Annex 5: Respondents' Submissions to Consultation 24/57 (24/69e)

A 5.1 Eircom (24/69e.1)

A 5.2 SIRO (24/69e.2)

A 5.3 VMI (including SPC Network report) (24/69e.3)

A 5.4 Vodafone (24/69e.4)

Eircom response to 24/57

eir's Response to ComReg Consultation: Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg Decision D05/24 (WN2024-010)

Further Consultation following notification of a wholesale FTTH promotion (WN2024-021)

ComReg Document: ComReg 24/57

19 July 2024

DOCUMENT CONTROL

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The comments submitted in response to this consultation document are those of Eircom Limited (trading as 'eir' and 'open eir'), collectively referred to as 'eir Group' or 'eir'.

Response to consultation

1. eir is surprised and disappointed to note ComReg's consultation, ComReg 24/57, reopening consultation ComReg 24/38. The circumstances that ComReg set out in ComReg 24/07 for when a consultation would be appropriate are not met in the current situation. It is ComReg's stated position that a consultation is only necessary where the impact on competition is unclear.

2. ComReg states at paragraph 5 of ComReg 24/57 that "*ComReg at this stage of its review of WN2024-021 has not identified any serious concerns with the promotion on a standalone basis*". This does not provide a basis for a consultation to be undertaken pursuant to ComReg D05/24.

3. ComReg notes that the promotion may be cumulated with WN2024-010 and states that this plus the timing of the WN2024-021 merit a consultation '*in the interest of transparency*'. Nowhere in ComReg 24/57 does ComReg offer a view on whether it has any concerns regarding the cumulative impact of WN2024-021. Indeed, as ComReg states it does not intend to conduct a separate consultation on WN2024-021, it would seem that ComReg does not have any material concern with WN2024-021.

4. Irrespective of one's view on cumulative impact, ComReg's approach to this consultation and the assessment of WN2024-010 is not rational and is flawed. ComReg should reach a conclusion on WN2024-010 on its merits guided by the principles of competition law as set out in ComReg D05/24. ComReg should communicate its conclusion in respect of WN2024-010 on or before 26 July 2024 as previously committed to in ComReg 24/38. Instead ComReg is seeking to further delay reaching a conclusion on WN2024-010 by yet another month. WN2024-010 was notified in February.

5. It is clear that the entire process followed by ComReg to date has been incorrect and fails to adhere to the requirements of ComReg D05/24, as set out in our response to ComReg consultation 24/38. The conditions under which a consultation may be justified are not met. Rather, ComReg states the rationale for the consultation is '*in the interest of transparency*'. However

D05/24 clearly establishes a regime for wholesale promotions which includes transparency mechanisms. i.e. Access Seekers are to be provided with 2 months advance notice of a promotion. "*Where approval is granted following ComReg's assessment, this is to be followed by a two month advance publication period to industry. This should* ***give industry sufficient time to prepare*** *for the wholesale promotion or discount, for example by altering their retail offers / advertising.*"[1] [emphasis added] Additionally, ComReg D05/25 paragraph 9.562 and 9.565 clearly states that "*ComReg does recognise* ***that not all proposed offers from Eircom may require the full three months assessment,*** *and in such instances will endeavour to undertake its assessment as quickly as is practicable*" and "*ComReg will not consult on offers that either obviously fail or pass the assessment as this is not required and would create an unnecessary process*". This is important in the context of ComReg consultation 24/38 where ComReg concludes that the relevant criterion in D05/24 are met and does not raise any doubts regarding same – and therefore incorrectly in the first instance issue a consultation process and in the second instance re-opening that consultation to allow for additional comments despite there being no basis to do so under ComReg D05/24 in either instance.

6. In the absence of offering any view on the cumulative effect, ComReg has failed to demonstrate any meaningful concern that would justify the reopening of consultation 24/38 or to consult on 2024-021. Indeed as already noted, whether the cumulative effect of 2024-021 is compliant with D05/24, based on an assessment of economic principles, is irrelevant to a decision as to whether 2024-010 may proceed. ComReg has failed to provide any evidence of concern grounded by any economic analysis and is in no way guided by the principles of competition law to make appropriate conclusions thereon.

7. There is no objective reason to further delay a decision on WN2024-010 beyond 26 July 2024.

[1] Para. 9.569, ComReg 24/07

SIRO response to 24/57

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18th July 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:

1. Migration from Legacy to Modern Networks

Concerns:

1.1. 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.

1.2. 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.

1.3. 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.

