



Commission for
Communications Regulation

**Decision Notice and Decision Instrument:
Designation of SMP and SMP Obligations**

Market Analysis:

Voice Call Termination on Hutchison 3G Ireland's
Mobile Network

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1 Executive Summary

- 1.1 This Decision Notice is the culmination of ComReg's review of the market for wholesale voice call termination on Hutchison 3G Ireland's ("H3GI") network. ComReg has undertaken a full public consultation and has carefully taken into account all submissions in arriving at its conclusions in relation to market definition, market analysis and obligations to be imposed on the operator being designated with Significant Market Power ("SMP") in accordance with Regulation 27(4) of the Framework Regulations.¹ In accordance with Regulation 20 of the Framework Regulations, the draft measure containing ComReg's preliminary conclusions was notified to the European Commission and the national regulatory authorities ("NRAs") in other EU member states.
- 1.2 ComReg has now determined that the market for wholesale voice call termination on H3GI's individual mobile network is not effectively competitive. ComReg is therefore in this Decision Notice and Decision Instrument, designating H3GI with SMP, in accordance with Regulation 27(4) of the Framework Regulations. This Decision by ComReg is supported by a detailed analysis of a number of key criteria. Those criteria and ComReg's summary conclusions in relation to them are as follows:
- *Market share:* H3GI has 100% share of the relevant market. This is indicative, but, it should be noted, not by itself, determinative of SMP.
 - *Existing and potential competition:* There is no existing competition in the relevant market and due to the high and non-transitory barriers to entry, there is no prospect of potential competition over the period of this review.
 - *Countervailing buyer power ("CBP"):* There is insufficient CBP to prevent H3GI from behaving to an appreciable extent independently of its customers and competitors in setting its mobile termination rates ("MTRs").
- 1.3 ComReg has considered the potential problems which may arise from H3GI's position of SMP in the relevant market and has carefully examined a number of regulatory options for addressing those problems. The remedies which ComReg is now imposing on H3GI by this Decision Notice and Decision Instrument are:
- An obligation in relation to transparency;
 - An obligation in relation to non-discrimination; and
 - An obligation in relation to price control.
- 1.4 The final Decision Instrument setting out formally the SMP obligations to be imposed on H3GI as a consequence of the SMP designation is contained in Appendix A. Those SMP obligations are effective from the effective date which is the publication date of this Decision Notice. Information that may be

¹ The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

confidential/commercially sensitive has been redacted from this document and where relevant, this has been indicated throughout.

2 Background to the Decision Notice

- 2.1 The EU electronic communications regulatory framework requires that ComReg defines relevant communications markets appropriate to national circumstances and relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations. In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.
- 2.2 The Framework Regulations further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which must take place as soon as possible after the adoption of the European Commission's Recommendation.² In carrying out market definition and market analysis, ComReg must take the utmost account of the European Commission's Recommendation and the SMP Guidelines.³
- 2.3 The following is a brief summary of events leading to the publication of this Decision Notice:
- In October 2003, ComReg issued a consultation document outlining its preliminary views on the markets for wholesale mobile voice call termination.⁴ This was followed by a response to consultation published in June, 2004⁵ and Decision D9/04⁶ published in July, 2004. In that Decision, ComReg defined separate wholesale markets for the termination of mobile voice calls on the networks of each mobile network operator ("MNO") in Ireland: namely Vodafone, O2, Meteor and H3GI. Each MNO was designated with SMP in the wholesale market for voice call termination on their respective mobile networks and a range of SMP obligations were imposed on the MNOs.
 - ComReg Decision D9/04 was appealed by H3GI to the Electronic Communications Appeals Panel ("ECAP"). In its ruling, issued on 26 September, 2005, the ECAP partially annulled ComReg Decision D9/04 with the result that the designation of H3GI as having SMP was set aside.⁷

² European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344/65 [2007].

³ European Commission guidelines on market analysis and the assessment of significant market power under the community regulatory framework for electronic communications networks and services, OJ C 165/6 [2002].

⁴ ComReg (2003) Market Analysis – Wholesale voice call termination on individual mobile networks, Document 03/127a, 22 October.

⁵ ComReg (2004) Response to Consultation and Notification to the European Commission - Wholesale voice call termination on individual mobile networks, Document 04/62a, 8 June.

⁶ ComReg (2004) Market Analysis – Wholesale Voice Call Termination on Individual Mobile Networks, Document 04/82, Decision No. D9/04, 29 July.

⁷ ECAP (2005) Decision No: 02/05 of the Electronic Communications Appeals Panel in respect of Appeal No: ECAP 2004/01.

- Following the ECAP decision, ComReg undertook a new assessment of the market for wholesale voice call termination on H3GI's mobile network. On 11 January, 2007, ComReg issued a public consultation on its review of the wholesale market for voice call termination on H3GI's mobile network ("ComReg Document 07/01").⁸
- Having taken into account the responses to this consultation, ComReg published a response to consultation document and notified this to the European Commission on 8 January, 2008 ("ComReg Document 08/06")⁹ as required by Regulation 20 of the Framework Regulations. This response to consultation included a draft Decision Instrument and ComReg called for submissions on the draft text of the Decision Instrument. ComReg received comments on the draft Decision Instrument from four respondents, Meteor, Eircom, Vodafone and H3GI.
- Pursuant to Article 7(3) of the Framework Directive,¹⁰ the European Commission examined the notification. The notified measures were accepted by the European Commission with comments,¹¹ in correspondence to ComReg dated 18 February, 2008. While the European Commission made no comments on ComReg's market definition and SMP analysis in its response, it did invite ComReg when finalising its decision on a price control for H3GI to take into account the necessity to impose a glide path obligation on H3GI to bring its MTRs to a competitive level without delay. The European Commission also invited ComReg to clarify and provide more information in relation to its approach to benchmarking in relation to price control.
- Having taken into account all responses received in relation to the draft Decision Instrument, ComReg is now publishing its final Decision Notice and Decision Instrument. ComReg's conclusions as expressed in this Decision Notice and Decision Instrument are based on the substantial body of empirical analysis contained in its previously published ComReg documents which reviewed the relevant issues. In this regard, it should be noted that elements of the analysis underpinning certain aspects of the Decision Notice and Decision Instrument are set out in earlier ComReg documents¹² which form part of ComReg's decision making and consultation process. This Decision Notice and Decision Instrument should be read in conjunction with ComReg Document 07/01 and ComReg Document 08/06.

⁸ ComReg (2007) Market Analysis - Consultation on Wholesale Voice Call Termination on Hutchison 3G Ireland's Mobile Network, Document 07/01, 11 January.

⁹ ComReg (2008) Wholesale Voice Call Termination on Hutchison 3G Ireland's Mobile Network, Response to Consultation and Consultation on Draft Decisions, Document 08/06, 8 January.

¹⁰ Directive 2002/21/EC of the European Parliament and the Council of 7 March, 2002, on a common regulatory framework for electronic communications networks and services.

¹¹ See correspondence sent from the European Commission to ComReg dated 18 February, 2008. Available at:

http://circa.europa.eu/Public/irc/info/ecctf/library?l=ireland/registeredsnotifications/ie20080746/ie-2008-0746_actepdf/ EN 1.0 &a=d

¹² ComReg Document 07/01 and ComReg Document 08/06.

3 Summary of the Decision Instrument

- 3.1 The following section contains a brief summary of the Decision Instrument which is set out in Appendix A. This is based on ComReg's findings as outlined in ComReg Document 08/06 on market definition, on H3GI's market power, and the type of obligations that might be imposed on H3GI.

Market Definition

- 3.2 ComReg adopted the approach set out in the European Commission's Recommendation¹³ as its starting point for defining the relevant product market, such that the review was concerned with the wholesale market for voice call termination on individual mobile networks. The European Commission's Recommendation of 2003 has been replaced by the European Commission's Recommendation as published in December, 2007.¹⁴ The new Recommendation continues to identify wholesale voice call termination on individual mobile networks as a market susceptible to *ex ante* regulation and hence, a market on which NRAs must conduct market analysis and, where a SMP designation is made, impose SMP obligations.
- 3.3 As a result of its analysis, ComReg concludes that the relevant product market is the wholesale market for voice call termination on H3GI's individual mobile network. ComReg's view is based on the following:
- The relevant market is an individual mobile network market;
 - Other mobile telephony services are not in the same market as voice call termination services on an individual mobile network; and
 - Mobile voice call termination services are technology neutral, that is, they include voice termination services over 2G and 3G networks.
- 3.4 ComReg considers that the relevant geographic market is Ireland, due to the similarities in competitive conditions across the State. All MNOs have national licenses, national coverage requirements and offer geographically uniform MTRs.

¹³ Commission Recommendation of 11 February, 2003, on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ C 114/45 [2003].

http://ec.europa.eu/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf

¹⁴ Commission Recommendation of 17 December, 2007, on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344/65 [2007].

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:EN:PDF>

Designation of Undertakings with SMP

3.5 ComReg analysed the relevant market to decide whether or not it was effectively competitive. As a result of its analysis, ComReg concludes that the evidence indicates that H3GI has SMP in the market (i.e. a position equivalent to dominance in competition law terms) in which it supplies mobile voice call termination. This is supported by ComReg's analysis of a number of key criteria. Those criteria and ComReg's comments in respect of same are set out briefly below.

- *Market share:* H3GI has 100% share of the relevant market. This is indicative, but not by itself, determinative of SMP.
- *Existing and potential competition:* There is no existing competition in the relevant market and due to the high and non-transitory barriers to entry there is no prospect of potential competition over the period of this review.
- *CBP:* There is insufficient CBP to prevent H3GI from behaving to an appreciable extent independently of its customers and competitors in setting its MTRs.

