



Commission for  
**Communications Regulation**

**Non-confidential Version**

## **Final Determination**

**Final determination in the dispute between Huchinson 3G (Ireland) Limited and Tesco Mobile (Ireland) Limited regarding an alleged failure by Tesco Mobile to negotiate interconnection by virtue of an alleged failure to negotiate Mobile Termination Rates for the provision of mobile voice call termination services**

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## 1. INTRODUCTION

### **The Commission for Communications Regulations and the legislative framework for disputes**

1. The Commission for Communications Regulations (“ComReg”) was established under Section 6 of the Communications Regulation Act, 2002 (“the Act of 2002”).<sup>1</sup> ComReg is the regulator for the electronic communications and postal sectors. It is charged with the regulation of amongst other things, fixed and mobile electronic communications service providers in the State. ComReg is the National Regulatory Authority (“NRA”) in the State for the purpose of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”).<sup>2</sup> The functions of ComReg are set out in section 10 of the Act of 2002 and a body of secondary legislation, including statutory instruments that transpose the requirements of various EU directives.
2. The Framework Directive was transposed into Irish law by the Act of 2002 and the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (“the Framework Regulations”).<sup>3</sup>
3. Article 20 (1) of the Framework Directive obliged Member States to provide in their national legislation for dispute resolution mechanisms for the purpose of issuing “*binding decisions*” to resolve disputes between undertakings.<sup>4</sup> Regulation 31 of the Framework Regulations transposes Article 20 (1) of the Framework Directive into Irish law and provides that:

“In the event of a dispute arising between undertakings in connection with obligations under the Framework Directive, the Specific Directives, these Regulations or the Specific Regulations, the Regulator shall, subject to paragraph (2), at the request of either party, initiate an investigation of the dispute and, as soon as possible but, except in circumstances which the Regulator considers exceptional, within 4 months from the date on which the dispute was notified to it by either party, make a determination, aimed at

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<sup>1</sup> Communications Regulation Act, 2002 (No. 20 of 2002), amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007).

<sup>2</sup> Official Journal of the European Communities, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33)

<sup>3</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007 (S.I. No. 271 of 2007).

<sup>4</sup> Under Regulation 2 of the Framework Regulations an “undertaking” means a person engaged or intending to engage in the provision of electronic communications networks or services or associated facilities.

ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute.”

4. Under Regulation 31 (6) of the Framework Regulations, an undertaking to which a determination applies must comply with it.
5. Regulation 31 (8) of the Framework Regulations provides that an undertaking which fails to cooperate with an investigation under Regulation 31 or to comply with a determination thereunder is guilty of an offence.
6. Regulation 31 (9) of the Framework Regulations provides that any obligations imposed on an undertaking by ComReg in resolving a dispute must respect the provisions of “*the Framework Directive, the Specific Directives, these Regulations, the Specific Regulations and section 12 of the Act of 2002*”.
7. S 12 of the Act of 2002 describes the objectives of ComReg in exercising its functions under section 10 of the Act of 2002. This issue is addressed in greater detail below at paragraphs 338 to 353.
8. Regulation 31 (11) of the Framework Regulations provides that neither party to a dispute is precluded from bringing an action before the courts and that the dispute resolution procedure is without prejudice to their rights of appeal.

**The parties to this dispute**

9. Hutchison 3G Ireland Limited (“H3GI”) is an authorised undertaking under the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations, 2003 (“the Authorisation Regulations”) and has also been licensed to provide 3G mobile services in Ireland. The Electronic Register of Authorised Undertakings maintained by ComReg discloses that H3GI is registered as a provider of data services, internet services and publicly available telephony services.
10. The following is an extract from the H3GI website:

“3 Ireland is owned 100% by Hutchison Whampoa which is one of Hong Kong's biggest companies with a successful track record in global telecommunications. Backed by strong and experienced stakeholders, we are building a business that provides first class products and services. We are at the forefront of this technology and are blazing the trail as leaders in the video mobile (3G) industry. Hutchison Whampoa has numerous mobile telecommunications businesses around the world. The company also has four other core business areas: ports and related services; property and hotels; retail and manufacturing; and energy and infrastructure.”

11. Tesco Mobile Ireland Limited (“TMI”) is also an authorised undertaking under the Authorisation Regulations. TMI has registered in the Electronic Register of Authorised Undertakings maintained by ComReg as a provider of publicly available telephony services.
12. The following is an extract from a press release by Tesco Ireland Limited (“Tesco”) announcing the launch of TMI:

“ As a Mobile Virtual Network Operator (MVNO)<sup>5</sup>, Tesco Mobile is a new independent company and is a joint venture between Tesco Ireland and O2 Ireland, which means that Tesco Mobile customers will roam on the O2 network. Customers will be offered a pre paid service initially.”

### **Background to this dispute**

13. In March 2007, initial contact was made between TMI and H3GI with a view to establishing interconnection between their respective networks. This contact was initiated by TMI and initially was for the purposes of supporting short message services (“SMS”) interworking between the parties’ networks. It was apparently anticipated that voice interconnection would also be required. TMI informed H3GI of its proposed charges to H3GI for the termination of calls on the TMI network (i.e. its mobile termination rate, or “MTR”) by e-mail on 3 April, 2007. H3GI sent an initial draft of an interconnection agreement to TMI on 13 June, 2007 which provided for voice and SMS services. Most of the draft interconnection agreement appears to have been readily agreed, with some minor amendments proposed and accepted by the parties.
14. However, the issue of TMI’s MTR was not agreed. TMI had updated the initial draft interconnection agreement received from H3GI to reflect issues such as company name. It contained the MTRs of which it had advised H3GI in April and the draft was returned to H3GI on 18 June, 2007.
15. On 31 July, 2007, H3GI made some further changes to the draft interconnection agreement, including a reduction in the TMI MTR to that of the MTR of O2 Communications (Ireland) Limited (“O2”).
16. On 2 August, 2007, TMI rejected the proposed reduction of its MTR by H3GI.
17. There followed a series of interactions between the parties (both orally and in writing) resulting in a situation where, by 25 September, 2007, the draft interconnection agreement appeared to be sufficiently agreed for there to be a proposal that it be signed, with the fields for the TMI MTR left blank, i.e. to have been agreed between the parties except for the price of TMI’s MTR.

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<sup>5</sup> ComReg notes that a MVNO (mobile virtual network operator) is an organisation which provides mobile telephony services to its customers, but does not have allocation of spectrum.

18. Between 25 September, 2007 and the end of October, 2007 there were a number of interactions between the parties regarding the matter of TMI's MTR. In the absence of agreement on 31 October, 2007, H3GI submitted a request for dispute resolution to ComReg.
19. Following the provision of additional information by H3GI regarding the legal basis for the dispute, ComReg accepted the dispute on 18 December, 2007.

**Definition of "mobile termination"**

20. When a call is made to a mobile phone, whether from a fixed line or from a mobile on another network, the call passes from the "calling party" on the network of the originating operator to the "called party" on the network of the terminating operator. The terminating operator charges a fee to the originating operator for connecting the call to called party; this is known as a "termination charge". Under the convention of "Calling Party Pays", the termination charge, paid by the originating operator and passed on to the calling party in the retail price paid for the call. The termination charge is also referred to throughout this document as the MTR, or the "Termination Rate".

**Summary of the dispute**

21. The scope of the dispute as set out by H3GI is as follows:

"H3GI wishes to agree appropriate mobile termination ("MTRs") rates for voice call mobile termination services on TMI's mobile virtual network in order to facilitate direct interconnection for voice calls between H3GI and TMI. TMI has proposed MTRs, which H3GI believes are wholly unreasonable (the "proposed TMI MTR"). Despite numerous requests from H3GI, TMI refuses to negotiate with H3GI concerning MTRs for the provision of mobile voice call termination services on TMI's virtual mobile network."

22. H3GI requested the following resolution of the dispute:

"H3GI requests that ComReg resolve the dispute between the parties further to Regulation 31 of the Framework Regulations and Regulation 6 of the Access Regulations by setting a rate for the termination of voice calls on TMI's virtual mobile network, which reflects the costs associated with the provision of such mobile termination services by TMI and a reasonable rate of return on its investment. Alternatively, H3GI would request that ComReg resolve the dispute between the parties by setting TMI's MTRs at a level, which corresponds to the MTRs of its host network operator, O2."

## 2. ADMINISTRATIVE PROCEDURE TO DATE

23. The following sets out a summary of the administrative procedure to date relating to the dispute. During the course of the administrative procedure a number of communications passed between ComReg and the parties including those relating to operational detail of the procedures (e.g. deadlines for submissions and requests for non-confidential versions of submissions). Only substantive communications are referred to below.
24. On 31 October 2007, H3GI submitted an initial dispute resolution request.
25. On 26 November 2007, ComReg wrote to H3GI seeking clarification *inter alia* of how the failure to negotiate the price of the MTR was equivalent to a failure to negotiate interconnection, why it was believed that an SMP analysis<sup>6</sup> would not be a more appropriate mechanism to deal with the issue of TMI's price level and why this issue did not fall into the category of "more general non-compliant behaviour", as set out in ComReg document D18/03 which would indicate that the substance of the matter was a complaint rather than a dispute.
26. On 13 December 2007, H3GI provided the clarification sought and on 18 December 2007, ComReg notified the parties of its initial acceptance of the dispute. In addition, the notification to TMI sought its views as to the appropriateness of the matter for the dispute resolution process.
27. TMI submitted its comments on 7 January 2008.
28. On 11 January 2008, ComReg wrote to both TMI and H3GI confirming acceptance of the dispute.
29. On 25 January 2008, TMI submitted its response to the dispute resolution request to ComReg.
30. On 7 February 2008, ComReg provided H3GI with a copy of TMI's response.
31. On 8 February 2008, ComReg wrote to TMI pursuant to section 13 (D) of the Act of 2002, requiring it to provide corporate governance and commercial documentation.
32. On 22 February 2008, ComReg provided H3GI with a non-confidential version of TMI's submission of 7 January 2008.
33. On 28 February 2008, ComReg provided TMI with a non-confidential version of H3GI's submission of 13 December 2007.
34. On 7 March 2008, H3GI submitted comments on TMI's submissions of 7 January 2008 and 25 January 2008.

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<sup>6</sup> SMP means "significant market power" i.e. a position equivalent to dominance in competition law terms. See Regulation 25 of the Framework Regulations.

35. On 13 March 2008, ComReg wrote to the parties pursuant to section 13 (D) of the Act of 2002, requiring them to provide details of their interconnection agreements. ComReg also required TMI to provide further corporate governance and commercial information.
36. On 18 March 2008, ComReg wrote to the parties with regard to the timelines for resolving the dispute and inviting their proposals on the treatment of confidential information.
37. On 23 April 2008, TMI confirmed that the corporate governance and commercial information provided to ComReg remained confidential.
38. On 28 April 2008, ComReg provided TMI with a non-confidential version of H3GI's submission of 7 March 2008.
39. On 30 April 2008, TMI provided ComReg with comments on H3GI's submission of 7 March 2008.
40. On 19 May 2008, ComReg provided the parties a document for comment, setting out its proposed analytical framework for resolving the dispute ("the Document for Comment").
41. On 30 May 2008, H3GI provided comments on the Document for Comment
42. On 9 June 2008, TMI provided comments on the Document for Comment
43. Following the analysis of the party's submissions a draft determination was submitted to and approved by the Commission on 5 February 2009.
44. The parties received the relevant redacted versions of the draft determination on 6 February 2009.
45. ComReg received comment from the parties in response to the draft determination on 20 February 2009.
46. There were also a number of communications with the parties regarding the treatment of and access to confidential information.
47. On 29 July 2009, ComReg communicated to the parties its decision not to accept H3GI's request for a confidentiality ring for the exchange confidential material.
48. On 27 November 2009, TMI notified H3GI and ComReg that, as of 1 December 2008 it proposed a new MTR.

### **3. SUMMARIES OF THE PARTIES' SUBMISSIONS**

49. The following sets out a non-exhaustive summary of the various correspondences and submissions and the responses of the parties in relation to the main issues raised in the dispute.



**H3GI's submissions and the relief sought**

50. The scope of the dispute and the resolution sought by H3GI are contained in its submission requesting dispute resolution as set out at paragraphs 21 to 22. H3GI also requested that any reduction in the MTR imposed by ComReg would have effect from the date of the dispute submission (i.e. retrospectively to that date).
51. H3GI sought “*confirmation from ComReg on TMI’s obligation to negotiate interconnection*” under Regulation 5 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (“the Access Regulations”). In support of its request for dispute resolution, H3GI outlined that the dispute arose in connection with TMI’s obligations under Regulation 5 of the Access Regulations.<sup>7</sup>
52. In, summary, H3GI contended that the appropriate basis for ComReg’s intervention in respect of setting a price is Regulation 31 of the Framework Regulations and Regulation 6 (2) (a) of the Access Regulations.
53. H3GI set out the interactions between itself and TMI and stated that it believed that it had “*exhausted all avenues in a timely manner in its attempts to resolve the dispute*” and that it did not believe that “*alternative means of resolving the dispute other than through a ComReg determination, exist*”.
54. H3GI attached copies of the correspondence between itself and TMI on this issue. H3GI also set out the impact of the dispute on H3GI in a confidential annex, describing the monetary impact of the difference between the proposed TMI MTR and a MTR based on O2’s MTR, on its business.
55. In support of its proposed remedy, H3GI suggested that the underlying cost base of TMI was related to the costs of its host network, O2.
56. H3GI also raised the issue of the ownership of TMI by reference to the commercial arrangements between TMI, O2 and Liffey Telecom (a wholly owned subsidiary of O2).
57. H3GI also stated that “*there is a risk that O2 could benefit from the excessive MTRs proposed by O2, notwithstanding the price control obligation imposed by ComReg on O2.*”
58. H3GI also referred to cases relating to the imposition of a price control on a mobile virtual network operator (“MVNO”) by the Austrian national regulatory authority<sup>8</sup> (the equivalent to ComReg in Ireland).

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<sup>7</sup> The Access Regulations transpose Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (“the Access Directive”) in to Irish law.

<sup>8</sup> Cases AT/2004/0044, SG Greffe (2004) D/201834 and AT/2007/0680, SG Greffe (2004) D/205894.

59. In response to the clarification requested by ComReg as to the suitability of the matter for dispute resolution, H3GI clarified its view as to why a dispute in relation to the price of interconnection was a dispute regarding the negotiation of interconnection.
60. Notwithstanding that the resolution sought was in the form of a price control obligation imposed following a finding of SMP, H3GI also clarified why it was unnecessary to make a finding of SMP in order to intervene in the manner proposed by H3GI.
61. H3GI also clarified why it believed that the issue at stake was a dispute between the parties, as opposed to a general issue of non-compliance which would more appropriately be dealt with by way of a complaint resulting in a compliance investigation.

#### **TMI's submissions**

##### **(i) TMI's submission on whether the matter raised by H3GI was suitable to be dealt with under a dispute resolution process**

62. In its submission on whether the matter raised by H3GI was suitable to be dealt with by way of the dispute resolution process, TMI stated that "*the outline facts of the case are agreed between TMI and H3GI*" and that "*TMI and H3GI have not reached agreement on the mobile termination rate that TMI should charge H3GI for traffic from H3GI to TMI*".
63. TMI stated that it "*accepts that the appropriate legal background is that of the Framework Directive and the Access Directive as transposed into the Access Regulations*".
64. TMI stated that it "*recognises the correspondence that H3GI adduces as evidence*".
65. TMI referred to two distinct impacts of the dispute, one being loss of reputation and the other being commercial loss. In summary, on the issue of loss of reputation, TMI said that the impact on TMI is higher than that on H3GI. On the issue of commercial loss, TMI set out an analysis that indicates the commercial impact on H3GI at the end of six months.
66. In respect of the proposed remedy, TMI said that the imposition of a cost orientation obligation is only possible following an analysis "*commensurate with that required for a finding of SMP*."
67. TMI also referred to the Austrian case referred to by H3GI (see footnote 8 of TMI's submission) and the EU Commission's position on the proposed imposition of a price control in that case to the effect that "*any preliminary findings which form part of the dispute process should not prejudice the outcome of the market analysis and the SMP assessment that the NRA is required to carry out*".
68. In relation to the obligation to negotiate interconnection, TMI stated that it is "*aware of its obligation to negotiate interconnection and has entered into such negotiations*".

69. TMI also raised issues of the competitive dynamic in the setting of MTRs for new and established entities.

**(ii) TMI's submission on H3GI's dispute resolution request**

70. TMI's submission on H3GI's dispute resolution request focussed on three main issues: the alleged refusal to negotiate, the suggested correct level of TMI's MTR and end-to-end connectivity.

71. On the issue of refusal to negotiate, TMI set out its analysis of the interaction between TMI and H3GI, including the proposals advanced by both parties, which included a billing moratorium and a "Bill and Keep"<sup>9</sup> solution. TMI states that "*there was no failure to negotiate, there was failure to reach agreement so far*".

72. In respect of the correct level of TMI's MTR, TMI claimed that it is not a service provider but "*has in place the full range of GSM equipment with the sole exception of O2's radio network.*" On this basis, TMI asserted that H3GI's statement that O2 Ireland's MTR is the appropriate benchmark, is not well founded.

73. In this context, TMI stated that it had not been designated as having SMP and that even though the imposition of such an obligation is possible pursuant to Regulation 5 (3) of the Access Regulations, this would be "*unfair, disproportionate and discriminatory*".

74. Furthermore, TMI referred to ComReg documents numbers 08/06 and 07/01, together with an extract from the EU Commission's comments in relation to the Austrian case, referred to by H3GI, (see footnote 8) in support its view that an obligation to offer cost oriented MTRs can be imposed only on operators having SMP.

75. TMI also outlined its view even if TMI was found to have SMP, then for consistency, ComReg must follow the same steps as it has taken with H3GI in respect of a SMP analysis and the remedies flowing from any SMP finding.

76. On the issue of end-to-end connectivity, TMI stated its concerns regarding the fact that H3GI had not opened end-to-end connectivity. TMI's summary of ComReg's view, set out in ComReg document 08/06, is that end-to-end connectivity will not be facilitated by a finding of cost orientation and on the basis that matters relating to cost orientation and matters relating end-to-end connectivity are separate.

