Commission for
Communications Regulation

Market Review

Fixed Voice Call Termination and Mobile Voice Call Termination

Non Confidential Submissions to Consultation 17/90

Submissions to Consultation

Reference	ComReg 19/47s
Date:	23 May 2019

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation
1 Lárcheantar na nDugaí, Sráid na nGildeanna, BÁC 1, Éire, D01 E4X0. One Dockland Central, Guild Street, Dublin 1, Ireland, D01 E4X0.

Consultation - Document 17/90

Response to Consultation and Decision - 19/47 and D10/19

Index of NON CONFIDENTIAL Responses to Consultation (Fixed Voice and Mobile Voice Call Termination Market Analysis).

1. Alto
2. AT&T
3. BT Ireland
4. Eir
5. Carphone Warehouse / iDmobile
6. Three Ireland
7. Virgin Media
8. Vodafone Ireland
9. Lycamobile
10. Verizon
11. Tesco Mobile Ireland

alto

alternative operators in the communications market

Market Review: Review of FVCT & MVCT & Ref: 17/90

Submission By ALTO

Date: January 10th 2018

1. **Introduction**

1.1 ALTO is pleased to respond to the ComReg's Market Review of the Fixed Voice Call Termination and Mobile Voice Termination Markets in Ireland – Ref: 17/90 and 17/90r.

1.2 ALTO responds in a limited manner and expresses no view on the correctness or otherwise on the findings of Significant Market Power – SMP, concerning and connected with any individual ALTO member.

1.3 It is a matter for each member to respond to ComReg with substantive replies to areas of concern within the Market Review.

1.4 ALTO has considered the detailed 509 page consultation paper issued by ComReg together with supporting documentation and we note ComReg document reference 17/104 entitled: "*Information Notice: ComReg Document 17/90 - Consultation and Draft Decision … ComReg Document 17/90 and the Separate Pricing Consultation*".

1.5 ComReg's findings can be summarised as being somewhat enhanced though in the main the remedies are almost identical to those findings made previously effecting market operators. In consequence, ALTO opts not to respond in detail to the Consultation questions posed.

1.6 In section 2 below, ALTO sets out some observations for consideration in ComReg's deliberations under discrete headings.

1.7 ALTO notes that the separate pricing consultation is due to issue in Q. 1 – 2018. ALTO will be responding to the pricing consultation in due course.

2. Observations

Increased number of providers in scope

2.1 ALTO generally supports the enhanced scope found in the Market Review.

2.2 A consequence of the enhanced scope found within the Market Review is that more providers are covered by the SMP conditions for fixed and mobile termination.

2.3 Regulation is clearly the only constraint given that some unregulated providers have live rates at 2000% higher for fixed and at 300% for mobile termination presently, as set out in Tables 18 and 22 of the consultation.

2.4 ALTO submits that ComReg should consider how it should apply the proposed SMP conditions to new entrant and currently unregulated operators, including OTT operators so that there is a level playing field for all in the market.

Advance notification

2.5 ALTO submits that a 30-day notification period for fixed and mobile termination rate changes is appropriate between providers for both fixed and mobile termination.

2.6 Such a time period aligns with billing cycles and is practical.

2.7 ALTO does not agree with the proposal for a 60-day notification to ComReg for pre-approval of termination rates changes. This is disproportionate and burdensome, and reduces the flexibility for providers.

RIO publication

2.8 ComReg's current proposals introduce more burdens for fixed and mobile providers and does not offer greater benefits than the current requirement to offer similar terms. It is clear that the requirements for the RIO are very prescriptive.

Charge control

2.9 ALTO submits that fixed and mobile termination rates should be set as per Recommendation 2009/396/EC of 7 May, 2009, on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU, O.J. L124/67, 20.05.2009, ("**the 2009 Recommendation**").

2.10 While industry anticipates a further consultation on this area, it is necessary to make this submission at this stage.

ALTO

10 January 2018

AT&T Comments on ComReg Fixed Voice Call Termination and Mobile Voice Call Termination Market Review

10 January 2018

Summary

1. AT&T Global Network Services Ireland Limited ("AT&T") respectfully submits these comments in response to ComReg's *Fixed Voice Call Termination and Mobile Voice Call Termination Market Review* consultation published on 2 November 2017 ("the Consultation").[1] AT&T is a wholly-owned subsidiary of AT&T Inc., which, through its affiliates, operates one of the world's most advanced global backbone networks, and provides services to virtually every country and territory in the world. In Ireland and other EEA Member States, AT&T Inc., through its affiliates, is a competitive provider of business connectivity and managed network services, and a leading provider of bilateral connectivity services linking Ireland and all other EEA Member States with the United States. AT&T's comments are limited to responding to **Question 14**[2] of the Consultation concerning the treatment of non-EEA originated calls in the proposed Wholesale Voice Call Termination (WCVT) price control remedies. For the reasons described below, AT&T urges ComReg to adopt "Candidate Approach 1: Retain the status quo ante",[3] whereby price control remedies would continue to apply to all calls terminated in Ireland irrespective of where any individual call may have originated.

Potential GATS Implications of Differential Treatment of Non-EEA Originated Calls in Price Control Remedies

2. AT&T welcomes the significant progress in recent years by ComReg and other EEA regulators in reducing termination rates for calls on fixed and mobile networks. Unfortunately, some operators in other EU countries are now seeking to charge higher termination rates for calls originating outside the EU than those charged for calls originating inside the EU – sometimes by significant margins. These increases do not appear to reflect incremental costs for termination of such traffic, but are instead simply discriminatory rate practices. Such practices harm consumer and business users at both ends of these international routes by encouraging higher calling prices that in turn reduce traffic volumes.[4]

---

[1] ComReg Document 17/90r, available at: https://www.comreg.ie/publication-download/market-review-fixed-voice-call-termination-mobile-voice-call-termination

[2] "In respect of the potential alternative approaches for price control obligations on the application of WVCT to calls originated outside the EEA, please indicate which approach would better address the identified competition problems. Please explain the reason for your answer, providing any empirical evidence and clearly indicating the relevant paragraph numbers to which your comments refer." Consultation at page 493

[3] Consultation at 8.139 to 8.146

[4] *See, e.g.*, OECD, *International Traffic Termination*, OECD Digital Economy Paper No. 238, (2014) ("OECD Report"), at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP(2013)9/FINAL&docLanguage=En The OECD Report describes the effects of lower termination rates in stimulating increased international traffic following the liberalisation of telecommunications markets around the world, and reviews policies

3. AT&T believes that a policy of allowing any form of "differentiated approach" based on the origin of calls, as described in ComReg's "Candidate Approach 2",[5] would raise concerns regarding compliance with the commitments entered into by the European Communities and their Member States under the WTO General Agreement on Trade in Services (GATS). Article II of the WTO GATS Agreement requires Ireland and other EU Member States to provide to "services and service suppliers of any other member, treatment no less favourable than it accords to like services and services suppliers of any other country." Requiring Ireland's Service Providers to charge cost-based rates for calls from end-users within the EEA, while also authorising those Service Providers to charge rates higher than cost-based levels to terminate calls from end-users outside the EEA, does not appear consistent with the "most-favoured-nation" (MFN) treatment required by this obligation.

4. Excluding non-EEA originated calls from WCVT price control remedies would also appear to be inconsistent with the Additional Commitment by the European Communities and their Member States under the GATS Reference Paper, which requires Ireland and other EU Member States to ensure that interconnection with major supplier operators is provided "under non-discriminatory terms, conditions . . . and rates" and at "cost-oriented rates."[6] Allowing a "differentiated approach" based on the origin of calls would also appear to be inconsistent with the EU commitments under the GATS Annex on Telecommunications, which require Ireland and other EU Member States to "ensure that any service supplier of any member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions."[7] Indeed, the Office of the United States Trade Representative (USTR) has expressed concerns that allowing differential termination rates that are not reflective of the incremental costs of terminating

implemented by some African countries to increase termination charges for inbound international traffic. The report finds that "policies seeking to raise payments received from foreign carriers may leave countries at best with the same level of revenues or indeed cause a slight reduction of revenues per access path. However, even if revenues remain unchanged, what is evident is that incoming traffic to those countries is decreasing significantly and much more than in those that have not imposed such measures. Thus, regardless of the effects on payments, other spill-over effects to the rest of the economy, given a reduction of international traffic, must also be considered." *Id.* at 33.

[5] Under ComReg's "Candidate Approach 2", the price control obligation of cost orientation which ComReg proposes to impose on Service Providers designated with Significant Market Power would apply only to the termination of calls which originated in the EEA. Consultation at 8.147

[6] WTO, European Communities and Their Member States, Schedule of Specific Commitments, Additional Commitment, Sect. 2.2. *See also, e.g.*, OECD Report at 19-21 (describing WTO commitments applicable to international telecom traffic). An operator incurs the same cost to terminate an international call on its domestic network regardless of the call origination point. Pursuant to this commitment, the cost-oriented termination rate required for EEA-originated calls should also apply to calls originating in other WTO Member countries.

[7] WTO GATS Annex on Telecommunications, Sect. 5. The WTO Dispute Settlement Body has found that the "reasonable" terms for access and use required by the GATS Annex on Telecommunications include "questions of pricing of that access and use." WTO, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, Apr. 2, 2002, ¶ 7.333.

such traffic may be contrary to the EU's compliance with the GATS Annex on Telecommunications and a violation of the GATS Reference Paper.[8]

Other Advantages of Maintaining No Differential Treatment

5. In addition to the GATS implications, AT&T believes that ComReg has correctly identified[9] the various advantages of maintaining the current approach of including all calls, regardless of origin, in the scope of WCVT price control remedies. These advantages include: regulatory certainty for Irish Service Providers who won't have the potential system upgrade costs to assess and bill based on CLI; avoiding retaliatory price increases by non-EEA Service Providers with potential negative consequences for Irish end-users; avoiding higher retail charges for calling Ireland from non-EEA countries with negative welfare consequences for Irish citizens; and the possible incentive for inefficient traffic routing to present calls from outside the EEA as if they are EEA-originated (with the associated potential for arbitrage and artificial inflation of traffic). AT&T also believes that monitoring compliance with a "differentiated approach" model for termination rates would be challenging, especially in view of the high number of potential international routes between Ireland and non-EEA countries.

Conclusion

6. For the reasons outlined above, AT&T urges ComReg not to allow Irish operators to impose differential termination rates and instead to maintain the current regulatory approach of applying WCVT price control remedies to all calls terminating in Ireland irrespective of where the call originates. In this context, AT&T wishes to highlight a recent decision[10] by the Swedish regulator PTS not to proceed with its earlier proposal to allow Swedish operators to charge rates that are higher than cost-oriented levels to terminate calls originating in non-EEA countries.[11] In adopting this change in position, PTS concluded that, because the actual termination cost for calls originating outside the EEA is not higher than for calls originating within the EEA, it is proportionate and reasonable to

[8] *See* USTR 2015 Section 1377 Report (https://ustr.gov/sites/default/files/2015-Section-1377-Report_FINAL.pdf) at 13: "Requiring, or even allowing, European operators to charge cost-oriented rates for calls from end-users within the EEA, while also authorizing those operators to charge rates higher than cost-oriented levels to terminate calls from end-users outside the EEA, raises concerns with respect to the EU's adherence to its obligations under GATS Article II and section 5 of the GATS Telecommunications Annex." *See also* USTR 2016 National Trade Estimate Report (https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf) at 165: "The European Commission and EU Member States appear to endorse, explicitly or implicitly, a two-tier approach to the termination of international traffic. These actions adversely affect the ability of U.S. telecommunications operators to provide affordable, quality services to U.S. consumers calling Europe and may raise questions regarding these EU governments' treatment of U.S. suppliers."

[9] Consultation at 8.140 to 8.144

[10] *Third Consultation on Draft Mobile Call Termination Market Analysis*, PTS, Page 70, Section 6.4.6, available in Swedish at http://www.pts.se/upload/Remisser/2016/Samtrafik%20o%20mobil%20lric/15-4802-beslutsutkast-mobil-terminering-160601.pdf,

[11] The earlier PTS proposal would only have allowed Swedish operators to apply reciprocal pricing to match but not exceed the termination rates applied by the non-EEA originating operators.

require operators with Significant Market Power in the relevant market to apply uniform pricing for call termination, irrespective of where the call originates. In addition, while ComReg correctly notes that, in the pending Mobile Call Termination Market Review in the UK, Ofcom proposes to retain the status quo ante (whereby no distinction is made by reference to call origin), AT&T wishes to highlight that, in its Narrowband Market Review Statement of 30 November 2017,[12] Ofcom has now confirmed this approach for fixed voice call termination in the UK. AT&T urges ComReg to reach the same conclusion as the Swedish and UK regulators in its *Fixed Voice Call Termination and Mobile Voice Call Termination Market Review*.

AT&T
10 January 2018

[12] *Narrowband Market Review: Statement*, Ofcom, 30 November 2017 at 14.55 to 14.72, available at: https://www.ofcom.org.uk/consultations-and-statements/category-1/narrowband-market-review

BT Communications Ireland Ltd ["BT"] Response to the ComReg Consultation:

Market Review Fixed Voice Call Termination and

Mobile Voice Call Termination

Issue 1 – 10 January 2018

1.0 Introduction

We welcome the opportunity to comment to this consultation which updates regulation that has been analysed at this depth at least twice previously. Given this Market Review updates the previous consultations we will limit our comments to the following four material issues.

Comment 1 – The European Commission views termination rates (FTRs and MTRs) as susceptible to competition problems and that is clearly the basis for this ComReg Market Review consultation. However, such appears to assume all of Europe and the rest of the world will behave in the same way to be compliant with the Commission's intentions which is not always the case. We are aware that some European companies and non-EEA states will apply supernormal termination rates for calls that they terminate, which can lead to distorted international cross boarder trading with a transfer of wealth from EU compliant countries to non-compliant EEA countries/operators and non-EEA countries/operators.

We have also experienced from another party what is commonly known as defensive high termination pricing which raises the same issues as above but between EEA countries.

While we acknowledge ComReg's proposal within the Draft Decision (Clause 12) we are concerned at the absence of standards for the discrimination of non-EEA origins and the treatment of roaming EEA subscribers roaming outside of the EEA and non-EEA subscribers roaming within the EEA. This is a particular concern given the absence of strong CLI integrity rules.

Comment 2 – OTT Termination

We welcome the ComReg discussion on OTT services however we consider some of the technical aspects reported need further refinement.

a. We have experienced calls that we transited to another European country for termination on a mobile platform being unexpectedly diverted to an OTT operator. ComReg suggest in the consultation that signalling would allow for different options for termination; however we have never seen such in the issues we have experienced. We only became aware of the calls being diverted to OTT termination when customers complained of poor speech quality when they were expecting a carrier quality service. Hence we are not aware of the effectiveness of any special signalling to give customers a choice of carrier vs. OTT termination.

b. ComReg also make a comment that there is a much lower risk to fixed line operators. We can understand ComReg's logic that fixed line CPE can't support apps. However, this fails to consider that calls for fixed line calls could just as easily terminate on an app. on a mobile phone, tablet or PC etc. Our experience of OTT bypass is that the service is handed over to the OTT supplier long before entering Ireland and hence does not pass through traditional operators in Ireland. We are certainly aware of one very large multinational organisation using OTT to terminate traditional carrier calls in some other European countries.
c. We consider ComReg need dynamic regulation where it can consider case-by-case operators that need to be included within this market. We note that ComReg was able to apply a dynamic approach to de-regulating geographic areas between market reviews for leased lines some years ago so a precedent has been set for dynamic changes. We consider OTT operators that engage in terminating carrier calls should by their action be deemed to be operating in the regulatory market and have to comply with the same legislation and obligations as existing carriers, and it is distorting to competition that they are not treated the same. Hence we consider more work is needed in this area and a dynamic regulatory system be adopted that if an operator is trading in terminating carrier calls it should have to comply with the full set of regulatory obligations.

Comment 3 – We welcome and agree with ComReg's proposal to significantly widen the list of operators deemed to have market power in this market which should remove the considerable distortion and unfairness in the termination rates being charged. As above we consider OTT providers terminating carrier calls should be included in this list. We also consider that if an operator is set up to terminate calls then it should (consistent with the Draft Decision clause 9.1) be <u>obligated</u> to accept requests for direct interconnect to its networks. Although transit is not part of this decision, the termination of calls is part of the market and it should therefore be possible for all operators to provide direct interconnect when requested so that other operators can avail of the termination rate rather than paying termination plus transit. We agree with ComReg that operators should have an obligation to accept interconnect requests when they terminate calls.

Comment 4 – We are not disputing the principle of cost orientation that is being applied however we are concerned in a market of falling call volumes as evidenced in the ComReg study and rising costs that fixed line prices should be correcting upwards and not downwards. We would be interested in discussing our costs with ComReg in this matter. We would consider

End

eir

Market Review:

Fixed Voice Call Termination and Mobile Voice Call Termination

10th January 2017

DOCUMENT CONTROL

Document name	eir response to ComReg 17/90
Document Owner	eir
Status	Non-Confidential

Executive summary

1. eir welcomes the opportunity to comment on ComReg's market analysis and preliminary conclusions. In this submission:

   (i) eir considers that ComReg has underestimated the manner in which over-the-top (OTT) and digital services have fundamentally changed the structure and competitive dynamics of retail communication markets and urges ComReg to review its market monitoring programme with a view to extending its scope to ensure that accurate data is collected in respect of all elements of the Irish communications markets including OTT services, which are a relevant and material consideration.

   (ii) eir notes that ComReg has not explicitly defined the product or geographic scope of the retail voice call (RVC) markets but encourages ComReg to do so, in order to inform its view of market trajectory thereby resulting in a sufficiently forward looking assessment of the relevant wholesale markets.

   (iii) eir does not disagree with ComReg's preliminary conclusions on the wholesale Fixed Voice Call Termination (FVCT) and Mobile Voice Call Termination (MVCT) product and geographic markets.

   (iv) eir agrees with ComReg's assessment of significant market power (SMP) in the relevant FVCT markets. However, although eir recognises at this particular juncture that it is unlikely that OTT services will effectively constrain pricing and market power at the wholesale level of the fixed and mobile termination markets, OTT services and all-IP networks will in time become a sufficient competitive constraint on traditional voice services at the wholesale level.

   (v) eir welcomes ComReg's proposal to expand the number of Fixed Service Providers (FSPs) and Mobile Service Providers (MSPs) that are designated as SMP providers. It is important going forward that these markets are reviewed more regularly in line with ComReg's obligations under EU law. It is also important that ComReg has the ability to efficiently address market developments, including new entrants. All operators providing FVCT and MVCT should be subject to the same regulatory constraints.

   (vi) eir does not agree with ComReg's approach to imposing remedies in the Relevant FVCT market. In particular eir does not agree with ComReg's proposal to impose additional remedies on eir alone.

   (vii) eir is of the view that ComReg should allow differentiated approaches to calls originated within and outside the European Economic Area (EEA). In addition, although eir is of the view that calls originated outside the EEA should not be subject to a cost orientation obligation and that operators should have the flexibility to negotiate these rates, eir does not agree with ComReg's proposals to limit this in terms of roaming subscribers of EEA and non-EEA MSPs.

RESPONSE TO CONSULTATION QUESTIONS

Section 3: Retail Fixed Voice and Mobile Voice Market Trends

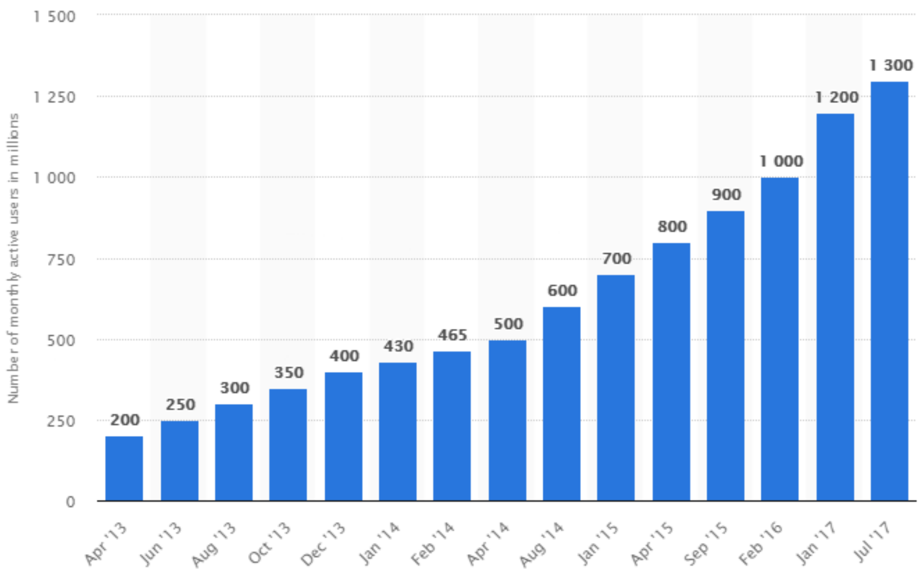
Q. 1. Do you agree that this Section identifies the main relevant developments in the retail fixed voice and mobile voice markets since the previous reviews of the Relevant FVCT and MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

2. eir agrees that section 3 of ComReg 17/90 identifies the main relevant developments in the retail fixed voice and mobile voice markets since the previous reviews of the Relevant FVCT and MVCT Markets. However, eir is of the view that ComReg has significantly underestimated the prevalence of OTT communication services.

3. The increased economic importance of digital services has profoundly changed the structure of telecommunications and media markets. In particular, OTT communication apps are, by far, the most-used communication platform worldwide and major OTT players such as Facebook Messenger and WhatsApp add tens of millions of users every month (See Figure 1 and 2). In fact, as of 2017, both Facebook Messenger[1] and WhatsApp[2] had 1.3 billion active monthly users worldwide.

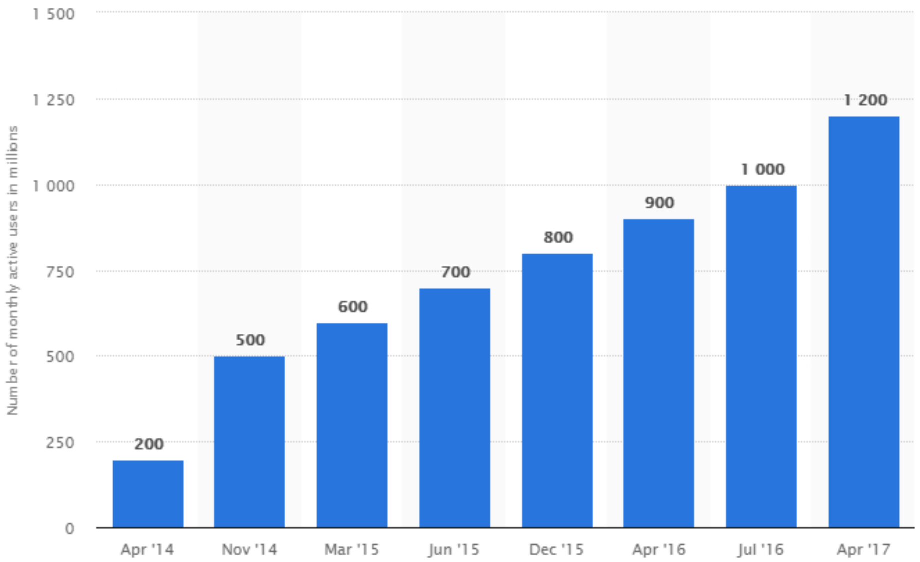
[1] https://newsroom.fb.com/news/2017/12/messengers-2017-year-in-review/
[2] https://www.fastcompany.com/40459142/whatsapps-cofounder-on-how-it-reached-1-3-billion-users-without-losing-its-focus

Figure 1. Growth in number of monthly active WhatsApp users worldwide from April 2013 to July 2017 (in millions)



Source: Statista

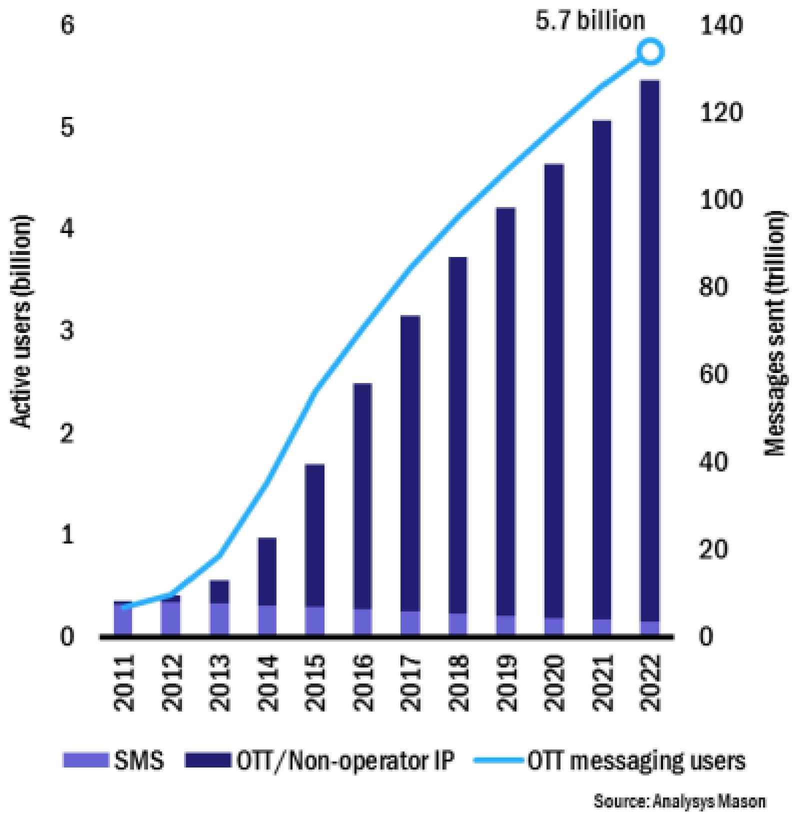
Figure 2. Growth in number of monthly active Facebook Messenger users from April 2014 to April 2017 (in millions)



Source: Statista

4. Consequently, the competitive environment in the telecommunications market has experienced considerable change and will continue to do so. Analysys Mason predicts that OTT messaging services will be used by 75% of the global population by 2022[3] (See Figure 3). Digital markets are in many cases highly dynamic, which leads to quickly shifting market boundaries. It is of utmost importance that in a market such as telecoms, market innovation and dynamism are recognised and factored into regulatory analysis to ensure that a sufficiently forward looking perspective is taken.

