



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

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

Decision

NON-CONFIDENTIAL

Response to Consultation and Final Decision

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1 Introduction

- (1) Under ComReg Decision D05/24, Eircom Limited ('**Eircom**') may not apply any Discounts or Promotions in respect of FTTP-based VUA without the express prior approval of ComReg, which approval ComReg may grant on Eircom's application where the following four criteria are met, namely:
 - a) the proposed price taking account of any Promotion or Discount remains above the Price Floor;
 - b) ComReg is satisfied that the Promotion or Discount does not, in form or in effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers;
 - c) ComReg is satisfied that the Promotion or Discount is not targeted at a specific geographic area and for the avoidance of doubt, no Promotion or Discount will be approved that gives rise to a geographic differentiation of prices; and
 - d) ComReg is satisfied that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.
- (2) On 23 February 2024, Eircom submitted a FTTH Wholesale Discount scheme ('**the Notification**')¹ to ComReg and following a number of queries by ComReg, provided further information on 21 March 2024 at which point ComReg considered Eircom's notification referred to as Wholesale Notification 2024-010 ('**WN2024-010**') to be complete. Further clarifications were provided by Eircom at an online meeting on 18 April 2024 and in follow-up correspondence.
- (3) On the basis that WN2024-010 was the first discount that could be implemented in the market further to the relaxation of the ban on discounts and promotions on FTTH² in ComReg Decision D05/24, and that its impact on the market (having regard to its characteristics including the amount of the discount offered and the length it would operate) may be significant, ComReg took the view that it was appropriate to hold a consultation in respect of its assessment of WN2024-010. Consultation 24/38 was published on 24 May 2024³ and closed on 24 June 2024.

¹ Wholesale Notification 2024-010 ('**WN2024-010**'), also referred to as Change Request Document 994 or '**CRD 994**'.

² The terms "**FTTH**" (fibre to the home) and "**FTTP**" (fibre to the premises) are used interchangeably throughout this document.

³ [ComReg Consultation 24/38](#)

- (4) On 31 May 2024, Eircom notified to ComReg pursuant to Decision D05/24, a promotion, Wholesale Notification 2024-021 ('**WN2024-021**'), in respect of Eircom's 1Gbps FTTH offering. The promotion may be cumulated with other discounts and promotions, including discount scheme WN2024-010 and was notified at a time when Consultation 24/38 in respect of WN2024-010 was ongoing. In those particular circumstances where Eircom had confirmed no more than 4 weeks prior to notifying WN2024-021, that it had no plan to introduce additional discounts or promotions for FTTP VUA and in the interest of transparency, ComReg took the view that Access Seekers should be given the opportunity to provide further views and information and data in respect of the discount scheme (WN2024-010) in the knowledge that the promotion notified under WN2024-021 may also apply for part of the time that the discount scheme would be operational. Consultation 24/57⁴ ('**Consultation 24/57**' or '**the Further Consultation**') was published on 5 July 2024 and closed on 19 July 2024.
- (5) Submissions to Consultation 24/38 were received from the following five respondents ('**Respondent(s)**):
- a) Eircom;
 - b) SIRO;
 - c) Sky;
 - d) Virgin Media Ireland ('**VMI**'), which included a separate consultant report by SPC Network; and
 - e) Vodafone.
- (6) Submissions to Consultation 24/57 were received from the following four respondents ('**Respondent(s)**):
- a) Eircom;
 - b) SIRO;
 - c) VMI which included an updated separate consultant report by SPC Network; and
 - d) Vodafone.
- (7) In Consultation 24/38, ComReg had proposed to approve the discount scheme notified as WN2024-010. **Having considered all of the submissions received to**

⁴ ComReg Consultation 24/57

both consultations, on balance and for the reasons outlined in this document ComReg has decided not to approve the discount scheme notified as WN2024-010. This means that Eircom may not publish and make the discount scheme available to anyone.

- (8) In the Consultation, in proposing to approve WN2024-010, ComReg had taken note of Oxera's view that WN2024-010 did not meet two of the four criteria set out in Decision D05/24 for approval, in that the discount scheme gave an advantage to Eircom Retail compared to other Access Seekers and the restriction in WN2024-010 that an Access Seeker could only avail of the discount in respect of its own existing customers on Eircom's copper and FTTC based network may restrict retail competition on Eircom's network. ComReg put to consultation its consideration at the time that that advantage may not be material and the impact of restricting WN2024-010 to upgrades to FTTH of an Access Seeker's own customers on competition was unclear given the presence of other network alternatives in many areas.
- (9) In particular, while ComReg was of the view that the cap set on a maximum number of Eircom Retail customers which could avail of the discount was ineffective in addressing any advantage that would benefit Eircom Retail, ComReg suggested that it may be possible to ensure that the advantage to Eircom Retail was immaterial using the retail FTTH margin squeeze test in operation under Decision D05/24. ComReg accordingly proposed to approve the discount scheme subject to Eircom ensuring that any advantage to Eircom Retail remained immaterial using the FTTH Margin Squeeze Test ('**FTTP MST**') set out in Decision D05/24, so that, namely, the average wholesale discount available to Eircom Retail, calculated as prescribed under the FTTP MST is comparable to the average wholesale discount available to an Access Seeker with a smaller copper base than Eircom's.
- (10) However, there were little to no support for ComReg's proposal to approve the discount scheme. With the exception of Eircom, all respondents to both Consultations (including the retail service providers ('**RSPs**' or '**retailers**') who would have been expected to benefit from the discounts proposed under WN2024-010) rejected the discount scheme as they saw no rationale for the restriction to own-customer upgrades, other than to give an advantage to Eircom Retail by locking-in end-users to their existing retailers. This advantage would not be eliminated by the cap Eircom had proposed on the number of lines Eircom Retail could receive a discount. The Respondents also considered that the discount scheme could have the effect of delaying rather than encouraging copper to fibre migration. As for Eircom, it disagreed that there was any advantage to Eircom Retail and it dismissed the possibility to use the FTTP MST to provide the necessary assurance to ComReg (in the absence of an effective cap).

- (11) On balance, having considered all of the submissions received, ComReg finds, in contrast to the position set out in Consultation 24/38, that **the risks to competition in the market and investments arising out of WN2024-010 outweigh the benefits and the discount scheme notified as WN2024-10 must be rejected.** In particular, reducing the advantage to Eircom Retail to a cost difference per FTTH line per operator does not capture the reduction in competitive intensity arising from limiting the discount's availability to a customer's existing retailer. This is because the effect of the restriction is not only a higher average cost saving per FTTH line for Eircom, it is also to "lock-in" end-users to their existing retailers. This, in turn, favours Eircom Retail, given its larger copper-based customer base. This advantage to Eircom Retail is not compensated by any identifiable pro-competitive benefits, and is not adequately addressed by the cap that Eircom had proposed, or through the FTTP MST. In particular, the "lock-in" of existing customers as a result of the own-customer upgrade restriction will not be sufficiently mitigated by network competition where Eircom Retail's competitors choose a non-Eircom service (having regard to their more limited footprints) or increased competition on Eircom's network where Eircom Retail's competitors "win" an end user to FTTC before Eircom's FTTH network passes. This also means that the reduction in the competitive intensity among retailers resulting from the advantage provided by the own-customer upgrade restriction to Eircom Retail is unlikely to be compensated through an increase in wholesale competition intensity that is sufficient to ensure that competition is not undermined.
- (12) The remainder of this document sets out the details of the discount scheme notified under WN2024-010, the framework ComReg uses in assessing FTTH Wholesale Discounts or Promotions, ComReg's consideration of Respondents' Submissions to Consultation 24/38 and Consultation 24/57) and ComReg's final assessment of WN2024-010.
- (13) The Notification and additional information provided by Eircom in relation to WN2024-010 are at Annex 1. As part of ComReg's considerations, ComReg obtained economic advice from economic advisors Oxera, and a copy of Oxera's report which was published as part of Consultation 24/38⁵ is at Annex 2, and its additional report having reviewed the submissions received to both Consultation 24/38 and 24/57 at Annex 3⁶. A non-confidential copy of the Respondents' Submissions to Consultation

⁵ "Oxera's review of WN2024-010 FTTH Discount_02.05.2024": hereafter, referred to as the 'Oxera Report'.

⁶ "Oxera's review of Eircom Wholesale Notification 24-010 FTTH Discount: Updated report": hereafter, referred to as the 'Updated Oxera Report'

24/38 is set out at Annex 4 of this Decision,⁷ and a non-confidential copy of the Respondents' Submissions to Consultation 24/57 is set out at Annex 5 of this Decision.⁸ Unless specified otherwise, reference to a Respondent's Submission is a reference to its Submission to Consultation 24/38.

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⁷ Where a Respondent has submitted both a confidential and non-confidential response to the Consultation 24/38, this is taken as a single submission.

⁸ Where a Respondent has submitted both a confidential and non-confidential response to the Further Consultation 24/57, this is taken as a single submission.

2 Eircom's Wholesale Notification WN2024-010

- (14) WN2024-010 consists of a proposed discount scheme (also referred to as the 'Offer' or the 'FTTH Tariff Proposal') which would be available to all operators purchasing wholesale inputs from Eircom ('Access Seeker'), when they upgrade their respective existing customers from wholesale copper services (FTTC and CGA) to a wholesale FTTH service. Specifically, the Discount Scheme provides for a €3 discount to the headline monthly rental price of Eircom's FTTH services on a per line basis to Access Seekers.
- (15) WN2024-010 was notified to ComReg pursuant to Section 14.10 of the Decision Instrument in Decision D05/24 and it falls within the meaning of discount and promotions as defined in that decision.
- (16) The Discount Scheme comprises the following features:
- A €3 reduction from the monthly rental price for FTTH for any copper-based technology upgrade (including FTTC) to FTTH, available to all Access Seekers (including Eircom Retail);
 - No volume targets are required to be met for Access Seekers to be eligible for the reduction;
 - The reduction is available for new upgrades only, starting from the effective date of the Discount Scheme;
 - The reduction applies for the duration of the Discount Scheme, which will be for a maximum of 3 years with FTTH prices reverting to the list price 3 years after the Discount Scheme commences (Eircom can terminate the Discount Scheme earlier subject to 12 month notification to Access Seekers);
 - The reduction applies to all FTTH profiles available from Eircom, including VUA and Bitstream products;
 - The discount in the Discount Scheme is only available for upgrades of an Access Seeker's own customers from a CGA or FTTC based broadband service to an FTTH service on the Eircom network. It does not apply to new FTTH connections or where an Access Seeker, in acquiring a customer from another Access Seeker, upgrades the acquired customer from copper-based broadband to FTTH.
- (17) According to Eircom's Notification, the Discount Scheme was intended to incentivise access seekers to upgrade their connections from copper-based technology services to FTTH. Eircom stated:

“The FTTH Tariff Proposal promotes the deployment of a high-capacity fibre-based broadband network on a national basis and reduces access costs for wholesale customers. The FTTH Tariff Proposal will incentivise operators to upgrade from FTTC products to higher-capacity FTTH products whilst ensuring that there is robust and vigorous competition between wholesale network operators⁹.”

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⁹ Eircom CRD 994, pp 2-3.

3 Assessment Framework

3.1 Substantive criteria

- (18) Under ComReg Decision D05/24, any wholesale FTTP VUA promotion or discount proposed by Eircom is subject to case-by-case approval by ComReg. Approval will only be granted where ComReg is satisfied that the proposed discount or promotion will not have a detrimental impact on actual or potential economically efficient alternative investment in VHCN¹⁰. In particular, as set out above, ComReg will not approve a wholesale promotion or discount unless it meets the following criteria¹¹:
- the proposed price taking account of any Promotion or Discount remains above the Price Floor;
 - ComReg is satisfied that the Promotion or Discount does not, in form or in effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers;
 - ComReg is satisfied that the Promotion or Discount is not targeted at a specific geographic area and for the avoidance of doubt, no Promotion or Discount will be approved that gives rise to a geographic differentiation of prices; and
 - ComReg is satisfied that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.
- (19) ComReg notes that a number of Submissions proposed amendments to the discount scheme notified under WN2024-010 which they suggested ought to be directed by ComReg were ComReg to approve WN2024-010.¹² ComReg, however, believes that the framework for the review of discounts and promotions as set out in Decision D05/24 is better approached as being a review that is limited to an assessment of the terms and conditions notified by Eircom, and accordingly as a decision to approve or not approve (subject as the case may be to certain conditions designed to ensure or monitor compliance) the scheme as notified by Eircom. ComReg accordingly has not engaged in an assessment of whether the amendments suggested by Respondents would address any issue identified by ComReg as part of its final assessment. Rather ComReg has limited its assessment to whether it is satisfied that each of the four criteria for approval is met.