1.4. 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:

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

1.5. 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.

1.6. 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.

1.7. 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.

Supporting Data and Reasoning:

1.8. 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.
1.9. 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.

2. ComReg's Assessment of Advantage to Eircom Retail

Concerns:

2.1. ComReg's assessment that the advantage to Eircom Retail is immaterial is, in our view, inaccurate and underestimates the potential for competitive harm.

Supporting Data and Reasoning:

2.2. 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.

2.3. 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.

2.4. 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.

2.5. 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:

2.6. 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.

2.7. 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:

2.8. 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.

2.9. 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:

2.10. The cap does not account for the fact that not all FTTC lines will be upgraded to FTTH within the timeframe of the offer.

2.11. 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:

2.12. 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.

2.13. This selective application of the cap results in an uneven competitive landscape, favouring Eircom Retail disproportionately.

Delayed Impact of FTTH Rollout:

2.14. 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.

2.15. 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:

2.16. 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.

2.17. Without rigorous oversight, Eircom Retail could still find ways to benefit beyond the intended limitations of the cap.

2.18. 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.

2.19. 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

3. 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>

3.1. 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.

3.2. 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:

Avoiding False "Ticking of Upgrade Box":

3.3. There is a risk that agents or automated systems could falsely mark an upgrade as completed without an actual migration.

3.4. Measures should be put in place to verify that the migration has genuinely occurred.

Acceptable Order Types:

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

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

Verification of Genuine Upgrades:

3.7. 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.

Preventing Straw-Man Copper Orders:

3.8. 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.
3.9. Service should be active for at least three months before they are eligible for an upgrade discount.

Difficulty of Monitoring and Complaint Evidence:

Hard to Find Evidence:

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

Need for Active Monitoring by ComReg:

3.12. 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:

3.13. Comprehensive Product List: ComReg should provide a detailed list of existing products eligible for the discount to prevent ambiguity and exploitation.
3.14. Verification Measures: Implement stringent verification measures to ensure that migrations are genuine, including verifying the same customer, operator, and premises.
3.15. 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.
3.16. Active Monitoring: ComReg should take an active role in monitoring migrations, conducting random audits, and analysing migration data to prevent and detect fraudulent activities.

3.17. 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.

4. Other Comments

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

4.1.1. 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.

4.1.2. 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.

4.1.3. 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.

4.1.4. 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.

4.1.5. Competitors with less financial backing face higher costs to mitigate risks, making it harder for them to compete on equal footing with Eir.

4.1.6. 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.

4.1.7. 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.

4.1.8. 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.

4.2. <u>Term of the Discount:</u>

4.2.1. Concern:

4.2.1.1. 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.

4.2.2. Length of the Discount Period:

4.2.2.1. The proposed three-year term for the discount is too long and will have loyalty-inducing effects.

4.2.2.2. A shorter discount period would mitigate the risk of creating a loyalty effect that dissuades customers from switching to alternative providers.

4.2.3. Impact on FTTH-to-FTTH Migrations:

4.2.3.1. By 2026, FTTH to FTTH migrations will likely become a significant source of wholesale competition.

4.2.3.2. A long-term discount scheme could impede this natural competitive evolution by locking customers into Eircom's network for long periods.

4.2.3.3. It is crucial to reduce the term of the discount to prevent long-term loyalty effects that stifle competition in the burgeoning FTTH market.

4.2.4. **Recommendations:**

4.2.4.1. Shorten the discount term to one year or less to avoid creating undue loyalty and allow for a more dynamic competitive landscape.

4.2.4.2. Ensure that discounts are structured to encourage genuine migrations without unduly influencing customer retention or acquisition strategies.

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

4.3.1. Financial Strain on SIRO's Network Rollout:

4.3.1.1. Increased Competitive Pressure:

4.3.1.2. 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.

4.3.2. Resource Allocation:

4.3.3. 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.

4.3.4. Increased Costs of Capital:

4.3.5. 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.

4.3.6. [✂ [redacted] ✂]

4.3.7. [✂ [redacted] ✂]

4.3.8. [✂ [redacted] ✂]

4.3.9. [✂ [redacted] ✂]

4.3.9.1. [✂ [redacted] ✂]

4.3.9.2. [✂ [redacted] ✂]

4.3.9.3. [✂ [redacted] ✂]

4.3.9.4. [✂ [redacted] ✂]

4.3.10. [✂ [redacted] ✂]

4.4. Impact on Network Coverage and Service Availability:

4.4.1. Slower Expansion Rates:

4.4.1.1. 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.