Figure 3. Number of OTT messaging active users worldwide and messages sent by message type, 2011- 2022



5. When usage patterns of fixed and mobile voice services are examined, it is clear that customers are not only increasingly switching from fixed to mobile voice usage but also from both fixed and mobile voice services to OTT communication services, including both voice and video calls provided over apps such as Facebook Messenger, Whatsapp, Facetime, Skype and Viber. Facebook, for example, estimated that as of July 2016 10 percent of all Voice over IP

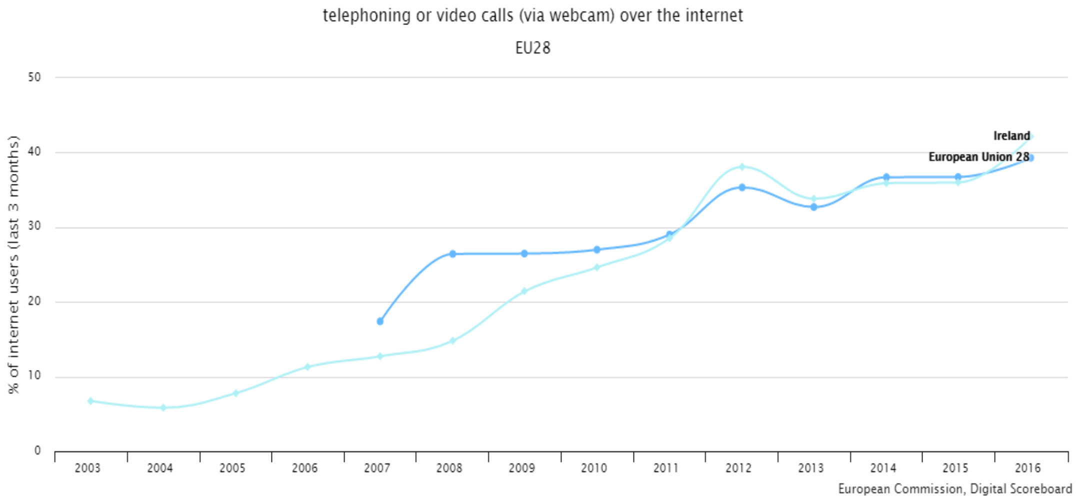
[3] Analysys Mason, Communication services: worldwide trends and forecasts 2017–2022

(VoIP) calls made globally were taking place within its Messenger app.[4] Facebook subsequently reported in February 2017 that 400 million people use Facebook Messenger audio and video calling each month[5], while 17 billion real-time video chats took place globally on Messenger in 2017, twice as many video chat sessions as occurred on the platform in 2016.[6]

6. Similarly, WhatsApp passed the one billion global users milestone in February 2016 and at that time reported that it was handling more than 100 million voice calls per day on its service.[7] In terms of video calls, WhatsApp announced in May 2017, just 7 months after launch of its video calling feature, that its users were making a total of 55 million video calls per day.[8] It is also believed that WhatsApp is likely to launch group voice and video calling shortly.[9] This type of additional functionality as offered by OTT communication providers is not available over legacy voice services and is likely to make OTT services more attractive to a significant cohort of end-users.

7. In an Irish and wider European context, the European Commission has reported that 42.2% of internet users in Ireland had used telephoning or video calls (via webcam) over the internet in 2016. This is a trend that has remained in line with the EU 28 average since 2007 and has in fact currently surpassed the EU average (See Figure 4).

Figure 4. Take up of telephony or video call services over the internet in Ireland and the EU 28



Source: European Commission, Digital Scoreboard

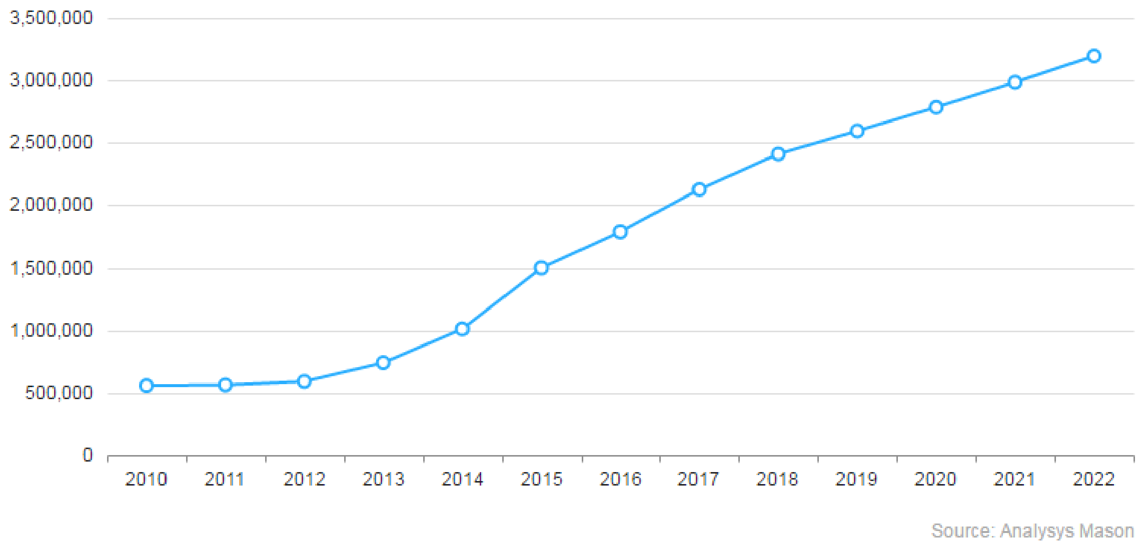
[4] https://venturebeat.com/2016/07/20/facebook-messenger-hits-1-billion-monthly-active-users-now-powers-10-of-all-voip-calls/
[5] https://techcrunch.com/2017/02/01/facebook-video-calls/?ncid=rss
[6] https://newsroom.fb.com/news/2017/12/messengers-2017-year-in-review/
[7] https://techcrunch.com/2016/06/24/whatsapp-hits-100-million-calls-per-day/
[8] https://www.techzim.co.zw/2017/05/whatsapp-users-now-making-55-million-video-calls-day/
[9] https://www.geo.tv/latest/164085-whatsapp-likely-to-launch-group-voice-video-calls-report

8. ComReg states in paragraph 3.45 that *"traditional Service Providers are responding to market changes and are retaining market share, resulting in the emergence of new services e.g. WiFi calling".* While eir agrees that traditional service providers (SPs) are indeed responding to market changes with the introduction of new innovative services such as Voice over Broadband (VoB) and WiFi calling, eir is of the view that it cannot necessarily be concluded that traditional SPs are *"retaining market share"* as a result.

9. The total size of the digital communications market in Ireland, including OTT calls and messages, is currently unknown. Although ComReg reports on overall market voice subscription volumes and usage for both fixed and mobile services, data is not available on all voice minutes as well as video chat minutes that occur over data networks. It is therefore difficult to calculate the actual size of the retail market and the position that each operator finds itself in terms of market share when OTT providers are in scope. eir also notes that this direct reaction to OTT services, in the context of the provision of new and innovative communication services, would appear to indicate that such services are likely to constitute part of the markets for both retail fixed voice calls (RFVC) and retail fixed mobile voice calls (RMVC) or an overall retail voice and video call market.

10. Analysys Mason reports that the total number of active users of non-operator OTT VoIP services in Ireland, whether over fixed or mobile networks, was 1.78 million or approximately 38% of the population as of 2016. This figure is expected to grow to 3.19 million by 2022 (See Figure 5).

Figure 5. Total number of active users of non-operator OTT VoIP services in Ireland, 2010-2022



11. Although ComReg recognises the decline in retail fixed voice traffic, it appears to consider the fact that *"a majority of households (73%) continue to have retail voice connections at a fixed*

location for Q1 2017"[10] as being of equal importance. The prevailing high proportion of households with a retail fixed voice connection is not necessarily indicative of consumer preferences with regard to fixed voice services. It is more likely largely attributable to the fact that fixed voice is increasingly sold in a bundle with broadband services.

12. The number of households with a fixed voice connection does not infer that the fixed voice component is important to customers or indeed that its inclusion in a bundle drives demand in this market, but rather that the bundling of fixed voice with broadband services is an inheritance of the historical configuration of the fixed line market. The relevance of fixed voice services to end users and the market in general is in significant decline. Historically, this particular dual play offering has arisen because consumers who had fixed line voice have progressively adopted fixed broadband, rather than via a conscious decision to adopt a "bundle" of fixed voice and fixed broadband. The Commission has recognised this in its explanatory note to the 2014 Recommendation that *"in cases of the provision of the fixed voice service with broadband access and/or IPTV, bundling at the retail level is rather a phenomenon of continued provision of a declining fixed voice service alongside broadband access and/or IPTV, rather than an economically significant offer that alters the competitive dynamics over a longer period."*[11]

13. In such circumstances, usage data rather than subscription volumes is of course the appropriate indicator of consumer preferences. eir conducted internal analysis at the beginning of 2017 with regard to usage and revenue data on the top ten (by volume) fixed Consumer Talk plans for the period February to April 2017 inclusive. [✂text deemed to be confidential].

    [✂table deemed to be confidential]

14. The retail voice markets are subject to fundamental changes in competitive dynamics and it is important that ComReg and stakeholders are equipped to understand the nature and extent of those changes when undertaking market reviews. As such eir urges ComReg to review its market monitoring programme with a view to extending its scope to ensure that accurate data is collected in respect of all elements of the Irish communications markets including OTT services, which are a relevant and material consideration.

[10] Paragraph 3.43
[11] https://www.pts.se/upload/Regler/Explanatorynote-20141009.pdf

Section 4: Assessment of Retail Fixed and Mobile Voice Calls

Q. 2. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant FVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

15. eir notes that ComReg has not explicitly defined the RFVC market apart from stating that "*it is ComReg's preliminary view that there are unlikely to be effective retail demand-side or retail supply-side substitutes which would, within the timeframe of this market review, indirectly constrain a SSNIP in FTRs or MTRs by a Service Provider supplying FVCT or MVCT".* In addition, there does not appear to be any indication as to ComReg's preliminary view on the geographic scope of the retail market. eir does not agree with ComReg's inferred preliminary conclusions on the retail product market for fixed voice services. eir considers that the retail voice call market should include all voice and video call services, whether fixed, mobile or OTT services, and that ComReg's implied retail market definition does not adequately capture the significant impact of mobile and OTT competition on traditional retail markets for fixed voice calls.

16. Specifically, ComReg has not adequately considered the competitive constraints of mobile voice and OTT on fixed voice services by not applying an empirical and suitably quantitative critical loss test (CLT) in conjunction with its use of the small but significant non-transitory increase in price (SNNIP) test. ComReg states that for *"a 1 cent SSNIP of RFVC, 16% of consumer respondents purchasing standalone RFVC stated that they would definitely change their behaviour, with a further 14% noting that they might change their behaviour*". In addition ComReg states that for respondents purchasing RFVC in a bundle with other services, *"8% of consumer respondents stated that they would definitely change their behaviour, while 17% noted that they might change their behaviour".* This is not an insignificant proportion of consumers and in terms of market definition needs to be considered in the context of what could be considered as an acceptable loss for a hypothetical monopolist. The conclusions that ComReg have reached are therefore inconsistent with the results of the market research.

17. eir notes that the while an analysis of the retail market for the purposes of defining the relevant wholesale market is advised by the Commission on the premise that demand in the wholesale market is a derived demand (i.e. driven by demand in the retail market), an NRA is not required to conclude on either the precise product or geographic scope of the retail market in question

for the purposes of a wholesale market review. However, the telecommunications market is rapidly changing and concluding on the broadened scope of the related retail market(s) should therefore be seen as a useful tool in understanding market trajectory.

18. eir also notes that market reviews of the Retail Access at a Fixed Location (RAFL) and the Fixed Access and Call Origination (FACO) markets are overdue. The RAFL market was last reviewed in 2014. Commenting on the market analysis in 2014 the European Commission invited ComReg to complete its analysis of the FACO markets and analysis of upstream remedies in the shortest timeframe possible and reassess the need for ex ante retail regulation in relevant Fixed Voice Access markets in the presence of appropriate upstream regulation. In response ComReg indicated it may consult early in 2015 on a three criteria assessment of the retail voice access markets. This re-analysis of the RAFL and consultation is now long overdue and disappointingly does not appear on ComReg's current work-plan. eir notes that the expected review of the FACO market for 2018 is also not included in ComReg's work plan for the year ended 30 June 2018 and eir would therefore expect this to be included in the 2018/19 work plan.

Q. 3. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

19. eir notes that ComReg has not explicitly defined the RMVC product market apart from stating that "*it is ComReg's preliminary view that there are unlikely to be effective retail demand-side or retail supply-side substitutes which would, within the timeframe of this market review, indirectly constrain a SSNIP in FTRs or MTRs by a Service Provider supplying FVCT or MVCT".* In addition, there does not appear to be any indication as to ComReg's preliminary view on the geographic scope of the market.

20. In line with eir's response to Question 2, eir does not agree with ComReg's inferred preliminary conclusions on the retail product market for mobile voice services. eir is of the view that the market at the retail level should be defined as one that includes all voice and video call services regardless of the platform that such services are delivered over. Again in its assessment of the RMVC market ComReg has not conducted a CLT in conjunction with its retail price sensitivity and switching analysis.

21. ComReg states that in the context of *"a 1 cent increase in the price of RMVC, 6% of consumer respondents purchasing RMVC stated that they would definitely change their behaviour with a further 10% noting that they might change their behaviour".* For a 3 cent increase in the price of RMVC *"the indicated change in behaviour increases significantly with 22% of consumer respondents purchasing RMVC noting that they would definitely change their behaviour and a further 15% noting that they might change their behaviour".* Again this is not an insignificant proportion of consumers that would definitely or likely change their behaviour in response to a price increase at the retail level.

22. eir notes that the while an analysis of the retail market for the purposes of defining the relevant wholesale market is advised by the Commission on the premise that demand in the wholesale market is a derived demand (i.e. driven by demand in the retail market), an NRA is not required to conclude on either the precise product or geographic scope of the retail market in question for the purposes of a wholesale market review. However, the telecommunications market is rapidly changing and concluding on the broadened scope of the related retail market(s) should therefore be seen as a useful tool in understanding market trajectory.

Section 5: Wholesale Relevant FVCT and MVCT Market Definitions

Q. 4. Do you agree with ComReg's preliminary conclusions on the wholesale FVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

23. Whilst eir would question the robustness of ComReg's analytical approach eir does not disagree with ComReg's preliminary conclusions on the wholesale FVCT product market and geographic market definition assessment in that each market is defined as

    "the provision by an FSP of a wholesale FVCT service to other Service Providers from the nearest point to the End User or level on that terminating FSP's network at which incoming voice calls can be handed over for termination to Geographic Numbers, and in respect of which that FSP is able to set the FTR."

Q. 5. Do you agree with ComReg's preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

24. Whilst eir would question the robustness of ComReg's analytical approach eir does not disagree with ComReg's preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment in that each market is defined as

    "the provision by a MSP of a wholesale MVCT service to other Service Providers for the purpose of terminating incoming voice calls to mobile numbers, and in respect of which that MSP is able to set the MTR."

Section 6: Competition Analysis and Assessment of Significant Market Power in Relevant FVCT Markets and Relevant MVCT Markets

Q. 6. Do you agree with ComReg's assessment of SMP in the Relevant FVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

25. eir agrees with ComReg's assessment of SMP in the relevant FVCT markets. However, although eir recognises at this particular juncture that it is unlikely that OTT services will effectively constrain pricing and market power at the wholesale level of the fixed and mobile termination markets, OTT services and all-IP networks will, from a regulatory perspective and at a future point in time, become a sufficient competitive constraint on traditional voice services at the wholesale level.

26. eir welcomes ComReg's proposal to expand the number of FSPs that are designated as SMP providers. However, the designated FSP's should be expanded further to include 'Wholesale FVCT supplied by 'PhonePulse'. ComReg should also clarify that Vodafone includes all of its subsidiary companies e.g. Cable & Wireless and similarly that Viatel includes Digiweb and Smart. eir notes that the SMP Designations in the FVCT market have not been properly reviewed since 2007. The consultation in 2012 (ComReg 12/96) proposed that there were 22 SMP operators, a substantial increase from the 7 operators designated in 2007. However, ComReg did not complete the 2012 review and as such (taking into account market consolidation) ComReg has allowed 10 SMP operators the opportunity to abuse their SMP for

at least five years and in some cases even longer. In the current consultation ComReg seeks to justify this regulatory holiday for 10 SMP operators on the basis that there was an ongoing legal challenge to separate decisions on mobile termination rates.[12] However, this is not an appropriate justification for allowing fixed SMP operators to remain unregulated for significant periods of time.

27. In the current review ComReg identifies a further 6 market players with SMP in the FVCT market. Thus ComReg has failed to regulate 16 operators with SMP as a consequence of its delays in reviewing this market. This is a material breach by ComReg of its duties. eir is of the view that either all operators in the FVCT market should be designated as having SMP or alternatively no operator should be designated. This is especially true in the case of established operators. Asymmetric rates, as a direct consequence of certain operators being designated as SMP operators and others having the freedom to set their own termination rates, serve to foster inefficient entry, which ultimately negatively impacts consumers and is contrary to the European Commission's Termination Rate Recommendation made over 8 years ago in 2009. It is therefore imperative that ComReg ensures that this particular market is consistently reviewed in an efficient and timely manner.

Q. 7. Do you agree with ComReg's assessment of SMP in the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

28. eir agrees with ComReg's assessment of SMP in the relevant MVCT markets. Again eir notes that OTT communication services and the transition from circuit switched networks to all-IP networks will continue to have implications for fixed and mobile telephony services and termination markets over the longer term. In such a scenario, the distinction between voice and data for terminating purposes will be blurred and costs of both voice and data are expected to fall since the majority of services will be delivered over a common platform. The bottleneck nature of termination markets may therefore eventually disappear, should the pricing scheme for a two-way interconnection of two networks no longer envisage distinct termination charges, when voice data is transferred from one operator's network to the other.

29. eir welcomes ComReg's proposal to designate the new mobile virtual network operator (MVNO) entrants in the market, namely iD Mobile and Virgin Media as SMP providers in relation to the

[12] Paragraph 1.29, ComReg 17/90

termination of calls on their mobile networks. eir is of this view that this is the correct approach. As recognised by ComReg, these MVNOs charge and have the ability to set MTRs. Although eir notes that iD Mobile's MTR is higher than the designated SMP operators, it has voluntarily reduced its MTR each year since launch. Virgin Media on the other hand has chosen not to reduce its MTR which remains at 2.6c. [✂text deemed to be confidential].

Section 7: Competition Problems and Impacts on Competition and Consumers (FVCT and MVCT)

Q. 8. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant FVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

30. While eir agrees that competition problems could potentially arise in the Relevant FVCT Markets at this point in time, the main concern in this regard is excessive pricing practices by operators who have not been designated as SMP providers. In this regard, eir is concerned that the SMP Designations have not been properly reviewed since 2007.

31. It is important going forward that these markets are reviewed more regularly in line with ComReg's obligations under EU law. It is also important that ComReg has the ability to efficiently address market developments, including new entrants. All operators providing FVCT should be subject to the same regulatory constraints as the same potential competition problems apply equally to each operator in each Relevant FVCT Market. There is no justification for discriminatory treatment by ComReg over lengthy periods of time, as has occurred in the past.

Q. 9. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

32. While eir agrees that competition problems could potentially arise in the Relevant MVCT Markets at this point in time, the main concern in this regard is excessive pricing practices by

operators who have not been designated as SMP providers. In this regard, eir notes that the SMP Designations have not been properly reviewed since 2012.

33. In the interim, two MVNOs have entered the Irish Mobile market. [✂text deemed to be confidential], they currently have the ability to set their MTR independently of their competitors, customers and consumers. It is therefore important going forward that these markets are also reviewed more regularly in line with ComReg's obligations under EU law. All operators providing MVCT should be subject to the same regulatory constraints as the same potential competition problems apply equally to each operator in each Relevant MVCT Market.

Section 8: Approach to Specifying and Implementing Remedies in the Relevant Termination Markets

Q. 10. Do you agree with ComReg's approach to imposing remedies in the Relevant FVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

34. eir does not agree with ComReg's approach to imposing remedies in the Relevant FVCT market. In particular eir does not agree with ComReg's proposal to impose additional remedies on eir alone. This includes the proposal to impose Cost Accounting and Accounting Separation obligations on eir, namely that eir will be subject to the cost accounting obligations set out in the 2010 Accounting Separation Decision (as may be amended from time to time). ComReg has not provided any sufficient reasoning as to why eir should be subject to more burdensome regulatory remedies than other operators that have been designated with SMP. Such an approach is not appropriate or justified for any operator in the market. Since it is proposed that each SMP FSP and MSP make publically available on its website a Reference Interconnect Offer (RIO), the obligation on eir to maintain the Switched Transit Routing Price List (STRPL) should also be removed.

35. eir also considers it inappropriate that it should be subject to specific obligations regarding the provision of interconnect products for the purpose of call termination when other SMP operators are not subject to specific obligations.

36. eir notes that ComReg considers[13] "*it is appropriate to place an obligation on Eircom (and Eircom alone) to grant access to certain associated facilities for the purpose of interconnection associated with Eircom's FVCT service. The reasoning for doing so is that it is appropriate to oblige Eircom to facilitate interconnection when terminating calls on its network, having regard to the multiple and deep levels of interconnection required by Service Providers handing over such calls to Eircom.*" eir does not consider ComReg's stated position to be sufficient justification for the proposed three forms of interconnection to be imposed on eir.

37. The three forms of specified interconnection are Customer Sited Handover (CSH), In Span Handover (ISH) and In Building Handover (IBH). In other words the point of interconnection is at the other SMP operators switch facility (CSH), at the open eir switch (IBH) or at a point in between the two facilities (ISH). There is no justification why eir alone should be subject to the specified forms of interconnect. All SMP operators should either have specific obligations to facilitate / support CSH, ISH, and IBH forms of interconnect, or be subject to the generic obligation that is enshrined in the FVCT definition ("*For the avoidance of doubt, the provision of Fixed Voice Call Termination involves the provision of an Interconnection service*").[14] In its regulatory proposals ComReg is unfavourably discriminating against eir.

38. Discriminating between eir and other operators in relation to interconnection obligations is inconsistent with ComReg's views expressed in paragraph 8.57 that all SMP Operators should offer equivalent terms to other SPs where new forms of interconnection are provided by a SMP FSP to one undertaking (including that which is provided by the SMP FSP to itself or to its subsidiaries, affiliates or partners).

39. ComReg also proposes that eir should have a specific transparency obligation in relation to FVCT services / facilities that form part of any offer or provision of a Switchless Voice (SV) Service to any other Undertaking. This obligation should be removed from the FVCT remedies. The provision of SV is related to the FACO market (where a SV remedy already exists) and not the FVCT market.

40. eir notes that its comments with respect to the proposed imposition of remedies in the FVCT market are without prejudice to any position it may take in response to 'The Separate Pricing Consultation', which ComReg has advised[15] is now due to be published in Q1 2018 and not Q4 2017 as originally expected.

[13] Paragraph 8.74, ComReg 17/90
[14] ComReg 17/90R – page 462
[15] Information Notice: ComReg Document 17/90 - Consultation and Draft Decision (ComReg 17/104)

Q. 11. Do you agree with ComReg's draft FVCT Decision Instrument set out in Appendix 6? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

41. eir has a number of comments in respect of the draft text of the FVCT Decision Instrument.

(i) Section 1.4 states *"If a conflict arises between this Decision Instrument, and any other obligation imposed by ComReg (including as hereby amended), <u>the most restrictive obligation or provision shall apply</u>."* [Emphasis added] This represents a departure from previous practice whereby the most recent obligation takes precedence. For example see the most recently proposed obligations in the WLA/WCA review and the 2015 FACO Decision below. eir objects to ComReg's amended approach which serves to reduce regulatory certainty and is contrary to Regulation 8(6) of the Access Regulations which require that *"Any obligations imposed in accordance with this Regulation shall—*

*(a) be **based on the nature of the problem identified**,*
*(b) be **proportionate and justified** in the light of the objectives laid down in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, and*
*(c) **only be imposed following consultation** in accordance with Regulations 12 and 13 of the Framework Regulations*". [Emphasis added]

- Proposed WLA / WCA Decisions: *"1.3 The provisions of ComReg Document No. [●] and ComReg Decision [●] shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, <u>to the extent that there is any conflict</u> between a decision instrument dated prior to the Effective Date (as defined in Section 2.1 of this Decision Instrument) and this Decision Instrument, <u>this Decision Instrument should prevail.</u>* [Emphasis added]
- FACO Decision*: "15.2 For the avoidance of doubt, <u>to the extent that there is any conflict</u> between a Decision Instrument dated prior to the Effective Date and Eircom's obligations set out herein, <u>it is the latter which shall prevail</u>.* [Emphasis added]

(ii) eir considers that nomadic and emergency access numbers should be removed from the definition of fixed numbers and the relevant wholesale fixed market. The Nomadic Number concerned is 076, which is already being addressed in the context of a separate on-going consultation. In addition, eir is unclear as to why ComReg has included calls to emergency access numbers when these numbers are already subject to a separate Call Handling Fee (CHF).

Suggested definition:

*"**Fixed Number**" means a number from the Irish national numbering scheme as set out in the Numbering Conditions of Use, which, within the meaning of this Decision Instrument, is terminated at a fixed location;*

(iii) Paragraph 11.7 should be deleted from the Decision Instrument. Section 11.4 already sets out what should be contained in the RIO. As previously stated, this transparency obligation should be removed from the FVCT remedies. The provision of SV is related to the FACO market (where a SV remedy already exists) and not the FVCT market.

