



Commission for
Communications Regulation

Decision Notice & Decision Instrument –
Designation of SMP & SMP Obligations

**Market Analysis – Interconnection Market
Review Fixed Wholesale Call Termination
Services**

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1 Introduction

- 1.1 The new EU electronic communications regulatory framework requires that ComReg define relevant communications markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.¹ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.
- 1.2 The Framework Regulations further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes place as soon as possible after the adoption, or subsequent revision, of the European Commission's Recommendation.² In carrying out market definition and market analysis, ComReg must take the utmost account of the European Commission's Recommendation and the SMP Guidelines.³
- 1.3 The following is a brief summary of events leading to the publication of this Decision Notice:
 - The review of the wholesale call termination on individual public telephone networks provided at a fixed location commenced with the publication of a national consultation on 22 October 2004.⁴
 - On 20 May 2005, ComReg notified the European Commission and published its response to consultation.⁵ The notified measures were accepted by the European Commission.⁶ ComReg did not publish a final decision on foot of the notified measures at that time.
 - On 19 January 2007, ComReg issued a consultation document in relation to call termination at a fixed location (ComReg Document 07/03). As part of this consultation document, ComReg re-examined and updated the market analysis contained in the first notification to the Commission. This allowed ComReg to fully consider any change in the market from the time of the first review.
 - Having considered the responses to the above consultation, ComReg published a response to consultation document and notified this to the European Commission on 17 October 2007 (ComReg Document 07/83), as required by Regulation 20 of the Framework Regulations. This response to consultation included a draft decision instrument and

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

² European Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services

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

⁴ ComReg (2004) Market Analysis - Interconnection Markets, Document 04/106a, October.

⁵ ComReg (2005) Market Analysis - Interconnection Markets, Response to Consultation and Consultation on Draft Decisions, Document 05/37a, May.

⁶ Comments pursuant to Article 7(3) of the Framework Directive. Brussels, 17 June 2005

ComReg called for submissions on the draft text of the decision instrument. ComReg received comments on the draft measure from two respondents.

- The notified measures were accepted by the European Commission with comments, in correspondence to ComReg dated 16 November 2007. Pursuant to Article 7 (3) of the Framework Directive,⁷ the European Commission examined the notification and communicated that it would like to invite ComReg to consider a number of modifications to the proposed price control remedy on OAOs, and to also impose an access remedy on OAOs.
- 1.4 ComReg adopted the approach set out in the European Commission’s Recommendation as its starting point for defining the relevant product market, such that the review was concerned with the market for call termination on individual fixed networks. ComReg formed the view that there were seven relevant markets corresponding to the networks of operators providing termination services in Ireland. These operators are: Eircom, BT Ireland, Verizon, Ntl/Chorus, Colt Telecom, Smart Telecom and Magnet.
 - 1.5 ComReg conducted an analysis of the relevant markets to decide whether or not they are effectively competitive. ComReg analysed a wide range of criteria including market share, existing and potential competition, barriers to entry and expansion, and countervailing buyer power.
 - 1.6 Having regard to the above, ComReg is of the view that, in accordance with the Framework Regulations, the following operators should be designated as having Significant Market Power (“SMP”) in the market for wholesale call termination on their individual network: Eircom, BT Ireland, Verizon, Ntl/Chorus, Colt Telecom, Smart Telecom and Magnet. Within the period of this review, there is nothing to suggest to ComReg that the SMP which these fixed operators have will be diluted in any meaningful way, in the absence of appropriate and proportionate SMP obligations.
 - 1.7 ComReg undertook full public consultation and has considered all comments in arriving at its preliminary conclusions in relation to market definition, market analysis and SMP obligations, in accordance with Regulation 27(4) of the Framework Regulations. As required by Regulation 20 of the Framework Regulations, the draft measure containing these preliminary conclusions was made accessible to the European Commission and the national regulatory authorities (“NRAs”) in other EU member states. ComReg considered all comments on the draft measure and notified the response to the European Commission on the 17 October 2007.
 - 1.8 Having determined that the markets for wholesale call termination on individual fixed networks are not effectively competitive, ComReg is now designating Eircom, BT Ireland, Verizon, Ntl/Chorus, Colt Telecom, Smart Telecom and Magnet with SMP, in accordance with Regulation 27(4) of the Framework Regulations. This document also contains the final decision instrument setting out the SMP obligations to be imposed on the aforementioned operators as a consequence of the SMP

⁷ 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

designation. The final decision instrument is set out as an Annex to this document and the SMP obligations therein are effective, from the date of publication.

2 Background to Decision

- 2.1 This Decision Notice and Decision Instrument is based on the market definition, market analysis and reasoning conducted by ComReg in relation to the markets for fixed call termination, as part of the consultation process arising from:
- ComReg Document 07/03 (Market Analysis – Interconnection Market Review - Fixed Wholesale Call Termination Services: Consultation Document) which was published in January 2007; and
 - ComReg Document 07/83 (Market Analysis – Interconnection Market Review - Fixed Wholesale Call Termination Services: Response to Consultation Document 07/03 and Consultation on Draft Decision) which was published in October 2007.
- 2.2 This decision is based on the substantial body of empirical estimation and analysis contained in previously published documents where due consideration was given to the full range of issues covered.
- 2.3 In ComReg Document 07/83, ComReg consulted upon its draft decision instrument and asked if respondents believed that the text of the draft decision instrument was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the remedies proposed. All comments in relation to ComReg Document 07/83 were carefully considered by ComReg. The final decision instrument is contained in the Annex to this document.