4.4.2. Uneven Coverage:

4.4.2.1. 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.

4.5. Reduced Incentives for Innovation and Quality Improvement:

4.5.1. Short-Term Focus:

4.5.1.1. 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.

4.5.2. Compromised Service Offerings:

4.5.2.1. 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.

4.6. Market Entrenchment of the Incumbent:

4.6.1. Strengthening Eircom’s Dominance:

4.6.1.1. 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.

4.6.2. Barriers to Entry and Expansion:

4.6.2.1. 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.

4.7. Long-Term Competitive Harm:

4.7.1. Erosion of Market Diversity:

4.7.1.1. 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.

4.7.2. Regulatory and Economic Risks:

4.7.2.1. 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.

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

4.8.1. 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:

4.8.2. Geographic Restriction Mechanism - Exclusion Zones:

4.8.2.1. 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.

4.8.3. Cost-based Pricing discounting:

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

4.8.4. Market Share Caps:

4.8.4.1. 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.

4.8.5. Competitive Safeguards:

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

4.8.6. Time-limited Discounts:

4.8.6.1. 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.

4.8.7. Establish Altnet Protection Zones

4.8.7.1. 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.

4.8.8. Investment Recognition:

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

4.8.9. Consumer Protection Measures - Transparent Communication:

4.8.9.1. 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.

4.8.9.2. 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.

4.8.10. 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.

4.9. Conclusion

4.9.1. 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.

4.9.2. 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.

4.9.3. 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.

4.9.4. 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.

5. Regarding the matters raised in ComReg 24/57

5.1. An Eircom promotion such as is proposed can appear to circumvent the restriction on discount schemes due to several factors highlighted in the consultations and assessments by ComReg.

5.1.1. A Measure Equivalent to a Discount Scheme: The proposed promotion due to the length of the application of the discount, a period of two years, notwithstanding the initial short term nature of the scheme 6 months, is a measure equivalent to a discount scheme, which itself should be subject to the same requirements as a discount scheme.

5.1.2. Cumulative Discounts: Eircom's FTTH promotional offer (WN2024-021) can be cumulated with other discounts, such as WN2024-010, leading to significant reductions in prices. This means that an Access Seeker eligible for both discounts could receive a cumulative reduction, effectively lowering the wholesale price substantially.

5.1.3. Notification Timing and Intentions: Eircom notified ComReg of the new promotion shortly after indicating it had no plans for additional discounts, raising concerns about the company's intentions and the potential for strategic manipulation of the timing and nature of these promotions.

5.1.4. Economic Assessments and Competitive Impact: The Oxera report for ComReg expressed concerns that the cumulative effect of these discounts could favor Eircom's retail arm, despite conditions intended to prevent such favoritism. The assessment indicates that while the discounts might appear compliant individually, their combined effect could undermine competition by providing significant cost advantages to Eircom's retail operations.

5.1.5. Transparency and Market Impact: The potential for such promotions to be perceived as circumventing restrictions lies in the lack of transparency and the significant cumulative effect, which can make it challenging for competitors to match Eircom's pricing strategies without suffering financial disadvantages.

Yours sincerely

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

Annex 1

[✂ [redacted] ✂]

VMI response to 24/57

Virgin Media response to:

ComReg's Further Consultation following a notification of a wholesale FTTH promotion (WN2024-021) subsequent to Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg D05/24 (Reference: ComReg24/38)

19 July 2024
Non-Confidential

Foreword

This is the Virgin Media Ireland Limited ("Virgin Media") response to ComReg's Further Consultation following a notification of a wholesale FTTH promotion (WN2024-021) subsequent to a 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.

Context

1.1 On 24 June 2024, Virgin Media responded 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) (the "**First Discount**").

1.2 Virgin Media raised serious concerns with respect to the proposed discount scheme on the basis that it unfairly benefits Eircom Limited over all other operators in the marketplace.

1.3 Subsequently, on 5 July 2024, ComReg published a Further Consultation in response to a notification by Eircom Limited dated 31 May 2024 pursuant to Decision D05/24 of a wholesale FTTH promotion (WN2024-021), in respect of Eircom's 1Gbps FTTH offering (namely, Open eir's NGA VUA Standalone 1000Mbps product) (the "**Second Discount**").

1.4 From ComReg's documentation it appears that Eircom was likely to be already planning this Second Discount during the consultation on the upgrade discount without mentioning this to the market, as it was notified to ComReg just seven days after the first consultation was released. Although obviously aware of the Second Discount, ComReg did not inform other operators at the time of the consultation of the First Discount. This raises concerns for Virgin Media.

