Commission for
Communications Regulation

Draft Determination in a dispute between (i) four parties represented by Towerhouse LLP and (ii) Eircom Ltd

Responses to ComReg Document No 16/40

Submissions to Draft Determination 16/40

Reference: ComReg 16/40s

Version: Final

Date: 31 January 2017

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation
Abbey Court Irish Life Centre Lower Abbey Street Dublin 1 Ireland
Telephone +353 1 804 9600 *Fax* +353 1 804 9680 *Email* info@comreg.ie *Web* www.comreg.ie

Submissions Received from Respondents

Document No:	16/40s
Date:	31 January 2017

Draft Determination:	16/40

Content

Section

1: Alternative Operators in the Communications Market ('ALTO')

alto

alternative operators in the communications market

Consultation: Towerhouse vs. Eircom Dispute - Draft Determination - Ref: 16/40

Submission By ALTO

Date: July 1st 2016

ALTO is pleased to respond to the Consultation: Towerhouse vs. Eircom Dispute - Draft Determination - Ref: 16/40.

ALTO welcomes this opportunity to comment on this important consultation. A consultation that places Ireland back in line with other EU Member States for communications services and service levels, which will ultimately result in better network performance and consumer experience.

Preliminary Remarks

ALTO has not taken any role in the substantive dispute in this instance, although four ALTO members commissioned Towerhouse LLP to take the dispute on their behalf.[*]

ComReg – in particular Paul Conway and Michael Patterson are to be congratulated for endeavouring to produce an innovative and forward-looking mechanism to resolve this particular dispute.

Towerhouse LLP advocated the disputing parties issues with precision and accuracy and grounded the dispute entirely in the regulations, making the job of work for ComReg somewhat easier than perhaps it could have been. Towerhouse LLP is also to be congratulated for that.

Response to Consultation:

1. ALTO welcomes the draft determination published by ComReg.
2. The proposal contained within the draft determination that Service Credits – SCs, must be paid within 2 days, seeks to bring Ireland back into line with

[*] For the avoidance of doubt: ALTO members are always able to dissociate from a position taken at ALTO. In the context of this consultation, ALTO has not participated and has limited information as to the various interpartes aspects of this particular dispute.

the wider EU in terms of the resolution of annoying and inconvenient line and fault repair issues.

3. The recognition by ComReg that the range of faults sought to be considered in the draft is all-inclusive (e.g., including 'storm mode' now) and entirely cognisant of the costs associated with managing expectations and the timely repair of faults. It remains to be seen how the Service Level Agreements – SLAs, will functionally operate until the SCs are agreed. ALTO awaits that point with interest.
4. ALTO submits that it prefers Line Fault Index – LFI, and event based reporting as the correct system of measurement (as set out in the draft decision). This is in order to properly assess the performance of the network and the network elements being made available to users. ALTO does not support network availability measurement as a mode of operation in Ireland. Event based SLAs gives operators and the end-user a much better expectation as to when the fault will actually be fixed.
5. ALTO submits that with the correct levels of incentive and SCs to be later negotiated, the decisions made in this dispute may have a positive impact on the network.

ALTO

1st July 2016

2: Eircom Limited

1 Heuston South Quarter
St. John's Road
Dublin 8
T +353 1 671 4444
eir.ie

Ms Claire Kelly
Commission for Communications Regulation
Irish Life Centre
Abbey St
Dublin 1

1 July 2016

Re: Case 850 – SLA Dispute between 4 parties represented by Towerhouse LLP and eircom Limited – Draft Determination

Dear Ms Kelly

I refer to the Draft Determination received by eir from ComReg on the 20th May 2016, further to ComReg's presentation on 23rd February 2016 of its proposed approach for the resolution of the dispute brought by Towerhouse LLP. I refer further to our letter of 4th March 2016 outlining our serious concerns with ComReg's proposed approach as well as the Clarifications meeting held on 22nd June 2016.

