Eliminating the double negative, Oxera's conclusion is that the proposed multiplier effect has been designed to ensure Eircom does gain a competitive advantage.

20. Oxera says that:

    "… the offer has a high likelihood of favouring Eircom's retail arm, and would therefore be in breach of the second criterion, through the likely 'effect' of the offer." (para. 3.38)

21. Despite this clear finding by Oxera, ComReg still allows the proposal to stand on the subjective assessment that the advantage to Eircom is not material, being just 32 cents per line per month. We accept that ComReg has the right to reject its advisor's advice. However, it is not consistent with good regulatory practice for ComReg to reject such a strong finding without providing robust reasoning, which it does not.

22. As shown in the table above, we have undertaken our own analysis of the benefit to Eircom relative to Vodafone and Sky based on subscriber data shown in ComReg's quarterly key data report and agree with Oxera that the benefit to Eircom is larger than to either Vodafone or Sky when the discount is averaged across all upgraded lines. Our analysis shows Eircom has a 36 cent advantage over Vodafone and a 41 cent advantage over Sky.

23. This phenomenon occurs because Eircom has been the least successful of the three operators at getting customers onto FTTH. Thus, it appears that the discount scheme has been designed to discriminate in favour of the least successful operator in attracting FTTH customers and that operator is Eircom itself.

24. Whilst the discount scheme may help move broadband users from CGA and FTTC to FTTP, we do not think that the scheme should do so in a manner that discriminates in favour of Eircom itself, which this scheme appears to do.

4 EFFECT ON INVESTMENT BY OTHER OPERATORS

25. ComReg's Strategy Statement states that its mission is to:

"…facilitate the development of a competitive communications sector in Ireland that attracts investment, encourages innovation, and empowers consumers to choose and use communications services with confidence".[9]

26. Both Oxera and ComReg claim that the proposed FTTH discount would not affect other operators. This is based on the discounted price being above the price floor and the price floor allowing for the recovering of connection costs (which Eircom waives) and so an appropriate benchmark. We disagree and argue that the discounted price should not be assumed to be non-exclusionary just because it is above Eircom's modelled costs. The exclusionary effects of the discount scheme run counter to the Strategy Statement

27. In assuming that a price above the price floor, which we assume is accurately set at Eircom's costs, ComReg is equating a price above the SMP operator's cost with one that cannot be exclusionary. However, we argue that this is too simplistic and that even a price above cost can be exclusionary and should not be considered a safe harbour.[10]

28. This is illustrated in the deep pockets theory of predation.[11] In this theory, there are two competing firms: an incumbent which has access to abundant internal capital and a rival that requires external funding. The incumbent firm seeks to limit the profits the rival can earn to a level below that which its investors require to make capital available to continue operations. The rival is expected to face a higher cost of capital than the incumbent and so needs to earn a higher return on capital employed and if it is not able to earn this return then its external funders will not make capital available for entry or expansion.

29. The fact that the entrant needs funding from external sources is important in the deep-pockets theory because there is an agency relationship between the firm and the investor which is not considered in most models of predation which only consider the firms' stock of capital and not the source.

30. Thus, the dominant firm can set a price that sacrifices profits in the short-run but are not below its costs. These prices would "pass" a traditional price-cost test but would still be

[9] ComReg op. cit. footnote 1 Para. 2.13

[10] Fumagalli, C., & Motta, M. (2024). Economic principles for the enforcement of abuse of dominance provisions. *Journal of Competition Law & Economics*, nhae003.

[11] See Bolton, Patrick, and David S. Scharfstein. "A theory of predation based on agency problems in financial contracting." *The American economic review* (1990): 93-106.

exclusionary. Eircom's FTTH discount scheme may have this effect and ComReg should undertake the relative analysis to determine whether it does so.

5 COULD THE DISCOUNT SCHEME'S HARM BE REDUCED?

31. We have been asked to consider whether the problems with the discount scheme we have highlighted above could be corrected.