3.6 Having regard to the above, ComReg has decided, in accordance with the Framework Regulations, to designate H3GI with SMP in the market for voice call termination on its individual mobile network.

SMP Obligations

3.7 ComReg is required to impose on an operator designated with SMP such of the obligations provided for by the Access Regulations as ComReg considers appropriate.¹⁵ These obligations must be:

- Based on the nature of the problem identified;
- Proportionate; and
- Justified in light of the objectives set out in s 12 of the Communications Regulation Act, 2002.

3.8 ComReg must impose at least one of the following obligations on an operator designated with SMP and may impose more than one. The possible obligations that ComReg may impose are as follows:¹⁶

- Access to, and use of, specific network elements and associated facilities;
- Transparency;
- Non-discrimination;
- Accounting separation;

¹⁵ The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

¹⁶ Paragraph 114 of the SMP Guidelines.

- Price control; and
 - Cost accounting.
- 3.9 ComReg has decided to impose certain SMP obligations on H3GI to address its position of SMP. ComReg has concluded that H3GI's SMP can not be appropriately addressed in the absence of appropriate and proportionate SMP obligations.
- 3.10 Accordingly, ComReg has decided to impose the following obligations on H3GI as provided for by the Access Regulations:
- Transparency;
 - Non-discrimination; and
 - Price control.

4 Responses to Issues Raised in Submissions by Interested Parties and the European Commission in relation to the Draft Decision Instrument

Introduction

- 4.1 In ComReg Document 08/06, ComReg set out its proposed findings up to that point in the consultation process and consulted upon the draft Decision Instrument, intended to formally impose the SMP obligations on H3GI. ComReg asked if respondents believed that the text of the draft Decision Instrument was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the proposed SMP obligations.
- 4.2 Four responses were received in relation to the consultation on the specific text of the draft Decision Instrument contained in ComReg Document 08/06. These responses were received from Eircom Ltd, Vodafone, Meteor and H3GI. ComReg would like to thank all of the respondents for their submissions.
- 4.3 ComReg also received comments on its proposed measures from the European Commission. ComReg has taken the utmost account of those comments in accordance with Article 7(5) of the Framework Directive.
- 4.4 Having considered all of the issues and taken into account the views expressed by the respondents and the European Commission, ComReg has finalised the Decision Instrument. The SMP obligations applicable to H3GI in relation to the relevant market are set out in the Decision Instrument and are imposed and effective from 1 December, 2008, i.e. the publication date of this Decision Notice and Decision Instrument.
- 4.5 This section sets out the main issues raised by the respondents in relation to the draft Decision Instrument contained in ComReg Document 08/06, together with ComReg's views and conclusions on those issues.

Designation of H3GI with SMP

- 4.6 In ComReg Document 08/06, ComReg set out its preliminary view that, on the basis of the market definition and the findings of the market analysis, H3GI should be designated with SMP in the relevant market. For the reasons outlined in ComReg Document 08/06,¹⁷ ComReg has decided, having carefully taken into account respondents' views, that there is a relevant product market for wholesale voice call termination on H3GI's mobile network in the geographic market of Ireland. ComReg's definition of the relevant market was not substantially disputed by respondents.¹⁸ However, one respondent reserved its position on this issue.

¹⁷ See Section 3 of ComReg Document 08/06 and Section 3 of ComReg Document 07/01.

¹⁸ As stated earlier, in defining the relevant market, ComReg took into account the fact that in its 2003 Recommendation, the European Commission listed the market for wholesale voice call termination on individual mobile networks as a relevant market susceptible to *ex ante* regulation. The European Commission confirmed again that this market is a market susceptible to *ex ante* regulation in its revised Recommendation on Relevant Markets published in December, 2007.

Views of Respondents

- 4.7 Only two of the four respondents commented directly on the designation of H3GI as having SMP. One respondent agreed with ComReg's conclusion that H3GI has SMP in the relevant market and that respondent submitted that this is the only logical and consistent conclusion.
- 4.8 The other respondent disagreed with ComReg's proposed designation of H3GI with SMP and submitted that ComReg has failed to demonstrate H3GI as having SMP. The respondent believes that, for the reasons expressed in its response to ComReg Document 07/01, ComReg has failed to undertake a sufficiently thorough analysis of the relevant market and all significant factors, including but not limited to CBP and the role of dispute resolution. As a result, it is of the view that ComReg has not provided a clear economic or other basis for the conclusions reached by it with regard to its finding of SMP.

ComReg's Position

- 4.9 Having analysed the competitive characteristics of the relevant market,¹⁹ taking utmost account of the SMP guidelines and the European Commission's Recommendation, and having considered the respondents' views, ComReg is of the view that H3GI enjoys a position of single dominance in the market for wholesale voice call termination services on its mobile network.²⁰ This finding is based on ComReg's assessment of the following key SMP criteria which were considered to be most relevant for the analysis of competition in the market in question and which are also identified by the European Commission in its SMP Guidelines:²¹

- (a) Market share;
- (b) Existing competition;
- (c) Barriers to entry and potential competition; and
- (d) CBP (i.e. countervailing buyer power).

- 4.10 ComReg also examined other criteria listed in the SMP Guidelines and an explanation as to why ComReg considered them less relevant in the context of this specific market review is set out in Annex F of ComReg Documents 07/01 and 08/06.

- 4.11 As referred to in section 3 above, ComReg concludes that the relevant market is the market for voice call termination on an individual mobile network and that other mobile telephony services are not in the same market as voice call termination services on an individual mobile network. This implies that currently each MNO is a

¹⁹ See ComReg Document 07/01, paragraphs 4.5 to 4.100 and Annex F; and also paragraphs 4.8 to 4.207 and Annex F of ComReg Document 08/06.

²⁰ Article 14(2) of the Framework Directive defines SMP in the following terms:

"An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers".

²¹ As required by the SMP Guidelines, paragraph 78.

single supplier of call termination services to its customers and has 100% market share of the market for wholesale voice call termination on its mobile network – a high and non transitory market share. ComReg took as its starting point to this review that having 100% market share of the relevant market is not by itself determinative of the issue of SMP. The SMP Guidelines state that the existence of a dominant position cannot be established solely on the basis of large market shares, and that NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of SMP.²² However, the SMP Guidelines also state that according to established case-law, very large market shares (that is in excess of 50%) were in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.²³

4.12 Following very carefully the recommendations contained in the SMP Guidelines,²⁴ ComReg has examined the possibility of other factors that may affect the extent to which H3GI can act to an appreciable extent independently of its competitors, customers and consumers in relation to its mobile termination services. In view of the market definition assessment and given the particular characteristics of termination markets, ComReg has concluded that H3GI has a sustainable and non-transient position in the relevant market and that there are high and non-transitory barriers to entry that would prevent the emergence of potential competition over the period of the review. ComReg does not foresee developments that would allow another provider to compete effectively in offering termination to H3GI's subscribers. There are no potential alternatives to terminating a call on H3GI's network other than H3GI itself and potential competitive entry does not provide a competitive constraint on H3GI. This gives a strong indication of SMP.

4.13 The European Commission has commented as follows:

“A market definition for call termination on each mobile network would imply that currently each mobile network operator is a single supplier on each market. However, whether every operator then has market power still depends on whether there is any countervailing buyer power, which would render any non-transitory price increase unprofitable.”²⁵

4.14 In addition to the fact that H3GI has 100% market share on the relevant market, that there are high and non transient barriers to entry into the relevant market and no prospect of potential entry over the period of the review, ComReg therefore also considered whether CBP existed so as to come to a final decision on whether or not H3GI should be designated with SMP.

CBP

4.15 As set out in its two consultation documents, ComReg proposed that CBP existed where large customers had the ability within a reasonable timeframe to resort to credible alternatives if the supplier decided to increase prices or to deteriorate the

²² SMP Guidelines, paragraph 78.

²³ *ibid*, paragraph 75.

²⁴ *ibid*, paragraph 78.

²⁵ Public Consultation on a Draft Commission Recommendation on Relevant Product and Service Markets. Brussels, 28 June, 2006 SEC (2006) 837, page 39.

conditions of delivery. An operator was not dominant where sufficient CBP existed to constrain its charging prices above competitive levels. Such buyer power existed where the purchaser had an alternative source of supply, could provide the service itself, or could simply refuse to purchase the service if the cost was too high.²⁶ Hence, ComReg considered whether an originating operator or purchaser of wholesale call termination from H3GI (such as Eircom or another fixed or mobile operator) had sufficient CBP to prevent H3GI from being able to behave to an appreciable extent independently of its competitors, customers and ultimately consumers (i.e. whether it could affect a potential finding of SMP).