Introduction

ComReg's Draft Determination in essence proposes to require eir to agree with OAOs to guarantee that it will repair 100% of faults within two days and to support that guarantee by agreeing to pay a Service Credit per line per day until such time that the fault is cleared. By contrast with the proposed approach that ComReg had set out at the presentation held on 23rd February 2016, the Draft Determination does not suggest that the level of performance expected of eir is that of an "ideal network" but on the contrary appears to recognise that eir should not have to bear the costs of a requirement for a performance level that is in excess of the level of performance set out in the BAFO. However, not only is the requirement that eir pays service credits in respect of 100% of faults not repaired in two days entirely at odds with this acknowledgment, but the Clarifications meeting has cast significant doubt as to ComReg's intention as regards the level of performance that it may expect of eir and/or eir to finance. eir believes that ComReg's approach whereby it expresses "preliminary views" in respect of matters which it then insists do not fall within the scope of its proposed decision is unhelpful and inconsistent with ComReg's statutory duty to ensure regulatory certainty.

For the reasons set out in detail below, ComReg's proposed determination whereby eir would have to pay service credits in respect of all faults not repaired in two days sets a level of performance that eir, having regard to the characteristics of its network, is simply not in the position to guarantee, and indeed it is not a level of performance, or more generally an agreement, that OAOs have requested of eir. Nor is it a level of performance which is required of eir as a result of eir's existing obligations, or one which ComReg could reasonably require eir to meet. It is accordingly eir's strong view that it is not a determination that ComReg may,

under its dispute resolution powers under Regulation 31 of the Framework Regulations 2011 or otherwise, lawfully make.

Regulation 31 of the Framework Regulations empowers ComReg, in respect of a dispute arising in connection with existing obligations under the Framework Directive, the Specific Directives or the Specific Regulations[1] to make a determination aimed at ensuring compliance with the obligations of the Framework Directive, the Specific Directives and the Specific Regulations to resolve the dispute. The exercise by ComReg of its powers under Regulation 31 is accordingly subject to there being a dispute which is susceptible to being solved by a determination aimed at ensuring compliance and ComReg may not impose new obligations exceeding the scope of existing obligations.

A. There is no genuine dispute for ComReg to solve

First, eir does not agree with ComReg's conclusion at para 62 that "*given the duration of discussions on the subject and the failure to agree revised terms, the matter constitutes a genuine dispute*". In particular, it is not quite the case that eir and the Referring Parties have failed to agree revised terms. As explained by ComReg (para 31), "*prior to the submission of the Dispute referral, eircom offered (by way of a BAFO) to increase the performance target for repairs to be completed within 2 working days from 73% to 77%, in respect of both SB-WLR and LLU. That BAFO was accepted and took effect from 1 September 2015*". eir further disagrees that the current SLAs do not comply with its SMP obligations. Its SMP obligations include the obligation to meet reasonable requests for access in a fair, reasonable and timely manner, which in turn includes an obligation to negotiate in good faith and conclude service level agreements with provisions for performance metrics and service credits.

eir in fact has concluded and updated legally binding SLAs which make provisions for performance metrics as well as Service Credits arising from failure to meet the agreed performance metrics. The fact that these SLAs (in the form of the BAFO) do not set levels of performance as requested by OAOs does not mean as ComReg suggests that "*the Parties have been unable to agree satisfactory SLAs in respect of repairs for the CGA products in question*" (para 58) and that the negotiations have failed, in particular in circumstances where new SLAs with increased service levels have come into force.

eir notes further in this regard that there is absolutely no basis upon which to suggest that the performance metrics agreed in the SLAs are in any way insufficient or inconsistent with eir's obligation to grant access in a fair, reasonable and timely manner. In particular, insofar as the performance targets requested by the Referring Parties for the purpose of the SLAs' performance metrics are concerned,[2] as consistently stated by eir, a service level of 85% for two day repair is not reasonable. eir notes again that the Referring Parties have offered no valid justification for the setting of such a performance level. A central plank of their case is that they are entitled to the same level of performance as eir's retail arm. The level of service that eir has agreed in the BAFO to guarantee is the level of service which eir is required to deliver to retail customers under its USO obligations, a level of service which ComReg is aware, has proved challenging for eir to meet. The BAFO accordingly sets the maximum level of service which eir could possibly agree to guarantee in the context of its existing obligations.