¹⁰ Paragraph 9.557 of ComReg Decision D05/24.

¹¹ ComReg Decision D05/24, Decision Instrument: Section 14.10.1–14.10.4.

¹² See e.g., SIRO's Submission, pp. 6-7; Sky's Submission, p. 3.

- (20) **Based on its assessment of the Offer under each of the criteria set out in Decision D05/24 and having considered advice from Oxera, and taken into consideration Respondents' Submissions, ComReg finds that the Discount Scheme notified under WN2024-010 does not meet two of the criteria for approval set out in Decision D05/24, for the reasons detailed in Chapter 4.**

3.2 Procedural aspects

- (21) Notification by Eircom of a proposed discount initiates a three month assessment period which may be paused where complete information has not been provided, or additional information is required, in which case it will resume on provision of the relevant information by Eircom.¹³
- (22) ComReg is also required to carry out a consultation where it considers that the proposal will have a significant impact on the market within the meaning of the EEC Regulations or, for example, if the proposal is thought to contain aspects of concern where the impact on competition is unclear and may require input to be sought from stakeholders.¹⁴ However as set out in Decision D05/24, ComReg will exercise its discretion and will only carry out a consultation where it considers it necessary. ComReg will not consult on a proposed discount that either obviously fails or passes the criteria.¹⁵ The assessment period can be paused for the period of consultation, and subsequently may be extended if necessary. ComReg will inform Eircom and stakeholders at the same time of its final assessment of the relevant offer at the end of the assessment period.¹⁶
- (23) Many of the Submissions included comments on the approach followed by ComReg in the case of WN2024-010, including comments from Eircom that ComReg should not have engaged in consultation at all and comments from other Respondents that the Further Consultation carried out by ComReg following notification of WN2024-021 was insufficient and ComReg should have consulted on its assessment of WN2024-021 in its own right and not only as regards the cumulative impact of WN2024-021 on WN2024-010.¹⁷ In light of those submissions, ComReg wishes to clarify as follows:

¹³ Paragraph 9.566(a) of ComReg Decision D05/24

¹⁴ Paragraph 9.566(c) of ComReg Decision D05/24

¹⁵ Paragraph 9.565 of ComReg Decision D05/24

¹⁶ See ComReg Decision D05/24, paragraphs 9.557 to 9.567.

¹⁷ See e.g., VMI's conclusion in its Submission to the Further Consultation.

- (24) First, insofar as WN2024-010 is concerned, ComReg issued a public consultation on its assessment of WN2024-010 on the basis that WN2024-010 was the first discount that could be implemented in the market further to the relaxation of the ban on discounts and promotions on FTTH in ComReg Decision D05/24, and that its features, including its scope (covering all of Eircom's FTTH VUA and Bitstream offering), the amount of the discount offered and the length it would operate, meant that ComReg's proposed approval could have a significant impact of the market within the meaning of Regulation 101 of the ECC Regulations.
- (25) Consultation was also consistent with the approach set out in Decision D05/24. As explained in paragraph 9.565 of Decision D05/24, ComReg accepted Oxera's recommendation that ComReg should carry out a consultation where there was merit in seeking information from market participants as part of the assessment process including where the assessment was not clear-cut, and ComReg signalled that ComReg "*would exercise its discretion and carry out a consultation where it considers it necessary, for example, to assess the impact of the offer*".¹⁸ ComReg's approach to consultation as regards WN2024-010 is entirely consistent with the approach set out in Decision D05/24; in particular the notification contained aspects of concern to ComReg where the impact on competition was not clear and required input from stakeholders (as specifically envisaged in paragraph 9.566 of Decision D05/24).
- (26) ComReg notes also, as regards its assessment of WN2024-010, it was not a discount or promotion that could be said to "*obviously pass the four criteria*" as Eircom contends in its Submission and ComReg does not believe that Eircom can credibly suggest that it was "*unclear on the basis of the consultation by ComReg*"¹⁹ or that ComReg "*[did] not raise any doubts*"²⁰ in respect of the four criteria being passed. In particular, inclusion of a cap by Eircom as part of WN2024-010 could not have the effect of depriving ComReg of its discretion as regards the assessment of the notification. In this regard, for the reasons set out in Consultation 24/38 and this Decision, the cap included by Eircom is not effective. Furthermore, ComReg's proposal to find that the four criteria were met by WN2024-010 was contrary to the expert economic advice that it had received and reached on the basis of a proposed finding that Criterion 2 was met although there was an advantage to Eircom Retail but which could be considered to be immaterial. Consultation in these circumstances was entirely appropriate.

¹⁸ Paragraph 9.565 of ComReg Decision D05/24.

¹⁹ Eircom's Submission, p. 3.

²⁰ Eircom's Submission, p. 2, summary

- (27) Second, as regards the reopening of Consultation 24/38 following receipt of WN2024-021, ComReg notes Eircom's submission that the Further Consultation "*is not rational and is flawed*"²¹ and "*in the absences of offering any view on the cumulative effect, ComReg has failed to demonstrate any meaningful concern that would justify the reopening of consultation 24/08 or to consult on WN2024-021.*"²² However, the Further Consultation (Consultation 24/57) was driven by a concern to protect the integrity of ComReg's consultation process in circumstances where ComReg received WN2024-021 on 31 May 2024, only one week after it published Consultation 24/38 and despite assurances given by Eircom no more than four weeks earlier, that Eircom had no immediate plans to introduce further discounts. ComReg took the view that the fact of WN2024-021 happening during the consultation period and noting also that the two offers as notified could be cumulated, meant that industry should be informed of Eircom's notification of WN2024-021 and Respondents allowed to make any further submissions as they saw fit as regards WN2024-010, in light of WN2024-021.
- (28) ComReg notes Respondents' support for this view (save for Eircom), in particular SIRO and VMI. As SIRO noted, "*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.*" (For the avoidance of doubt, it is not the case, as VMI appears to have understood, that ComReg was aware of WN2024-021 when it issued Consultation 24/38.²³)
- (29) For the avoidance of doubt, therefore, the fact that a public consultation was held in respect of WN2024-010 does not mean that ComReg will necessarily hold a public consultation in respect of each and every notification of a wholesale discount or promotion by Eircom; instead ComReg will be guided by the framework set out in Decision D05/24 including whether the proposed discount or promotion clearly meet or does not meet the approval criteria or whether there is uncertainty in this respect. In this regard, in the matter of ComReg not proceeding with a consultation for WN2024-021, which is dealt in full in ComReg 24/70, suffice to say here that the main cause for uncertainty arose from the timing of that notification, at the time when Consultation 24/38 was still open.

²¹ Eircom's Submission to the Further Consultation, paragraph 4.

²² Eircom response to the Further Consultation, paragraph 6.

²³ VMI's Submission to the Further Consultation, paragraph 1.4

4 ComReg's assessment of WN2024-010

- (30) ComReg's assessment of WN2024-010 based on the framework as set out in Decision D05/24 is set out below, taking each of the four criteria set out in Decision D05/24 before addressing the matter of any cumulative impact of WN2024-010 and WN2024-021.

4.1 Criterion 1: FTTH prices remain above the Price Floor

- (31) The first criterion that must be satisfied is:

The proposed price taking account of any Promotion or Discount remains above the Price Floor.

- (32) Under Decision D05/24 the FTTC VUA price acts as a price floor for FTTH VUA.²⁴ At the time of Consultation 24/38, the FTTC VUA monthly rental charge was set at €19.12. On 1 July 2024 Eircom increased the FTTC VUA monthly rental charge to €20.00 in accordance with the pricing continuity approach for FTTC VUA provided for in Decision D05/24.
- (33) At this time (August 2024) the lowest FTTH VUA monthly rental charge is €23.50 and the maximum discount available under WN2024-010 of €3 would bring this to €20.50. This is €0.50 (2.5%) above the €20.00 Price Floor. Therefore, based on the existing FTTC VUA and FTTH VUA prices, the proposed discounted FTTH VUA price under WN2024-010 is above the Price Floor.
- (34) As noted by Oxera, if Eircom were to use the afforded flexibility to increase the FTTC VUA price, and thus the Price Floor, above €20.50, i.e., in excess of €0.50 (2.5%) in the next three years without also increasing the undiscounted FTTH VUA list price, the discounted FTTH VUA prices could fall below the Price Floor²⁵.
- (35) Consequently, while ComReg finds that the proposed FTTH VUA prices taking account of WN2024-010 remains above the Price Floor at existing FTTC VUA price levels, it is also the case that should Eircom increase FTTC VUA prices in the future, Eircom may also need to adjust the FTTH VUA undiscounted list price to ensure that the FTTH VUA price including the discount continues to be above the Price Floor for the duration of the price control period.

²⁴ ComReg Decision D05/24, Decision Instrument: Section 14.6.1.

²⁵ Oxera Report, paragraph 3.8.

- (36) In its Submission, Eircom indicated that the price floor obligations will continue to be respected over the three-year discount period²⁶ and that “*eir will continue to meet its pricing floor obligations under D05/24 irrespective of the number of discount offers it implements*”²⁷.²⁸
- (37) On this basis, ComReg finds that at this time, the prices taking account of the discount in WN2024-010 remain above the Price Floor. Therefore, ComReg is satisfied that the first criterion is met subject to Eircom ensuring that the discounted FTTH VUA price remains at all times above the Price Floor, including, where necessary, by increasing the undiscounted FTTH VUA list price when increasing the FTTC VUA price.

4.2 Criterion 2: The relative benefit to Eircom Retail

- (38) The second criterion that must be satisfied is:

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

- (39) The Oxera Report identifies two distinct elements to this criterion: (i) whether the discount is available to a range of Access Seekers; and (ii) whether the discount favours Eircom's retail arm²⁹.

4.2.1 Whether the discount is available to a range of Access Seekers

- (40) Regarding the first element, there did not appear to be any grounds for concern that the discount would not be available to a range of Access Seekers in practice, for the following reasons:
- (41) First, WN2024-010 applies to all FTTH profiles, including Bitstream and VUA that are purchased by Access Seekers³⁰. This means, as Eircom and Oxera have noted, that Access Seekers, who may have a preferred type of access and/or may focus on

²⁶ Eircom's Submission, paragraph 10.

²⁷ Eircom's Submission, paragraph 5

²⁸ While ComReg is satisfied that the price floor criterion is met, the issues raised in respect of the effectiveness of the price floor are discussed in the assessment of Criterion 4.

²⁹ Oxera Report, paragraph 3.10

³⁰ Eircom CRD 994, p. 4

providing retail products with certain speeds, can equally benefit from the discount irrespective of the specific FTTH wholesale input used.

- (42) Second, there are no explicit volume-based conditions or thresholds pertaining to WN2024-010, which means, as also noted by Eircom and Oxera, that the discount is attainable on each upgraded line, irrespective of the total volume of upgrades. This means all Access Seekers, irrespective of their existing scale, would be able to obtain the €3 monthly discount for each line they upgrade.
- (43) However, the own-customer upgrade restriction within WN2024-010 means that the discount is not available to an Access Seeker that acquires a customer from a rival and, in the process, upgrades them from a copper-based to an FTTH-based product on the Eircom wholesale network. In turn, this means, as noted by Oxera in the Oxera Report, that the degree to which an Access Seeker can benefit from WN2024-010 depends on the size of its copper/FTTC customer base and that Access Seekers without an existing copper or FTTC customer base would not be able to avail of the discount.³¹ In Oxera's view, the own-customer upgrade restriction could have an adverse impact on retail competition by reducing incentives to acquire and upgrade rival customers and thus locking-in existing market shares and thereby protect the market position of Eircom's retail arm.³² The extent that this is so is considered below.

4.2.2 Whether the discount favours Eircom Retail

ComReg's initial assessment in the Consultation that the discount scheme would likely not favour Eircom Retail to a material extent

Effect of the own-customer upgrade restriction

- (44) ComReg noted in Consultation 24/38 that not only could the own-customer upgrade restriction help lock-in existing market shares but, given Eircom Retail's large copper base, it also had the potential to benefit most from the own-customer upgrade restriction. In particular, Eircom Retail could realise the largest total value of cost savings through obtaining the €3 per line monthly discount for upgrading this base of customers. The Oxera Report observed that any savings an Access Seeker achieves due to discounts on wholesale prices could be used to support a more compelling retail offer, either through lower retail prices, or through other non-price improvements that would provide a competitive advantage, all else being equal.³³

³¹ Oxera Report, paragraph 3.14.