3 Market Review

Market Definition

- 3.1 ComReg has decided the relevant markets are the seven relevant markets corresponding to networks of operators providing termination services in Ireland. These operators are: Eircom, BT Ireland, Verizon, Ntl/Chorus, Colt Telecom, Smart Telecom and Magnet. ComReg excludes from the scope of the relevant market call termination to service providers, self supply for termination of calls to end users on a fixed network and VoIP services. ComReg has determined that the relevant geographic market is Ireland and that the geographic dimension of the market corresponds to the geographic coverage of each operator's network.
- 3.2 The defined markets are in line with the European Commission's recommendation on Relevant Markets and with the new Draft Recommendation.⁸

Designation of Undertakings with Significant Market Power

- 3.3 The most pertinent criteria used to assess SMP in the wholesale call termination market include the following:⁹
- Market share;
 - Existing competition;
 - Barriers to entry and potential competition; and
 - Countervailing buyer power.
- 3.4 ComReg has decided that the following operators are to be designated as having SMP in the market for wholesale call termination on their individual networks: Eircom, BT Ireland, Verizon, Ntl/Chorus, Colt Telecom, Smart Telecom and Magnet.

SMP Obligations

- 3.5 ComReg is required to impose ex ante regulatory obligations that are appropriate, based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 of the Framework Directive. ComReg has identified the SMP obligations that it considers would be appropriate to impose on an SMP operator in the relevant markets. These were the obligations of access to and use of, specific network elements and associated facilities, transparency, nondiscrimination, accounting separation, price control and cost accounting obligations.

⁸

http://ec.europa.eu/information_society/policy/ecom/comm/doc/info_centre/public_consult/review/recommendation_final.pdf

⁹ Annex F of ComReg Document 07/83 contained a summary of the other SMP criteria contained in the SMP Guidelines and an explanation for why ComReg considered them less relevant in the context of this market review.

3.6 ComReg has decided to impose the following obligations on Eircom in respect of the fixed call termination market:

- Access to and use of specific network facilities;
- Transparency;
- Non-discrimination;
- Price control; and
- Accounting separation and cost accounting.

3.7 ComReg has decided to impose the following obligations on BT Ireland, Verizon, Ntl/Chorus Ireland, Colt Telecom, Smart Telecom and Magnet in respect of the fixed call termination market:

- Transparency;
- Non-discrimination; and
- Price control.

3.8 In ComReg Document 07/83, ComReg consulted upon the draft decision instrument formally imposing these SMP obligations and asked if respondents believed that the text of the decision instrument was from a legal, technical and practical perspective, sufficiently detailed, clear, precise and intelligible with regard to the specifics of the proposed SMP obligations. The comments of respondents were carefully considered and the final decision instrument formalising the SMP obligations to be imposed on SMP operators is set out in the Annex to this document.

4 Response to Consultation on the Draft Decision Instrument

Introduction

- 4.1 Two responses were received in relation to the consultation on the specific text of the draft decision instrument contained in ComReg Document 07/83. These responses were received from Eircom Ltd and BT Ireland. ComReg would like to thank respondents for their submissions. ComReg has taken all their comments into account in arriving at its final conclusions.
- 4.2 ComReg also received comments on the draft measure from the European Commission. ComReg has taken utmost account of those comments in accordance with Article 7(5) of the Framework Directive when adopting the final measure.
- 4.3 ComReg would note that the amendments to the decision instrument are not substantive changes in nature. The text does not therefore materially depart from that proposed in ComReg Document 07/83.
- 4.4 This section sets out the main issues raised by the respondents and ComReg's responses to comments received on foot of ComReg Document 07/83. Having considered the issues further and the views expressed by the respondents and the EU Commission, a final Decision Instrument has been drawn up in relation to SMP to be imposed on Eircom, BT Ireland, Verizon, Ntl/Chorus, Colt Telecom, Smart Telecom and Magnet. The SMP obligations applicable to the aforementioned SMP operators in relation to the relevant markets (as outlined in the Annex) will be imposed and effective from 21 December 2007, the publication date of this document.

Responses to Consultation (07/83) and ComReg's Position

- 4.5 Detailed below are the main issues raised by the respondents in response to ComReg Document 07/83. The comments in relation to the relevant sections of the draft decision instrument are set out below and are followed by ComReg's conclusions on whether or not the proposed changes are justified and warranted and should be adopted.

Access Obligation

Access Obligation on Eircom

- 4.6 The Draft Decision states that an access obligation will be imposed on Eircom.

Views of Respondents

- 4.7 Only one respondent expressed views on this remedy. This respondent believes that the obligation imposed on Eircom to negotiate in good faith on issues concerning access needs to be time bound with a clear procedure. The respondent also suggests that ComReg should consult (as opposed to "may consult") should Eircom propose to withdraw access to any facility, given the lack of information available regarding Eircom's NGN/NGA plans and the lack of regulatory certainty this creates for OAOs. In relation to access terms, the respondent submits that legally binding SLAs

are an essential aspect of service for OAOs which should be subject to a continual process of improvement as has occurred in other jurisdictions.

ComReg's Position

- 4.8 In relation to the concerns expressed by one respondent on the access obligation to be imposed on Eircom, ComReg would emphasise under that obligation Eircom is required to negotiate in good faith and, as stated in ComReg Document 07/83, ComReg will consult on the full details of this obligation at a later date.
- 4.9 In relation to the suggestion that ComReg should consult on every occasion where Eircom proposes to withdraw access to a facility, as discussed in ComReg Document 07/83,¹⁰ Eircom will be required to obtain prior approval from ComReg in relation to withdrawal of a facility. ComReg will then consider the impact of the request to withdraw the product/service and if it is decided that there would be a significant impact on industry, a consultation process would be initiated by ComReg. The consultation will include such issues as the notification necessary for industry, whether compensation might be necessary or appropriate (regarding stranded assets of OAOs, etc). ComReg notes the respondents' view that SLAs should be subject to a continual process of improvement. As stated in ComReg Document 07/83, ComReg intends to consult further on the proper implementation of SLAs, to ensure compliance with regulatory obligations.

Access Obligation on OAOs

- 4.10 In ComReg Documents 07/03 and 07/83, ComReg did not propose to impose an access obligation on the markets for call termination on OAOs' networks as ComReg considers that to do so would be disproportionate. This is owing to:
- OAO's networks having different geographic reach and structure to serve end users compared to Eircom. OAO's offer termination services that are different from those offered by Eircom, generally offering only one level of interconnection, whereas Eircom offers three levels of interconnect;
 - No OAO has a market share greater than 5% of total direct access paths. The nature of the call termination on end users service is such that Eircom will have an enduring bottleneck control over the primary call termination on all end users connected to the Eircom network and may have bottleneck control over tandem and double tandem call termination; and
 - Eircom is the largest buyer of termination across all fixed networks, it is the main buyer of termination on behalf of other networks (indirect interconnection) and it is the largest provider of fixed end-to-end connectivity.
- 4.11 In view of the above factors, it would appear to be in the commercial interests of each OAO to interconnect with Eircom and with other OAOs. In order to provide a complete portfolio of services to its own subscribers OAOs are highly unlikely to have an incentive not to interconnect.

¹⁰ See section on withdrawal of access, paragraphs 6.112 – 6.113

Views of Respondents

4.12 While no respondents raised any issues on the non-imposition of an access remedy on OAOs, the EU Commission did raise some concerns. It is of the view that any general interconnection obligation that might stem from the Irish legislation would not resolve swiftly access problems such as delaying tactics compared to a more specific access obligation imposed as a result of a market analysis. It is also of the view that a non-discrimination obligation imposed on OAOs cannot be considered as a guarantee that access will be granted automatically. The Commission invites ComReg to impose an effective access obligation on OAOs, in addition to Eircom.

ComReg's Position

4.13 Having further considered this issue, ComReg remains of the view as that expressed in ComReg Document 07/83. An access obligation on OAOs designated with SMP is unnecessary at this stage in view of the current asymmetric situation in interconnection. Firstly, in order to provide a complete portfolio of service to its own subscribers, it is in the commercial interests of OAOs to interconnect with Eircom and with other OAOs and it is highly unlikely that an OAO would not have an incentive to interconnect. Secondly, a large asymmetry exists between OAOs and Eircom in terms of the geographic reach and structure of their networks. Eircom offers three levels of interconnection while OAOs generally offer only one level of interconnection. The nature of the call termination to end users service is such that Eircom will have an enduring bottleneck control over primary call termination on all end users connected to the Eircom network and may have bottleneck control over tandem and double tandem call termination. Thirdly, there is a huge disparity in terms of the scale of Eircom vis-à-vis the OAOs. Currently there is no OAO that has 5% market share as measured on the basis of total direct access paths. Eircom is also the largest buyer of termination across all fixed networks, it is the main buyer of termination on behalf of other networks (indirect interconnection) and it is the largest provider of fixed end-to-end connectivity.

4.14 In addition, other regulatory measures should address any concerns in relation to interconnection for termination. This is consistent with the requirement to adopt the least burdensome means of regulatory intervention at this time. Further to the obligation of non-discrimination, a failure to provide access, where it is already being provided (as is the case with the OAOs) could constitute a breach of the OAOs non-discrimination obligation and ComReg could intervene in a timely fashion to remedy non-compliance. Alternatively, if there was evidence of a failure to provide end-to-end connectivity, Regulation 6 of the Access Regulations could be used to impose an access obligation – without the necessity of undertaking a market analysis, normally undertaken in respect of SMP operators. Also, a failure by an OAO to provide interconnection could be the subject of a dispute notification to ComReg.

4.15 In view of the above factors, it is ComReg's view that the imposition of an access obligation would be disproportionate at this time. Nevertheless, ComReg reserves its right to further intervene in relation to an access obligation for OAOs if deemed necessary, subject to consultation. ComReg will closely monitor developments in the markets for call termination on fixed networks and should a situation arise relating to denial of interconnection by an OAO, ComReg may re-consider this issue and,

whether it would be necessary to impose access obligations on OAOs designated with SMP.

Non-Discrimination Obligation

Non-Discrimination Obligation on Eircom

4.16 The Draft Decision states that a non-discrimination obligation will be imposed on Eircom.

Views of Respondents

4.17 Both respondents expressed views on this remedy. One respondent believes that Eircom should be obliged to publish full comparative performance data in the public domain to demonstrate non-discrimination and the level of detail to be published should be subject to a separate consultation.

4.18 The other respondent believes that the proposed obligation of non-discrimination which refers to Eircom's "retail arms and their associates" is inappropriate. The respondent fundamentally disagrees with ComReg's attempts to present Eircom's retail arm as an OAO stating that Eircom's retail arm is Eircom. It is not in the same position as an OAO, terminating fixed calls on Eircom's network. The respondent states that it is important that ComReg bears this in mind when devising remedies designed to ensure that the wholesale services provided by Eircom to OAOs allow them to compete effectively with Eircom on retail markets. In addition, this respondent believes that Eircom should not be obliged to provide information to another provider making a request for new network access unless and until Eircom have sufficient understanding of the nature of the request to judge that it is genuine and reasonable.

ComReg's Position

4.19 In relation to the issue of whether or not Eircom should be obliged to publish full comparative performance data to demonstrate non-discrimination, ComReg does not currently consider that this is necessary. However, in the event that the provision of interconnection should change during the timeframe of this review ComReg may consider requiring Eircom to publish statistics of this nature, if deemed appropriate.

4.20 In relation to the claim that ComReg attempted to present Eircom's retail arm as an OAO, ComReg believes that this misrepresents its views. ComReg has already pointed this out in ComReg Document 07/83. Eircom has presented no evidence that ComReg attempts to present Eircom's retail arm as an OAO. It is obvious that Eircom's retail arm is not in fact an OAO and it is unclear why the respondent should suggest that ComReg thinks otherwise. The issue being examined is the position of Eircom's retail arm, versus an OAO's retail arm not the notion that they are both the same. The point is in fact that they are not always the same. In some cases, they may be in the same position and in other cases, they are not. The object of a non-discrimination obligation is to oblige Eircom's wholesale arm to give equality of treatment to Eircom Retail on the one hand and OAOs on the other, so that the latter is not placed unduly at a disadvantage relative to Eircom Retail and insofar as is possible is afforded a level playing field and equality of treatment. The ERG Remedies document for example, states that:

‘In general non-discrimination requires that the SMP undertaking ‘applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provide services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners’. This shows that the scope of the non-discrimination obligation clearly covers a firm’s internal processes. The general non-discrimination obligation requires that third party access seekers are treated no less favourably than the operator’s internal divisions.’¹¹

- 4.21 On the matter of whether Eircom should not be obliged to provide information to another provider making a request for new network access unless and until Eircom have sufficient understanding of the nature of the request to judge that it is genuine and reasonable, if an OAO raises a dispute then ComReg will judge whether it is or is not reasonable for such a request.

Non-Discrimination Obligation on OAOs

- 4.22 The Draft Decision states that a non-discrimination obligation will be imposed on the OAOs.

Views of Respondents

- 4.23 Both respondents commented on this remedy. One respondent commented that the transparency obligation to be imposed on OAOs is disproportionate on OAOs given the exceptionally low level of the total fixed call termination market that they experience owing to delayed development of appropriate wholesale products (e.g. GLUMP). The second respondent queries why the proposed non-discrimination obligation on OAOs is not symmetric to those being imposed on Eircom. The respondent argues that if ComReg adopts a ‘light-handed’ form of regulation on OAOs with SMP in this market, then it should adopt a similar approach on Eircom to ensure regulatory symmetry across fixed network platforms.

ComReg’s Position

- 4.24 In view of the identified market failure in call termination, an obligation of non discrimination is required on all SMP operators in addition to the price control obligation, discussed below, to prevent and monitor potential competitive distortions brought about by termination charges. It is necessary as opportunities exist for OAOs with SMP to discriminate in a manner that would disadvantage another provider by applying different charges where differences are not justified by reference to objective considerations. Thus, regardless of the size of a fixed network operator (“FNO”) in the overall fixed-line sector, each individual FNO has the ability to discriminate against particular operators, with an accompanying negative effect on competition.
- 4.25 In an asymmetric setting however, the scope of the non discrimination obligation is wider in the case of Eircom (as it pertains to access to its network and facilities) than that of the OAOs (as it pertains to terminating access only). This is owing to the ubiquity of the Eircom network. All of the key interconnection facilities are more likely to be provided by Eircom and required for the correct functioning of the

¹¹ ERG Common Position on the approach to appropriate remedies in the new regulatory framework.

market in general and even in parts of the call termination market. Without appropriate access obligations, Eircom could have an incentive to apply unreasonable contractual terms on other operators, and exercise non-price forms of discrimination, such as unreasonable bundling. In that regard, there may be a risk that Eircom could leverage its SMP from the wholesale market into the potentially competitive retail calls market.

- 4.26 For the reasons set out in ComReg Document 07/83, ComReg considers that it is reasonable to require Eircom to provide termination services on an unbundled basis in order to ensure that OAOs are not required to buy additional products to those directly required for their services. ComReg concludes that, as part of the access obligation, Eircom should continue to provide call termination services on an unbundled basis. The non discrimination obligation proposed for Eircom and OAOs respectively is appropriate and proportionate and justified, and, as outlined in ComReg Document 07/83, takes into account the asymmetries that exist between these operators in interconnection.
- 4.27 Given the findings of SMP and having taken into account the views of all respondents, ComReg remains of the view, as stated in ComReg Documents 07/03 and 07/83, that all OAO's designated with SMP in the call termination market should be required to apply similar terms and conditions on interconnecting operators in equivalent circumstances. It is noteworthy that no negative comments were received from the EU Commission in respect of this measure.

Transparency Obligation on OAOs

- 4.28 The Draft Decision states that a transparency obligation will be imposed on the OAOs.

Views of Respondents

- 4.29 One respondent commented that the transparency obligation to be imposed on OAOs is disproportionate on OAOs given the exceptionally low level of the total fixed call termination market that they experience owing to delayed development of appropriate wholesale products (e.g. GLUMP).

ComReg's Position

- 4.30 ComReg disagrees with the first respondent that the transparency obligation to be imposed on OAOs is disproportionate. Each operator has 100% market share for call termination on its own network, there are high and non-transitory barriers to entry, no immediate prospect of competition and there is insufficient countervailing buyer power to act as a competitive constraint in the relevant markets. For these reasons, the relevant OAOs have been designated with SMP.
- 4.31 Given the findings of SMP and having taken into account the views of all respondents, ComReg remains of the view as stated in ComReg Documents 07/03 and 07/83, that it is appropriate, proportionate and justified to impose an obligation of transparency on OAOs designated with SMP in the call termination market.
- 4.32 The obligation of transparency will give greater visibility to the terms and conditions on which other organisations can purchase termination services. This will in turn enable negotiations to be undertaken more speedily and reduce potential complaints.

Furthermore, the obligation to provide a minimum of 21 calendar days notice of changes to termination charges will allow organisations to react to any price changes in a timely manner. The requirement for OAOs to publish their fixed termination rate(s) on their website is not deemed to be a costly or burdensome exercise for OAOs.

- 4.33 An obligation of transparency is necessary to help ComReg monitor SMP operators and thereby ensure that SMP OAOs are not behaving in a discriminatory way with respect to termination on their individual networks. Information used to measure compliance with obligations of non-discrimination and price control (as discussed below) would not otherwise be available without an obligation of transparency. This can help deter potential anti-competitive behaviour by SMP operators. It is important a price control is associated with a degree of transparency for interconnecting operators, consumers and other interested parties.
- 4.34 For these reasons, ComReg concludes that it is appropriate, proportionate and justified to impose an obligation of transparency on OAOs designated with SMP.

Price Control Obligation on OAOs

- 4.35 ComReg’s preliminary view as stated in ComReg Document 07/83 was to impose a price control obligation on OAOs when an OAO reaches 5% market share of total direct access paths or after a period of 5 years from the effective date of a final decision on this market review, whichever is soonest.

Views of Respondents

- 4.36 The views of respondents in relation to the price control to be imposed on OAOs were mixed.
- 4.37 While one respondent can see the merit in a threshold below which disproportionate remedies should not be applied, it is concerned that the trigger for the proposed price control remedy has been formulated to ensure that no OAO will be subject to a price control obligation. It believes the proposed price controls for OAOs are inconsistent with the guidance of the European Regulators Group and with the regulatory ‘best practice’ of ComReg’s peer national regulatory authorities (“NRAs”) suggesting that mandated reciprocity in termination rates is the norm. This respondent maintains that a price control trigger based on the wholesale revenue earned from call termination is more appropriate as it relates to the relevant product market in question. On this basis, the respondent believes that the current market share of some of the OAOs exceeds the 5% threshold. The respondent supports the proportionate application of regulatory remedies, for example, imposing a lighter regulatory burden on smaller OAOs, but it does not believe that OAOs should escape the obligation of cost-orientation where appropriate.
- 4.38 The other respondent noted that OAOs have an exceptionally low level of the total fixed call termination market. However, this respondent believes that the threshold of reaching 5% of the market is too vague and suggests that a more appropriate threshold level is when an OAO reached 20% of the market with a clear definition of how that would be measured. The respondent welcomes a consultation on the period of any glide path and the level of any “efficient rate” as OAO networks do not mirror the incumbent fixed network.

4.39 The EU Commission had the following comments in relation to the proposed price control obligation for OAOs. It is of the view that ComReg's approach to this remedy for OAOs does not address the competition problem identified (i.e., excessive pricing). The Commission believes that the threshold for implementation of the price control is not justified and that not to impose a price control on OAOs at this stage is inconsistent with the majority approach of other NRAs. Noting that the OAOs are able to charge termination rates significantly above Eircom and the apparently high level of interconnection charges in Ireland, the Commission invites ComReg to apply and appropriate price control for OAOs at this stage. In light of the work currently undertaken within the ERG to arrive at a coherent cost accounting method for fixed termination, the Commission invites ComReg to revisit its analysis as soon as a common approach has been established at a European level.

ComReg's Position

4.40 Having completed the review of competition and developments in these call termination markets and, taking into account the views of respondents, ComReg concludes that, in the presence of SMP, it is appropriate and proportionate to impose a price control on OAOs effective from the date of this final Decision and, similar to Eircom, their termination rates should over time tend towards an efficient cost orientated level. Forbearance or simply monitoring the trend in termination charges is not sufficient to address the potential underlying competition problems in these markets. Without regulatory pressure, both Eircom and the OAO have less of an incentive to lower their termination rates such that if prices are left unregulated there is a risk that termination charges will be excessive. Hence, the price control measure is an appropriate and proportionate regulatory response that addresses OAOs position of SMP in these markets.

4.41 ComReg has considered the requirements of proportionality in selecting an appropriate form of price control for OAOs and has taken account of their stage of development in the market. ComReg recognises that small players are potentially at a disadvantage because they are late entrants and have less efficient economies of scale and scope. ComReg is also of the view that investment and innovation should be encouraged and considers this when setting out appropriate price control on an OAO on the basis of its SMP status. Application of a trigger mechanism recognises dynamic benefits, and an interim period may allow OAOs to recover the level of initial investment and achieve economies of scale.

4.42 For correct incentives, ComReg concludes that the most appropriate and proportionate form of price control to impose on an OAO is a glide path to reduce prevailing termination rates towards an efficient level. When an OAO reaches a market share of 5% of direct access paths (to be determined on the basis of Quarterly Report data), or five years after the publication of this Decision, whichever is soonest, this will trigger the commencement of a glide path for an OAO to reduce its termination rates to an efficient level. At that stage, ComReg plans to further consult on the specific details of a glide path period or target to be achieved by an SMP OAO and the timing of the same. ComReg recognises that setting (strict) cost-orientated rates potentially ignores real economies of scale issues that certain network operators cannot address however efficient they may be, and indeed, as noted in ComReg Document 07/83, uniform rates may not be appropriate or justified owing to the asymmetries that exist between the interconnection services offered by Eircom and OAOs. In view of this asymmetric setting in interconnection, an

appropriate approach to setting OAO's termination rates may be to reflect the geographic reach and structure of the particular network built by the OAO to serve end users.

- 4.43 ComReg believes the principle of the threshold (a 5% market share, or within 5 years of the effective date of the final Decision, whichever is soonest) is an appropriate basis for triggering the commencement of a glide path towards an efficient rate principally on the basis that it balances consumer protection with the need to ensure a proportionate effect, the encouragement of investment and the continued promotion of competition in the retail market. The European Commission has used market share thresholds in other areas of competition law, for example in relation to vertical agreements, therefore precedence for a trigger mechanism of this sort exists.¹²
- 4.44 In principal, if asymmetric rate differences are allowed to persist over too long a period of time this can lead to inefficiencies and be detrimental to competition and welfare. In choosing an appropriate price control for OAOs, ComReg has therefore also considered the potential effects on related markets. With a very small market share (no one OAO has a 5% or greater market share of total direct access paths at this time),¹³ the welfare burden of OAOs higher termination rates are likely to be relatively low, while the dynamic benefits of having an additional player in the market are likely to be high. It is not clear that OAOs termination prices are significantly above that of Eircom in absolute terms or will be higher than the incumbents' regulated rate in the future. The evolution of OAOs termination rates suggests some convergence in these rates and a number of OAOs already have a termination rate approximate to that of Eircom. ComReg considers that voluntary reductions by OAOs form part of a glide path toward efficient termination rates. Such an approach is not unduly burdensome and provides an opportunity for OAOs to self regulate consistent with achieving more efficient termination rates by the least intrusive means.
- 4.45 It is also not immediately clear that any potential competitive harm associated with higher termination rates on the part of OAOs is of sufficient magnitude as to justify intervention at this point in time. The absolute level of difference between Eircom's rates and the OAOs is relatively small, and given the limited market share of the OAOs, the overall benefit of bringing their rates down to the regulated level (which may well be above Eircom's level in any case) is likely to be very limited. The actual costs of regulating OAOs rates could exceed this benefit, not just in terms of the costs to the OAOs themselves, but also in developing cost modelling approaches and analysing the actual costs of the OAOs themselves. As such, it is not likely that regulatory intervention is warranted until an OAO has reached a certain size, or a time period has elapsed which would be such that it should reasonably be expected to move towards the regulated level. In any event, ComReg notes from the European Commissions 12th Implementation Report that Irish fixed interconnection

¹² Commission (2000) Guidelines on Vertical Restraints. In these Guidelines, the Commission states that vertical agreements entered into by undertakings whose market share on the relevant market does not exceed 10% are generally considered to fall outside the scope of Article 81(1). This recognises that vertical agreements between firms with small market shares are unlikely to have a significant impact on the market.

¹³ Eircom has 94% or more market share of direct access paths.

charges, including termination rates, are favourable compared to other EU member states.¹⁴

4.46 Hence, ComReg will adopt a unified approach in relation to call termination such that operators' charges all ultimately approximate efficient cost orientated rates. ComReg considers a requirement to move towards an efficient termination level when an OAO reaches a market share of 5% of direct access paths, or within five years of the publication of this Decision, whichever is soonest, would balance the need to encourage investment and innovation while limiting any potential distortion to competition as an OAO's market share grows. Application of a trigger mechanism should provide incentives for OAOs to become more efficient and grow market share. ComReg notes the ability of OAOs to migrate indirect access lines (e.g., wholesale line rental) to direct access lines (LLU). Thus, were OAOs to have a far from negligible market share of direct access paths, any potential adverse impact would be addressed as these operators become subject to price control.

¹⁴ See European Commission (2007) 12th Report on the Implementation of the Telecommunications Regulatory Package – 2006, Figures 20, 21, 22 in relation to call termination on incumbents' fixed networks and Figure 23, call termination on alternative operators fixed networks.

Appendix A – Decision Instrument

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument relates to the market for wholesale call termination services used to provide retail calls to end users on each public telephone network provided at a fixed location. It is a market that differs from any defined in the EU Commission’s Recommendation¹⁵ and is made by the Commission for Communications Regulation (“ComReg”):

- i. Having had regard to sections 10 and 12 of the Act of 2002¹⁶;
- ii. Having taken account, of its functions under Regulation 6 (1) of Access Regulations¹⁷;
- iii. Having taken account of and assessed the proportionality of the obligations herein, relative to the objectives of ComReg set out in section 12 of the Act of 2002;
- iv. Having taken in to account the matters set out in Regulation 13 (4) of the Access Regulations;
- v. Having (where appropriate) complied with the Policy Directions made by the Minister¹⁸;
- vi. Having taken the utmost account of the EU Commission’s Recommendation and the SMP Guidelines¹⁹;
- vii. Having taken account of the submissions received in relation to ComReg Document No.07/03; and
- viii. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations²⁰, and Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations.

1.2 This Decision Instrument is based on the market analysis and reasoning conducted by ComReg in relation to the market for wholesale call termination services used to

¹⁵ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (as amended).

¹⁶ The Communications Regulation Act, 2002.

¹⁷ The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

¹⁸ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

¹⁹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

²⁰ The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

provide retail calls to end users on each public telephone network provided at a fixed location, and the reasoning set out in the body of this decision which shall be construed together with this decision instrument.

2 MARKET DEFINITION

2.1 The relevant product market in this Decision Instrument is defined as the market for wholesale call termination services used to provide retail calls to end users on each public telephone network provided at a fixed location in accordance with the EU Commission’s Recommendation (“the Market”).

2.2 The relevant geographic market for the Market is defined as Ireland.

3 DESIGNATION OF UNDERTAKINGS WITH SIGNIFICANT MARKET POWER (“SMP”)

3.1 Pursuant to Regulation 25 and Regulation 26 (4) of the Framework Regulations, Eircom Limited (“Eircom”) and the following other authorised operators (together referred to hereinafter as “the OAOs”) are designated as having SMP in the Market in Ireland:

1. BT Communications Ireland Limited;
2. Verizon Ireland Limited;
3. Ntl Communications (Ireland) Limited and Chorus Communications Limited;²¹
4. Colt Telecom Ireland Limited;
5. Smart Telecom; and
6. Magnet Networks Limited.

3.2 In this Decision Instrument, any reference to Eircom, or any of the OAOs includes a reference to their successors and assigns and any undertaking which is associated with, or is controlled by, or controls, directly or indirectly, Eircom, or any of the OAOs and which carries out business activities in Ireland, where the activities engaged in (either directly or indirectly) are activities within the scope of the Market in Ireland.

4 SMP OBLIGATIONS²²

²¹ UPC is the new parent company of Ntl Communications (Ireland) Ltd and Chorus Communications Ltd. Chorus, the wholly owned subsidiary of UPC, acquired Ntl in 2005. UPC (Chorus) is in the process of merging these entities. The amalgamated entity is intended to be designated with SMP by section 3.1. This is a specific illustration of the situations intended to be covered generally by section 3.2.

²² ComReg is legally obliged to impose ex ante SMP obligations that are appropriate, based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications.

- 4.1 ComReg is imposing SMP obligations, as provided for by Regulations 10, 11, 12, 13 and 14 of the Access Regulations, on Eircom and the OAOS. The SMP obligations are described further in the sections below.

5 EIRCOM - OBLIGATION TO PROVIDE ACCESS

- 5.1 Pursuant to Regulation 13 (1) of the Access Regulations, Eircom shall meet all reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities, by undertakings²³ requesting access, or use of such access products, features or additional associated facilities, included in the Market.

- 5.2 Without prejudice to the generality of the foregoing, Eircom shall:

- i. Pursuant to Regulation 13 (2) (b) of the Access Regulations, negotiate in good faith with undertakings, requesting access;
- ii. Pursuant to Regulation 13 (2) (c) of the Access Regulations, not withdraw access to facilities already granted and continue to provide such facilities in accordance with existing terms and conditions and specifications;
- iii. If Eircom proposes a withdrawal of facilities already granted, it shall notify ComReg of its proposal one (1) calendar month in advance of so doing, giving detailed reasons for the proposal, but shall not withdraw such facilities unless it has obtained the prior approval of ComReg in writing. In certain cases of withdrawal, ComReg may consult with relevant parties, prior to making a decision on whether to grant or to withhold the approval referred to in section 5.2;
- iv. Pursuant to Regulation 13 (2) (e) of the Access Regulations, grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- v. Pursuant to Regulation 13 (2) (h) of the Access Regulations, provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; and
- vi. Pursuant to Regulation 13 (2) (i) of the Access Regulations, interconnect networks or network facilities.

- 5.3 Pursuant to Regulation 13 (1) and 13 (2) of the Access Regulations, Eircom shall have an obligation to meet reasonable requests for access to, and use of the wholesale access products, features or additional associated facilities, which are described in:

²³ In this Decision Instrument an “undertaking” has the meaning as that contained in the Framework Regulations and includes OAOS.

1. Service Schedules 002 and 005 and including but not limited to other Eircom services listed under “Eircom services” in Annex C of Eircom’s reference interconnect offer (“RIO”);
2. Eircom’s RIO Network Price List;
3. Eircom’s Interconnect O&M Manual;
4. Eircom’s service level agreement (“SLA”) for Interconnect Paths; and
5. Eircom’s document on Traffic Designation for Inbound & Outbound Interconnect Paths, as published on Eircom’s wholesale website.

6 EIRCOM - CONDITIONS ATTACHED TO ACCESS OBLIGATIONS

- 6.1 Pursuant to its obligation of non-discrimination under section 7 and pursuant to Regulation 13 (3) of the Access Regulations, it shall be a condition of the obligations referred to in section 5 that Eircom shall conclude legally binding SLAs with OAOs in respect of those facilities referred to in section 5. Eircom shall develop and offer, or where appropriate, continue to offer, SLAs in respect of those products and services referred to in section 5.

7 EIRCOM AND OAOs - OBLIGATION OF NON-DISCRIMINATION

Eircom

- 7.1 Pursuant to Regulation 11 of the Access Regulations Eircom shall have an obligation of non-discrimination with respect to the provision of those services and products described in section 5. Without prejudice to the generality of the foregoing, Eircom shall:
- i. Apply equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provide services and information to others under the same conditions and of the same quality as Eircom provide for their own services or those of their subsidiaries or partners; and
 - ii. Ensure that information and services are provided, to undertakings according to timescales, on a basis, and of a quality, which are at least equivalent to those provided by Eircom to their retail arms and their associates.
- 7.2 Without prejudice to the generality of paragraph 7.1, Eircom shall provide access to other undertakings (requesting access in accordance with paragraphs 5.1 and 5.2 of this Decision Instrument) to any additional wholesale inputs which are necessary to enable those undertakings to provide end to end services which are the equivalent of those offered by the retail divisions of Eircom.

OAOs

- 7.3 Pursuant to Regulation 11 of the Access Regulations, the OAOs apply similar terms and conditions to undertakings that obtain, or seek to obtain from them, call termination services, products, services and facilities in the Market.

8 EIRCOM AND OAOs - OBLIGATION OF TRANSPARENCY

Eircom

- 8.1 Pursuant to Regulation 10 (1) of the Access Regulations, in furtherance of its obligation of non-discrimination under section 7 and for the purpose of ComReg monitoring compliance with that obligation, Eircom shall, ensure that it is transparent in relation to interconnection and access in the Market.
- 8.2 Without prejudice to the generality of paragraph 8.1, Eircom shall:
- i. Publish on its wholesale website, and keep updated, a RIO in respect of the services and facilities referred to in section 5;
 - ii. Ensure that the RIO is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested;
 - iii. Ensure that the RIO includes a description of the relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices; and
 - iv. Ensure that the RIO contains details of the terms and conditions of access in respect of facilities already granted.
- 8.3 Without prejudice to the generality of paragraphs 8.1 and 8.2, Eircom shall continue to publish the call termination schedules, prices, product descriptions and inter-operator process manuals contained in “*Core RIO document Version 3.14*” (as amended from time to time) and Eircom RIO Price List Version 1.64 (as amended from time to time)²⁴.
- 8.4 Eircom shall make public such information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 5, as specified by ComReg from time to time.
- 8.5 Eircom shall comply with the processes developed in accordance with ComReg Decision Notice D10/02.

OAOs

- 8.6 The OAOs shall publish on their websites (or make public in an easily accessible manner where no website exists), their prices and associated terms and conditions

²⁴ These documents are currently published on the Eircom wholesale website www.Eircomwholesale.ie

(and any amendments thereto) in respect of wholesale call termination services in the Market.

- 8.7 The OAOs shall give a minimum of 21 calendar days notice of a change in their termination rate to other operators.

9 EIRCOM - OBLIGATION OF ACCOUNTING SEPARATION

- 9.1 Pursuant to Regulation 12 of the Access Regulations, Eircom shall have an obligation to maintain separated accounts. All of the obligations in relation to accounting separation applying to Eircom in force immediately prior to the effective date of this Decision Instrument, shall be maintained in their entirety and Eircom shall comply with those obligations, pending a further decision to be made by ComReg (following further consultation) in relation to the details of and implementation of accounting separation obligations and cost accounting obligations.

10 EIRCOM AND OAOs - OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING

Eircom

- 10.1 Pursuant to Regulation 14 (1) of the Access Regulations, the prices charged by Eircom to any other undertaking for those products and services described in section 5 shall be cost oriented and such costs shall be calculated using a pricing model based on forward looking long run incremental costs (“FL-LRIC”) or an alternative pricing model, should ComReg decide, following consultation, to adopt such an alternative pricing model.
- 10.2 Pursuant to Regulation 14 (1) of the Access Regulations, Eircom shall comply with all of the obligations in relation to cost accounting applicable to it prior to the date of this Decision Instrument until such time as ComReg makes a decision consequent to further consultation in relation to accounting separation obligations and cost accounting obligations.

OAOs

- 10.3 Pursuant to Regulation 14 (1) of the Access Regulations, the OAOs shall have price control obligations: once a OAO reaches a 5% share of the Market (as determined by ComReg in accordance with statistics to be obtained and compiled by it) of total direct access paths, it shall, from a date to be determined by ComReg, become subject to a price control obligation taking the form of a glide path towards an efficient rate. ComReg will consult on the appropriate period for such a glide path period and the appropriate level of the regulated price to be achieved by the OAO, once ComReg has determined that the OAO has reached the 5% share of the Market threshold.
- 10.4 If a OAO does not reach the 5% share of the Market of total direct access paths within a five-year timeframe, ComReg may decide to impose a price control regulation, following consultation on an appropriate glide path and an appropriate level of a regulated price to be achieved at the end of the glide path period.

- 10.5 ComReg may, issue directions to the OAOs for the purposes of establishing a glide path and setting regulated prices for the OAOs.

11 STATUTORY POWERS NOT AFFECTED

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

12 EFFECTIVE DATE

- 12.1 This Decision Instrument shall be effective from the 21 day of December, 2007 until further notice by ComReg.

**JOHN DOHERTY
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
DATED THIS THE 21st DAY OF DECEMBER, 2007**