1.5 Despite the incredibly short timeline imposed by ComReg for responses to this Further Consultation (2 weeks), Virgin Media has again consulted its own economic advisors and include in this response an update to the analyses carried out by SPC Network ("**SPC Updated Report**") highlighting the negative economic impact these proposed discount schemes would have on Virgin Media.

1.6 Virgin Media strongly reiterates all its submissions made in its initial response to the First Discount consultation and sets out here further grave concerns in respect of the First Discount, the Second Discount and more alarmingly, the cumulative effect of both discounts.

Virgin Media's Response

2 Failure by ComReg to Consult on Second Discount

2.1 Virgin Media has serious concerns that ComReg's statutory duties[1] around full consideration of the issues, consultation and transparency mechanisms have not been adhered to by ComReg

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[1] Under Regulation 101(1) of the European Union (Electronic Communications Code) Regulations 2022 (SI 444/2022) (the "**EECC Regulations**"), which transpose Directive (EU) 2018/1972 (the European Electronic Communications Code) in Ireland, a 'measure' means a "*decision, designation, determination, requirement, specification or other act of an equivalent effect*". Pursuant to Regulation 101(2) of the EECC Regulations, where ComReg intends to take a 'measure' (i.e., a decision such as that in relation to the proposed Eircom FTTH wholesale discounts) it **must** do the following:

- pursuant to Regulation 101(3) of the EECC Regulations, ComReg **must** publish the text of the proposed measure (i.e., a consultation), give the reasons for it (including information as to which of its statutory powers gives rise to the measure), and specify the period within which submissions relating to the proposal may be made by interested parties;
- pursuant to Regulation 101(4) of the EECC Regulations, ComReg must have full regard to the complexity of the matter and, except in exceptional circumstances, the consultation period must not be shorter than **30 days**;
- pursuant to Regulation 102(1) of the EECC Regulations, ComReg must take account of the views of "*end-users, …, manufacturers and undertakings that provide electronic communications networks or services on issues related to all end-user and consumer rights … concerning publicly available electronic communications services, in particular where they have a significant impact on the market*."
- pursuant to Regulation 103(1) of the EECC Regulations, ComReg must ensure that up to-date information regarding actions required and decisions made by it or other competent authorities under the EECC Regulations is made publicly available on its website and updated on a regular basis.

here. In order to properly consider a particular measure, an informed consultation is required (and not a 'quasi-consultation') particularly when ComReg admits it has <u>not formed</u> a reasoned opinion to consult upon by virtue of not: (a) engaging any economic analysis or evidence on its likely impacts or (b) considering the cumulative effects of the First Discount and Second Discount.

2.2 The First Discount and Second Discount unfairly benefit both Eircom's wholesale and retail arms over all other operators in the marketplace and any future implementation of such discounts is a "measure" which should attract a strong level of scrutiny and consideration under the mandated consultation process.

2.3 Virgin Media believes ComReg was correct to fully consult on the First Discount given the serious impact of such discount measures on operators. However, <u>no</u> full consultation process has been adhered to, nor seems likely to be adhered to, in respect to the Second Discount (or in relation to the interaction or cumulative effect of both First Discount and Second Discount), which Virgin Media believes is fundamentally unfair and in conflict with its obligations under the EECC Regulations.

2.4 Pursuant to the European Union (Electronic Communications Code) Regulations 2022 (SI 444/2022) (the "**EECC Regulations**"), which transpose Directive (EU) 2018/1972 (the European Electronic Communications Code) in Ireland, ComReg may <u>only</u> circumvent the need to consult on a "measure" in cases: (i) where there is an urgent need to act (pursuant to Regulation 17(9) – (11) of the EECC Regulations) <u>**or**</u> (ii) where there is a need to act in relation to a spectrum measure which would have a significant impact on a relevant market (under Regulation 23(3) – (8) of the EECC Regulations). Neither of these two exceptions have been cited by ComReg or indeed are relevant to the Second Discount.

2.5 ComReg must comply with these statutory consultation obligations in respect to prospective "measures", for the proposed Second Discount be valid and enforceable. A failure by ComReg to follow due process undermines the legitimacy of any decision it makes arising from same. To avoid uncertainty and inequity, other operators must be permitted to fully contribute to the decision being made.