(iv) ComReg states at 12.2 that *"The cost-orientation obligation imposed at Section 12.1, to the extent that it applies to FTRs, does not apply to calls originated outside of the EEA, unless the call is originated by a Subscriber of an EEA Mobile Service Provider while roaming in non-EEA countries. Furthermore, the cost-orientation obligation imposed at Section 12.1, to the extent that it applies to FTRs, does not apply to calls originated inside of the EEA where the caller is a Subscriber of a non-EEA MSP who is roaming in the EEA."*

Although eir is of the view that calls originated outside the EEA should not be subject to a cost orientation obligation and that operators should have the flexibility to negotiate these rates, eir does not agree with ComReg's proposals to limit this in terms of roaming subscribers of EEA and non-EEA MSPs. [✂text deemed to be confidential]

(v) The following reference in paragraph 6.1 should be corrected to section 5.1:

6.1 For the purposes of Part II of this Decision Instrument, each of the Fixed Service Providers identified at Sections ~~4~~ 5.1(i) to ~~4~~5.1(xxii) above are referred to individually as the "SMP Fixed Service Provider" and collectively as the "SMP Fixed Service Providers".

Q. 12. Do you agree with ComReg's approach to imposing remedies in the Relevant MVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

42. eir agrees with ComReg's approach to imposing remedies in the Relevant MVCT Markets in that all remedies are to be equally imposed for all designated SMP MSPs. eir is also of the view that there should be consistency across the remedies imposed in the both the FVCT and MVCT markets.

43. eir notes that its comments with respect to the proposed imposition of remedies in the MVCT market are without prejudice to any position it may take in response to 'The Separate Pricing Consultation', which ComReg has advised[16] is now due to be published in Q1 2018 and not Q4 2017 as originally expected.

Q. 13. Do you agree with ComReg's draft MVCT Decision Instrument set out in Appendix 7? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

44. eir has a number of comments in respect of the draft text of the MVCT Decision Instrument.

(i) Section 1.4 states "*If a conflict arises between this Decision Instrument, and any other obligation imposed by ComReg (including as hereby amended), <u>the most restrictive obligation or provision shall apply</u>.*" [Emphasis added] This represents a departure from previous practice whereby the most recent obligation takes precedence. For example see the most recently proposed obligations in the WLA/WCA review and the 2015 FACO Decision below. eir objects to ComReg's amended approach which serves to reduce regulatory certainty and is contrary to Regulation 8(6) of the Access Regulations which require that "*Any obligations imposed in accordance with this Regulation shall—*

*(a) be **based on the nature of the problem identified**,*
*(b) be **proportionate and justified** in the light of the objectives laid down in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations, and*

[16] Information Notice: ComReg Document 17/90 - Consultation and Draft Decision (ComReg 17/104)

(c) ***only be imposed following consultation*** *in accordance with Regulations 12 and 13 of the Framework Regulations*". [Emphasis added]

- Proposed WLA / WCA Decisions: *"1.3 The provisions of ComReg Document No. [●] and ComReg Decision [●] shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, to the extent that there is any conflict between a decision instrument dated prior to the Effective Date (as defined in Section 2.1 of this Decision Instrument) and this Decision Instrument, this Decision Instrument should prevail.* [Emphasis added]
- FACO Decision: *"15.2 For the avoidance of doubt, to the extent that there is any conflict between a Decision Instrument dated prior to the Effective Date and Eircom's obligations set out herein, it is the latter which shall prevail.* [Emphasis added]

(ii) There should be consistency between the text of the MTR and FTR decisions. The following changes should therefore be made to the MTR decision text for the purpose of improved alignment:

- The following sentence should be added to the end of MTR section 9.2. *"A response to a request for Access (including Access to MVCT and Associated Facilities) shall be provided in a timely manner."*
- This text commencing MTR section 11.7 should be moved to form 11.6 (iii) *"Provide ComReg with written notification of its intention to amend its MTR(s) not less than 60 (sixty) calendar days in advance of the date on which any such amendments come into effect. At the time of such notification each SMP Mobile Service Provider shall furnish to ComReg a statement confirming that its proposed amended MTR(s) comply with Section 12 of this Decision Instrument."*

Q. 14. In respect of the potential alternative approaches for price control obligations on the application of WVCT to calls originated outside the EEA, please indicate which approach would better address the identified competition problems. Please explain the reason for your answer, providing any empirical evidence and clearly indicating the relevant paragraph numbers to which your comments refer.

45. With regard to the application of price control remedies for calls originating within the EEA as opposed to those originating within non-EEA countries, eir is of the view that ComReg should allow differentiated approaches to calls originated within and outside the EEA. No price control

should apply to calls originated from outside the EEA as this would be unbalanced and disproportionate, given that EU rules do not apply to non-EEA countries. Fixed and mobile network operators and end users in Ireland have been disadvantaged vis-à-vis their non-EU/EEA counterparts, as the former pay substantially higher termination rates when calling international numbers, whereas non-EU/EEA operators are still able to benefit from the regulated termination rates by routing calls through operators in EU/EEA countries that are obliged to apply regulated termination rates to all traffic.

46. In addition, a number of mobile operators in EU/EEA countries who are not subject to such an obligation have already introduced higher MTRs for non-EU originated traffic as opposed to traffic terminating on their network from EU networks. [✂text deemed to be confidential].

47. [✂text deemed to be confidential] Irish operators don't have flexibility under the SMP rules to implement differentiated rates, the regulated rates apply irrespective of where the traffic comes from. As such, they are restricted from applying separate rates for EU and non-EU traffic, which exacerbates the negative impact on Irish network operators and consumers.

48. In order to avoid distorting competition further in this regard, Irish operators need the ability to address asymmetry so that Irish consumers don't face higher costs i.e. without such flexibility Irish operators will have to recover the excess costs somehow. Such an approach would reduce the existing disparity between the termination rates paid by Irish operators and end users when calling abroad and international callers when calling Irish numbers.

49. Additionally, in terms of contributing to the development of the internal market and ensuring the development of consistent regulatory practice, an increasing number of E/EEU NRAs are now applying regulated FTRs and MTRs to intra EU/EEA traffic or national traffic only rather than to all traffic, regardless of where the call originates from (See Tables 2 and 3).

Table 2. Applicability of EU/EEA regulated fixed termination rates

Country	All traffic	EU/EEA traffic	National traffic only
Austria		✓	
Belgium		✓	
Bulgaria		✓	
Croatia		✓	
Cyprus		✓	
Czech Republic		✓	
Denmark	✓		
Estonia		✓	
Finland	✓		
France		✓	
Germany	✓[17]		
Greece		✓	
Hungary	✓		
Ireland	✓		
Italy		✓	
Latvia	✓		
Lithuania		✓	
Luxembourg	✓		
Macedonia (FYROM)			✓
Malta			✓
Netherlands		✓	
Norway		✓	
Poland	✓		
Portugal		✓	
Romania	✓		
Slovakia	✓		
Slovenia		✓	
Spain	✓		
Sweden	✓		
Switzerland	✓		
Turkey			✓
United Kingdom	✓		

[17] BNetzA permits German operators to refuse termination of traffic from certain non-EEA countries, subject to approval from BNetzA

Table 3. Applicability of EU/EEA regulated mobile termination rates

Country	All traffic	EU/EEA traffic	National traffic only
Austria		✓	
Belgium		✓	
Bulgaria		✓	
Croatia		✓	
Cyprus	✓		
Czech Republic		✓	
Denmark		✓	
Estonia		✓	
Finland	✓		
France		✓	
Germany	✓[18]		
Greece		✓	
Hungary		✓	
Ireland	✓		
Italy		✓	
Latvia	✓		
Lithuania		✓	
Luxembourg		✓	
Macedonia (FYROM)			✓
Malta			✓
Netherlands		✓	
Norway		✓	
Poland		✓	
Portugal		✓	
Romania	✓		
Slovakia	✓[19]		
Slovenia		✓	
Spain	✓[20]		
Sweden	✓		
Switzerland			✓
Turkey			✓
United Kingdom	✓		

[18] BNetzA permits German operators to refuse termination of traffic from certain non-EEA countries, subject to approval from BNetzA
[19] Proposed intra EU/EEA only
[20] Proposed MTR would apply to intra EU/EEA traffic only

50. A number of NRAs have also recognised the requirement for additional flexibility in terms of the operation of the regulated termination regime. In Bulgaria, France and Greece for example the NRAs have stipulated that the price control obligation does not apply to traffic which either does not contain information on the origin of the call or for which such information cannot be determined.

51. Although eir is of the view that calls originated outside the EEA should not be subject to a cost orientation obligation and that operators should have the flexibility to negotiate these rates, eir does not agree with ComReg's proposals to limit this in terms of roaming subscribers of EEA and non-EEA MSPs. [✂text deemed to be confidential].

Section 9: Regulatory Impact Assessment

Q. 15. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of FVCT? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

52. eir considers that ComReg has conducted insufficient analysis in terms of the impacts of its proposal to continue to impose much more burdensome obligations on eir than on all other FSPs designated as SMP operators. At no point does ComReg give consideration to the costs and benefits of the additional detailed requirements within each obligation. The assessment completed in this regard is cursory in nature and does not address the disproportionate burden that will be placed on eir in terms of continued compliance costs. All benefits and costs associated with regulatory regimes should be quantified where possible.

53. The Regulatory Impact Assessment (RIA) from this perspective is neither comprehensive nor thorough and merely represents a subjective and qualitative assessment of the associated costs. It does not sufficiently address relevant costs and benefits in a manner that identifies the additional burden on eir and as such ensure that it is not too onerous in light of the benefit to the market to be achieved. The measure(s) chosen to address the issues identified should be imposed in the same manner for all designated SMP operators.

54. ComReg's concerns in relation to the vertically integrated nature of eir and apparently unique ability to leverage market power across markets are purely theoretical in nature. This is particularly so in the context of a telecommunications market characterised by the presence of a number of large and extremely well-resourced international competitors that also operate

across a number of different markets and do not face the same regulatory constraints as eir. This creates an uneven playing field, particularly in the face of increased convergence and own network deployment.

Q. 16. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of MVCT? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

55. Although eir considers that the outcome of the RIA in the context of the mobile market is appropriate in that the proposed remedies apply equally to all operators, eir is of the view that its comments in relation to Question 15 equally apply here. The RIA in respect of MVCT suffers from the same lack of sufficient analysis of the related costs and benefits and in this manner is neither comprehensive nor thorough and merely represents a subjective and qualitative assessment.

Market Review

Fixed Voice Call Termination and Mobile Voice Call Termination

Response by: Carphone Warehouse Ireland Mobile Limited (trading as iD)

Reference: ComReg 17/90*

Date: 10th January 2018

Classification: Commercially Sensitive

Introduction

This submission is made by iD in response to ComReg's Consultation and Draft Decision Document reference 17/90r*. iD welcomes the opportunity to consult and have responded to those questions that are directly relevant to our business.

Q. 1. Do you agree that this Section identifies the main relevant developments in the retail fixed voice and mobile voice markets since the previous reviews of the Relevant FVCT and MVCT Markets?

In our view ComReg’s preliminary conclusions on the main relevant developments in the mobile voice markets are reasonable.

Q. 3. Do you agree with ComReg’s preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant MVCT Markets?

In our view ComReg’s assessment is robust and informs the analysis of the Relevant MVCT Markets.

Q. 5. Do you agree with ComReg’s preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment?

In our view ComReg’s preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment are reasonable.

Q. 7. Do you agree with ComReg’s assessment of SMP in the Relevant MVCT Markets?

In our view ComReg’s assessment of SMP in Relevant MVCT Markets is reasonable. However in regards to point 6.103 and the comparison to host network investment this does not fairly consider the specific challenges of an MVNO versus an established MNO.

Q. 9. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant MVCT Markets?

In our view ComReg's assessment of the competition problems and associated impacts on competition and consumers are reasonable. In particular section 7.98 review of smaller or new entrant MSPs, whose subscribers are more likely to make more off-net than on-net calls (given the size of their subscriber base). In these circumstances, excessive MTRs may foreclose a new entrant MSP.

Q. 12. Do you agree with ComReg's approach to imposing remedies in the Relevant MVCT Markets? Are there other approaches that would better address the identified competition problems?

In our view ComReg's approach to imposing remedies is reasonable however we would be conscious of any remedy that may have an adverse impact (such as cost) on iD or our customers.

- Note re section 8.208: Despite not being subject to this transparency obligation iD have maintained interconnect partner engagement and STRPL notification.
- Note re section 8.274: As previously presented to ComReg the application of an asymmetrical MTR was to provide iD with [redacted] and effectively compete in the market. The MTR established was realistic in practice, ultimately sustainable and not drive market disruption. To support this we continually engaged with market partners and aligned our MTR movement with wholesale rates. The scenario outlined in section 7.98 clearly represents the challenge faced by new entrants to the market not to mention upfront or initial operational cost pending a sustainable base. The proposed application of price control would be in direct conflict with the example in section 7.98 and would consider that application of price control on iD be reviewed.
- Note re section 8.285: We welcome and agree with the proportionality applied in this instance.

Q. 13. Do you agree with ComReg's draft MVCT Decision Instrument set out in Appendix 7? Do you agree with ComReg's definitions and interpretations as set out in this draft Decision Instrument?

In principle we agree with the draft MVCT Decision Instrument however we would be conscious of any adverse impact (such as cost) on iD or our customers such as application of price control.

Q. 16. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of MVCT? Please explain the reasons for your

answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

In our view ComReg’s preliminary conclusions on the Regulatory Impact Assessment in respect of MVCT are reasonable.

Voice Call Termination
Fixed & Mobile

Response from Three to Document 17/90

Non-Confidential Version

Three.ie

Introduction

Three is pleased to respond to ComReg's consultation on the voice call termination markets. All of our points are addressed in detail in response to the questions below, however the main points are as follows:

- ComReg's decision resulting from this market review should be future-proof as it will be 4 – 5 years before the next review is completed. Market conditions will change considerably during this time, so the decision must be adaptable to allow modification by ComReg without requiring a full review.
- The reference to numbering within market definitions carries some risk, as the use of numbers is also likely to change significantly during the lifetime of this review.
- The exclusion of products that use 0818 numbers leaves a gap in the relevant market definitions.
- Three supports Approach 2 – regarding calls that originate outside of the EEA.

Response to the Consultation Questions

Q. 1. Do you agree that this Section identifies the main relevant developments in the retail fixed voice and mobile voice markets since the previous reviews of the Relevant FVCT and MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Overall, ComReg has identified the main trends that are apparent up to now, including the decline in traditional switched voice services, and the growth of voice over data service which is enabled by the prevalence of both mobile and fixed broadband. This move away from traditional services began earlier for messaging services than for voice, as only limited broadband capacity was required and quality of service is not a significant issue. With continual improvements in the availability of bandwidth and reliability of coverage for fixed and mobile broadband, conditions are now ready for voice services to follow the same trend as messaging did, albeit lagging behind by a number of years.

Some trends continue at a steady pace, but others can reach an inflection point and suddenly take-off. The use of voice over IP is one that is nearing an inflection point. The changeover is already apparent, with less and less traditional fixed-line telephony products. The roll-out of ubiquitous broadband (through the National Broadband Plan in addition to investment by network operators) means this trend will continue.

Mobile voice has hit a plateau with little real growth in volume since 2015. We are also approaching the point where mobile broadband service will have the same coverage and penetration (of smartphones) as circuit-switched voice, which will encourage the use of mobile voice over IP/broadband. This trend will affect all categories of service (Managed, Partially Managed, and Unmanaged). In some cases we have noticed this is already occurring and some end customers are unaware that it is happening, e.g. Viber's call termination directly to smartphone applications.

The last full review of the voice call termination markets was completed in 2012, so in practice the decisions made on foot of this current review will need to serve for a minimum of four years and probably more. The framework put in place will need to be robust, but also adaptable enough to cater for the full lifespan of the review, so adaptability is key. It should be possible for ComReg to respond to market developments without needing to wait until the next full market review. The use of IP voice could easily bring about sufficient change to warrant either the inclusion of new service providers or the removal of existing ones within the next couple of years, and ComReg should be able to do this within the scope of the current market review.

Q. 2. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant FVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

CPNP means the costs to call an individual number range (and changes to the cost) are effectively masked. At the time when a call recipient selects their service provider they have little or no regard to the cost to callers to reach them. In addition, the cost to call any particular number type is not significant enough to sway a retail caller's choice of service provider – it is only part of a bundle of services. This means that the normal consequence of a price change on demand does not carry through to the person who causes the call to occur – the caller. In turn, the person who sets the charge (the terminating service provider) can increase pricing for many services and number ranges without suffering the reduction in demand that would be expected in a normally competitive market.

ComReg has defined the relevant markets for both FVCT and MVCT by reference to the ITU-T E.164 number range that is used to make the call. The risk associated with this approach is to ensure that all appropriate number ranges are covered by the decision. It should be recognised that an increase in termination price for one number type alone is unlikely on its own to influence consumer behaviour even in cases where it can be passed through to the caller by the originating network as a retail price increase. It should be remembered that several terminating operators will provide service behind any one number range, so if one terminating operator increases the price while others don't, then originating operators must decide whether to increase the retail price for all calls to those numbers or to none.

Retail tariffs are already too complicated to allow different prices to be applied to non-geographic fixed number ranges depending on the identity of the terminating operator. In any case, as ComReg rightly points out in paragraph 4.35, fixed numbers do not give users the ability to distinguish between the fixed line networks being called. Again, this means there is no pass-through of price awareness to callers.

In addition to this, the called party reaction to an increase in termination price will exert no price pressure on the terminating operator, as it is the calling party who pays. The call recipient is more likely to focus on the service they receive, e.g. the value added features delivered, and the price for the part of the service bundle that they pay for. We generally agree with ComReg's conclusions that the called party will have low awareness and low sensitivity to the calling party's cost.

This means that the party who selects the terminating operator (the called party) is not concerned with the termination price, while the party who pays can exert no influence over the price.

Q. 3. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

Overall, Three agrees with the conclusion that there is currently no supply-side or demand-side substitution effect that could adequately constrain price increases for wholesale call termination.

Q. 4. Do you agree with ComReg's preliminary conclusions on the wholesale FVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Three agrees that ComReg should adopt a technology neutral approach to the definition of the relevant voice call termination markets. As ComReg states in paragraph 5.75, the relevant market will include all services which share similar economic and functional characteristics regardless of the underlying technology on which such call termination is based.

The Annex to the European Commission Recommendation on Relevant Markets specifies the following as the markets susceptible to ex-ante regulation:

- Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location

- Market 2: Wholesale voice call termination on individual mobile networks
- Market 3: a) Wholesale local access provided at a fixed location, b) Wholesale central access provided at a fixed location for mass-market products
- Market 4: Wholesale high-quality access provided at a fixed location

Only Markets 1 and 2 are relevant for this consultation, and for the most part, similar considerations will apply.

A difficulty arises where it is necessary to break Market 1 and 2 down into the individual products in order to identify which products require to be subject to regulation. For fixed services, ComReg has chosen to identify the products by reference to the number range used to terminate the call, which in turn requires a review of all of the relevant number ranges. It presents a difficulty in that the final decision will be a static reference to the use of numbers as they are today, and will not adapt as use of the numbers change.

To a large extent, Three would agree with the analysis carried out by ComReg in Section 5 of the consultation document, however we believe the wrong conclusion has been arrived at in relation to the product supplied using 0818 numbers. The economic and functional characteristics of this product are consistent with those that apply to Geographic or 076 numbers, and should lead to the inclusion of products supplied using these numbers within Market 1.

Products that use 0818 numbers are supplied by both network operators and partially-independent service providers, however where an end recipient of calls has chosen to promote an 0818 number, this is usually the only number that a caller can use to make a call. There is no demand side substitute that is available to the caller, and in this way, the terminating service provider effectively controls access to the customer in the same way as for a geographic call.

The above is certainly true in the case where the service provider also supplies the underlying physical connectivity, but also in most other cases. It should be noted that while non-geographic calls would traditionally have been translated into geographic numbers for delivery, this is no longer necessary, and in particular IP networks can terminate the calls directly using the 0818 number. In this way, the service provider controls access to the customer in the same way as the provider of a geographic termination service does. In fact, Three would consider providing a termination service on its network using 0818 numbers if that remains outside of price control.

The same product features that are generally provided on 0818 numbers can now be equally provided on geographic numbers, so essentially the only difference remaining between geographic and 0818 numbers is that geographic numbers are restricted to the minimum numbering areas, whereas 0818 has a single national geographic area.

There is no demand-side or supply side constraint to the price that a provider of termination service using 0818 numbers would face. On the demand side an originating service provider has no alternative available. On the supply side, there is no alternative, as all networks are required to route the call to the terminating network.

As the 0818 numbers use CPNP, there is low sensitivity on the part of the customer who chooses the service provider (called party) to the termination price, as it is passed on to the originating network. This is exactly the same as for geographic numbers or for 076 numbers. The terminating service provider can effectively control the price without concern for the other parties involved.

All of the other non-geographic numbers are receiving party pays (excluding Premium for which a separate regulatory framework applies), which means that the proposed exclusion of 0818 calls from the relevant market stands as being inconsistent with the treatment of the other products that have the same functional and economic characteristics. For these reasons, Three is of the view that it is appropriate to include calls to 0818 numbers in the fixed voice call termination market.

In paragraph 5.52, ComReg states that there are differences in end user awareness and incentives in respect of the level of the FTRs applied, as well as differences in the revenue opportunities which accrue to terminating FSPs in respect of calls incoming to such numbers. Three does not believe this holds true in practice. Given that there is only a “diluted” feed-through of the termination pricing to the caller, and that the originating operator must connect the call, the 0818 service provider (who might terminate the call directly) has no concern for the termination price, and neither does their customer. Further, it would not be possible for the originating operator to pass on price increases by individual terminating service providers without having multiple prices for calls to 0818 calls. This is not practical.

The decision made by the call recipient when selecting their service provider will be influenced by price to them, and the features of the service, not the termination price.

As noted, ComReg has recently published its *Review of Non-Geographic Numbers.* In this Review, ComReg proposes to cease issuing numbers in the 076, 1850 and 1890 number ranges, and to streamline non-geographic numbers to the 1800 and the 0818 ranges, which it proposes to designate as being ‘geo-linked’. This would continue the requirement that retail charges for calls made to 0818 numbers are no greater than the charges for equivalent calls to geographic numbers.

This would create a situation where a service provider who terminates both geographic and 0818 calls would be restricted from increasing the price for geographic termination, but unfettered for 0818. They could increase the 0818 price as often and as high as they wish without consequence. There could be no pass-through to retail pricing as the 0818 retail price is linked to the geographic price.

At wholesale level, ComReg has indicated that it may be necessary to carry out an assessment of wholesale charges for calls to non-geographic numbers, however 0818 termination has been excluded from this review also.

The exclusion of 0818 from the definition of fixed termination is a major gap in the market review that should be changed.

In relation to managed and partially managed voice provided using IP or other technology, Three agrees with ComReg's conclusion in paragraph 5.85 that the competitive conditions underlying the provision these services are sufficiently similar to those underlying the provision of FVCT services using circuit switched voice technology for them to be included in Relevant Markets.

In relation to unmanaged VoIP calls, ComReg has formed a preliminary view (paragraph 5.88) that these calls should be excluded from the Relevant FVCT market, as they do not require the use of a geographic number. To begin with, Three believes it would be incorrect if the use of geographic numbers was a decisive factor in this consideration. Voice call termination can be delivered with numbers other than geographic numbers and even without numbers at all. The consideration of whether these services are included in the relevant market or not should be based on the functional and economic conditions, and should not be limited to the means of identification used.

While OTT service providers might not yet have reached sufficient market penetration to warrant inclusion in the relevant markets, Three is of the opinion that underlying conditions are changing rapidly and that this is likely to change within the lifetime of the current review. Both fixed and mobile broadband coverage and quality is reaching the point where VoIP or voice over data can become a viable substitute for managed and traditional circuit switched voice. VoIP is nearing an inflection point where it will act as a constraint on pricing of traditional call termination. ComReg should maintain the ability to bring VoIP and OTT services within the relevant market during the lifetime of this review as an "add-on", i.e. without having to carry out the full market review again.

In relation to the geographic scope of the markets, Three agrees with ComReg's conclusion that the geographic scope of the wholesale relevant voice call termination markets is the area where each provider offers service.

Q. 5. Do you agree with ComReg's preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Overall, Three agrees with ComReg's preliminary conclusions, however some of the points raised above in response to question 4 apply also in response to this question.

It is not necessary to hold a mobile number assignment in order to deliver mobile voice call termination service, and we would caution against including numbering within the definition of the market. This decision should be based on the functional and economic conditions of the relevant products. The use of smartphones apps that can access a mobile user's contacts, and require registration where a user enters their own mobile number means that OTT providers do not need to be allocated mobile numbers by ComReg in order to provide call termination services – they just use the numbers allocated to other operators.

Three believes VoIP call services and OTT voice services are likely to become a constraint on mobile voice call termination pricing earlier than fixed. This is because of the prevalence of smartphones that can use apps to terminate calls in a frictionless manner. In some cases, the end user will not even be aware that the call is being delivered in this way. Three has observed evidence of OTT Bypass on its network. As is the case for the fixed markets, ComReg should retain the flexibility to include these services within the market definition during the lifetime of this review without needing to revisit the full market analysis/review.

Q. 6. Do you agree with ComReg's assessment of SMP in the Relevant FVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Three agrees with ComReg's assessment and preliminary conclusion.

Q. 7. Do you agree with ComReg's assessment of SMP in the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Three agrees with ComReg's assessment and preliminary conclusion.

Q. 8. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant FVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Three agrees with ComReg's assessment and preliminary conclusion.

Q. 9. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Three agrees with ComReg's assessment and preliminary conclusion.

Q. 10. Do you agree with ComReg's approach to imposing remedies in the Relevant FVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Three agrees with ComReg's approach to imposing remedies in the fixed voice call termination market. Please see Annex 1 for Three's comments regarding the distinction between EEA originated and non-EEA originated calls. This applies equally to the mobile market (Q. 12).

Q. 11. Do you agree with ComReg's draft FVCT Decision Instrument set out in Appendix 6? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

For the reasons set-out above, Three does not believe ComReg should tie the definition of the voice call termination market to the numbers used. In particular, we have identified the exclusion of services that use 0818 numbers as a gap in the current proposals. ComReg should either revise the definition to remove reference to particular number ranges, or include 0818 numbers within the definition.

Three agrees with ComReg's proposed text for the case where a distinction is drawn between EEA originated and non-EEA originated calls.

Q. 12. Do you agree with ComReg's approach to imposing remedies in the Relevant MVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Three agrees with ComReg's approach to imposing remedies in the mobile voice call termination market. Please see Annex 1 for Three's comments regarding the distinction between EEA originated and non-EEA originated calls. This applies equally to the fixed market (Q.10).