³² Oxera Report, paragraph 3.60

³³ Oxera Report, paragraph 3.20

- (45) Furthermore, the own-customer upgrade restriction means an Access Seeker would be able to upgrade its own copper/FTTC customers to an FTTH service on Eircom's network at a €3 per month cost advantage relative to any customers acquired from rivals and upgraded to FTTH. Oxera noted that, at the margin, Access Seekers will, therefore, prefer to upgrade their own copper-based customers over seeking to 'win and upgrade' a rival's copper-based customer, given they will get a discount on the wholesale FTTH service for the former, but not the latter. The fact that Eircom Retail has a much larger copper-based broadband base compared to its rivals means that any dampening of retail competition between Access Seekers for the upgrade of copper-based customers arising from the own-customer upgrade restriction could be of greater benefit to Eircom's retail arm.³⁴
- (46) ComReg noted that Eircom offered no clear rationale for restricting the discount to own-customer upgrades. Eircom's Notification for WN2024-010 stated that the restriction would facilitate planning and managing the migration to FTTH and that the discount structure sought to incentivise Access Seekers to proactively upgrade their own copper/FTTC base. Prior to the Consultation although Eircom had indicated that Access Seekers favoured upgrading to FTTH, copper-based customers gained from other operators, actual data held by ComReg separately showed that the majority of upgrades to FTTH currently were in fact own-customer upgrades. When ComReg gave Eircom an opportunity to comment on what data held by ComReg showed, Eircom did not dispute that this was the case but noted that nevertheless the Offer will specifically encourage operators to upgrade their existing base from copper to fibre. Eircom also stated that, in future, other promotions and discounts could be devised which encourage FTTH growth among retailers in different ways.
- (47) Accordingly, the structure of WN2024-010, whereby the discount is limited to own-customer upgrades, may in effect, favour Eircom's retail arm, contrary to the requirement of the second criterion, in the Consultation, ComReg proposed to find that any such advantage was not material, for the following reasons.
- (48) First, a significant proportion of the active copper base has yet to be passed by Eircom's FTTH network. The own-customer upgrade restriction is no impediment to Access Seekers competing, including competing with Eircom Retail, for those customers and could provide an incentive to Access Seekers to increase their share of this copper base, so that they can avail of the discount in the future when the customer's premises is passed by Eircom's FTTH network.

³⁴ Oxera Report, paragraph 3.18

- (49) To illustrate this, ComReg noted that Eircom's Q4-2023 results presentation indicates that there were 452k active FTTC lines as of Q4-2023³⁵, while 932k premises were passed by FTTC only, which is down from the 1.5m premises that were passed by FTTC only in Q4 2019.³⁶ According to Eircom's own publications, as of Q1 2024 active FTTC lines stand at 428k,³⁷ and 0.9m premises were passed by FTTC only.³⁸
- (50) This indicates that Eircom's active FTTC customers are contained within a 1.5m FTTC premises footprint, the majority of which have still to be passed by Eircom's FTTH network. Indeed, ComReg's analysis of the available Eircode data shows that less than 40% of active FTTC lines were passed by Eircom's FTTH network at the end Q4-2023 (still less than 40% as at Q1 2024). It will also take Eircom a number of years to pass the remaining 60% (in recent years Eircom has been passing circa 200k premises annually with FTTH). Hence, a significant proportion of the existing active FTTC base (possibly more than 50%) will still not be passed by Eircom's FTTH network at the time WN2024-010 is proposed to commence and, for a period, retail competition will continue to be based on FTTC for this cohort of customers.
- (51) In summary, while the own-customer upgrade restriction may dampen retail competition for those active FTTC lines that are passed by Eircom's FTTH network, 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.
- (52) Second, Oxera assessed the potential wholesale cost saving per line that could be achieved by each major Access Seeker (including Eircom's retail arm), assuming that Access Seekers distribute the total value of cost savings generated on upgraded lines across their entire FTTH customer base at the retail level (including upgraded and existing FTTH lines)³⁹.
- (53) In undertaking the analysis Oxera recognised that the pace of Eircom's overlay of FTTC with FTTH will impact an Access Seeker's ability to avail of the discount, as Eircom cannot upgrade a line to FTTH until it has passed the associated premises

³⁵ [PowerPoint Presentation \(eir.ie\)](#), hereafter, referred to as the 'Eircom Q4-2023 Results', slide 6.

³⁶ Eircom Q4-2023 Results, slide 7.

³⁷ [PowerPoint Presentation \(eir.ie\)](#), hereafter, referred to as the 'Eircom Q1-2024 Results', slide 6.

³⁸ Eircom Q1-2024 Results', slide 7.

³⁹For example, suppose that an Access Seeker has a 50:50 mix of copper/FTTC and FTTH lines in their portfolio and, if they upgrade all remaining copper/FTTC customers to FTTH (50% of its base) it can achieve a discount of €3 for each of these customers. If these cost savings are passed through to retail prices on a nation-wide basis across all FTTH lines regardless of whether a specific line was in receipt of a wholesale discount, then each Access Seeker could offer an average retail price reduction across all FTTH lines of €1.50 (50%*€3).

with FTTH. As noted above, it will be a number of years before many active FTTC customers are passed by Eircom's FTTH network. It is also the case, that some active CGA lines will never be passed by Eircom's FTTH network as they are located in the Intervention Area, and outside Eircom's planned FTTH footprint. Oxera's analysis has allowed for these factors in the range of plausible Eircom FTTH overlay scenarios that could pertain at different stages over the next 3 years.

- (54) This analysis allowed for the fact that the potential cost advantage one Access Seeker can achieve relative to another depends not just on its mix of existing lines on copper/FTTC as against those it has on FTTH across all network operators (including Eircom's FTTH network), but also on the share of each Access Seeker's copper/FTTC base that could feasibly be upgraded at different periods within the three-year window of the offer. Oxera's analysis⁴⁰ indicates that, if no cap is applied to the number of upgraded copper-based lines for which Eircom Retail can receive a discount, Eircom Retail may realise a higher average cost saving per FTTH line across its FTTH portfolio than could possibly be attained by its main retail rivals⁴¹. In the 100% upgradable base scenario, the application of Eircom's cap will mean that Eircom achieves broadly the same average cost savings as Sky and Vodafone. Below 100% Eircom's cap will not prevent Eircom Retail from realising higher average cost savings. Given Eircom's rollout target, it is unlikely to reach the 100% level of coverage (outside the NBP IA) before 2026 and Eircom is likely to have an advantage over other retailers for the majority of the period for which the discount will be available.⁴²
- (55) In the compliance statement included as part of WN2024-010, Eircom recognised that its position as having the largest FTTC retail base could provide its downstream arm with an advantage relative to other Access Seekers. To address this, Eircom capped the number of Eircom Retail FTTC lines that are eligible for the discount. Eircom stated:

"This cap is specifically set at 1.32 times the size of the second-largest FTTC customer base within eir's wholesale network as of December 2023. As a result, although eir retail currently serves [X ██████████ X] FTTC customers,

⁴⁰ Oxera's analysis considers 2 FTTH overlay scenarios: 100% scenario based Eircom completing all of its planned FTTH overlay; and a 69% scenario based on the % of national premises outside of the NBP IA currently covered by Eircom's FTTH network (as per Q4 2023).

⁴¹ Oxera Report, paragraph 3.38

⁴² Almost two-and-a-half years out of a maximum of three years, assuming the discount comes into effect in August 2024 and Eircom's FTTH rollout is not completed until the end of 2026.

the number of customers eligible for this promotion is limited to [redacted] 43.

(56) Eircom also stated:

“The selection of a 1.32 multiplier is a deliberate, proportional approach to structuring incentives for network upgrades...By basing the cap on the customer base size of the second-largest FTTC provider and then applying this multiplier, we mitigate any potential undue competitive advantage that Eircom Retail might have from its substantial FTTC customer base. Hence this approach promotes fair competition and establishes a level playing field, ensuring that the benefits of network upgrades are accessible in a balanced and equitable manner across the industry.”⁴⁴

(57) There is no equivalent cap proposed for other copper-based services (such as CGA) which Eircom justified by reference to “*the distinct market conditions and competitive dynamics associated with these services*”⁴⁵. These included the fact that CGA is characterised by declining demand and reduced strategic importance for investment by operators, including Eircom. Eircom also noted that placing a cap on CGA would be ineffective in assisting planning and managing the migration of the Operator's existing CGA subscribers to FTTH as CGA services are available throughout Ireland and include the Intervention Area.

(58) However, having considered these points, ComReg noted that:

- both FTTC and CGA broadband are technologies characterised by declining demand and reduced strategic importance for investment by operators;
- planning and managing the migration of CGA is likely to be similar to planning and managing the migration of FTTC. Before upgrading a line from copper to FTTH an Access Seeker needs to know the Eircode of the premise that it wishes to upgrade so it can use this Eircode to establish if it is passed by Eircom's FTTH network and/or another commercial operator's FTTH network, or if it will only be passed by NBI's FTTH.

(59) Therefore, Eircom Retail could also favourably benefit from having the largest volume of active CGA lines, so any assessment of the potential benefit to Eircom Retail has to consider the possible extent that the proposed FTTC cap might mitigate any

⁴³ Eircom CRD 994, p. 4

⁴⁴ Eircom CRD 994, p. 4

⁴⁵ Open Eir's response of 21 March 2024 to ComReg's queries sent on 15 March 2024 in relation to Wholesale Notification 2024-010 (WN2024-010), p. 2. Hereafter referred to as 'Eircom Clarifications'.

potential undue competitive advantage that Eircom Retail’s larger share of both the FTTC and CGA base might engender.

- (60) ComReg proposed also that the relative benefit of WN2024-010 could be measured by calculating the total discount achieved by each Access Seeker and dividing this total by the number of its FTTH customers, as this may translate into average price reductions or improved retail offerings of the same magnitude. The following table uses “dummy data” to indicate how the average benefit that could be achieved by two Access Seekers with different customer profiles might compare when each Access Seeker achieves the same customer upgrades percentages.

Table 1 – Potential marginal benefit by upgrade scenario


	Existing Copper Base	Existing FTTP Base	% Copper upgraded	Upgraded copper lines	Upgrades eligible for discount	Monthly Savings (€3 per eligible upgrade)	FTTH base after upgrades	Average cost saving per FTTH line €	Marginal Benefit €
Passed base									
Access Seeker A	110,000	50,000	69%	75,900	75,900	227,700	125,900	€ 1.81	
Access Seeker B	75,000	52,500	69%	51,750	51,750	155,250	104,250	€ 1.49	€ 0.32
No Cap									
Access Seeker A	110,000	50,000	100%	110,000	110,000	330,000	160,000	€ 2.06	
Access Seeker B	75,000	52,500	100%	75,000	75,000	225,000	127,500	€ 1.76	€ 0.30
94k cap on A									
Access Seeker A	110,000	50,000	100%	110,000	94,000	282,000	160,000	€ 1.76	
Access Seeker B	75,000	52,500	100%	75,000	75,000	225,000	127,500	€ 1.76	€ (0.00)

- (61) As copper-based services account for a higher proportion of the existing customer base of ‘Access Seeker A’, it can derive a marginal benefit from WN2024-010 relative to ‘Access Seeker B’. In this example, implementing a 94k cap on ‘Access Seeker A’ would effectively eliminate the marginal benefit if both Access Seekers were able to upgrade 100% of their copper base to FTTH. However, the cap is not effective in the 69% upgrade scenario, as the total number of upgrades achieved by ‘Access Seeker A’ under this scenario is less than the 94k cap.

- (62) Oxera undertook similar analysis using Q4 2023 customer data for Eircom Retail and the two largest rival Access Seekers. Oxera’s analysis indicated that, in the 100% upgradable base scenario, the cap set by Eircom as detailed in WN2024-010 does limit the estimated average benefit to a broadly equivalent level for all three Access Seekers. However, in any scenario where the upgradable FTTC base is below [X] % of total FTTC and CGA copper lines (outside the NBP IA), the

implementation of the cap does not limit Eircom's average cost savings⁴⁶. In between these two scenarios, it can be shown that the cap does reduce the average cost savings to Eircom Retail, but these could continue to exceed those that might be attainable by its main retail rivals, were each Access Seeker to upgrade all of its eligible copper base (after allowing for CGA presence in the Intervention Area) to Eircom's FTTH⁴⁷.

- (63) Consequently, Oxera concluded that *“the cap proposed by Eircom does not provide sufficient assurances to eliminate the concern that Eircom's retail arm would gain an advantage. As such, 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.”*⁴⁸
- (64) However, while ComReg agreed with Oxera's findings that WN2024-010 may give Eircom Retail a marginal benefit of up to 32 cents per FTTH line in some upgrade scenarios, ComReg did not consider this to be material when compared to the prevailing level of Retail FTTH Prices. For example, Eircom Retail offered an ‘up to 500Mb’ broadband product on a 12-month contract for €34.99.⁴⁹ The estimated marginal benefit that Eircom Retail might derive in any month in that case would be circa 1% of the discounted retail price. This materiality would be even less if compared against Eircom's undiscounted Retail FTTH price for this product of €74.99.
- (65) ComReg also noted that Oxera's analysis relied on simplified assumptions, such as assuming that each Access Seeker could upgrade all of its existing copper base that is passed by Eircom's FTTH network in each scenario, and that Access Seekers will only upgrade that copper base to Eircom's FTTH network. However, there are factors other than the extent of Eircom's FTTH overlay that can affect an Access Seeker's ability to upgrade its existing copper base. For example, it is unlikely that an Access Seeker will be able to persuade all its customers to upgrade from copper to FTTH. In addition, Access Seekers can opt for an FTTH service provided by a non-Eircom FTTH network. As a result, the competitive advantage that Eircom Retail can actually realise from WN2024-010 may be less than Oxera's analysis suggests.

⁴⁶ This is because the number of eligible lines under the cap represents [\times  \times] % of Eircom's total FTTC base. Therefore, below this level, the cap does not bite.

⁴⁷ Oxera Report, paragraphs 3.30 – 3.37.

⁴⁸ Oxera Report, paragraph 3.38

⁴⁹ See, <https://www.eir.ie/shop/broadband>, accessed 02/05/2024.

- (66) ComReg proposed that the second criterion was met, on the basis that the advantage to Eircom Retail was not material and would not as such impact competition in the market, and subject to that advantage remaining immaterial for all the time that WN2024-010 would be in place.
- (67) ComReg noted that Eircom Retail's ability to leverage the cost savings from wholesale discounts into lower retail prices for FTTH, was ultimately dependent on the level of wholesale discounts included as part of the wholesale network input costs that are modelled in the FTTP Margin Squeeze Test (FTTP MST) so that the FTTP MST could be used also to monitor the materiality of any advantage arising to Eircom Retail from the Offer.
- (68) In particular, under Decision D05/24, the FTTP MST is used to monitor Eircom's obligation not to cause a margin squeeze between its FTTH retail prices (including retail discounts) and the prices/costs of the Wholesale Network Inputs (including wholesale discounts) used in the provision of those FTTH services⁵⁰. The FTTP MST is forward looking and is based on forecasts of costs and revenues. The forecasted Wholesale Network Input ('WNI') for FTTH VUA, which is the primary component of the level of wholesale costs in the FTTP MST, is based "*on the forecasted monthly price (based on Eircom's published reference offers) less the forecasted wholesale discounts provided to the retail arm of Eircom for FTTP VUA (for each month of the ACL)*"⁵¹. The FTTP MST also uses an Average Customer Life of 42 months.
- (69) This means that the forecast costs and revenues in the FTTP MST will always consider a period that exceeds the maximum 3 year term of WN2024-010, and that the forecast of wholesale discounts in the FTTP MST will consider the longer time period of the ACL and the pace of own-customer upgrades that Eircom Retail might be expected to achieve across that time period. For example, an FTTP MST submitted in early 2025 will be based on forecasts covering a period up to late 2029, which is a couple of years after Eircom's planned FTTH overlay is expected to be completed and is also a period when the 3 year life of the WN2024-010 discounts will have expired. The FTTP MST also has to consider factors affecting upgrade rates other than the degree of FTTH overlay, such as the willingness of FTTC customers to upgrade to FTTH and the level of churn between rival Access Seekers.

⁵⁰ "A margin squeeze occurs when an SMP SP, active in both the wholesale and retail markets, sets prices in such a way as to prevent an RSP from replicating the retail service provided by the SMP SP at the same price (which covers its downstream costs and generates a profit)". Paragraph 9.574, ComReg Decision D05/24.

⁵¹ ComReg Decision D05/24, Table 81, p. 651.

(70) As such, ComReg considered that the FTTP MST provided the means to check at all times that the forecast wholesale discounts in future FTTP MST models would not reflect a material advantage to Eircom Retail and more particularly, that the forecast of average wholesale discounts across the 42 months of the ACL for Eircom Retail could be attained by a rival Access Seeker with a smaller copper base than Eircom Retail's across the same period.

Form

(71) As regards the potential for the 'form' of WN2024-010 to favour Eircom's Retail arm by dampening retail competition and consequentially locking-in existing retail fixed broadband market shares, ComReg, in Consultation 24/38, noted that not only the prospect of the own-customer upgrade restriction could potentially incentivise retail competition for customers that have an active copper line but are not yet passed by Eircom FTTH, but that Eircode data indicated that a significant cohort of the active VDSL premises that are upgradeable to FTTH are passed by network operators other than Eircom⁵². As such, any reduction on retail competition relying on wholesale access on Eircom's network may be compensated for by increased retail competition across all networks. In other words, any potential advantage to Eircom Retail from the restriction to own-customer upgrades on the Eircom network, may be lessened by the fact that Access Seekers would have, in a significant number of cases, the option to use a wholesale FTTH provider other than Eircom. This option would become more widespread as SIRO extends its FTTH network footprint and VMI continues to overlay its cable network with FTTH and so increase the potential for retail competition.

(72) Therefore, ComReg did not expect that the 'form' of WN2024-010 would restrict retail competition to an extent that would provide a material benefit that favours Eircom's retail arm.

(73) On this basis, ComReg proposed to make a finding that the second criterion was met, and in order to ensure that this remains the case throughout the lifetime of WN2024-010 ComReg proposed to monitor that no material advantage accrues to Eircom Retail using the FTTP MST model. In particular ComReg proposed to require Eircom to ensure that the forecast of average wholesale discounts across the 42 months of the ACL for Eircom Retail used in the FTTP MST model can be attained by a rival Access Seeker with a smaller copper base than Eircom Retail's across the same period.

⁵² For example, SIRO FTTH is estimated to be available at [redacted] % of the Eircodes with an active Eircom Retail FTTC line (Q1 2024).

ComReg's re-consideration of whether WN2024-010 would favour Eircom Retail in light of the Respondents' Submissions

- (74) ComReg's proposal to consider that Criterion 2 was met on the basis that Eircom ensures that the advantage to Eircom Retail remained immaterial was opposed by all Respondents.
- (75) All Respondents save Eircom were of the view that Criterion 2 should not be found to be met where the structure of the discount, in the form of the own-customer upgrade restriction and in circumstances where Eircom had provided no pro-competitive justification for it, did give an advantage to Eircom Retail which was not addressed by the cap offered by Eircom. Respondents such as Vodafone and Sky, who are wholesale customers of Eircom and which would be expected to benefit (through lower prices) from WN2024-010, were particularly concerned that the scheme locked-in market shares; respondents were also dubious that WN2024-010 would encourage copper to fibre migration. Eircom disagreed with the analysis underpinning the finding of an advantage and opposed, on a number of grounds of both a legal and practical nature, the requirement that it ensures that the advantage does not translate into a cost benefit to Eircom.
- (76) Taking into account all Respondents' submissions, ComReg has reconsidered its position in respect of Criterion 2. Submissions from RSPs indicate that reducing the advantage to Eircom Retail to a cost difference per FTTH line per operator, as per the analysis underpinning ComReg's assessment of Criterion 2 in the Consultation, does not capture the reduction in competition intensity arising from limiting the discount's availability to a customer's existing retailer. In particular, the effect of the restriction is to incentivise retailers to focus on upgrading their own customer base so that end-users are "locked-in" to their existing retailers. This, in turn, favours Eircom Retail, given its larger copper-based customer base. This advantage to Eircom Retail, which extends beyond a higher average cost saving per FTTH line for Eircom, is not compensated by any identifiable pro-competitive benefits, and is not adequately addressed by the cap set by Eircom, or through the FTTP MST. In particular, the "lock-in" of existing customers as a result of the own-customer upgrade restriction will not be sufficiently mitigated by network competition where Eircom Retail's competitors choose a non-Eircom service (for example at Q1 2024 only [X] % of the active FTTC base was passed by a non-Eircom FTTH service). As Eircom's FTTH rollout continues the "lock-in" effect will also not be sufficiently mitigated by any increased competition on Eircom's network where Eircom Retail's competitors "win" an end user to FTTC before Eircom's FTTH network passes and subsequently migrate that customer to FTTH. As such, ComReg is not in the position to approve the discount scheme. In particular, ComReg is not satisfied, *ex ante*, that WN2024-010 does not favour Eircom Retail contrary to the requirement at section

14.10.2 of the Decision Instrument in Decision D05/24. This is explained in detail below.

Own-customer upgrade restriction favours Eircom Retail and has no pro-competitive rationale

- (77) Save for Eircom, all Respondents were concerned that, in the absence of any other rationale for it, the own-customer upgrade restriction only served to reduce competition in the retail market and they strongly disagreed that the discount scheme would not favour Eircom's retail arm. In particular, SIRO, Sky and VMI emphasised that in the absence of a pro-competitive rationale, the own-customer restriction could only be considered to be designed to give an advantage to Eircom Retail and Vodafone pointed to the competition distortion brought about by the restriction.
- (78) Vodafone emphasised that the restriction "*distorts competition by providing greater benefits to operators that have a larger retail copper customer base*" including because it "*has the impact of 'locking' in copper customers to their existing retailer during and after the FTTH upgrade*".⁵³ SIRO was of the view that "ComReg's assessment that the advantage to Eircom Retail is immaterial is... inaccurate and underestimates the potential for competitive harm"⁵⁴, on the basis that "*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*", a point also made by VMI.⁵⁵ For SIRO, the "*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*"- Eircom Retail would be "*the least successful in upgrading their customer lines to FTTH*" and in this context, "*[t]he 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*."⁵⁶ SPC Network also pointed out that "*As Eircom has the smallest proportion of FTTH customers, the proposed scheme discriminates in favour of Eircom*".⁵⁷
- (79) For Sky the own-customer upgrade restriction meant that it would "*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...*". As there was "*no clear pro-competitive rationale provided for this limitation*", it

⁵³ Vodafone's Submission, p. 5.

⁵⁴ SIRO's Submission, p. 2.

⁵⁵ VMI's Submission, p. 5.

⁵⁶ SIRO's Submission, p. 6.

⁵⁷ SPC Network Report, p. 4, paragraph 3.

followed, in Sky's view, 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"*.⁵⁸ Vodafone was also of the view that the own-customer upgrade restriction *"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."*⁵⁹

- (80) ComReg notes in this regard that Eircom's Submission provides no further insight into the rationale for the own-customer upgrade restriction and does not point to any pro-competitive rationale that would allow dispelling, or mitigating, the concerns expressed by the other Respondents as regards the anti-competitive effects of the discount scheme arising from its structure. While Eircom provided data on FTTC to FTTH upgrades from October 2023 to April 2024 suggesting that this data *"clearly demonstrates that the network upgrade rate for all providers [redacted], [redacted] is very low and [redacted] [redacted]"*,⁶⁰ SIRO's Submission notes that *"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"*⁶¹. ComReg notes that Eircom calculated the FTTC upgrade percentages for this 6 month period with reference to the total FTTC base, thereby understating the relevant upgrade rate given the large volume of active FTTC premises⁶² that have still to be passed by Eircom's FTTH network at this time.
- (81) The data provided by Eircom in its Submission⁶³ in any event does not justify the own-customer upgrade restriction as it indicates that an Access Seeker is more than [redacted] likely to have upgraded its own customer to FTTH than upgrade a customer acquired from another Access Seeker. Other data provided by Eircom on FTTC base movements from 2022, which indicated that FTTC upgrades to Eircom FTTH were more often the result of migrations (i.e. wins and upgrades) from other Access Seekers as opposed to own-customer upgrades. However, the upgrade rates highlighted in Eircom's 2022 FTTC data are not consistent with ComReg's analysis

⁵⁸ Sky's Submission, p. 3.

⁵⁹ Vodafone's Submission, p. 5.

⁶⁰ Eircom's Submission, paragraph 4.

⁶¹ SIRO's Submission, p. 2.

⁶² As noted in paragraph (50) circa 60% of active FTTC lines are not passed by Eircom FTTH as at Q1 2024.

⁶³ Table 1, Eircom's Submission, p. 5.

of the 2022 QKDR FTTC data, which shows that a significant majority of FTTC to FTTP transitions were the result of own-customer upgrades.

- (82) Yet, even if Eircom had interpreted the 2022 data as suggesting that Access Seekers were less likely to upgrade their own base to Eircom FTTH in 2022, this is clearly not the case by late 2023. Eircom says that “*open eir operates in a dynamic market place*”, but the discount scheme does not appear to have been designed based on up-to-date market data. As Sky notes, “*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.*”⁶⁴ And Vodafone makes the point that it is “*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.*”⁶⁵
- (83) In other words, the same discount scheme without the own-customer upgrade restriction would better incentivise copper to fibre transition by encouraging Access Seekers to upgrade the customers it acquires from rivals. Both SIRO and Sky make the point that the own-customer upgrade restriction could actually prolong copper to fibre transition as it would encourage Access Seekers to keep customers on legacy products when switching and then, at a later stage, seek to upgrade them to FTTH when they can avail of the own-customer upgrade discount⁶⁶. Sky observes that “*This is both highly inefficient and will inevitably result in a slower CSO process than in the alternative scenario where the offer was not restricted to retail operators existing customers.*”⁶⁷
- (84) In light of this, Eircom’s claim that the “*proposed FTTH discount is a strategic test of a useful tool for eir to use ... within the confines of pricing obligations under D05/24, to incentivise larger migrations to FTTH in the future*”⁶⁸ appears to apply only to migrations for the benefit of Eircom Retail in that it is designed to incentivise own-customer upgrades at a time when RSPs are already actively upgrading their own base. Eircom’s indication that it intends “*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*”⁶⁹ is not a justification for the own-customer

⁶⁴ Sky’s Submission, p. 3.

⁶⁵ Vodafone’s Submission, p. 2.

⁶⁶For example, see SIRO’s Submission, p. 5 (Straw-man Copper Orders) and Sky’s Submission, p. 2.

⁶⁷ Sky’s Submission, p. 2.

⁶⁸ Eircom’s Submission, p. 8, paragraph 8.

⁶⁹ Eircom’s Submission, p. 3.

upgrade restriction contained in WN2024-010. Indeed, a discount scheme without the own-customer upgrade restriction so that wholesale customers who win and upgrade a rival RSP's copper customer also benefit from a discount would better incentivise migrations to FTTH.

- (85) Nonetheless, Eircom's submissions take issue with ComReg, and Oxera, finding that the own-customer upgrade restriction in the discount scheme provides an advantage to Eircom Retail, on the basis that the assessment underpinning this finding is not "*guided by the principles of competition law*" which "*failure results in an over-emphasis of the term "advantage" in its broadest sense*", and "*over-simplified statements of potential advantage and potential harm*"⁷⁰. The core of Eircom's position appears to be that had ComReg and Oxera assessed the discount scheme "*guided by competition law principles*", they could not have concluded that there was an advantage to Eircom Retail.⁷¹
- (86) Among others, Eircom suggests that ComReg's and Oxera's assessments ignore the requirement under competition law that Eircom Retail would "*need to be dominant in the retail broadband market*"⁷² and do not take into account important market characteristics including that there are three parties in the supply chain including a broadband wholesaler (open eir) offering FTTH to retailers who in turn offer it to end-users, who would have "*countervailing buyer power*" and the freedom to switch retail providers, and that Eircom faces competition from alternative infrastructure providers as infrastructure provider and broadband wholesaler and retailer.⁷³ Eircom appears to contend that the measure of a retailer's incentive to acquire new or upgrade existing customers is best assessed by reference to the margins available to an "*equally efficient operator*", which it says are largely sufficient, and whether a retailer is "*guaranteed*" to persuade an end-user to take up an offer. On the basis that "*it is not guaranteed that a Retailer including eir Retail will persuade its customers to move and qualify for each line in their respective base as the End-user still has the ultimate choice of retailers and service offerings*", Eircom believes that market outcomes will be as a result of competition and the fact that some end-users may receive "*a better value proposition*" in the short term is not in issue given that they remain contestable.⁷⁴

⁷⁰ Eircom's Submission, p. 1.

⁷¹ Eircom's Submission, p. 8, paragraph 15.

⁷² Eircom's Submission, paragraph 19.

⁷³ Eircom's Submission, paragraphs 22-23.

⁷⁴ Eircom's Submission, paragraphs 26-28.

- (87) However, an assessment guided by competition law principles does not mean, contrary to what Eircom appears at times to contend in its Submissions, that competition law, rather than the ex-ante regulatory framework, applies; even accepting Eircom's proposition that competition law would require ComReg to prove that Eircom is dominant in the retail broadband market before addressing the impact of a wholesale discount scheme, which is not necessarily correct in all circumstances, there is simply no requirement arising under Decision D05/24 that identifying an advantage to Eircom Retail would require first ComReg to establish under competition law that Eircom Retail is dominant.
- (88) It is true, as acknowledged by Oxera and ComReg in Consultation 24/38, that there are indeed several retail operators with varying market shares and offerings, and end users have the freedom to switch providers based on their own preferences. However, competition law principles do not mean that, and Eircom's Submissions do not in any way explain how, these market characteristics would mean that the own-customer upgrade restriction does not provide an advantage to Eircom Retail. Eircom ignores the fact that the own-customer upgrade restriction in the discount scheme would place Eircom, the vertically integrated operator designated with Significant Market Power upstream, in the position to reserve to itself the ability to make "*a better value proposition*" to the largest cohort of customers on its network by denying availability of a discount to those retailers using its network to compete with its retail arm. Indeed, the EC Gigabit Recommendation stipulates that pricing flexibility for FTTH should be accompanied by additional safeguards to protect competition. These safeguards include the need to ensure that discounts offered by an SMP operator to its retail arm do not exceed the discounts offered to third party access seekers⁷⁵.
- (89) No competition law principle supports the proposition that no advantage can arise to Eircom because end-users may switch retailers and that this gives them "countervailing buyer power". Countervailing buyer power in a competition law context means that an undertaking with a high market share is not able to act to an appreciable extent independently of customers as a result of them having sufficient bargaining strength owing to the customers' size or their commercial significance for the dominant undertaking, and their ability to switch quickly to competing suppliers, to promote new entry or to vertically integrate, and to credibly threaten to do so.⁷⁶ Consumers of mass-market broadband access products do not have "countervailing buyer power".

⁷⁵ 2024 Gigabit Recommendation (recital 59)

⁷⁶ European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJEC [2009] C45/02, paragraph 18.

(90) Finally, ComReg notes that competition law principles would include the principle of objective justification of conduct restrictive of competition, so that a practice with exclusionary effect would lead to a finding of an abuse where there is no objective necessity for the behaviour. While “*the principles of objective justification and proportionality are firmly part of Article 102 analysis*”,⁷⁷ Eircom has not furnished any credible justification for the own-customer upgrade restriction.

(91) ComReg accordingly remains of the view that the discount scheme, as structured, gives an advantage to Eircom Retail. ComReg also notes that Eircom's submission that there is no advantage are at odds with its explanation for the cap included in the discount scheme. In particular, the pricing statement of compliance included as part of WN2024-010 makes it clear that the cap proposed by Eircom is to address “*any potential undue competitive advantage that eir retail might have from its substantial FTTC customer base*”.⁷⁸

The cap does not mitigate the advantage to Eircom Retail and the FTTP MST provides no valid alternative

(92) There was generally agreement in the Submissions to Consultation that the cap included as part of WN2024-010 would not “*mitigate any potential undue competitive advantage that eir retail might have from its substantial FTTC customer base*” as contended by Eircom.

(93) Vodafone noted that the specific design of the cap means that the own-customer upgrade restriction will still favour Eircom Retail for a number of reasons:

- “*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.*”⁷⁹

⁷⁷ R. Wish and D. Bailey, *Competition Law*, 10th edition, Oxford University Press, p. 220. ComReg also notes Part III, Section D of the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings.

⁷⁸ Pricing Statement of Compliance for CRD 994, p. 4.

⁷⁹ Vodafone's Submission, p. 7.

- (94) SIRO made similar points noting that Eircom's 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, particularly during the years when a substantial proportion of the FTTC base has yet to be passed by Eircom's FTTH network as the cap "*does not account for the fact that not all FTTC lines will be upgraded to FTTH within the timeframe of the offer*". The fact that the cap only applies to FTTC lines and not to CGA lines could also allow Eircom Retail to potentially exploit its large CGA customer base without similar restrictions. As a result, "*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.*"⁸⁰
- (95) Sky agreed that "*the cap on Eir is not sufficient*"⁸¹, while for VMI, the cap proposed by Eircom "*does not work*".⁸² Analysis undertaken by SPC Network showed that the multiplier that informs the level of the cap on Eircom Retail would need to be reduced from 1.32 times the second largest operator's FTTC base to 0.55 to ensure an equivalent average discount per line for Eircom Retail and its main retail competitors.⁸³
- (96) Eircom's Submissions did not address the substance of ComReg's assessment that the cap in the discount scheme was ineffective in addressing the advantage that would benefit Eircom Retail. According to Eircom, it proposed the cap in WN2024-010 on the basis of comments offered by ComReg in 2023, when Eircom had notified a similar discount offer, that the offer could not be approved unless it included a cap on the discounts for Eircom Retail such that the scheme does not favour it compared to other RSPs.⁸⁴ Eircom submitted that it "*fully took on board*" ComReg's comments by including such a cap in this offer, and "*the introduction of the cap by open eir (which only applies to eir Retail) means that Eircom Retail's full base will never qualify even at the outset.*"⁸⁵ For the avoidance of doubt, the reason that Eircom Retail's full base cannot avail of the offer at the outset is not the cap but rather, the fact that a significant percentage of active FTTC premises will not have been passed by Eircom's FTTH network at the outset of the offer. ComReg estimates that only [REDACTED] of premises with an active VDSL line were passed by Eircom's FTTH

⁸⁰ SIRO's Submission, p. 3.

⁸¹ Sky's Submission, p. 3.

⁸² VMI's Submission, p. 5.

⁸³ SPC Network's Report for VMI, p. 7, paragraph 32.

⁸⁴ Eircom's Submission, p. 3.

⁸⁵ Eircom's Submission, p. 12, paragraph 27.

network based on analysis of 2024 Q1 Eircode data. Indeed, it is possible that, even by the end of the offer, the cap may not bite as all FTTC premises might not be passed by Eircom's FTTH deployment within the next 3 years.⁸⁶

- (97) Absent an effective cap, ComReg proposed in the Consultation, on the basis that the relative benefit of WN2024-010 can be measured by calculating the total discount achieved by each Access Seeker and dividing this total by the number of its FTTH customers, as this may translate into average price reductions or improved retail offerings of the same magnitude, to use the FTTP MST to check at all times that forecast wholesale discounts do not reflect a material advantage to Eircom Retail. More particularly this would involve establishing that the forecast of average wholesale discounts across the 42 months of the ACL for Eircom Retail could be attained by a rival Access Seeker with a smaller copper base than Eircom Retail's across the same period, thereby eliminating any potential financial benefit to Eircom Retail over the lifetime of the offer.⁸⁷
- (98) Respondents other than Eircom did not make submissions as regards the mechanism proposed by ComReg to monitor that the advantage to Eircom Retail would remain immaterial through the application of the FTTP MST (they being of the view that the discount should not be approved at all). SIRO however noted the proposed requirement that the average wholesale discount does not provide material advantage to Eircom Retail was vague (a point also made by Eircom) and that "*clearer guidelines and robust monitoring mechanisms are need for transparency and to ensure compliance and prevent any unintended competitive distortions*".⁸⁸ This would include monitoring the own-customer upgrade restriction which would involve "*monitoring migrations, conducting random audits, and analysing migration data to prevent and detect fraudulent activities*" and verifying that the own-customer upgrade involves the same customer, operator, and physical premises.⁸⁹
- (99) Eircom made extensive submissions on ComReg's proposal to require that Eircom establish that the forecast of average wholesale discounts across the 42 months of

⁸⁶ Eircom reported 0.9m FTTC only premises in Q1 2024, having passed 190k premises with FTTH YoY, which suggest that overlay of FTTC with FTTH will not be complete in the next four years. See: [eir Q1-24 results presentation](#), p. 7.