---

1 Being the Access Directive, the Authorisation Directive, the Universal Service Directive and the ePrivacy Directive and the domestic transposing instruments being the Access Regulations, the Authorisation Regulations, the Universal Service Regulations and the ePrivacy Regulations.

2 While at the Clarifications meeting, ComReg suggested that the Referring Parties had not asked that ComReg "*adjudicate on performance targets*", in fact in the request to ComReg for dispute resolution (Towerhouse's dispute reference of 16 November 2015), the Referring Parties requested ComReg to "*fix the terms of the Regulated Contracts by increasing the performance targets for each SLA to the levels requested by the Referring Parties*".

In the light of this, it is eir's submission that in the circumstances, ComReg is limited to either determine that there is in fact no genuine dispute for the purpose of Regulation 31 as the current SLAs are entirely sufficient to meet eir's relevant SMP obligations in the matter of SLAs or, in the alternative, that the performance metrics set out in the BAFO are consistent with eir's obligation to grant access in a fair, reasonable and timely manner so that there is no need for ComReg to intervene further.

As such, eir also believes that there is no basis for ComReg's proposed intervention requiring eir to guarantee that 100% of faults will be repaired in two days as it is not required by the Referring Parties or consistent with the scope of eir's obligations, as explained in further detail below.

B. The Draft Determination exceeds the scope of existing obligations

(i) *The Draft Determination sets a specific level of performance, which ComReg may not do*

At the Clarifications meeting, ComReg insisted several times that "*ComReg was not setting binding wholesale performance targets in the Draft Determination*" and explained that ""*imposing a mandatory wholesale performance target would be a different matter*" seemingly acknowledging that it could not set, at least by way of dispute resolution, mandatory wholesale performance targets.

However, contrary to what ComReg somehow appears to believe, this is exactly what the proposed determination does. It requires eir to offer to OAOs service level agreements the effect of which will be that unless eir repairs, not 85% as required by OAOs, but 100%, of faults within two days, service credits will be due. It is impossible to understand how ComReg can take the view that this does not impose on eir mandatory performance levels. As a result of the proposed determination, eir would be required to guarantee in SLAs that 100% of faults will be repaired in two days, failing which service credits will be owed in respect of all faults that remain after two days. ComReg at the Clarifications meeting said that "*the Draft Determination was about when service credits will be paid*". There is no difference between setting performance levels for the purpose of an SLA, below which service credits are paid, and setting "*when service credits will be paid*".

It is also the case that it is impossible to otherwise reconcile ComReg's proposed resolution with the requirements that eir conclude SLAs, defined as "legally binding contracts between Eircom and OAOs *in relation to the service levels which Eircom commits* to from time to time" (as per the Decision Instrument in the FACO Decision, ComReg Decision D05/15, eir's emphasis) and the obligation that the SLAs include "*provision for Performance Metrics*".

eir notes that ComReg in its (relatively) recent market analysis of the call origination market did consider the matter of Service Level Agreements and imposed some obligations on eir as regards the clauses that such agreements must contain. However, ComReg did not impose a specific service level that eir would be required to guarantee by way of SLAs. ComReg may not do now what it did not find necessary to do when imposing on eir obligations based on the nature of the problems identified in the market analysis. In the light of this, eir does not believe that having regard to eir's current obligations in respect of SLAs and the justification provided for the same by ComReg in its market review, ComReg is in any way entitled to set the level of performance for the purpose of SLAs. Instead, consistent with the obligations imposed on eir, this is a matter of agreement between eir and OAOs.

eir notes in this respect that in the dispute submission, the Referring Parties themselves see the basis for any determination by ComReg of the level of performance required as that which "*would be voluntarily agreed to, in circumstances where the purchaser and seller were participating in a competitive environment, in the absence of any significant inequality of bargaining positions*" (para

22.3). No rational operator in eir's position would voluntarily agree to the service levels requested by the Referring Parties or, for that matter, resulting from ComReg's proposals.