Q. 13. Do you agree with ComReg's draft MVCT Decision Instrument set out in Appendix 7? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

For the reasons set-out above, Three does not believe ComReg should tie the definition of the voice call termination market to the numbers used. In particular, we are of the view that 0818 numbers could be used to provide voice call termination where such termination occurs on a mobile network. The exclusion of 0818 is a gap in the current draft decision.

Three agrees with ComReg's proposed text for the case where a distinction is drawn between EEA originated and non-EEA originated calls.

Q. 14. In respect of the potential alternative approaches for price control obligations on the application of WVCT to calls originated outside the EEA, please indicate which approach would better address the identified competition problems. Please explain the reason for your answer, providing any empirical evidence and clearly indicating the relevant paragraph numbers to which your comments refer.

Three supports the exclusion of calls originating outside of the EEA from the price control obligation. See Annex 1 below for futher information.

Q. 15. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of FVCT? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Three agrees with ComReg's assessment and preliminary conclusion.

Q. 16. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of MVCT? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

Three agrees with ComReg's assessment and preliminary conclusion.

Annex 1 – EEA vs Non-EEA Originated Calls

In this market review ComReg has identified a problem that has emerged as a result of the fact that EEA countries are subject to the same regulatory and price control framework for call termination whereas countries outside of the EEA are not. The price to terminate voice calls within all EEA countries is largely consistent, stable, and has only a small degree of variation.

The fact that termination rates are subject to control for EEA operators is well known to operators outside of the EEA. It should be noted that for most operators outside of the EEA an Irish operator will have only a limited business relationship. In most cases, the only interaction between the two will be the mutual termination of each other's international voice call traffic. The negotiation around these rates is limited, and there is little else that the operators can use to influence the negotiation other than their own reciprocal rate. It has been recognised by operators outside of the EEA that in cases where price control applies to calls originating outside of the EEA, then these operators can increase their own termination rate without any change to the reciprocal rate. This has led to a significant disparity between the termination rates that apply to some countries.

It should be noted that not all operators/countries have adopted the attitude where they will take advantage of the disparity in negotiating power. Three sees the international termination rates falling into three (3) categories (a) EEA; (b) non-EEA where operators behave reasonably, and (c) non-EEA countries where operators have taken advantage of the asymmetrical regulatory position.

Table 1 below gives some examples of the termination rate charged to Three for calls that fall into category (b) and (c) above. This is not an exhaustive list.

[✂text deemed to be confidential, confidential data has been removed from the tablel]

[redacted]

Three has noticed a trend emerging recently whereby non-EEA operators will simply implement order-of-magnitude price increases without discussion. One example of this is *[✄text deemed to be confidential]*. In November 2017, *[✄text deemed to be confidential]* operators imposed a price increase from below *[✄text deemed to be confidential]* to over *[✄text deemed to be confidential]*. This is not in any way attributed to an imbalance in traffic volumes between the two destinations, as the volume of traffic received from *[✄text deemed to be confidential* by Three each month is typically about 95% of the volume sent.

Other examples would include *[✂text deemed to be confidential]*, which charges over *[✂text deemed to be confidential]*, and where we send approximately 65% of the volume of minutes that we receive, and *[✂text deemed to be confidential]* where we incur a blended charge of over *[✂text deemed to be confidential]*, and where we send approximately 140% of the volume of minutes that we receive. *[✂text deemed to be confidential]* has recently imposed a significant price increase.

In these cases, Irish Service Providers and, by extension, their subscribers, are cross-subsidising non-EEA Service Providers. This cost is passed on ultimately to Irish consumers unless it can be offset by higher reciprocal pricing or negotiated down. Freedom to increase termination rates in Ireland is the only leverage we have to exert downward price pressure on non-EEA terminating operators.

Trend in Other EU Countries

Most NRAs have recognised this issue and where a review has been carried out almost all have removed non-EEA originated calls from the price control obligation. At this time, of 29 EEA countries reviewed, 19 have modified the application of their price control to allow different treatment of non-EEA originating calls. Of the 10 that have not, in 7 cases it is more than 3 years since the market review was carried out.

ComReg would be out of alignment with the approach that is being taken by other EU NRAs if it chose to impose the same price control for EEA and non-EEA originated calls now. Given that this review will have a 4 – 5 year lifetime, ComReg would likely be the only EU NRA still maintaining this position by end of this review.

Three notes that in Germany a different approach is taken, whereby operators are not entitled to apply different price control remedies, but may refuse to carry calls for those non-EEA countries that discriminate between national and international calls by setting different termination rates. Three would not see this as the appropriate solution, as ultimately it leads to customer disruption and loss of welfare.

ComReg raised a concern in paragraph 8.143 that allowing increased termination pricing for non-EEA countries could negatively affect welfare of Irish consumers by reducing the volume of inbound calls. Three would note that in the first place it is not a given that prices will actually increase. It is necessary for Irish operators to have the flexibility to increase rates in order to restore the balance of power in negotiation of termination rates. Three accepts that it is possible that some prices will increase for a time, even if only to demonstrate that it can happen, however we do not see that this would have any impact on inbound call volume – in the first place it is not clear whether or when this price increase might be passed on to callers, and it is also unclear what the price elasticity for these calls would be. In any case, Irish operators are unlikely to implement any extreme price increase, as a reduction in volume would be counter-productive for the operator itself.

Three agrees with ComReg's analysis at paragraph 8.151, which states that The principal advantage of Approach 2 is that Irish Service Providers will be enabled to respond to non-EEA Service Providers who levy high termination rates. This eliminates the cross-subsidy from Irish consumers and restores balance to the negotiation of international termination rates.

Three does not agree that the disadvantage highlighted in paragraph 8.157 will materialise, i.e. the "race to the top". In practice operators do not change rates often, and they also do not maintain country bespoke termination rates. It is more likely that any operator who chooses to have a different termination rate for non-EEA countries will implement a small number of price bands rather than have a bespoke price per country. In any case the incentive for the "race to the top" type of price changes quickly disappears as it becomes apparent to negotiators that further increases will simply net-off against each other. The purpose is to restore balance to price setting discussions.

For the above reasons, Three supports ComReg's Approach 2, which draws a distinction between EEA and non-EEA originated calls.

Virgin Media response to:

Consultation: Fixed and mobile call termination market review

ComReg 17/90

Non-confidential

Introduction

Virgin Media Ireland Limited ('**Virgin Media'**) welcomes the opportunity to respond to ComReg's Consultation ('**the Consultation'**) on its fixed and mobile call termination market review (ComReg 17/90).

ComReg has requested input on the treatment of calls that are originated outside of the European Economic Area ('**EEA**') (Q14 page 493). In particular, ComReg has asked for feedback on two options:

- **Candidate Approach 1:** Retain the status quo
- **Candidate Approach 2:** Allow differentiated approaches to calls originated within and outside the EEA

Virgin Media has provided feedback on this question below.

Summary

In relation to the treatment of calls that are originated outside of the EEA, Virgin Media considers that:

- Different competition conditions apply to the supply of call termination for calls originated outside of the EEA.
- The status quo (Candidate Approach 1) does not benefit Irish end-users
- The benefits of the status quo accrue to parties outside of the European Union, and therefore should not be accounted for in any regulatory impact assessment.
- For good reason, an increasing number of NRAs within the European Union are lifting price controls for termination of calls originated outside of the EEA
- The risks identified by ComReg as justification for retaining the status quo approach are speculative and are have not been substantiated

For these reasons, Virgin Media considers that regulatory intervention in the supply of call termination to non-EEA operators is neither required nor is it warranted. Of the two approaches presented by ComReg, Virgin Media is therefore prefers *Candidate Approach 2*. However, Virgin Media considers that the most appropriate outcome is for this category of traffic to be excluded from the relevant market and that regulatory obligations applied to this type of traffic be withdrawn.

ComReg's assessment

ComReg's preliminary market definition

ComReg's preliminary view is that the relevant markets encompass the provision of Fixed Voice Call Termination ('**FVCT**') services and Mobile Voice Call Termination ('**MVCT**') to other undertakings, regardless of whether those undertakings were located in Ireland or abroad.

In arriving at this view ComReg noted that the service is, from a functional and technical perspective, the same irrespective of which undertaking it is provided to, and that the same competitive problem arises in each instance.

<u>ComReg's preliminary impact assessment</u>

ComReg noted that retaining the *status quo* could lead to wealth transfers / net out-payments from Irish SMP Service Providers to non-EEA service providers, resulting in cross-subsidisation of non-EEA Service Providers.

ComReg noted that an increasing number of other EU NRAs have altered their approaches to the regulation of FTRs to allow FSPs some latitude in FTRs charged for terminating calls originated in non-EEA countries.

ComReg noted that, according to incomplete data provided by operators in 2016, calls originated abroad account for a small proportion of overall call termination volumes in Ireland

ComReg noted that the primary benefit of retaining *status quo* approach is that it ensures regulatory certainty for Irish Service Providers and for purchasers of termination services.

ComReg considered that retaining the *status quo* avoids the risk that permitting freedom to set termination rates for non-EEA originated calls could lead to retaliatory increases by non-EEA Service Providers in respect of termination rates charged on non-EEA routes where termination rates are currently low (approximate cost). ComReg noted that this could lead to negative consequences for Irish end-users if these retaliatory termination rate increases were passed through to the retail level.

ComReg noted that retaining the *status quo* may also avoid the risk that higher inbound termination rates could lead to higher retail rates charged for calls made to Ireland from overseas, which could reduce the volume of calls they receive from friends, family and business contacts overseas, or lead to substitution of inbound calls with outbound calls for which Irish end-users pay.

Finally, ComReg noted that retaining the *status quo* may avoid creating an arbitrage opportunity between EEA and non-EEA Service Providers whereby the origin of traffic in is disguised in order to avail of lower EEA termination rates.

ComReg acknowledged however that retaining the *status quo* ante sets Ireland at odds with the emerging regulatory approach across the EU.

Virgin Media's assessment

<u>Market definition</u>

Virgin Media disagrees with ComReg's view that the same competition problem arises in the provision of call termination to non-EEA service providers.

The competition conditions are different in a number of important ways. First, while Irish service providers must offer their customers access to fixed and mobile numbers in Ireland, non-EEA service providers are not required to do so. This means that non-EEA service providers are free to "walk away" from negotiations with another Irish service provider, whereas other Irish service providers are not.

Secondly, the downstream retail product – namely retail international calls – is different in ways that alter the competitive conditions in the supply of call termination to non-EEA operators. For example, the retail price of international calls is typically higher than the price of domestic calls, reflecting the additional cost of international transit. As a result, end-users are more likely to avail of other options when making international calls. This was reflected in ComReg's FVCT market research, which showed that consumers are more likely to choose VOIP services when making international calls than they are when making domestic calls. In particular, ComReg's results[1] show that amongst Over the Top ('**OTT**') app users surveyed, on average, 54% of their international calls are made via internet apps while 46% of these calls are made using fixed line. Whereas for calls made within Ireland, these same consumers make only 41% of these calls through OTT App, while 59% are still made using traditional fixed line.

This increased tendency for consumers to substitute traditional services with VOIP services when making international calls suggests more elastic demand for retail international calls. It is notable that when consumers use OTT applications instead of traditional fixed and mobile services to make calls, this also results to a loss in termination review for fixed and mobile operators. These factors would most likely translate into increased price elasticity in the upstream call termination markets.

The international market also differs from the domestic market because of the role that international transit providers play in aggregating traffic. For the following reasons, the relative bargaining position held by international transit provider when negotiating with an Irish service provider is fundamentally different from that assumed by another domestic service provider:

- International transit providers tend to aggregate large volumes of traffic on behalf of a large number of international call providers
- International service providers are not competing in the Irish retail calls market.
- International transit providers provide bundles of international transit with call termination.
- International transit providers can offer the Irish service provider access to favourable international call rates in return for a lower termination rate.

In addition, it is notable that the market for the supply of call termination to non-EEA operators is an export market. By definition, EEA end-users are not involved in this market and for that reason there is no justification for regulatory intervention by ComReg.

For these reasons, Virgin Media considers that the provision of call termination to non-EEA market should be considered a separate market from the supply of call termination to Irish service providers.

[1] FVCT market research, page 38.

Regulatory impact assessment

The status quo does not benefit Irish end-users

Virgin Media agrees that imposing price controls on the supply of termination to non-EEA service providers results in an effective wealth transfer from Irish service providers to non-EEA service providers. This transfer will ultimately be funded by, and will result in a net-cost to end-users in the European Union (the '**Single Market'**). The transfer will benefit firms and end-users outside of the EEA, whose welfare should not be factored into ComReg's cost-benefit analysis.

Virgin Media notes that the commercial bargaining position of Irish service providers is undermined in any situation where price controls are unevenly applied. Considerable weight should be given to this welfare loss in the regulatory impact assessment because the impact is direct and is salient. On that basis, Virgin Media considers that imposing price controls on Irish operators is likely to result in a net-loss for end-users within the Single Market.

Since ComReg is unable to intervene in the provision of call termination by non-EEA providers, and the market involves the supply of services in both directions, then ComReg should refrain from intervening in the market altogether.

For good reason, an increasing number of NRAs are lifting price controls for termination of calls originated outside of the EEA

Table 39 of the Consultation showed that an increasing number of other European National Regulatory Authorities ('**NRAs**') have removed price caps that were applied to the supply of call termination to operators outside of the EEA.

This shift in thinking across European NRAs reflects an acknowledgement that imposing price controls on this category of traffic is not beneficial to consumers within the Single Market.

Virgin Media notes that calls from non-EEA operators were in most cases only applied implicitly by European NRAs, based on a "catch-all" market definition, rather than being applied explicitly, i.e. remedies were applied for all incoming calls to fixed and mobile numbers, without having considered the non-EEA issue specifically.

Calls originated abroad account for a small proportion of overall call termination volumes in Ireland

Even if the traffic volumes for this type of traffic are considered by ComReg to be inconsequentially small, the appropriate approach for ComReg to take in that case would regulatory forebearance by ComReg – since the benefit of intervention in that case would be so small. Virgin Media nevertheless considers that the wealth transfer from Irish service providers to non-EEA service providers under the status quo is substantial, and the proportion of traffic originated by non-EEA and terminated in Ireland does not justify intervention.

Regulatory certainty

Virgin Media disagrees that any benefit arises to Irish Service Providers by retaining the *status quo*. Retaining the *status quo* does not, in itself, imply regulatory certainty. For example, ComReg could provide equivalent regulatory certainty by signalling that it no longer intends to intervene in the termination of non-EEA traffic.

Furthermore, ComReg's methodology should not assign preference to the status quo, since doing so leads to the risk of unjustified perpetual regulation. Instead, ComReg should identify whether competition problems arise that warrant regulatory intervention, and if so, what are the interventions that would best address the problems that have been identified.

ComReg has itself highlighted that the status quo results in a net transfer from Irish Service Providers to Non-EEA service providers, which amounts to a dis-benefit to Irish firms and consumers.

Regarding the purchasers of termination services, only those outside of the EEA will benefit from the status quo. As such, these benefits should not be taken into account by ComReg.

On that basis, neither of these "benefits" referred to by ComReg exist in practice.

The risks identified by ComReg as justification for the status quo are speculative and have not been substantiated

ComReg has pointed to a number of risks that it considers could arise if it were to depart from the *status quo*. For the reasons explained below, Virgin Media considers that the risks identified by ComReg as justification for retaining the status quo approach are speculative and are have not been substantiated Virgin Media.

- *The risk of retaliatory increases by non-EEA Service Providers*

  ComReg has speculated that retaining the *status quo* avoids the risk that permitting freedom to set termination rates for non-EEA originated calls could lead to retaliatory increases by non-EEA Service Providers in respect of termination rates charged on non-EEA routes where termination rates are currently low.

  Virgin Media considers that this assertion incorrectly implies that Irish service providers are either not incentivised, or not capable, of negotiating favourable interconnect agreements with overseas operators. In practice it is only by allowing Irish service providers pricing freedom that non-EEA service providers can be disciplined for setting excessive termination rates. The risk of non-EEA service providers imposing excessive termination rates is reduced when Irish service providers have pricing freedom.

  Virgin Media considers that it is in the interest of Irish service providers and international transit providers to negotiate call termination and transit rates that enable competitive retail pricing for international calls. Irish consumers have showed an increased willingness to use OTT services instead of traditional fixed and mobile services to make international calls. Due to the increased price elasticity associated with international calls, Irish service providers need to look for ways to reduce the wholesale costs of international calls so that they can compete effectively with OTT services in the international retail calls market. Offering competitive termination rates is an integral part of negotiating international favourable interconnect agreements.

- *The risk of a reduction in the volume of calls received from friends, family and business contacts overseas*

  ComReg has speculated that moving away from the *status quo* could lead to a risk that the volume of calls received by Irish end-users from overseas will reduce.

  In order to establish whether this risk warrants any intervention, ComReg would first need to demonstrate that:

  a. Irish operators would increase average termination rates for non-EEA originated traffic if the price control was removed;
  b. non-EEA service providers would pass this price increase onto their customers through a substantial increase in the price of retail calls to Ireland;
  c. this price increase would result in a reduction in calls to Irish consumers and businesses; and
  d. the reduction in "traditional" calls would harm end-users in the Single Market.

  ComReg has not provided evidence that these conditions are met.

  ComReg has, on the other hand, provided evidence that end-users are willing to use OTT services instead of traditional services when making international calls, so it is far from clear that a reduction in tradition inbound international calls to Irish numbers from outside the EEA would result in harm to end-users in the Single Market. For this reason, Virgin Media considers that further analysis would be required in order for ComReg to establish whether the above conditions are met, and whether this risk would arise in the case of a departure from the *status quo*.

- *The risk of an arbitrage opportunity arising*

  ComReg has suggested that moving away from the *status quo* risks creating an arbitrage opportunity between EEA and non-EEA Service Providers whereby the origin of traffic could be disguised in order to avail of lower EEA termination rates.

  ComReg has not established that there is an arbitrage problem here that needs to be solved, nor the extent to which any resulting harm to end-users could arise. Virgin Media considers that any risk of arbitrage, if it were to arise, would represent a commercial risk for Irish operators rather than for end-users. Virgin Media considers that it is not ComReg's role to protect Irish service providers against this type of commercial risk. Rather, it would fall upon Irish service providers to put appropriate measures in place to protect themselves against potential revenue losses.

  In terms of potential efficiency losses relating to adjustments in call routing. ComReg has presented no evidence that efficiency losses would arise, or that an detriment to end-users in the Single Market would arise. On that basis, Virgin Media disagrees that this should factor into ComReg's impact assessment.

For these reasons, Virgin Media considers that regulatory intervention in the supply of call termination to non-EEA operators is neither required nor is it warranted. Of the two approaches presented by ComReg, Virgin Media is therefore prefers *Candidate Approach 2*. However, Virgin Media considers that the most appropriate outcome is for this category of traffic to be excluded from the relevant market and that regulatory obligations applied to this type of traffic be withdrawn.

Market Review of
Fixed Voice Call Termination &
Mobile Voice Call Termination

Response to Consultation

10 January 2018

Executive Summary

I. Vodafone welcomes the opportunity to respond to the ComReg market review on Fixed Voice Call Termination and Mobile Voice Call Termination markets.

II. Since entering the Irish market 15 years ago, Vodafone has made significant investments in its network and in supporting technologies and infrastructure. Vodafone is the single biggest investor in new technology in the Irish telecoms industry annually, with over €2 billion invested to date, in building and maintaining the network.

III. Over the next three years, Vodafone will invest **[Confidential text removed]** in Ireland across mobile, broadband, fibre to the home, network infrastructure and enhanced customer care systems.

IV. The telecoms sector in general requires high levels of investment if Ireland is to realise its ambitions to drive the knowledge economy, achieve a Gigabit society and improve inclusivity by delivering higher speed services to more remote areas. It is also clear that a stable and profitable sector attracts investment.

V. The profitability of the telecoms sector has been greatly impacted in recent years. The investment demands (for spectrum and new technologies) continue to increase, competition has intensified and regulatory measures such as roaming reforms and termination rate regulation have impacted the business case for investment in the Irish telecoms sector. ComReg needs to **give serious consideration to this economic backdrop** as part of this market analysis and particularly as part of the separate pricing consultation paper.

VI. Even before the most recent 2018 MTR rate reductions **Ireland already has very low termination rates**. As evidenced in the most recent BEREC update[1] on its benchmark of fixed and mobile termination rates across Europe, Ireland is well below average rates across both fixed and termination rates. The market is intensely competitive and consumers in Ireland already benefit from voice rich price plans with unlimited cross net call allowances. There is no justification at this point for more onerous regulatory controls.

[1] BEREC termination rates at European level – July 2017 (Published December 2017) http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/7524-termination-rates-at-european-level-july-2017

VII. In a number of areas under consideration as part of this consultation process Vodafone supports in principle the analysis of ComReg. In the absence of the detailed pricing consultation it is difficult to comment on the proportionality of remedies being proposed however we note the position of ComReg[2] that respondents will have the opportunity to comment on price control issues when responding to the separate pricing consultation.

Calls Originated Outside the EEA

VIII. One critical aspect of the price control concerns how ComReg impose the pricing remedy. The majority of member states impose their price control remedy only on calls that originate within the European Economic Area ('EEA') and Ireland should align with its European colleagues to ensure we are not disadvantaged in the absence of symmetric obligations.

IX. Vodafone has provided examples below of how non-EEA countries charge termination rates well above those charged in Ireland. A change in regulation is required here to ensure fair outcome for Irish operators. As it stands there is a considerable transfer of wealth out of Ireland caused by the current termination regime. The following summary statistics clearly illustrate this.

X. **[Confidential data removed]**

XI. In our detailed response to ComReg question 14 below we give country specific examples of this disparity.

OTT Services

XII. Vodafone recognise that ComReg are bound to take the utmost account of the 2009 Termination Rate Recommendation. However, the patterns of use of mobiles by customers is moving rapidly and regulation must keep pace with these changes in the market.

XIII. This applies particularly to the use by mobile customers of OTT services. In text replying to Q3/5/7 below we argue that OTT services are already an intrinsic part of the set of services used by our customers. Regulation, and any proposed remedies, must recognise this but also must be flexible enough to remain appropriate over the lifetime of this Market Review.

[2] ComReg document 17/90 ComReg information Notice

Consultation Questions

Question 1

Do you agree that this Section identifies the main relevant developments in the retail fixed voice and mobile voice markets since the previous reviews of the Relevant FVCT and MVCT markets? Please explain the reason for your answer clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

1. Vodafone agree with the developments highlighted by ComReg. Additional factors also need to be considered.

   It is Vodafone's view that the ComReg analysis should also consider the ongoing demand for network investment required to ensure that Ireland is at the forefront internationally in terms of connectivity and also that Ireland is in a position to benefit from becoming a truly digital society. This is highlighted through the work of the Mobile Phone and Broadband taskforce[3] which demonstrates the public will and political support to deliver the next evolution in mobile services, to improve network coverage and to ensure the rollout of enhanced voice features such as VOLTE and WiFi calling

2. The changes to the retail market structures are also an indicator of the challenging business case for investment in the Irish market. In the mobile market Telefonica, was facing mounting international debt and declining Irish revenues[4], and made the decision to exit the Irish market when it sold its Irish business to Hutchison 3G Ireland ('Three').

   Three committed as part of the EU Commission acquisition approval process to facilitate commercial arrangements for two MVNOs who launched services in the second half of 2015.

[3] Report of the Mobile Phone and Broadband Taskforce published 20/12/2016 https://www.dccae.gov.ie/en-ie/communications/publications/Pages/Report-of-the-Mobile-Phone-and-Broadband-Taskforce.aspx
[4] https://www.independent.ie/business/irish/o2-brand-to-disappear-as-three-snaps-up-rival-operator-for-850m-29369261.html

In 2017, less than 2 years after launch, iD mobile the Dixons Carphone owned MVNO signalled its intent to exit its mobile network operations because of high operation costs[5].

3. Vodafone believe the development of OTT services is more significant than recognised in ComReg's text, we give more detail below in our response to Q3/5/7.

Question 2

Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the relevant FVCT markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views

4. Vodafone broadly agree with this assessment.

As indicated in the ComReg consultation the structure of voice tariffs influences consumer awareness of call costs. Consumers can now avail of higher amounts of inclusive call allowances as more value has been added into customer plans.

5 https://www.irishtimes.com/business/technology/dixons-carphone-looks-to-offload-id-mobile-in-ireland-1.3137079

Vodafone wish to address ComReg Questions 3, 5, & 7 together:

Question 3

Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the relevant MVCT markets. Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

Question 5

Do you agree with ComReg's preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Question 7

Do you agree with ComReg's assessment of SMP in the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

OTT Players and Market Constraint

5. Throughout this Market Review document ComReg identify the very significant influence that OTT services have in the way mobile customers are using their phones however the consultation fails to acknowledge the very real constraint that these OTT services place on the prices operators charge for both originating and terminating call minutes.

6. Clearly there is significant usage of OTT services among consumers. In the key findings of ComReg's Consumer MVCT Market Research (ComReg 17/90b)[6] ComReg identify

   - "Amongst smartphone users in the survey, 48% say that they use OTT Apps for voice/video calls every day or every couple of days, rising to 66% amongst Dublin residents and 58% amongst those aged 15-34 (Ref: Slide 4)."

7. The increasing level of use of OTT voice services will constrain the prices that operators charge for all calls, originating and terminating. If we do not limit these prices ourselves, we will see the erosion of the voice market. No additional regulatory controls are required to provide incentives to limit these voice termination prices. We can easily see the parallels with the SMS market. In this market, where OTT messaging products have been available for a number of years longer than OTT voice products, there is an increased take-up of OTT messaging Apps. This is supported by the ComReg survey which highlights

   - 67% of all surveyed use an internet messaging app at least every couple of days, rising to 77% amongst 15-34 year olds and 70% in Dublin and Total Urban regions (Ref: Slide 29).

8. In parallel with this increase in OTT usage there has been a 15% reduction[7] in SMS network traffic. This dramatic fall in SMS usage illustrates the effect that OTT services can have on voice and messaging services and the use of messaging apps have driven a dramatic reduction in SMS traffic in the last 2 years. This illustrates how quickly consumer behaviour changes yet despite clear evidence that users are quickly adopting OTT services ComReg have concluded that OTT services do not constrain termination prices.