4.16 ComReg has examined²⁷ the relative bargaining positions of the parties²⁸ and the key factors that may have influenced those respective positions.²⁹ ComReg Document 08/06 sets out a response to the arguments raised by the one respondent who disagreed with ComReg's analysis of CBP, dispute resolution and its finding of SMP.³⁰ Having regard to that analysis, and having carefully taken into account of that respondent's views, ComReg believes it is reasonable to conclude that there is insufficient CBP to prevent H3GI from behaving to an appreciable extent independently of its customers and other market participants in setting its MTRs. The following points summarise ComReg's conclusions with regards to CBP:

- BT is the operator that terminated the bulk of H3GI's traffic via transit. Being a new entrant did not prevent H3GI from setting rates unilaterally vis-à-vis BT. As evidenced by the negotiations, BT has insufficient CBP owing largely to its incentives to achieve wholesale revenues as well as end-to-end connectivity for its subscribers.³¹
- It is also evident from the history of negotiations³² that although Eircom may have been initially able to exert some degree of CBP over H3GI before the launch of its retail services (as H3GI did not secure its initial proposed MTR) it

²⁶ This accords with the European Regulators' Group ("ERG") approach which suggests that: "The extent of countervailing buyer power largely depends on whether customers can credibly threaten to switch to other suppliers, to self-provide the service, to significantly reduce consumption or to cease to use the service at all in [the] case of a price increase". ERG (2005) Revised ERG Working paper on the SMP concept for the new regulatory framework, September, page 5.

²⁷ ComReg considered the issue of CBP in detail in ComReg Document 07/01 and also in paragraphs 4.17 to 4.178 and Annex D, E and G of ComReg Document 08/06.

²⁸ ComReg undertook an assessment of the evidence from the actual negotiations between H3GI and its interconnecting partners, Eircom and BT, to understand the bargaining dynamic between those operators and what the outcome of any future negotiation between the parties might be more likely to approximate to. Annex E (confidential) of ComReg Documents 07/01 and 08/06 contained a full chronology of the negotiations between the parties.

²⁹ ComReg undertook a detailed analysis of a number of additional factors that may have played an important role in the bargaining dynamic between the parties, such as bargaining tools that are potentially available to buyers when engaging in negotiations with sellers (i.e. the threat of a possible refusal to purchase or delay, or where the buyer is an important outlet for the seller); H3GI as a new entrant; the role of the regulatory context (i.e. regulation applying to Eircom in the interconnection markets; and dispute resolution).

³⁰ In particular, see paragraphs 4.93 to 4.169 of ComReg Document 08/06.

³¹ See ComReg Document 07/01 at paragraphs 4.29–4.47, Annex E (confidential) and also paragraphs 4.35–4.36, Annex E (confidential) of ComReg Document 08/06.

³² In ComReg's analysis of the CBP issue, it has examined the negotiating histories in relation to MTRs between H3GI and Eircom in the periods prior to H3GI's commercial launch and post-launch. See paragraphs 4.35 to 4.47 and Annex E (confidential) of ComReg Document 08/06.

was not in a position to prevent H3GI from acting to an appreciable extent independently when setting its MTRs. The factual record shows the rates that H3GI and Eircom ultimately agreed upon were higher than the MTRs in the overall mobile sector at that time.³³ Eircom did not constrain H3GI's rates to levels consistent with other MNOs facing similar wholesale customers and/or demand conditions.

- Eircom's commercial incentives and its regulatory obligations to engage in interconnect negotiations also constrain Eircom in exercising CBP. ComReg has considered these factors and the role that they may have played in the bargaining dynamic between H3GI and Eircom.³⁴ If Eircom had delayed or refused to interconnect, alternatives were available to direct interconnection with Eircom for H3GI to credibly launch, such as, the option to interconnect (directly/indirectly) with multiple fixed network operators ("FNOs") and MNOs. At the time of commercial launch, H3GI had concluded a direct interconnect agreement with BT to deliver terminating traffic, including Eircom traffic, to the H3GI network. This was likely to have strengthened H3GI's bargaining position in the negotiations. In respect of negotiating termination rates, Eircom was not in a position to offer more advantageous rates to one operator over another which removed a potentially very significant source of bargaining strength for Eircom. That is, Eircom could not respond to H3GI's requests for high MTRs by a reciprocal increase in its own termination charges.
- While interconnection with Eircom is of importance for H3GI, Eircom's customers similarly expect end-to-end connectivity with all available networks. Any commercial incentive which Eircom may have had to cease purchasing termination from H3GI will have decreased substantially. This is largely owing to the likely pressure coming from Eircom's own customers to ensure that they have the ability to make calls to subscribers on H3GI's network. A refusal by Eircom to provide its customers with certain retail call services (in this instance

³³ H3GI's experts, Binmore and Harbord, carried out an analysis for H3GI and developed a CBP model which predicts, in a saturated market scenario, that the MTRs of a new entrant into the mobile market will be just below the average of other operators' MTRs. ComReg analysed this CBP model (ComReg Document 07/01, paragraphs 4.16-4.28, Annex D). ComReg was of the view that a saturated market did not appear to be an appropriate assumption in the Irish context, where total subscriber numbers continue to grow. Following the views of ComReg set out in ComReg Document 07/01, Binmore and Harbord extended their analysis to cover a non-saturated scenario. ComReg then also analysed the revised CBP model (ComReg Document 08/06, paragraphs 4.22 to 4.34 and Annex D). ComReg reviewed the revised Binmore and Harbord model and noted in particular its emphasis on the bargaining dynamic. However, ComReg's principal reservation on the model was that its predicted outcomes and the arguments for Eircom possessing sufficient CBP did not fit the empirical evidence. Contrary to the predictions of that model, when H3GI entered the mobile market it was not forced to accept MTRs that were at or below the average of the 2G operator rates.

³⁴ ComReg notes that a similar range of issues were considered by the Competition Appeals Tribunal ("the CAT") in *Hutchison 3G (UK) Limited v Office of Communications* [2008] CAT 11 ("the CAT ruling") in the context of Hutchison 3G UK Limited ("H3G") having SMP in the relevant market in the UK. The CAT found that OFCOM was right to rely on other factors such as BT's regulatory obligations regarding carrier pre-selection and indirect access and more general commercial considerations which might weaken BT's CBP. See for example paragraphs 55, 56 and 140 of the CAT ruling.

calls to H3GI's subscribers) could stimulate substitution via Carrier Pre-Selection ("CPS")³⁵ and damage Eircom's reputation.

- On a prospective basis, factors associated with being a new entrant and the threat of refusal to deal and/or delay are of less direct relevance. With existing contracts in place between H3GI and Eircom and defined steps to proceed to re-negotiation of rates or severing relations within the contract, H3GI is likely to be in an even stronger bargaining position than it was when about to enter the market since it has by now gained a greater share of mobile subscribers. Indeed, the increase in relative size by H3GI, as well as the fact that Eircom's customers would be likely to be unhappy about losing the ability to call H3GI's customers, indicates that the bargaining position of H3GI is probably stronger now than it was in 2005 when H3GI entered the market. ComReg is of the view that, on a forward-looking basis, H3GI will be able to negotiate rates that are at least as high as the current level and that there would be insufficient downward pressure on these rates in the future absent regulatory intervention.³⁶
- ComReg notes H3GI's success in obtaining MTRs significantly higher than those achieved by other Irish MNOs designated with SMP. H3GI's MTRs at peak, off-peak and weekend are significantly higher than those of the other Irish MNOs designated with SMP.³⁷ In addition, ComReg estimates that H3GI's current "blended" MTR is approximately 3 cents per minute higher than the average of the other three MNOs designated with SMP.³⁸ H3GI's current MTRs are also significantly higher than the average of European MTRs and, in the absence of regulation, this differential seems likely to increase over time as other operators continue on glide paths to lower rates.³⁹ ComReg also notes that H3GI's prevailing rates are higher than Hutchison's prevailing rates in a number of other jurisdictions where it operates.⁴⁰ There appears little incentive or impetus for H3GI to decrease its rates in line with the general trend of declining MTRs in the mobile sector in Ireland and elsewhere in Europe.⁴¹
- ComReg believes that it is more probable than not that H3GI would, in the absence of regulation, be able to sustain these rates over the period of the review,

³⁵ Eircom is required to allow CPS or indirect access (IA) which enables competing retail service providers to provide calls to customers using the Eircom network. As a result, consumers have the ability to switch to alternative CPS/ IA providers of such calls. See paragraphs 4.126 to 4.138 of ComReg Document 08/06.

³⁶ ComReg notes that, at paragraph 132 of the CAT ruling, the CAT finds that even if BT had sufficient CBP in the earlier period, it did not mean that it still had it in the later period.

³⁷ See Table 4.5 of ComReg Document 07/01 and Table 4.1 of ComReg Document 08/06. It should be noted that following further decreases in the MTRs charged by Vodafone, O2 and Meteor in January, 2008, the gap between H3GI's rates and those of the other operators designated with SMP has widened.

³⁸ See footnote 83, page 43, ComReg Document 08/06. It should be noted that following further decreases in the MTRs charged by Vodafone, O2 and Meteor in January, 2008, the difference between H3GI's blended rate and the average blended rate of the other three operators is now over 3 cents per minute.

³⁹ See Figure 4.1 of ComReg Document 07/01 and Figure 4.1 of ComReg Document 08/06.

⁴⁰ See paragraph 6.67 of ComReg Document 08/06.

⁴¹ This is consistent with the economic literature. For instance, see Gans J.S. & S.P. King (2000) Mobile network competition, customer ignorance and fixed to mobile call prices, *Information Economics and Policy*, 12: 301-328.

despite H3GI's increasing market share.⁴² There does not appear to be any move to re-negotiate these rates, even though there is a mechanism in the interconnection agreement with Eircom to provide for their review. There does not appear to be sufficient pressure on H3GI from other operators to require it to reduce its rates, even though the MTRs of the MNOs designated with SMP are falling. Operators have incentives to charge high prices for termination because terminating operators' wholesale customers are also frequently their downstream competitors.⁴³ H3GI has the ability to charge higher MTRs by virtue of the high and non-transient barriers to entry and the absence of significant competitive pressure and insufficient CBP over the timeframe of the review.⁴⁴

4.17 On balance, these factors taken together are consistent with SMP, which is the ability to act to an appreciable extent independently of other market participants and customers. The empirical evidence suggests that H3GI enjoys and will continue to enjoy MTRs significantly higher than those of the other Irish MNOs designated with SMP if no regulatory remedies are imposed. The empirical evidence does not, therefore, support the contention that buyers in general and Eircom in particular, had or have sufficient CBP to restrict H3GI from acting, to an appreciable extent, independently of its competitors or customers. It is precisely such a situation that *ex ante* SMP regulation (as provided for by domestic and EU legislation) is intended to address.