(ii) *The requirement that eir pays service credits in respect of all faults not repaired in two days is inconsistent, and largely exceeds, eir's obligation to grant access in a fair, reasonable and timely manner*

Even if ComReg was correct to say that the proposed determination that eir must offer SLAs providing for the payment of service credits for each fault that is not repaired in two days does not in fact impose a performance level requirement on eir (and it is difficult to see how this is not the case), its proposal would remain outside the scope of what ComReg may require of eir. In particular, there is nothing in the draft determination that explains which existing obligation of eir such a proposal relates to (other than the obligation to conclude SLAs but then, ComReg's proposed determination is, by ComReg's own interpretation, at odds with applicable requirements as regards the content of SLAs). At para 67 of the Draft Determination, ComReg explains that *"in the context of resolving the Dispute ComReg is conscious of the need for it to make a determination in order to ensure compliance with these specific obligations* [being eir's obligation to conclude legally binding SLAs which include provision for performance metrics; and to negotiate in good faith in relation to the conclusion of legally binding and fit for purpose SLAs] *and with eircom's general obligation to provide access in a fair, reasonable and timely manner*". However, eir believes that there is no existing obligation which could be reasonably considered to include a requirement that eir pays its wholesale customers service credits in respect of faults not repaired in two days, including in particular its obligation to grant access in a fair, reasonable and timely manner.

In this regard, ComReg's proposed determination, however, would clearly exceed what is required to ensure that eir provides access in a fair, reasonable and timely manner and as such, would amount to the imposition of obligations that are without justification and entirely unfair and unreasonable. In particular, an obligation on the part of eir to guarantee that all faults would be repaired within two days is simply unreasonable and inconsistent with eir's obligation to meet *reasonable* requests for access.

That ComReg's proposed determination is unreasonable is in fact clear from the proposed determination itself.

As explained by ComReg at para 81 and 91 of the Draft Determination, the service levels proposed by eir in the BAFO and agreed by the Referring Parties are consistent with "*ComReg's best estimate of an efficient but achievable level of performance*". Furthermore, the prices paid by OAOs for access to eir's network "*are set at a rate that is sufficient to recover the cost of a reasonably adequate level of service provision*" (being that of the BAFO). It is difficult to see how any requirement to exceed the efficient level of performance associated with access to the network could in any way be consistent with eir's obligations and more generally, with ComReg's statutory duties and objectives to ensure efficient investments.

In this regard, we see ComReg's "reference performance" construct as an acknowledgement that it is unreasonable to expect eir to guarantee to OAOs that all faults will be repaired in two days and an acknowledgement that the current price control would not allow eir to recover such costs of access to its network. ComReg's proposal tries to avoid the conclusion that it is unreasonable to expect eir to guarantee such a level of service by suggesting that a financing mechanism for compensation payable beyond the "reference performance" could be achieved through the access price control. However, noting the very tentative language used by ComReg in its consideration of such a recovery mechanism (para 86), we do not believe that there is any reality to it and note the following:

First, ComReg explains at para 86 that the mechanism for recovery of the costs of service credits paid by eir on the difference between SLA performance targets and the reference performance is outside the scope of the dispute and not part of the determination. This is a matter on which ComReg heavily

insisted at the Clarifications meeting. While eir agrees that ComReg would have no power under Regulation 31 to impose such a cost recovery mechanism, the fact that there is no such cost recovery mechanism means that ComReg's proposed determination exceeds the scope of eir's existing obligations. The obligation that ComReg proposes to impose may not be separated from its financing and both fall outside the scope of what ComReg may lawfully do pursuant to Regulation 31 (or indeed, as a matter of general principle, SMP regulation).

Second, and in this respect, ComReg's assessment in respect of efficiency at para 124 that "*the parties' proposals are less strong in this regard because there is limited incentive to improve performance beyond the parameters set out in their proposals even where it may make sense to do so in overall economic sense*" is fundamentally flawed and incorrect. We note that the price of access currently remunerates eir including in respect of the provision of an efficient level of service. This means that ComReg's determination would require eir to pay service credits corresponding to service levels that are inefficient and for which eir is not paid. In this context, it is also the case that any incentive that eir would have to exceed the reference performance as the result of the SLAs would actually proceed from an encouragement to inefficient investment. Furthermore, absent a financing mechanism, the proposition that OAOs should be guaranteed funds received through open eir, with open eir alone bearing the risk of the guarantee, is also impossible to reconcile with the principle that regulation should promote efficiency and SMP regulation enables competition between operators. It would provide for an unwarranted selective advantage to the benefit of other operators and the detriment of eir.

This underscores the fact that a requirement to pay service credits for all faults not repaired in two days does not form part of eir's obligation to provide access in a fair, reasonable and timely manner. This conclusion also applies to ComReg's "*preliminary view*" at para 129 that eir should be required to pay Service Credits where *force majeure* arises. Again, not only is this entirely inconsistent with the principle of reasonableness and fairness, but it is also at odds with ComReg's assessment of a reasonable and efficient level of performance in the context of access pricing. As explained by ComReg at para 81, ComReg's Revised Copper Access Model from which regulated prices are derived makes assumptions about eir's efficiency and also "*the impact of extraneous force majeure including storms and other events*" reflecting ComReg's best estimate of an efficient but achievable level of performance. There is no reason why eir should bear the burden of unforeseeable and/or exceptional weather events or third parties' intervention including wayleave issues which affect its performance.

Finally, and strictly without prejudice to the above, we note that at the Clarifications meeting, ComReg sought to distance itself from its comments in the Draft Determination setting the "reference network" performance level at that set out in the BAFO. For the reasons set out above, eir strongly disagrees with the proposed Determination to the extent that it seeks to impose on eir an obligation to undertake with OAOs contractual obligations to pay service credits in circumstances where eir's performance is on a par with an efficient level of performance. eir disagrees in even stronger terms with any suggestion that it could be required to pay OAOs service credits and be precluded from recovering their costs where its performance would not meet the level of performance of an "ideal network" that is in fact a level that is above the efficient level of performance. We refer in this regard to the comments we made in our letter of 4 March 2016 in respect of ComReg's suggestions in February concerning the "ideal network".

C. The structure of current SLAs is fit-for-purpose and has not been disputed

ComReg's proposed determination purports to make a finding that current SLAs are not fit for purpose on the basis that they do not incentivise eir to repair faults or do not provide for compensation when the agreed level of performance is achieved. It also purports to dictate the structure of SLAs. However, the structure of the SLAs, including the principle that service credits are awarded reflecting the extent of the failure to achieve the level of performance guaranteed, is simply not a matter which is in the scope of the dispute and not something which ComReg should be attempting to resolve. As acknowledged by ComReg at para 58, the improvements requested by the Referring parties "*utilise the same SLA structure as is currently in use*".

Furthermore, eir fundamentally disagrees that the structure of the SLAs means that they are not fit for purpose on the basis that *"they do not compensate operators for costs associated with wholesale performance below a certain level"* (para 66). ComReg notes that under the current SLAs, *"if eircom achieves its proposed SLA targets... there should be no SC payment made for repairs which fall inside that repair performance target"* (para 71) and takes the view that *"the current and proposed method of calculating SCs provide no incentive to Eircom"* (para 72). eir does not believe that this is in any way correct, and furthermore believes that ComReg's suggestion of what constitutes an SLA is fundamentally at odds with the common and standard understanding of an SLA. As such, ComReg's proposed determination far exceeds the scope of eir's obligations. We note the following:

- An SLA is an agreement whereby a party agrees to deliver a specified level of service, below which compensation is payable. As mentioned above, the FACO Decision Instrument defines an SLA as *"a legally binding contract between Eircom and OAOs in relation to the service levels which Eircom commits* to *from time to time"* and service credits as *"a financial credit which is provided by Eircom to an OAO where Eircom has failed to meet a Performance Metric in an SLA"*. The fact that current SLAs do not provide for compensation for faults not repaired when the agreed level of performance is achieved is of course consistent with the nature of SLAs. The main objective of an SLA is to agree service levels and to provide for compensation when they are not met. When service levels are met, there is simply no basis for claiming compensation. eir's obligation to agree SLAs with OAOs cannot be reasonably interpreted in any other way. As such, ComReg's proposed determination that *"the appropriate performance level should be assessed on a per line basis rather than on an aggregate basis and that the amount paid per fault should reflect the duration of the outage in excess of two working days"* (para 75) represents a radical departure from eir's existing obligations, for which no justification can be found in ComReg's relevant market analysis.

- As explained previously, the current SLA structure, whereby service levels are agreed at two days, five days and ten days, does incentive eir to repair all faults, at a level of performance that is consistent with the efficient operation of its network.

- The rationale advanced by ComReg in order to justify the requirement that SCs are paid on a per line per day basis (after two days) appears to be somewhat linked to ComReg's view that *"the costs of faults that must be borne by operators will include not just administrative costs but may also include the cost of compensating end users, revenues foregone, reputational damage and so forth"* and that *"there may be wider harm to the competitive process if end users perceive that faults will be repaired more quickly if they are Eircom customers than if they are with an OAO"* (para 94). eir believes that this rationale is incorrect and unfair. eir notes the following:

    - Service Credits compensate operators where eir fails to deliver the agreed level of service. There is not necessarily a direct relationship between that compensation and the costs incurred in respect of each fault. eir notes further in this regard that there could be no understanding on the part of OAOs that they are provided access to a fault-free network.

    - eir objects to ComReg's setting out what was termed at the meeting *"provisional guidance"* as regards the quantum of service credits. As ComReg itself has acknowledged, this is not an issue that is the subject of the dispute and eir does not believe that it is appropriate that ComReg expresses any views as to what is a matter for negotiations for the parties to the SLAs. Furthermore, eir fundamentally disagrees with ComReg's view that the service credits should reflect *"the cost to society"* and/or the *"retail costs"* and/or *"reputational damages"*. No explanation or rationale has been advanced for any of these positions or to attempt to define what they mean, nor has ComReg provided any reason for its allegation that there is a

linear relationship between fault duration and the retail cost incurred. For the avoidance of doubt, eir believes that ComReg's view is at odds with the nature of an SLA, which should give the right incentive to achieve the level of performance agreed. This is not necessarily the same as the retail costs incurred in respect of fault repair even if these were common to all operators. eir believes that this position is consistent with the position expressed by OAOs during the Clarifications meeting.

- eir further strongly objects to ComReg's suggestion that customers may perceive that faults for eir's retail customers may be repaired more quickly. There is no explanation whatsoever as to why customers could perceive this to be the case. eir notes further in this respect that for many years now, on foot of ComReg's directions, eir has published repair KPIs in order to provide assurance to consumers and operators that the products and related services used by both eir and OAOs are of the same standard and that no discrimination was occurring. Published repair KPIs to-date largely demonstrates this point. Any further intervention by ComReg, including in the form of the proposed determination, on foot of this concern, is accordingly entirely unwarranted and disproportionate.

For these reasons, ComReg's Draft Determination is entirely inappropriate as it exceeds ComReg's jurisdiction under Regulation 31. ComReg's powers of intervention under Regulation 31 are limited to making a determination aimed at ensuring compliance with existing obligations to solve the dispute before ComReg. ComReg's proposed determination is inconsistent with the scope of eir's obligations and does not solve the dispute. Instead it moves the Parties further apart.