3 Failure by ComReg to Adhere to its Statutory Duties

3.1 ComReg, as the state telecommunications regulator, is obliged to adhere to general regulatory principles, specific regulatory obligations and to its statutory objectives and functions. These are all centred around the principles of non-discrimination, fairness, maintaining competition and investment in the market and ensuring regulatory certainty, consistency and efficiency.

3.2 In particular, ComReg needs to consider the below in the context of the Second Discount (and the cumulative effect of the First Discount and the Second Discount):

- **Promotion of Competition:** ComReg **must** ensure that there is <u>no distortion or restriction of competition</u>[2] in the provision of electronic communications networks and associated facilities in the State, including efficient infrastructure-based competition, and in the provision of electronic communications services and associated services.

[2] *Section 12(1)(a)(i) of the Communications Regulation Act 2002 (as amended) and Regulation 4(3)(b) of the EECC Regulations,*

- **Contribution to the Development of the Internal Market:** ComReg **must** ensure that it contributes to the development of the internal market by removing remaining obstacles to, and facilitating convergent conditions for, investment in[3], and the provision of, electronic communications networks, electronic communications services, associated facilities and associated services in the State.

- **Proportionate Measures:** ComReg **must** seek to ensure that any measures taken by it are proportionate and transparent[4], having regard to its statutory duties and objectives.

- **Non-Discrimination between Providers:** ComReg **must** ensure that in similar circumstances, there is no discrimination in the treatment of providers of electronic communications networks and services[5].

3.3 In relation to both the First Discount and Second Discount (and the cumulative effects of both) Virgin Media has serious concerns that ComReg, would be in conflict with its required statutory objectives and functions (as outlined above) if it were to approve these Eircom discounts (while ignoring its own economic experts).

3.4 For example, the proposed discount schemes unfairly benefit Eircom over all other operators in the marketplace, likely harming the evolution of network-based competition and competition from new wholesale operators such as Virgin Media. This was identified by ComReg's own economic consultants, Oxera[6] and was a key submission in Virgin Media's first response. The compounding effect of both discounts is further highlighted in the attached SPC Updated Report and reiterated in this further response. Approval of this scheme would also likely trigger a negative impact on investments and wholesale competition in the market, as well as disincentivising others from expanding plans or entering the market (e.g., a current operator or new wholesale market entrants).

3.5 ComReg has been consistent in its engagement and encouragement of Virgin Media's significant investment in a new wholesale business and now appears to be unfairly disadvantaging the business before it can properly commence. This encouragement has meant that Virgin Media is now investing €200m in its ongoing network upgrade to full fibre and is at odds with the shift in position ComReg now appears to be taking in respect to the discount schemes.

3.6 Equally, the discount schemes, portrayed by Eircom as encouraging copper switch-off, are flawed as they will cause a 'lock-in' of existing market structure. This is clearly contrary to ComReg's competition promotion objectives (as outlined above), which do not allow discounting by the SMP operator to e.g., facilitate copper switch off. In relation to the Second Discount in particular, and as noted in **Section 2** above, the decision by ComReg not to consult appropriately on this additional discount and not to give reasons for doing so, also shows a

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[3] *Pursuant to Section 12(1)(a)(ii) of the Communications Regulation Act 2002 (as amended) and Regulation 4(3)(c) of the EECC Regulations*

[4] *Section 12(3) of the Communications Regulation Act 2002 (as amended) and Regulation 4(1) / Regulation 4(5) of the EECC Regulations*

[5] *Section 12(6) of the Communications Regulation Act 2002 (as amended) and Regulation 5(b) of the EECC Regulations*

[6] *Section 1.12 Oxera Report "Therefore the offer has a high likelihood of favouring Eircom's retail arm, and would therefore be in breach of the second criterion through the 'effect' of the offer."*

clear disregard for the statutory requirement on ComReg to pursue policy objectives in a "*transparent, non-discriminatory and proportionate manner*."

4 Failure by ComReg to Consider Expert Economic Advice & Own Decision-Making

4.1 ComReg is incorrect to dismiss its own independent economic consultant findings that any advantage is not 'material' to the consultation on the First Discount, without providing adequate reasoning to support such a claim (or any other economic evidence). Additionally, no economic evidence has been put forward or considered in relation to the Second Discount (nor the cumulative effect of the First Discount and Second Discount).

4.2 This is clearly in conflict with principles outlined in **Section 3** above in relation to transparency and proportionality. This decision is further compounded by the fact that ComReg is presumably working under these same economic parameters (or lack thereof) in respect to its evaluation of the Second Discount, i.e., without taking the advice of their expert economic advisors on board.