Dispute Resolution

4.18 In the context of CBP, ComReg considered the issue of dispute resolution in ComReg Document 07/01 and also in ComReg Document 08/06.⁴⁵ Having regard to its analysis, ComReg would summarise its conclusions in relation to dispute resolution as follows:

- For various reasons, the setting through a dispute resolution mechanism, of a cost oriented rate (a SMP obligation) on an operator without SMP (as submitted and suggested by one respondent) was not considered likely, proportionate, or consistent with the requirements of Regulation 6 of the Access Regulations.
- It would in any case be very difficult, if not impossible to predict whether a dispute would be notified, how it would be determined by ComReg, how it would be affected by other legal rights of redress and how parties to the dispute may conduct themselves in handling the dispute. The matters that the respondent

⁴² As market share increases the cost of call termination should decrease as the unit cost falls due to economies of scale.

⁴³ This is again consistent with the economic literature which shows that in addition to smaller operators charging higher termination rates than larger operators, asymmetric regulation may ultimately carry perverse incentives for smaller operators to increase their termination rates. See Dewenter and Haucap (2005), The Effects of Regulating Mobile Termination Rates for Asymmetric Networks, European Journal of Law and Economics, 20: 185-197, p.185-197.

⁴⁴ ComReg notes that, at paragraph 140 of the CAT ruling, the CAT found that OFCOM was right to conclude that H3G has SMP because of (i) its 100 per cent market share; (ii) the existence of absolute barriers to entry; and (iii) the absence of sufficient CBP on the part of its main customer BT. BT is the largest buyer of mobile call termination services in the UK and every operator (fixed or mobile) needs to interconnect with it so that their subscribers can complete calls to BT's subscribers. In Ireland, Eircom is in a similar position to BT.

⁴⁵ See paragraphs 4.151 – 4.164 and Annex D (D.26 – D.53) of ComReg Document 08/06.

raises as being relevant to consideration of this issue are also highly speculative.⁴⁶

- ComReg considers that the respondent's assumptions about the role of dispute resolution are largely inaccurate, overstated and do not reflect the reality.⁴⁷ The respondent in its submissions does not take into account the likelihood of a dispute being notified to and accepted by ComReg. It ignores the various alternatives open to the parties outside of dispute resolution and the other legal means of redress that might follow on from ComReg's determination of a dispute. It also ignores the fact that if the availability of dispute resolution was considered to be a sufficient constraint on SMP, this would largely dispense with the need for *ex ante* regulation by means of SMP regulation.⁴⁸ This is completely at odds with EU legislation, guidelines and good regulatory practice.⁴⁹ It also ignores the fact that dispute resolution does not act as an effective constraint against SMP because it is directed only at the parties involved in the dispute and not the market at large.
- Furthermore, the evidence from the actual negotiations that took place between H3GI and Eircom suggests that H3GI appeared to have used the prospect of dispute resolution to its advantage. H3GI notified a dispute to ComReg [CONFIDENTIAL].

SMP Designation

4.19 On balance based on an examination of the SMP criteria which ComReg believes are relevant, ComReg's view is that, in addition to H3GI's 100% market share of the relevant market, there are high and non transitory barriers to entry and the evidence does not indicate that there is sufficient CBP in this market. Hence, in view of:

- (a) All the circumstances and issues outlined above and in earlier published ComReg documents, and that having considered all of the issues and representations made as part of the consultation process;
- (b) The fact that no new evidence has come to light which would cause ComReg to alter its views as outlined in earlier documents; and

⁴⁶ ComReg notes that in the CAT ruling, the CAT stated that the expectations that the parties to a negotiation could properly have about the way in which OFCOM would resolve a dispute are not such as to give BT sufficient CBP to negate H3G's SMP. The CAT also stated that the existence of dispute resolution powers and the ability of a potential SMP operator to notify a dispute to OFCOM did not constrain H3G's SMP in the relevant market. See paragraphs 93, 94 and 140 of the CAT ruling.

⁴⁷ According to the CAT ruling, dispute resolution powers under section 185 of the Communications Act, 2003 were to be disregarded as a matter of law when assessing whether H3G had SMP (section 185 of the Communications Act, 2003 implements the provisions of the Framework Directive and the Access Directive that cover disputes arising in connection with obligations under those directives). See for example, paragraphs 122 and 140 of the CAT ruling.

⁴⁸ According to the CAT ruling (paragraph 123) it is clear from the Framework Directive and the Access Directive that the process of market review and the imposition of SMP conditions is intended to exist alongside the NRAs' dispute resolution powers and reliance on dispute resolution powers to curb the exercise of SMP is not a satisfactory substitute for proper *ex ante* regulation in the form of price controls in markets with SMP.

⁴⁹ EU legislation, guidelines and good regulatory practice were considered in detail in ComReg Document 07/01 (see paragraphs 4.68 – 4.71) and ComReg Document 08/06 (see paragraphs 4.69 – 4.79).

- (c) The fact that the European Commission did not raise any concerns in relation to the SMP decision;

ComReg concludes and finds that H3GI has a position of SMP on the wholesale market for voice call termination on its mobile network.

Imposition of Specific Obligations

4.20 ComReg has found that the market for wholesale voice call termination on H3GI's mobile network in Ireland is not effectively competitive and that in that market H3GI is in a dominant position.⁵⁰ Accordingly, ComReg has decided to designate H3GI as having SMP. In light of that designation ComReg is required by Regulation 27(4) of the Framework Regulations to impose on H3GI such specific obligations as it considers appropriate. ComReg has considered the appropriateness of imposing on H3GI obligations relating to:

- (a) Price Control;
- (b) Transparency;
- (c) Non-discrimination;
- (d) Access to specific network facilities; and
- (e) Cost accounting and accounting separation.

4.21 Having examined the appropriateness of these obligations ComReg proposed that the imposition on H3GI of obligations of price control, transparency and non-discrimination would be appropriate. Initially in ComReg Document 07/01 and subsequently in ComReg Document 08/06, ComReg set out the reasons why it believed that the imposition of these obligations on H3GI was appropriate.

Price Control Obligation

4.22 In ComReg Document 08/06, ComReg proposed that a cost orientation obligation be imposed on H3GI as a means to address its SMP. ComReg proposed as a first step, imposing a price cap ceiling on H3GI's prevailing MTRs (i.e. setting maximum rates) followed by a glide path over a five year period to a current target blended rate of 7.99 cents per minute. ComReg indicated that a broadly consistent approach was to be adopted with the result that the MTRs of all MNOs designated with SMP, ultimately approximate efficient, cost orientated rates.

4.23 It was proposed that the glide-path referred to above would commence either:

- (a) When H3GI achieved a 5% market share of mobile subscribers; or
- (b) A maximum of two years after the date of the final Decision, whichever occurred earlier.

⁵⁰ European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165/6 [2002], paragraph 112.

- 4.24 In relation to a trigger based on market share, it was proposed that the market share would be calculated by ComReg and based on ComReg's Quarterly Report data.

Views of Respondents

- 4.25 The proposed application of the price control generated the greatest level of debate among respondents as regards of the three proposed remedies.
- 4.26 Only one respondent disagreed with ComReg's proposal to impose a cost orientation obligation on H3GI, arguing that a cost orientation obligation of any form is disproportionate, unjustified and discriminatory and thus contrary to Regulation 9(6) of the Access Regulations and s12 of the Communications Regulation Act, 2002. This respondent maintains that ComReg's proposal to designate H3GI with SMP is unsupported by its analysis detailed in ComReg Documents 07/01 and 08/06. In addition, the respondent submits that, by ComReg's own admission, H3GI is not in a position to raise its price on a forward looking basis; hence, it is unnecessary to impose a ceiling on H3GI's current MTRs.
- 4.27 The comments of the other respondents largely focus on the way the price control measure is proposed to be implemented and not on whether the imposition of a price control measure is in principle, appropriate or justified.
- 4.28 All but one of the respondents agreed with ComReg's proposal that H3GI be required to achieve a current target blended MTR of 7.99 cents per minute within five years after the date of a final Decision. One respondent submitted that the provisions concerning a glide path (the trigger mechanism, the target rate of 7.99 cent per minute, and the applicable timescale for achieving this target rate) are unsupported by any detailed analysis. According to this respondent, ComReg does not provide any rationale or justification for the target rate or associated timelines for achieving the target. The respondent believes that the term mobile subscribers should be defined for the purposes of a trigger mechanism. Finally, this respondent submitted that the proposed price control is more intrusive and less flexible than the price control imposed on the other MNOs designated with SMP as it does not award H3GI the same opportunity to offer voluntary reductions where appropriate, as it believes was the case with the other MNOs. This respondent submits that the proposed price control is disproportionate and discriminatory when compared to the treatment of other MNOs designated with SMP and hence, contrary to Regulation 9(6) of the Access Regulations.
- 4.29 The majority of respondents, while acknowledging the need to be proportionate, generally welcomed the fact that H3GI would be required to bring its MTRs into line with those of the other MNOs on a phased basis, over a reasonable period of time. One respondent submitted that the inclusion of a clear timescale and threshold conditions for the initiation of a glide path approach to the adjustment of H3GI's MTRs to the current target rate, (something already volunteered by the other MNOs designated with SMP) is clearly a positive step. This respondent maintains that this provision improves transparency and provides certainty for all operators in the fixed and mobile markets.
- 4.30 While the European Commission and the majority of the respondents are supportive of the overall effect of the proposed price control, they call upon ComReg to ensure greater consistency with the price control obligation imposed on the other MNOs designated with SMP, and to move immediately to initiate a glide path for H3GI's

MTRs. In particular, the European Commission expressed the view that the proposed trigger for the introduction of a glide path on H3GI does not address the competition problem identified. The European Commission emphasises that higher termination rates are acceptable only when justified by cost during a transitory period and invites ComReg when finalising its decision on a price control for H3GI, to take into account the necessity to impose without delay a glide path obligation on H3GI to bring its MTRs to a competitive level. For a coherent European approach, the European Commission also invites ComReg to revisit its analysis as soon as a common approach has been established at a European level.