9. In relation to OTT usage the survey also highlights

[6] https://www.comreg.ie/media/dlm_uploads/2017/10/Comreg1790b.pdf
[7] Figure 16 of ComReg Doc 17/90r

- 48% of smartphone users say that they use OTT Apps for voice/video calls every day or every couple of days, rising to 66% amongst Dublin residents and 58% amongst those aged 15-34 (Ref: Slide 26).

- 67% of all surveyed use an internet messaging app at least every couple of days, rising to 77% amongst 15-34 year olds and 70% in Dublin and Total Urban regions (Ref: Slide 29).

10. It is clear that the rapid development and use of OTT applications will continue in the coming years. The evolution of OTT services continues to present challenges to regulators and it is critical that the process of Market Analysis and Regulation can keep pace with these changes. Any price control regime introduced as a result of this Market Analysis must be flexible enough to keep pace with change and should not restrict the ability of traditional operators to compete.

11. In completing their SNIP test, it appears that ComReg conclude that small increase in retail charges can be sustained without reducing call volume.

    - "the pass through of termination rates increases above the competitive level is not likely to lead to significant increases in retail charges. Consumer reactions to such price changes need to be considered in this context "(ComReg 17/90r paragraph 4.16.)

    Vodafone do not agree with this conclusion. The presence of a broad range of OTT players will constrain the retail price. Any increase in retail charges is highly likely to drive a reduction in call volumes.

Current Termination Pricing behaviour.

12. ComReg analyse the changes in MTR prices charged by Mobile operators and from this analysis conclude that there is a lack of competition in the MTR market.

- 4.217 "data suggest that the driver of this reduction has been regulation, rather the competitive constraint posed by unmanaged VoIP. . ., whereby all 2012 SMP MSPs reduce their MTRs on the same day, and at the maximum permissible level"

In reaching this conclusion ComReg are not taking into account that the price control that they imposed was based on LRIC. Therefore, when the obligations where imposed operators were already constrained to charge the marginal network cost of call minutes for MTR traffic. Any attempt by an operator to further reduce prices below this regulated figure would not only be loss making but would also be contrary to the principle of cost orientation as it would force operators to subsidize the termination service from other services. If ComReg had allowed a more reasonable cost basis for MTR, such as LRAIC+, operators would have some room to manoeuvre but LRIC effectively allows no space for operator discretion.

13. As part of a SNIP test ComReg also carry out some analysis of the possible effects of increased MTRs on call charges. In paragraph 4.16 ComReg conclude that

- "the pass through of termination rates increases above the competitive level is not likely to lead to significant increases in retail charges. Consumer reactions to such price changes need to be considered in this context "

ComReg then conclude that small changes in retail charges will not affect call volumes. We do not agree with this analysis and our view is that operators are sufficiently constrained by competition with OTT services.

.

Question 14

In respect of the potential alternative approaches for price control obligations on the application of WVCT to calls originated outside the EEA please indicate which approach would better address the identified competition problems. Please explain the reason for your answer providing any empirical evidence and clearly indicate the relevant paragraph numbers to which your comments refer.

Pricing of Termination for calls Originated outside the EEA

14. Vodafone refers to ComReg's discussion on alternative approaches to the application of price control remedies with respect to calls originating within the European Economic Area ('EEA') on the one hand, and non-EEA countries on the other. ComReg discuss the advantage and disadvantages of two potential courses of action in this respect.

15. Based on our experience of dealing with some non-EEA service providers Vodafone are strongly of the view that customers in Ireland would be better served by allowing operators to set different MTR rates, where necessary, for traffic arriving from non-EEA countries.

16. If this is not permitted, then a serious competition problem arises as non-EEA operators have the freedom to increase their termination rates and the Irish operator has no ability to negotiate with the international operator - it must offer a set regulated price. This is leading to wealth transfer through the cross-subsidisation of those non-EEA Service Providers by Irish operators and, ultimately, Irish retail subscribers.

17. This is a pressing issue and it is of critical importance that ComReg provides protection to Irish operators as part of this decision. The argument may be that this issue only arises in respect of smaller non EEA countries with relatively low traffic volumes however this is not the case. The census for 2016[8] identifies more than 25 different countries of origin outside the EEA with 1000 or more non-Irish nationals resident in Ireland. For many of these countries Vodafone is

[8] Census 2018 All non-Irish nationals in Ireland http://www.cso.ie/en/releasesandpublications/ep/p-cp7md/p7md/p7anii/

required to pay much higher termination rates to the operator outside the EEA and can also be subject to ad hoc and unjustified increases which increasingly limits our ability to offer greater choice for key customer segments who have a need to call family and friends in their country of origin.

18. To illustrate the challenges faced by Vodafone we have examined our international outbound minutes to 193 non-EEA countries over the six months to December 2017. **[Confidential text and data removed]**

19. ComReg's MTR order of 2012 imposed a LRIC pricing regime on termination costs. This allows Vodafone (and other Irish Operators) to only recover a limited fraction of our total costs of providing a termination service. Non-EEA Service Providers do not face any similar restriction and are aware that they can increase Termination rates without any fear of the retaliation from us. This leads to net out-payments by Irish Service Providers. Irish Service Providers and, by extension, our subscribers, are cross-subsidizing non-EEA Service Providers.

20. We would strongly urge ComReg follow the approach of other EU NRAs who have recognised the challenge arising. EU NRAs are increasingly affording discretion to operators when setting termination rates to non-EEA countries.

21. The preferred solution is that remedy is imposed in such a way that allows Irish operators to use commercial negotiations to set their own termination rates for terminating incoming non-EEA originated calls. To avoid the 'race to top' discussed in paragraph 8.157 of the consultation we further suggest that ComReg allow Irish operators to refuse MVCT to a non-EEA country that discriminate between national and international calls by setting different termination rates.

22. We note that ComReg has incomplete information in some destination countries. This may be inevitable as many operators will use transit operator to reach these destinations and pay net transit/termination fees thus not being aware of the actual termination rate in each country. This does not remove the advantage of achieving lower termination rate in these non-EEA countries as these rates will feed into the blended transit/termination rates.

Advantages of retaining the status quo

23. In paragraph 7.11 ComReg argue that 'no change' offers better regulatory certainty, potentially avoiding the costs associated with upgrading their traffic identification and billing systems to identify call origin.

24. Vodafone do not consider this to be an advantage as Irish operators already have the choice of not making these upgrades if they believe termination rate are not a sufficiently significant issue for them to justify the investment.

25. In paragraph 7.13 ComReg notes that an approach whereby NRAs allow differential termination rates for non-EEA traffic (or indeed other non-EEA countries which implement similar approaches) could, depending on the particular circumstances of each case, be of relevance to international trade agreements.

26. In our experience of discussion and negotiation of international termination and transitions rates issues of international trade agreements have never been raised by any parties.

Disadvantages of retaining the status quo

27. We agree that the key disadvantage of this approach is that it prevents Irish Service Providers from responding to the imposition of high imbalanced termination rates for non-EEA Service Providers of. Irish Service Providers must therefore continue to either absorb the costs of doing so, or pass these costs onto their retail subscribers. Ultimately, Irish subscribers may continue to cross-subsidise non-EEA Service Providers.

28. Retaining the status quo also sets Ireland at odds with the emerging regulatory approach across the EU and consistency is now required.

Candidate Approach 2: Allow differentiated approaches to calls originated within and outside the EEA

29. Vodafone strongly favour this approach and recommend that ComReg stipulate that the price control obligation of cost orientation would apply only to the termination of calls which originated in the EEA. This would allow us to commercially negotiate termination rates.

30. We agreed with the identified Benefits of allowing a differentiated approach

31. The principal possible advantage of Candidate Approach 2 is that Irish Service Providers will be enabled to respond to non-EEA Service Providers who levy high termination rates. This means that Irish Service Providers – and, by extension, Irish retail consumers – would no longer be cross-subsidizing non-EEA Service Providers, or (under the assumption of asymmetric traffic flows, where the Irish Service Provider terminates fewer minutes than it originates), be cross-subsidizing at a lower level, as the Irish Service Provider would be able to compensate for its high outgoing termination payments indirectly by charging the non-EEA Service Provider, rather than from its own subscribers (where such costs are passed on), or by absorbing the costs, thereby diverting funds from alternatives such as network and infrastructure investment.

32. From a consumer perspective, we believe that allowing a differential approach to price regulation will lead to reduced costs to Irish consumers as it will incentivise non-EEA Service Providers to reduce their termination rates from their previously high level. This will allow the Irish FSP to pass cost reductions onto Irish subscribers.

33. Lastly, Candidate Approach 2 has been adopted by the majority of EU NRAs. Were Ireland also to do so, it would be ensuring consistency with contemporary regulatory practice across the EU.

Lycamobile
Call the world for less

Lycamobile Ireland Limited
Unit 18, Bluebell Business Park
Old Nass Road
Dublin, D12 RW52

10 January 2018

Máire FitzGerald
Commission for Communications Regulation
1 Dockland Central
Guild Street
Dublin 1

Re: Market Review FVCT & MVCT – ComReg 17/90 – Non Confidential

Due to time limitations, Lycamobile Ireland Limited ("Lycamobile") wish to respond to Question 14. In this regard, Lycamobile makes reference to Table 39.

In Portugal, Anacom initially took the view that for calls originating within the EU/EEA and terminating within Portugal the regulated MTR will apply; for calls originating outside the EU/EEA but terminating within Portugal, mobile network operators (including relevant MVNOs) may charge a higher MTR as the non-EU/EEA originating operators charge an MTR in excess of the regulated MTR applicable within Portugal. Anacom later modified its approach to include a tiered mobile terminating rate depending upon the country from which the call originated.

In Austria, from the outset, RTR has permitted the mobile network operators (including the relevant MVNOs) to charge a differential MTR depending upon the country from which the call originates. Within Austria, the relevant mobile terminating rate is determined by the CLI of the originating call that is terminating within Austria. There are four Groups. Each Group has a different MTR applied. As an example, Lycamobile request ComReg refer to Annex 1 attached. It is noteworthy that although Group A includes calls originating within the EU/EEA, it also includes other countries where the reciprocal mobile terminating rate is relatively equivalent to the regulated Austrian mobile terminating rate. All mobile network operators (including relevant MVNOs) have by Interconnection Agreement, agreed bilaterally to follow this approach.

In relation to paragraphs 8.134 through 8.136, Lycamobile advise ComReg that the Lycamobile traffic profile differs from that described in the Consultation. Lycamobile has a higher than average/mean of calls originating within Ireland and terminating outside the EU/EEA as well as calls originating outside the EU/EEA and terminating within Ireland. Lycamobile will supplement this response with specifics relating to the Lycamobile call profile on a confidential basis.

Lycamobile Ireland Limited
Unit 18, Bluebell Business Park
Old Nass Road
Dublin, D12 RW52

Thus, Lycamobile recommends Candidate Approach 2. Lycamobile acknowledge the disadvantage of Candidate Approach 2 as set out in paragraph 8.158 (c). Regarding this disadvantage, Lycamobile would need to investigate the technical practicality of determining whether or not the non-EEA MSP subscriber is roaming or not roaming. Regarding the disadvantage set out in paragraph 8.158 (d), Lycamobile refer ComReg to Annex 1. Lycamobile considers that this disadvantage falls away if countries are grouped according to their relative mobile terminating rate. As noted above in relation to Austria, not all "Group A" countries are within the EU/EEA, but nevertheless have mobile terminating rates approximating that of the EU/EEA.

Lycamobile also advise ComReg of an additional point, namely that Candidate Approach 2 only works for MVNOs such as Lycamobile where the transit partner (whether that be the host Mobile Network Operator or a third party operator) passes onto the MVNO the higher mobile terminating rate the transit partner collects from the non-EU/EEA service provider for calls originating outside the EU/EEA and terminating within Ireland (less a cost oriented transit fee) – as soon as the transit partner collects the same. It needs to be kept in mind that the arrangement between the transit operator and the non-EU/EEA service provider will not necessarily be known to the MVNO as that contractual relationship is private between the transit operator and the non-EU/EEA service provider. For this reason, it will be necessary to impose transparency obligations upon the transit operator (whether this be the host Mobile Network Operator or a third party operator) with regard to the agreed / unilaterally imposed mobile terminating rate charged by the Irish operator on the non-EU/EEA service provider pursuant to their interconnection agreement.

Yours sincerely,
On behalf of Lycamobile Ireland Limited

Richard Hohenstein,
Solicitor England and Wales

Verizon Response to ComReg's "Market Review: Fixed Voice Call Termination and Mobile Voice Call Termination" Consultation

Introduction

1. Verizon Enterprise Solutions ("Verizon") welcomes the opportunity to respond to ComReg's Market Review: Fixed Voice Call Termination and Mobile Voice Call Termination" consultation, reference 17/90r (the "Consultation").[1]

2. Verizon is the global IT solutions partner to business and government. As part of Verizon Communications – a company with nearly $131 billion in annual revenue – Verizon serves 98 per cent of the Fortune 500. Verizon caters to large and medium businesses and government agencies and is connecting systems, machines, ideas and people around the world for altogether better outcomes.

3. Please note the views expressed in this response are specific to the Irish market environment and regulatory regime and should not be taken as expressing Verizon's views in other jurisdictions where the regulatory and market environments could differ from that in Ireland.

4. This response is structured around the questions included in the Consultation.

5. The key point for Verizon in this consultation is that the status quo for calls from outside the EEA should be retained meaning that ComReg should not allow service providers to charge higher than regulated rates for traffic originating outside the EEA area. However, if ComReg were to allow differentiation, it must restrict this to traffic originating in countries that themselves apply high termination rates. This would ensure that Irish service providers could not charge higher rates for traffic originating in countries, such as the US, where regulated termination rates are extremely low (or zero as will be the case in the US from July 1st, 2018 for all major providers and 2 years later for smaller ones).

Response to Questions

Q. 1. Do you agree that this Section identifies the main relevant developments in the retail fixed voice and mobile voice markets since the previous reviews of the Relevant FVCT and MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

[1] Consultation available at: https://www.comreg.ie/publication/market-review-fixed-voice-call-termination-mobile-voice-call-termination/, Reference Number: 17/90r, 27 October 2017.

6. We generally agree with the analysis of the main relevant developments in both the retail fixed voice call termination (FVCT) and mobile voice call termination (MVCT) markets since the previous reviews.

7. Firstly, we are disappointed that the review focuses on the domestic consumer and small and medium enterprise (SME) sectors, without a full understanding of the large business communications market. This means that some of the evidence presented in Section 3 of the Consultation is not truly reflective of the whole market. While this lack of business customer analysis does not ultimately affect the outcome of this market review, it is an important distinction that large business customers and domestic consumers and SMEs purchase and use their communications in different ways.

Q. 2. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant FVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

8. We generally agree with ComReg's preliminary conclusions on the retail product and geographic market assessment for FVCT set out in Section 4 of the Consultation.

Q. 3. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

9. We generally agree with ComReg's preliminary conclusions on the retail product and geographic market assessment for MVCT set out in Section 4 of the Consultation.

Q. 4. Do you agree with ComReg's preliminary conclusions on the wholesale FVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

10. We agree with ComReg's preliminary conclusions on the wholesale FVCT product market and geographic market definition assessment, as set out in Section 5 of the Consultation. We strongly agree with the inclusion of incoming calls from any destination (including non-EEA calls). We set out reasoning and evidence on this point in response to Question 14 below.

Q. 5. Do you agree with ComReg's preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment? Please explain the

reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

11. We agree with ComReg's preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment, as set out in Section 5 of the Consultation. We strongly agree with the inclusion of incoming calls from any destination (including non-EEA calls). We set out reasoning and evidence on this point in response to Question 14 below.

Q. 6. Do you agree with ComReg's assessment of SMP in the Relevant FVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

12. We agree with ComReg's assessment of significant market power (SMP) in the Relevant FVCT Markets as set out in Section 6 of the Consultation.

13. In particular, we agree with the finding of SMP in all 22 of the Fixed Service Providers (FSPs),[2] and the application of remedies to all 22 SMP FSPs (as discussed below in response to Question 10). This has the additional upside of providing greater clarity, regulatory certainty, and simplicity to the market which will benefit industry and ComReg in its enforcement of the SMP conditions.

14. The evidence provided by ComReg in Tables 18 and 19 on pages 250-251 of the Consultation shows the large delta between the regulated rates of the 2007 SMP FSPs and the rates of those Service Providers who are not currently subject to the cost-orientation obligation. Not only does this demonstrate that providers of FVCT have the ability and incentive to leverage their market power to impose high charges (some over 2000% higher[3]) absent regulation, but it also clearly demonstrates the potential for consumer harm if Service Providers pass on these costs to their consumers through higher retail prices. Furthermore, we strongly urge ComReg to see if it can identify a way to ensure that new entrants to the fixed termination market can be included in scope of the SMP conditions to ensure a level playing field for all.

Q. 7. Do you agree with ComReg's assessment of SMP in the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

---

[2] See paragraphs 5.157 and 6.27 of the Consultation.

[3] See for example, Table 18 on page 250 of the Consultation, where Ocean is shown to have a rate which is 2337% higher than the regulated rate in 2017.

15. We agree with ComReg's assessment of SMP in the Relevant MVCT Markets as set out in Section 6 of the Consultation.

16. In particular, we agree with the finding of SMP in all seven of the Mobile Service Providers (MSPs),[4] and the application of remedies to all seven SMP MSPs (as discussed below in response to Question 12). This provides greater clarity, regulatory certainty, and simplicity to the market which will benefit industry and ComReg in its enforcement of the SMP conditions. Furthermore, we strongly urge ComReg to see if it can identify a way to ensure that new entrants to the mobile termination market can be included in scope of the SMP conditions to ensure a level playing field for all.

17. As with the fixed market, the evidence provided by ComReg in Table 22 on page 257 of the Consultation, showing the large delta between the regulated rates of the 2012 SMP MSPs and the rates of those Service Providers who are not currently subject to the cost-orientation obligation. Not only does this demonstrate that providers of MVCT have the ability and incentive to leverage their market powers to impose high charges (some over 300% higher[5]) absent regulation, but it also clearly demonstrates the potential for consumer harm if Service Providers pass on these costs to their consumers through higher retail prices.

Q. 8. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant FVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

18. We generally agree with ComReg's analysis of the potential competition problems and the associated impacts on competition and consumers in the Relevant FVCT markets as set out in Section 7 of the Consultation. We would however raise a few specific points in relation to the analysis.

19. Firstly, when discussing the potential issue of wealth transfer to outside of Ireland due to differences in termination rates in different countries;[6] we would argue that this depends on firstly the volume of traffic and the relevant rates. For example, countries like the US have very low regulated termination rates and originate a large amount of traffic. Therefore it is also possible that there could be a wealth transfer to Ireland.

[4] See paragraphs 5.245 and 6.27 of the Consultation.
[5] See for example, Table 22 on page 257 of the Consultation, where Virgin Media's current rate is shown to be 317% higher than the regulated rate.
[6] See paragraph 7.43 of the Consultation.

20. ComReg also discusses the negative impact of having inconsistent regulation across the EU, citing lack of regulatory certainty, lack of transparency and increased regulatory burden, especially for pan-EU Service Providers.[7] We fully agree that consistency and certainty are of key importance; however we would argue that this extends to global Service Providers as well. As discussed below, this is particularly important when considering Service Providers who originate and terminate national, European and non-EEA traffic, and who would benefit from a clear and simple price control which applies to all calls regardless of origin. We discuss this issue in further detail in response to Question 14 below.

Q. 9. Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

21. We generally agree with ComReg's analysis of the potential competition problems and the associated impacts on competition and consumers in the Relevant MVCT markets as set out in Section 7 of the Consultation. Please do note the few specific points in relation to the analysis raised above in response to Question 8 which are relevant to both the fixed and mobile termination markets.

Q. 10. Do you agree with ComReg's approach to imposing remedies in the Relevant FVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

22. We agree with the majority of the remedies proposed by ComReg for the Relevant FVCT Markets; however there are a number of remedies where we do not agree that they are proportionate, or consider they require greater clarification. We address each of the sections of remedies in turn below.

Transparency

23. We agree with ComReg's proposal for a written notification to Service Providers 30 days in advance of any changes to terms, conditions and termination rates. This aligns better with monthly billing cycles and provides a balance between flexibility and the operational requirements for changes to prices. Furthermore, 30 days should give sufficient time to

[7] See paragraph 7.94 of the Consultation.

the purchasing Service Provider to verify compliance against the price control and raise concern to the SMP FSP and/or ComReg.

24. However we strongly disagree with a number of the other proposed transparency SMP conditions, namely:

    a. the publication of an RIO; and

    b. the 60-day advance notification to ComReg.

25. With regard to the publication of an RIO, we see no rationale for this being a necessary requirement for alternative operators other than Eircom given that the similar terms and conditions requirement imposed in 2007 currently functions well. Such a requirement would only serve to create a large administrative burden in terms of time and resource for alternative operators such as Verizon with no commercial or regulatory benefit.

26. We strongly disagree with proposed requirement to provide ComReg with advance notice of changes to termination rates for a "pre-approval". This is highly disproportionate and unnecessarily interventionist as it would restrict Service Providers' flexibility in responding not only to competition, but also from passing on savings to consumers through lower termination rates as soon as possible. We also question whether providers would know 60 days in advance whether they will change their termination rates. Furthermore, it seems like a large administrative burden for both Service Providers and ComReg to process with no clear benefit. We therefore consider that this proposed remedy goes against the requirement for ComReg to choose proportionate and justified remedies.[8] Greater transparency around the price control combined with the 30-day notice between Service Providers should be sufficient for non-compliance to be identified and either handled between Service Providers or escalated to ComReg as a dispute.

<u>Non-discrimination</u>

27. ComReg's proposed obligation to ensure equivalence in the services and information provided even when such services or information has not been requested[9] is unclear, burdensome, and hard to comply with in practice. We therefore request that ComReg removes this proposed condition.

<u>Access</u>

[8] As per section 12 of the Communications Regulation Act 2002 (as amended), and Regulation 16 of the Framework Regulations.

[9] See paragraph 8.54 and 10.3 of the Draft FVCT Decision Instrument at Annex 6.

28. We generally agree with the access remedies proposed by ComReg in the Relevant FVCT markets. In particular, we agree with the requirement for all SMP FSPs to negotiate access in good faith and to provide such access in a fair, reasonable and timely manner.

29. We are also pleased to see additional requirements on Eircom with regards to interconnect access and the provision of service level agreements (SLAs) for interconnection services. We also agree with the need for the interconnection remedy to apply to all types of interconnection based on the different requirements of Service Providers and their different degrees of network build out.[10]

30. While we agree with ComReg's view that "calls originating in the EU outside the State, but destined for an Irish subscriber will require access to FVCT", however we note that this access to FVCT is also required for the termination of calls from outside of the EU. It is therefore essential that equivalence in access is ensured for all calls, regardless of origin. We believe that the Draft FVCT Decision Instrument reflects this sufficiently.[11]

Price Control, Cost Accounting, and Accounting Separation

31. In advance of the Separate Pricing Consultation being published, Verizon considers that the LRIC cost standard is the most appropriate standard to choose in order to best sustain competition in Ireland, for both fixed and mobile termination rates. We therefore encourage ComReg to remain consistent with the 2009 EC recommendation in favour of LRIC[12], and we fully support this approach. Consistency of regulatory approach across the EU is of considerable benefit to both pan-European and even global Service Providers and consumers alike, and therefore we strongly urge ComReg to adopt a LRIC based approach.

32. We discuss the issue of the inclusion of non-EEA calls in the price control in response to Question 14 below.

33. We agree with the proposed cost accounting and accounting separation requirements for Eircom, and agree with ComReg that it would be disproportionate to apply these requirements to other SMP FSPs.[13]

Q. 11. Do you agree with ComReg's draft FVCT Decision Instrument set out in Appendix 6? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

[10] See paragraph 8.79 of the Consultation.
[11] See Annex 6 of the Consultation.
[12] Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:124:0067:0074:EN:PDF
[13] As set out in paragraphs 8.163 to 8.183 of the Consultation.

34. We generally agree with the drafting of the FVCT Decision Instrument in Annex 6. However we make the following specific comments.

35. With regard to the treatment of non-EEA calls, which we discuss in greater detail in response to Question 14, we prefer the drafting used at the second option for 12.1 and 12.2. In order to ensure that there is no ambiguity, we would urge ComReg to make clear in the accompanying statement to the Final Decision Instrument that this wording is intentionally drafted to specifically include calls from non-EEA countries in the price control.

36. As discussed above in response to Question 10, we do not agree with the proposed obligations to require the publication of an RIO, and the 60-day advance notification to ComReg.

Q. 12. Do you agree with ComReg's approach to imposing remedies in the Relevant MVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

37. We generally agree with the remedies proposed for SMP MSPs. There are a number of specific remedies we would highlight that we agree with. These are:

   a. Transparency: We agree with the 30-day advance notification requirement for changes to term, conditions and termination rates. This aligns with our monthly billing cycles and provides a balance between flexibility and the operational requirements for changes to prices. Furthermore, 30 days should give sufficient time to the purchasing Service Provider to verify compliance against the price control and raise concern to the SMP MSP and/or ComReg.

   b. Access: We agree with the need for good faith negotiations for fair, reasonable and timely access to MVCT.

38. As above, in advance of the Separate Pricing Consultation being published, Verizon considers that the LRIC cost standard is the most appropriate standard to choose in order to best sustain competition in Ireland, for both fixed and mobile termination rates. We therefore encourage ComReg to remain consistent with the 2009 EC recommendation in favour of LRIC[14], and we fully support this approach. Consistency of regulatory approach across the EU is of considerable benefit to both pan-European and even global Service

[14] Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:124:0067:0074:EN:PDF

Providers and consumers alike, and therefore we strongly urge ComReg to adopt a LRIC based approach.

39. We discuss the issue of the inclusion of non-EEA calls in the price control in response to Question 14 below.

Q. 13. Do you agree with ComReg's draft MVCT Decision Instrument set out in Appendix 7? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

40. We generally agree with the drafting of the MVCT Decision Instrument in Annex 7. However we make the following specific comments.

41. With regard to the treatment of non-EEA calls, which we discuss in greater detail in response to Question 14, we prefer the drafting used at the second option for 12.1. In order to ensure that there is no ambiguity, we would urge ComReg to make clear in the accompanying statement to the Final Decision Instrument that this wording is intentionally drafted to specifically include calls from non-EEA countries in the price control.