32. We suggest that the problem of the discount favouring Eircom could be corrected by adjusting the level of the cap. To ensure that Eircom receives no greater benefit than either Sky or Vodafone at a 69% upgradeable base, this would need a substantial cut in the cap to a multiplier of 0.55 times the second largest operator (Vodafone). On this basis, we calculate that both Eircom and Vodafone would have an average discount of €1.33 per line and Sky would have an average discount of €1.28 per line, assuming a 69% upgradeable base.

33. To arrive at a cap of 0.55 we have calculated Eircom's average discount allowing Eircom's FTTH lines to increase by the lower of either its current number of all broadband lines multiplied by the upgrade coverage percentage of 69% less its current number of FTTH lines or the total of Vodafone's FTTC lines multiplied by the cap. We have assumed that all Vodafone broadband lines other than FTTH are FTTC. We have calculated Vodafone's average discount per line as its current number of all broadband lines multiplied by the upgrade coverage percentage of 69% less its current number of FTTH lines. We have then subtracted Vodafone's average discount from Eircom's average discount to arrive at the minimum difference between the two.

6 CONCLUSION

34. Based on the above, it is our view that ComReg has been overly optimistic about the proposed discount's effects on the market. We believe, as it appears Oxera does, that the discount will have a negative effect on competition. We go further than Oxera, as in our view the discounted prices will have an exclusionary effect on other network builders, such as VMI by making it harder for them to justify further investments.

35. We prepared a paper for VMI before the Wholesale Local and Wholesale Central Market Review on the state of the market in Ireland in which we argued that maintaining regulation would be the best approach to support investment in FTTH by all companies. We were

pleased to see that ComReg largely took such an approach in its market review proposals and Decision.

36. In that vein we do not understand why ComReg proposes to accept Eircom's discount scheme as we think this risks partially undoing the good work it did in the market review. At this stage in the development of the market, it would be better for competition and consumers to disallow the discount and keep the wholesale FTTH price at the current level. Failing that, the scheme can be improved by placing a cap on the number of lines Eircom can upgrade to a proportion where it gains no competitive advantage over its rivals.

Vodafone response to 24/38

Vodafone Response to Consultation

Draft Decision on Assessment of a wholesale
FTTH discount scheme notified by Eircom
Limited under ComReg Decision D05/24

Public Consultation

Reference: ComReg Doc 24/38

Version: Non-Confidential

Date: 24/06/24

Introduction

Vodafone welcomes the opportunity to respond to the Commission for Communications Regulation (ComReg)'s consultation on its assessment of the wholesale discount scheme notified by Eircom Limited (hereafter Eircom).

The Eircom Proposal: Eircom is proposing a €3 discount on the standard monthly rental charge for its FTTH VUA and Bitstream products, when an Access Seeker upgrades a customer from copper-based technologies (either FTTC or CGA). Eircom states that there are no volume requirements to obtain the discounts, that they will be available across Eircom's entire FTTH network footprint, and available to all Access Seekers on a non-discriminatory basis. The discounts would however be limited to upgrades of an Access Seeker's own customers from a copper-based to FTTH-based product on the Eircom network – this means they do not apply where an Access Seeker acquires an existing copper-based customer from another retailer and upgrades them to FTTH, nor when an Access Seeker acquires an existing FTTH customer. The proposed scheme would commence on 1 August 2024, and run for a maximum of three years.

ComReg preliminary assessment: ComReg has assessed the proposal based on considering the 4 criteria for approving Eircom discounts set out in ComReg Decision D05/24. These include a requirement for the discounts not to favour Eircom's retail arm, and not undermine competition. ComReg proposes to approve the proposal based on its view that it meets its 4 criteria. It recognises that the proposal to limit discounts to Access Seekers own customers may dampen retail competition and favour Eircom's retail downstream arm, but considers these impacts are likely to be immaterial[1], and that the scheme will benefit the market by incentivising operators to migrate their copper-based customers more quickly to FTTH.[2] It therefore concludes on balance that the benefits of the proposal outweigh the risks.[3]