**H3GI's responses**

77. In its response of 7 March, 2008 to TMI's submissions of 7 January and 25 January 2008, H3GI presented its analysis of the interactions of the parties in respect of the negotiation of

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<sup>9</sup> "Bill and Keep" is an arrangement where effectively, call termination rates are mutually set to zero.

interconnection. It concluded, by reference to the correspondence, that *“TMI thereby made it abundantly clear to H3GI that it was not willing to negotiate its MTR”*.

78. H3GI described how the ongoing discussions between the parties related only to reaching agreement on an interim arrangement that would allow traffic to pass between the networks, pending resolution of this dispute. These discussions did not constitute the ongoing negotiation of TMI's MTR.
79. The parties had discussed a possible “Bill and Keep” arrangement. H3GI also claimed that the interactions between the parties on a “Bill and Keep” solution to the issue of MTRs took place in the negotiation of this interim arrangement. H3GI therefore, claimed that the issue relating to “Bill and Keep” and the position of Hutchison 3G UK in respect of this issue were mischaracterised by TMI.
80. H3GI summarised the interactions between the parties in attempting to reach agreement on an interim arrangement and stated its belief *“that TMI ... is not willing to enter negotiations with respect to its MTR even on an interim basis.”*
81. H3GI raised the issue of the discussions between ComReg and TMI and stated that *“any role that ComReg might have played prior to the submission of the Dispute must be clarified”*.
82. H3GI addressed the issue of its motives in raising the dispute, refuting what it summarises as TMI's claim that *“H3GI did not have the intention of finding a commercial solution to the issue because it wanted a regulatory dispute”*. To this end, H3GI outlined its actions in attempting to reach an agreement on price.
83. On the issue of cost justification, H3GI said that it firmly believes that it would be inappropriate for H3GI to accept an MTR significantly higher than TMI's host network, without some kind of rationale.
84. On the issue of the correct level of TMI's MTR, H3GI outlined what it believes to be the underlying cost structure and drivers for TMI. H3GI addressed the comparison between national roaming by H3GI on Vodafone's network and the relationship between TMI and O2. H3GI said that it believes that an examination by ComReg of TMI's cost base would indicate that the proposed TMI MTR is unreasonable. H3GI also raised the issue of the invoicing for SMS services and the absence of a request from TMI for a Multimedia Messaging Service (“MMS”) interworking agreement between the parties.
85. On the issue of end-to-end connectivity, H3GI stated that there is no interconnect agreement in place to allow traffic to flow in either direction and that the infrastructure that is in place would have existed in any event to allow SMS interworking between the networks. H3GI stated its belief that it has made every effort to facilitate end-to-end-connectivity for voice traffic.

86. H3GI restated its request for the remedy it proposed in its submission requesting dispute resolution. It queried the relative importance of the TMI statement that it (TMI) “*has in place the full range of GSM equipment with the sole exception of O2’s radio network*” as this would not materially affect TMI’s overall cost base for mobile voice call termination and so would not necessarily justify the MTR being sought by TMI.
87. On the loss of reputation, H3GI said that any such impact would be small, based on the volume of traffic between TMI and H3GI and that it would in fact be higher for H3GI.
88. Addressing commercial loss, H3GI said it was not in a position to comment due to the redacted nature of TMI’s submissions, but stated that based on a possible rapid growth in TMI’s customer base, the levels of out payments will grow correspondingly and that an expeditious resolution is required to the dispute.
89. In responding to the issue of “competitive dynamic” raised by TMI, H3GI stated that its concerns were as set out in its dispute resolution request and related to the setting of MTRs by a MVNO at a level above that of its host network and the fact that O2 has a 50% stake in TMI allowing O2 to derive benefit from the higher TMI MTR.
90. H3GI clarified its marketing to the business and residential sectors.

**Further responses**

91. In a response of 30 April, 2008 to H3GI’s submission of 7 March, 2008, TMI summarises and restates its previous positions. TMI also addresses the issue of SMS invoicing and the lack of a request for MMS interworking. (These were issues raised by H3GI as summarised at paragraphs 84 and 85.)
92. In a response of 9 May, 2008 to TMI’s submission of 30 April, 2008, H3GI reiterated its views and rejected TMI’s allegation that it misrepresented the position on SMS invoicing.

**Other information submitted by the parties**

93. ComReg required TMI to provide copies of documentation to delineate and explain its ownership. This included *inter alia* a copy of the Shareholders’ Agreement relating to TMI and copies of minutes of board meetings at which decisions were made relating to TMI’s MTR.
94. Separately, ComReg also required TMI to provide copies of interconnection agreements between TMI and O2 and copies of all contracts between TMI and O2 (and related companies).
95. ComReg required both parties to provide details of all interconnection agreements that they had entered in to and to provide details of the MTRs associated with these agreements.

#### 4. PRELIMINARY ISSUES

96. In the Document for Comment, ComReg set out what in its view were the preliminary issues to be determined in this dispute and a proposed analytical framework for the resolution of these issues. This analysis is reproduced below.

##### **Preliminary issues to be determined**

97. ComReg will first consider the following issues:

- (i) Obligations which apply to TMI in respect of negotiating interconnection; and
- (ii) The alleged failure by TMI to negotiate.

##### **(i) Obligations which apply to TMI in respect of negotiating interconnection**

98. The following paragraphs set out a summary of the issues to be considered in relation to the obligations which might apply to TMI in respect of negotiating interconnection.

99. Regulation 31 (1) of the Framework Regulations applies to disputes “...*arising between undertakings in connection with obligations under the Framework Directive, the Specific Directives, these Regulations or the Specific Regulations...*” In notifying the dispute to ComReg, H3GI seeks ComReg’s intervention by reason of TMI’s obligation to negotiate interconnection and H3GI’s own right to request interconnection under Regulations 5 (1) and 5 (2) of the Access Regulations.

100. An issue to be determined is the question of which obligations apply to TMI in respect of negotiating interconnection.

101. In its dispute resolution submission, H3GI sets out that TMI has an obligation to negotiate interconnection under Regulation 5 (2) of the Access Regulations. In its response of 7 January 2008, TMI accepts that it has this obligation.

102. In its dispute submission, H3GI points to its belief that TMI is a joint venture between Tesco and Liffey Telecom and also that TMI’s MTR should be based on O2’s MTR. This, in ComReg’s view, appears to raise a question as to whether TMI’s obligation under Regulation 5 (2) of the Access Regulations is in fact also conditioned by O2’s having SMP in the market for wholesale mobile voice call termination.

103. If the scenario in paragraph 102 is the case, then in ComReg’s view, it may be unnecessary for ComReg to intervene to ensure compliance with Regulation 5 (2) of the Access Regulations. This is because O2’s SMP would condition the conduct of any interconnection negotiations by TMI (including obligations of price control and non-discrimination) between it and H3GI.

104. On this approach, it is necessary to examine the relationship between TMI and O2 in order to determine the obligations imposed upon TMI. ComReg would note that in this scenario, it would not be a question of any *new* obligation being imposed on TMI, but a question of whether O2's existing obligation already applies, to the extent that for the purposes of termination and the provision of access, O2's obligations should be considered as capable of applying to TMI also. This issue is discussed at paragraphs 112 to 173 and 210 to 252.

**(ii) The alleged failure by TMI to negotiate**

105. The alleged failure of TMI to negotiate raises the issue of TMI's potential non-compliance with an obligation. Regulation 31 of the Framework Regulations does not require ComReg to make findings of non-compliance with obligations, or to make such findings prior to making a dispute determination.

106. While Regulation 31 (1) of the Framework Regulations sets out that ComReg "[...] *make a determination, aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute*", matters of non-compliance with obligations and enforcement of obligations are dealt with elsewhere in the Access Regulations and the Framework Regulations. Regulation 18 (1) of the Access Regulations provides that "[...] *where the Regulator makes a finding that a person has not complied with an obligation under the Access Regulations, ComReg shall follow the procedures set out in Regulation 18 (1) of the Access Regulations*".

107. It is undisputed by the parties that there has been a failure to reach an agreement on interconnection. ComReg notes that, while there are conflicting interpretations as to the reasons for this failure and the nature and extent of the engagement between the parties on this issue, it is evident that TMI did engage with H3GI to negotiate MTRs. Furthermore, H3GI itself requests relief in the form of a price determination and not for example, a finding of non-compliance with an obligation.

108. The scope of the dispute is as summarised in paragraph 21 H3GI's description of the dispute as summarised in paragraph 21, contains three distinct elements. The first is that H3GI wishes to have "appropriate" MTRs to allow interconnection between H3GI's and TMI's networks. The second is that TMI's proposed rates are "unreasonable" and the third is that TMI "refuses" to negotiate MTRs. It is ComReg's view that the first element and second elements constitute the kernel of the issue to be resolved in the dispute in that H3GI, in essence, alleges that TMI has proposed an inappropriate rate and requests as a resolution, that an appropriate rate be set. On the third issue of an alleged "refusal" on the part of TMI to negotiate MTRs with H3GI, it is evident that this is a separate issue resulting from the parties failure to agree on the unreasonableness or appropriateness of TMI's MTR. It therefore follows that any investigation or determination by ComReg on the issue of an alleged "refusal" on the part of TMI to negotiate MTRs with H3GI

would not be necessary to effectively resolve the disputed issue of the unreasonableness or appropriateness of TMI's MTR.

109. It may also be observed that whilst TMI may have negotiated with H3GI, it may be the case (as H3GI contends) that its negotiating position on price was "unreasonable". According to that analysis, an assessment as to whether the TMI price is reasonable does not depend on the nature of the negotiations conducted between the parties.
110. As a determination as to whether or not there was negotiation is independent of a consideration of whether the TMI price is reasonable or appropriate, ComReg is entitled to make a determination on price without having to address the issue of TMI's alleged failure to negotiate with H3GI. Therefore, ComReg does not propose to make a finding on the issue of that alleged failure to negotiate in the context of this dispute resolution process.
111. Notwithstanding this, ComReg notes the following:
- That the negotiation of interconnection involves the agreement of a very wide range of issues apart from price.
  - As has outlined at paragraph 17, above, all other constituents of interconnection (with the exception of price) had been agreed between the parties indicating that there had been some negotiation on these other interconnection issues.
  - It is not disputed that TMI has offered to interconnect at a price which (as shown by the analysis at paragraph 272) is similar to that charged by H3GI for the same service.
  - Depending on the circumstances a "take or leave it" approach may, in any event, constitute a valid method of negotiation.
  - TMI has not been mandated to provide access on regulated terms.

#### **Approach of ComReg in formulating a determination**

112. Prior to considering the detail and substance of the dispute, ComReg sets out a preliminary analysis of the options available to it in relation to the relief ultimately sought, so as to identify which of these represent outcomes which would not effectively resolve the dispute. This is to ensure that effort is not expended on sterile approaches.
113. Without prejudging the actual consideration of the substantive issue of the dispute, the following is an analysis of potential interventions that ComReg could reasonably make, with a view to resolving the dispute.
114. There appear to be two broad scenarios:



- (i) *Scenario 1* - where O2's SMP obligations apply to TMI; and
- (ii) *Scenario 2* - where O2's SMP obligations do not apply to TMI.

ComReg has examined each of these points in turn.

**(i) Scenario 1 - Where O2's SMP obligations apply to TMI**

- 115. One set of possible interventions relates to the scenario where O2's SMP obligations apply to TMI.
- 116. In this case, the options for the intervention are reduced to one i.e. a determination that O2's existing obligations apply. A determination to this effect would mean that O2's existing SMP price control and non-discrimination obligations would apply and therefore, there would be a fully defined framework for effecting interconnection between the parties. It would only remain for ComReg to specify that those obligations applied. It would also be open to ComReg to use its enforcement powers under the Access Regulations in respect of any non-compliance with those obligations.

**(ii) Scenario 2 – Where O2's SMP obligations do not apply to TMI**

- 117. The second set of possibilities for intervention relates to the scenario where O2's SMP obligations do not apply to TMI. In ComReg's judgement the options for potential interventions are as follows :
  - (a) Set an interim MTR price pending a future market analysis of the TMI termination market; or
  - (b) Oblige the parties to enter into good faith negotiations; or
  - (c) Oblige the parties to enter good faith negotiations and to set a framework for setting the price; or
  - (d) ComReg to set a price.
  - (e) Conclusions on different potential options open to ComReg under Scenario 2

ComReg has examined each of the above options in turn.

**(ii)(a) Set an interim MTR price pending a future market analysis of the TMI termination market**

118. Two sub-options exist under this option. The first is to set an interim price with retrospection of any permanent price arising from a market analysis.<sup>10</sup> The other is to set the interim price without retrospection.
119. In relation to any retrospection, both parties would have to make provisions in their accounts for the possibility of a settlement payment based on the permanent price arising from a market analysis. As there is currently no defined timeline for concluding such a market analysis, no certainty on the outcome of such an analysis and no certainty on the level of the final price (if any) that might be set of foot of such analysis, it is ComReg's view that such an approach is not commercially sustainable for either party.
120. Alternatively, if an interim price is set without retrospection, then it must be set at a level which does not prejudice the outcome of the market analysis. An interim price lower than any price control that might ultimately be imposed would constitute an unwarranted level of intervention in TMI's business.
121. Both of these sub-options are effectively grounded on the supposition that the outcome of a market analysis on TMI would result in a finding of SMP on it and the imposition of a SMP price control on it also.
122. Based on this analysis, setting an interim price as a resolution to this dispute would run the risk of being commercially unsustainable and prejudging the outcome of a market analysis and predetermining the precise nature of any remedy that may be ultimately be imposed in the event of a finding of SMP.<sup>11</sup>
123. These outcomes mean that setting an interim price would not, in ComReg's judgment, amount to an effective resolution of the dispute.

**(ii)(b) Oblige the parties to enter into good faith negotiations**

124. The second option would simply be to oblige the parties to enter into good faith negotiations. However, given that TMI's position is that negotiations have taken place and that there has simply been disagreement, this approach is unlikely to yield a different outcome - unless ComReg sets

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<sup>10</sup> One of ComReg's statutory tasks is market definition and analysis. Under Regulation 26 and 27 of the Framework Regulations, ComReg is obliged to define and analyse relevant markets in accordance with competition law principles. EU Commission Recommendation of 17 December, 2007 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, sets out a list of seven markets that ComReg must define and analyse. One of the markets that ComReg must define and analyse is the market for voice call termination on individual mobile networks. Where undertakings active on this market are found to have SMP, certain regulatory obligations, including price control, may be imposed on them.

<sup>11</sup> ComReg also notes the comments of the EU Commission that in reaching its decision "...TKK draws some preliminary conclusions with regard to a potential market for call termination on the network of an MVNO such as Tele2. The EU Commission emphasises that any preliminary findings which form part of the dispute resolution should not prejudice the outcome of the market analysis and SMP assessment in the market for call termination on individual mobile networks."

out a framework for the negotiations, including some framework for setting the price. Moreover, defining what negotiating in good faith actually is would in itself be problematic and could possibly prove to be a further issue of contention for the parties. Accordingly, simply requiring the parties to engage in negotiations would not, in ComReg's judgment, amount to an effective or certain resolution of the dispute.

**(ii)(c) Oblige the parties to enter good faith negotiations and to set a framework for setting the price**

125. The third option is for ComReg to determine that the parties must enter into good faith negotiations and to set a framework for agreeing on price. However, if ComReg were to prescribe a framework, it would have to be sufficiently detailed so as to ensure that the negotiations on price reached a successful conclusion. In ComReg's view, specifying this level of detail would be almost tantamount to ComReg setting the actual price. This approach would render any "negotiation" almost meaningless and would likely only produce the same outcome as ComReg itself using the same framework to set a price - but in a less efficient or timely manner. Therefore, this approach would not in ComReg's view amount to an effective resolution of the dispute.

**(ii)(d) ComReg to set a price**

126. A fourth option is a determination by ComReg of the appropriate level of TMI's MTR pursuant to Regulation 31 of the Framework Regulations. This would deal with the disagreement over price and thereby resolve the dispute. In addition, provided any such price does not make or rely on preliminary findings in relation to a future market analysis, such a determination would not prejudice the outcome of such an analysis.

**(ii)(e) Conclusions on different potential options open to ComReg under Scenario 2**

127. In ComReg's judgment, balancing the different options, the only realistic option for an effective, certain and viable resolution to the dispute, in the scenario where O2's obligations do not apply, is to determine the dispute by setting a final price for TMI's MTR. This approach is consistent with the relief sought by H3GI, which is for ComReg to determine TMI's MTR.<sup>12</sup> This approach is separate from the basis on which an actual price *level* to be determined using this approach.

## **5. THE APPLICABILITY OF O2'S OBLIGATIONS TO TMI**

128. In the Document for Comment, ComReg set out its proposed approach to determining the question of the applicability of O2's obligations to TMI. ComReg has considered the submissions of the parties (as summarised at paragraphs 174 to 209). There was nothing contained in the

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<sup>12</sup> It should be noted that H3GI requested that ComReg determine TMI's price to be that of its network host O2 be set a level based on cost plus some reasonable mark-up.

submissions which leads ComReg to a conclusion that its proposed approach is inappropriate or flawed. The analysis based on ComReg's original proposal in the Document for Comment is as set out below, these included:

- (i) Questions to be addressed;
- (ii) The SMP Designation on O2;
- (iii) The phrase "associated with";
- (iv) The meaning of "control"; and
- (v) Conclusions on general approach to the issue of "control".

ComReg has examined each of these points in turn.

**(i) Questions to be addressed**

129. In its dispute resolution request, H3GI submits that *"TMI's MTRs should be set at a level which corresponds to the MTRs of its host network operator, O2."* In determining whether H3GI's assertion that TMI's MTR should correspond to that of O2 is correct and whether ComReg should set TMI's MTRs in this manner, ComReg must first address whether O2's obligations of price control with regard to MTRs on the market for wholesale call termination on O2's mobile network are applicable to TMI.
130. If the available evidence shows that TMI appears to be (for the purposes of the regulatory controls) controlled by O2, then the price control obligation (and other obligations) currently applicable to O2 is also capable of applying to TMI. The question of "control" of TMI by O2 is discussed further at paragraphs 210 to 252.
131. If on the other hand, the available evidence shows that O2 does not control TMI, the price control currently applicable to O2 could not be applied to TMI. In the context of this dispute, ComReg would then be required to determine the appropriate MTR that TMI should be entitled to charge to H3GI (see paragraph 127).
132. Accordingly, ComReg proposes to address the question of whether O2 controls TMI for the purpose of the price control for MTRs on the wholesale market for voice call termination on O2's mobile network.

**(ii) The SMP Designation on O2.**

133. O2 was designated with SMP under the ComReg document entitled *"Decision Notice - Designation of SMP on the market for wholesale Market Analysis – Wholesale Voice Call Termination on Individual Mobile Networks"* (Decision No: D9/04/ Document No: 04/82) on 29 July, 2004 ("the SMP Designation").

134. The SMP Designation was based on the market definition, market analysis and reasoning conducted by ComReg in relation to the market for wholesale voice call termination on individual mobile networks, as part of the consultation process arising from the ComReg document entitled “*Market Analysis: Wholesale voice call termination on individual mobile networks*” (Document No. 04/62a) 8 June, 2004.
135. The SMP Designation was made by ComReg pursuant to the provisions of Regulations 25, 26 and 27 of the Framework Regulations, in particular Regulation 27 (4) of the Framework Regulations. Regulation 25, 26 and 27 respectively describe what SMP is (i.e. a position equivalent to dominance in competition law terms<sup>13</sup>) the legal requirement on ComReg to define certain markets susceptible to *ex ante* regulation and the legal requirement on ComReg to conduct market analysis on such markets in order to determine whether or not there is an undertaking(s) with SMP on them.
136. Section 3.1 of the SMP Designation provides that:
- “This Decision relates to the market for wholesale voice call termination on individual mobile networks.”
137. Section 3.2 of the SMP Designation provides that:
- “The relevant geographic market for the product markets is defined as the Republic of Ireland.”
138. Section 3.5 of the SMP Designation provides that:
- “Vodafone, O2, Meteor, and ‘3’ are designated as having SMP in the wholesale market for voice call termination on individual mobile networks.”
139. Section 3.6 of the SMP Designation provides that:
- “A reference in this section to Vodafone, O2, Meteor or ‘3’ shall be deemed to include Vodafone, O2, Meteor or ‘3’ and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking in question and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant market defined in section 2 of this Decision.”
140. Section 3.6 of the SMP Designation is relevant to this dispute determination because it is capable of applying to parties, other than those specifically referred to in it by name. In this case, O2 is

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<sup>13</sup> Drawing on the established jurisprudence of the Court of First Instance and the European Court of Justice, SMP is “...a position of economic strength affording it [an undertaking(s)] the power to behave to an appreciable extent, independently of competitors, customers, and, ultimately, consumers.”

specifically referred to in the SMP Designation. A reference to O2 is “...*deemed to include...O2...and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, the undertaking in question and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant market defined in section 2 of this Decision*”.<sup>14</sup>

141. The question as to whether the “deeming provision” in section 3.6 of the SMP Designation applies to TMI is to be ascertained by an analysis of the contractual relationships and commercial arrangements between O2 and TMI.

142. If the deeming provision in section 3.6 of the SMP Designation applies, then on the face of it at least, O2’s regulatory obligations flowing from its SMP are capable of applying to TMI also. The obligations capable of applying to TMI are those set out in the ComReg document entitled “*Decision Notice – Imposition of SMP Obligations - Market Analysis: Wholesale Voice Call Termination on Individual Mobile Networks*” (Decision No. D11/05/ Document No. 05/78) on 13 October, 2005 (“the SMP obligations decision”). The SMP obligations decision imposed obligations of price control on O2 (as well as Vodafone and Meteor).<sup>15</sup> The specifics of the price control obligations are as set out in section 6 of the SMP obligations decision.

143. At the outset, ComReg notes that Regulation 27 (4) of the Framework Regulations provides that:

“Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power on that market in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate.”

144. The purpose of the deeming provision is to ensure that undertakings designated with SMP cannot circumvent otherwise validly imposed regulatory obligations by some means.

**(iii) The phrase “associated with”.**

145. While the SMP Designation could in theory apply to an undertaking that is “associated with” O2, ComReg does not consider that it does so in this case. While it may not be possible to exhaustively outline what types of “association” would mean that the SMP Designation should be applied, association could for example, capture a situation where an operator such as O2 created a separate, wholly owned subsidiary carrying out “...*business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities falling within the scope of the relevant market...*” with a view to circumventing its regulatory obligations. On the other hand,

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<sup>14</sup> The relevant market is that of wholesale voice call termination on individual mobile networks.

<sup>15</sup> No obligations were imposed on H3GI as it did not have SMP at that time.

other forms of association might have nothing whatsoever to do with wholesale mobile call termination services, in which case the SMP Designation and the wording would clearly be inapplicable.

146. A definition of the term “associate” was included in the Act of 2002 as follows:

“ ‘associate’ , in relation to an undertaking, means—

- (a) a holding company of the undertaking, or
- (b) a subsidiary company of the undertaking, or
- (c) a company that is a subsidiary of a body corporate, if the undertaking is also a subsidiary of the body, but neither company is a subsidiary of the other, or
- (d) a body corporate that is not a subsidiary of the undertaking but in respect of which the undertaking is beneficially entitled to more than 20 per cent of the nominal value of either—
  - (i) the allotted share capital of the body, or
  - (ii) the shares carrying voting rights (other than voting rights which arise only in specified circumstances) of the body,

or
- (e) a partnership or joint venture in which the undertaking has a financial interest;”<sup>16</sup>

147. The term “associate” is used in the Act of 2002 at section 24 solely in relation to whistleblowers. The term “associate” is not used in the Act of 2002 in any context relating to assessment of market power (SMP) or the applicability of obligations in the context of SMP.

148. The insertion of a definition of the term “associate” by way of amendment to the Act of 2002 also postdates the imposition of the SMP Designation and the SMP obligations decision. Accordingly, ComReg is of the view that it would be inappropriate to rely on this definition.

149. Any consideration of whether the association in question is relevant or sufficient to cause the O2 SMP Designation to apply to an undertaking other than O2, should take in to account purpose of the deeming provision. In this regard, the association test should examine whether association has the intent or effect of circumventing regulatory obligations. It is ComReg’s view that the tests applied in this determination in the context of “control” in any event adequately address the applicability (or not) of the phrase “associated with”.

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<sup>16</sup> See the Communications Regulation (Amendment) Act, 2007.

**(iv) The meaning of “control”**

150. If on the balance of probabilities, taking the available evidence into account, that O2 exercises sufficient control in relation to the determining of TMI’s MTR, this situation would in principle be captured by section 3.6 of the SMP Designation.
151. The word “control” is not itself defined in the section 3.6 of the SMP Designation. There are different types and degrees of control in practice. In light of the overall aim and purpose of section 3.6 of the SMP Designation, the question is what type of control/degree of control the SMP Designation may be applicable to the circumstances under consideration here. It seems reasonable to suggest that, for the purpose of the analysis being engaged in here, a sufficient degree of control must be both involved and exercised.
152. Similar to the consideration of the issue of association, the assessment of control should take in to account the purpose of the deeming provision. An assessment that control existed, where such control did not have as a result the intent or effect of regulatory circumvention, would clearly not be correct. However, it should be stressed that the question of intent is not actually determinative or corroborative as regards the question of circumvention of regulatory obligations: if there is no circumvention there is no effect on the market, if there is circumvention, then intention is not relevant as there may be an effect on the market.
153. In the absence of a definition being provided for in the SMP Designation, ComReg believes that it is helpful to have some reference points to ascertain the meaning of “control” or have a good working definition of it. These are as follows:
- (a) Ordinary meaning of “control”.
  - (b) Competition law meanings of “control”.
  - (c) Other approaches to the meaning of “control”.
  - (d) Conclusions on general approach to the issue of “control”.

ComReg has examined each of these options in turn.

**(iv)(a) Ordinary meaning of “control”.**

154. It is perhaps useful to refer to the ordinary English language meaning of the word. The Concise Oxford English Dictionary for example, gives a primary definition of “control” as “...*the power to influence people’s behaviour or the course of events.*” The sub-sense meaning of that primary definition is given as “...*the restriction of an activity, tendency, or phenomenon.*”<sup>17</sup> The primary definition of “control” in the Chambers Online English Dictionary is given as “*authority or*

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<sup>17</sup> Concise Oxford English Dictionary (10th Ed), New York, 2002.



*charge; power to influence or guide*". Under these ordinary English language meanings, it would appear that any degree of influence by O2 over TMI's MTR could be sufficient to bring TMI within the SMP Designation and therefore, subject to O2's obligations. However, such a broadly encompassing test would not appear logical, desirable or appropriate, as it might bring into regulation entities whose relationship with O2 did not give rise to a situation where there was circumvention of regulation. For example, even operators interconnected to O2 could then be said to be in a position to influence O2.

**(iv)(b) Competition law meanings of "control".**

155. Under the law of EU merger control, the EU Commission and national competition agencies are frequently required to determine, on an *ex-ante* basis, if a merger or joint venture, or other arrangement is a concentration that must be notified, for the purposes of merger control. Competition law and practice has therefore developed approaches for deciding whether these transactions are concentrations for the purpose of EU merger control. Article 3 (1) (b) of Council Regulation (EC) No 139/2004 of 20 January, 2004 on the control of concentrations between undertakings ("the Merger Regulation") provides that a concentration occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone, or by several undertakings acting jointly.
156. Control is defined by Article 3 (2) of the Merger Regulation as the possibility of exercising "decisive influence" on an undertaking. The Merger Regulation applies to joint ventures, as well as mergers and acquisitions. The EU Commission consolidated jurisdictional notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("the Notice") examines the concept of control in considerable detail. According to the Notice, it is not necessary to show that the decisive influence is or will be actually exercised: it is the possibility of the exercise of that influence which is decisive.<sup>18</sup>
157. The Notice distinguishes between sole control and joint control. Sole control exists if one undertaking alone can exercise decisive influence on an undertaking. The solely controlling undertaking can enjoy the power to determine the strategic commercial decisions of the other undertaking. That power, according to the Notice, is typically achieved by the acquisition of a majority of voting rights in a company. According to the Notice, sole control also exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (so-called negative sole control). The shareholder acquires decisive influence by being able to create a deadlock.

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<sup>18</sup> At paragraph 16.

158. According to the Notice, joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense normally means the power to block actions (for example through veto rights) which determine the strategic commercial behaviour of an undertaking.
159. Control, according to the Notice can be manifested in different ways, depending on the circumstances. It may be evident from the constitution of the joint venture, *i.e.* in its corporate documentation, the contractual arrangements between the joint venture company and its parents, or from control over assets such as plant and machinery or intellectual property. The Notice makes it clear that control, whether sole or joint, can be acquired on either a *de jure* or *de facto* basis.
160. Whether one is concerned with sole control or joint control, the concept of decisive influence is common to both.
161. In the context of national merger control in Ireland, the Competition Act, 2002 (“the Act”) also addresses the issue of control. S 16 (2) of the Act (dealing with mergers and acquisitions) provides that:
- “For the purposes of this Act, control, in relation to an undertaking, shall be regarded as existing if, by reason of securities, contracts or any other means, or any combination of securities, contracts or other means, **decisive influence** is capable of being exercised with regard to the activities of the undertaking and, in particular, by—
- (a) ownership of, or the right to use all or part of, the assets of an undertaking, or
- (b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.”
- (Emphasis added)
162. S 16 (2) of the Act is concerned with the exercising of “decisive influence” and of deciding what kind of control can trigger the provisions of the Act.
163. In the dispute at hand, one could in theory apply the merger control test for the purpose of determining whether O2 controls TMI and whether as a result, section 3.6 of the SMP Designation applies – meaning that O2’s obligations should be capable of applying to TMI also.
164. In the context of Article 81 of the Treaty Establishing the European Community (“the Treaty”) the Courts of Justice and First Instance of the European Communities have considered the definition

of an undertaking for the purpose of applying Article 81 of the Treaty (which prohibits agreements and concerted practices between undertakings that have as their object or effect of preventing, restricting or distorting competition). Companies belonging to the same group and having the status of parent and subsidiary may have distinct legal personalities. However, “...if the undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market” they are treated as a single economic entity for the purpose of Article 81.<sup>19</sup> However, ComReg does not propose to apply the test based on Article 81 of the Treaty for the purposes of resolving this dispute.

**(iv)(c) Other approaches to the meaning of “control”.**

165. From the point of view of control of the network, if one considers a situation where TMI is controlled by O2 for the purposes of the O2’s SMP Designation, then it does not matter whether TMI controls the network, or O2 controls the network - in either case O2’s obligations would apply. Conversely, if TMI is not controlled by O2 for the purposes of O2’s SMP Designation then it does not matter whether TMI controls the network, or O2 controls the network. In either case, O2’s obligations do not apply. An analysis of the issue of whether O2 controls TMI’s network does not therefore, in ComReg’s view need to be done, as the outcome has no bearing upon the issue as to whether O2 controls TMI for the purposes of the latter determining its MTR.
166. ComReg has considered whether it should have regard to an accounting approach to control. Accordingly, definitions of the term “control” can be found in a number of different accounting standards.
167. International Accounting Standard 27, Consolidated and Separate Financial Statements (“IAS 27”) issued by the International Accounting Standards Board<sup>20</sup>, defines control in the following terms:

“Control is the power to govern the financial and operating policies of an entity so as to obtain benefits from its activities.”

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<sup>19</sup> Case 17/74 *Centrafarm BV and Adnaan De Peijper v Sterling Drug Inc.* [1974] ECR 1147, at paragraph 41.

<sup>20</sup> The International Accounting Standards Board (“IASB”) is an independent standard-setting board, appointed and overseen by a geographically and professionally diverse group of Trustees of the International Accounting Standards Committee Foundation. The IASB comprises a group of people representing, within that group, the best available combination of technical skills and background experience of relevant international business and market conditions in order to contribute to the development of high quality, global accounting standards. The IASB co-operates with national accounting standard-setters to achieve convergence in accounting standards around the world.

168. Financial Reporting Standard 2 - *Accounting for Subsidiary Undertakings* (“FRS 2”) issued by the Accounting Standards Board<sup>21</sup>, provides the following definition of control at paragraph 6 and dominant influence at paragraph 7:

“Control:- The ability of an undertaking to direct the financial and operating policies of another undertaking with a view to gaining economic benefits from its activities.

[...]

Dominant influence:- Influence that can be exercised to achieve the operating and financial policies desired by the holder of the influence, notwithstanding the rights or influence of any other party.”

In the context of 14(c) and section 258(2)(c)<sup>22</sup>, the right to exercise a dominant influence means that the holder has a right to give directions with respect to the operating and financial policies of another undertaking with which its directors are obliged to comply, whether or not they are for the benefit of that undertaking.

The actual exercise of dominant influence is the exercise of an influence that achieves the result that the operating and financial policies of the undertaking influenced are set in accordance with the wishes of the holder of the influence and for the holder's benefit whether or not those wishes are explicit. The actual exercise of dominant influence is identified by its effect in practice rather than by the way in which it is exercised.<sup>23</sup>”

169. The consideration of other definitions of control set out in, for example, companies and tax legislation would not, in ComReg’s view, necessarily provide it with substantially further assistance in determining the issue that arises here.

**(iv)(d) Conclusions on general approach to the issue of “control”**

170. All of the tests mentioned would appear to provide useful analogical reference points, although it should be pointed out that they have been developed in different contexts to *ex ante* regulation in

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<sup>21</sup> The Accounting Standards Board (“ASB”) forms part of the Financial Reporting Council, the UK’s independent regulator responsible for corporate governance and reporting. The ASB collaborates with accounting standard-setters from other countries and the IASB in setting UK accounting standards and ensuring that UK accounting standards have with due regard to international developments.

<sup>22</sup> From 4(1) 10A Schedule of the UK Companies Act 1985, as amended by UK Companies Act 1989.

<sup>23</sup> Financial Reporting Standard defining phrase used in section 258(4)(a) of the UK Companies Act 1985 as amended by UK Companies Act 1989.

the electronic communications sector.<sup>24</sup> ComReg considers that it is appropriate for it to have regard to these tests, and that the circumstances of a case would dictate the relevance of each test and how or whether it should be applied. In general, it is ComReg's view that it should exercise its discretion as to how it resolves these questions as they arise, particularly since it cannot predict in advance how parties will choose to arrange their commercial affairs, or be expected to know generally how regulated companies conduct their internal affairs in practice. However, that discretion is to be exercised reasonably and having regard to the factors relevant to the case at hand.

171. ComReg considers that neither the dictionary definitions of control, nor the various tests described here are necessarily determinative for the purpose of interpreting section 3.6 of the SMP Designation.
172. While the test for control set out in the Notice relates to *ex ante* Competition law and does not directly apply to the circumstances of this dispute, ComReg considers it to be instructive to its approach to the issue in this dispute. In the context of this dispute, ComReg favours a test that has regard to the concept of control meaning "decisive influence". Furthermore, ComReg concludes that a test of decisive influence exercised by means of sole control is the most appropriate and reasonable test, in light of the circumstances of this dispute. As the Notice makes clear at paragraph 54, "*Sole Control is acquired if one undertaking alone can exercise decisive influence on an undertaking.*" The undertaking in sole control can exercise such control by determining the strategic commercial decisions of the controlled undertaking, either through majority voting rights or by means of a sole veto on strategic decisions. This approach seems to provide a logical, systematic, familiar and accepted analytical framework for resolving the issue of control. In this case, the test of decisive influence indicates the proper degree of control that should exist in order to demonstrate that O2 could effectively determine the level of TMI's MTR that it (O2) desired. Electronic communications regulation relies significantly on competition law principles and *ex ante* competition law principles. The decisive influence test has the advantage of being derived from another specialised area of *ex ante* competition law (merger control). ComReg is also of the view that this test is consistent with the fact that O2's obligations flow from a finding of SMP, which is based on O2's ability to act independently in the market. A test of decisive influence based on sole control is consistent with the assessment of the freedom of action giving rise to a finding of SMP, that is, whether any control being exercised by O2 can be exercised independently. This approach also leads to a conclusion that the appropriate test is one having regard to the concept of decisive influence based on sole rather than joint control. Joint control would not confer on O2 the ability to act independently.

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<sup>24</sup> ComReg notes however, that merger control operates *ex ante*, as does SMP regulation in the electronic communications sector.

173. In applying this approach, ComReg considers that it is appropriate to examine both possible control mechanisms, based on their corporate documentation and empirical evidence. The question of control is further addressed in section 7 below.

## 6. THE RESPONSES OF THE PARTIES TO THE DOCUMENT FOR COMMENT

174. On 19 May 2008, ComReg provided the parties with the Document for Comment. On 30 May and 9 June, 2008, respectively, H3GI and TMI provided their submissions to ComReg in relation to the Document for Comment. This section summarises and comments on those submissions.

### Summary of H3GI's response to the Document for Comment

175. H3GI stated that ComReg has the power in the context of a dispute to impose SMP-type obligations, including obligations relating to price, where an entity refuses to negotiate interconnection prices.<sup>25</sup>

176. H3GI stated that it *“fully supports”* ComReg's proposal to determine the dispute by setting a final price of TMI's mobile termination rate, if O2's obligations do not apply to TMI.<sup>26</sup>

177. In relation to the wording relating to the question of control in section 3.6 of O2's SMP Designation, H3GI stated that the section *“was to ensure that an SMP undertaking did not seek to circumvent regulatory obligations...”*<sup>27</sup>

178. H3GI stated that the decisive influence test is the “correct” test to apply in relation to the question of “control”.<sup>28</sup>

179. H3GI stated that it is unclear why ComReg is of the view that it is unnecessary to apply the “associated with” test and that if it was necessary to apply it, TMI would be associated with O2. H3GI refers to definitions of “associated with”, such as that in section 2 of the Communications Regulation (Amendment) Act, 2007.<sup>29</sup>

180. Much of H3GI's submissions were concerned with the question of control of TMI.<sup>30</sup> H3GI quoted extensively from the Notice (referred to by ComReg in relation to the question of control). H3GI also suggested various types of documents that it says ComReg should review to determine the issue of control.<sup>31</sup>

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<sup>25</sup> H3GI Submission of 30 May 2008, p. 1.

<sup>26</sup> H3GI Submission, op. cit., p. 1.

<sup>27</sup> H3GI Submission, op. cit., p. 2.

<sup>28</sup> H3GI Submission, op. cit., p. 3.

<sup>29</sup> H3GI Submission, op. cit., p. 3.

<sup>30</sup> H3GI Submission, op. cit., pp. 4-11.

<sup>31</sup> H3GI Submission, op. cit., p. 10.

181. H3GI urged ComReg to establish a confidentiality ring so that it can examine TMI's confidential documents.<sup>32</sup>
182. H3GI appeared to agree with ComReg's proposed test to do with the circumvention of regulatory obligations and stated that it should be applied in the manner that ComReg proposed.<sup>33</sup>
183. H3GI requested clarification of the interaction between the dispute and any possible compliance action (should O2's obligations be found to apply to TMI).

#### **ComReg's comments on H3GI's response to the Document for Comment**

184. H3GI appeared to broadly agree with ComReg's proposed approach.
185. H3GI urged ComReg to undertake an examination of the issue of control. H3GI suggested a range of documents that ComReg should call for from TMI. ComReg believes however that it has been able to form a reasonable view on the issue of control on the basis of the materials that it already has before it and one that is sufficient for the purposes of the exercise being engaged in here.
186. In relation to the "associated with" element of the control test, as set out at paragraph 145, above, the assessment of the applicability of the phrase "associated with" is in the context of a constraint on the circumvention of regulatory obligations. Statutory and other definitions/tests of "association" may be considered as guidance on a case by case basis – depending on the facts of a dispute. However, in this dispute ComReg does not consider them appropriate in the context of assessing regulatory circumvention.
187. In relation to H3GI's request for a confidentiality ring, ComReg has an express statutory duty, pursuant to Regulation 21 of the Framework Regulations, to "*maintain and accept as confidential any information provided by an undertaking expressed by it to be confidential, except where the Regulator has good reason to consider otherwise.*" In this dispute both parties provided documentary submissions, in relation to which confidentiality was claimed. It has been argued by one party that, its advisers should have sight of the other parties' confidential documentation, via the establishment of a confidentiality ring. ComReg has considered this request carefully, but does not believe that it is necessary to establish a confidentiality ring, or that doing so would be in accordance with its statutory duties. ComReg's approach has been that, where confidential information has had a bearing on this final determination, ComReg has provided information on the factors taken into account; the type of evidence considered; the methodology used and factors taken into account in analysing the evidence; how any analysis relates explicitly to the issues at stake and the detailed conclusions. It is ComReg's view that this approach ensures that confidentiality is maintained and ensures that ComReg provides reasons for its final determination

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<sup>32</sup> H3GI Submission, op. cit., p. 11.

<sup>33</sup> H3GI Submission, op. cit., p. 12.

that are clear, adequate and intelligible to all parties. ComReg has not identified or been given a good reason (or a sufficiently good one) by the requesting party to justify the establishment of a confidentiality ring. Therefore, ComReg will maintain the confidentiality of information that has been submitted to it as confidential. ComReg communicated this to the parties on 29 July 2009.

188. With regard to H3GI's request for clarification of the interaction between the dispute and any possible compliance action (should O2's obligations be found to apply to TMI) these are independent functions of ComReg. If, during the course of a dispute, ComReg becomes aware of potential non-compliance, then a decision on the appropriate course of action will be taken on its merits and independently of the dispute.

### **Summary of TMI's response to the Document for Comment**

189. TMI suggested, in its submission of 9 June 2008 that ComReg must make a finding as to whether or not there was a failure by it to negotiate with H3GI. TMI stated that ComReg's approach (i.e. not to find on the alleged failure to negotiate) would be "*akin to a court considering the necessary penalty for a crime without considering whether the crime was ever committed.*"<sup>34</sup> TMI stated that ComReg has not analysed why it can make a determination on price, without making a finding on the alleged failure to negotiate.<sup>35</sup> TMI stated that ComReg must make such a finding before it can impose any remedies on TMI pursuant to Regulation 6 of the Access Regulations 2003.
190. TMI argued that there was merely a failure by the parties to *agree* on price.<sup>36</sup>
191. TMI argued that ComReg should already have defined in advance what "control" is for the purposes of section 3.6 of the SMP Designation. As it did not do this, it says that ComReg must now consult on the issue.<sup>37</sup> TMI also stated that ComReg does not have the power under Regulation 31 of the Framework Regulations to apply a definition of control based on for example, the Competition Act, 2002.
192. TMI comments that the best approach is for ComReg to conduct market analysis on TMI and if SMP is found, to deliberate on the most appropriate remedy.<sup>38</sup>
193. TMI argued that ComReg has sought to "*...broaden the scope of the dispute notified to it outside the scope of the actual request for dispute resolution made by H3GI.*"

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<sup>34</sup> TMI submission of 9 June 2008, p. 1, p. 5.

<sup>35</sup> TMI Submission op. cit., p. 5.

<sup>36</sup> TMI Submission op. cit., p. 2.

<sup>37</sup> TMI Submission op. cit., p. 2, p. 12.

<sup>38</sup> TMI Submission op. cit., p. 2, p. 12.



194. TMI argued that if ComReg finds that TMI did not refuse to negotiate, it must dismiss H3GI's dispute and refuse to grant the relief it seeks.<sup>39</sup>
195. TMI suggested that ComReg may have prejudged the relief options set out in its Document for Comment.<sup>40</sup>
196. TMI agreed with the potential options 1-3 (set out in the Document for Comment) in circumstances where TMI is deemed not to have O2's SMP obligations.

#### **ComReg's comments on TMI's response to the Document for Comment**

197. TMI suggests that ComReg must, in order to vindicate TMI's constitutional rights, determine whether there is a failure to negotiate interconnection or the price of interconnection, before it can proceed to make a determination. ComReg would respectfully disagree for the reasons set out in paragraphs 105 to 110 and for the following reasons.
198. Regulation 31 of the Framework Regulations provides that "*...the Regulator shall...make a determination, aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute.*" ComReg's obligation is clear: it must make a determination which ensures regulatory compliance in order to resolve this dispute. If ComReg found for example, that TMI had indeed failed to negotiate, there is no question but that H3GI would be entitled to some form of relief to resolve the dispute. But equally, if ComReg found that TMI had not failed to negotiate, that does not mean that ComReg could dismiss the dispute and refuse to grant relief to H3GI – that simply would not resolve the dispute – and there is still a dispute, regardless of about the rights or wrongs relating to the negotiation issue. Whether or not negotiation happened does not appear to ComReg to be determinative of the issues in dispute. One is still left with the fact that there is a failure to agree price *for whatever reason*. Ultimately, ComReg must still attempt to resolve the dispute over price.
199. With regard to TMI's suggestion that ComReg's approach (i.e. not to find on the alleged failure to negotiate) would be "*akin to a court considering the necessary penalty for a crime without considering whether the crime was ever committed*",<sup>41</sup> ComReg would again, respectfully disagree. TMI's analogy is imperfect and misleading. ComReg refers to the reason contained at paragraph 198. In addition the making of a dispute determination by ComReg under Regulation 31 of the Framework Regulations does not constitute criminal proceedings, nor is it akin to (similar to) criminal proceedings. The conduct of criminal proceedings is a function expressly reserved for the Courts i.e. it is a judicial function, by virtue of the provisions of Articles 34 and

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<sup>39</sup> TMI Submission op. cit., pp. 9-10.

<sup>40</sup> TMI Submission op. cit., p. 11.

<sup>41</sup> TMI Submission op. cit., p. 1, p. 5.

37 of Bunreacht na hÉireann. None of the issues considered here and none of the consequences of a determination under Regulation 31 of the Framework Regulations to do with this dispute are remotely of a criminal character, or nature. A dispute determination is not punitive, as a criminal sanction would be and for this reason also, TMI's analogy is flawed.

200. In addition, it does not appear to ComReg that any of the issues raised in this dispute raise matters to do with the constitutional rights and protections afforded to all persons by Bunreacht na hÉireann in the context of criminal trials.
201. In relation to TMI's view that ComReg must *ex ante* define the test for control, the fact that this did not happen does not legally preclude ComReg from defining the test now in the dispute resolution forum. If this were not the case, ComReg would be prevented from exercising the dispute resolution function conferred upon it by law. The two parties to this dispute have indeed already been consulted with on this matter through the publication of the Document for Comment. Furthermore, it should be noted that under Regulation 19 (1) Framework Regulations, public consultation is not required in respect of a dispute determination under Regulation 31 of the Framework Regulations.<sup>42</sup>
202. ComReg does not agree with TMI's view that ComReg should determine the issue of any remedies on TMI by undertaking a market analysis on TMI. Support for this proposition is found for example in the recent judgment of the UK Competition Appeal Tribunal ("the CAT")<sup>43</sup> in relation to disputes that the Office of Communications ("Ofcom")<sup>44</sup> in the UK had ruled upon.<sup>45</sup> While it should be acknowledged that TMI is entitled to have a market analysis conducted in relation to its position at some point, this dispute cannot be dismissed or deferred in order to cater for that market analysis.
203. TMI has asserted that ComReg has sought to "*broaden the scope of the dispute notified to it outside the scope of the actual request for dispute resolution made by H3GI*". However, ComReg respectfully disagrees. As set out paragraph 108, there are three elements to the stated scope of

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<sup>42</sup> The Regulation 19 consultation requirements apply to "measures" as defined therein. Regulation 19 (1) provides that a "measure" means a decision, designation, determination, requirement, specification or other act of an equivalent effect made by the Regulator under these Regulations or the Specific Regulations, **other than a determination under Regulation 31...** (Emphasis added).

<sup>43</sup> The UK Competition Appeal Tribunal is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues.

<sup>44</sup> Ofcom is the UK's NRA responsible for regulating the broadcasting, telecommunications and wireless communications sectors.

<sup>45</sup> *T-Mobile (UK) Limited, British Telecommunications plc, Hutchison 3G UK Limited Cable & Wireless UK v Office of Communications* [2008] CAT 12. The CAT ruled that the UK regulator, Ofcom, cannot abrogate or postpone its responsibility to resolve a dispute by proposing to address it either through *ex ante* regulation or competition law. If a price dispute is notified, it is wrong to determine it on some other basis, or through another forum – the dispute forum is the proper place to resolve it.

this dispute. The first is a statement that H3GI wishes to agree appropriate MTRs. The second is a statement that it is H3GI's belief that TMI has proposed unreasonable rates and the third is that TMI has refused to negotiate with H3GI. TMI's submission focuses on the elements of the stated scope relating to negotiation and appears to indicate that a consideration of whether TMI's proposed MTR is unreasonable is beyond the scope of the dispute.

204. The first element of the scope is a statement of H3GI's desire to agree appropriate MTRs. Only a failure to agree a MTR that H3GI considered appropriate would give rise to a dispute between the parties on this point. The second element is an explicit statement that H3GI believes TMI's MTR proposals to be unreasonable. Unless TMI agrees that its proposal was unreasonable (which it has not) then this item is a matter for dispute between the parties.
205. A consideration of the dispute which failed to address whether TMI's proposed MTR was reasonable, or what an appropriate MTR is, would be one which failed to adequately address the full scope of the dispute.<sup>46</sup> As set out at paragraphs 105 to 110, these are issues which still clearly need to be resolved. It is not necessary to make a determination on the issue of negotiation in order to examine these issues. Therefore, ComReg has not broadened the scope of the dispute, but has addressed the elements of the dispute as submitted by H3GI and notified to TMI. It is ComReg's view that TMI is mistaken in its view that an examination of the elements relating to the appropriateness or reasonableness of TMI's proposed MTR is contingent on a finding that TMI failed to negotiate.
206. As set out paragraph 105, it is ComReg's view that the dispute process under Regulation 31 of the Framework Regulations does not require ComReg to make findings of compliance or non-compliance. Having considered TMI's submission, ComReg does not consider it appropriate to alter this view.
207. In respect of the third element of the scope of the dispute, ComReg has set out at paragraphs 124 to 125 its view that a form of determination which focused on the issue of negotiation would not be an effective resolution of the dispute by ComReg. This view was endorsed by TMI in its submission on the Document for Comment (at page 15 of the submission) where it agreed with ComReg's conclusions in this regard.
208. ComReg does not agree with TMI's suggestion that ComReg may have prejudged the relief options set out in the Document for Comment. These options were set out as possible structures for a determination without any regard to a finding on the appropriateness of a particular price level, or whether that level would be in the context of a SMP finding or otherwise. The associated

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<sup>46</sup> ComReg noted that any determination must be aimed at ensuring compliance with obligations. An assessment of whether O2's SMP obligations apply in the circumstances of this dispute is therefore relevant and proper.

analysis of these options set out whether a determination of that form would result in a proper resolution of the dispute. This approach did not prejudge the outcome of any analysis.

209. TMI suggests that ComReg must conduct a SMP analysis before it can make any intervention by way of setting the level of MTR. However, ComReg does not agree. Regulation 6 (2) of the Access Regulations provides that ComReg may impose obligations, including obligations of price control, to ensure end-to end connectivity. Furthermore, Regulation 6 (5) of the Access Regulations explicitly provides that ComReg may exercise its powers under the Access Regulations (which would include the power to impose a price control) “*in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives and regulatory principles set out in section 12 of the Act of 2002, in accordance with these Regulations and Regulations 19, 20, 31 and 32 of the Framework Regulations.*” These provisions clearly confer on ComReg the ability to intervene by way of specifying a price in circumstances, other than a finding of SMP and specifically, in the context of Regulation 31 of the Framework Regulations which governs this dispute.

## **7. THE ISSUE OF CONTROL IN TMI’S CORPORATE DOCUMENTATION AND IN PRACTICE**

210. In section 5 of this determination, ComReg set out its views on and approach to the issues of control. In summary, ComReg stated that it favoured a test that has regard to the concept of control meaning “decisive influence” and the exercise of sole control, for the purposes of this dispute. In applying this approach, ComReg stated that it considered that it is appropriate to examine the issue of control, based on the relevant party’s corporate documentation and the evidence of what has actually occurred and what is actually occurring, by reference to that documentation and other empirical evidence.
211. In order to determine this issue, ComReg examined the various agreements between O2, TMI and Tesco governing their relationship. In addition, ComReg examined the minutes of TMI board meetings, where issues relating to MTR were discussed. The following categories of documents were considered:

- (i) Shareholders' Agreement.
- (ii) Services Agreement.
- (iii) Interconnect Agreement.
- (iv) Other Agreements.
- (v) General Comments.
- (vi) Board meeting minutes.

ComReg has examined each of these in turn.

**(i) Shareholders' Agreement**

212. The Shareholders' Agreement between Tesco and O2 relating to TMI, provides that [REDACTED] [REDACTED].<sup>47</sup> ✂[confidential to TMI]
213. Both shareholders may nominate [REDACTED] ✂[confidential to TMI] to the Board of the company and voting rights are [REDACTED].<sup>48</sup> ✂[confidential to TMI]
214. The Chairman [REDACTED].<sup>49</sup> ✂[confidential to TMI]
215. Significant autonomy is delegated to the management of TMI.<sup>50</sup> However, some matters are reserved as requiring shareholder agreement.<sup>51</sup> [REDACTED]  
[REDACTED]  
[REDACTED].<sup>52</sup> ✂[confidential to TMI]
216. If there is disagreement on shareholder matters, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].<sup>53</sup> ✂[confidential to TMI]
217. [REDACTED]  
[REDACTED]

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<sup>47</sup> Clause 2.1 of the Shareholders' Agreement.

<sup>48</sup> Clause 6 of the Shareholders' Agreement.

<sup>49</sup> Clause 6.8 of the Shareholders' Agreement.

<sup>50</sup> Schedule 4 (Business Principles) appended to the Shareholders' Agreement.

<sup>51</sup> Clause 7 of the Shareholders' Agreement.

<sup>52</sup> These fall within the categories set out at Clauses 7.2.13, 7.2.14, 7.2.15, and 7.2.19 of the Shareholders' Agreement as being "Shareholder Matters".

<sup>53</sup> Clause 7.7 of the Shareholders' Agreement.

[REDACTED]

[REDACTED]<sup>54</sup> ✂[confidential to TMI]

218. Based on the provisions of the Shareholders' Agreement as summarised in paragraphs 212 to 217,

[REDACTED]

[REDACTED] ✂[confidential to TMI]

219. [REDACTED]

[REDACTED]

[REDACTED]<sup>55</sup> ✂[confidential to TMI]

220. [REDACTED]

[REDACTED] ✂[confidential to TMI]

**(ii) Services Agreements**

221. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂[confidential to TMI]

**(iii) Interconnect Agreement**

222. The form and content of this agreement [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

✂[confidential to TMI]

**(iv) Other Agreements**

223. The other agreements between the parties govern [REDACTED]

[REDACTED] ✂[confidential to TMI]. They have no specific provisions that confer control on

O2.

**(v) General Comments**

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<sup>54</sup> Clause 7.8 of the Shareholders' Agreement.

<sup>55</sup> Clause 6.15 of the Shareholders' Agreement.

224. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI]

**(vi) Board meeting minutes**

225. In assessing the minutes of board and board sub-committee meetings in the context of identifying the possible exercise of control by O2 on TMI in respect of MTR, it is useful to set out in advance what one might anticipate would be the behaviour of Tesco and TMI *absent* such control.

226. The matter under consideration is the setting of MTRs by TMI. In general and due to the proportion of overall MNO revenue attributable to termination, the MTR is an important underlying driver of a MNO business plan. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI]. In this regard, it seems reasonable to suggest that the shareholders would have had common cause in maximising the MTR revenue. Because of this, ComReg considers it unlikely that O2 would have needed (or would need) to exercise control over Tesco to maximise the MTR [REDACTED]  
[REDACTED] §<[confidential to TMI], as this would seem to be a course that Tesco, acting rationally, would be expected to choose for itself, irrespective of any O2 control.

227. Once the MTR was set at a level so as to maximise MTR revenue, the parties would continue to have an independent interest in maintaining the MTR at the highest level commercially possible and a circumstance where O2 could exercise any control it might have, in preventing a reduction in MTR is unlikely to crystallise. This is because it is difficult to envisage a commercial circumstance in which Tesco would unilaterally seek a reduction in TMI's MTR. This is the expected behaviour of the parties in the absence of control being exercised by O2.

228. From the minutes of a Steering Committee meeting of [REDACTED]  
[REDACTED] §<[confidential to TMI].

229. The minutes of the steering committee of [REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI].

230. In the Board meeting minutes of [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI].
231. The minutes of the Steering Committee meeting [REDACTED]  
[REDACTED] §<[confidential to TMI].
232. The minutes of the Board Meeting of [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI].
233. The minutes of the Board Meeting of [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI].
234. The Steering Committee minutes of [REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI].
235. The minutes of the Board Meeting of [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] §<[confidential to TMI].
236. Based on the record of the TMI Board meetings and the meetings of the delegated Steering Committee, [REDACTED]



[REDACTED]

[REDACTED] [confidential to TMI]. It is ComReg's view that the behaviour of the Tesco representatives in this regard is consistent with the behaviour which would be expected absent O2 control. ComReg has not seen evidence to support a view that O2 actually exercised control.

237. In the context of the alignment between expected behaviour and observed behaviour, it is ComReg's view that there was no need to examine additional TMI documentation in respect of decision making as regards MTR.

**Conclusions in respect of control**

238. In the context of the setting of MTRs, ComReg's conclusion is, that based on the nature of the contractual arrangements between the parties, [REDACTED]

[REDACTED]

239. Furthermore, based on the observed behaviour of the Tesco and O2 representatives on the Board of TMI, the conclusion that control is not actually being exercised is consistent with the proposition that it is in Tesco's own interest to maintain as high a MTR as possible; with the result that there is no observable exercise of control by O2.

**Actual or intended circumvention of obligations**

240. The empirical evidence that ComReg has examined supports the view that control has not been exercised by O2. Accordingly, a consideration of the further test related to an intention to circumvent regulatory obligations is not necessary. In addition, the issue of intent could not be seen as determinative or corroborative as regards the issue of control and it would not alter the view, supported by the evidence, that control is not being exercised by O2 in this case.

241. ComReg has nonetheless considered this point, so as to provide as thorough an analysis of the issues as possible. Having done so, ComReg has not in any event seen evidence that would support the view that there has been circumvention of regulatory obligations.

242. In considering whether, or not the relationship between TMI and H3GI was designed to, or would have the effect of circumventing obligations in the relevant market, it is helpful to consider the types of indicators that might be evident if this were the case.

243. One of the main reasons for circumvention would be to allow a higher MTR to be charged than provided for in the O2 SMP price control obligation. To realise the “fruits” of such circumvention, one might expect to see some or all of the following:

- Arrangements which would allow the excess charge to be passed from TMI to O2.
- An attempt to convert call termination at O2’s rate to call termination at the higher TMI rate.
- Short payback periods for the setup of such arrangements.
- Some degree of certainty in relation to the ability of the avoidance mechanism to deliver the intended benefits.

244. The following paragraphs provide an assessment of these indicators in the context of the actual arrangements between O2 and TMI.

245. Arrangements which would allow the excess charge to be passed from TMI to O2. To guarantee the benefit to O2 of the higher TMI MTR, a number of methods could have been used; these include :

- [REDACTED]  
[REDACTED]  
[REDACTED] ☒ [confidential to TMI].
- [REDACTED]  
[REDACTED]  
[REDACTED] ☒ [confidential to TMI].
- [REDACTED]  
[REDACTED]  
[REDACTED] ☒ [confidential to TMI].

246. On examination, there is no arrangement for the direct pass-through of any excess mark-up. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ✂[confidential to TMI].

247. With regard to any attempts to convert call termination at O2's rate to call termination at the higher TMI rate, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ✂[confidential to TMI]. This focus has the effect of limiting, rather than maximising, the benefits if the intended goal was the conversion of the existing call base to a higher termination rate.

248. In relation to possible short payback periods for the setup of such arrangements, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ✂[confidential to TMI].<sup>56</sup>

249. With regard to a degree of certainty in relation to the ability of the avoidance mechanism to deliver the intended benefits, [REDACTED]  
[REDACTED]  
[REDACTED] ✂[confidential to TMI].

**Conclusions**

250. Based on the facts and analysis set out at paragraphs 226 to 249, ComReg is of the opinion that even if O2 could theoretically exercise control, this is unlikely to crystallise because Tesco would have independent commercial reasons for desiring to maximise the MTR. Thus, neither the effect

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<sup>56</sup> Schedule 6 (Business Plan) of the Shareholders' Agreement.

nor, it may be inferred, the intent of the arrangement between O2 and Tesco appears to be the circumvention of the SMP regulation of O2.

251. The analysis of the issue of control can be summarised as follows:

- O2 cannot exercise decisive influence by way of sole control over TMI in respect of the setting of MTRs.
- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] <[confidential to TMI];
- Tesco is likely to independently wish to maintain a high MTR (even absent control by O2) and the empirical evidence is consistent with Tesco acting in accordance with this independent approach;
- Any arrangements which would potentially give rise to control do not appear to have been designed with the specific intent, or effect of avoiding SMP regulation, but are general corporate governance procedures; and
- ComReg has not seen evidence of mechanisms which would allow O2 to realise the benefits of any circumvention of regulation.

252. The purpose of section 3.6 of O2's SMP Designation is to prevent circumvention of regulatory obligations. Any assessment of the terms "control" or "associated" are considered in the context of the purpose of section 3.6 of O2's SMP Designation. Based on its examination of the matter as set out, above, ComReg considers, on balance and taking in to account the evidence, that control is not being exercised by O2 and that the provisions of the SMP Designation do not apply to TMI in this case.

## **8. ANALYSIS OF TMI'S PROPOSED PRICE FOR MTR**

253. At paragraph 114 above, it was considered that 2 broad scenarios existed (i) where O2's SMP obligations apply to TMI; and (ii) where O2's SMP obligations do not apply to TMI. At paragraph 124, ComReg set out that the only realistic option for an effective, certain and viable resolution to the dispute, in the scenario where O2's obligations did not apply, is to determine the dispute by setting a final price for TMI's MTR. Having concluded at paragraph 252 that the provisions of the O2's SMP designation do not apply to TMI in this case, ComReg now considers the setting of a final price for TMI's MTR.

### Analysis of TMI's cost base for mobile termination

254. In its dispute resolution request, received by ComReg on 31 October 2007, H3GI set out that one of the options for relief it sought was for ComReg to set “...a rate for the termination of voice calls on TMI's virtual mobile network, which reflects the costs associated with the provision of such mobile termination services by TMI and a reasonable rate of return on its investment.”<sup>57</sup> The following paragraphs set out ComReg's analysis of TMI's costs in providing mobile termination services.
255. The O2 Services Agreement sets out the price per minute that O2 charges TMI for the termination of traffic destined for TMI's end users at ██████████ [confidential to TMI]c. This is the base cost per minute to TMI of implementing such termination. In addition, TMI has ongoing costs in respect of interconnect billing, revenue collection and management of the interconnect arrangements.
256. In arriving at an estimate for the costs of these additional activities associated with termination, it is useful to examine the manner in which calls to mobile numbers which have been ported away from their original networks are handled. In this case, the original host network accepts a call that is sent to it, performs a look-up, determines that the call is proper to another network and routes it into the other network and bills the originating network for its look-up and transit plus the MTR of the destination network. In this case all of the mobile operators in Ireland charge within 10% of each other for this look-up and transit. Based on the information in Eircom's STRPL (issue 81) this charge is approximately 0.5c per minute. This charge must cover the network costs associated with the look-up and transit, as well as activities equivalent to the activities carried out by TMI in respect of call termination (management of contracts with interconnected operators, billing of termination fess, etc.) in addition to the actual termination, for which it pays O2 ██████████ [confidential to TMI]c per minute
257. Therefore, a high end estimate of the per-minute costs for TMI to terminate calls is ██████████ [confidential to TMI] c per minute.
258. Based on a cost of ██████████ [confidential to TMI] c per minute, if TMI were to charge the O2 MTR, then based on time of day call traffic splits of between a low end estimate of 33%:33%:33% (Peak:Off-peak:Weekend<sup>58</sup>) and a high end estimate 60%:20%:20%, TMI's margin would be between ██████████% [confidential to TMI] and ██████████% [confidential to TMI].
259. Based on a cost of ██████████ [confidential to TMI]c per minute, if TMI were to charge the MTR it sought from H3GI then based on time of day traffic splits of between 33%:33%:33% and

<sup>57</sup> H3GI Dispute Resolution Request, 31 October 2007, p.11.

<sup>58</sup> Peak tariff period is Monday to Friday, from 9:00am to 5:59pm; Off-peak tariff period is Monday to Friday, from 6:00pm to 7:59am; Weekend tariff period is from Friday 6:00pm to Monday 7:59am.



call, rather it is obtaining an overall retail margin against a blended average of its out payments on MTR. This retail approach is similar for O2, Vodafone and Meteor.

266. Based on Q2 2009 mobile operator customer numbers<sup>60</sup> and allowing that that customer numbers are a proxy for traffic volumes, this would mean that traffic from H3GI to TMI would represent 0.38% of the total traffic from H3GI. Therefore MTRs paid to TMI by H3GI would represent 0.38% of the total MTRs paid by H3GI.
267. Based on all other mobile operators customer numbers staying static and TMI reaching 50,000<sup>61</sup> customers and allowing that that customer numbers are a proxy for traffic volumes, this would mean that traffic from H3GI to TMI would represent 1.09% of the total traffic from H3GI. Therefore, MTRs paid to TMI by H3GI would represent 1.09% of the total MTRs paid by H3GI
268. The difference between TMI's proposed price and the benchmark that H3GI suggests for TMI's rate of O2's rate would be 37%. That is, O2's rate is 37% below TMI's proposed price. This means that based on 50,000 TMI customers and the MTRs being paid to TMI being 1.09% of H3GI's total, the maximum impact that the current TMI proposal could have on H3GI's blended outpayment is 0.59% based on outpayments to TMI.
269. The H3GI outpayment does not represent the total cost of a call from H3GI to TMI as H3GI also has its internal network costs. This further dilutes the impact of the difference between the TMI proposed price and the H3GI proposal on the overall costs and hence, profitability of H3GI's calls from its network to TMI.
270. All other operators have in effect accepted TMI's asking price therefore; H3GI does not appear to be competitively disadvantaged as against the other mobile network operators because the impact of TMI's asking price is effectively similar for each of them. Of the current operators in this market, H3GI and TMI are the most recent entrants. Any business challenges faced by a new entrant to a market containing more established operators will affect both parties to varying degrees (depending on size). These issues do not relate to the price paid for termination on other networks.
271. ComReg is of the view that the impact of the TMI asking price on H3GI is not sufficiently materially different to the impact on other operators, so as to place H3GI in a separate category from the other operators.
272. The main commercial factors that ComReg believes would affect an operator's decision to route traffic at a particular termination price would include the level of the price relative to existing and

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<sup>60</sup> ComReg Quarterly Report Q2 2009

<sup>61</sup> This figure was chosen as it is in excess of H3GI's estimate of TMI's customer base after one year (based on the confidential annex B to the dispute resolution request) and in fact is higher than TMI's customer base as at June 2008 and to be indicative of the short term impact of TMI's proposed rate on H3GI.

recent prices in the market (including the operator's own) the proportionate impact of the price on the operators overall termination outpayment and the absolute level of cost that a higher price would result in. In addition, the decision will be affected by the margin that the operator can make at a particular MTR. Therefore, an assessment of whether a particular price prevents end-to-end connectivity depends on the market environment at a point in time.

273. Using data on Mobile Call Termination minutes provided to ComReg by all Mobile operators ComReg has calculated the average time of day call traffic spilt in the tariff periods Peak, Off-peak and Weekend<sup>62</sup> for the period 1 July 2008 to 30 June 2009. For H3GI the average time of day call traffic spilt are ■%:■%:■% >[Confidential to H3GI]. For TMI the average time of day call traffic spilt are ■%:■%:■%.>[Confidential to TMI]
274. Using the H3GI average time of day call traffic spilt calculated in 272, and the H3GI MTRs<sup>63</sup> published in the STRPL<sup>64</sup> ComReg calculated an average MTR of 13.74 cents per minute.
275. Using the TMI average time of day call traffic spilt calculated in 273 above, and the TMI MTRs<sup>65</sup> effective from 1 December 2009<sup>66</sup> ComReg calculated an average MTR of 13.79 cents per minute.
276. The MTR proposed by TMI is within 0.4% (0.05 cents per minute) of that which has been agreed by a number of operators for termination on the H3GI network.
277. The fact that H3GI is willing to charge a price similar to that proposed by TMI to other operators terminating on the H3GI network would seem to suggest that H3GI itself does not see price levels of this order as a bar to end-to-end connectivity.
278. The fact that all other operators in the Irish market are routing traffic to TMI and H3GI at what may be termed comparable prices, suggests that the absolute level of prices in this range is not a bar to end-to-end connectivity.
279. However, it may be that the price range within which H3GI and TMI MTRs lie are at the boundary of what would prevent end-to-end connectivity. In this case, the slightly lower H3GI rate may lie entirely within the range that allows end-to-end connectivity and the TMI rate may be at a level where end-to-end connectivity begins to be inhibited. Accordingly, a MTR equal to H3GI's MTR is not a bar to end-to-end connectivity while a MTR equal to TMI's proposed MTR appears to be at the level where end-to-end connectivity can be ensured.

<sup>62</sup> Peak tariff period is Monday to Friday, from 9:00am to 5:59pm; Off-peak tariff period is Monday to Friday, from 6:00pm to 7:59am; Weekend tariff period is from Friday 6:00pm to Monday 7:59am.

<sup>63</sup> H3GI STRPL MTR (cents per minute) - Peak: 17.776333; Off-peak: 11.427643; Weekend: 8.888167.

<sup>64</sup> Switched Routing and Transit Price List, Version 81, 2 November 2009.

<sup>65</sup> TMI MTR (cents per minute) - Peak: 17.12; Off-peak: 12.02; Weekend: 9.81.

<sup>66</sup> Switched Routing and Transit Price List, Version 81, 2 November 2009.



280. H3GI states that the absence of a commercial agreement constitutes a risk to end-to-end connectivity. At no point does it state or justify that the absolute level of the price proposed by TMI is in itself a bar to this.
281. Based on the above empirical evidence from the market, ComReg is of the view that the price level of H3GI's MTR is not a bar to end-to-end connectivity. Furthermore, the MTR proposed by TMI is within 0.4% of the H3GI MTR. It is ComReg's view that the proposed TMI MTR not a bar to end-to-end connectivity.

**Assessment of the distortive impact of the margin within the TMI price**

282. H3GI in its dispute submission sets out an absolute level of estimated difference in the outpayments to TMI over a three year period if the TMI proposed price applies as opposed to the O2 termination rate. H3GI states that this three year cumulative difference amounts to €[REDACTED].  
 ✂[Confidential to H3GI]
283. H3GI's assumptions are based on there being no reduction in TMI's MTR over the 3 years.
284. In its dispute submission, H3GI outlines its view that such a difference may convey a competitive advantage to TMI. The distortive effect of such an advantage must be assessed in the context of the overall businesses of TMI and H3GI.
285. Applying H3GI's customer estimates for TMI and H3GI and applying a monthly average revenue per user ("ARPU") of €25<sup>67</sup> for each operator across the 3 years, the €[REDACTED] ✂[Confidential to H3GI] figure presents [REDACTED]% ✂[Confidential to H3GI] of TMI's total revenue and [REDACTED]% ✂[Confidential to H3GI] of H3GI's. Based on the pre-paid / post-paid profile of H3GI's customer base of 59 / 41 (based on ComReg quarterly report to end June 2009) this will underestimate the H3GI revenue and hence, overstate the proportionate negative impact on H3GI of the €[REDACTED] ✂[Confidential to H3GI] figure.
286. The benefit of the higher price (and margin) is proportionately higher for TMI compared to H3GI. Conversely, the negative impact of an intervention to lower the TMI asking price to O2's would also be proportionately higher on TMI.
287. H3GI makes the point that TMI is a 2G MVNO.<sup>68</sup> As such, the range of products and services it can offer is limited to those that can be supported by 2G. Therefore, TMI is restricted in the scope and range of services it can offer in competition to H3GI which is a 3G network operator. Furthermore, H3GI initially offered post-paid subscriptions only, with its current post-paid to pre-

<sup>67</sup> This is an estimate based on pre-paid ARPU rates of €25.2 for Vodafone (quarter to end September 2008) and €26.9 for O2 (quarter to end June 2008), based on published investor relations information. This will underestimate the impact on H3GI as its APRU will be a blend of pre-paid and higher post paid rates.

<sup>68</sup> Point (d), p. 6, of H3GI's submission of 7 March 2008.

paid split being 41% to 59%.<sup>69</sup> TMI offers pre-paid subscriptions only. Therefore, the competitive impact of MTRs alone is not fully reflective of the competitive dynamic between the parties as they compete also on service differentiation with H3GI offering services that can only be delivered over 3G and on market segment with TMI competing only in a portion of market that H3GI competes in. In this context, the setting of a rate based on H3GI's proposed outcome would affect 100% of TMI's market activity. On the other hand, if a price at TMI's proposed price were to confer on it any competitive advantage, this advantage would only be exercised on a proportion of H3GI's overall market activity.

#### **Assessment of commercial reasonableness of TMI's proposed price**

288. When viewed through a commercial lens, TMI had agreed its MTR with [REDACTED] [confidential to TMI]. No other operator apart from H3GI has decided not to route traffic at this price. Based on customer numbers, these operators, apart from H3GI, represent traffic from almost 5 million mobile subscribers and 2 million fixed subscribers in Ireland, as well as any international traffic directed at the TMI network.
289. A question arises as to whether it would be reasonable for TMI on a commercial basis to agree a price for MTR with H3GI at a discount to that in force for the rest of the market in a context where H3GI presents traffic from some 200,000 mobile customers.
290. Based on the correspondence between the parties, H3GI offered no reason to TMI as to why it should conclude an agreement at a discounted price, save for H3GI's belief that TMI's price was not cost oriented. It offered no volume commitments, it offered no preferential payment terms and declined to link TMI's price to its own price.
291. Apart from the assertion that the TMI prices were not cost oriented, the sole inducement used by H3GI to leverage lower prices has been to refuse to route traffic from its network to that of TMI at the price proposed by TMI.
292. Given that the TMI proposed price had been accepted by such a large part of the market, ComReg does not believe that it was commercially reasonable for TMI to have to agree to lower its price for H3GI, in the absence of some identifiable commercial benefit. From the correspondence that ComReg has seen, it appears that H3GI offered no such commercial inducement.

#### **Assessment of whether H3GI had a legitimate expectation based on regulation that TMI's pricing should be cost oriented**

293. Based on the dispute submission, H3GI advances a proposition that the obligation to negotiate interconnection under Regulation 5 (2) of the Access Regulations should be read to mean that

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<sup>69</sup> Based on ComReg Quarterly report for the period Q2, 2009.

there is an obligation to negotiate reasonable terms for the price of interconnection. Based on the arguments H3GI advances in respect of the level of TMI's MTR (adducing arguments which explore TMI's possible cost base) H3GI also implies that reasonable in the context of the price of termination, should mean "cost oriented".

294. The logical extension of the H3GI position seems to be that Regulation 5 (2) of the Access Regulations imposes a cost orientation obligation on all undertakings that become subject to this Regulation.
295. If H3GI's interpretation of Regulation 5 (2) is accepted, then Regulation 5 (2) renders meaningless the explicit checks and balances within Regulation 9 and Regulation 6 of the Access Regulations. In this regard, it is generally the case that SMP obligations may only be imposed on operators designated with SMP. However, SMP type obligations can also be imposed on operators not having SMP, "*to the extent that it is necessary to ensure end-to-end connectivity*". It is clear that this provision should be given a narrow construction and that it has a limited application in practice i.e. SMP type obligations should only be imposed on non-SMP operators "*to the extent that it is necessary to ensure end-to-end connectivity*".
296. It is the general position under the electronic communications legislative framework that SMP type obligations (including a price control obligation of cost orientation) may only be imposed on an operator that actually has SMP. The exception is that under Regulation 6 of the Access Regulations, such obligations may be imposed on operators that do not have SMP. However, that itself is subject to an exception, in that they should only be imposed "*to the extent that it is necessary to ensure end-to-end connectivity*". There is therefore an express statutory limitation, to what on a proper construction, is an exceptional power to impose SMP obligations on non-SMP operators. This is in addition to the limitations that would have to be considered under proportionality grounds and the relevant statutory objectives that ComReg has under section 12 of the Act of 2002. There are for example, a number of forms of price control, not as onerous as cost orientation. These matters do not appear to be properly taken in to account by H3GI. Accordingly, ComReg does not believe that it would have been reasonable, or correct for H3GI to have had any clear expectation that TMI's price be cost oriented.

#### **Consideration of ComReg's approach in regulating Mobile MTRs**

297. ComReg Document 06/08 "*Market Analysis -Wholesale voice call termination on Hutchison 3G Ireland's mobile network*" outlined matters that ComReg took in to account in considering the imposition of remedies in mobile termination markets and in particular, price control remedies. It must be stressed that the consideration of the imposition of these remedies was in the context of a designation of SMP.

298. At paragraph 6.47 of the document, ComReg sets out its view that *“In practice, a common approach to setting termination rates is to allow entrant networks to set higher charges on market entry in order to recover the level of initial investment and potential inability to achieve economies of scope and scale. Accordingly, a stringent remedy in the initial period of market growth may be inappropriate and unnecessary. For example, setting (strict) cost-orientated rates immediately potentially ignores real economies of scale issues that certain network operators cannot address however efficient they may be.”* While TMI is not an infrastructure based market entrant, it does have set up costs and as with any mobile service provider, fixed running costs. As outlined above, a MTR above cost oriented rates for a new entrant may be reasonable in the initial stages of market entry to cover these costs until there is scale and scope in its business.
299. At paragraph 6.48 of the document, ComReg sets out its view that *“This trigger mechanism also recognises the dynamic benefits that the existence of H3GI, the fourth mobile operator in the market, brings in terms of competition or the lower connection or handsets that it may be able to offer. H3GI charging higher termination rates may obtain higher expected profits in the short term, strengthening its relative competitive position through faster penetration of the market than immediate cost based regulation, thereby leading to increased competition in the long term to the benefit of consumers.”* The trigger mechanism referenced refers to a period during which H3GI would be allowed to maintain its MTR at the market entry level prior to being required to reduce it in line with a glide path to a level that is the same as the other SMP MNOs over a period of up to 5 years. This view articulates a position where there is an overall competitive benefit to allowing non-cost based MTR pricing in the short term after market entry. This is relevant in considering whether the MTR pricing proposed by TMI is reasonable.
300. Also at paragraph 6.48 of the document, ComReg sets out its view that *“With a very small market share (not currently exceeding 5% of mobile subscribers), the welfare burden of H3GI’s high MTRs are likely to be relatively low, while the dynamic benefits of having an additional player in the market are likely to be high.”* This view articulates a position where at low market share the impact of a new entrant having a high MTR is offset by the positive consumer benefits that arise from its market entry. This is a relevant consideration in considering whether TMI’s proposed MTR is reasonable.
301. This approach was reaffirmed in ComReg Decision D05/08 *“Decision Notice and Decision Instrument: Designation of SMP and SMP Obligations Market Analysis: Voice Call Termination on Hutchison 3G Ireland’s Mobile Network”*. This document summarised ComReg’s position as follows: *“The approach recognises that it can be socially optimal to have non-reciprocal MTRs across different operators but only for a limited period. With a smaller market share than other MNOs, the welfare burden of H3GI’s high MTRs is likely to be relatively low, while the dynamic benefits of having an additional player in the mobile market are likely to be high. By permitting*

*H3GI to charge higher MTRs than other MNOs for a limited period of time it may obtain higher expected profits in the short term, thus strengthening its relative competitive position and encouraging it to invest and innovate. The welfare benefit is that H3GI's strengthened competitive position will lead to increased competition in the retail mobile market in the long term, which will benefit consumers.”*

302. ComReg notes that TMI is a new entrant and has not been designated with SMP. ComReg also notes that, based on both TMI's and H3GI's projections, TMI is unlikely to have a market share in excess of 2.5% after three years.<sup>70</sup> In the light of these facts, the considerations set out in paragraphs 298 to 300 indicate that an approach which sets a lower bound for TMI's MTR based on a cost plus basis, would be unreasonable. Such an approach would forego potential market benefits from allowing TMI's MTR to be set higher than this in the period following its market entry.

#### **Other considerations**

303. In its request for relief H3GI requests that “*ComReg resolve the dispute between the parties further to Regulation 31 of the Framework Regulations and Regulation 6 of the Access Regulations by setting a rate for the termination of voice calls on TMI's virtual mobile network, which reflects the costs associated with the provision of such mobile termination services by TMI and a reasonable rate of return on investment.*”<sup>71</sup> In assessing whether such an approach would be fair and reasonable between the parties, it is useful to consider the basis on which H3GI sets its price for MTR. At paragraph 6.67 of ComReg Document 06/08 “*Market Analysis -Wholesale voice call termination on Hutchison 3G Ireland's mobile network*” ComReg set out that:

“ComReg is of the view that the prevailing MTRs of H3GI are unlikely to reflect the efficient cost of provision. This seems likely based on precedents in other European countries vis a vis termination rates ... and comments from the EU Commission about MTRs in general. Progressive reductions are being implemented by all existing SMP MNOs in the Irish mobile market who are expected to achieve MTRs of 7.99 cents by 1 January 2012. H3GI's MTRs are likely to be persistently high with no effective pressure (e.g., from new entry/expansion or from strong buyers) to bring them down to a more appropriate level over the period of the review. ComReg notes that in the absence of regulation H3GI has not (voluntarily) lowered its MTRs, and is

<sup>70</sup> This is based on publicly available statements by TMI on target market share (Quote from Tom Britten TMI General Manager in report of 29 October 2007 on <http://www.enn.ie>) and H3GI projections of TMI customer base in 2010 (contained in Annex B of the H3GI dispute resolution request of 31 October 2007) divided by the number of mobile subscriptions in Ireland at Q2 2008 based on ComReg's Quarterly Report.

<sup>71</sup> H3GI's dispute resolution request of 31 October 2007, p. 11.

hence charging competing operators termination rates above the market average rates. ComReg would also highlight that while Hutchison's termination rates in other EU jurisdictions differ and are less than the prevailing H3GI rate in Ireland, they are declining similar to 2G networks."

304. In the same document at paragraph 4.190, ComReg set out its view that *"As stated before, given that H3GI's MTRs are considerably higher than other operators, it seems reasonable to suggest that they are considerably larger than the competitive level"*.
305. This view was reaffirmed in ComReg Decision D05/08 at paragraph 4.34, where ComReg stated that *"ComReg's investigation of the relevant market has established that it is not effectively competitive and that H3GI has SMP on it. Given the absence of effective competition, there is a clear risk that H3GI might **sustain** prices at an excessively high level."* (Emphasis added) and at paragraph 4.41 of the same document where ComReg stated that *"The evidence suggests that H3GI has the ability to charge high prices and the incentives to do so."* and at paragraph 4.45 which states *"The glide path provision is ultimately intended to achieve the objective of **bringing** H3GI's MTRs to a competitive level."* (Emphasis added).
306. Therefore, by placing in the market prices that are likely to be above the competitive level (based on the views set out at paragraphs 303 and 305) H3GI, by its actions, seems to consider pricing above the competitive level to be reasonable.

## 9. FINAL DETERMINATION ON RELIEF

### The relief sought by H3GI

307. In its dispute resolution request, H3GI submits that *"Under Regulation 31 of the Framework Regulations and Regulation 6 of the Access Regulations, ComReg is entitled to determine the dispute between the parties by setting an appropriate MTR for the provision of termination services on TMI's virtual mobile network."*<sup>72</sup>
308. H3GI requests that *"ComReg resolve the dispute between the parties further to Regulation 31 of the Framework Regulations and Regulation 6 of the Access Regulations by setting a rate for the termination of voice calls on TMI's virtual mobile network, which reflects the costs associated with the provision of such mobile termination services by TMI and a reasonable rate of return on investment."*<sup>73</sup>

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<sup>72</sup> H3GI's dispute resolution request of 31 October 2007, p. 6.

<sup>73</sup> H3GI request op. cit., p. 11.

309. In the alternative, H3GI requests that “*ComReg resolve the dispute between the parties by setting TMI’s MTRs at a level, which corresponds to the MTRs of its host network operator, O2... TMI’s MTRs should be set at a level which corresponds to the MTRs of its host network operator, O2.*”<sup>74</sup>
310. The only relief sought by H3GI is a determination by ComReg with regard to the price of TMI’s MTR (albeit that H3GI specified the criteria by which it wished to have this price set).
311. If it is the case that O2’s obligations apply to TMI by virtue of the SMP Designation, in particular section 3.6 thereof, then O2’s obligations would be capable of applying automatically to TMI. The question of ComReg using Regulation 6 of the Access Regulations to set a MTR would not arise in those circumstances.
312. If on the other hand, O2’s obligations under the SMP designation do not apply to TMI, it might be open to ComReg to set a MTR under Regulation 6 of the Access Regulations, i.e. to impose SMP-type obligations (including price control) on non-SMP operators in specific circumstances and subject to the limitations contained in Regulation 6 of the Access Regulations.
313. In this regard, the relevant parts of Regulation 6 of the Access Regulations provide as follows:
- “ (1) The Regulator shall, acting in pursuit of the objectives set out in section 12 of the Act of 2002, encourage and, where appropriate, ensure, in accordance with these Regulations, adequate access, interconnection and interoperability of services in such a way as to –
- (a) promote efficiency,
- (b) promote sustainable competition, and
- (c) give the maximum benefit to end-users.
- (2) Without prejudice to any measures that may be taken in accordance with Regulation 9 regarding undertakings with significant market power, the Regulator may:
- (a) to the extent that it is necessary to ensure end-to-end connectivity, impose obligations referred to in Regulations 10 to 14 inclusive on undertakings that control access to end-users, including in justified cases, the obligation to interconnect their networks where this is not already the case;

[...]

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<sup>74</sup> H3GI request op. cit., p. 11.

- (4) Any obligations imposed by the Regulator pursuant to paragraphs (1), (2) and (3) shall be objective, transparent, proportionate and non-discriminatory and shall be applied in accordance with Regulations 19 and 20 of the Framework Regulations.
- (5) With regard to access and interconnection, the Regulator may exercise its powers under these Regulations, the Framework Regulations, the Authorisation Regulations and the Universal Service Regulations on its own initiative, where justified, or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives and regulatory principles set out in section 12 of the Act of 2002, in accordance with these Regulations and Regulations 19, 20, 31 and 32 of the Framework Regulations.”

### **The options for relief**

314. If the O2 SMP designation does not apply to TMI, then the dispute must be considered in the context of TMI not having been designated as having SMP in the termination market. H3GI seeks a determination which is in effect, an intervention in the form of a price control of a non-SMP operator.
315. A question that arises is whether it is appropriate for ComReg to intervene with respect to price in the context of a dispute determination pursuant to Regulation 31 of the Framework Regulations.
316. If the answer to this question is in the affirmative, then ComReg must consider as to how such an intervention must take place.
317. H3GI cites Regulation 6 (2) (a) of the Access Regulations as the basis on which ComReg might reach a determination pursuant to Regulation 31 of the Framework Regulations and in the form of the relief sought (i.e. the imposition of a price control on a non-SMP operator).
318. In accordance with Regulation 31 (9) of the Framework Regulations, any determination which is in effect an intervention in the form of a price control on a non-SMP operator would also have to take account of the legal limits of the Access Regulations in permitting this course of action.
319. Regulation 14 of the Access Regulations provides for the imposition of price controls, including cost orientation, on undertakings. However, in general the imposition of any such obligations on an undertaking is permissible only where there is a finding that the undertaking has SMP.
320. Regulation 6 (2) (a) of the Access Regulations provides an exception, allowing for the imposition of SMP type obligations (including price control) on non-SMP operators. However, this provision is expressly qualified so that the imposition of such obligations, if appropriate at all, is permissible only “*to the extent that it is necessary to ensure end-to-end connectivity*”.



**Identification of a price range which might form the basis of a dispute determination**

321. If it is appropriate for ComReg to impose a price control on a non-SMP operator in the context of a dispute determination pursuant to Regulation 31 of the Framework Regulations, then in reaching a determination on a price, ComReg has considered the upper and lower bounds for the range of prices that might be imposed by way of a determination. This narrows the range of possible outcomes that ComReg should reasonably consider:

- (i) Basis for upper bound for the range of prices that might be imposed under a determination
- (ii) Analysis of the upper bound for the range of prices that might be imposed by way of a determination
- (iii) Basis for lower bound for the range of prices that might be imposed by way of a determination
- (iv) Analysis of the lower bound for the range of prices that might be imposed by way of a determination

ComReg has considered each of these points.

**(i) Basis for upper bound for the range of prices that might be imposed under a determination**

322. A price for MTR which prevented end-to-end connectivity might on the face of it raise the possibility of ComReg intervening in accordance with the provisions of Regulation 6 (2) (a) of the Access Regulations to set a price control obligation on a non-SMP operator. This is the legal basis that H3GI has identified for ComReg's intervention.

323. Therefore, a price which prevents end-to-end connectivity would appear to represent the upper bound for a price range which ComReg might impose by way of an intervention conforming to Regulation 6 (2) (a) of the Access Regulations, having regard to the limits of its statutory powers and indeed, legal requirements with regard to proportionality.

324. If there was no price proposed by TMI, it would be necessary to carry out a hypothetical analysis as to what level of price would be an impediment to end-to-end connectivity. However, there is a price proposed by TMI and ComReg can carry out an evaluation of the impact on end-to-end connectivity of this price to assess whether it is above the level that inhibits end-to-end connectivity.

**(ii) Analysis of the upper bound for the range of prices that might be imposed by way of a determination**

325. As has been set out at paragraphs 272 to 281, based on market information, a MTR equal to the current H3GI MTR is not a bar to end-to-end connectivity in the Irish market, while TMI's proposed MTR is a bar to end-to-end connectivity in the context of this dispute, as it has been rejected by H3GI. Accordingly, the upper bound for a determination should be H3GI's current MTR as this is the highest level at which there is empirical evidence that the market implements end-to-end connectivity.

**(iii) Basis for lower bound for the range of prices that might be imposed by way of a determination**

326. An assessment of what the lower bound of the price range of prices which ComReg might impose by way of an intervention in accordance with Regulation 6 (2) (a) of the Access Regulations must also properly take into account the limitations on the imposition of obligations under 6 (2) (a) of the Access Regulations previously referred to.

327. ComReg does not have to consider the complete range of prices from zero, but can assess the lower bound against the price proposed by H3GI, which is the O2 MTR.

**(iv) Analysis of the lower bound for the range of prices that might be imposed by way of a determination**

328. If ComReg determined a price for TMI's MTR below the upper bound, but above what H3GI considered to be reasonable and H3GI refused to route traffic to TMI at this price (even if H3GI's position was in fact unreasonable) then the price would have failed to ensure end-to-end connectivity. Based on a narrow interpretation of 6 (2) (a) of the Access Regulations, ComReg would be entitled to intervene to set a price that would *ensure* end-to-end connectivity [Emphasis added]. However, this interpretation would appear to render meaningless the concept of a dispute determination on price, as the only determination that would ensure connectivity from H3GI's perspective would be to set a price acceptable to H3GI - as H3GI could choose not to route traffic at any other price. Accordingly, ComReg is of the view that the concept of a lower bound for a price determination must mean the price that is determined by ComReg as being reasonable in the circumstances of the dispute (i.e. the determined price) as opposed to the price that H3GI considers acceptable.

**Other issues**

329. ComReg considered these other issues:

- (i) ComReg's role in the formulation of the TMI proposed MTR; and
- (ii) The intent of H3GI.

ComReg has examined each of these points in turn.

**(i) ComReg's role in the formulation of the TMI proposed MTR**

330. In various correspondences with H3GI, TMI asserted that its proposed MTR had been agreed, or otherwise approved by ComReg. H3GI has raised this issue seeking clarification of ComReg's role.
331. In a number of meetings prior to TMI's market entry there was some discussion between ComReg and TMI representatives which covered amongst other issues, TMI's MTR.
332. ComReg was not in a position to approve TMI's MTR, unless TMI had SMP at the relevant time, or unless a dispute had been notified to ComReg in respect of TMI's MTR, or unless ComReg used Regulation 6 of the Access Regulations to act of its own initiative at the relevant time – none of which was the case.
333. ComReg did express its concern that TMI's initial proposal for a MTR – which was higher than the highest currently in the market would be undesirable. That was the fullest extent of ComReg's role in the matter. ComReg was within its rights to express this concern and indeed, it is not surprising that as a regulator, ComReg might be expected to in general, to favour lower prices and to communicate this to operators, as and when the occasion required.
334. ComReg did not approve, or otherwise agree to TMI's proposed MTR. ComReg categorically refutes any suggestion to the contrary. Moreover, ComReg had in fact no power to approve or agree the TMI's MTR in the manner suggested by TMI. In order to have any say over TMI's MTR, ComReg would at the relevant time had to have exercised its powers under either Regulation 6 of the Access Regulations, or under the dispute resolution provisions contained in Regulation 31 of the Framework Regulations. An approval or agreement (even if it had been given or reached as TMI suggests) on any other basis would therefore have been *ultra vires*.

**(ii) The intent of H3GI**

335. It has been accepted by both parties that H3GI has a right to request interconnection from TMI and that TMI has an obligation to negotiate interconnection. It is undisputed by the parties that there has been a disagreement on the price element of the negotiation and this is reflected in the scope of the dispute.
336. In its response of 7 January 2008, TMI characterised the H3GI dispute request as “unnecessary” and that H3GI sought direct interconnection for “non-commercial reasons”. TMI referred to H3GI's intent in requesting resolution of the dispute. By intent, ComReg understands this to mean H3GI's possible aim or motive.
337. The rights and obligations are not expressed to be dependent on, or attenuated by the intent of the party requesting dispute resolution. To the extent that TMI claims that the dispute was designed to “force the hand of ComReg”, ComReg does not see why this should affect the manner in which it

makes its determination, or affect its ability to do so. If H3GI has submitted a valid dispute and ComReg accepts it, and H3GI thereby becomes entitled to have its request for relief examined, then the question of intent is immaterial and should not be of any concern to ComReg, unless there is a very clear reason for doing otherwise. Put simply, the request for dispute resolution should be assessed on its merits. ComReg does not see that there is a compelling reason in this dispute to examine or question the issue of H3GI's intent.

**Statutory policy considerations in this final determination**

338. When making a determination under Regulation 31 of the Framework Regulations, Regulation 31 (6) provides that ComReg must have regard to section 12 of the Act of 2002 which provides that:

“The objectives of the Commission in exercising its functions shall be as follows-

12. (1)(a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities-

- (i) to promote competition,
- (ii) to contribute to the development of the internal market, and
- (iii) to promote the interests of users within the Community,

(b) to ensure the efficient management and use of the radio frequency spectrum and numbers from the national numbering scheme in the State in accordance with a direction under section 13, and

(c) to promote the development of the postal sector and in particular the availability of a universal postal service within, to and from the State at an affordable price for the benefit of all users.

(2) In relation to the objectives referred to in subsection (1) (a), the Commission shall take all reasonable measures which are aimed at achieving those objectives, including-

- (a) in so far as the promotion of competition is concerned-
  - (i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality,
  - (ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector,

- (iii) encouraging efficient investment in infrastructure and promoting innovation, and
  - (iv) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources,
- (b) in so far as contributing to the development of the internal market is concerned-
  - (i) removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level,
  - (ii) encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity,
  - (iii) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services and associated facilities, and
  - (iv) co-operating with electronic communications national regulatory authorities in other Member States of the Community and with the Commission of the Community in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of Community law in this field, and
- (c) in so far as promotion of the interests of users within the Community is concerned-
  - (i) ensuring that all users have access to a universal service,
  - (ii) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved,
  - (iii) contributing to ensuring a high level of protection of personal data and privacy,

- (iv) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services,
  - (v) encouraging access to the internet at reasonable cost to users,
  - (vi) addressing the needs of specific social groups, in particular disabled users, and
  - (vii) ensuring that the integrity and security of public communications networks are maintained.
- (3) In carrying out its functions, the Commission shall seek to ensure that measures taken by it are proportionate having regard to the objectives set out in this section.
- (4) In carrying out its functions, the Commission shall, without prejudice to subsections (1), (2) and (3), have regard to policy statements, published by or on behalf of the Government or a Minister of the Government and notified to the Commission, in relation to the economic and social development of the State.
- (5) In carrying out its functions, the Commission shall have regard to international developments with regard to electronic communications networks and electronic communications services, associated facilities, postal services, the radio frequency spectrum and numbering.
- (6) The Commission shall take the utmost account of the desirability that the exercise of its functions aimed at achieving the objectives referred to in subsection (1)(a) does not result in discrimination in favour of or against particular types of technology for the transmission of electronic communications services.
- (7) In this section, "national numbering scheme" means the scheme administered by the Commission which sets out the sequence of numbers or other characters used to route telephony traffic to specific locations."

339. This dispute concerns the provision of electronic communications networks, electronic communications services and associated facilities - specifically, call termination on mobile networks. ComReg has taken particular account of sections 12 (1) (a) (i) to (iii) of the Act of 2002

as being relevant to this dispute. As noted above sections 12 (1) (a) (i) to (iii) of the Act of 2002 provide that the objectives of the ComReg in exercising its functions, in relation to electronic communications, shall be as follows:

- “ (i) to promote competition,
- (ii) to contribute to the development of the internal market, and
- (iii) to promote the interests of users within the Community”

340. ComReg considers that in relation to these objectives and in reaching this final determination that it has taken all reasonable measures contemplated by section 12 (2) of the Act of 2002 which are aimed at achieving those objectives. For example, in relation to the promotion of competition under section 12 (1) (a) (i) of the Act of 2002 (ensuring users derive maximum benefit in terms of choice, price and quality) ComReg is of the view that the entry of TMI to the Irish market place has extended the ability of consumers to make purchasing decisions based on a wider range of choice, price and quality. A determination which had the effect of damaging TMI’s business plan would have the potential effect of limiting these consumer benefits.
341. In considering the provisions of section 12 (2) (a) (ii) of the Act of 2002 (ensuring no distortion or restriction of competition) the analysis at paragraphs 282 to 287 suggests that an intervention to lower the TMI asking price would have proportionately a more negative impact on TMI than H3GI. Furthermore, the position of H3GI vis-à-vis the other competitors in the market is not damaged by the proposed TMI MTR (as set out at paragraph 270). While the absolute amount representing the difference between TMI’s proposed MTR and a MTR based on O2’s rate is not insignificant (using H3GI’s estimate of €██████████ ⌘ [Confidential to H3GI] over three years) when viewed as a proportion of the projected overall revenues for both parties (██████████% ⌘ [Confidential to H3GI] and ██████████% ⌘ [Confidential to H3GI] for TMI and H3GI respectively) and considering the relative positions of the parties in the market (H3GI is a more established operator than TMI) ComReg is of the view that it is not sufficient to distort competition between the parties. In addition, any determination as to price would be limited to the price between the parties to the dispute. Therefore, a determination which lowered the price for H3GI would create a distortion between H3GI and other MNOs, as the higher price proposed by TMI is actually charged to other mobile operators.
342. In considering the provisions of section 12 (2) (a) (iii) of the Act of 2002 (encouragement of efficient investment in infrastructure and promotion of innovation) ComReg recognises that investment in competing infrastructures is likely to give rise to sustainable competition. There are already four competing mobile networks (H3GI, Vodafone, O2 and the Eircom group). At this time, no further licensing of MNOs is envisaged by ComReg. The hosting of a MVNO allows a mobile network operator to maximise the usage of its network; thus enabling it to optimise its

investment. In the absence of new infrastructure entrants in the mobile market, the entry of MVNOs has the potential to introduce innovative retail propositions. In that context, MVNOs are a means to increase effective competition in the retail mobile market. Moreover, a final determination by ComReg that inhibited or damaged the business case for MVNO entry would not be conducive to the promotion of innovation. It could also inhibit the optimisation of cost recovery for those operators who had built their own networks. It should be noted that H3GI is obliged, as a condition of its licence, to offer to host a MVNO on defined terms. ComReg also notes that Eircom has entered the mobile market as a reseller of Meteor's airtime, and An Post has recently announced that it intends to enter the market as a reseller of Vodafone's airtime.

343. In relation to section 12 (1) (a) (ii) of the Act of 2002 (the development of the internal market) ComReg considers that an analysis and a final determination by ComReg which takes too narrow a view of the dynamics of MVNO entry, could exacerbate the existing comparatively low incidence of MVNOs service providers in Ireland, compared to other EU Member States. Annex 1 contains extracts from the Progress Report on the Single European Electronic Communications Market 2007 (13<sup>th</sup> Report) published by the European Commission, which describe the position regarding MVNO and service provider entry and its effect on the market in the UK, Spain, Portugal, Italy, Germany and France.
344. In considering the provisions of section 12 (2) (b) (iii) of the Act of 2002 (ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services and associated facilities) ComReg is cognisant that it has adopted an approach whereby it does not automatically apply cost orientated price controls to new entrants,<sup>75</sup> or operators with low market share with immediate effect once a regulatory intervention on price has been identified as being appropriate. ComReg believes that such an approach should be on a case by case basis and should take account of the overall market position of the operator in question, as well as the level of the prices that are already in the market. In this regard, ComReg has exercised forbearance in the implementation of cost orientation remedies, opting instead for price caps and glide paths with market or time based thresholds for the commencement of such controls. Therefore, if ComReg were to impose a cost orientation obligation on TMI without good reason (which as set out above does not exist) this would not be consistent with the provisions of section 12 (2) (b) (iii) of the Act of 2002. However, it should be noted that having proper regard to this consideration would not as a matter of course require ComReg to carry out a SMP analysis prior to setting a price control. Subject to the limitations contained therein, the Access Regulations provide that ComReg can impose a price control in circumstances other than in the context of SMP. One of these circumstances is in the context of

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<sup>75</sup> As set out in ComReg Document 06/08 "Market Analysis -Wholesale voice call termination on Hutchison 3G Ireland's mobile network."



Regulation 31 of the Framework Regulations, under which ComReg is making this final determination.

345. In considering the provisions of section 12 (3) of the Act of 2002 (that measures taken by ComReg are proportionate having regard to the objectives set out) ComReg has taken account of the analysis of the impact of a MTR based on TMI's proposed price, the commercial nature of the interaction between the parties, whether H3GI could have a legitimate expectation that TMI's price should be cost oriented in the absence of a SMP finding on TMI, the fact that the proposed price has been accepted by the other operators in the Irish market, the analysis that a final determination based on TMI's proposed price would not distort competition and the TMI cost base relative to its proposed price.
346. Having considered these matters, ComReg is of the view that a final determination that obliged TMI to move to cost oriented prices would not be proportionate with respect to TMI. Similarly, ComReg is of the view that a final determination that took no account of the relative pricing between TMI's MTR and MTRs generally and recently in the market would not be proportionate with respect to H3GI. A final determination that set a level for TMI's MTR at or about its proposed price, would place only a limited regulatory burden on TMI. By the same token, such a determination would not place H3GI at a material disadvantage in the market. Given that the dispute is between H3GI and TMI and that apart from TMI, H3GI has the highest MTR in the market, ComReg believes that a final determination that aligned TMI's MTR with H3GI's current MTR would properly balance the interests of the parties. Such a form of regulatory intervention is the minimum that ComReg can make to arrive at a final determination that effectively resolves this dispute. A regulatory intervention in excess of the minimum necessary to effectively resolve the dispute would, in ComReg's view, not be proportionate.
347. In relation to the provisions of section 12 (4) of the Act of 2002 (having regard to policy statements, published by or on behalf of the Government or a Minister of the Government and notified to ComReg, in relation to the economic and social development of the State) on 26 of March 2004 the Minister for Communications, Marine and Natural Resources issued a General Policy Direction on Competition to ComReg pursuant to Section 13 of the Act of 2002. This General Policy Direction on Competition provides that:

“ComReg shall focus on the promotion of competition as a key objective. Where necessary, ComReg shall implement remedies which counteract or remove barriers to market entry and shall support entry by new players to the market and entry into new sectors by existing players. ComReg shall have a particular focus on:

- market share of new entrants;

- ensuring that the applicable margin attributable to a product at the wholesale level is sufficient to promote and sustain competition;
- price level to the end user;
- competition in the fixed and mobile markets;
- the potential of alternative technology delivery platforms to support competition.”

348. In the present circumstances, it is ComReg’s view, based on the analysis set out in paragraph 341, that a final determination which set a price for MTR at the level of O2’s MTR would have a proportionately larger impact on TMI (an undertaking entering the market) as against H3GI (an undertaking already active in the market). Therefore, such a determination would not have the effect of supporting entry by new players. As has been set out at paragraph 343, international experience indicates that the entry of MVNOs can increase competition in the mobile market. ComReg is required by the General Policy Direction on Competition to have special focus on competition in this market and a final determination that inhibited the entry of new players would have the effect of limiting potential competition in this market.

349. In considering the provisions of section 12 (5) of the Act of 2002 (having regard to international developments of electronic communications) ComReg notes the contents of the Progress Report on the Single European Electronic Communications Market 2007 (13<sup>th</sup> Report) published by the European Commission. Extracts of this report, outlining the situation regarding MVNO and service provider entry and its effect on the market in the UK, Spain, Portugal, Italy, Germany and France are included in Annex 1. These extracts demonstrate an increase in the entry of MVNOs and mobile resellers in these markets and demonstrate that in a number of markets the increased competition has had a positive impact on the range of propositions offered to the retail market and that it has also had a positive impact, insofar as it has lowered retail prices. A number of these extracts show that MVNO entry is perceived as being difficult in the face of the activities of existing network operators. Therefore, ComReg is of the view that a final determination which negatively impacted the business case of a MVNO during its market entry phase, would risk not promoting a situation where there were new entrants in the form of MVNOs or resellers. Running this risk could mean forgoing the potential for the benefits to Ireland that have been seen in other markets.

350. In respect of other relevant international developments, ComReg notes the ruling of the Austrian National Regulatory Authority which, on foot of a dispute, set the MTR of a MVNO to that of its host operator.<sup>76</sup> ComReg also notes the comments of the EU Commission that in reaching its

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<sup>76</sup> AT/2004/0044, SG Greffe (2004) D/201834.

decision “...TKK draws some preliminary conclusions with regard to a potential market for call termination on the network of an MVNO such as Tele2. The EU Commission emphasises that any preliminary findings which form part of the dispute resolution should not prejudge the outcome of the market analysis and SMP assessment in the market for call termination on individual mobile networks”.<sup>77</sup> In ComReg’s analysis of this dispute, it has not drawn such “preliminary findings” and has adopted an approach which does not prejudge the outcome of any future market analysis and SMP assessment in the market for call termination on individual mobile networks on TMI’s network.

351. Furthermore, ComReg notes the more recent rulings of the CAT in the UK<sup>78</sup> which suggests that a regulator has wide jurisdiction in determining a dispute and that it can determine prices on foot of a dispute, other than on the basis of cost orientation. ComReg also notes in passing that Hutchison 3G UK was granted leave to appeal the ruling of the CAT quashing Hutchison 3G UK’s appeal of Ofcom’s decision that found that Hutchison 3G UK had SMP on the wholesale market for voice call termination on its mobile network in the UK. In granting leave to appeal ([2008] CAT 16) the CAT stated amongst other things that “*This point raises the same argument as is raised under Grounds one and two, namely that Ofcom’s dispute resolution powers effectively prevent H3G from setting a price “at an excessively high level” so that there is no risk of excessively high pricing...*” and that “*If H3G is right that on a proper construction of Ofcom’s dispute resolution powers H3G is precluded from charging a price appreciably above the competitive level*”. Therefore in granting leave to appeal the CAT had reference to arguments that related to the upper bound of price. That upper bound was not determined by cost orientation, but by excessive pricing by reference to a price appreciably above the competitive level. Therefore, even though the original CAT ruling was under appeal, the grounds for the appeal did not envisage a situation where dispute determinations on price must be on a cost oriented basis. ComReg notes that Hutchison 3G UK’s appeal of Ofcom’s decision that found it had SMP on the wholesale market for voice call termination on its mobile network in the UK, was dismissed in a unanimous decision by the English Court of Appeal on 16 July 2009.<sup>79</sup>
352. In considering the provisions of section 12 (6) of the Act of 2002 (no discrimination in favour of or against particular types of technology) ComReg is of the view that its proposed determination does not discriminate between technologies. Mobile voice call termination can be effected using either 2G or 3G technologies. A similar deal could have been struck by TMI using the O2 (or

<sup>77</sup> Case AT/2004/0044: dispute settlement with regard to access and interconnection European Commission comments pursuant to Article 7(3) of Directive 2002/21/EC dated 19 April /2004 – ([http://circa.europa.eu/Public/irc/info/ecctf/library?l=/commissionsdecisions/commission\\_decisions\\_1/2004\\_0044\\_depdef/\\_EN\\_1.0\\_&a=d](http://circa.europa.eu/Public/irc/info/ecctf/library?l=/commissionsdecisions/commission_decisions_1/2004_0044_depdef/_EN_1.0_&a=d))

<sup>78</sup> Hutchison 3G UK Limited v Office of Communications [2008] CAT 11 and T-Mobile (UK) Limited, British Telecommunications plc, Hutchison 3G UK Limited Cable & Wireless UK v Office of Communications [2008] CAT 12.

<sup>79</sup> Hutchison 3G UK Limited v The Office of Communications [2009] EWCA Civ 683.

other operator) 3G network for call delivery where there is 3G coverage. In fact, the Services Agreement between TMI and O2 makes explicit provision for the extension of the services to the use of the O2 3G network. In this case, the O2 3G network could be used for call delivery where there is 3G coverage. The issue is not the technology used to carry the call, but the effectiveness of Tesco's negotiation for call conveyance with any one of the MNOs (in this case O2) which has conferred on TMI a particular cost base for such conveyance.

353. A further statutory and policy consideration is that in relation to the treatment of confidential information provided to ComReg by the parties in this dispute. ComReg has an express statutory duty, pursuant to Regulation 21 of the Framework Regulations, to "*maintain and accept as confidential any information provided by an undertaking expressed by it to be confidential, except where the Regulator has good reason to consider otherwise.*" In this dispute both parties provided documentary submissions, in relation to which confidentiality was claimed. It has been argued by one party that, its advisers should have sight of the other parties' confidential documentation, via the establishment of a confidentiality ring. ComReg has considered this request carefully, but does not believe that it is necessary to establish a confidentiality ring, or that doing so would be in accordance with its statutory duties. ComReg's approach has been that, where confidential information has had a bearing on this final determination, ComReg has provided information on the factors taken into account; the type of evidence considered; the methodology used and factors taken into account in analysing the evidence; how any analysis relates explicitly to the issues at stake and the detailed conclusions. It is ComReg's view that this approach ensures that confidentiality is maintained and ensures that ComReg provides reasons for its final determination that are clear, adequate and intelligible to all parties. ComReg has not identified or been given a good reason (or a sufficiently good one) by the requesting party to justify the establishment of a confidentiality ring. Therefore, ComReg will maintain the confidentiality of information that has been submitted to it as confidential. ComReg notes that a decision to this effect was communicated to the parties to this dispute on 29 July 2009.

#### **Other considerations in formulating a determination**

354. Regulation 31 (1) of the Framework Regulations requires ComReg to make a determination "*aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute*". ComReg has set out its analysis of the form of a final determination to effectively resolve the dispute at paragraphs 117 to 127, above. This analysis concluded that a final determination which set a price between the parties was the only form of determination which would effectively resolve the dispute.
355. ComReg has also considered whether a form of determination which aligned the TMI MTR with the H3GI MTR, as existed at the time of the dispute, would be fair and reasonable as between the

parties. In considering this, ComReg took account of the margin over costs that such an approach would yield to TMI. ComReg balanced this as against the fact that TMI is not otherwise subject to a price control regulation on this price and that such prices are commercially negotiated.

356. Notwithstanding the level of the margin available to TMI, the analysis set out at paragraph 263 shows that prices in the range proposed by TMI are generally accepted in the market. The analysis at paragraphs 288 to 292 shows that in a commercial context there were no material commercial drivers for TMI to agree a rate with H3GI lower than that already accepted by the market. The analysis set out at paragraphs 282 to 287 shows that the margin available to TMI at its proposed MTR (and based on H3GI's estimates) is not sufficient in ComReg's view to materially and negatively impact H3GI. The analysis at paragraphs 293 to 296 shows that in the context of TMI not being subject to a SMP finding, that H3GI could have no legitimate expectation that TMI's pricing would be constrained by regulation to the extent that it should or would be cost oriented.
357. The analysis at paragraph 285 shows that the proposed TMI asking price has a relatively larger positive benefit to TMI, compared to the negative impact on H3GI. In addition, based on the Eircom STRPL, with the exception of TMI, H3GI has the highest MTR in the Irish market.
358. Considering these factors, ComReg is of the view that a determination which ensures TMI's MTR is equivalent to an MTR which exists in the market at the time of the dispute and has been shown to ensure end-to-end connectivity (H3GI's MTR) balances the positions of the parties and is fair and reasonable.
359. ComReg notes that the proposed determination aimed at resolving this dispute, communicated to the parties on 6 February 2009 in the Draft Determination, was as follows:
- “1. The price for TMI's MTR as between TMI and H3GI shall be a maximum of 13.7 cents per minute based on a weighted average of traffic distribution or as otherwise specified by ComReg in accordance with (6) below.
  2. For the purpose of this [Draft] Determination, the TMI MTR shall be calculated based on TMI's terminating traffic distribution in the twelve months prior to the effective date of the determination and shall be revalidated on each six month anniversary of the effective date of the determination. Such revalidation shall be based on the invoiced amounts for TMI's termination of H3GI's traffic whether directly or indirectly routed.
  3. In order for TMI to revalidate the MTR, H3GI will provide TMI with details of the traffic volumes and time of day splits it has been invoiced for in connection with call termination on TMI for traffic delivered via transit operators.

4. The MTR derived from each revalidation shall apply until the next revalidation and no retrospection will apply.
5. This [Draft] Determination shall not prevent TMI from setting a price lower than the determined price referred to in (1) above.
6. In the event of a material change in the market conditions underlying the setting of the determined price either party may remit the issue to ComReg for consideration.”

360. With regard to Point 1 of the determination shown in paragraph 359 above, pursuant to Regulation 6 (2) (a) of the Access Regulations. ComReg’s power to impose a price on an undertaking which has not been designated as having SMP is limited to setting a price which ensures end-to-end connectivity. Therefore, ComReg does not have the power to set a price lower than the highest price currently in the market at which ensures end-to-end connectivity. The revised MTRs proposed by TMI to H3GI and ComReg on 27 November 2009, effective from 1 December 2009 approximate to the highest price currently in the market at which ensures end-to-end connectivity and are therefore at a price level which would be at the limit of ComReg’s power to set, were it necessary for ComReg to do so. It is therefore ComReg’s position that as the have been implemented voluntarily by TMI, unless these prices are withdrawn, it is ComReg’s view that no further regulatory intervention is necessary to resolve this dispute.
361. With regard to Points 2 - 6 of the proposed determination shown in paragraph 359 above, since the draft determination was provided to the parties on 6 February 2009, ComReg’s legal basis for setting a price has remained unchanged in that its *vires* is limited to setting a price to the extent necessary to ensure end-to-end connectivity and that to determine a price which is lower than the highest price at which end-to-end connectivity is currently occurring in the market (i.e. H3GI’s current MTR), would be beyond the powers conferred on ComReg by Regulation 6 (2) (a) of the Access Regulations.
362. Following to the conclusion of H3GI’s appeal of ComReg Decision D05/08<sup>80</sup> on 21 April 2009, H3GI has been designated with SMP. Pursuant to the SMP designation, H3GI is now subject to obligations of price control.
363. ComReg also noted that the current level of H3GI MTRs (as of the date of this final determination) were in the market prior to H3GI’s SMP designation and were therefore

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<sup>80</sup> Decision Notice and Decision Instrument: Designation of SMP and SMP Obligations, Market Analysis: Voice Call Termination on Hutchison 3G Ireland’s Mobile Network (Decision No: D05/08, Document No: 08/92, Date: 1 December, 2008).

commercially negotiated MTRs as opposed to MTRs published in compliance with regulatory obligations of price control.

364. It is ComReg's view that a determination which linked the future MTRs of an undertaking which has not been designated with SMP (i.e. TMI) to the future MTRs of an undertaking subject to an SMP obligation of price control (i.e. H3GI), would be beyond the powers conferred on ComReg by Regulation 6 (2) (a) of the Access Regulations.
365. Pursuant to Regulation 6 (2) (a) of the Access Regulations, ComReg's power to impose a price on an undertaking which has not been designated as having SMP is limited to setting a price which ensures end-to-end connectivity. Therefore, ComReg does not have the power to set a price lower than the highest price currently in the market at which end-to-end connectivity occurs. The revised MTRs proposed by TMI to H3GI and ComReg on 27 November 2009, effective from 1 December 2009 approximate to the highest price currently in the market at which end-to-end connectivity occurs and are therefore at a price level which would be at the limit of ComReg's power to set, where it necessary for ComReg to do so. It is therefore ComReg's position that as they have been implemented voluntarily by TMI, unless these prices are withdrawn, it is ComReg's view that no further regulatory intervention is necessary to resolve this dispute.
366. ComReg noted that, in accordance with its price control obligation, H3GI is obliged to gradually reduce its MTRs to 7.99 cent per minute by 1 December 2013. As published in the ComReg Information Notice of 29 May 2009<sup>81</sup>, H3GI voluntarily committed to make a further reduction in its MTRs to a maximum of 5 cent per minute, by 1 January 2013. H3GI's MTRs are to be reduced in a stepped approach beginning on 1 January 2010 when H3GI will reduce its current average MTR which was commercially negotiated and pre-dates H3GI's SMP designation, to an average MTR which is the result of its SMP designation and subsequent price control obligations. This is not inconsistent with the circumstances discussed at paragraphs 361 to 365.

### **Form of final determination**

367. ComReg set out, at paragraphs 128 to 173 and 210 to 252, its consideration of the applicability of O2's obligations to TMI. ComReg concluded that regulatory obligations imposed by ComReg pursuant to O2's SMP designation, do not apply to TMI.
368. ComReg set out, at paragraphs 117 to 127, its consideration of the options for relief including the relief sought by H3GI. ComReg concluded that the only realistic option for an effective, certain and viable resolution to the dispute, in the scenario where O2's obligations do not apply, is to determine the dispute by setting a final price for TMI's MTR. This approach is consistent with the relief sought by H3GI.

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<sup>81</sup> Information Notice: Reductions in mobile termination charges by Hutchison 3G (Ireland) Limited will benefit consumers (Document No: 09/34r, Date: 29 May 2009).

369. ComReg set out, at paragraphs 314 to 318, its consideration of the legal basis for setting a final price for TMI's MTR. ComReg concluded that if the O2 SMP designation does not apply to TMI, then the dispute must be considered in the context of TMI not having been designated as having SMP in the termination market. In accordance with Regulation 31 (9) of the Framework Regulations, any determination which is in effect an intervention in the form of a price control on a non-SMP operator would also have to take account of the of the Access Regulations.
370. ComReg set out, at paragraphs 319 to 320, its consideration of the Access Regulations with regard to a legal basis for setting a final price for TMI's MTR. ComReg considered that Regulation 14 of the Access Regulations provides for the imposition of price controls, including cost orientation, on undertakings with SMP and is therefore not applicable in this instance. Regulation 6 (2) (a) of the Access Regulations provides an exception, allowing for the imposition of SMP type obligations (including price control) on non-SMP operators. This provision is expressly qualified that the imposition of obligations, is permissible only "*to the extent that it is necessary to ensure end-to-end connectivity*". ComReg concluded that, in setting a final price for TMI's MTR to resolve this dispute, its *vires* was limited to setting a price to the extent necessary to ensure end-to-end connectivity. ComReg also concluded that to determine a price which is lower than the highest price at which end-to-end connectivity is currently occurring in the market (i.e. H3GI's current MTR), would be beyond the powers conferred on ComReg by Regulation 6 (2) (a) of the Access Regulations.
371. ComReg set out, at paragraphs 262 to 281, its consideration of the MTR proposed by TMI on 27 November 2009. Based empirical evidence from the market, ComReg is of the view that the price level of H3GI's current MTR (the current highest in the market) is not a bar to end-to-end connectivity. Furthermore, based on call traffic profiles for a 12 months period to June 2009, the average MTR proposed by TMI is within 0.4% of the average H3GI MTR. ComReg concluded that the MTR proposed by TMI on 27 November 2009 is not a bar to end-to-end connectivity.
372. ComReg notes that this determination does not take account of future developments in the market (including but not limited to the potential for changes in H3GI's MTR or a market analysis of TMI in respect of call termination). ComReg is of the view that a determination cannot readily be constructed which would set a price which takes account of all possible material changes in the market.
373. It must be stressed, that this final determination only addresses (and can only address) the matters of dispute between the parties to the dispute. Accordingly, it is only concerned with the resolution of the dispute between the parties thereto and not the determination of TMI's MTR generally in the market or with respect to other operators in the market seeking to interconnect with TMI.



**10. FINAL DETERMINATION**

374. In accordance with Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2003 as amended; the Communications Regulation Act, 2002 as amended; Commission for Communications Regulation (“ComReg”) Decision Notice D18/03; and for the purpose of this final determination in the dispute between Hutchison 3G Ireland Limited (“H3GI”) and Tesco Mobile Ireland Limited (“TMI”), ComReg hereby determines that the revised Mobile Termination Rates (“MTRs”) proposed by TMI to H3GI and ComReg on 27 November 2009, effective from 1 December 2009, are consistent with the price necessary to resolve this dispute. These MTRs have been implemented by TMI on a voluntary basis and, unless they are withdrawn, no further regulatory intervention is necessary to resolve this dispute.

**John Doherty**

**Chairman**

**Commission for Communications Regulation**

**Dated this the 18<sup>th</sup> day of December 2009**

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## **ANNEX 1**

### **Extracts from the Progress Report on the Single European Electronic Communications Market 2007 - (13th Report) published by the European Commission**

#### ***UK***

Mobile penetration was 119% in 2007 (up from 109% in 2006) with 72.2 million subscriptions. The take-up of 3G progressed to reach 8.3 million users, or 11.6% of all mobile subscribers, in October 2007. The four established network operators continued to have market shares within a few percentage points of each other, while the new entrant was the largest 3G operator in terms of subscribers. The mobile market has seen the biggest falls in prices due to the strong price competition between the providers to attract users as market growth slows. The United Kingdom also has a relatively large number of mobile virtual network operators (MVNOs) and other service providers active on the mobile market, which provide services to a growing number of customers.

#### ***Spain***

The Spanish mobile market is continuing to grow, albeit at a slower pace than in previous years and, as a result, the mobile penetration rate (110.4%) was below the EU average (111.8%) as at October 2007. Competition in the mobile market is strong, with the most intensive use of number portability in the EU as a competition tool (350 000 mobile numbers ported per month) and three of the main European mobile players present in Spain. During the last year, the number of market players in the mobile market significantly increased: the fourth UMTS licence-holder and the seven MVNOs launched commercial services.

Seven new entrants have launched mobile services following the access obligation imposed by the regulator on the three MNOs present at the time and which have not required further regulatory intervention. The appeals, to the national courts, lodged by the MNOs against the regulator's finding of joint dominance are still pending. So far the new entrants' market share has been marginal, and most of the new entrants are mobile service providers, although some cable operators are MVNOs with an infrastructure based business model.

#### ***Portugal***

The NRA has not yet notified the mobile access market, but it is evaluating the possible existence of joint dominance in this market. In addition to three commercial agreements signed during 2006 with mobile service providers, the postal incumbent launched commercial services in November 2007 following the signature of an MVNO agreement.

### ***Italy***

Furthermore, converged fixed-mobile services have started to be widely commercialised by the incumbent and by one mobile operator. All fixed non-integrated operators are entering the mobile market as service providers, so that many other products are expected to be launched in 2008.

In 2007, mobile networks operators concluded several reseller/enhanced service provider (ESP) agreements with some important retail chains, the National Post and three fixed operators, some of which exceeded 100 000 subscribers by end-2007. However, alternative fixed operators have maintained that the current technical and economic conditions applied by mobile network operators do not allow them to offer competitive integrated fixed-mobile services. AGCOM pointed out that it has not received any formal complaints on the matter.

### ***Ireland***

In 2007 the first mobile virtual network operator (MVNO) entered the Irish market. Market entry took place later than initially expected owing to technical number portability issues.

### ***Germany***

Mobile penetration was at 113.3% in 2007 (up from 101% in 2006) with 93.3 million subscriptions. There were four mobile network operators, seven main mobile service providers and one MVNO in the market. The overall market share of the incumbent fixed network operator's subsidiary was 37.0% in 2007 (36.9% in the year before). The main competitor held a market share of 34.9% (35.6% in the year before). The third and fourth mobile network operators together had 28.2% market share.

Further new low-cost mobile operators entered the market, offering a minimum service and an easy tariff system, with just one price for calls to all national mobile and fixed line networks and SMS and particularly low costs for on-net calls. A popular newspaper and almost all discount supermarket chains now offer mobile telephony products as resellers. All but one mobile network operator started subsidiary low-cost brands with only a minimum

service. As a consequence, tariffs have continued to fall. Prices for mobile flat rates have also gone down in the reporting year.

***France***

Thirteen MVNOs were on the market as at October 2007, none of them having control over network elements. This figure does not include mere resellers of the MNOs' products. Market shares have only slightly increased, from 1.99% in September 2006 to 4.2% in October 2007, this figure including MVNOs owned by mobile operators. It seems clear that MVNOs do not exercise much competition pressure on the mobile market. One reason could be the restrictive conditions imposed by the mobile operators for providing access to their networks, in the absence of any regulatory measure on access to mobile networks on this market.