- 4.31 Three respondents question the need for a trigger within the price control remedy. They argue that the inclusion of a trigger is inconsistent with the European Commission's guidance, that it is arbitrary and not sufficiently justified, that it is likely to lead to a significant delay in the actual implementation of a glide path or cost orientated termination charges on H3GI, and that therefore, it will not promote predictability or certainty in the market. While these respondents acknowledge that asymmetric rates may be objectively justified for a limited period, they contend that symmetry in MTRs should be achieved over time as the impact of exogenous factors diminishes.
- 4.32 One respondent submitted that the immediate implementation of a glide path would allow the competition problems identified by ComReg to be addressed immediately and would provide the best incentives for H3GI to grow its market share, thereby overcoming any challenges posed by late entry. This view is shared by the European Commission which indicates that any further delay in the commencement of a glide path could remove H3GI's incentive to become cost efficient.
- 4.33 The European Commission also commented that while a benchmark approach to the setting of a price control is not precluded, such an approach should serve to promote efficiency, competition and maximise consumer benefits. The European Commission looks for clarification from ComReg as to which countries were selected for the benchmarking comparison and the reasons why ComReg considers that these countries are most suited for setting reasonable prices on the Irish market for mobile call termination, based on objective criteria.

ComReg's Position

Rationale for Price Control Obligation

- 4.34 Regulation 14(1) of the Access Regulations provides that ComReg may impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access "*where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze to the detriment of end-users.*"⁵¹ ComReg's investigation of the relevant market has established that it is not effectively competitive and that H3GI has SMP on it. Given the absence of effective competition, there is a clear risk that H3GI might sustain prices at an excessively high level.

⁵¹ Access Regulations, Regulation 14 (1).

- 4.35 The presence of that risk tends to be confirmed by a number of elements, of which ComReg has taken account. H3GI has sought (and obtained) MTRs from Eircom and other fixed operators and MNOs that were higher than other MNO's rates at the time of H3GI's entry into the mobile market. H3GI's MTRs have remained constant over the period since it entered the market, against a backdrop of declining MTRs by the other MNOs designated with SMP and indeed declining MTRs across Europe in general. H3GI's prevailing MTRs are significantly higher than the MTRs charged by other Irish MNOs designated with SMP. Based on these elements, ComReg considers that there is a clear risk of H3GI's price levels being sustained at an excessively high level due to the lack of effective pressure (e.g. from new entry/expansion or from strong buyers, such as Eircom and/or other MNOs) to bring them down to a competitive level over the period of the review.
- 4.36 The detrimental effect may manifest itself in a number of ways. ComReg has explained in ComReg Document 08/06 its view on the detrimental consequences of excessively high levels of MTR over sustained periods on end-users, in terms of raising rivals' costs and exploitation of end users.⁵²
- 4.37 In making its determination under Regulation 14 of the Access Regulations, ComReg has been mindful of the need to promote efficiency, sustainable competition as well as maximising consumer benefits, as required by the Access Regulations.⁵³ Forbearance from price control is not appropriate or justified given the risk that H3GI's price levels might be sustained at an excessively high level; the presence of that risk being confirmed by the absence of any reductions in H3GI's MTRs to date and the absence of any sign of H3GI's MTRs tending towards a competitive level. Amongst other things, high MTRs raise the costs for other operators seeking to terminate calls on the network concerned. ComReg has previously indicated that, absent regulation of H3GI's MTRs (where other MNOs designated with SMP were progressively reducing their respective MTRs) H3GI's artificial advantage arising from its higher MTRs would be strengthened.⁵⁴ Forbearance from price control would also likely remove the incentive for H3GI to become cost effective as quickly as possible. In addition, MTRs make up the largest proportion of costs in the retail price of a fixed and/or mobile to mobile, voice call. This ultimately has an effect on the price paid by end-users with the result that high MTRs in general lead to higher prices for consumers.⁵⁵
- 4.38 ComReg has also taken account of H3GI's position as a recent mobile entrant and its smaller share of the market. In this context, it has also considered the effect of price control on H3GI's financial position. However, it has concluded that the imposition of a price control obligation is justified and proportionate given the failure in the market in question and H3GI's position in that market. In reaching that conclusion, ComReg has taken account of H3GI's 100% share of the market concerned and the chosen method of alignment of H3GI's MTRs to an efficient level, which is by way of a glide path obligation over a reasonable time period. ComReg notes that H3GI's market share is increasing and the number portability process for example, should

⁵² ComReg Document 08/06, paras.6.7-6.15.

⁵³ Access Regulations, Regulation 14 (3).

⁵⁴ For example, see paragraph 6.49 to 6.51 of ComReg Document 08/06.

⁵⁵ ComReg notes that in relation to possible welfare gains from regulation, the CAT did not agree that the welfare gains were "negligible". See paragraphs 164 and 197 of the CAT ruling.

assist H3GI in gaining market share. In addition, H3GI has the benefit of national roaming agreements with other MNOs, providing almost full national coverage. H3GI has some flexibility in how it achieves the target rate through voluntary proposals to ComReg consistent with the glide path.

- 4.39 Accordingly, the imposition of a price control obligation is consistent with the achievement of ComReg's overall statutory objectives. For the reasons set out below, in selecting the appropriate form of price control, ComReg has aimed at providing greater predictability, legal certainty, and increased transparency regarding H3GI's MTRs whilst also keeping regulation to the minimum necessary to achieve the objective of bringing H3GI's MTRs to a competitive level to the benefit of the industry as a whole and ultimately consumers.⁵⁶ ComReg notes that the majority of EU member states have now imposed cost orientation obligations on operators in relation to their MTRs. This is consistent with the European Commission's policy with regard to the regulation of this relevant market.

Price Ceiling

- 4.40 ComReg's approach to price control envisages that H3GI's MTRs be capped at their current level immediately from the date of publication of this Decision Notice. Following this H3GI's MTRs will then be reduced to a competitive level on a phased basis, over a reasonable period of time, as discussed in more detail below. In view of the SMP designation and the respondents' views, ComReg believes it appropriate and justified to impose a maximum price on H3GI by capping its rates at their current level.⁵⁷ This is because forbearance, as discussed in paragraph 4.37 above, or simply monitoring the trend in H3GI's MTRs, is not sufficient to address the potential underlying competition problems in this market.⁵⁸ Such an approach could potentially lead to prices being maintained above a competitive level for a longer period to the detriment of the market and ultimately, end users. ComReg notes the views of one respondent who suggests that a price cap on H3GI's MTRs would preclude H3GI from raising its MTRs in line with inflation which is an onerous cost control burden. ComReg is of the view that capping H3GI's MTRs at their current rates is appropriate as this will lead to the initial benefit of some real reductions in H3GI's MTRs which will then be followed by further reductions when H3GI commences on a glide path towards the current blended target MTR of 7.99 cents.

Glide path

- 4.41 ComReg is of the view that a price control which consists only of imposing a ceiling at H3GI's prevailing rates indefinitely, would not be appropriate or sufficient to safeguard consumers in the medium to long term. This is because, in the absence of regulation, H3GI has not voluntarily lowered its MTRs from the price agreed by H3GI at commercial launch and ComReg has no evidence before it that H3GI has

⁵⁶ In accordance with the Access Regulations, Regulation 9 (6).

⁵⁷ This is also reflected in the ERG's Common Position on termination rates which states that "NRAs should impose a maximum price" and that if a MNO chooses to voluntarily charge prices below this amount, it should be allowed to do so. ERG (2008) ERG's Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rate.

http://www.erg.eu.int/doc/publications/erg_07_83_mtr_ftr_cp_12_03_08.pdf (at page 93).

⁵⁸ ComReg outlined potential competition problems that could arise in the call termination market, ComReg Document 08/06 paragraphs 6.1 to 6.28.

come under sufficient pressure so as to require it to reduce its MTRs. The evidence suggests that H3GI has the ability to charge high prices and the incentives to do so. In light of the reductions that have occurred in the other MNOs' rates in the intervening period, H3GI's MTRs for peak, off-peak and weekend calls are now significantly higher than the rates of the other MNOs designated with SMP. Furthermore, ComReg notes that the MTRs of H3GI's affiliates in the Hutchison Group in other EU jurisdictions are in many cases lower than H3GI's rates and they are also declining along similar lines to 2G networks. Therefore, in ComReg Document 08/06, ComReg proposed that in addition to a price cap, H3GI would have to comply with a glide path when it reached a trigger, and reduce its MTRs to a current blended target of 7.99 cents, no later than five years after the date of ComReg's final Decision.

4.42 ComReg has noted the European Commission's view that ComReg should consider implementing the glide path on H3GI *earlier* than was proposed by ComReg. The European Commission was of the view that any grace period could remove H3GI's incentive to become cost effective as quickly as possible. Other respondents also strongly advocated the immediate commencement of the glide-path on H3GI.

4.43 Accordingly, having carefully taken into account the comments of the European Commission and the representations of other respondents, ComReg has decided that the glide-path for regulated MTRs will commence either (a) when H3GI achieves a market share of 5% of mobile subscribers, or (b) six months after the effective date of this Decision Notice (i.e. the date of its publication) whichever occurs soonest. Thus, the six month period referred to here, represents a "longstop" date. For the purposes of the 5% market share trigger, ComReg will use the market shares for mobile subscribers, exclusive of mobile broadband subscribers using data cards or USB modems (dongles). It may be noted in this regard that ComReg has defined the relevant market as the market for wholesale voice call termination services on H3GI's network (which excludes SMS and mobile data services). In arriving at its conclusions ComReg has, in addition to having taken into account the views of the European Commission and respondents, considered the need for transparency, greater predictability and legal certainty in relation to H3GI's MTRs. Furthermore, ComReg has also considered the need to avoid the possibility of significant delay in the commencement of the glide path. As previously noted, asymmetric regulation (i.e. only regulating the other SMP MNOs and requiring them to reduce MTRs) increasingly tends to distort competition and high MTRs in general lead to higher prices for consumers. H3GI's market share is increasing and in Q2, 2008 represented 4.1% of the total active mobile subscription base in Ireland (exclusive of mobile broadband).⁵⁹

4.44 Overall, ComReg set out in ComReg Document 08/06⁶⁰ reasons as to why it considers the proposed price control and glide path obligation on H3GI is appropriate, proportionate and justified. These reasons can be summarised as follows:

- The proposed approach balances the need to avoid the risk of market distortion and to protect consumers against excessively high retail prices for mobile calls

⁵⁹ ComReg (2008) Irish Communications Market: Key Data Report - Q2, 2008, Document 08/75, 10 September.

⁶⁰ See paragraphs 6.29 to 6.71.

with the need to take proportionate measures, to encourage investment by mobile operators and to promote further competition in the retail mobile market. This is in accordance with ComReg's policy objectives.⁶¹

- ComReg is of the view that the trigger mechanism for initiating a graduated approach to reducing H3GI's MTRs does not represent the deferred imposition of price control. Upon being designated with SMP, H3GI will immediately become subject to a cost orientation obligation. This obligation will entail a ceiling at H3GI's prevailing MTRs which will apply from the effective date of this Decision Notice. Furthermore H3GI will be required to reduce its MTRs over time towards an efficient cost orientated level. ComReg's proposals have the objective of reducing the impact of market failure and bringing H3GI's MTRs down to a competitive level on a phased basis within a reasonable period. This is broadly similar to the price control obligation imposed on the MNOs currently designated with SMP.⁶²
- The features of the price control obligation (the trigger mechanism and glide path approach) which ComReg intends to apply seek to ensure that the price control on H3GI is proportionate. The approach takes account of H3GI's stage of development in the market and in particular, H3GI's position as the fourth operator in the Irish mobile market⁶³ and as the operator of a greenfield 3G network.⁶⁴
- The approach recognises that it can be socially optimal to have non-reciprocal MTRs across different operators but only for a limited period. With a smaller market share than other MNOs, the welfare burden of H3GI's high MTRs is likely to be relatively low, while the dynamic benefits of having an additional player in the mobile market are likely to be high. By permitting H3GI to charge higher MTRs than other MNOs for a limited period of time it may obtain higher expected profits in the short term, thus strengthening its relative competitive position and encouraging it to invest and innovate. The welfare benefit is that H3GI's strengthened competitive position will lead to increased competition in the retail mobile market in the long term, which will benefit consumers.
- However, if asymmetric rate differences are allowed to continue over too long a period of time this can lead to competitive distortions, inefficiencies and be detrimental to competition and consumer welfare. Setting MTRs to reflect the efficient cost of provision provides incentives for H3GI to become more efficient and reduces the risk of detrimental effects on end users. ComReg has also considered the potential effects on related markets. As H3GI grows larger and secures higher market shares, its higher MTRs may become increasingly

⁶¹ Regulation 14 (2) of the Access Regulations.

⁶² ComReg notes that on this point, the CAT was of the view that H3G's small market share (4%) did not justify leaving it unregulated. According to the CAT ruling, OFCOM was correct in deciding to set a price control for H3G as well as other MNOs. See paragraphs 237, 239 and 298 of the CAT ruling.

⁶³ While H3GI obtained a 3G licence in mid-2002, it commenced offering a full suite of 3G services to Irish consumers in late 2005.

⁶⁴ Whilst H3GI has not obtained a GSM licence, it has, however, roaming arrangements in place so that in areas of the country which are not covered by H3GI's 3G network its customers can interconnect using a 2G network.

burdensome on existing MNOs designated with SMP and customers of other networks, who have to pay these charges. Regulation of other MNOs designated with SMP, requiring them alone to reduce their respective MTRs, may lead to greater distortions to competition. As noted earlier, H3GI's artificial advantage arising from its higher MTRs would be strengthened.⁶⁵ For this reason, ComReg concludes that it is necessary to bring H3GI's MTRs into line with the other MNOs designated with SMP over a reasonable period of time.

- 4.45 In ComReg's view, the process of aligning H3GI's MTRs with those of the other MNOs designated with SMP and moving towards more reasonable prices for wholesale voice call termination, addresses the potential competition problems and market failures identified in the market analysis in a proportionate way. In view of the respondents' calls for more visibility of the price control to be imposed on H3GI, the inclusion in the Decision Instrument of a clear timeline and threshold conditions for the initiation of the glide path will provide greater transparency, predictability and provide certainty for all operators (both FNOs and MNOs) in the market in relation to MTRs. The glide path provision is ultimately intended to achieve the objective of bringing H3GI's MTRs to a competitive level. It is also intended to achieve the objective of aligning H3GI's MTRs with the current target MTR of 7.99 cents, already committed to by the MNOs designated with SMP. ComReg believes that this will ultimately benefit end users through lower retail prices.
- 4.46 To ensure that the actual implementation of the glide path occurs without delay, once the trigger has been met, and to ensure predictability for MNOs' and to safeguard consumers, H3GI must therefore, submit proposals to ComReg regarding how it intends to achieve the current target rate within the specified timelines in a manner satisfactory to ComReg. It is ComReg's preference and expectation that H3GI would offer annual reductions to their MTRs in equal proportions (i.e., a reduction of the same proportion in each year). Alternative proposals from H3GI which are consistent with a gradual transition to the current target rate of 7.99 cents and which are consistent with the glide paths of the MNOs designated with SMP, would however be given careful consideration by ComReg. ComReg would not consider it acceptable or satisfactory, or in compliance with its glide path obligations, if H3GI proposed to undertake all reduction(s) in for example, the last year of the control period.
- 4.47 H3GI's proposals in relation to the glide path must be submitted to ComReg no later than either a) five months after the effective date of this Decision Notice and Decision Instrument or b) one month after ComReg has notified H3GI that the 5% market share trigger has been met (if that happens sooner than (a) above). ComReg considers this approach to be reasonable, proportionate and not burdensome to H3GI. It is an approach that provides an opportunity for H3GI itself to suggest the reductions to its MTRs which will bring it to the current target rate of 7.99 cents, in a gradual manner. This approach has the attraction of being efficient and transparent. Having carefully taken in to account the submissions received from respondents and

⁶⁵ ComReg notes that at paragraph 209 of the CAT ruling, the CAT was of the view that a decision to regulate some but not all MNOs, would alter the conditions for competition in the market for the supply of mobile subscription and call origination services. At paragraph 212 of the CAT ruling, the CAT also stated that the ability of H3G to offer cheaper retail packages because of the money they make on mobile call termination is not necessarily beneficial to the competitive process or in the long term interests of consumers.

the European Commission and in the interests of transparency, predictability and legal certainty for all operators in the market, ComReg considers that it is preferable that the glide path commence *immediately*, either upon H3GI reaching the 5% market share or the 6 month longstop date (whichever occurs soonest). Absent satisfactory proposals by H3GI in respect of its MTRs, ComReg reserves the right (following consultation if necessary) to issue a direction to H3GI regarding the structure of the glide path. ComReg may also, if it considers it necessary and appropriate, undertake cost modelling for that purpose.

Target Rate

- 4.48 ComReg clearly indicated in ComReg Document 08/06 that H3GI must achieve the current target blended MTR of 7.99 cents by no later than five years after the effective date of this Decision Notice.
- 4.49 One of the main purposes of price regulation of SMP operators is to try to achieve efficient outcomes consistent with those in a competitive market. As stated before, H3GI's current MTRs are significantly higher than the other MNOs designated with SMP, significantly higher than the average MTRs in Europe and, in some cases, higher than rates applied by H3GI's affiliates in the Hutchison Group in a number of other jurisdictions.
- 4.50 One method of imposing cost orientated prices would be to cost model H3GI's exact costs involved in terminating calls, subsequent to it being designated with SMP. However, it is likely that this information would not be available for considerable time. As noted above, the delay that this could involve would prejudice other operators who terminate their calls on H3GI's network and ultimately have a negative impact on consumers. In addition, ComReg is of the view that to place an accounting separation and/or cost accounting systems obligation on H3GI at this stage at least may be excessively burdensome and costly for it to comply with and may therefore represent a disproportionate approach in light of the alternatives.
- 4.51 For these reasons, ComReg believed it was appropriate to consider an alternative method for bringing H3GI's MTRs to a competitive level. The method which ComReg has chosen to adopt as a means of imposing cost orientated prices on H3GI is a benchmarking approach. ComReg was of the view that a benchmarking approach was preferable at this time as it is likely to be less burdensome for H3GI compared to the potential regulatory and compliance costs and delays associated with undertaking a detailed cost model specifically for H3GI. In ComReg's view, benchmarking is likely to be the least intrusive and most proportionate means of setting MTRs at this time. ComReg also notes the European Commission's view that the regulatory framework does not exclude the possibility of using a benchmark approach for pricing purposes.⁶⁶
- 4.52 The purpose of this benchmarking exercise was to determine what could be considered to be an efficient MTR level in Europe by reference to European "best practice". ComReg noted that efficient MTRs may be established through a

⁶⁶ See correspondence sent from the European Commission to ComReg dated 18 February, 2008. Available at: http://circa.europa.eu/Public/irc/infso/ecctf/library?l=ireland/registerednotifications/ie20080746/ie-2008-0746_actepdf/ EN 1.0 &a=d.

combination of bottom up long run incremental cost ("LRIC") modelling, top down approaches and reference to MTRs in other countries.⁶⁷

- 4.53 In setting a target rate, ComReg considered the average MTR in Europe published by the ERG. The current average MTR in Europe is approximately 8.7 cents and this rate has been falling over time.⁶⁸
- 4.54 ComReg also had regard to the cost modelling approaches adopted in the UK, France, Sweden, Austria and Germany.⁶⁹ ComReg considers that these countries are likely to be a suitable reference point for setting reasonable MTRs for MNOs designated with SMP in Ireland, because the NRAs in these countries have undertaken some cost modelling of MTRs and the selected countries appear to represent (at this stage) best practice in terms of current and future MTR levels. These countries already have MTRs which are below the current average MTR in Europe of circa 8.7 cents. The selected countries have used some LRIC modelling and/or some consideration of cost accounting, to establish a reasonable efficient target MTR level and, hence, could be seen as a best approximation of the costs of an efficient operator at this stage. As three of the MNOs which operate in Ireland also operate in the UK (i.e. Vodafone, O₂ and an affiliate of H3GI, namely H3G) ComReg has had regard to OFCOM's approach. OFCOM had regard to cost models which have been updated on a number of occasions. On the basis of their most recent model, OFCOM concluded that a reasonable efficient charge level for MTRs by 2010/11 is 5.1 pence sterling, for 2G/3G operators and 5.9 pence sterling for a 3G-only operator (this equates to approximately 7.5 cents).⁷⁰
- 4.55 From the exercise referred to above, ComReg proposed, at the time of the publication of ComReg Document 08/06, a target rate of 7.99 cents which it considered was a reasonable efficient target MTR level and was likely to be a credible approximation of a cost orientated price for mobile voice call termination at that time. However, in the intervening period, the EU Commission has consulted on a draft Recommendation in relation to termination rates.⁷¹ Progressive reductions in MTRs are being implemented across Europe and there is a movement towards a reduction of asymmetries in MTRs. As a result, the current glide paths set for the MNOs designated with SMP, and proposed for H3GI, may be above the cost of efficient service provision.
- 4.56 ComReg has decided that H3GI must comply with a glide path towards an efficient cost orientated MTR and reduce its MTRs towards a current target blended rate of 7.99 cents which must be achieved by 2013. The glide path provision, while bringing H3GI's MTRs into line with those of the other MNOs designated with SMP, is

⁶⁷ In imposing cost recovery mechanisms or pricing methodology, ComReg may take account of MTRs in comparable competitive markets. In this regard, see Regulation 14 (3) of the Access Regulations.

⁶⁸ Published by the European Regulators Group:

http://www.erg.eu.int/doc/publications/erg_08_41_mtr_update_snapshot_081020.pdf.

⁶⁹ Hutchison operates in the UK and Sweden and has been designated with SMP in each of these countries.

⁷⁰ These are 2006/07 prices. OFCOM, 2007, Mobile Call Termination Statement, 27 March, 2007.

⁷¹ European Commission (2008), draft Commission recommendation on the regulatory treatment of fixed and mobile termination rates in the EU:

http://ec.europa.eu/information_society/policy/ecomms/doc/library/public_consult/termination_rates/termination.pdf

ultimately intended to bring H3GI's MTRs towards an efficient cost orientated level over a reasonable time period. ComReg is mindful of the need to promote efficiency and competition, as well as maximising consumer benefits. ComReg will continue to monitor MTRs on an ongoing basis to ensure that the trend in MTRs in Ireland is consistent with best practice in Europe, using available information on MTRs across the EU from reliable sources. It must be stressed therefore, that ComReg will keep the nature of the glide path (including the current target rate of 7.99 cent and the timeline for achieving it) under review. Given that progressive reductions in MTRs are being implemented across Europe, it may at a future date, be necessary and proportionate to amend the current target rate of 7.99 cent to align with best practice in the EU. In this regard, ComReg strictly reserves the right to review and if ultimately necessary, amend H3GI's price control obligations herein. ComReg may, if it considers it necessary and appropriate, decide to undertake cost modelling of H3GI and/or other MNOs in Ireland for that purpose.

Non-Imposition of Access Obligation

4.57 For the reasons set out in paragraphs 6.93 to 6.95 of ComReg Document 08/06, ComReg proposed that an access obligation would not be imposed on H3GI at this stage.

Views of Respondents

4.58 The majority of the respondents submitted that a symmetric regulatory approach to the access obligation must be adopted. Two respondents stated that as an access obligation was imposed on other MNOs designated with SMP in the markets for mobile voice call termination on their individual networks, and in the absence of factors unique to H3GI, the same remedy should be imposed on H3GI. They submitted that an access obligation should be imposed on H3GI in line with the other MNOs or if it is not applied to H3GI, it should also be withdrawn from other MNOs designated with SMP. One respondent did not accept that H3GI's low market share or posited lack of economies of scale were significant in determining whether an access obligation is warranted.

4.59 Another respondent questioned ComReg's argument that the motivation to interconnect is stronger for H3GI as a late entrant. Even if this is the case, the respondent calls for a review of the access obligations that have been applied to Meteor, as it is also a late entrant and therefore, is similarly strongly motivated to provide access. The respondent argues that ComReg has failed to demonstrate why commercial incentives would not be equally strong for Meteor, which is also striving to overcome late entry to the market relative to Vodafone and O2.

4.60 Two respondents believe that the non-imposition of an access obligation on H3GI does not take account of the comments made by the European Commission to ComReg regarding the fixed termination markets in December, 2007. The European Commission stated that, in its view, the general obligation contained in the Access Regulations is not sufficient, and a non-discrimination obligation cannot be considered as a guarantee that access will be granted automatically. One of the two aforementioned respondents refers to the fact that ComReg justified its decision to exercise forbearance from imposing an access obligation on other alternative operators ("OAOs") in the fixed termination markets by referring to the commercial

incentives of smaller/newer entrants, the Access Regulations, and to the large asymmetries between OAOs and Eircom in terms of the geographic reach and structure of their networks. The same respondent argues that these asymmetries do not apply to the mobile market. For these reasons, the respondent argues that the proposal to forebear on imposing an access obligation on H3GI has been insufficiently justified.

- 4.61 One respondent argues that the omission of an access obligation is inconsistent with ComReg's previous MTR decision which was originally imposed on H3GI. In its original market analysis in 2005, ComReg considered it appropriate that an access remedy be applicable to all SMP operators under consideration, which included H3GI at the time. The respondent argues that it is clear from ComReg Document 08/06 that ComReg does not perceive there to be any significant change to market conditions and therefore, the decision not to apply an access obligation appears to be solely attributed to a shift in ComReg's opinion regarding the motivations of providing access. This respondent calls for ComReg to be consistent in applying remedies. The same respondent questions whether ComReg's decision not to impose an access obligation on H3GI relies on a market share threshold above which it views the access incentives to be sufficiently strong to obviate the need for an access remedy. This respondent points to the fact that Meteor had a market share of less than 10% when ComReg proposed an access remedy on it.

ComReg's Position

- 4.62 ComReg has further considered this issue in light of respondents' views. If ComReg was to become aware of a refusal or delayed interconnection by H3GI, ComReg would consider whether this constituted a breach by H3GI of the obligation of non-discrimination (whereby a failure to provide access, where it is already being provided to others (as is the case with H3GI) could constitute a breach of H3GI's non-discrimination obligation) and ComReg could intervene in a timely fashion to remedy any non-compliance.
- 4.63 H3GI's non-discrimination obligation together with H3GI's commercial interests to offer access and interconnection, suggest to ComReg that an access obligation is not necessary at this stage. This is consistent with the requirement to adopt the least burdensome means of regulatory intervention at this time. However, in the event that an access problem arose, (such as for example, delaying tactics on the part of H3GI) ComReg would consider the necessity and appropriateness of the imposition of a more specific access obligation on H3GI.

Transparency Obligation

- 4.64 In ComReg Document 08/06, ComReg set out its view that H3GI should be required to publish on its website any amendments to its MTRs 30 days in advance of those amendments becoming effective.

Views of Respondents

- 4.65 Three of the four respondents argued that a consistent approach should be applied to all MNOs regarding the period of time required by an operator to publish on its website any amendments to its MTRs. The other MNOs designated with SMP are

required to publish any amendments to their MTRs 28 days in advance of those amendments becoming effective. One respondent does not accept ComReg's rationale for an asymmetric regulatory approach to H3GI vis-à-vis its competitors in the mobile market in terms of the differences in the transparency obligation imposed on H3GI. The respondent argues that it is discriminatory, that other MNOs are required to publish a Reference Interconnect Offer ("RIO") while H3GI is not. This respondent argues that it is a regulatory burden and should not be imposed on H3GI and should be removed for all other MNOs.

ComReg's Position

4.66 In light of respondents' views and, having considered this issue further, ComReg remains of the view it expressed in ComReg Documents 07/01 and 08/06 that it is necessary and appropriate to apply an obligation of transparency to H3GI, consistent with all MNOs designated with SMP. This obligation has the purpose of assisting transparency for the monitoring of potential anti-competitive behaviour, as well as allowing competing providers time to plan for changes to MTRs. Consistent with all SMP operators, H3GI will be required to provide 28 days advance notice of any change to its MTRs and the Decision Instrument has been amended accordingly.

Appendix A – Decision Instrument

1 STATUTORY POWERS

1.1 This Decision Instrument is made by the Commission for Communications Regulation (“ComReg”):

1. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations⁷² and Regulations 9, 10, 11 and 14 of the Access Regulations;⁷³
2. Having regard to and in compliance with ss 10 and 12 of the Act of 2002⁷⁴ and the factors set out in Regulation 13 (4) of the Access Regulations;
3. Taking the utmost account of the European Commission’s Recommendation⁷⁵ and the SMP Guidelines;⁷⁶
4. In compliance with s 13 of the Act of 2002 and the relevant Policy Directions made by the Minister;⁷⁷
5. Based on the market definition exercise and the analysis conducted by ComReg in relation to the market for wholesale voice call termination services on H3GI’s individual mobile network described in more detail in the Consultation Document entitled *Market Analysis: Mobile voice call termination on Hutchison 3G Ireland’s mobile network* (Document No. 07/01) dated 11 January, 2007 and the Response to Consultation and Consultation on Draft Decision entitled *Market Analysis - Wholesale Voice call termination on Hutchison 3G Ireland’s mobile network*; (Document No 08/06) dated 8 January, 2008 and in this Decision Notice and Decision Instrument; and
6. Having taken into account the submissions received in response to Document No. 07/01 and Document No 08/06.

⁷² The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

⁷³ The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

⁷⁴ The Communications Regulation Act, 2002.

⁷⁵ European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁷⁶ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

⁷⁷ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

- 1.2 In this Decision Instrument the following words and phrases shall have the following meanings:

“**H3GI**” means Hutchison 3G (Ireland) Limited;

“**Mobile Subscribers**” means mobile subscribers, excluding mobile broadband subscribers using data cards and USB modems (dongles);

“**MVCT**” means wholesale mobile voice call termination services;

“**Operator**” means an undertaking (within the meaning of the Framework Regulations) seeking MVCT from H3GI;

“**SMP**” means significant market power, as referred to in Regulation 25 of the Framework Regulations.

- 1.3 This Decision Instrument shall where necessary be construed in conjunction with the remainder of this Decision Notice and the consultation documents preceding this Decision Notice and Decision Instrument (as referred to in section 1.1, (5) hereof).

2 MARKET DEFINITION

- 2.1 This Decision Instrument relates to the market for wholesale voice call termination services on individual mobile networks, as identified in the European Commission's Recommendation.
- 2.2 Pursuant to Regulation 26 of the Framework Regulations and in accordance with the European Commission's Recommendation of 17 December, 2007⁷⁸, the relevant product market in this Decision Instrument is defined as the market for wholesale voice call termination on H3GI's individual mobile network.
- 2.3 Pursuant to Regulation 26 of the Framework Regulations, the relevant geographic market for the market for wholesale voice call termination on H3GI's individual mobile network is defined as Ireland.

3 DESIGNATION OF UNDERTAKING WITH SMP

- 3.1 Pursuant to Regulation 27 of the Framework Regulations, H3GI is designated as having SMP in the market for wholesale voice call termination on its individual mobile network in Ireland.
- 3.2 For the purposes of this Decision Instrument, any reference to H3GI includes its successors and assigns and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, H3GI and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant product and geographic markets defined in this Decision Instrument.

⁷⁸ OJ L 344/65 [2007].

4 SMP OBLIGATIONS

4.1 ComReg hereby imposes the SMP obligations on H3GI, as provided for by Regulations 9, 10, 11 and 14 of the Access Regulations and as set out hereunder.

5 OBLIGATION OF TRANSPARENCY

5.1 Pursuant to Regulation 10 of the Access Regulations, H3GI shall have the obligation to ensure transparency in relation to the terms and conditions (including price) for offering and providing MVCT.

5.2 Without prejudice to the generality of section 5.1, H3GI shall comply with the SMP obligations set out in sections 5.3 and 5.4.

5.3 H3GI shall publish on its official website and in an easily accessible manner, all MVCT prices 30 days after the effective date of this Decision Instrument. H3GI shall publish on its official website and in an easily accessible manner all amendments to MVCT prices 28 days prior to their becoming effective.

5.4 H3GI shall make publicly available, accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices in respect of MVCT and other information, as may be specified by ComReg from time to time.

6 OBLIGATION OF NON-DISCRIMINATION

6.1 Pursuant to Regulation 11 of the Access Regulations, H3GI shall have an obligation of non-discrimination.

6.2 Without prejudice to the generality of section 6.1, H3GI shall:

1. Ensure that it applies equivalent conditions in equivalent circumstances to the Operators to which it provides equivalent MVCT; and
2. Ensure that it provides MVCT and information in relation thereto, to Operators under the same conditions and of the same quality as H3GI provides for its own MVCT, or those of its subsidiaries or partners.

7 OBLIGATION RELATING TO PRICE CONTROL

7.1 Pursuant to Regulation 14 of the Access Regulations, H3GI shall have an obligation of cost orientation with respect to its prices for MVCT, to take effect in accordance with the provisions of this section.

7.2 From the effective date of this Decision Instrument, H3GI's prices for MVCT shall not exceed those set out in the Table below.

Table: Maximum prices that H3GI is permitted to charge for MVCT (Cent per minute)

Peak	Off-Peak	Weekend
17.78	11.43	8.89

- 7.3 When H3GI achieves 5% market share in relation to Mobile Subscribers, or upon the expiry of 6 calendar months from the effective date of this Decision Instrument, whichever happens earlier, a glide path towards the reduction in H3GI's prices for MVCT shall become operative. H3GI shall reduce its prices for MVCT to a target blended price of 7.99 Cent per minute, no later than 60 calendar months from the effective date of this Decision Instrument. The target blended price of 7.99 Cent per minute shall be a weighted average price of peak, off-peak and weekend prices for MVCT. The obligation to meet this target shall be implemented on a phased basis over the period of 60 calendar months.
- 7.4 No later than either (a) 5 calendar months after the effective date of this Decision Instrument, or (b) 1 calendar month after ComReg has notified H3GI under section 7.6 that the 5% market share trigger has been met (if that happens sooner than (a) above), H3GI shall submit a proposal in writing to ComReg, describing in detail how it proposes to achieve the target blended price of 7.99 Cent per minute, in compliance with its obligations under section 7.3 and this Decision Instrument. The written proposal shall at a minimum, specify:
1. The exact number of reductions in prices for MVCT that H3GI proposes to make;
 2. The exact amount of each proposed reduction; and
 3. The exact times when each of the proposed reductions are to become effective.
- 7.5 Without prejudice to section 7.3 and section 7.4, ComReg may, if it is not satisfied with H3GI's draft proposal referred to in section 7.4, issue a decision, following prior consultation, in relation to the glide path towards the target blended price of 7.99 Cent per minute. Such a decision on a glide path may, amongst other things, specify:
1. The exact number of reductions in H3GI's prices for MVCT that are required;
 2. The exact amount of each reduction; and
 3. The exact times when such reductions must become effective.

- 7.6 The market share referred to in section 7.3 and section 7.4 shall be calculated by ComReg. H3GI shall comply with any written request made by ComReg requesting statistical or other information for the purpose of calculating H3GI's market share referred to in section 7.3. ComReg shall inform H3GI in writing if it determines that H3GI has attained a market share of 5% of Mobile Subscribers.

8 STATUTORY POWERS NOT AFFECTED

- 8.1 For the avoidance of doubt, nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the effective date of this Decision Instrument) from time to time as the occasion requires.

9 EFFECTIVE DATE

- 9.1 This Decision Instrument shall be effective from the date of its publication and shall remain in force until further notice by ComReg.

**JOHN DOHERTY
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
DATED THIS THE 1 DAY OF DECEMBER, 2008**

Appendix B – Glossary

CAT	Competition Appeals Tribunal (UK)
CBP	Countervailing Buyer Power
CPS	Carrier Pre Selection
ECAP	Electronic Communications Appeals Panel
ERG	European Regulators Group
FNO	Fixed Network Operator
H3G	Hutchison UK
H3GI	Hutchison (3G Ireland) Limited
IA	Indirect Access
LRIC	Long Run Incremental Costing
MNO	Mobile Network Operator
MTR	Mobile Termination Rate
NRA	National Regulatory Authority
OAO	Other Alternative Operator
RIO	Reference Interconnect Offer
SMP	Significant Market Power
USB	Universal Serial Bus (dongles)