4.3 Equally, ComReg has not taken account of its own decision making, under *ComReg Decision D05/24*. Under *Decision D05/24*, Eircom may <u>not</u> apply any discounts or promotions in respect of FTTP-based VUA without the express prior approval of ComReg, which approval ComReg may grant where the following **four criteria** are met:

( ) Price remains above the 'Price Floor' (i.e., **€19.12** currently);

( ) There is no undue advantage to Eircom's retail arm;

( ) There is no geographic price differentiation; and

( ) There is no adverse effect on competition or alternative investments.

4.4 As highlighted above in **Section 2** and **Section 3**, Virgin Media has serious concerns that both the First Discount and the Second Discount clearly provide Eircom's retail arm an undue advantage (given that Eircom can leverage wholesale discounts into its retail arm) and should ComReg approve these discounts, it would clearly have an adverse impact on competition and investments in the market going forward, for the reasons highlighted above.

5 Competition Concerns

5.1 On top of the issues highlighted under **Section 2**, **Section 3** and **Section 4** and in addition to Virgin Media's submissions in its first response to the consultation, Virgin Media also has general competition concerns in relation to the imposition of the First Discount and the Second Discount (with ComReg as the lead regulator responsible for ensuring adequate competition in the market) in particular the ability of eir (with its SMP / dominant position) to engage in what Virgin Media considers to be predatory pricing behaviour in order to undercut its competitors (and potential future competitors).

5.2 The attached SPC Updated Report sets out in further detail the economic effects this cumulative discount scheme has on the market. It is arguable that the First Discount and the Second Discount may border on predatory pricing, allowing Eircom to undercut its competitors in relation to FTTH wholesale offerings. As was noted in the seminal case on predatory pricing, *AKZO v Commission*[7], the "*criterion of legitimacy*" to be adopted is a criterion based on the costs and the strategy of the dominant undertaking itself, and not on the costs or prices of its competitors.[8] Virgin Media has legitimate concerns about the nature and long-term effects of these proposed discounts, should ComReg approve of same. Given Eircom is a vertically integrated company, it raises serious concerns around margin squeeze as continued discounting negatively effects the ability of retail operators to make a rate of return.

Conclusion

Virgin Media remains of the view that the First Discount has a chilling effect on competition in the market and believes strongly that the additional Second Discount will have a further magnified effect on its ability to compete with Eircom Limited for wholesale business. This view is backed up by an Updated Report from our economic advisors, SPC, which highlights the lock-in-effect these combined discounts have on customer behaviour.

Irrespective of this position, Virgin Media also has serious concerns around the approach ComReg has adopted to the Second Discount by Eircom Limited. ComReg have not only failed to properly consult on this Second Discount but also failed in their statutory duty to address key ComReg objectives such as proportionality, the promotion of competition / investment and ensuring non-discrimination between providers of electronic communication services in the State in respect of the cumulative nature of these proposed discount schemes. The failure of ComReg to consider its own economic expert's advice and its own decision-making criteria further compounds Virgin Media's view that more scrutiny is required to allow for a proper consultation including detailed economic analysis of the effects both proposed schemes will have on the WLA market.

Attachments

SPC Updated Report

The SPC Updated Report will be sent as a separate attachment and forms part of Virgin Media's response.

[7] Case C-62/86, *AKZO v Commission*.

[8] Case C-62/86, *AKZO v Commission,* paragraph 74.

SPC Network

Eircom's Wholesale FTTH Discount Scheme: with 1 Gbps FTTH Promotion

Report for Virgin Media Ireland

July 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 "FTTH Tariff Proposal". 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 to 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 were 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.

Table 1: Average Upgrade Discount by Access Seeker

	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

[5] Oxera Report para. 3.21

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

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 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*

[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.

not gain an advantage relative to other Access Seekers across different potential scenarios" (para. 3.36, emphasis added).

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

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[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 cut in the cap to a multiplier of 0.91 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 0.91 we have used the following equation:

$$Cap \ = \frac{NF_v}{F_V} / \frac{(F_V + NF_V)}{(F_E + NF_E)}$$

Where *F* is the current number of FTTH lines and *NF* is the additional FTTH lines needed to achieve the upgrades to 69%. The subscripts *E* and *V* refer to Eircom and Vodafone respectively. Thus the cap is set by the ratio of Vodafone's new FTTH to its existing FTTH lines divided by the ratio of all Vodafone's fibre lines to all Eircom fibre lines.

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 decision 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.