Q. 14. In respect of the potential alternative approaches for price control obligations on the application of WVCT to calls originated outside the EEA, please indicate which approach would better address the identified competition problems. Please explain the reason for your answer, providing any empirical evidence and clearly indicating the relevant paragraph numbers to which your comments refer.

42. In response to this question, we first set out our overall view on the inclusion on non-EEA calls in the price controls for both the FVCT and MVCT markets, before addressing the specific points raised by ComReg in the consultation.

<u>Verizon's position on termination rates</u>

43. Termination rates, both fixed and mobile, have a large impact on our business as a multinational telecoms company routing calls into Ireland from numerous non-EEA destinations, and in particular the US, and as such, any uncertainty and/or any significant increase in either the fixed or mobile termination rates for traffic originating in non-EEA countries would have significant impact on our business, as it would significantly increase costs for Verizon's US originating traffic to the EEA and affect our ability to provide affordable voice services to US consumers calling the EEA.

44. We consider that there are a number of reasons to refrain from "differential regulation"[15] which fall into the following categories:

- Legal arguments
- Economic impact
- Consumer impact

<u>Legal arguments</u>

45. As highlighted in Annex 1 to this submission, we consider that there is no alternative option in this situation, as differential treatment of non-EEA calls would violate:

- **The EU telecommunications rules** – most if not all Service Providers in EU member states are required to have non-discriminatory and cost-orientated termination rates, which "differential regulation" would clearly violate;
- **General competition rules** – as all Service Providers are dominant in the termination of calls onto their own network, charging higher termination rates for calls from non-EEA countries will be an abuse of a dominant position in the form of excessive pricing, and/or discriminatory pricing; and
- **The WTO General Agreement on Trade in Services (GATS)** – "differential regulation" would go against the principle of service suppliers treating Members less favourably than any other;[16] that access and use of any public telecommunications transport networks and services for Members should be on reasonable and non-discriminatory terms and conditions;[17] and that "major suppliers" to interconnect with cost-orientated, transparent, and reasonable rates[18].

<u>Economic impact</u>

46. As highlighted above, "differential regulation" has a large cost impact on multinational operators such as Verizon. Given the small margins involved in the voice market, costs inevitably are passed on to customers. **[✂]**[19]

[✂ TABLE REDACTED]

---

[15] We refer to "differential regulation" as including both where non-EEA calls are subject to reciprocity or no regulation at all. This is as opposed to including non-EEA calls in the price control along with EEA calls.
[16] Article II of the WTO GATS.
[17] See Article 5(a) of the Annex on Telecommunications to the WTO GATS.
[18] See Section 2.2 of the Telecommunications Services Reference Paper.
[19] **[✂]**

47. Please see Annex 2 to this submission which is a confidential spread sheet detailing the surcharges currently added on top of the regulated termination rates for fixed and mobile in other European countries which have a "differential regulation" regime in place. **[✂].**

48. Allowing commercial negotiation of termination rates would be incredibly burdensome, inefficient, and costly, as individual rates negotiations with each SMP provider would need to take place. In Ireland alone, ComReg has identified at least 29 providers of either FVCT or MVCT. This negotiation cost is ultimately passed on to consumers in the form of higher prices, most likely with little benefit in terms of reduced rates (or indeed, negative impact on consumers as such negotiations could actually result in higher termination rates; especially as operators seek to recover revenue lost to decreasing regulated rates within the EEA. Furthermore it is questionable whether room would effectively exist for commercial negotiations as every carrier has a monopoly thanks to its full and exclusive control of terminating access to its subscribers. Non-EEA carriers might perhaps (and paradoxically) be offered the option to increase their rates for termination of Irish traffic into their non-EEA countries (paradoxically since differentiated rated are precisely allegedly a remedy against high termination rates outside of the EU); but this will be of no effect in a competitive environment where other transit routes will necessarily be available to Irish Service Providers on the wholesale market at cheaper rates based on regulated rates, wherever differentiation based on country of origin is prohibited, such as in the US. It is therefore more efficient, less burdensome, and would put consumers at less risk to include non-EEA originating calls in the relevant price controls for both FVCT and MVCT.

49. Furthermore, some regulators have argued that Service can still commercially negotiate termination rates in the context of (global) transit and bi-lateral agreements. We refute this argument. The regulated termination rates are a cost element that needs to be taken into account when negotiating the rates in such agreements. This means that in situations where EU regulators allow their in-country carriers to apply differential and higher termination rates for traffic originating from outside the EEA, these higher termination costs in almost all instances will be passed through in the (global) transit and bi-lateral agreements, with the consequence that traffic coming from non-EEA countries will be confronted with often much higher termination rates than traffic originating within the EEA. It is hardly possible in the context of these (global) transit and bi-lateral agreements to negotiate termination rates to a lower level than what is set by the terminating network. Similarly, it is hardly possible in the same context for a carrier to set commercial termination rates to its network at levels significantly above regulated rates, because other routes available on the wholesale market at (cheaper) rates close to regulated rates will be preferred. Consequently, wherever termination rates are regulated for all types of traffic no matter where it originates in the other party's country, as is the case in the US, SPs in these countries will be unable in practice to replicate the surcharges that Irish

Service Providers would potentially apply This is precisely the reason why it is of key importance that regulators make sure that termination rates are indeed cost-oriented, ideally irrespective of the country where the traffic originates.

50. By ensuring that the charge control on termination rates applies to all calls terminated to fixed locations and mobiles in Ireland regardless of origin, ComReg would ensure that there is regulatory certainty to both buyers and providers of FVCT and MVCT, which would be beneficial.

51. Other sources of costs from adopting a “differential regulation” approach to termination rates would arise due to the need to make system changes. Requiring Service Providers to modify the already complex systems in order to accommodate differential regulation, which could potentially bring no benefits or even higher termination rates, would be burdensome, disproportionate, and potentially have a negative effect on consumers through higher prices.

52. Furthermore, “differential regulation” would mean increased complexity of regulation for termination rates. We consider that it would be disproportionate to introduce inefficient, burdensome and complex regulation in this area. Furthermore, it would not align with ComReg’s obligations to ensure its regulation is appropriate, proportionate and justified.

53. More generally, “differential regulation” may also discourage callers from contacting Ireland if termination rates ultimately increased, as the cost to the consumer increased as a result. A reduction in calls would not only reduce the revenues for Ireland-based operators, but could also have a greater impact on the wider economy if there were a reduction in the calls from US business consumers to businesses in the Ireland. We note in Annex 1 to this submission that the U.S. Trade Representative (USTR) has already identified “differential regulation” for termination rates as a “foreign trade barrier”, and has already raised the issue both in 2015 and 2016.

54. While Verizon does not serve domestic consumers in Ireland, it is possible that an increase in termination rates due to differential regulation would have a disproportionate negative impact on BAME communities whose relatives and contacts may be located in non-EEA countries, either through increased cost or a reduction in calls between such consumers. This was noted by Ofcom in its recent Mobile Call Termination consultation.[20]

Consumer impact

[20] See paragraph A4.11 of Annex 11 to the Ofcom consultation “Mobile call termination market review 2018-21” published 27 June 2017, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0014/103343/mobile-call-termination-consultation-annexes.pdf

55. In addition to unnecessary cost increases which would be passed on to consumers in the form of higher call charges, consumers could also be impacted in the following ways.

56. Introducing "differential regulation" could lead to Service Providers trying to avoid paying higher rates through inefficient routing via multiple countries or CLI masking so that it is harder to identify the originating country of the call. Both of these potential impacts of "differential regulation" would mean that tackling nuisance calls and/or fraud would be harder. This suggests that there is a greater risk of both inefficiency and consumer harm from adopting "differential regulation" for termination rates for calls from non-EEA countries.

Summary

57. In light of the above, and the two adjoining annexes to this submission, we strongly urge ComReg to continue with its provisional proposal to ensure that all calls terminated to both fixed locations and mobiles in Ireland should be subject to the proposed price control obligation, regardless of origin (including non-EEA countries).

58. While our position is that we would not support any form of "differential regulation", if ComReg were to consider allowing Service Providers to set higher than regulated rates for calls originating outside the EEA, we consider that it would be of key importance to ensure that the higher than regulated termination rates do not apply to countries that themselves apply very low termination rates for traffic coming from EEA countries (such as the US). This is even more relevant if it concerns countries where termination rates are strongly regulated and need to apply to all traffic regardless of origin, as is the case in the US, as well as in light of the fact that it is impossible to "correct" these higher differential termination rates in the context of (global) transit and bi-lateral agreements as explained above.

Specific points in relation to the ComReg Consultation

59. ComReg sets out two options for the inclusion (Option 1) or not (Option 2) of non-EEA calls in the price control obligation for both FVCT and MVCT along with an analysis of the advantages and disadvantages of each option in Section 8 of the Consultation. Many of the issues overlap across the two options presented, so we discuss them thematically below.

Negotiation of rates and retaliation rates

60. One of the advantages that ComReg attributes to adopting a differential regulation option (Option 2) is that the freedom to negotiate termination rates for non-EEA calls would allow SMP FSPs and MSPs to respond to higher termination rates in other countries where

rates are high.[21] ComReg argues that this could lead to a negotiation to mutually lower rates.[22] Verizon strongly refutes this assumption for a number of reasons.

61. Firstly, SMP FSPs and MSPs by definition are incentivised to increase revenue streams such as increase net revenue inflow to Ireland through increasing termination rates. We consider that by far the most likely outcome of adopting differential regulation is that operators would raise rates to the detriment of consumers (both originating and receiving) and this would in turn lead to a "race to the top" of termination rates. This is particularly true where the higher rates in other countries are set by regulation (such as Ghana[23]), which means negotiating rates below this level is highly unlikely if not impossible. Therefore the likelihood of achieving a rate decrease is therefore unlikely to be changed if differential regulation were applied, but would only result in a cost increase for Irish consumers. We therefore argue that the likelihood of differential regulation leading to low termination rates is limited, and this is even more true where Irish Service Providers currently face high termination rates."

62. This is not just theory. In a number of European countries where differential regulation has been introduced, Service Providers have added surcharges to the regulated rates for non-EEA traffic (see our Confidential Annex 2 for full details). In particular, we would highlight:

    a. Greece – Differential regulation has been in place in Greece since September 2015 for the FVCT market. The fixed termination rate applied by Greek incumbent OTE for non-EEA calls rose 100% in March 2017 to 0.02€/min, and is 36 times higher than the regulated EEA rate.[24]

    b. Croatia – When differential regulation was introduced in Croatia, the incumbent Hrvatski Telekom referred to the deregulation of fixed termination rates for non-EEA calls and a subsequent price increase for such calls in March 2016 (but does not give the rates).[25] **[✂]**

[21] See paragraph 8.151 of the Consultation.
[22] See paragraph 8.154 of the Consultation.
[23] Legislation in Ghana sets a minimum price of $0.19 per minute for termination of international calls. Parliament of Ghana, Electronic Communications (Amendment) Act 2009 http://www.nca.org.gh/assets/Uploads/Ghana-Electronic-Communications-Amendment-Act-Act-787.pdf
[24] The fixed termination rate increase for non-EEA calls can be seen on the published price list from OTE, the Greek incumbent. The 2016 rates (from 1 January 2016) are available here: http://www.otewholesale.gr/Portals/0/Interconnection_EN%20241016.pdf (in English); and the 2017 rates (from 1 March 2017 for non-EEA calls) are available here: http://www.otewholesale.gr/Portals/0/Interconnection_EN_01032017.pdf (in English).
[25] See bottom of page 17 of the Q4 2016 Results press release here (in English): http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj1kLjd3OPWAhXqJsAKHQ4ZBQIQ

63. We also encourage ComReg to review the research and findings from an EU NRAs questionnaire carried out by Ofcom in the context of its Mobile Call Termination Review. Ofcom found that "in other EU member states where differential regulation has been applied, providers have increased MTRs for non-EEA originated calls". Ofcom also found that this increased rate was often a blanket rate applied to all non-EEA originated calls, and therefore not based on a need to meet higher rates in other countries (such as the US, which has very low rates).[26]

64. In addition, in its Final Statement on the Narrowband Market Review, Ofcom conducted a similar analysis for fixed termination rates by contacting EU NRAs. It noted that "where price regulation of non-EEA calls has been removed, the FTRs charged to non-EEA telecoms providers have tended to increase", and that "no examples were cited of lower rates being negotiated".[27]

65. Given the above, if ComReg were to allow differential regulation, it may lead to increased revenue, and but also increased cost. At best, this would lead to a neutral outcome, but at worst, it could lead to substantial cost increases which would be passed on to retail customers (clearly a detrimental outcome for them), or to wholesale customers (which would be negative for competition).

66. ComReg should not try to counter-balance the regulatory or legislative decisions of other countries through its regulation for the Irish markets. Service Providers that feel that high termination rates of other countries are impacting their business should lobby the relevant regulators, governments or operators to change that situation, and should not use Irish consumers and businesses as leverage.

Regulatory consistency

67. ComReg say that a reason for not applying the price control to all calls including non-EEA originated calls is to ensure consistency with other EU countries.[28] Verizon encourages ComReg to adopt the correct remedy for the problems identified, in light of the above evidence, rather than one that could potentially cause consumer harm and increase costs for providers.

FggmMAA&url=http%3A%2F%2Fwww.t.ht.hr%2FResourceManager%2FFileDownload.aspx%3FrId%3D9245%26rType%3D2&usg=AOvVaw3jB5BYqGfhAOsdM_UqCQPA

[26] See paragraph A11.11 of Annex 11 to the Ofcom consultation "Mobile call termination market review 2018-21" published 27 June 2017, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0014/103343/mobile-call-termination-consultation-annexes.pdf

[27] See paragraph 14.67 of the Ofcom "Narrowband Market Review: Statement - Markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets", published 30 November 2017, https://www.ofcom.org.uk/__data/assets/pdf_file/0020/108353/final-statement-narrowband-market-review.pdf

[28] See paragraph 8.146 of the Consultation.

68. It should be noted that since the publication of this Consultation, Ofcom has concluded in its Final Decision Statement on the Narrowband Market Review to apply its price control for Wholesale Call Termination on all calls, regardless of origin.[29] Ofcom adopts a similar position for Mobile Call Termination in its recent Mobile Call Termination consultation.[30]

Other specific points

69. **Trade agreements** – ComReg notes in the Consultation that applying the price control to all calls regardless of origin would mean that the regulation was in line with international trade agreements.[31] We strongly support this conclusion, and as noted above, would agree that including all calls in the price control would better align with the WTO GATS requirements – see above and also Annex 1 to this submission.

Conclusion

70. In light of the above, we strong urge ComReg to remain with the status quo and ensure that the price control (and all other remedies) applies equally to all calls (regardless of origin).

71. However, should ComReg decide to impose some form of differential regulation, we strongly urge ComReg to restrict this to traffic originating in countries that themselves apply high termination rates. This would ensure that Irish service providers could not charge higher rates for traffic originating in countries, such as the US, where regulated termination rates are extremely low (or zero as will be the case in the US from July 1st, 2018 for all major providers and 2 years later for smaller ones).

Q. 15. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of FVCT? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

72. Notwithstanding the comments we make above, we generally agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of FVCT.

Q. 16. Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of MVCT? Please explain the reasons for your answer, clearly

[29] See paragraph 14.72 of the Ofcom "Narrowband Market Review: Statement - Markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets", published 30 November 2017, https://www.ofcom.org.uk/__data/assets/pdf_file/0020/108353/final-statement-narrowband-market-review.pdf

[30] See paragraph 4.74 of the Ofcom consultation "Mobile call termination market review 2018-21" published 27 June 2017, available at: https://www.ofcom.org.uk/__data/assets/pdf_file/0014/103343/mobile-call-termination-consultation-annexes.pdf

[31] See paragraph 8.142 of the Consultation.

indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

73. We agree with ComReg's preliminary conclusions on the on the Regulatory Impact Assessment, in respect of MVCT.

Response by Tesco Mobile Ireland

to the

Commission for Communications Regulation's

Consultation entitled

"Market Review Fixed Voice Call Termination

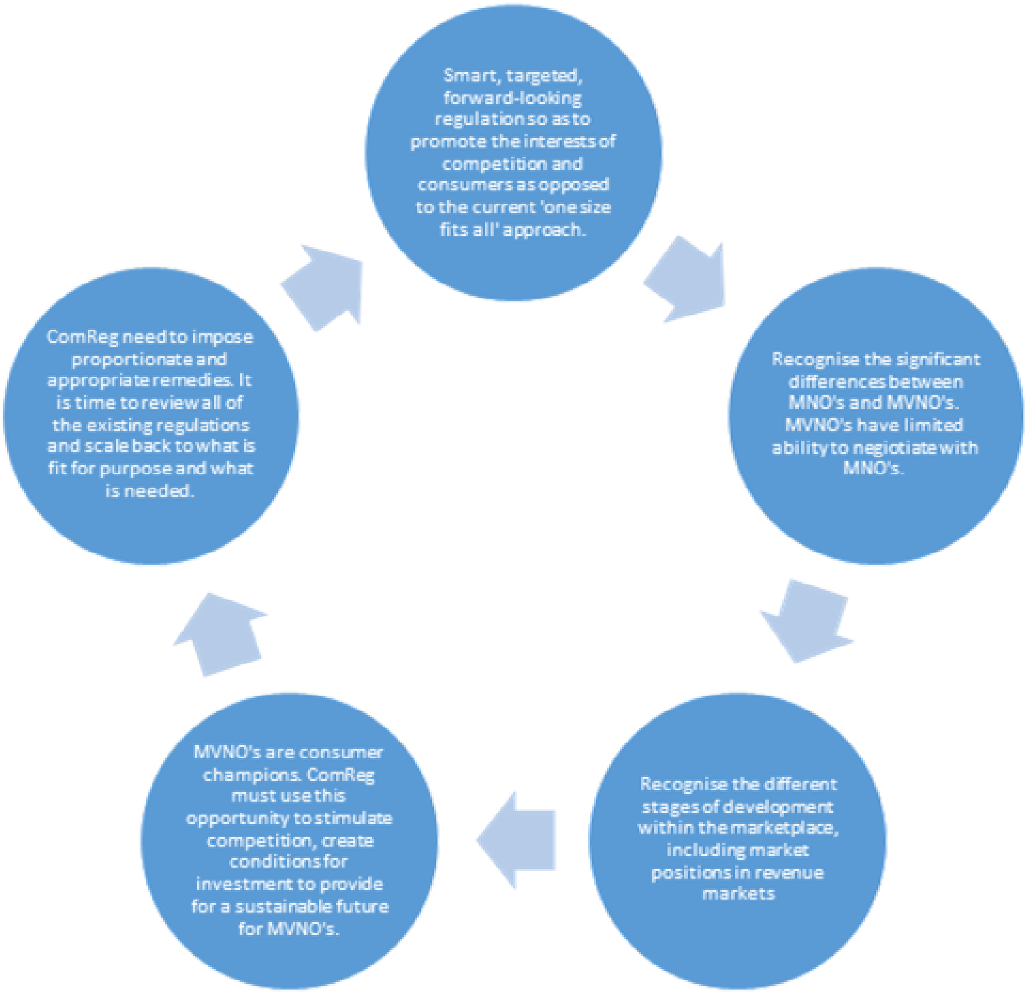
and Mobile Voice Call Termination"

ComReg Reference: 17/90r*

10 January 2018

Contents

Overview of Key Themes in the Submission



Executive Summary

- Targeted intervention and the creation of conditions for investment in the Irish mobile market are urgently needed to promote the emergence, and sustenance, of competition in the market. ComReg's current consultation represents an invaluable opportunity for ComReg in this regard.

- The one-size-fits-all approach to mobile regulation which is currently in force and which has been proposed by ComReg is not appropriate and does not take into account the clear differences between MVNOs and MNOs. The European Commission has previously recognised that MVNOs and MNOs are inherently distinct.

- MVNOs are a vital source of untapped competition which, in the optimum regulatory environment, could enhance the pricing and services offered to Irish mobile consumers.

- Contrary to ComReg's views set out in the consultation, MVNOs have very limited ability to negotiate access/contract terms with MNOs.

- It is impossible to conclude that TMI holds a dominant position or 'significant market power' on any market. Such a finding is contrary to long-established principles of EU and Irish competition law.

- The mobile market in Ireland has changed significantly since ComReg's last review. There are now *only* 3 MNOs and soon to be *only* 3 MVNOs. The number of MVNOs has fallen because the regime in Ireland is not conducive to MVNOs being able to compete and enhance consumer welfare.

- TMI's organisation structure has changed significantly since ComReg's last review. TMI is effectively a new entrant into the market as a pure MVNO since Tesco acquired Three's shareholdings in TMI.

- The current represents TMI's first opportunity to engage with ComReg as a pure MVNO. TMI is very grateful for this opportunity and is keen to ensure increased competition in the market in order to bring value to customers and consumers, a core principle in the 'Tesco DNA'.

- ComReg's research fails to take account of vitally important factors on the market. The stage at which service providers are at in the lifecycle of development is a very important factor which demonstrates the costs and investment costs that the service provider is likely to have, the duration of operations in the Irish market and the market share of the services and revenues markets. ComReg also failed to take account of the EU Roaming Regulation which changed the definition of the domestic mobile market.

- ComReg is encouraged to use not only its hard legal powers but also soft power and 'nudging' ability to encourage and stimulate much needed competition in the market place.

Introduction

1. This submission by Tesco Mobile Ireland ("TMI") responds to the Commission for Communications Regulation's ("ComReg's") consultation entitled "*Market Review Fixed Voice Call Termination and Mobile Voice Call Termination*" (the "Consultation").[1]

2. The central tenet of this submission is that ComReg should adopt targeted, smart and competition-focussed regulation so as to promote the interests of competition and consumers in regard to, in general, Mobile Virtual Network Operators ("MVNOs") and, in particular, Mobile Termination Rates ("MTRs").

3. The opportunity which ComReg has through this Consultation is a significant one. Prices for consumers could fall significantly and consumer welfare could be enhanced if the right regulatory regime was put in place now by ComReg.

MVNOs are a vital source of competition

4. MVNOs represent an untapped source of competition which, in the optimum regulatory environment, could enhance the pricing and services offered to 4.9 million consumers in Ireland which would reflect well on ComReg and its important role in Irish society and in the Irish economy. As ComReg itself says in describing its role on its own website:

   "Promotion of Competition

   This role involves enabling maximum competition in Broadband, Voice and Voice over Internet Protocol through a range of measures, including LLU, bitstream, wireless broadband (including mobile wireless broadband), cable and alternative infrastructure. It also includes promoting enhanced competition in mobile via MVNO entrants, reviewing and (where appropriate) making adjustments in the fixed network wholesale pricing regime, and overseeing operators' compliance with obligations under the regulatory frameworks for telecoms and spectrum." (Emphasis added)

5. The Consultation and the resulting action provide ComReg with an excellent and important opportunity to promote and facilitate enhanced competition in mobile telephony in Ireland via MVNOs.

6. It is unlikely that there will be further additional entry by MNOs into the Irish market for the foreseeable future or perhaps ever under the current conditions. Instead, the trend internationally has been towards market consolidation.[2] Hence, it is even more important than ever that there is stimulation of competition through utilisation of the MVNO model. For TMI and other new

[1] The Consultation is available at: https://www.comreg.ie/?dlm_download=market-review-fixed-voice-call-termination-mobile-voice-call-termination.
[2] See *Competition Law & Policy*, vol.3, issue 4, Nov.2017.

entrants, investment signals by bodies such as ComReg are required to ensure that there is a market in Ireland to invest in and remain in as well as a regulatory environment that supports and is conducive to competition.

7. Consumers and competition will benefit if a smart and dynamic regulatory regime is put in place to enable MVNOs bring value to consumers. This regime would include easing unnecessary burdens and *only* imposing proportionate and appropriate requirements. It is time to review all the existing regulations and scale back to what is fit for purpose and what is needed.

8. Even if there are certain constraints imposed by EU law on ComReg, it is still possible for some measure of discretion to be exercised by ComReg in meeting its desire and its duty to ensure competition.

9. TMI believes ComReg can achieve enhanced competition by, in particular:

    (i) appropriately distinguishing between the regulatory environment for MVNOs and the regulatory environment for Mobile Network Operators ("MNOs") because, as is described in greater detail below and is well known to ComReg, MVNOs and MNOs are inherently different types of operator; and

    (ii) "targeted intervention" and "creating conditions for investment" (phrases taken from ComReg's Strategy Statement 2017-2019[3]) to ensure the regulatory environment guarantees a sustainable future for MVNOs by incentivising investment and growth which in turn will enhance competition in the market.

<u>The one-size-fits-all approach to mobile regulation is not appropriate</u>

10. MNOs and MVNOs are distinct by their very nature. Examples of this clear distinction are:

    (i) MNOs and MVNOs are at different stages of development as market players – it is important to recognise that MVNOs are, in many ways, dependent on MNOs and should not be treated the same (it is irrational to treat nascent MVNOs in the same way as fully-formed MNOs are treated);
    (ii) The market position of MVNOs is significantly different in terms of services and revenue markets to the market position of MNOs;
    (iii) There are significant costs for MVNOs associated with providing MVCT; and
    (iv) The EU Roaming Regulation significantly weakens the position of MVNOs.

11. The European Commission does not consider MNOs and MVNOs to be in an equal position in terms of competition. The European Commission raised concerns in respect of the merger of Three and O2. It stated:

[3] ComReg's Strategy Statement 2017 -2019 is available at: https://www.comreg.ie/publication/electronic-communications-strategy-statement-2017-2019/.

"*After the merger, Three would remain as a larger company* ***only facing competition from Vodafone and Eircom as remaining mobile network operators'****.* (Emphasis added)

In addition, the European Commission stated that:

'*Moreover,* ***previous entry by MVNOs demonstrated that it is difficult for MVNOs to obtain a sufficiently high market share and affect the behaviour of other MNOs*****.**" (Emphasis added)[4]

12. To adopt a one-size-fits-all regulatory environment for both MNOs and MVNOs would be to misunderstand the key and clear differences between these two distinct market operators. It would also have the effect of preventing MVNOs from providing robust competition on the market.