Summary of Vodafone view:

- Vodafone note that **discount schemes can in principle provide benefits** to the market and end-users through enabling lower retail prices or higher quality retail services and incentivising faster migration of customers from copper to FTTH networks compared to the status quo. **The discount scheme as proposed however is not appropriate**. This document sets out our points for consideration.
- We our not clear why a wholesale provider, who is seeking to incentivise customers to switch from legacy to fibre networks, **would propose to constrain the offer by limiting it with an own customer only restriction**. This restriction is not consistent with the objective.
- The proposal to limit discounts to Access Seeker's own customers **will dampen retail competition and favour Eircom in the retail market,** and unlike ComReg, we consider **these competition impacts are likely to be material**. The proposal therefore **does not meet two of ComReg's key criteria for approving discounts.**
- ComReg's assessment is also flawed, as a result of comparing the potential benefits and risks of the scheme **to the status quo without discounts, rather than against potential alternatives.** Eircom has market power, as recognised by the SMP designation in D05/24, and given the associated remedies,

1 ComReg Doc 24/38 paragraph 36.

2 It states that the latter is consistent with ComReg's goal of promoting the take up of Very High-Capacity Networks and has the potential to lead to lower prices for consumers – See ComReg Doc 24/38 paragraph 4.

3 ComReg Doc 24/38 paragraph 7.

openeir can set wholesale FTTH prices above a competitive level in the status quo. The benchmark against which ComReg should assesses Eircom's proposals should not be whether prices are lower than in the status quo but whether Eircom's proposals are a proxy for prices that openeir would set if the market was effectively competitive. In a competitive market there could be alternative pricing schemes that would provide similar or greater benefits to openeir, the market and end users but which would not distort competition.

ComReg should consider potential alternatives, and the benefits and risks of these versus Eircom's proposal, before approving the scheme, taking into account the points raised below.

The discount scheme could in principle provide benefits to the market and end-users and meets some (but not all) of ComReg's criteria for approval.

We agree with ComReg's assessment that Eircom's discount scheme is likely to meet its approval criteria regarding the Price Floor, and the requirement that discounts are not geographically targeted.[1]

Vodafone also agrees that in principle, a discount scheme could provide benefits to the market and end users compared to the status quo:

- The provision of wholesale price discounts result in wholesale cost savings for Access Seekers, which could be passed on to end-users in the form of lower retail prices or be used to make non-price improvements to services (thus increasing the quality of retail services).

- By targeting discounts at customers that are migrated from copper-based to FTTH-based networks, the scheme could also provide greater incentives for Access Seekers to migrate customers to FTTH, and in turn increase the speed of copper-to-FTTH migration. As ComReg states, this could result in network cost savings for openeir, which could then be passed on in the form of lower wholesale prices, and in turn passed on by Access Seekers in the form of lower retail prices and/or higher quality services.[2]

However, as acknowledged by Eircom in its proposal, the benefits to end users are contingent on competition in the retail fixed broadband market working effectively: if not, Access Seekers may not pass on lower wholesale prices in the form of lower-priced or higher quality services.[3]

And as we explain below, Eircom's proposal to limit its discounts to Access Seekers own customers is likely to materially dampen competition in the retail broadband market and favour Eircom's retail arm, which would offset the benefits from lower prices at a wholesale level. Alternative approaches which offer the same level of cost savings at a wholesale level but did not distort retail competition would result in more of the benefits of reductions in prices at a wholesale level being passed through to end users.

Limiting the discounts to Access Seeker's own customers dampens competition in the retail broadband market and favours Eircom retail.

Eircom's proposal means that a retailer can avail of the €3 discount only for its own CGA/FTTC customers that it upgrades to FTTH on Eircom's network, but not for CGA/FTTC customers that it attracts from other retailers with FTTH offers (so called "win and upgrade" customers), nor existing FTTH customers acquired from other providers.