7 ADDENDUM: THE 1 GBPS FTTH PROMOTION

37. Since this report was prepared, ComReg has launched a further consultation on Eircom's proposed discount of €2.00 for new connections and upgrades from to the 1 Gbps FTTP service (the "1 Gbps FTTH Promotion").[12] From paragraphs 1 and 2 of ComReg's further consultation on the 1 Gbps FTTH Promotion, it appears that Eircom was likely to be already planning this discount during the consultation on the upgrade discount without mentioning this to the market, as it was notified to ComReg just seven days after the first consultation was released. This promotion is available on a standalone basis for new connections and upgrades to 1 Gbps FTTH and can also be cumulative. Thus, an Access Seeker upgrading an existing FTTC customer to FTTP 1 Gbps would receive a discount of €3.00 per month for the upgrade to FTTP and a further €2.00 per month when upgrading to FTTP 1 Gbps. The discount will last for a period of two years made during a six month period (proposed to be 1 November 2024 to 30 April 2025).

38. In the comments above, we highlighted three concerns with the original 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

[12] ComReg *Assessment of a Wholesale FTTH Discount Scheme notified by Eircom Limited under ComReg Decision D05/24 (WN2024-010): Further Consultation following notification of a wholesale FTTH promotion (WN2024-021).* 5th July 2024

investment – which is contrary to both the Strategy Statement and the WLA/WCA Decision that promotes market entry at wholesale level and sets a wholesale price floor to prevent from market foreclosure by Eircom.

39. We have reviewed the 1Gbps FTTH Promotion and find that all three of our original concerns are made all the greater by this discount, in particular where it is applied cumulatively with the original upgrade discount. We explain why on each of the points below. We also have two additional process concerns that will be addressed later in this Addendum.

40. First, as Eircom contends that the wholesale discount will have little effect on retail prices[13], it will generate higher profits for Access Seekers, including Eircom Retail. This will encourage Access Seekers to focus on upgrading existing FTTC customers to 1 Gbps FTTH to earn a €5.00 per month discount, rather than competing for new customers. This will lock in markets shares still more, benefitting Eircom most of all as it has the largest retail market share which Access Seekers have no incentive to win from Eircom.

41. Second, and most importantly, by our calculation, Eircom will gain an even greater benefit compared to other Access Seekers with the cumulative discount. Table 2 below updates Table 1 and shows that the additional benefit to Eircom, with the 1.32 cap applied, increases from €0.24 per month to €0.40 per customer per month in the 100% upgradeable base scenario and from €0.36 to €0.59 in the 69% upgradeable scenario. This assumes all upgrades are to 1 Gbps under both scenarios.

Table 2: Average Cumulative Discount by Access Seeker

	Total Broadband Lines	FTTH Lines	FTTH share of total	Average Upgrade Discount per line		Average Cumulative Discount per Line	
				100% of lines	69% of lines	100% of lines	69% of lines
Eircom	464,000	140,000	30.2%	€2.09	€ 1.69	€3.49	€2.81
Vodafone	329,000	126,000	38.3%	€1.85	€ 1.33	€3.09	€2.22
Sky	258,000	102,000	39.5%	€1.81	€ 1.28	€3.02	€2.14

[13] ComReg, Op cit Footnote 3, paragraph 72 (b)

42. As referenced above (para. 20), Oxera found that the proposed discount of €3.00 per month had a high likelihood of favouring Eircom's retail arm more than its rivals and would therefore be in breach of the second criterion. That advantage is increased by the 1 Gbps FTTH Promotion. Oxera also found that the cap reduced but did not eliminate that advantage and that the cap was designed to provide an advantage to Eircom. This situation clearly also does not change with the additional discount for upgrades to 1 Gbps.

43. The only way in which to reduce the additional benefit for Eircom is by reducing the cap to 0.91, which would result in the average profit for Eircom and Vodafone being equal and only €0.08 higher than Sky's.[14]

44. Finally, the larger discount will further undermine other network builders' business models and make it harder for them to justify the investment necessary to compete with Eircom at scale and so less likely that a truly competitive network market will develop in Ireland. The extent to which it will deter other investments will be affected by how much the discount is passed onto consumers and so lowers retail prices. The more it does so, the harder it will be for other network builders to compete even though Eircom's prices would be likely to pass a traditional price/cost test.