⁸⁷ In the 2024 Gigabit Recommendation (recital 59), the European Commission recommends that NRAs should only accept discounts that "*do not foreclose market entry for efficient competitors (including infrastructure competition) and do not undermine the existing market position of efficient competitors. That is the case where the volume discounts and long-term access-pricing agreements offered by an SMP operator to its retail arm do not exceed the discount, or where the agreements are no better than those offered in good faith to third party access seekers.*"

⁸⁸ SIRO's Submission, p. 4.

⁸⁹ SIRO's Submission, p. 5.

the Average Customer Life for Eircom Retail could be attained by an Access Seeker with a smaller copper base across the same period. In particular, Eircom opposed any requirement to monitor the extent of the advantage to Eircom Retail arising from the own-customer restriction on the basis that ComReg has no legal basis for the imposition of such a condition; that the FTTP MST is not an appropriate benchmark; the purpose of the obligation is unclear given that ComReg is satisfied that there is no material advantage to Eircom and ComReg is better placed to monitor developments in the retail market.⁹⁰ The issues raised by Eircom are considered below.

(100) First, the purpose of requiring Eircom to control for the effect of the discount scheme through the FTTP MST was to allow Eircom to launch the discount scheme (having regard to the benefits of the scheme as they appeared to ComReg at the time of the Consultation) while mitigating competitive distortions by ensuring that the discount scheme would not result in a financial advantage or cost benefit to Eircom Retail as compared to its smaller retailer rivals. ComReg envisaged that this requirement would have acted as a substitute for an effective cap on the number of Eircom Retail customers which could benefit from the discount. This was on the basis that the factors that Eircom would have had to consider in determining the average level of discounts in the FTTP MST are similar to the factors that would need to be taken into consideration in order to arrive at an effective cap, that is, a cap that can “*mitigate any potential undue competitive advantage that eir retail might have from its substantial FTTC customer base*” as Eircom states in its pricing statement of compliance. In particular, to design a cap capable to mitigate any potential undue competitive advantage that Eircom Retail might have from its substantial FTTC customer base, an estimate of the level of benefits that can be attained by other Access Seekers over the lifetime of WN2024-010 will need to be calculated.⁹¹

(101) Those factors include:

- the size of rival Access Seekers' copper base relative to Eircom Retail's copper base;
- the extent that the active copper base is currently passed by Eircom's FTTH network and how this is likely to affect the rate of copper upgrades in the early months of the offer;
- how future FTTH overlay is likely to affect upgrade rates over the duration of the offer;

⁹⁰ Eircom's Submission, p. 15-20, paragraphs 39 to 50.

⁹¹ As such, Eircom's position that it is not possible for it to estimate the average discount that could be attained by an Access Seeker over the lifetime of the offer calls into question the basis for, and the credibility of, the cap proposed by Eircom.

- estimates of the potential cost savings arising from the discount for other Access Seekers relative to Eircom Retail; and
- The average cost of those savings when applied across the other Access Seeker's broadband base.

(102) Second, as regards the practical difficulties or issues identified by Eircom with ComReg's proposal, most are misconceived, in particular:

- a) Eircom's concerns that "[i]t 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"⁹² is misguided as there is no requirement or reason that this is done by Eircom's retail arm, rather than its wholesale arm. Indeed its wholesale arm would be better positioned to ascertain, not just how Eircom Retail might benefit from WN2024-010, but also how this might compare to the benefit attainable by Access Seekers that compete with Eircom Retail using variants of FTTH VUA/Bitstream on Eircom's network.
- b) Eircom's argument that the strategic choices of rival access seekers complicate the forecast of discounts levels in the FTTP MST is misconceived as the extent to which rival Access Seekers can purchase from a range of FTTH infrastructure providers (such as Siro and VM)⁹³ is not relevant to the FTTP MST wholesale input calculations, which are concerned with how Access Seekers can use Eircom Wholesale's regulated services to compete with Eircom Retail.
- c) Eircom's point that requiring it to compare its average wholesale discounted price with the costs faced by "all Eir Retail's competitors...is not consistent with competition law principles or the FTTP MST - which use an equally efficient operator test"⁹⁴ is also misconceived. In particular neither competition law principles nor the FTTP MST support Eircom's apparent suggestion that the wholesale network input price charged by a dominant or SMP operator to its downstream rivals accessing its network could vary depending on the scale of their retail operations. The FTTP MST does rely for its 'benchmark operator' on an equally efficient operator, but this is relevant only to the calculation of the downstream (retail) costs and any unregulated wholesale/network costs (if

⁹² Eircom's Submission, p. 16, paragraph 41.

⁹³ See Eircom's Submission, p. 16, paragraph 42.

⁹⁴ Eircom's Submission, p. 14, paragraph 36.

relevant), and not to the regulated wholesale input costs.⁹⁵ It is also a key requirement of the EC 2024 Recommendation that discounts received by the downstream arm of the vertically-integrated SP should not exceed the highest volume discount offered to Access Seekers⁹⁶.

- d) Eircom's concern that "*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 (sic) if FTTH Bitstream discounts were excluded*"⁹⁷ is also entirely misconceived. The regulated wholesale input in the FTTP MST is always the relevant FTTH VUA service, as this is the regulated wholesale service that is expected to be used by third-party access seekers using Eircom's network to compete with Eircom Retail. Therefore, the effective discount will be the same regardless of whether the Access Seeker ultimately opts to purchase a standalone FTTH VUA service from Eircom Wholesale and self-provides backhaul or opts to purchase a combined FTTH VUA and backhaul service from Eircom Wholesale in the form of FTTH Bitstream.

(103) However, ComReg recognises that calculating the average level of discounts available to operators in the FTTP MST to address the (monetary) advantage to Eircom Retail arising from the own-customer upgrade restriction is a complex exercise to undertake in a dynamic market, particularly as Eircom still has to pass most of its active copper base with FTTH (even though, it should be noted, Eircom would need to undertake such an exercise in any event for the purpose of calibrating a cap capable to address the monetary advantage to Eircom Retail arising from such a restriction, given Eircom Retail's larger copper base). More fundamentally, ComReg accepts, having considered the Submissions to Consultation and Oxera's advice further, that the advantage to Eircom Retail arising from the own-customer upgrade restriction, "*cannot*", in Eircom's words, "*be determined merely by comparing average wholesale discounts*".⁹⁸ In particular, as other Respondents have

⁹⁵ In the FTTP MST, the downstream arm of the incumbent is treated as though it were a separate company purchasing wholesale inputs on the same basis as competing downstream Access Seekers. This reflects the approach set out in the 2013 EC Recommendation which indicates that, when modelling wholesale costs, NRAs should identify "...the most relevant regulated inputs used or expected to be used by access seekers at the NGA based wholesale layer...". The 2024 EC Recommendation on the regulatory promotion of Gigabit connectivity, Annex III, Recital 4, states also that "*When identifying the relevant reference wholesale price, NRAs should consider the access price that the SMP operator effectively charges third-party access seekers for the relevant regulated wholesale input*".

⁹⁶ See Decision D05/24, paragraph 9.711.

⁹⁷ Eircom's Submission, paragraph 42, pp. 16-17.

⁹⁸ Eircom's Submission, paragraph 42, pp. 16-17

emphasised, the own-customer upgrade restriction also protects Eircom's customer base from Access Seekers' competitive efforts by "*locking' in copper customers to their existing retailer during and after the FTTH upgrade, which benefits operators with a larger existing copper base*"⁹⁹ namely, Eircom Retail. This means that even with the FTTP MST safeguard that ComReg had proposed in the Consultation ComReg cannot be satisfied that WN2024-010, does not favour Eircom Retail , as a result of the own-customer upgrade restriction.

Conclusion on whether the discount favours Eircom Retail

- (104) In the Consultation, ComReg had considered that the benefits arising from the discount scheme, for instance in respect of facilitating retailers to plan and manage migration to FTTH, incentivising copper to fibre migration and supporting lower prices for end-users, outweighed the risk that WN2024-010 provided a material advantage to Eircom Retail and that any such advantage could be kept immaterial through the application of the FTTP MST. Bar Eircom, however, all Respondents to the Consultation, including RSPs relying on access to Eircom's network that would be expected to enjoy such benefits, could see no good case for the restriction (for which Eircom had provided no cogent explanation) in the first place and highlighted that the restriction would not deliver pro-competitive outcomes nor encourage copper to fibre migrations.
- (105) In light of this, ComReg no longer believes that it is in the position to approve WN2024-010 on the basis that on balance its benefit would outweigh the risks to competition arising from the own-customer upgrade restriction.
- (106) As Eircom points out in its Submissions,¹⁰⁰ "*the granting of approval by ComReg requires that section 14.10.2 [of the Decision Instrument in Decision D05/24] has been met before launch*". In light of the unanimous views of Respondents other than Eircom that the discount scheme will provide an advantage to Eircom Retail and will distort competition (a position supported by ComReg's advisors Oxera) and having regard to Eircom's Submissions, the mechanism proposed in the Consultation could not address effectively the advantage to Eircom Retail and is insufficient to allow ComReg make a finding that it is satisfied that the discount scheme does not favour Eircom Retail, as required under section 14.10.2 of the Decision Instrument in Decision D05/24.

⁹⁹ See e.g., Vodafone's Submission, p. 5.

¹⁰⁰ Eircom's Submission, paragraphs 33, p. 14

- (107) Accordingly, ComReg, having had regard to all submissions received to Consultation, has reached the conclusion that Criterion 2 is not met as ComReg is not satisfied that WN2024-010 will not favour Eircom Retail.
- (108) ComReg accordingly will not approve WN2024-010 on the basis proposed in Consultation 24/38. While it is not necessary to address the legal issues raised by Eircom as regards the condition to approval proposed in Consultation 24/38, ComReg notes nevertheless that the proposal to require Eircom to ensure that the level of discounts offered to Eircom's retail arm did not exceed the levels available to other Access Seekers was with the view to allowing ComReg reach the position that it was satisfied that the discount scheme did not favour Eircom Retail, and allowing Eircom to proceed with the discount scheme. As such ComReg does not agree with Eircom that this would have imposed a new "obligation" on Eircom, or that it would have amounted to an amendment to the approval mechanism provided for in Decision D05/24, such that it would have required notification to the European Commission.
- (109) ComReg also notes for completeness that monitoring developments in the retail market, as Eircom suggests in its Submission,¹⁰¹ once the discount scheme is in place, in other words, "ex post" monitoring, is not consistent with the assessment framework provided for under Decision D05/24, whereby discount schemes can only be launched where, in particular, ComReg is satisfied *ex ante* that the discount scheme does not favour Eircom Retail. An ex-post process whereby ComReg examines whether WN2024-010 favours Eircom Retail and then intervenes, by which time the harm to competition would already have occurred, was excluded at the time Decision D05/24 was adopted.
- (110) As ComReg finds that Criterion 2 is not met, WN2024-010 cannot be approved and it is not necessary to consider whether the other criteria are met. ComReg nevertheless for completeness and transparency examines below Criteria 3 and 4.

4.3 Criterion 3: Geographic pricing

- (111) The third criterion that must be satisfied is:

ComReg is satisfied that the Promotion or Discount is not targeted at a specific geographic area and for the avoidance of doubt, no Promotion or Discount will be approved that gives rise to a geographic differentiation of prices.

¹⁰¹ Eircom's Submission, p. 19, paragraphs 48-49.

- (112) As submitted by Eircom, the discount scheme notified in WN2024-010 does not contain any conditions or provisions which would be expected to give rise to the Discount applying in effect to a specific geographic area. ComReg agrees in this regard with Oxera that there is no reason to expect that the WN2024-010 would lead to geographically differentiated prices¹⁰² and finds accordingly that Criterion 3 is met.
- (113) While none of the Respondents to Consultation 24/38 raised concerns that WN2024-010 would give rise to a geographic differentiation of prices, SIRO suggested that ComReg consider establishing geographic exclusion zones where Eircom is prohibited from offering discount schemes, “*in areas where altnets like SIRO have built or are actively building infrastructure*”.¹⁰³
- (114) However, such an approach would place a significant limit on Eircom's pricing flexibility in terms of offering discounts given the extent of existing and planned deployment by SIRO and VMI to an extent that is not envisaged in Decision D05/24, and ComReg does not believe that it is a course of action that is open to it within the assessment framework set out in Decision D05/24 and notes that under Decision D05/24, network competition is encouraged where it is sustainable by maintaining national prices for FTTH VUA above the price floor in order to prevent foreclosure.

4.4 Criterion 4: Impact on investments by alternative operators and competition

- (115) The fourth criterion that must be satisfied is:

ComReg is satisfied that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.

4.4.1 ComReg's initial assessment in the Consultation that the discount scheme would not affect investments or undermine competition

- (116) In Consultation 24/38, ComReg proposed to find that Criterion 4 was met on the basis that WN2024-010 would have no material impact on competitors' investment plans given that the discounted prices are above the FTTC VUA based price floor. Oxera noted that, provided it allows for the recovery of connection costs, the price floor proxied by the FTTC VUA price is an appropriate benchmark against which to consider whether the discounted FTTH VUA prices would foreclose competitive

¹⁰²Oxera Report, paragraph 3.46.

¹⁰³ SIRO's Submission, p. 10.

alternative network operators.¹⁰⁴ On this basis, provided that the discounted price remains above the Price Floor, the FTTH VUA prices including the discount would remain at a level which would not foreclose the competitive alternative network operators or undermine competition at the wholesale level.

- (117) ComReg also noted that the FTTC VUA rental price does allow for a contribution to the recovery of connection costs. The monthly costs of the LLU and SLU components of the FTTC VUA service include a contribution to the costs of providing and maintaining the service lead into the customer premises, and provision of the service lead is the most significant element of the connection cost. The cost modelling underpinning the FTTC VUA rental price also allows for a monthly contribution to the recovery of other connection related costs such as the cross jumpering required in the local exchange and cabinet.¹⁰⁵
- (118) WN2024-010 also did not include conditions that require volume-based targets to be met in order to qualify for the discount. Therefore, in deciding whether to upgrade an existing copper-based customer, an operator could assess the FTTH wholesale price including the discount that it can obtain from Eircom against the wholesale prices offered by alternative network operators, without there being implications for the wholesale prices it pays on other line volumes supplied using Eircom's FTTH network. There was no concern that this offer could have loyalty-enhancing effects as a result of retro-actively applied discounts.¹⁰⁶ On the basis that the discounted price is above the FTTH VUA price floor and that the FTTH Proposal doesn't include volume-based targets, Oxera considered that the fourth criterion was satisfied with respect to the impact on wholesale competition.¹⁰⁷
- (119) In Consultation 24/38, ComReg also considered risks that the own-customer upgrade restriction would dampen retail market restriction. Eircom had submitted as part of its notification of WN2024-010 that a €3 discount should incentivise Access Seekers to upgrade from copper-based products to higher-capacity FTTH products and speed up the transition to fibre,¹⁰⁸ and competition in the retail market would mean the reductions in wholesale prices arising from the discount would be expected to modestly reduce customer prices.¹⁰⁹ Oxera pointed out that there was no evidence

¹⁰⁴ Oxera Report, paragraphs 3.55 to 3.59.

¹⁰⁵ For further information on the cost modelling of FTTC VUA related connection costs see ComReg Decision D05/24, paragraph 9.346

¹⁰⁶ Oxera Report, paragraphs 3.49 to 3.52.

¹⁰⁷ Oxera Report, paragraph 3.46.

¹⁰⁸ Eircom CRD 994, p.6

¹⁰⁹ Eircom CRD 994, p.7

that removing the restriction on own-customer upgrades would disincentivise copper to FTTH migration, while, at the same time, the removal would eliminate any risk of a dampening effect on retail competition that may be associated with the restriction on own-customer upgrades.¹¹⁰

- (120) However, ComReg considered that any dampening effect on retail competition on Eircom's FTTH network may be mitigated in those instances where Access Seekers have the option to upgrade a copper-based customer it wins from a rival Access Seeker to an FTTH service provided by SIRO or VMI. As such, the own-customer upgrade restriction could increase the propensity for Eircom Retail's competitors to opt for a non-Eircom FTTH service when it acquires a copper-based customer from Eircom Retail. The own-customer restriction could make it easier for rival FTTH network operators to compete with Eircom FTTH in attracting the non-Eircom retail Access Seekers than would be the case if there was no restriction to own-customer upgrades, possibly leading to more vigorous wholesale competition in the future.
- (121) Therefore, on the basis that the Offer does not give rise to prices that are below the Price Floor, in the absence of loyalty-inducing conditions and having found no evidence that it would foreclose competitive alternative network operators, ComReg proposed to find that the fourth criterion was met.

4.4.2 ComReg's re-assessment of the impact on investments and competition

- (122) Save for Eircom, all Respondents to Consultation 24/38 disagreed with ComReg's proposed conclusion that WN2024-010 would not adversely affect investments or undermine competition. Having considered the Respondents' Submissions, ComReg remains of the view that WN2024-010, in reducing the FTTH VUA price, is unlikely to adversely affect investments by alternative operators; ComReg, however, has reconsidered its assessment of whether WN2024-010 will undermine competition and is not satisfied that it will not do so, as set out below.

Network investment

- (123) Both VMI (supported by SPC Network) and SIRO disagreed with the premise that the discount would not affect investments given that the discounted price was above the price floor. For VMI and SIRO, using the price floor to assess the risk of foreclosure was too simplistic and a price above the price floor can still be

¹¹⁰ Oxera Report, paragraphs 3.41 – 3.42.

exclusionary. SIRO was also of the view that the discount scheme would have loyalty-inducing effects arising from the length the scheme was to apply (three years).

(124) More particularly, VMI raised concerns that the “*discount scheme will harm the evolution of network-based competition and damage nascent competition from wholesale providers such as Virgin Media.*”¹¹¹ SPC Network, for VMI, referring to the deep pockets theory of predation, argued that “*the discounted price should not be assumed to be non-exclusionary just because it is above Eircom’s modelled costs... Using the price floor to assess the risk of foreclosure is too simplistic and that even a price above cost can be exclusionary and should not be considered a safe harbour.*”¹¹² SIRO noted that Eircom 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.*”¹¹³ In contrast, Eircom submitted that, given that the discounted price will remain above the FTTH price floor specified by Decision D05/24, “*it will not disincentivise other operators from rolling out VHCNs or competitively pricing their fibre networks*”¹¹⁴ and “*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.*”¹¹⁵

(125) ComReg accepts that Eircom could have incumbency advantages that lower its cost of entry: in particular Eircom is able to reuse existing infrastructure such as existing fibre cables, ducts and poles to deploy its FTTH network, with the result that it will not need to incur the same level of investment that a new-entrant would have to undertake to utilise a similar quantity of assets.. ComReg also agrees with SIRO that this is “*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.*”¹¹⁶ As all operators are expected to continue to invest in network expansion and/or upgrades throughout this period, ComReg is mindful of the need to incentivise such investment. NRA’s across Europe have sought to promote market entry by fixed network operators, as vibrant competition amongst

¹¹¹ VMI’s Submission, p. 5.

¹¹² SPC Network’s Report, p. 6, paragraphs 27-28.

¹¹³ SIRO’s Submission, p. 6.

¹¹⁴ Eircom’s Submission, p. 3, paragraph 2.

¹¹⁵ Eircom’s Submission, p. 7, paragraph 11.

¹¹⁶ SIRO’s Submission, p. 6.

networks is considered to be the best way to ensure that end-users reap maximum benefits in terms of choice of high-quality services, delivered at competitive prices. Market entry requires network operators take a long-term view as they have to commit to making significant upfront investments in long-lived assets knowing that it will take many years to recover the costs of those investments. Therefore, ComReg does not agree with Eircom's assertion that that "*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.*"¹¹⁷. In deciding to continue investing, an operator will consider the extent that it can recover its initial outlay in FTTH before committing to further investment; an operator will not be incentivised to commit to future investment in FTTH if there is no prospect of it being able to recover all sunk costs associated with those past investment. Indeed, the purpose of setting a price floor with reference to a long-run costing approach, such as BU-LRAIC+, is to ensure that prices do not fall below the level that is required for operators to recover the costs of all investments made over the lifetime of the network. Therefore, as all operators are expected to continue to invest in network expansion and/or upgrades during the lifetime of the offer, Eircom's assertion that sunk costs do not matter for the assessment of the impact of the offer on network competition is incorrect¹¹⁸.

- (126) ComReg also notes that the price floor is designed to provide "build-or-buy signals" to alternative networks so that it is an appropriate benchmark for assessing if there is risk that price levels will foreclose network investment, and should help mitigate Eircom's incumbency advantages by ensuring that they do not fall to a level that would prevent the entry or expansion of rival wholesale network operators.
- (127) In this regard, SPC Network's assumption that the cost modelling "*is accurately set at Eircom's costs*"¹¹⁹ is not correct as ComReg's approach does not use a Top-Down (TD) costing approach based on Eircom's incurred costs. Instead, ComReg has always adopted a bottom-up (BU-LRAIC+) approach to inform cost-oriented prices for broadband services on the basis that it would strike the right balance between preventing excessive prices and informing the correct build-or-buy signals based on an 'anchor technology' approach: that is, an approach whereby the prices being set act as a reference point to anchor the investment decisions of commercial operators

¹¹⁷ Eircom's Submission, p. 7, paragraph 11.

¹¹⁸ See Updated Oxera Report, paragraph 2.53.

¹¹⁹ SPC Network's Report, p. 6, paragraph 27.

deploying broadband networks in Ireland.¹²⁰ The bottom-up approach values the network based on the costs an operator would incur in deploying such a network today, including the costs of deploying new cables as well as the investment in remediating/replacing all ducts and poles to ensure they are capable of accepting the deployment of new cables. As noted in Decision D05/24: “*The use of bottom-up cost models was intended to set appropriate build-or-buy signals for investment and therefore to support ComReg’s objective to prioritise dynamic efficiency gains over productive or allocative efficiency concerns and, in particular, to encourage new entrants where network competition is viable.*”¹²¹ (emphasis added).

(128) ComReg notes that the significant fibre network deployment by network operators commenced in the presence of FTTC VUA price regulation has continued since the adoption of Decision D05/24. ComReg considers that the price floor, which continues to be informed by the BU-LRAIC+ approach, provides the relevant benchmark for the investment decisions of all operators, including altnets such as SIRO and VMI.

(129) As regards SIRO’s concern that the duration of the scheme was liable to induce loyalty effects,¹²² ComReg does not believe that the scheme would produce loyalty-inducing effects as regards the Eircom platform (in contrast to producing loyalty-inducing effects for existing retailers remaining on the Eircom platform). According to SIRO, “*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.*”¹²³ However, SIRO does not identify the mechanism within the discount scheme that binds a retailer to the Eircom platform and prevents it from switching to an alternative network and ComReg does not believe that the discount would have such loyalty-inducing effects. In particular, customers are not required to commit to a long term contract to avail of the discount. As Oxera has noted, this means that Access Seekers would benefit from the discount for the duration that the eligible line remains on Eircom’s network but do not face a penalty if they choose to cease or switch to another network operator. Consequently, there is no evidence to indicate that the duration of the discount will give rise to loyalty effects, provided rivals are able to compete with the Eircom offer.¹²⁴ While the lower discounted price may challenge SIRO, in that it makes SIRO’s existing prices less attractive relatively, for

¹²⁰ Further discussion of ComReg’s cost modelling approach can be found in Decision D05/24, paragraphs 9.342 to 9.362.

¹²¹ Decision D05/24, paragraph 9.347.

¹²² SIRO’s Submission, p. 7.

¹²³ SIRO’s Submission, p. 6.

¹²⁴ Updated Oxera Report, paragraphs 2.51 to 2.52

the reasons set out above, ComReg does not consider that discounted prices above the price floor are necessarily detrimental to competition.