This limitation **dampens competition for current retail copper-based customers, by reducing the competitive intensity for these customers**:

[1] Vodafone agrees with ComReg that the current FTTH VUA price with the proposed discount would be above the Price Floor based on current FTTC VUA prices. We would highlight that Eircom have a challenge ongoing in relation to the FTTC prices which Eircom now consider as the Price Floor for their proposed scheme assessment.

[2] ComReg Doc 24/38 paragraph 72.

[3] Eircom CRD 994, p.7 – Eircom acknowledges that it is competition in the retail market which would mean reductions in wholesale prices from the scheme would be expected to reduce end customer prices.

- The proposal effectively results a retailer having a €3 cost advantage over other retailers in relation to its own copper customers when upgrading these to FTTH, and during the period that these FTTH customers attract the discount.
- This reduces the ability of operators to compete for other retailers' copper customers when and after these upgrade to FTTH, and in turn incentivises them not to compete for those customers. In other words, retailers will have an incentive to upgrade their own copper-based customers but will not be effectively able to 'win and upgrade' a rival's customers, given they will get a discount on the wholesale FTTH product for the former, but not the latter.
- This impact is likely to be significant: the €3 advantage represents approximately over 10% of the many of the current inc VAT retail prices in the market for 500Mbps FTTH products.

The **proposal rewards those operators who have been less efficient** in migration of customers from legacy copper to fibre and in effect penalises operators who have focused on upgrading copper to fibre customers who will remain subject to higher wholesale costs.

It also further distorts competition by providing greater benefits to operators that have a larger retail copper customer base:

- The own-customer upgrade restriction has the impact of "**locking" in copper customers to their existing retailer during and after the FTTH upgrade,** which benefits operators with a larger existing copper base, in effect protecting their current market position on copper customers.
- Retailers with a larger copper base can also obtain a larger total wholesale cost saving from the discounts, meaning they are able to gain greater absolute profits if they do not pass on some or all those savings to end-users.

This therefore has the effect of favouring Eircom's retail arm, given data shows that they have by far the largest copper base within Eircom's expected FTTH network footprint. In particular, Q1 2024 data in ComReg's Quarterly Key Data Report indicates that Eircom Retail has close to twice the number of copper customers across Ireland than its next biggest competitor: using operator's share of fixed broadband customers excluding FTTP and Cable as a proxy[1], Eircom's share of retail copper subscribers across Ireland is 38%, compared to 20% for the next biggest operator (see table below) - there is no clear reason to believe that these shares would differ materially when looking at the areas that will be covered by Eircom's FTTH network.

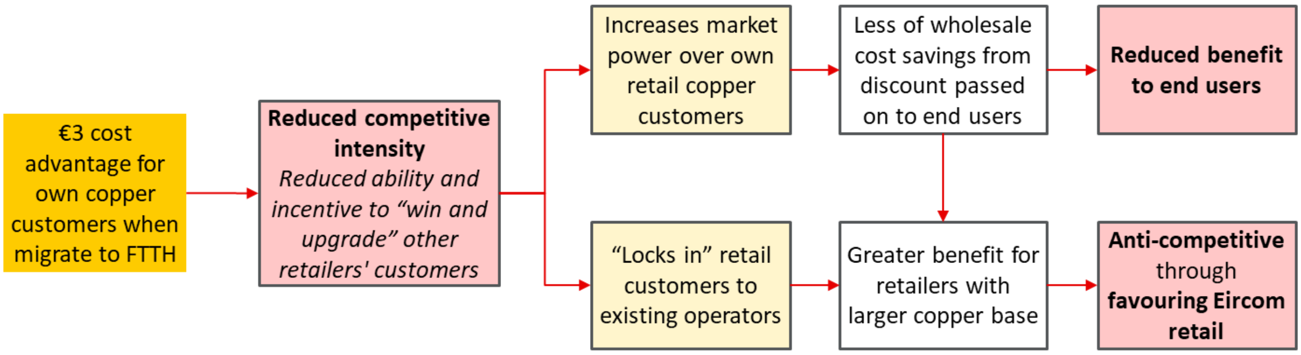
Subscriber share of three biggest retail operators – Fixed broadband excl. FTTP and Cable – Q1 2024

Retail operator	Share of fixed broadband subscribers, excl. FTTH and Cable
Eir	38%
Vodafone	20%
Sky	14%

Source: Vodafone based on ComReg Q1 2024 QKDR data: https://www.comreg.ie/industry/electronic-communications/data-portal/tabular-information/

[1] The subscriber shares or number of subscribers by operator for CGA and FTTC technologies is not directly available in ComReg's QKDR data, but the number of non-FTTH subscribers can be backed out from the available data. Cable subscribers are excluded by excluding Virgin Media when calculating the shares.

The diagram below illustrates the negative impact of the own-customer upgrade restriction within in the proposed scheme.



The impacts are likely to be material.

ComReg accepts that the proposal to limit discounts to Access Seeker's own customers could dampen retail competition and favour Eircom's retail arm, but sets out several reason why it considers these impacts will not be material:

- Eircom has proposed to cap the number of Eircom Retail FTTC customers that are eligible for the discount at 1.32 times the FTTC base of the second-largest retailer, which ComReg considers will limit the advantage to Eircom Retail to an immaterial level.[1]
- Any potential advantage to Eircom Retail will be lessened in parts of Eircom's FTTH footprint which are also covered by the SIRO and VMI FTTH networks, as *"Access Seekers will have, in a significant number of cases, the option to use an FTTH provider other than Eircom"*.[2]
- The own-customer upgrade restriction will only have the effect of dampening retail competition once a copper customer is passed by Eircom's FTTH network, and in the meantime, the restriction may actually increase Access Seekers' incentives to compete for these customers – this is because winning customers before they are passed by Eircom's FTTH network will increase their copper base, meaning they can then avail of the discount for more copper customers once they are passed and can be upgraded to FTTH.[3]

However as explained below, we consider this argumentation is not economically sound, and that in practice, the negative impacts outlined above will be material.

Eircom's proposed cap will not materially limit the negative impacts.

First, the cap will have no impact on the incentives of Eircom Retail or other retailers to retain the wholesale cost savings provided by the discount: even with the cap, the own-customer upgrade restriction will still increase the market power of operators over their own copper customer base, and therefore make it less likely that they will pass on the €3 discount to end-users when and after they upgrade.

[1] ComReg Doc 24/38 Paragraph 41-52.
[2] ComReg Doc 24/38 Paragraph 60.
[3] ComReg Doc 24/38 Paragraph 37-40

Second, the specific design of the cap means that the own-customer upgrade restriction will still favour Eircom Retail:

- The cap is set at a multiple of the base of the second-largest copper customer retailer, meaning, Eircom Retail will still be able to avail of the discount for a larger number of subscribers than any other retailer.
- The cap does not apply to CGA customers, so does not directly impose any limit on the number of Eircom Retail CGA customers that can avail of the discount when they are upgraded.
- It is not clear if the cap is a binding constraint, as it would only be a constraint if Eircom Retail is able to migrate the vast majority of its existing copper customers to FTTH retail offers, i.e. if the pricing structure has been extremely effective in 'locking in' retail customers.

The own-customer upgrade restriction will have a significant impact in areas where Eircom face no FTTH network competition.

The impact on retail competition impact will be magnified in areas where Eircom is the only FTTH network provider, which is likely to remain a sizeable area. For example, it is reasonable to consider that a large proportion of premises covered by Eircom's "Rural FTTH" network, which extends to approximately 340,000 premises, will not be covered by other FTTH networks – this represents approximately 15% of the c2.3m premises in Ireland, or 18% of the c1.9m premises that Eircom has stated it plans to cover with FTTH.

Copper customers currently not passed by Eircom's FTTH network will be impacted during the lifetime of Eircom's discount scheme.

We accept that the own-customer upgrade restriction will only have the effect of dampening retail competition once a copper customer is passed by Eircom's FTTH network. We also note that, based on ComReg's own analysis, a very large share of copper customers are already passed by the network (e.g. 40% of FTTC lines as of end Q4-2023[1]), including all CGA and FTTC customers in Eircom's Rural FTTH network coverage area.

Most of the remaining copper customers in Eircom's planned FTTH footprint are also likely to be passed during the duration of the discount scheme and will therefore be impacted – Eircom plans to pass 1.9m premises with FTTH by the end of 2026[2], while the proposed scheme could run to August 2027, given the proposed August 2024 commencement date and 3-year maximum scheme duration.

This delivers a greater discount opportunity over and lead resource over that longer period for the retailer with most eligible customers in these areas.

The own-customer upgrade restriction is unlikely to increase the competitive intensity for copper customers before they are passed by Eircom's FTTH network.

We agree with ComReg that due to the own-customer upgrade restriction, an Access Seeker can increase future FTTH wholesale cost savings by winning more copper customers before they are passed by Eircom's FTTH network, and that this could in principle incentivise them to compete more strongly for these customers in the short run.

[1] ComReg Doc 24/38 paragraph 39.
[2] See https://www.eir.ie/opencms/export/sites/default/.content/pdf/IR/news/eir-Q4-23-PRESS-RELEASE-VF.pdf

However this is unlikely to be the case in practice, given the expected short timeframe until FTTH services would be available to these customers. This is because a retailer will incur significant upfront costs in relation to winning a new retail copper customer[1], which it would then aim to recover over the lifetime of the customer.

However given the customers will be passed with FTTH within a short period and may then wish to then upgrade, it is likely that a significant share of this cost would not be recovered. For example, ComReg estimates that the average customer lifetime is 42 months or 3.5 years (ComReg's FTTH VUA MST assumes that Eircom retail would recover FTTC upfront costs over a 42-month period), yet most of the remaining copper customers will be passed by Eircom's FTTH network in a much shorter period than that.

Taking all the above together, we consider that given the own-customer upgrade restriction in Eircom's proposed scheme, **this will materially dampen competition and significantly favour Eircom's downstream retail arm, even with the proposed cap**. The scheme therefore **does not meet two of ComReg's key criteria for approving Eircom discounts i.e. for these not to favour Eircom, and not undermine competition**.

ComReg has not considered the scheme against potential alternatives.

ComReg's assessment is based on comparing the benefits and risks of the proposed scheme against the "status quo" where Eircom does not offer discounts.

We however consider the **status quo is not the correct "counterfactual" to compare the scheme against.** Eircom has market power in the Commercial NG WLA market, as recognised by the SMP designation in D05/24 and given "pricing flexibility" remedy within that Decision, openeir can set wholesale FTTH prices above a competitive level in the status quo. The benchmark against which ComReg should assesses Eircom's proposals should therefore not be whether prices are lower than in the status quo, but whether Eircom's proposals proxy prices that openeir would set if the market was effectively competitive. In a competitive market there could be alternative pricing schemes that would provide similar or greater benefits to openeir, the market and end users but which would not distort competition.
Given this, ComReg should instead **consider these potential alternatives, and compare the benefits and risks of Eircom's proposal against these.**

For example, ComReg and Oxera highlight that a scheme in which discounts are not limited to Access Seeker's own customer upgrades "would eliminate any risk of a dampening effect on retail competition", and state that there is no evidence that such a scheme would disincentivise copper to FTTH migration versus the currently proposed scheme.[2] Such a scheme is likely to be closer to the pricing structure that would prevail in a competitive market if Eircom did not have market power.

We ask that ComReg reconsiders its assessment of Eircom's proposal in the light of the above.

<u>ENDS</u>

[1] This would include marketing and commissioning costs, wholesale migration charges, and retail installation costs such as the cost of the retail router, which would be significant.
[2] ComReg Doc 24/38 paragraph 73.