45. Our first additional concern is the speed with which Eircom is proposing to introduce this additional promotion without ComReg having the opportunity to assess the effect of Upgrade Promotion. Again, we refer to paragraph 3.38 of the Oxera report quoted in paragraph 20 above which expressed its concern that the proposed Upgrade Promotion would be in breach of ComReg's second criterion through the likely effect of the offer. Our conclusion that the Upgrade Promotion discount should not be allowed notwithstanding, in our view ComReg would be wise to assess the effect of that discount before allowing the Upgrade Discount to be introduced.

46. Our second additional concern is that ComReg has apparently not asked Oxera for its views on the 1 Gbps FTTH Promotion. We noted in the main body of this document that Oxera had serious concerns about the upgrade promotion and think that ComReg should have asked

[14] See paragraph 33 above for an explanation of how the cap is calculated.

for, and taken account of, their views on the likely effects of the 1 Gbps FTTH Promotion as well.

47. In summary, therefore, our overall view is that the 1 Gbps FTTH Promotion will exaggerate the anticompetitive effects of the upgrade promotion to the long-term detriment of consumers. We therefore reiterate our conclusion in paragraph 36 above that allowing this promotion will undo the good work of the WLA/WCA Decision and that the 1 Gbps FTTH Promotion should not be allowed without applying a more aggressive cap of 0.91 to ensure that Eircom does not receive a greater benefit than other Access Seekers.

Vodafone response to 24/57

Vodafone Response to Consultation

Assessment of a wholesale
FTTH discount scheme notified by Eircom
Limited under ComReg Decision D05/24 (WN2024-010)

Further Consultation following notification
of a wholesale FTTH promotion (WN2024-021)

Public Consultation

Reference: ComReg Doc 24/57

Version: Non-Confidential

Date: 19/07/24

Introduction

Vodafone welcomes the opportunity to respond to the Commission for Communications Regulation (ComReg)'s consultation on its assessment of the wholesale discount scheme WN2024-021 notified by Eircom Limited (hereafter Eircom).

The Eircom Proposal (WN2024-021):

Eircom is proposing a €2 discount on the standard monthly rental charge for its FTTH VUA and Bitstream 1Gbps product, when an Access Seeker

1. Connects a new customer to 1Gbps, and
2. When a retailer upgrades one of its existing retail customers to 1Gbps from another Eir FTTH profile, and
3. When a retailer migrates an Openeir FTTH customer from another retailer on to 1Gbps and the losing retailer has not had that customer active already on the 1Gbps promotion then the discount is available.

The discount falls away after 2 years. The promotion ends on 30 April 2024 and the promotion can cumulate with other promotions.

ComReg preliminary assessment: ComReg states that it does not have any serious concern with the WN2024-021 promotion on a standalone basis. However when consulting on the plan to offer WN2024-010 ComReg were not aware of any separate discount proposals and ComReg advises it had received confirmation that there was no plan to introduce additional discounts in advance of publication of the WN2024-010 consultation. That position changed after the consultation issued on notification of WN2024-021.

Confirmation on Vodafone position on WN2024-010: 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. Vodafone refer ComReg to its previous submission and we must be clear Vodafone does not believe WN2024-010 should be implemented in its current form and the structure of the promotion is punitive for operators who have advanced copper to fibre migrations in recent years.

Vodafone will comment below on WN2024-021 on a standalone basis. This new promotion does not impact views in relation to WN2024-010 and nothing in the new proposals would override our objections to the format of that discount proposal.

We would also note that the position within Openeir is quite flexible in relation to structure of wholesale promotions – as indicated by the swift change in plans to introduce additional promotions following notification of WN2024-010. In this regard having considered the inputs of wholesale customers on both promotions it appears the position could be adapted with relative ease.

Vodafone views on WN2024-021

On a standalone basis Vodafone could support this discount proposal subject to removal of the following significant limitations

1. The limitation on migration of a 1Gpbs promotion line from another provider, and
2. The 2-year cap on the €2 discount.

Both conditions of the proposal limit retailer certainty. The proposition becomes unnecessarily complex when agents develop a pitch for customers based on their existing profile which in addition to line capability and existing operator information also now requires a check to see if the customer is on 1Gbps and if they are discounted already. This is clearly a constraint and seems totally unnecessary.

The 2-year cap also introduces unnecessary uncertainty and is not warranted. Vodafone would urge Openeir to introduce proposals on discount promotions that are simple, only time bound in terms of the period for which the promotion is available. The promotional price, once availed of should remain in place. Any alternative undermines the price guarantee which Openeir purport to offer.

If the proposal is amended, then Vodafone would support advancement of this proposal.

<u>ENDS</u>