13. Imposing price control obligations in their current form would only negatively impact competition and consumers. MVNOs cannot sustain the costs currently incurred and if these costs cannot be recouped via asymmetric MTRs then it is either a case of exiting the market or increasing retail prices which does not address the potential problems/market failures identified by ComReg. TMI believes that ComReg has an opportunity to 'right a wrong' i.e., amend the price control obligation imposed on MVNOs/late and new entrants and provide for a regulatory environment that incentivises investment and competition. If regulation should be incremental, then ComReg could amend the price control obligation and replace this with a price control glide path towards cost orientation. It is worth noting that glide paths that were made available to Vodafone, Meteor and Three following ComReg Decisions D11/05 and D05/08.

14. ComReg has stated in the Consultation:

"*9.107…Remedies are to be applied consistently across all MSPs, address the identified impacts of competition problems associated with MSPs having SMP in the Relevant MVCT Markets. This approach will ultimately benefit Service Providers by allowing them to compete fairly at the retail level*."

15. This is open to serious doubt. It is open to question how this approach provides for fair competition when the playing field is uneven from the onset. There is no level playing field to provide equal and fair opportunity to compete. This approach only ensures that the larger incumbents remain at the top, not effectively competing or providing consumer benefit while it is the MVNOs that are burdened at a very early stage of development and not being given any opportunity to grow and develop that do provide consumer benefit.

16. TMI is therefore calling on ComReg to focus on smart and targeted regulation that recognises the significant differences between MNOs and MVNOs.

[4] http://europa.eu/rapid/press-release_MEMO-14-387_en.htm and http://europa.eu/rapid/press-release_IP-14-607_en.htm

<u>Targeted intervention and the creation of conditions for investment are urgently needed</u>

17. TMI believes that to best address competition concerns in the market, MNOs should be required by regulation to facilitate the necessary arrangements with MVNOs which would promote the emergence, and sustenance, of competition on the market. For example, capacity based wholesale agreements which incentivise growth would be a welcome and positive change from the current landscape which includes archaic and unattractive per unit price wholesale offers. The current model deters growth and future investment.

18. The European Commission when raising its concerns regarding the merger of Three and O2 stated:

    "*Moreover, the Commission has concerns that the transaction would lead to a significant reduction in the number of mobile network operators (MNOs)* ***that are effectively willing to host mobile virtual network operators (MVNOs).*** *Prospective and existing MVNOs would have less choice of host networks and* ***hence weaker negotiating power to obtain favourable wholesale access terms****.*" (Emphasis added)

<u>It is irrational to conclude that TMI holds a dominant position or "significant market power" in any market</u>

19. According to the Consultation document, ComReg believes that each MNO and each and <u>every MVNO</u> <u>(irrespective of size or market power)</u> has significant market power (i.e., dominance):

    "*2.12 In respect of MVCT, ComReg proposes that the Relevant MVCT Markets are individually defined as:*

    > *"the provision by a MSP of a wholesale MVCT service to other Service Providers for the purpose of terminating incoming voice calls to mobile numbers, and in respect of which that MSP is able to set the MTR."*

    2.13 ComReg considers that all MSPs which provide MVCT and control the MTR that is charged constitute separate individual relevant markets for the purposes of this review. The competition assessment also shows that each MSP occupies a dominant position in its own MVCT market. Accordingly, ComReg proposes that MSPs which provide MVCT services would be regulated. A key aspect of ComReg's regulatory proposals is that the price charged by MSPs for the provision of MVCT be regulated. The precise details of the proposed price control methodology will also be set out in the Separate Pricing Consultation.

    2.14 ComReg's preliminary view is that each of Three, eir Mobile, Lycamobile, TMI, Virgin Media, iD Mobile and Vodafone has SMP in their Relevant MVCT Markets (together the 'Proposed SMP MSPs')."[5]

[5] The Consultation.

20. For the reasons set out in this submission, the conclusion that TMI holds a dominant position is entirely implausible, impractical and entirely contrary to long-established principles of EU competition law and its concept of dominance, as is demonstrated later in this submission.

21. In any event, even if all MVNOs are designated as having SMP, the Consultation should result in a reduction of burdens on MVNOs. The regime relating to MVNOs should be proportionate, practical, reasonable and targeted. As is outlined above, it is illogical and irrational for MNOs and MVNOs to be treated in the same manner when they are clearly so different.

The market has changed significantly since the ComReg's last review

22. The current regulatory regime has not worked. Since the last review, the market is in a very different position in that there are now *only* 3 MNOs and soon to be *only* 3 MVNOs. The number of MVNOs has fallen because the regime in Ireland is not conducive to MVNOs being able to compete and enhance consumer welfare. The number of MVNOs in Ireland is small and their effective presence is even smaller – this is due in large measure to the regulatory regime not being conducive to MVNOs (including, in particular, the MTR regime).

23. MVNOs have the ability, when afforded the appropriate regulatory and operating environment, to provide real and effective competition in the Irish market;[6] for example, MVNOs provide competition and consumer benefit with unlimited bundles at low retail costs (but unfortunately with corresponding significant wholesale cost: see comparative analysis below which supports this view) while the larger incumbents / MNOs are not incurring these costs by providing less off-net minutes in their plans and charging significantly more for plans which provide more off-net minutes.

24. Furthermore, from the analysis it is clear to see that from the off-net allowances provided by MVNOs, it would be very rare for a consumer to go outside of the bundle and be charged the off-net rate. On the other hand, for MNOs which offer significantly less off-net minutes (very limited off-net minutes in fact) consumers will always go out of bundle and as a result are charged the off-net rate so the MNOs benefit (see below extract from ComReg's Q3 2017 report which supports this view as it shows the significantly high revenue market shares of the MNO's compared to the MVNO's, which highlights the fact that it is only MVNO's that offer more value to consumers). Only the incumbent MNOs can act in this way on the basis that they have the subscriber/market power to do so. MVNOs are currently clearly not capable of acting independently of competitors and subscribers.

25. See following analysis which supports this proposition:

   - Comparative analysis - Prepay offers:

[6] Footnotes 161, 162 on page 87 of ComReg's consultation is not a true reflection of the market – the statement is more reflective of what competitive retail offers MVNOs only has brought to the market, which benefit subscribers.

PREPAY	TMI	Voda	Voda	Voda X	Three	EIR	EIR	iD	48	LYCA	POST
Top Up	€15	€20	€20	€20	€20	€20	€20	€15	€15	€15	€20
Keep Credit	€15	€0	€0	€0	€20	€0	€20	€15	€0	€0	€0
Allowance	30 Days	28 days	28 days	28 days	28 days	28 days	28 days	30 Days	30 Days	30 Days	30 Days
Minutes	10,000	Unlimited	100	100	0	Unlimited	0	300	50	Unlimited	250
Texts	0	Unlimited	100	Unlimited	Unlimited	0	Unlimited	0	100	Unlimited	250
Data	10GB (3G)	1GB (4G)	6GB (4G)	20GB (4G)	60GB (4G)	15GB (4G)	250MB (4G)	30GB (4G)	15GB (4G)	15GB (4G)	5GB (4G)
Other		Data Rollover	Data Rollover	Sky / Spotify /Weekend	Deezer	Youtube, Social & Hayu			Unlimited Whatsapp		
€10 Alternative						Unlimited Calls	Onnet Calls & 60 MB		300 Mins, All Texts, 1GB, WA	€7.50 for new customers	Unlimited Calls & Texts for €20

- *<u>Regarding TMI's Simply Value proposition €15 above and the net monthly MTR position per subscriber</u>*

[Text deemed to be confidential]

➢ Comparative analysis - Postpay / Billpay offers:

€30 24M	TMI	Voda	Three	EIR	ID	Virgin
Rental	€30	€40	€30	€30	€29	€25
Contract	24 months	24 months	24 months	24 months	1 month	1 month
Minutes	500	100	100 Flexi	100	Unlimited	Unlimited
Texts	500	Unlimited	0	Unlimited	Unlimited	Unlimited
Data	15GB (3G)	5GB (4G)	60GB (4G)	1GB (4G)	30GB (4G)	30GB (4G)
Other		Data Rollover	Deezer	Hayu		

- *<u>Regarding TMI's €30 24 month proposition and the net monthly MTR position per subscriber</u>*

[Text deemed to be confidential]

€25 SIM	TMI	Vodafone	Three	EIR*	iD	Virgin
Rental	€25	€30	€30	€30	€29	€25
Contract	30 Days	30 Days	30 Days	30 Days	30 Days	30 Days
Minutes	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Texts	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited
Data	20GB (3G)	5GB (4G)	60GB (4G)	15GB (4G)	30GB (4G)	30GB (4G)
Other		3 months Securenet	Deezer	Youtube, Social & Hayu		€15 for first 6 months

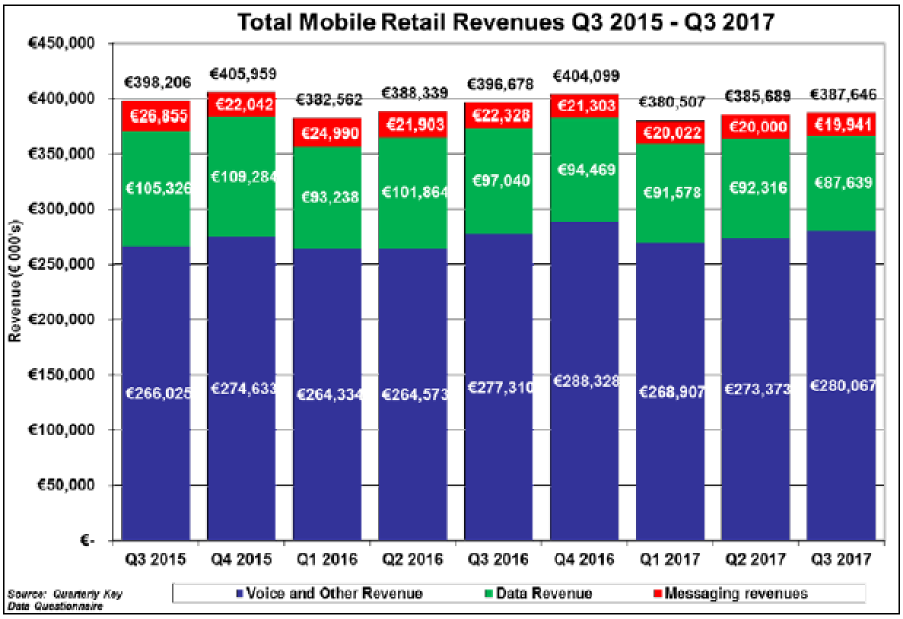
*Eir discounted to €25 for first 6 months. €35 plan includes 50 Int mins, 50 Int Texts and 30GB data

➢ **Comparative analysis – SIM ONLY offers**

- *<u>Regarding TMI's €25 SIMO 30 Day proposition and the net monthly MTR position per subscriber</u>*

[Text deemed to be confidential]

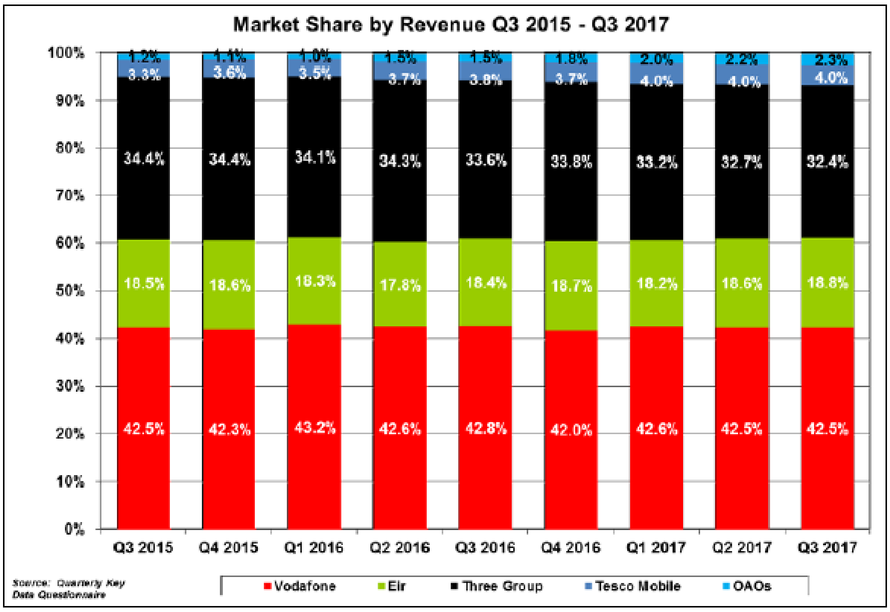
- **Revenue Market Shares:** Note figure 4.4.1 below which shows that mobile retail revenues for Q3 2017 were over €387 million.



Source: ComReg's Quarterly Report Q3 2017 publication[7]

- Note the following graph which shows the market shares by total retail revenues for mobile operators. Vodafone's market share remains highest at 42.5% followed by Three Group at 32.4%. Eir's market share is the next largest at 18.8% followed by Tesco and OAOs at 4.0% and 2.3% respectively.

[7] https://www.comreg.ie/publication/quarterly-key-data-report-q3-2017



Source: ComReg's Quarterly Report Q3 2017 publication

<u>**TMI's position has changed significantly since the last review**</u>

26. It is important that TMI's position is understood properly and completely by ComReg. TMI is effectively a new entrant to the market. It has severed connections with a MNO when Tesco acquired Three's shareholding in TMI. Its new sole owner is not a telecommunications company. For example, ComReg stated in the Consultation that the MVNOs have commercially negotiated access/contracts[8]. This is not the case for TMI. TMI is bound by terms which were effectively non-negotiable.

<u>**This is TMI's first opportunity to provide its views as a standalone MVNO to ComReg**</u>

27. TMI greatly welcomes the opportunity to take part in the Consultation and to make this submission. TMI is very keen to ensure, and would benefit greatly from, increased competition in the market.

28. TMI is now entirely owned by Tesco, and within the "Tesco DNA" is an ardent commitment to bringing value to its customers. To this end, TMI requires that ComReg regulates the market in a competition and consumer-focused manner in the interests of increased competition and for consumers generally. This Consultation represents an invaluable opportunity for ComReg to do so.

29. This is the first submission made by TMI in its current form i.e., owned entirely by Tesco. In the past, submissions to ComReg regarding TMI were prepared by the then shareholders of TMI who were, on the one hand, (a) an MNO (i.e., Three, or historically, Telefonica) and, on the other hand, (b) Tesco as an investor (and a consumer-focused retailer as opposed to a telecommunications

[8] See Consultation, para.2.4.

company). **This submission is therefore vitally important to TMI as it is the first such submission which expresses the views of TMI solely as a MVNO.**

30. TMI does not seek any outcome which would be unique to, or specific to, TMI. TMI does not want special treatment by ComReg. Instead, TMI seeks to have an outcome which provides regulatory certainty and creates a regulatory environment which promotes and incentivises investment that ultimately enhances competition and as a result benefits consumers generally. For MVNOs generally (whether incumbent or potential entrants (whether new or *de facto* new entrants)) an environment which provides a sustainable future where MVNOs can provide competition and value to the market place is vital.

ComReg's research fails to take into account vitally relevant factors

31. As outlined above, there are a number of factors that ComReg needs to take into account in order to make its research and the Consultation relevant to the current market conditions.

Life cycle of development

32. For example, the stage at which Service Providers ("SPs") are at in the life cycle of development is a very important factor. This will show what costs/investment costs each SP is likely to have; the duration of operations in the Irish market and market share of the services and revenues markets.

33. SPs with large market shares, have already fully built their networks and are at, for all intents and purposes, the ‘retention’ stage of the life cycle and therefore effectively want to retain their large subscriber base and are likely to originate less off-net minutes than on-net minutes than new entrants and MVNOs such as TMI with a significantly smaller subscriber base and still at a very early stage of development.

34. This is also supported by the fact that larger MNOs avoid MTR costs by providing very limited off-net minutes in its bundles and charging subscribers off-net out of bundle rates, whereas it is TMI and other smaller SPs that are incurring these costs in order to compete. As a result, TMI incurs significantly more termination rate charges compared to the significantly larger competitors. It is therefore a *disproportionate and discriminatory regulatory burden*.

35. In order for TMI to grow, it offers better value bundles than its competitors at a significant cost to itself. [Text deemed to be confidential] Late, new or pure MVNO entrants to the market should be given an opportunity to grow, drive competition with innovative retail offers which ultimately benefits consumers.

The EU Roaming Regulation

36. Furthermore, TMI believes that ComReg has failed to take into consideration the impact of the EU Roaming Regulation which mandated ‘Roam Like At Home’.

37. The EU Roaming Regulation changed the definition of the domestic mobile telephony market. Prior to the implementation of the Regulation, MSPs designed their retail plans/bundles on the domestic market: usage, services and costs were to some degree within the SP's control. However, since June 2016 this has now changed where now domestic includes EU roaming usage across the other 27 EU member states, where the same treatment/cost is to apply to services used while roaming within the EU as at home. In order to compete and retain the subscriber base it has accumulated, TMI, and presumably other MVNOs, had to open its plans for EU roaming usage but as an MVNO it does not benefit from inbound roamers whereas MNOs do. As identified above, this is another reason why MNOs and MVNOs should not be treated the same.

European Union Law Background

38. ComReg, as an emanation of Ireland (a Member State of the European Union), has a duty (under EU law) to ensure full and fair competition. This Consultation gives ComReg the opportunity to fulfil its duty in this context. This is clear not only by virtue of Ireland's obligations under the Treaty on European Union and the Treaty on the Functioning of the European Union but also the interpretation of EU law by the Court of Justice of the European Union.

39. Sometimes Member States and emanations of Member States use their softer powers. ComReg is encouraged to use not only its hard legal powers but also soft power and nudging ability to encourage and stimulate much needed competition in the market place.

TMI's Key Request to ComReg

40. This Consultation should lead to an effective and efficient forward-looking regulatory regime that serves to promote competition. The emergent change in regulation should lead to a competitive market landscape which would attract and incentivise investment from market players (particularly, MVNOs) for the ultimate benefit of consumers.

41. As mentioned above, TMI is not seeking any solution which is specific to it. Instead, it is simply requesting that ComReg ensures, on an industry-wide basis, that there is adequate potential competition in the marketplace at different levels:

    a. first, it is important that there are the conditions for competition between all Mobile Operators (whether they are MNOs or MVNOs);

    b. secondly, it is important that there is sufficient competition between MNOs and that conditions are created which facilitate the emergence of sustainable competition which will ultimately benefits consumers. Specifically when an MVNO's arrangements with a MNO expire, there ought to be sufficient choice and competitive tension between MNOs to enable MVNOs to have a real choice of MNOs; at present, MVNOs have very limited choice. This is supported by the European Commission's concerns regarding the recent merger of Three and O2 when it stated that:

       "*Moreover, the Commission has concerns that the transaction would lead to a significant reduction in the number of mobile network operators (MNOs) that are effectively willing to host mobile virtual network operators (MVNOs). Prospective and existing MVNOs would have less choice of host networks and hence weaker negotiating power to obtain favourable wholesale access terms*."

42. In addition, ComReg in its Strategy Statement 2017-2019 stated that:

    "*A key difference between the mobile and fixed network competition is that whereas the incumbent operator Eircom is required by regulation to offer wholesale access products to other service providers and thus facilitate the emergence of competition, **<u>no such regulatory measures are in place in,</u>** or have been deemed necessary, **<u>with respect to mobile networks</u>** (see Explanatory Box 7 for a discussion of the markets susceptible to ex ante regulation).*" (Emphasis added)

43. TMI believes now is the time to require MNOs to facilitate the emergence of competition, by mandating that they provide options to interested parties that provide wholesale offers which incentivises growth as opposed to restricting their offers to unattractive wholesale offers which do not provide any incentive to grow.

TMI's Response to Questions

Question 1

Do you agree that this Section identifies the main relevant developments in the retail fixed voice and mobile voice markets since the previous reviews of the Relevant FVCT and MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

44. Section 3 was interesting and useful. It identified many, but by no means all, of the main relevant developments. Moreover, it did not adequately deal with certain issues and the analysis was too limited in scope and not sufficiently anticipatory of future developments. In particular, it did not pay enough attention to the issues outlined in the following paragraphs.

45. Much of the research conducted on behalf of ComReg was either backward-looking and/or not forward-looking. The Consultation is about the future and the research results are, or will be, outdated very shortly and certainly do not accurately reflect the reality of the market place as it currently stands (e.g., the research does not adequately take into consideration OTT services such as WhatsApp (8 mentions of WhatsApp in 509 pages is not adequate) or that the vast majority of people have smart phones (and particularly the heavier users of mobile phone services).

46. ComReg's research needs to be much more forward looking in order to adopt appropriate rules for the future.

47. The Consultation does not give sufficient weight or attention to the fact that an MVNO backed by Dixons Carphone plc (i.e., iD) has decided to leave the market. The ID sale process has been unsuccessful to date. It is unfortunate that ComReg does not see the full implications of the exit of iD mobile from the Irish arena:

> "*2.15 ComReg notes the June 2017 statement made in Dixons Carphone plc's preliminary financial results for 2016/2017 that*
>
> > *"We have made the decision to exit our iD mobile operations in the Republic of Ireland. The iD mobile operations in the Republic of Ireland represent a different business model to the UK, as it is a capacity MVNO with options for expanding its spectrum. This brings with it excellent control, but that comes with upfront costs and increased administration, and we believe the business will flourish faster under dedicated ownership."*[9]
>
> *2.16 While ComReg notes iD Mobile's stated intention to exit operations in the State, ComReg sees no reason to alter its analysis of iD Mobile on the grounds of those stated intentions, and therefore proposes to designate iD Mobile (and its affiliates, assignees or successors) with SMP".*

[9] http://otp.investis.com/clients/uk/dixons_carphone_plc/rns/regulatory- story.aspx?cid=1821&newsid=886723

48. The Consultation should have considered why so many MVNOs have not prospered or survived in the Irish market.

49. The Consultation does not give sufficient weight to the fact that the number of MNOs has fallen from four to three.

50. The Consultation does not put appropriate weight on the inability of the likes of TMI to behave anti-competitively vis-à-vis termination rates. The Consultation states:

> "*2.41 Competition problems could, absent regulation, arise in the Relevant Termination Markets due, inter alia, to the ability and incentives of an SMP Service Provider, having regard to its market power, to set its termination rates above the competitive level. Termination rates ultimately feed into the cost of making calls and thus impact on consumers. Where termination rates are set above efficient cost, financial and competitive imbalances between Service Providers can also result. Such distortions imply that consumers as a group ultimately pay more in terms of reduced competition, lower innovation and higher prices.*
>
> *2.42 To mitigate identified potential competition problems that could arise from the exercise of market power by SMP Service Providers, ComReg has proposed that a range of proportionate ex ante regulatory remedies should be imposed to ensure the development of effective competition amongst Service Providers, to the ultimate benefit of consumers.*"

51. As ComReg will be aware, both Sky and iD Mobile have charged higher MTR rates for some time, yet without any intervention by ComReg there have been no increases in retail cost of calls to those operators or anti-competitive behaviour such as excluding those operators minutes from inclusive bundles etc.

52. It is unfortunate that in a country where mobile telephony has been available since 1984 (i.e., for 33 years), there are now likely to be only three MVNOs – a number that is declining – and the prospects are not positive. MVNOs provide an important competitive foil to MNOs and provide a vital choice for consumers.

53. In addition to iD's exit from the market, it is noted that Postmobile and Blueface are pure resellers and therefore have a limited impact on competition.

54. The Consultation shows that there has been relatively little switching – for example, para.3.100 recalls that 73% of respondents to the survey conducted on behalf of ComReg had never switched and 82% of rural residents had never switched. The regulatory regime is clearly inadequate.

55. The Consultation did not take into consideration 'Roam like at Home'. The EU Roaming Regulation in itself changed the definition of the domestic market. Prior to the implementation of the Regulation, MSPs designed their retail plans/bundles on the domestic market i.e., national - usage, services and costs were to some degree within SP's control, however since June 2016 this has now changed where now the term 'domestic' includes EU roaming usage which encompasses 27 other member states, where the same treatment/cost is to apply to services used while roaming within the EU as at

home. The Regulation proved positive for consumers while on the other hand resulted in increased cost and a loss of revenue for all operators. MVNOs are disproportionately impacted by this change as they do not generate revenue (at the regulated rates) from inbound roamers whereas MNOs do generate revenue to offset the negative impact.

56. The Consultation has concentrated on what might be termed the "old market" and not paid enough attention to the "new market" or "future market conditions". It is useful to take some examples. First, TMI does not have access to inbound or outbound roaming as they are on Three's network. Secondly, TMI does not have partner/subsidiary or group networks in key roaming destinations in the EU to offset costs. Thirdly, TMI is not big enough to negotiate rates below the regulated rates.

57. It is disappointing the Consultation did not pay adequate attention to the role, function and position of MVNOs such as TMI.

58. In regard to paragraph 3.32, the Red C research indicated that regular usage of OTT apps for voice and video calls is 72% in Dublin. This figure rises to 82% among the 18-35 years age bracket. So it is wrong to suggest, as the Consultation does, that there are no alternative competitive substitutes.

59. In regard to paragraph 3.76 which states: "… TMI has the contractual right to determine its own wholesale commercial terms and conditions associated with its supply of MVCT…." TMI has no ability to determine the applicable MTR due to the price control obligations imposed in 2012.

60. The Consultation recalls that the most important reasons cited for choosing current mobile supplier – see figure 47 on page 116 - are (1) network coverage /reliability (30%), (2) friends and family members being on the same network (28%) and (3) the cost of data (26%). With regard to each point cited, it is worth noting that (i) [Text deemed to be confidential]; (ii) the larger MNOs with significant market share would have more family and friends on their network by virtue of their market shares (supported by the market research showing that 43% of the sample were with Vodafone) – hence it will be the MVNOs that will lose subscribers from switching. The larger MNOs which are at a retention stage of the life cycle, offer more to its existing subscribers in order to retain them, that is if they call in to say they are leaving, while they offer less off-net and data for new subscribers in their packages – the cost of data is also more but with their family and friends on the same network they will consider switching mainly as a result of network coverage - the research supports the argument that subscribers tend to stay with their current provider unless another provider offers better coverage / reliability which doesn't bode well for TMI or other MVNOs restricted by their host network. [Text deemed to be confidential].