Conclusion

For the reasons outlined above, we do not believe that there is any legal basis or justification for the approach being contemplated by ComReg. We urge ComReg to take our serious concerns into account so that any intervention by ComReg is consistent with legal requirements and results in a reasonable outcome.

Yours sincerely,

Martin Giffney
Head of Regulatory Compliance

3: Towerhouse LLP

Towerhouse LLP

10 FITZROY SQUARE
LONDON W1T 5HP
T: +44 (0) 20 7874 1850

Michael Patterson
ComReg
Lower Abbey Street
Dublin

By email only: michael.patterson@comreg.ie

30 June 2016

Dear Michael

Case 850 Draft Determination

1. The referring parties welcome the draft determination published by ComReg in Dispute Case 850.
2. The proposal that Eircom must pay a service credit in relation to all faults which are unresolved after 2 days will bring Ireland into line with other member states in the EU and, depending on the level of service credit negotiated with industry, has the potential to provide eircom with an appropriate incentive to improve the service to Irish customers be reducing the level of faults in the network.
3. Although a definitive view on the success or otherwise of the SLA cannot be reached until the level of SC has been agreed, the finding that the regime should address all faults rather than just a proportion of faults is to be welcomed and will encourage eircom to provide OAOs and their customers with a better level of service. The Referring parties are also encouraged by the explicit recognition by ComReg that the service credits should reflect the range of costs which are borne by OAOs including costs of compensating end users, revenue foregone, reputational damage etc and also that "Storm Mode" does not have the effect of suspending the operation of the SLAs.
4. We welcome the clarification provided to the referring parties in the course of our meeting on 22nd June 2016. As discussed in that meeting, the primary concern of the referring parties had been that the draft determination published on 20th May appeared to depart materially from the proposal presented by ComReg to the referring parties and eircom on 23rd February. This concern and uncertainty was caused by the reference in section 5.5 of the draft determination to Eircom's BAFO as the reference network performance. We welcome the fact that the reference performance in the context of agreeing SCs is a matter of negotiation between the parties and that they are not bound by the parameters of BAFO in terms of reaching a settlement in this regard.

5. It is also our understanding that a reference performance in the context of Eircom being able to recover SCs through a wholesale charging regime where the reference performance is exceeded, has not been determined and is outside the scope of this dispute. However, we would expect that any decision on determining the level of that reference performance for that purpose will be subject to consultation and informed by any reference performance agreed by the parties pursuant to the SC negotiations.
6. Given the degree of confusion and attendant delay which this example has caused we would suggest that it be removed from the final, published, determination. As ComReg noted repeatedly in the meeting on 22nd June, consideration of the factors to be examined when determining wholesale charges is beyond the scope of the dispute brought by the referring parties and we therefore submit that has no place in a determination of that dispute. We accept that the example was intended to be helpful but we would suggest its inclusion in the final determination would be inappropriate as it might suggest (wrongly) that ComReg has pre-judged to an extent the negotiations on the level of service credits in which the parties are about to engage.
7. Finally, the referring parties welcome ComReg's clarification that Line Fault Index is not in scope in this dispute and that consideration of cost recovery by eircom would be consulted on separately when and if ComReg decides that this ought to be considered. In the event that occurs the referring parties look forward to providing ComReg with their views on the parameters that which will be relevant and ought to be taken into account.
8. Eircom and the referring parties now need to embark on a process of negotiation and this will provide us with the opportunity to negotiate the level of the Service Credits in order to provide eircom with incentives which will drive improved network performance.

Yours sincerely

DOMHNALL MCDONALD DODS

Digitally signed by DOMHNALL MCDONALD DODS
Date: 2016.06.30 11:25:15 +01'00'

Domhnall Dods

Senior Associate