- (130) We also note that SIRO's Submission included a stylised cost model to support its concerns regarding the adequacy of the existing price floor. However, for the reasons outlined in the Updated Oxera Report, the findings in SIRO's model do not alter ComReg's views on the appropriateness of the price floor.¹²⁵

Impact on competition

- (131) Save again for Eircom, all Respondents to Consultation 24/38 had significant concerns that WN2024-010 would undermine competition, in particular competition on the retail market. For example, while Sky could "*see the benefit of a wholesale discount offer in the market*" which, it noted, could "*... engender greater competition between wholesale operators and ultimately, better consumer outcomes*", Sky also emphasised that "*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*". In this regard, Sky was very concerned that "*any benefit stemming from this offer would potentially fail to outweigh the negative impact for retail competition and switching*". In particular, the own-customer upgrade restriction in WN20210-010 means that it "*represents a direct threat to vigorous retail competition*", because it favours Eircom Retail and provides the latter with an advantage that Sky does not agree is immaterial.¹²⁶
- (132) Vodafone made the point as regards the potential for WN2024-010 to lead to lower prices for consumers, that "*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.*"¹²⁷ In this regard, Respondents' concerns included the following:
- (133) For Sky, the discount scheme "*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.*"¹²⁸ Similarly, Vodafone noted that although the impact of the own-customer upgrade restriction would vary in significance depending on whether in an area, Eircom faces FTTH network competition (the impact being

¹²⁵ See also Updated Oxera Report, paragraphs 2.45 to 2.47.

¹²⁶ Sky's Submission, p. 2.

¹²⁷ Vodafone's Submission, p. 4.

¹²⁸ Sky's Submission, p. 2.

most significant where there is no such competition), in practice copper customers currently not passed by Eircom's FTTH network would be impacted during the duration of the discount scheme, given Eircom's roll-out plans. Furthermore, while Vodafone agreed that before such copper customers are passed by Eircom's FTTH network, the existence of the own-customer upgrade restriction might incentivise retailers to compete more strongly in the short term, Vodafone thought that *"this is unlikely to be the case in practice, given the expected short timeframe until FTTH services would be available to these customers."*¹²⁹

(134) Respondents also emphasised that competition would be undermined due to the fact that WN2024-010 risked locking-in the existing market structure for wholesale and retail FTTH. SIRO noted that *"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"*. SPC Network for VMI said in this regard that it is not *"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."*¹³⁰

(135) Vodafone noted also that *"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."*¹³¹ Vodafone set out in a diagram how the own-customer upgrade restriction would reduce benefit to end-users by reducing competitive intensity in that it reduces the ability and incentive to win and upgrade other retailers' customers which in turn:

- a) Increases the market power over one's own retail copper customers meaning that less of wholesale cost savings are passed on to end-users meaning both reduced benefit to end users and a greater benefit for retailers with larger copper base, which is anti-competitive by favouring Eircom Retail;
- b) "Locks in" retail customers to existing operators, which provides a greater benefit for retailers with larger copper base which again is anti-competitive by favouring Eircom Retail.¹³²

(136) For the reasons set out in Section 4.2, ComReg, having considered the Submissions to Consultation, is not satisfied that WN2014-010 will not favour Eircom Retail, and in fact, is of the view that the discount scheme does provide an advantage

¹²⁹ Vodafone's Submission, pp. 7-8.

¹³⁰ SPC Network's Report, pp 2-3, paragraph 9.

¹³¹ Vodafone's Submission, p. 5.

¹³² Vodafone's Submission, p. 6.

that is likely to be material, to Eircom Retail. ComReg notes in this regard, and agrees with submissions to that effect, that this is relevant to its assessment of Criterion 4. In the Consultation, ComReg noted (in circumstances where it had proposed to find that any advantage to Eircom Retail was immaterial) that the own-customer upgrade restriction could make it easier for rival FTTH network operators to compete with Eircom FTTH in attracting the non-Eircom retail Access Seekers than would be the case if there was no restriction to own-customer upgrades, possibly leading to more vigorous wholesale competition in the future and mitigating any dampening of retail competition. This assessment, however, does not hold where ComReg finds that there is an advantage to Eircom Retail. ComReg in this regard notes that the own-customer upgrade restriction reduces competitive intensity among retailers and this effect is unlikely to be compensated through an increase in wholesale competition intensity that is sufficient to ensure that competition is not undermined.

(137) In this regard, ComReg notes also that recent Eircode data (Q1 2024) on active FTTC connections that ComReg has analysed shows that SIRO and VMI still only pass circa [X ■ X]% of the active FTTC base leaving a significant swath of customers depending on retailer competition on the Eircom network rather than wholesale competition between networks. Data Eircom submitted on recent upgrade rates of its FTTC base also clearly shows that Access Seekers are currently upgrading their own customers at over [X ■ X] times the rate that they win and upgrade a competitors' copper customer. In this respect, the own-customer upgrade restriction would only serve to amplify this behaviour as it will further incentivise Access Seekers to target their marketing efforts to secure a certain €3 discount by upgrading its own copper-based customers rather than attempting to secure a rival's copper-based customer, in the hope that it can subsequently re-engage with that customer and persuade it to upgrade to FTTH. Indeed, Eircom's response to WN2024-010 highlights the significant uncertainties that an Access Seeker faces when it attempts to persuade a customer to upgrade:

“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 provider¹³³.”

(138) Finally, the own-customer upgrade restriction in favouring Eircom Retail during the copper to FTTH transition phase can also benefit Eircom Wholesale. Eircom's response to Consultation 24/38 confirms that *“unlike other Retailers, eir Retail is*

¹³³ Eircom's Submission, p. 11, paragraph 27.

*solely reliant on wholesale inputs from open eir in the Commercial Area.*¹³⁴

Therefore, the own-customer upgrade restriction that helps lock-in the majority of active copper customers transitioning to FTTH for Eircom Retail has the potential to benefit Eircom Wholesale, as securing a customer for Eircom Retail also secures the customer for Eircom Wholesale.

- (139) Therefore, having carefully considered all Submissions to Consultation and in light of the latest available broadband data, ComReg is not satisfied that WN2024-010, in particular as a result of the own-customer upgrade restriction, will not undermine competition. Criterion 4 accordingly is not met.

4.5 Considerations of the cumulative impact of WN2024-021

- (140) As set out in Chapter 2, WN2024-021, notified to ComReg when Consultation 24/38 was still opened, is a promotion consisting of a €2 price reduction on Eircom's NGA VUA Standalone 1 Gbps product (and Bitstream) to apply for a period of 2 years for connections to 1 Gbps FTTP VUA/Bitstream made during a six month period (proposed to be 1 November 2024 to 30 April 2025). The promotion applies to all new connections and upgrades to 1 Gbps FTTP but not to existing FTTP 1Gbps customers. The promotion, as notified, will not transfer between Access Seekers so that an Access Seeker winning a 1 Gbps customer during the two year period that the promotion applies in respect of that customer will not benefit from the discount. However, it may be cumulated with other discounts and promotions, including discount scheme WN2024-010. In that case, an Access Seeker qualifying for both WN2024-010 and WN2024-021 would receive cumulative discounts to the value of €5 off the 1Gbps FTTP headline price (€2 from the 1Gbps FTTP promotion and €3 from WN2024-010). For example, an FTTP VUA 1Gbps price of €28.50 would be reduced to €23.50 for a two year period should the Access Seeker benefit from the 1Gbps FTTP promotion in tandem with WN2024-010.

- (141) In Consultation 24/57, ComReg offered the opportunity to Respondents to make further submissions as regards WN2024-010 in the knowledge that were both schemes approved, their respective discounts could be cumulated.

- (142) While the Submissions to Consultation 24/57 principally focussed on matters of procedure (considered in Section 3 and insofar as the approval of WN2024-021 is concerned, in ComReg's separate decision set out in ComReg Document 24/70), a number of Respondents identified concerns arising from the cumulative impact of the two schemes. For instance SIRO was concerned that "*while the discounts might*

¹³⁴ Eircom's Submission, p. 16, paragraph 42.

appear compliant individually, their combined effect could undermine competition by providing significant cost advantages to Eircom's retail operations",¹³⁵ while VMI was of the view, supported by SPC Network, that WN2024-021 would magnify the detrimental effect of WN2024-010.¹³⁶ VMI also considered 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."¹³⁷ SPC Network was of the view that overall, "the 1 Gbps Promotion will exaggerate the anticompetitive effects of the upgrade promotion to the long term detriment of consumers".¹³⁸

(143) There were no submissions in response to Consultation 24/57 from Respondents to Consultation 24/38 making a case that WN2024-021 could address the advantage to Eircom Retail or the undermining of competition brought about by WN2024-010. Vodafone, however, made it clear that there was nothing in WN2024-021 that could override its objections to the format of the own-customer restriction in WN2024-010.¹³⁹

(144) Having considered the Submissions to the Further Consultation, ComReg notes that given that WN2024-010 does not meet the criteria for approval set out in Decision D05/24, WN2024-010 may not be put into effect by Eircom and the possibility that WN2024-021 could compound its effects no longer arises.¹⁴⁰ As WN2024-021 would in effect simply increase the amount of discount available under WN2024-010 for a subset of the lines concerned, there is nothing in WN2024-021 which affect ComReg's analysis that WN2024-010 does not meet the second and fourth criteria of the test set out in Decision D05/24.

4.6 Conclusion

(145) For these reasons, having assessed WN2024-010 above against each of the four criteria from the framework as set out in Decision D05/24, and having considered the submissions received to Consultation 24/38 and the Further Consultation, ComReg

¹³⁵ SIRO's Submission to the Further Consultation, paragraph 5.1.4.

¹³⁶ VMI's Submission to the Further Consultation, Conclusion.

¹³⁷ VMI's Submission to the Further Consultation, paragraph 5.2

¹³⁸ SPC Network's Report with Addendum, paragraph 47.

¹³⁹ Vodafone's Submission to the Further Consultation, p. 2.

¹⁴⁰ Insofar as VMI's submission that the discounts together could amount to predatory pricing, ComReg notes that the cumulated discounted price would have remained above the price floor and it is not clear on what basis and evidence VMI makes that submission.

has decided not to approve the discount scheme. The operative part of this decision is set out in Chapter 5.

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5 Decision Instrument

1. This Decision is made by the Commission for Communications Regulation:
 - 1.1. Pursuant to and having regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended) and Regulation 4 and Regulation 42 of the ECC Regulations;
 - 1.2. Pursuant to and having regard to Regulation 104 of the ECC Regulations;
 - 1.3. Pursuant to ComReg Decision D05/24 of 18 January 2024, in particular Sections 14.9, 14.10 and 14.11 of the Decision Instrument read together with paragraphs 9.497 to 9.569 of ComReg Document 24/07;
 - 1.4. Having regard to Eircom's Wholesale Notification WN2024-010 received on 23 February 2024, and completed on 21 March 2024, and the further information provided by Eircom including at a meeting held on 18 April 2024 and follow-up correspondence;
 - 1.5. Having regard to the submissions including the further information provided by Respondents in response to the public consultation held between 24 May 2024 and 24 June 2024 further to paragraph 9.566 of ComReg 24/07 and pursuant to Regulation 101 of the ECC Regulations (Consultation 24/38) and the submissions received to the further public consultation held between 5 July 2024 and 19 July 2024 (Consultation 24/57);
 - 1.6. For the reasons set out in paragraphs (1) to (145) above.
2. All capitalised terms in this Draft Decision Instrument have the same meaning of those terms defined in paragraphs (1) to (145) above and/or ComReg Decision D05/24.
3. On the basis that ComReg is not satisfied:
 - That, contrary to Section 14.10.2 of the Decision Instrument in Decision D05/24, the scheme notified under WN2024-010 does not, in form or effect, favour Eircom's retail arm; and
 - That, contrary to Section 14.10.4 of the Decision Instrument in Decision D05/24, the scheme notified under WN2024-010 will not undermine competition,

the scheme notified under WN2024-010 is not approved and Eircom may not publish or make available at any time the discount offer set out in WN2024-010.

4. This Decision applies with immediate effect.
5. This Decision shall be served upon Eircom Limited and published on ComReg's public website.

GARRETT BLANEY
COMMISSIONER
COMMISSION FOR COMMUNICATIONS REGULATION
ON THE 29TH DAY OF AUGUST 2024

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Annex 1: Notification WN2024-010 (24/69a)

- A 1.1 Eircom compliance statement (24/69a.1)
- A 1.2 Eircom price list – clean (24/69a.2)
- A 1.3 Eircom price list – tracked (24/69a.3)
- A 1.4 Eircom clarification of 21 March 2024 (24/69a.4)

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Annex 2: Oxera report (24/69b)

A 2.1 The Oxera report (24/69b)

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

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

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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)

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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)

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