61. TMI believes that ComReg has not accurately captured or comprehensively analysed the impact of: (i) OTT services; and (ii) EU Roaming Regulation which came into effect in June 2016. With regard to (i) OTT services[10] where ComReg's preliminary view is that '*OTT is unlikely to pose an effective supply side constraint …it appears the presence of OTT bypass is limited*', TMI would argue that subscribers are increasingly availing of OTT services using their large data allowances in order to avoid making traditional calls which cost consumers either by their bundle being decremented

[10] See paras.5.225 – 5.230.

(postpay/prepay bundles) or credit being decremented from the available credit on the traditional pay as you go prepay account and SP are deprived of a revenue generating opportunity to charge an MTR. TMI believes that OTT services are substitutable for traditional voice and SMS services and its usage is increasing daily. Consumer awareness of OTT services is also increasing with family and friends informing each other of alternative ways to communicate with no additional costs. ComReg makes multiple references to the increased usage of data[11] yet fails to correlate this to more consumers using OTT services such as WhatsApp and Viber for example to make calls, send texts etc. as an alternative communications service / effective substitute to traditional voice services. These calls avoid MTRs. OTT services are being limited, blocked and degraded, by operators in some markets to preserve revenue.

62. Data usage is continually increasing and now with the addition of EU roaming, TMI is also seeing a trend whereby subscribers are using more data when roaming – they are checking in while at airports and sending WhatsApp messages home replacing the usage of traditional voice and SMS... In relation to the research, question 20 specifically when asking the sample 'how often they used the following services on your mobile phone', number 5 on the list includes 'Internet based applications for voice calls such as VOIP, Skype, Internet call, on your mobile phone' the list of options doesn't actually include WhatsApp which is what consumers are using not VOIP or Skype. WhatsApp is included in the next list of options which is provided for messaging apps. Therefore TMI would suggest that the question was not sufficiently clear and as a result the results are not reflective of what services are being used as alternative/substitutable voice services.

63. In relation to (ii) EU Roaming Regulation i.e. Roam like At Home ("RLAH"). This Regulation in itself changed the definition of the domestic market. Prior to the implementation of the Regulation, MSPs designed their retail plans/bundles on the domestic market - usage, services and costs were to some degree within SP's control, however since June 2016 this has now changed where now domestic includes EU roaming usage across 27 other member states, where the same treatment/cost is to apply to services used while roaming within the EU as at home. TMI, in order to compete and retain the subscriber base it has accumulated, had to open its plans for EU roaming usage but as an MVNO it does not benefit from inbound roamers whereas MNOs do. This is another reason why MNOs and MVNOs should not be treated the same.

64. In addition, a trend that is not considered in sufficient detail is a comparison of the retail offers which include unlimited off-net packages and their costs to show exactly where consumers are deriving benefit from. This also supports TMI's arguments regarding minimal changes to costs and behaviour on foot of changes to MTRs including the introduction of Virgin and iD's higher MTR rates – prices did not change as a result of Virgin / iD MTR rates.

Question 2

Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant FVCT Markets? Please explain the reasons for your answer, clearly

[11] See para.3.84.

indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

65. TMI is expressing no views at this time on FVCT issues.

Question 3

Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment to the extent that it informs the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your views.

66. In the context of the retail product and geographic assessment in the MVCT market, the Consultation has not paid enough attention to the MVNO sector. The abbreviation "MVNO" is mentioned only once (in para.4.38) in 249 paragraphs. This is a great pity given the role which MVNOs can play in the sector. TMI would urge ComReg to rectify this in the eventual output of the process. The Consultation has not taken into account the specific circumstances of MVNOs (e.g., the fact that the likes of TMI are required to pay for termination and also again failed to address "Roam like Home"). Regulation 26 of the Framework Regulations requires that ComReg, taking utmost account of the 2014 Recommendation and of the SMP Guidelines, defines relevant markets appropriate to national circumstances – national circumstances and geographic perspectives would need to be reassessed considering the market / geography has changed as a result of the internal EU market. Boundaries have extended and this should be taken into consideration.

Question 4

Do you agree with ComReg's preliminary conclusions on the wholesale FVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

67. TMI is expressing no views at this time on FVCT issues.

Question 5

Do you agree with ComReg's preliminary conclusions on the wholesale MVCT product market and geographic market definition assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

68. [Text deemed to be confidential]

69. In regard to para.5.245, TMI respectfully disagrees with the finding in para.5.245 that wholesale MVCT supplied by TMI is a separate market. It seems wholly unrealistic that wholesale MVCT supplied by each MNO and MVNO constitutes its own separate market.

Question 6

Do you agree with ComReg's assessment of SMP in the Relevant FVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

70. TMI is expressing no views at this time on FVCT issues.

Question 7

Do you agree with ComReg's assessment of SMP in the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

71. First, TMI respectfully disagrees with the view suggested in para.6.230 that TMI should be designated as having SMP. This issue is addressed below.

72. Secondly, TMI respectfully disagrees with the view suggested in paras.6.160-6.175 that no undertaking whatsoever is likely to be in a position to exert sufficient Countervailing Buyer Power ("CBP") such that, absent regulation, it would sufficiently constrain TMI's ability to set its MTRs above the level consistent with a competitive market outcome, i.e., there is insufficient CBP to prevent TMI acting in the Relevant MVCT Market independently of competitors, customers and consumers. This issue is addressed below.

73. As mentioned above, as a first point, TMI respectfully disagrees with the view suggested in para.6.230 that TMI should be designated as having SMP. In regard to SMP generally, ComReg aligns SMP with dominance as defined in EU competition law.[12] It stretches credulity that EU competition law would ever regard an undertaking with a market share of c.7.9% and only 4% market share of the mobile revenue market (as in the case of TMI) would be dominant. Even if a facility has some unique features, it would still have to be dominant in an overall market and within its proper context. It is worth stressing that an undertaking whose revenue share is only half of its market share is hardly "dominant" or possessing "significant market power".

74. The "reasoning" used in chapter 6 of the Consultation would lead to the result that a new entrant with just a single customer would have SMP in regard to the termination of calls on its network. Other larger competitors may well have customers who wish to call a number on the network of an MNO or MVNO with a small market share but such large competitors could simply ignore small

[12] See, in particular, para.6.2.

operators. Dominance or SMP does not exist in the abstract but exists in a particular market.[13] And, in that context, it is necessary to look at the economic realities rather than making any formulaic or formalistic assumptions[14] or taking into account out of date information.[15]

75. In regard to para.6.2, and the reference to the Court of Justice of the European Union ("CJEU") judgment in *United Brands v Commission*, it is plainly incorrect to assume that TMI has, in the words of the CJEU "the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[16] This is the same test in Article 14(2) of the EU Framework Directive/Regulation 25(1) of the Irish Framework Regulations. TMI needs the MNOs and others much more than they need TMI. TMI simply does not have the market power to be able to determine or set the MTR against the wishes of the many larger operators (e.g., the smallest MNO has several times as many customers as TMI).

76. The Consultation sets out (in particular, at para.6.6) various criteria which are often used to assess the existence of SMP. It is worth examining each of them so as to demonstrate that it is incomprehensible that TMI has SMP:

    a. Overall size of the undertaking: TMI is an MVNO which is a small operator in the telecom sector (with [Text deemed to be confidential] employees [Text deemed to be confidential]) and while its parent is a large corporation, it has no SMP in the telecoms sector;
    b. Control of infrastructure not easily duplicated: this is utterly irrelevant for TMI because it has no infrastructure or such limited infrastructure as TMI possesses is easily duplicated;
    c. Technological advantages or superiority: technological advantages or superiority has no relevance for TMI as it is dependent on its MNO for telecom services;
    d. Absence of, or low, countervailing buyer power: customers and competitors (e.g., MNOs) have countervailing power;
    e. Easy or privileged access to capital markets/financial resources: TMI has no easy or privileged access to capital markets/financial resources;
    f. Product/services diversification (e.g., bundled products or services): TMI has limited products/services;
    g. Economies of scale; Economies of scope: TMI has neither economies of scale or scope;
    h. Vertical integration: TMI is not vertically integrated in the telecoms sector;
    i. A highly developed distribution and sales network: TMI does not have a highly developed distribution and sales network;
    j. Absence of potential competition: there is more than adequate competition – TMI has a market share of 7.9% hence 92% being shared by various MNOs and MVNOs; and

[13] See European Commission Notice on the definition of relevant market for the purposes of Community competition law OJ C 372/5, 9.12.1997.
[14] See the trend of case law before the EU's General Court and Court of Justice of the European Union which emphasises the need to assess economic reality rather than formulaic or formalistic approaches.
[15] E.g., para.6.161 which related to when TMI was partly owned by Three. The situation has now changed materially so it is important to take these new circumstances into account.
[16] Case 27/76 [1978] ECR 207, para.65.

k. Barriers to expansion: there are no barriers to expansion in regard to TMI's operations.

77. In regard to market shares, TMI's market share of c.7.9% is relevant in terms of termination. It is clear that other MNOs are not forced to contract with, or deal with, TMI. The market share of c.7.9% is an indicator of TMI's lack of market power. In this context, it is useful to recall the views of Whish and Bailey in their leading work Competition Law:

"*Findings of dominance below a market share of 50 per cent*

The Court of Justice held in United Brands that that firm, with a market share in the range of 40 per cent to 45 per cent, was dominant. In that case other factors were considered to be significant: the market share alone would not have been sufficient to sustain a finding of dominance; however the case shows that a firm supplying less than 50 per cent of the market may be found to hold a dominant position. In United Brands the Court said that, even though there was lively competition on the market at certain periods of the year, United Brands could still be held to be dominant for the purposes of Article 102; the Commission notes this point in paragraph 10 of its Guidance. <u>The decision in Virgin/British Airways[17] marked the first (and only) occasion on which an undertaking with a market share of less than 40 per cent has been found by the Commission to be in a dominant position under Article 102.</u> BA was held to be dominant in the UK market for the procurement of air travel agency services with a market share of 39.7 per cent. On appeal the General Court agreed that BA was dominant, noting that its market share was considerably larger than its rivals, and that this was reinforced by the world rank held by BA in terms of international scheduled passenger-kilometres flown, the extent of the range of its transport services and its hub network; the Court also considered that BA was an obligatory business partner for travel agents.[18] The General Court stated specifically that the fact that BA's market share was in decline could not, in itself, demonstrate that it was not dominant.[19] Some commentators would like there to be a 'safe harbour' below which a firm could not be found to be dominant. However the case law of the EU Courts does not provide one, and the Commission is not in a position to create one in the absence of jurisprudence enabling it to do so. In paragraph 14 of its Guidance on Article 102 Enforcement Priorities the Commission says that dominance is 'not likely' if the undertaking's market share is below 40 per cent; however it goes on to say that there could be some cases below that figure that may deserve its attention. Clearly this falls short of a safe harbour."[20] (Emphasis added)

78. It is difficult to see how – if only *once* the European Commission ever held that an undertaking with a market share of less than 40% was dominant – how TMI with 7% could have SMP (or, as the Consultation says,[21] dominance).

[17] OJ [2000] L 30/1.
[18] Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, paras 189–225, upheld on appeal to the Court of Justice Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331.
[19] OJ [2009] C 45/9, paras 16–17.
[20] Pages 193-194.
[21] Consultation, para.6.2.

79. As mentioned above, as a second point, TMI respectfully disagrees with the view suggested in paras.6.160-6.175 that no undertaking whatsoever is likely to be in a position to exert sufficient Countervailing Buyer Power ("CBP") such that, absent regulation, it would sufficiently constrain TMI's ability to set its MTRs above the level consistent with a competitive market outcome, i.e., there is insufficient CBP to prevent TMI acting in the Relevant MVCT Market independently of competitors, customers and consumers.

80. Other mobile operators do not have to interact with TMI. They may like to do so but they do not have to do so. To be dominant/have SMP, one ought to be an <u>*essential*</u> trading partner and not just a <u>*desirable*</u> one. It is not enough that other mobile operators might like to be able to terminate calls on TMI's virtual network. The Irish High Court has confirmed that one needs to be an essential trading partner if one is to be dominant.[22]

81. The Consultation uses, in para.6.161, out of date information and evidence and needs to reassess the situation in the light of the change of ownership of TMI from being owned partly by an MNO to not being owned at all by an MNO.

82. The Consultation sets out certain facts in para.6.165[23] but then draws a conclusion in that paragraph without explaining the rationale or justification for it:

> "*As set out in Table 25 above, TMI's subscriber base is lower than that of Vodafone, Three or eir Mobile, but greater than that of Lycamobile, Virgin Media, or iD Mobile. Nevertheless, ComReg considers that, given the respective parties' subscriber numbers, they will consider it somewhat important to interconnect with other domestic MSPs,[24] owing to the fact that consumers expect to be able to call subscribers of other Service Providers and the consequential need for Service Providers to ensure as wide as possible interconnection with other Service Providers.*"

83. This paragraph lacks reasoning or justification for its conclusion. It says that TMI's subscriber base is more than Lycamobile, Virgin Media, or iD Mobile but then finds, as concluded in para.6.230, that each of those operators (with smaller customer bases) also have SMP. There is no logic or reasoning set out in the paragraph or otherwise.

See note 7.14 page 295 – see also point 7.16. 2009 recommendation noted that 'in termination markets represent a situation of two-way access where both interconnecting parties are presumed to benefit from the arrangement. However in markets where operators have asymmetric market shares, this can result in significant payments from smaller to larger competitors - which is the case for TMI.

[22] *Dun Laoire Travel Ltd v Ryanair Holdings plc*, High Court, 30 October 1997.
[23] "As set out in Table 25 above, TMI's subscriber base is lower than that of Vodafone, Three or eir Mobile, but greater than that of Lycamobile, Virgin Media, or iD Mobile. Nevertheless, ComReg considers that, given the respective parties' subscriber numbers, they will consider it somewhat important to interconnect with other domestic MSPs, owing to the fact that consumers expect to be able to call subscribers of other Service Providers and the consequential need for Service Providers to ensure as wide as possible interconnection with other Service Providers."
[24] Although not necessarily at any level of MTR.

84. The Consultation also lacks reasoning and proposes conclusions based entirely on, with respect, groundless conjecture in para.6.166:

> "*Absent regulation, on a forward looking basis, it is ComReg's view that there may be some commercial incentives to interconnect to a certain degree*[25] *and, as TMI's subscriber base grows further, may increase. Moreover, given that the MTRs of the 2012 SMP MSPs are price regulated, this limits the incentive of SMP MSPs to engage in conduct intended to influence the level of MTR payable by a new market entrant*."

85. Paragraph 6.16 the relevant termination markets were defined such that each SP identified is the sole supplier of WVCT to its subscribers. This means by definition, SP do not face existing competition on these markets – TMI would contend that OTT services do provide effective competition and as awareness grows its effectiveness will become more apparent.

86. In regard to paragraph 6.167 regarding relative bargaining power – [Text deemed to be confidential]

87. TMI believes that SPs that participate in both the fixed and mobile market (eircom / Vodafone and Three to some degree) have an advantage over single technology players. This can be seen by their ability to bundle packages of fixed to mobile and vice versa calls as part of standard phone tariffs or broadband bundles. It also permits them to offer lower prices for calls to eMobile /eircom, Vodafone (possibly postfone) and Three and 48, thereby maximising the internalisation of costs associated with its fixed to mobile calls / mobile to fixed calls. These are further supporting arguments that MNOs and MVNOs should not be treated the same. In fact, they were not regarded the same by the European Commission when investigating the potential merger of Three and O2.

88. For these reasons, the European Commission's investigation revealed concerns about the reduction in the number of network hosts in Ireland. This could lead to deteriorated access conditions for MVNOs. Ultimately, this would have a negative impact for end consumers as well. However, there was no need for the European Commission to reach a final conclusion in this respect, as the commitments addressing the concerns on the retail market also address any concerns on the wholesale market.

89. When the European Commission commented on the O2/Three merger, it stated that after the transaction, Three would remain as a larger company only facing competition from Vodafone and Eircom as remaining mobile network operators. The European Commission did not even reference any current MVNOs in the arguments – they were not considered as competition.

90. Moreover, the European Commission has concerns that the transaction would lead to a significant reduction in the number of mobile network operators (MNOs) that are effectively willing to host mobile virtual network operators (MVNOs). Prospective and existing MVNOs would have less ***choice of host networks and hence weaker negotiating power to obtain favourable wholesale access terms.***

[25] Although not necessarily on the same terms and conditions that would pertain in the presence of regulation.

91. The European Commission considered that entry by an MVNO seems easier, as it does not need to build its own network but relies on other MNOs for access. Nevertheless, the European Commission had concerns that MVNOs will find it more difficult to enter the market after the merger, given the reduction in the number of MVNO hosts and the merged entity's decreased incentives to grant wholesale access. Moreover, previous entry by MVNOs demonstrated that it is difficult for MVNOs to obtain a sufficiently high market share and affect the behaviour of other MNOs. On this basis, the European Commission concluded that further MVNO entry, even if it were to occur, would not in itself be sufficient to negate the adverse effects of eliminating one of the four MNOs from the market.

92. Furthermore, the European Commission considers that the reduction in the number of network access suppliers post-merger is likely to reduce the bargaining power of MVNOs in the negotiating process. Also, the merged entity is likely to have lower incentives to host MVNOs on commercially attractive terms than Three and O2 would have absent the merger.

Question 8

Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant FVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

93. TMI is expressing no views at this time on FVCT issues.

Question 9

Do you agree that the competition problems and the associated impacts on competition and consumers which are identified in this Section are those which could potentially arise in the Relevant MVCT Markets? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

94. TMI recognises the possibility that the problems identified in paras.7.76-7.101 could theoretically arise but it is impossible, as a practical matter, to see those problems arising in the case of an operator such as TMI which is an MVNO with limited market power. For example, TMI would lack the market power/dominance/SMP to refuse supply (as contemplated by para.7.77) because TMI is dependent on the MNOs and cannot simply force others to deal with it or deal with it on terms which are anti-competitive or anti-consumer. Factually, TMI simply lacks the power to engage in practices such as excessive pricing as contemplated by para.7.100.

95. It is respectfully submitted that ComReg should not see TMI as having SMP or as being capable of causing competition problems. It defies logic and reason to ever assume that the following description at para.7.102 could be applied to TMI given its weak position:

> "*In summary, ComReg's preliminary view is that, absent regulation, Service Providers with SMP in the Relevant Termination Markets have the ability and incentive to engage in exploitative and exclusionary behaviours which would impact on competition and customers. ComReg has provided examples of potential competition problems and their potential impact. As a consequence, it is ComReg's preliminary view that the imposition of appropriate ex ante remedies is considered both justified and necessary. These remedies are discussed in Section 8.*"

At the analysis in chapter 7 (as summarised in para.7.102 which has just been quoted) is utterly inapplicable to TMI, it also follows that the remedies referred to in chapter 8 are simply not applicable to TMI.

96. It worth mentioning that dominance/SMP and the abuse of dominance/causing competition problems are interlinked: it is impossible to abuse dominance or cause competition problems unless the undertaking is dominant/have SMP. As it is abundantly clear to ComReg that TMI (particularly since it is no longer co-owned by a MNO) could not cause competition problems, it should be clear that the basis for that finding is that TMI lacks dominance/SMP.

97. It is also submitted that the draft MVCT Decision Instrument in Annex 7 is therefore lacking in reasoning and specificity as to why TMI should be regarded as having SMP.

Question 10

Do you agree with ComReg's approach to imposing remedies in the Relevant FVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

98. TMI is expressing no views at this time on FVCT issues.

Question 11

Do you agree with ComReg's draft FVCT Decision Instrument set out in Appendix 6? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

99. TMI is expressing no views at this time on FVCT issues.

Question 12

Do you agree with ComReg's approach to imposing remedies in the Relevant MVCT Markets? Are there other approaches that would better address the identified competition problems? Please explain the reason for your answer, clearly indicating

the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

100. Given its lack of market power, scale and size, TMI lacks any ability to cause competition problems. So, it does not see the remedies as relevant to its operations. However, TMI welcomes all remedies which would be imposed on those undertakings which have SMP and cause competition problems. In regard to access, transparency, non-discrimination and price control, MNOs with SMP should be subject to remedies and, in particular, MNOs should also be obliged to offer competitive offerings to actual or potential MVNOs. It is submitted that access to MNOs by MVNOs will be regulated so that MVNOs will have access to MNOs on competitive terms and, if the pricing and terms are too onerous then ComReg should be able to intervene and stimulate competition through ensuring sufficient presence involvement by MVNOs. In that regard, para.8.213 should be amended so that there should be a proposed remedy compelling MNOs to grant access to MVNOs (either new entrants or incumbents) access on a Fair, Reasonable and Non-Discriminatory (i.e., FRAND) terms – terms which would facilitate sustainable competition. If, for example, a MNO does not grant access to an MVNO on FRAND terms (including on pricing) then ComReg should have the ability to determine the price and terms of such access. This is important because it would enable MVNOs to enter, remain and expand in the market. As there is no doubt that MVNOs can, in the right circumstances, bring very welcome competition to the market and benefits to consumers hence the value in creating this additional remedy.

101. TMI, and others in a comparable situation, should see more forward-looking smart regulation introduced so as to have a possible layered/glidepath approach with different remedies for different entities with different levels of market power. It is respectfully submitted that it would be wrong, and contrary to administrative law, for ComReg to simply apply the same regime to all market participants. [Text deemed to be confidential].

Question 13

Do you agree with ComReg's draft MVCT Decision Instrument set out in Appendix 7? Do you agree with ComReg's definitions and interpretations as set out in these draft Decision Instruments? Please explain the reason for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

102. With respect, the draft MVCT Decision (in Annex 7) lacks sufficient reasoning and explanation as to why TMI ought to be seen as having SMP and have the same level of burdensome regulation imposed on it (as a small MVNO) as a large MNO such as Vodafone. The repetition of identical language (e.g., in clause 4.2) in respect of various operators shows that there is inadequate reasoning and analysis to take into account the specific circumstances of each entity. Moreover, the market definition used in the draft MVCT Decision is defective because the market has significantly changed with the introduction of RLAH and there are more real alternative communication services available. Ultimately, it does not take adequate account of the position and role of MVNOs and does not do enough to ensure that MVNOs can contribute to competition and consumer welfare.

103. In addition, as outlined throughout this consultation response, TMI believes regulation needs to be incremental, smart and targeted. TMI would like a more dynamic form of remedies in the market and believes now is the time for ComReg to introduce regulatory measures i.e., impose additional conditions on MNOs that mandate that they provide non-discriminatory wholesale access **options** to MVNOs seeking access which include capacity based wholesale offers in order to facilitate the emergence of sustainable competition. MVNO's and the market needs wholesale offers that incentivises growth as opposed to the current situation where archaic and unattractive per unit price wholesale offers are presented which deter growth and future investment.

104. With regards to paragraph 12.1, TMI contends that ComReg should amend the price control obligation proposed on MVNOs and replace this with a price control glide path towards cost orientation, taking into account the significant differences between MNOs and MVNOs. It is worth noting that glide paths that were made available to Vodafone, Meteor and Three following ComReg Decisions D11/05 and D05/08.

105. With regard to paragraph 12.2, TMI believes that the cost-orientation obligation should not apply to calls originated outside of the EEA regardless if the subscriber is a subscriber of an EEA SP. The EU Roaming Regulation applies to EU subscribers using services within the EU, it does not apply to services consumed outside of the EU and therefore the same logic should apply here.

Question 14

In respect of the potential alternative approaches for price control obligations on the application of WVCT to calls originated outside the EEA, please indicate which approach would better address the identified competition problems. Please explain the reason for your answer, providing any empirical evidence and clearly indicating the relevant paragraph numbers to which your comments refer.

106. TMI would agree with ComReg's proposal to apply the regulated rates to EEA calls only.

Question 15

Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of FVCT? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

107. TMI is expressing no views at this time on FVCT issues.

Question 16

Do you agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment, in respect of MVCT? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your position.

108. The Regulatory Impact Assessment fails to consider the real role of MVNOs. It is unfortunate that the RIA failed to assess the implications of the regime for MVNOs.

Conclusions

109. This Consultation gives ComReg an opportunity to stimulate competition. It is unlikely that there will be further entry by MNOs into the Irish market; instead, the trend internationally has been towards consolidation. Given the concerns expressed by ComReg in regard to consolidation among MNOs and the improbability of further MNOs entering the market, MVNOs are the future. Hence, it is very important that there is stimulation of competition through utilisation of the MVNO model. Consumers and competition will benefit if a smart and dynamic regulatory regime is put in place for MVNOs including easing unnecessary burdens and only imposing proportionate and appropriate requirements.

110. MVNOs can provide much needed competition but the demise and departure of MVNOs from the Irish market is testament to, in large measure, how the regulatory regime imposed on MVNOs is imposing an unnecessary burden on them and it is appropriate to now redress the imbalance and impose a more targeted and proportionate regime.

111. ComReg has stated throughout the Consultation that absent regulation, MTRs would not be likely to be reduced to a competitive level and that SPs would have both the means and incentive to set termination rates at supra-competitive levels. Conversely, TMI would argue that TMI prior to being designated with SMP and price control obligations being imposed that TMI were voluntarily reducing its MTRs rates.[26]

112. ComReg needs to move away from a 'one size fits all' type of regulation, regulation needs to be incremental, smart and targeted. TMI would like a more dynamic form of remedies in the market.

113. It is appropriate that TMI benefits from an asymmetric MTR and is not unduly burdened. This is justified by:

a. the need to ensure competition in the marketplace;
b. TMI's change in circumstances;
c. the fact that TMI is an effective new entrant;
d. the negative interconnect position;
e. there are imbalances in the market due to "Roam Like Home" because TMI as an MVNO cannot benefit from inbound roaming which would offset the costs of providing RLAH; TMI has no inbound wholesale roaming revenue because it does not own its own network unlike Three, Vodafone and eir;
f. TMI has a wholesale agreement with Three [Text deemed to be confidential].

114. TMI believes ComReg has an opportunity to (i) amend the obligations set in 2012, most notably TMI's designation of SMP and particularly the imposition of price control obligations taking into account the justification detailed throughout the consultation response; and (ii) mandate access conditions on MNOs which will facilitate sustainable competition and incentivise growth.

[26] See the previous consultation response submitted by TMI in 2012.

115. TMI believes and hopes that this submission assists ComReg in its important work. The following chart sets out the key messages that TMI has endeavoured to convey in this submission: