Commission for
Communications Regulation

Consultation

Market Analysis: – Interconnection Markets Wholesale Call Termination Services

Document No:	**07/03**
Date:	**19 January 2007**

All responses to this consultation should be clearly marked:- "Reference: Submission re ComReg YY/NN" as indicated above, and sent by post, facsimile, e-mail or on-line at www.comreg.ie (current consultations), to arrive on or before 5.30 pm Friday 2 March 2007, to:

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Please note ComReg will publish all submissions with the Response to Consultation, subject to the standard confidentiality procedure.

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1 Executive Summary

Introduction

1.1 On 22 October 2004 ComReg published a national consultation on the Interconnection markets[1] and on 19 May 2005 ComReg notified the EU Commission and published the response to consultation[2]. Notified measures were accepted by the EU Commission, in correspondence to the Chairperson of ComReg dated 17 June 2005. This process is referred to as the 'initial review' throughout this document.

1.2 ComReg has decided that before issuing a Final Decision, it is appropriate to review the findings of the initial review to include current data and to take account of any market developments since the Notification. This allows for consideration of changes in the markets, from the time of the initial review. In order to take account of current industry views ComReg met with a large number of operators and in June 2006 issued a comprehensive data direction to fixed and mobile network operators.

1.3 This second consultation will be referred to as the 'current review'. The current review on interconnection is published in two parts. This document 07/03 examines the markets for wholesale call termination. ComReg document 07/02 examines the markets for wholesale call origination and wholesale call transit (including international transit services).

Timeframe

1.4 The timeframe of this review is two years from the date of publication of the Decision.

Market definition

1.5 ComReg proposes to define markets for wholesale call termination to end users located on individual networks at fixed locations.

Market analysis

1.6 Each fixed network operator in the relevant market has one hundred percent market share. As a result, there are high and non-transitry barriers to entry that would prevent the emergence of potential competition over the period of this review. ComReg is also of the preliminary view that there is insufficient countervailing buyer power 'CBP' to constrain operators from acting to an appreciable extent independently from customers, competitors or consumers.

Proposed SMP designation

1.7 ComReg is of the preliminary view that the following fixed network operators should be designated with SMP.

Fixed Operators
eircom
BT Ireland
Verizon

[1] Document 04/106.

[2] Document 05/37a.

ntl Ireland
Colt Telecom
Smart Telecom
Magnet Communications Ltd

Remedies

1.8 In the markets for wholesale call termination to end users on individual fixed networks, ComReg is of the preliminary view that there is the potential for these operators to exercise their SMP by charging excessive prices for termination services. As a means to address this potential competition problem, ComReg is of the preliminary view that the following obligations should be imposed on the relevant operators. Recognising that there are likely to be different competitive conditions faced by eircom and OAOs, ComReg is of the preliminary view that proportionate remedies should be designed to reflect these differences.

1.9 **The following obligations are proposed for eircom**:

- Access;
- Transparency;
- Non-discrimination;
- Price control and cost accounting; and
- Accounting separation.

1.10 **The following obligations are proposed for the OAOs**:

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

1.11 ComReg is of the preliminary view that the remedies set out in this market review support the objectives outlined in the Communications Regulation Act 2002 which establish how ComReg should exercise its functions. Remedies proposed aim to address market failures, to protect consumers against the exercise of market power and to promote competition in the interconnection markets.

2 Introduction

Initial Review

2.1 On 22 October 2004 ComReg published a national consultation on the Interconnection markets[3] and on 19 May 2005 ComReg notified the EU Commission and published the response to consultation.[4] The EU Commission accepted the notified measures, in correspondence to the Chairperson of ComReg dated 17 June 2005. The latter process is referred to as the 'initial review' throughout this document.

Market definition

2.2 ComReg proposed to define four interconnection markets:

- National market for wholesale call origination services provided over public telephone networks at a fixed location;
- National markets for wholesale call termination services used to provide retail calls to end users on each public telephone network, provided at a fixed location;
- National markets for wholesale call termination services used to provide retail calls to service providers on public telephone networks, provided at a fixed location; and
- National market for wholesale national call transit services on the public telephone networks provided at a fixed location.

2.3 ComReg also proposed to undertake a separate national consultation on the market for international transit services.

Market analysis

2.4 eircom were found to have SMP in all four markets, while all other fixed network operators (OAOs) were to be designated as having SMP on their respective fixed public telephone network in the markets for wholesale call termination to end users. However, following discussion with the EU Commission on whether the call termination to service providers market was potentially susceptible to *ex-ante* regulation, ComReg withdrew its notification of this market.

Remedies

2.5 ComReg identified a number of competition problems that could arise out of significant market power in these markets, such as leveraging of market power and exploitative/exclusionary behaviour by dominant operators, which could include excessive pricing. In the markets for **call origination** and **national transit**, ComReg proposed that the following remedies should be imposed on eircom to address market failure:

- Transparency;
- Non-discrimination;
- Access;
- Price control and a cost accounting obligation;

[3] ComReg Document 04/106.

[4] ComReg Document 05/37a.

- An obligation to maintain existing accounting systems, accounting separation and associated methodologies pending the outcome of further consultation.

2.6 In the market for **call termination to end users**, ComReg recognised the different competitive conditions faced by eircom and OAOs, and proposed that proportionate remedies should be designed to reflect these differences.

2.7 ComReg proposed that appropriate remedies/obligations for OAOs were:

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

2.8 ComReg proposed that appropriate remedies for eircom were:

- Transparency;
- Non-discrimination;
- Access;
- Price control and cost accounting; and
- An obligation to maintain current cost accounting systems, accounting separation and associated methodologies pending the outcome of further consultation.

Other services necessary for the provision of interconnection

2.9 ComReg proposed to mandate the provision of capacity based interconnection products without the definition of a relevant market or a designation of SMP. ComReg considered its approach in mandating such products to be consistent with the approach set out in the *Access Regulations* and the *Explanatory Memorandum.* It was ComReg's view that the provision of these products was essential to ensure adequate access, interconnection and interoperability. ComReg also proposed that it was not necessary to impose additional remedies on fixed SMS. Finally, the information available to ComReg did not indicate that the supply of wholesale Directory Enquiry services was effectively competitive. However, ComReg intended to consider the matter further by means of an additional consultative stage.

Current Review

2.10 ComReg has decided that, before issuing a Final Decision, it is appropriate to re-examine and update the market analysis contained in the initial review. This will allow ComReg to assess fully any change in the market from the time of the initial review. This process is referred to throughout the document as the 'current review'.

2.11 The current review has involved collecting and updating data, and extending some elements of the initial review to take account of changing conditions. As part of the current review, ComReg issued specific data directions on the interconnection markets[5] and conducted meetings and conference calls with a large number of operators. ComReg has reviewed the findings of the EU Commission in its new Draft Recommendation on Relevant Markets[6] as well as the independent expert report

[5] Interconnection Data Direction sent out to the fixed and mobile network operators – dated 09 June 2006.

[6] http://ec.europa.eu/information_society/policy/ecomm/doc/info_centre/public_consult/review/recommendation_final.pdf

advising the EU Commission on this new recommendation[7]. ComReg has also carefully reviewed the findings of other NRAs and the comments of the EU Commission on these findings as a useful source of ancillary information on the interconnection markets.

2.12 The initial review generally incorporated market information to the end of 2004, where this information was available, and looked ahead two years in considering how the markets were likely to develop. The initial review primarily used quantitative data which had been collected on a quarterly basis for the purposes of the ComReg Quarterly Report. This current review is based on new quantitative data collected as part of the Interconnection Data Direction for the four periods from H1 2004 to H2 2005. A period of two years was chosen as it was considered that a longer period would have been overly burdensome for operators. As this new data is not directly comparable to the old Quarterly Report data, due to different sources, data categories, time periods used etc., only the newly collected quantitative data is relied on in the current review. As recommended in *The Guidelines*[8] the current review considers the market prospectively, and considers how the market is likely to change over the next two years. ComReg is of the preliminary view that while the data set runs until H2 2005, there has been little significant change in the intervening period that would indicate a change in the trends in market share.

2.13 ComReg is now inviting responses to this updated market analysis, and to the proposals and views contained herein. The intention is to consider responses, consult with the Competition Authority and publish a Final Decision, which will also be notified to the EU Commission.

2.14 ComReg would welcome comments from all interested parties on the questions posed in this market review and will accept written comments on or before 5.30 pm Friday 2 March 2007. Under Article 5 of the Framework Regulations and in order to promote further openness and transparency, ComReg will publish the names of all respondents subject to maintaining confidentiality.

Structure of this document

2.15 The consultation on interconnection is published in two parts. This document considers the market for wholesale call termination. ComReg Document 07/02 examines the markets for wholesale call origination and wholesale call transit (including international transit services).

2.16 The remainder of this consultation document is structured as follows:

- **Section 3** presents ComReg's preliminary conclusions on the definition of the wholesale call termination markets. This section consists of a review of the market definition procedure and its scope, as well as demand- and supply-side assessments;

[7] Martin Cave, Ulrich Stumpf and Tommasso Valletti, July 2006, "A review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation", available from: http://ec.europa.eu/information_society/policy/ecomm/info_centre/documentation/studies_ext_consult/index_en.htm

[8] Commission's Guidelines on Market Analysis and Significant Market Power ("The Guidelines"). OJ C 165/03. Paragraph 20.

- **Section 4** presents ComReg's SMP analysis of the call termination markets and presents ComReg's preliminary view on whether the markets are effectively competitive;
- **Section 5** presents ComReg's preliminary view on those undertakings with significant market power in the call termination markets;
- **Section 6** provides a discussion of competition problems. The general principles associated with remedies are outlined, a range of possible remedies is identified, and appropriate remedies proposed;
- **Section 7** provides a discussion of other relevant services for interconnection.
- **Section 8** outlines the nature of the regulatory impact assessment that needs to be conducted in relation to any proposed regulatory intervention regarding these markets;
- **Section 9** provides details with regard to the submission of comments on this consultation document;
- **Annex A** sets out the Draft Decision Instruments;
- **Annex B** sets out a glossary of terms used in this document;
- **Annex C** sets out the consultation questions;
- **Annex D** presents ComReg's views on the methodology for a wholesale price cap; and
- **Annex E** assesses the appropriate SMP criteria to be considered in the competition assessment for each market.

Q. 1. Are there additional factors that in your opinion require analysis by ComReg? If yes, please indicate precisely what they are. In respect of the factors analysed, is there additional analysis that in your opinion must be carried out. If so, please indicate precisely what that is.

3 Relevant Market Definition

Background to Product Market Definition

3.1 In order to consider the definition of interconnection markets, ComReg assessed the extent to which products or services have objective characteristics, prices and intended use which make them sufficiently interchangeable. The analysis of demand-side considerations involves an assessment of all those products or services that are viewed as sufficiently close substitutes by consumers to be included within the same relevant product market. ComReg examined the prevailing conditions of demand substitution by applying, where possible, the hypothetical monopolist test. The **S**mall but **S**ignificant **N**on-transitory **I**ncrease in **P**rice ("SSNIP") or hypothetical monopolist test provides a useful conceptual framework within which to identify the existence of close demand substitutes[9].

3.2 ComReg also considered the scope for supply-side substitution where *"its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy"* and where *"suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices"*[10]. The SSNIP test is also used, where possible, for the identification of effective supply-side constraints. For the products of a firm to be regarded as effective supply-side substitutes, it is not only necessary for the production, marketing and distribution of the relevant products to be possible without the need for significant new investments; it must also be possible within a relatively short period of time[11]. When these conditions are met, the market may be broadened to include the products that those suppliers are already producing[12].

3.3 The initial review described the procedures which were followed by ComReg in undertaking market definition and analysis and outlined the regulatory basis of the exercise. This current review draws on that approach and takes into account developments in the interconnection markets since the initial review and further information provided by operators in response to recent data requests.

3.4 ComReg notes that this current review is prospective in analysing possible developments in the market, and considers a timeframe of around two years.

Scope

3.5 The markets examined in this review encompass a range of wholesale services provided over fixed public narrowband networks that are necessary inputs for entities seeking to provide fixed public narrowband retail services.

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[9] EU Commission, Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5 ("the Commission's Notice on Market Definition"), paragraph 17 states - *"The question to be asked is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market".*

[10] The Commission's Notice on Market Definition, para. 20.

[11] OFT Guideline (July 2001) OFT 342, The role of market definition in monopoly and dominance inquiries, Economic Discussion Paper 2,, para. 2.20.

[12] Richard Whish (2003), Competition Law, Fifth Edition, pages 32-33.

3.6 The initial review defined four interconnection markets. These were:

- Wholesale call origination;
- Wholesale call termination to end users;
- Wholesale call termination to service providers; and
- Wholesale national call transit.

3.7 A potential fifth market for international call transit services was to be the subject of a further separate consultation.

3.8 Having further considered responses to the previous consultation, responses to data requests, and input from discussions with the EU Commission and industry, ComReg proposes that the current review should examine three markets:

- Wholesale call origination;
- Wholesale call termination; and
- Wholesale call transit (national and international transit).

3.9 This is line with the previous EC Recommendation[13], and with the new EC Draft Recommendation[14].

3.10 The nature of interconnection means that the wholesale market cannot be analysed in isolation from the downstream retail markets which rely on wholesale inputs. In related consultations[15], ComReg has considered the retail markets which require interconnection services as inputs.

3.11 Similar to the initial review ComReg proposes to maintain the definition of the boundaries between call origination, call termination and transit as follows:

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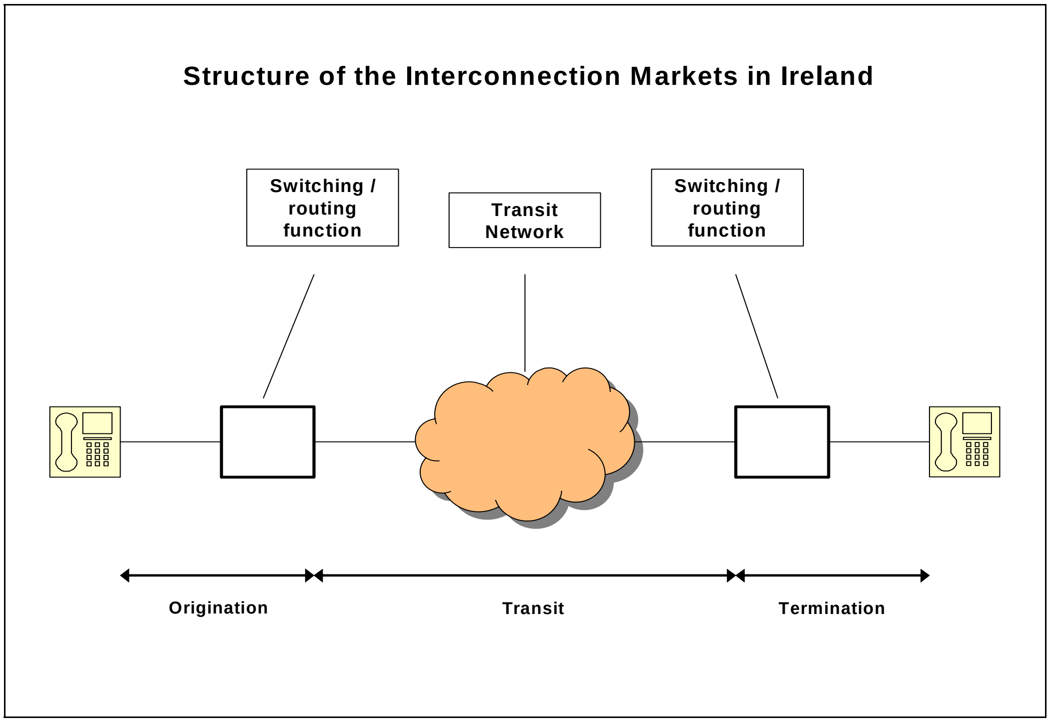
[13] Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector.

[14] Commission Staff Working Document, Public Consultation on a Draft Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector, Brussels, 28 June 2006 SEC (2006) 837.

[15] Retail Fixed Narrowband Access (04/94, response to consultation 05/25); Retail Fixed Calls (04/95, response to consultation 05/26) Wholesale unbundled access (including shared access) to metallic loops and sub-loops (04/40). Retail Fixed Narrowband Access (06/39) and Retail Fixed Calls (06/51).

Figure 3.1: Structure of Interconnection Markets in Ireland



- Origination services provide primary switching/routing functionality at the originating end of a call. It incorporates carriage from the service provider’s end of the end-user's local loop (which loop includes the subscriber’s line card, in its entirety), through the primary switching/routing stage (including, where appropriate, traffic concentration and/or non-call-by-call routing prior to the primary switching/routing stage), to the next stage in the call switching/routing (either call termination or call transit). The primary switching/routing stage is the first point in the network where call routing is done on a call-by-call basis.
- Termination services provide primary switching/routing functionality at the terminating end of a call. It incorporates carriage from the end of the previous stage in the call routing (either call origination or transit), through the primary switching/routing stage (including, where appropriate, traffic concentration and/or non-call-by-call routing subsequent to the primary switching/routing stage), to the end-user's local loop, including the subscriber’s line card, in its entirety. The primary switching/routing stage is the final point in the network where call routing is done on a call-by-call basis.
- Transit conveyance comprises all elements of national call routing that take place between call origination and call termination with the exception of any switching/routing stage that, for the call in question, undertakes a function not typically associated with simple call routing. For the avoidance of doubt, this definition of transit excludes switching/routing stages which undertake a specific CPS/WLR function and switching/routing stages which undertake a specific NTC function for the call in question. In the initial review, ComReg proposed that incoming transit services through international gateway exchanges were part of the international transit market. However, following a subsequent detailed data direction in October 2005 and more in-depth analysis, ComReg now proposes that the conditions of competition for such services are more analogous to national transit services and as such should be included in the national transit market.
- International transit services involve the switching/routing of outgoing retail international calls from an onshore international gateway switch.

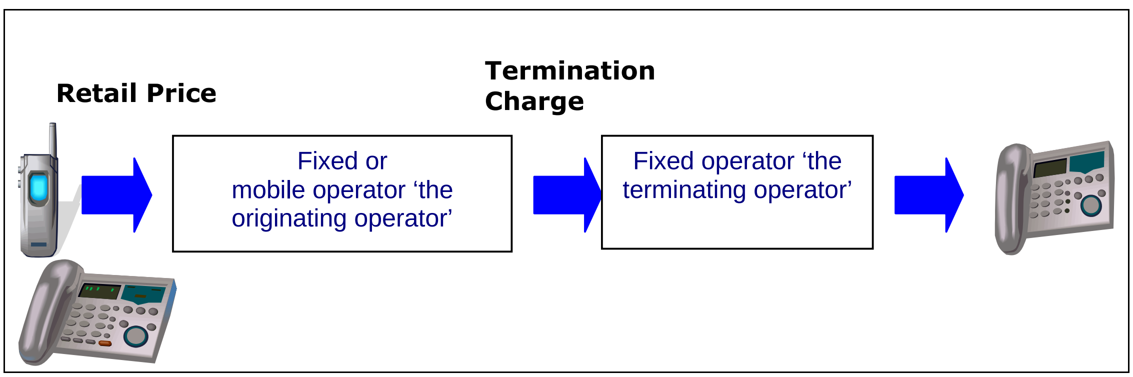
3.12 The *Framework Regulations* require that the market analysis procedure under Regulation 27 be carried out subsequent to ComReg defining a relevant market, which is to occur as soon as possible after the adoption, or subsequent revision, of the Recommendation on relevant product and service markets ("*the Relevant Markets Recommendation*") by the EU Commission.[16] In carrying out market definition and market analysis, ComReg must take the utmost account of the Relevant Markets Recommendation and the Commission's Guidelines on Market Analysis and Significant Market Power ("*The Guidelines*"). ComReg adopted the EU Commission's approach[17] as its starting point for defining the market, such that the review is concerned with wholesale call origination, transit and termination.

3.13 ComReg is consulting in parallel on all of the interconnection markets. For ease of presentation, this document examines the markets for wholesale call termination, while the markets for wholesale call origination and wholesale call transit are examined in ComReg document 07/02.

Market Definition: Call Termination

3.14 As stated above the services under examination in this review are those for the termination of voice calls on individual fixed networks. A terminating network is the network to which a customer who receives a call is directly connected. In Ireland, when a call is made to a fixed phone, whether from a fixed line or from a mobile on another network, the call passes from the originating operator to the terminating operator (this can be directly as in figure 3.2 below or indirectly via a transit operator). The terminating operator charges a fee for connecting the call to its customers which is known as a termination charge. The termination charge is paid by the originating operator and passed on to the caller in the retail price it pays for a call. Call termination charges may include call set-up charges and may be separated into peak, off-peak and weekend rates.

Figure 3.2: How a fixed termination charge arises



3.15 Of particular importance in the context of any market definition for termination services is the Calling Party Pays ('CPP') principle. The CPP principle means that the party making the call (the calling party), rather than the party receiving the call, (the called party), pays the entire cost of the call at the retail level. The fixed call termination charge is included in the originating operator's cost base and in the retail

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[16] Framework Regulations 26 and 27.

[17] Commission Recommendation on Relevant Product and Service Markets, in accordance with Directive 2002/21/EC.

price charged by the originating operator to its subscribers. This leads to a separation as the calling party pays for the voice call, which typically includes the fixed voice termination charge, while the called party selects the terminating operator and therefore the level of the termination charge. That is, the calling party pays the termination rate, but the called party decided which fixed operator to subscribe to. Termination rates therefore do not directly raise costs to the customers of the operator that sets the termination rates, rather they tend to raise costs to those who place calls to that operator's customers.

3.16 In the initial review, ComReg proposed that:

- Termination of calls to end users was not in the same market as termination of calls to service providers;
- The relevant product market for wholesale fixed termination services for calls to end users was defined by each individual fixed termination provider;
- Self-supply for termination of calls to end users (geographic termination) should be included in the relevant product market; and
- There was a single national market for supply of wholesale termination services.

3.17 In the current review, ComReg has addressed the following issues:

- Are termination of calls to end users in the same market as termination of calls to service providers;
- Is the relevant product market for wholesale fixed termination services for calls to end users a single network market;
- Is fixed call termination part of a wider fixed services market;
- Is self-supply for termination of calls to end users (geographic termination) included in the relevant product market; and
- Are termination of Voice over Internet Protocol (VoIP) call services in the same product market as call termination services; and
- The relevant geographic market.

Do termination services for calls to end users and calls to service providers fall within the same relevant product market?

3.18 ComReg proposed in the initial review that termination of calls to end users was not in the same market as termination of calls to service providers.

3.19 A consideration of demand for termination services suggests that termination services to end users and termination services to service providers are distinct products, and one cannot substitute for the other.

3.20 On the supply side, termination for calls to end users requires geographic call termination. In contrast, termination for calls to service providers requires non-geographic termination and thus can be provided without ubiquitous network coverage (e.g. in a concentrated area such as a business park). The economics of supplying access points for calls to service providers, which are likely to handle a lot of traffic, are different from those of supplying a nationwide network of low-traffic geographic termination points.

3.21 ComReg proposes that, while a hypothetical monopolist provider of call termination services for end users could, theoretically, enter the market for termination services for calls to service providers, in response to a price increase of 5 to 10%, the reverse is not the case. ComReg is of the preliminary view that the costs of rolling out a network to provide termination to end users is more significant than those of providing a termination service to service providers service. Hence, operators would be unlikely to enter the market in response to a 5 to 10 % increase in price.

3.22 Further, different competitive conditions pertain to wholesale termination of calls to service providers and wholesale termination of calls to end users. This is due to the ability of service providers to negotiate with the terminating network operator and to switch to competing networks for hosting their service platform (e.g. internet dial-up or freephone calls).

3.23 **Preliminary Conclusion: Wholesale call termination to service providers is not in the same market as wholesale call termination to end users.**[18]

Is the relevant market for termination of calls to end users a single network market?

3.24 In the initial review, ComReg proposed that the relevant product markets for wholesale fixed termination services for calls to end users was for each individual fixed network provider. This is a single network market structure.

3.25 ComReg could define a very narrow product market based on each individual fixed number on a fixed network but is of the preliminary view this is not appropriate given the fact that fixed operators do not price discriminate between termination charges to different numbers on its network. As such, the proposed product market is more appropriate as it evidences similar conditions of competition for all numbers on the network. A common pricing constraint applies to voice call termination for all subscribers to an individual fixed network.

3.26 A purchaser of wholesale termination that is, an operator that wishes to terminate a call to a fixed number on a specific network will not have any available substitutes for the service. The operator can only terminate the call on the network to which that number is assigned irrespective of whether the call is delivered to the terminating network directly from the originating network or by an intermediate third party transit provider. The call would be unsuccessful if an attempt were made to terminate it on another network.

3.27 Over the timeframe of this review there are no technical alternatives by which a call could be successfully terminated without the co-operation of the terminating operator. Therefore, each operator's termination service falls within its own distinct market, and is not substitutable for the termination service provided by other operators.

[18] In the initial consultation, along with the wholesale markets for call origination, call transit and call termination to end users on individual networks, ComReg also identified a second fixed termination market potentially susceptible to *ex-ante* regulation. This market related to the wholesale provision of termination services for calls to service providers. Following discussion with the Commission, ComReg withdrew the notification of the wholesale market for termination of call to Service Providers. See ComReg Document 0539 for further information.

In addition, the market is not one that is recommended as susceptible to *ex ante* regulation in the Independent Report on the Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation, Cave et al, July 2006.

Accordingly, it would be profitable for a hypothetical monopolist supplier of wholesale termination services to increase its termination charges by 5 to 10%. ComReg also examines below in 3.38 the impact of other technologies (e.g. VoIP) on the product market definition.

3.28 **Preliminary Conclusion: Wholesale call termination of calls to end users is a single network market.**

Is fixed call termination part of a wider fixed services market?

3.29 As stated above, ComReg considers it appropriate to take as a starting point the fact that there are separate markets for wholesale voice call termination on individual fixed networks. However, it is possible that termination is part of a cluster market incorporating all fixed services. This could be the case if fixed operators competed on the price of a bundle of fixed services offered and not on the price of each single service. Under that scenario a fixed operator would not be able to raise the price of termination without reducing the price of other services in the bundle. This does not seem to be the case in practise in particular as eircom, for example, does not vary the retail price charged for making fixed calls to all other operators. Otherwise depending on the level of competition in the overall fixed market, consumers might switch to another operator in response to a rise in the price of the bundle of fixed services. ComReg is of the preliminary view that such a wider market definition that encompassed all fixed services would only be viable if fixed subscribers were concerned about the cost of calling fixed phones, which ComReg is of the preliminary view does not appear to be the case under CPP.

3.30 ComReg has no evidence of price sensitivity at the retail level that suggests either sensitivity to wholesale termination rates or consideration of the identity of the provider of termination services. Consumer research indicates that price is the most important factor for respondents when selecting a fixed line provider, at sixty six per cent but this generally refers to the price for outgoing calls and subscribing to the service.[19] In addition, there is little, if any, dissemination of information that would make end users aware of termination charges. As a result, it is likely that most callers in Ireland would be unaware of the identity of the fixed operator terminating the calls that they make or the charge differentials between terminating operators. This is particularly so given that eircom does not at present make a distinction between making calls to its own retail arm and making calls to any other fixed operator. The lack of termination pricing awareness has the potential to limit the competitive significance of the identity of the terminating operator, even if callers were aware of the identity of the called network.

3.31 Retail price sensitivity can only impose a competitive constraint on termination rates if the retail party paying for the service can bypass the terminating network (i.e. there are demand-side substitutes at the retail level which constrain (or arguably might constrain) the ability of a fixed network operator to raise its termination charges). ComReg has considered, at some length in its Consultation on the Fixed Retail Calls Markets[20], the ability of retail end users to use substitute services to replace fixed-to-fixed voice telephony calls. In that analysis, ComReg concludes that, while fixed-to-mobile calls are in the same market, mobile-to-mobile calls do not at present represent a viable substitute.

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[19] ComReg document 0622a, Trends Survey Q1 2006.

[20] ComReg Document 0651, Retail Fixed Calls.

3.32 ComReg is of the preliminary view that fixed network operators do not compete for subscribers on the price of incoming calls to fixed phones but rather more often on the price of outgoing calls. This view is also consistent with the market definition exercise carried out as part of the initial review. In the context of its current review, ComReg emphasises that the provision of voice call termination at the wholesale level is a product that is and can be, purchased on an individual basis and thus the appropriate market definition is not that of a cluster of fixed services.

3.33 ComReg recognises that the regulation of wholesale voice call termination services can affect other fixed services and will take this into consideration, both in terms of its assessment of whether the relevant market is effectively competitive, and in terms of any remedies proposed to be applied.

3.34 **Preliminary conclusion: Fixed call termination is not part of a wider market for fixed services.**

Is self-supply included in the market for termination of calls to end users?

3.35 In the initial review, ComReg proposed that self-supply for termination of calls to end users should be included in the relevant product market.

3.36 To complete a call to another operator's network it is necessary to purchase wholesale call termination from that operator; no alternative wholesale inputs exist for completion of that call. Therefore self-supply is not of relevance in this market in terms of whether it could act as a constraint on the wholesale operator supplying call termination on its individual fixed network.

3.37 **Preliminary Conclusion: Self-supply is not included in the market for wholesale termination of calls to end users on individual fixed networks.**

Are termination of Voice over Internet Protocol (VoIP) call services in the same product market as call termination services?

3.38 At the retail level and indirectly at the wholesale level, it is conceivable that there could be an indirect constraint imposed on terminating operators from operators providing voice over internet protocol services (VoIP).[21] These types of calls would include managed voice over broadband services (VoB)[22] or unmanaged voice over internet (VoI)[23] services. In terms of functionality a VoB call could be substitutable for a fixed call and in the Irish market this is the preliminary conclusion in relation to VoB calls for non-residential users.[24] However, this is unlikely to act as a constraint on wholesale call termination. For example, end users might prefer to keep their

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[21] VoIP (voice over IP) is an IP telephony term for a set of facilities used to manage the delivery of voice information over the Internet. VoIP involves sending voice information in digital form in discrete packets rather than by using the traditional circuit-committed protocols of the PSTN network.

[22] VoB is a service that allows you to make telephone calls over a high-speed Internet connection rather than through a regular telephone outlet without having to go through your computer. On the Internet, the call is carried in packets using Voice over Internet Protocol (VoIP). As such, VoB is a sub-set of VoIP services.

[23] VoI services are accessible only through the installation of software on a computer and are available on a limited customer basis, that is, on a closed user group basis. Unlike VoB and traditional voice telephony services, VoI does not have a number range, ancillary services or service mediation. VoI calls are carried over the public internet and are not able to guarantee any quality of service.

[24] See preliminary conclusions in Retail Calls Consultation, ComReg document 0651, where VoB services are considered potential substitutes in the non-residential market.

telephone line free to receive incoming calls and to use their broadband connection in a complementary way, such as for higher speed internet access. Choosing a broadband only connection solely for making voice calls might be too costly to be considered a substitute for traditional voice services.[25]

3.39 VoB is dependent on users having a broadband connection. ComReg is of the preliminary view that the vast majority of consumers would be unlikely to switch to VoB services in the event of a 5-10% increase in price by a hypothetical monopolist provider of call termination services. Broadband penetration per capita stands at 10.31% and the trend in broadband take-up is expected to be strong in 2007. However, as detailed in the recent Retail Calls Market Review, Calls for Input document[26], because the broadband base was relatively low compared to other member states, even high projected growth rates did not bring Ireland up to the current EU-15 average. This was compounded by experience in other countries, where VoIP users remained a small proportion of broadband users, and VoB users represented a proportion of VoIP users.[27] The potential for significant demand-side substitution is also likely to be constrained by the need for customers to make two levels of investment to switch to VoB. First, they would require a broadband connection. Second, they would need an adaptor. This is particularly pertinent given CPP where called parties may be unlikely to invest in alternative technologies to minimise the cost of others calling them. Perhaps more fundamentally, VoB would still not obviate the need to pay a wholesale call termination charge if the originating operator is terminating the call on a geographic number associated with a specific end user on a particular fixed network.

3.40 ComReg intends to monitor developments in this market closely, particularly in respect of the conclusions in the retail calls markets and the development of VoIP products using fixed numbers.

3.41 **Preliminary conclusion: VoIP services would not at present act as a constraint in the market for wholesale call termination services on a fixed network.**

Relevant Geographic Market

3.42 A relevant geographical market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in relation to which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.[28] Furthermore, the SMP Guidelines note that in the electronic communications sector, the geographical scope of the relevant market has traditionally been defined with reference to two main

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[25] Cave M. et al, Independent Report, A Review of certain markets included in the Commission's Recommendation on relevant Markets subject to *ex ante* Regulation, July 2006.

[26] ComReg Document 06/51, Retail Calls Market Review, Calls for Input on the Assessment of the three criteria.

[27] ComReg's latest market research shows that only a small proportion of broadband users (less than 1% at the end of 2005) actually use VOIP services and only a subset of those use VOB.

[28] See the Commission Notice on Market Definition, SMP Guidelines, ComReg Document No 02/117 - Information Notice on Market Analysis and Data Collection and United Brands v. Commission, [1978] ECR 207, for additional guidance.

criteria: (a) the area covered by the network and (b) the existence of legal and any other regulatory instruments.[29]

3.43 Termination services are offered to and by all operators in Ireland on terms that do not differentiate by reference to geographic location and each individual fixed network is deemed a relevant product market according to the market definition. While a fixed network operators' customers may not be located nationwide if for example retail services were provided predominantly to customers in the Dublin area, termination to a particular end-user is made available on a nationwide basis and the national wholesale termination rate pricing is not differentiated. It is unlikely that retail customers would be satisfied with a service that only allowed for the termination of calls (and hence the receipt of calls) in a specific local area. ComReg is of the preliminary view therefore that the relevant geographic market for the supply of wholesale call termination services to end users corresponds to a national market.

3.44 **Preliminary conclusion: There is a national market for wholesale call termination services on a fixed network.**

Overall preliminary conclusions on Wholesale Call Termination Market Definition

3.45 The analysis which has been carried out indicates that:

- Wholesale call termination to service providers is not in the same market as wholesale call termination to end users on a fixed network;
- Wholesale call termination services to end users on a fixed network are not part of a wider fixed services market;
- Self-supply for termination of calls to end users on a fixed network should not be included in the relevant product market;
- VoIP services would not at present act as a constraint to a sufficient degree on wholesale call termination services; and
- There is a national market for wholesale call termination services to end users on individual fixed networks.

3.46 ComReg proposes to define the markets as follows:

- **National markets for wholesale call termination to end users located on individual fixed networks.**

3.47 The relevant operators in the markets for wholesale call termination to end users located on individual fixed networks are the following:

Table 3.1: Relevant operators in the market for wholesale voice call termination to end users on a fixed network.

Fixed Operators
eircom
BT Ireland

[29] SMP Guidelines, paragraph 59.

Verizon
ntl Ireland (Chorus)
Colt Telecom
Smart Telecom
Magnet Communications Ltd

3.48 In the initial review, ComReg had also identified the operators in table 3.2 below as active in the markets for wholesale call termination to end users located on individual fixed networks. However, following further analysis, ComReg is of the preliminary view that these operators do not need to be examined as part of the relevant markets for the reasons outlined further below.

Table 3.2: Operators not active in the market for wholesale call termination to end users located on individual fixed networks

Fixed Operators
Budget Telecom
Energis (Cable & Wireless)
Imagine Group Telecom
Finarea
Swiftcall
Talk Telecom

3.49 The OAOs in the list in table 3.2 above have termination rates published in eircom's switched transit and routing price list ('STRPL'), but are not receiving wholesale traffic for the purposes of termination to end users because:

a) They do not have directly connected end users; and/or

b) A geographic termination rate was a prerequisite to entering into any interconnection agreement with eircom.

3.50 Hence, most of these OAOs have not received any revenue to date from termination to end users and in most cases do not intend to provide this service within the timeframe of this review.

3.51 Two of these OAOs do have an allocation of geographic numbers and the evidence to date suggests that one has received termination revenue payments from eircom. However, these OAOs have no directly connected end customers and as such these calls/revenues are not for termination of calls to end users. Instead, these are calls destined for a geographic number (for example in the Dublin area) for onward routing to a calling card platform. The calling card platform then determines the destination of the call and where the destination is international it is routed back to the OAO's switch for international transit. Thus the geographic numbers are used for re-routing services and not for terminating calls to end users on those numbers, so the OAOs in question do not control access to an end user. ComReg is of the preliminary view that these OAOs with an allocation of geographic numbers would not constitute a relevant market for an SMP analysis. From the information provided by the OAOs the services provided by them are similar to the provision of calls to non-geographic numbers, so that the wholesale customers involved (e.g. calling card platforms) can choose to switch to another indirect access provider to route their calls if the price of 'termination' were to increase.

3.52 ComReg therefore is of the preliminary view that these OAOs should not be included in the market analysis, as they have no directly connected end users and are not active in the relevant market. ComReg proposes to monitor the position of the OAOs in this group and, in the event that market entry occurs, to review this preliminary finding.

Q. 2. Do you agree with the above preliminary conclusions regarding the market definition exercise? Please provide a reasoned response and refer to the relevant paragraph number(s) when submitting comments.

4 Relevant Market Analysis

Introduction

4.1 Having defined the scope of the relevant product and geographic markets, ComReg must assess the level of competition within each market. An undertaking will be deemed to have Significant Market power (SMP) if it is in a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

4.2 In the initial review, ComReg presented a detailed analysis of the relevant markets and assessed the state of competition on the relevant markets. In this document, the focus is on any development in the markets since the time of the initial review.

Background

4.3 Wholesale call termination services are part of the wholesale inputs used to provide retail calls to end users in Ireland.

4.4 Each fixed network operator provides wholesale termination services on its individual network for completing retail calls to its end users. Each fixed network operator is the only entity that can control the network termination point on its network as it is the only entity that can terminate calls to a specific end user on its network. A list of the relevant operators in these markets is provided in the table below.

Table 4.1: Operators in the markets for wholesale voice call termination to end users on a fixed network.

Fixed Operators
eircom
BT Ireland
Verizon
ntl Ireland
Colt Telecom
Smart Telecom
Magnet Communications Ltd

Market structure

4.4.1 ***Market share***

4.5 ComReg has identified single network markets for the provision of wholesale termination to end users. It is not possible for any operator other than the operator controlling the network terminating point to a particular end user and geographic number to terminate calls to that end user. Therefore each fixed network operator has a 100% market share of wholesale termination to end users on its network. The SMP Guidelines make clear that very large market shares – i.e. in excess of 50% - are in themselves, save in exceptional circumstances, suggestive of the existence of a dominant position. However, ComReg recognises that large market shares are not in themselves determinative of the question of SMP but one of a number of criteria that it has to examine.

4.5.1 ***Existing competition***

4.6 As stated above each fixed network operator has a one hundred percent market share over termination of calls to end users on its network. As examined in the market definition section[30], at the wholesale level there are currently no feasible supply or demand side substitutes for the provision of wholesale call termination services to end users at a fixed location. Technically, it is not at present possible to terminate a call to an end user without the co-operation of the operator to which the end user subscribes.

4.7 There are high and non-transitory barriers to entry into each individual network market during the period of this review. It is ComReg's preliminary view that there is a lack of existing competition in these individual network markets.

4.7.1 *Preliminary Conclusion*

4.8 ComReg is of the preliminary view that there is a lack of existing competition in the individual markets for wholesale call termination to end users on individual fixed networks.

4.8.1 ***Ability to price independently***

4.9 ComReg has examined the pricing behaviour of all OAOs with geographic termination prices published in eircom's Switched Transit and Routing Price List ('STRPL'). The conclusions to date indicate that there are differences in OAO activity which has an impact on the market analysis. ComReg has detailed in the market definition section above why some of the OAOs examined in the initial review are no longer part of the market and as such do not need to be examined under this SMP analysis.

4.10 The relevant OAOs for the SMP analysis generally entered the fixed retail market several years ago. They have directly connected customers and have sustained termination rates above those of eircom since entering the market. Two of the OAOs in this group have entered the market more recently, in 2005 and 2006 respectively, and have directly connected end users.

4.11 eircom as the incumbent, is the longest established operator, has directly connected end users and its rates have been subject to regulation since 1999.

4.12 As stated above, the SMP Guidelines indicate that market shares in excess of 50% are in themselves, save in exceptional circumstances, suggestive of the existence of a dominant position. However, a key question is whether there are other factors that may prevent the operator from acting, to an appreciable extent independently of its customers, competitors and consumers. In particular, ComReg will focus on whether any factors limit the ability of an operator to raise its price above what is likely to be the competitive level.

Barriers to entry and potential competition

4.13 Given the absolute barriers to entry as detailed above and in the market definition section, ComReg is of the preliminary view that the position of each fixed network operator, whereby it enjoys a monopoly over the supply of call termination to end

[30] Market Definition Section pages 9-19 of this document.

users on its network, will not change over the period of this review. It is ComReg's preliminary view that there do not seem to be feasible substitutes to wholesale call termination to end users at a fixed location. The nature of the call termination market definition (where call termination to a particular end-user is not replicable *per definition* and no other operator can terminate the call) means that many of the structural barriers to entry examined in the market analysis of the call origination and transit markets are not relevant for the termination market. Therefore fixed network operators are not threatened by potential competition in the supply of their termination services. Each fixed network operator has control over infrastructure not easily replicated as it is not possible to replicate access for termination of a call to a specific end user associated with a specific number.

4.14 As such, in considering whether there are any factors which may qualify an operator's potential dominance on its own network, ComReg has also examined the potential for the exercise of countervailing buyer power.

4.14.1 Preliminary Conclusion

4.15 ComReg is of the preliminary view that the high and non-transitory barriers to entry arising from the market definition means that it is not possible over the timeframe of this review for another operator to enter an individual market and compete for the provision of termination services to a specific operator's directly connected end users. There are high and non-transitory barriers to entry and no threat of potential competition.

Countervailing buyer power (CBP)

4.16 Given the particular characteristics of this market, as described above, the analysis of CBP becomes central in assessing whether some or all of these fixed network operators have SMP in the market for voice call termination over their individual networks[31]. In the absence of existing or potential competition the only remaining possible constraint on an operator's ability to price above the competitive level is the bargaining strength of buyers.

4.17 CBP exists when a particular purchaser (or group of purchasers) of a good or service is sufficiently important to its supplier to influence the price charged for that good or service. CBP refers to the relative strength of the buyer in its negotiations with the prospective seller for the good or service in question. In examining whether an undertaking has SMP, it is not sufficient for the buyer to have some CBP but, rather, it is necessary that the buyer can exert sufficient CBP such that the seller is unable to act to an appreciable extent independently of competitors, customers and consumers. Thereby, resulting in prices which are not excessive i.e. constrained to a level consistent with a competitive outcome. This consultation paper focuses on the issue of whether the relevant fixed network operators have sufficient market power to profitably raise the price above the efficient level in relation to their respective terminating networks. If such market power exists, then there may be a case for regulatory intervention to prevent any negative effects of such market power on consumers and ultimately end users. The aim of this CBP analysis is to evaluate the likelihood of and/or existence of CBP in the markets for wholesale call termination on individual fixed markets and to identify the circumstances under which this could be exerted. The section on CBP is laid out as follows:

[31] The relative importance of CBP in the assessment of competition in termination markets was also expounded in the ECAP finding, Decision number 02/05: Hutchison 3G Ireland Limited and Commission for Communications Regulation.

1. Background to Economic Framework.
2. CBP analysis - eircom.
    - Relative Bargaining Strengths of Operators.
3. CBP analysis - OAOs.
    - Evidence from the negotiations.
    - Relative Bargaining Strengths of Operators.

1. Economic framework

4.18 The emphasis on the importance of an examination of CBP and by extension relevant economic theory such as bargaining theory was re-confirmed by the ECAP decision in the Hutchison 3G Ireland's (H3GI) mobile case. ComReg has since carried out a new review of wholesale mobile voice termination on H3GI's network[32], following the decision of the ECAP the review examines in detail the issue of CBP and the application of bargaining theory. In particular, the H3GI mobile termination review examines the economic theory, the evidence from negotiations and any other issues such as regulatory intervention and/or obligations on operators that could influence the bargaining dynamic. In respect of ComReg's fixed termination analysis of CBP it has applied a similar template to that used in the H3GI market review.

4.19 There has been considerable economic analysis of the issue of call termination on networks.[33] ComReg has examined much of this in its aforementioned consultation on mobile termination on H3GI's network. To the extent that this literature is relevant in the case of the fixed termination markets, ComReg has borne it in mind in its examination in this current review. The majority of this literature has focussed on whether unregulated markets will lead to a socially optimal outcome (for the purposes of this consultation paper we will term this the 'traditional approach'). This consultation paper focuses on the issue of whether the individual fixed network operators have sufficient market power to potentially raise the price above the competitive level in relation to their respective terminating networks.

4.20 In the traditional approach, mobile termination rates have been studied as part of a more general class of access problems. The network operator terminating calls is analysed as making a take-it-or leave-it-offer (TIOLO) to operators who wish to terminate calls on its network. In the context of fixed to mobile termination rates, this usually leads to the conclusion that in the absence of regulation a mobile network operator would in effect behave like a monopolist bottleneck supplier and set the monopoly price or higher for terminating calls. This is particularly the case where callers pay for calls and termination tariffs are determined based on usage. In some situations this monopoly charge could be extremely high.

[32] ComReg document 0701, Market Analysis: Wholesale Mobile Voice Call Termination on Hutchison 3G Ireland's Mobile Network.

[33] See Armstrong (2002), "Theory of Access Pricing & Interconnection," Chapter 8 in Handbook of Telecommunications Economics, eds Cave M., S. Majumdar & I. Vogelsang, for a summary of this literature.

4.21 On the other hand, there are papers that focus more on the application of bargaining theory.[34] These argue that the level of termination rates can be determined by the relative bargaining strengths of the parties to the negotiations. The higher the agreement gains to one operator, for example, the more that operator has to lose if negotiations are not concluded successfully and the lower its bargaining power. The Binmore & Harbord paper which is examined in the H3GI mobile termination market review, predicted that termination rates negotiated between H3GI and eircom would likely be lower than the average of other existing mobile operators' rates. The authors examined the relevance of the effect of being a new entrant to the market and assumed that a new entrant would be more risk averse and impatient which would decrease its bargaining power. The paper also examined the effect of the regulator on any negotiation and found that the key issue in determining what rates would be set was the rate the regulator would set. ComReg would note that the predictions of the Binmore & Harbord paper do not match the empirical evidence in the H3GI mobile termination case.

4.22 ComReg examines in the following sub sections, the evidence for the exercise of CBP in relation to the markets for wholesale call termination, taking into account the economic theories as background to the analysis.

2. CBP Analysis - eircom

4.23 In this sub section ComReg examines whether there would be sufficient CBP to prevent eircom from acting to an appreciable extent independently of its customers, competitors and consumers in the market for wholesale call termination to end users on its network. As stated above, CBP exists when a particular purchaser (or group of purchasers) of a good or service is sufficiently important to its supplier to influence the price charged for that good or service. CBP can refer to the relative strength of the buyer in its negotiations with the prospective seller for the good or service in question. eircom is the largest fixed operator in the overall fixed services retail market. Its termination rates have been subject to regulation since 1999, so to that extent, an examination of its rate setting behaviour would not yield useful information. ComReg has instead examined below the credibility of ways in which OAOs could potentially exert CBP over eircom.

4.23.1 ***Relative Bargaining Strengths of the operators***

Option not to purchase or to delay

4.24 In respect of an option not to purchase, ComReg examined whether an OAO or indeed a mobile operator could credibly threaten not to buy termination from eircom. As stated earlier, this threat would be more credible where there would be no disturbances to outgoing (and incoming) connections for the buying operator and its customers. It is unlikely that an OAO or a mobile operator would cut-off interconnection with the incumbent. eircom originates a greater proportion of total calls, than any other fixed operator, so it is likely that an OAO would experience more disturbance to its customers than eircom would. ComReg does not have any evidence to date to suggest that OAOs would credibly cut-off interconnection with eircom.

4.25 Multiple networks coexist and these networks need to connect to facilitate off-net calling. This means that network operators are often not able to provide a full service

[34] Binmore K. & Harbord D., Bargaining over Fixed to Mobile Termination Rates: Countervailing Buyer Power as a Constraint on Monopoly Power, Journal of Competition Law and Economics, Volume 1 (3) 2005.

unless they purchase call termination services from other networks. Both OAOs and mobile operators would likely face pressure from their own customers if they discovered they were not able to make calls to all networks. This is particularly true the larger the networks of the other operators.

4.26 In light of the commercial realities and the existing contracts between OAOs and eircom, ComReg's preliminary view is that it does not seem likely that either party would refuse to interconnect. In addition, all operators irrespective of SMP status have a general regulatory requirement to interconnect in order to ensure end to end interconnectivity and interoperability of service. ComReg's preliminary conclusion is that neither OAOs nor mobile operators would credibly threaten not to purchase, nor would they have an option not to interconnect, thus suggesting that they would be unlikely to attempt to exercise CBP in this way.

The buyer as an important outlet for the seller

4.27 If an OAO decided to stop terminating calls to eircom this would then damage their own subscribers, as mentioned above, as they would no longer be ensured end to end interconnectivity with eircom's large base of subscribers. Just as it is likely not in the interests of eircom not to interconnect with the OAOs and mobile operators, it is likely the OAOs would be reluctant not to terminate calls to and from eircom's network.

4.28 It is unlikely that any one OAO or mobile operator could be of sufficient importance to eircom to exercise CBP, as eircom is the sole operator that has widespread interconnectivity with other operators in the market. All the OAOs that responded to the data direction indicated that eircom was the main originator of traffic terminating on their network. While the latter point is a reason why eircom would not have a commercial incentive to refuse interconnection with other operators, given the selling point of having ubiquitous interconnectivity, it also has the effect that no one purchaser of eircom's termination services would be sufficient to exercise CBP.

4.28.1 Preliminary Conclusion on CBP Analysis-eircom

4.29 Based on the analytical framework as outlined above, it is unlikely that any OAO or mobile operator would have the effect of exercising a constraint on eircom's market power.

4.30 ComReg is of the preliminary view that, in the absence of regulation, there would be insufficient CBP to constrain eircom in its ability to act to an appreciable extent independently of its customers, competitors and consumers. In sub-section 3 below, ComReg examines whether there would be sufficient CBP to constrain OAOs in their ability to act to an appreciable extent independently of their customers, competitors and consumers.

3. CBP Analysis - OAOs

4.31 ComReg examines in this sub-section the evidence for the sufficiency of CBP vis à vis the OAOs in these markets. eircom can be distinguished from other fixed network operators and mobile operators because it is the largest buyer of termination across all fixed networks, it is the main buyer of termination on behalf of other networks (due to traffic transiting across its network) and it is the largest fixed provider of end to end connectivity. In theory, operators have the option to either directly interconnect with each other or to use another operator for transit. However, in practice, most OAOs use eircom for transit of calls to other operators and do not have direct interconnection agreements with terminating fixed operators (eircom provides approximately 75% of transit services for traffic terminating on other fixed networks in Ireland as of H2

2005). Arising from this the assessment of CBP below examines the relationship between the OAOs and eircom, the latter being the largest buyer of fixed termination services.

4.32 In order to encapsulate a complete review of the factors inherent in the exercise of CBP ComReg will firstly assess the evidence from the actual negotiations between OAOs and eircom. Secondly, ComReg will examine any other evidence relating to the exercise of CBP based on the relative bargaining positions of the buyer and seller of termination using evidence from the negotiations and any relevant regulatory factors that need to be taken into consideration in the analysis under a modified Greenfield approach[35].

4.32.1 ***Evidence from the negotiations between OAOs and eircom***

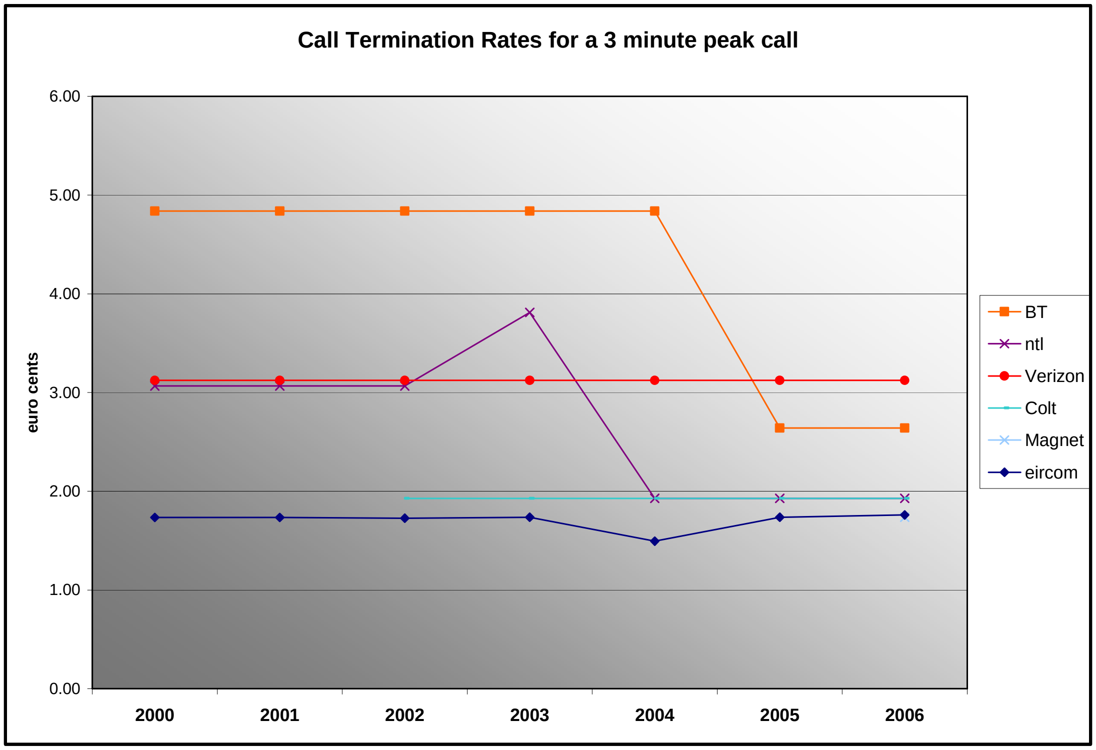
OAOs

4.33 The majority of the OAOs relevant for this analysis (see table 4.1 above) entered the fixed market in 2000. The data submitted by these operators as part of ComReg's data gathering exercise indicates that little negotiation over termination rates took place at that time, and generally the operators entered the market with termination rates similar to the prevailing eircom regulated rate at the time of entry. An analysis of how rates are set between the operators is relevant to CBP in terms of examining bargaining strength, as described in sub-section 1 above.

4.34 The following analysis examines the historic level of prices of the OAOs along with the evidence on the process for setting termination rates by the OAOs. Figure 4.1 below illustrates the absolute and relative wholesale termination services pricing for a three minute call at peak rates to a directly connected end user on a geographic number for eircom and the OAOs. The analysis confirms the relative stability of pricing for the OAOs since first entering the market. However, a pricing trend is unavailable for Magnet, the most recent entrant to the market. Magnet's final rates were agreed in 2006 and were reciprocal to eircom's cost oriented rates at the time. In addition, Smart's rates are not presented as they are subject to confidentiality.

[35] "A modified Greenfield approach takes account of non-SMP regulation and of SMP-related regulation originating in markets which are not a component of the value chain under review." A Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* Regulation An independent report by M. Cave, U. Stumpf, T. Valletti, July 2006.

Figure 4.1: Call termination rates for a three minute call at peak rates to a geographic number OAOs and eircom.



Source: eircom's switched transit and routing price list, version 54, 8-12-06 (Smart information is confidential).

4.35 However, any comparison of such rates should be approached with caution. Due to the fixed charge element (as well as a per minute charge) included in a number of operators' rates (including eircom's), a more complete picture of relative rates can be illustrated by a comparison of rates across a number of call durations. In the initial consultation, ComReg used a three minute call to compare rates but also examined rates of different call durations, which illustrated the sensitivity of the relative affordability of eircom's rate to the actual call length chosen. The charts below reproduce this comparison for both peak and off-peak rates as of October 2006. This takes into account any changes in the intervening period, namely the realignment of eircom's termination rates in July 2006 and the new entry of Magnet. It should be noted that Smart's rates are not presented as they are subject to confidentiality.

Figure 4.2: termination rates, OAOs at various call durations-peak rates

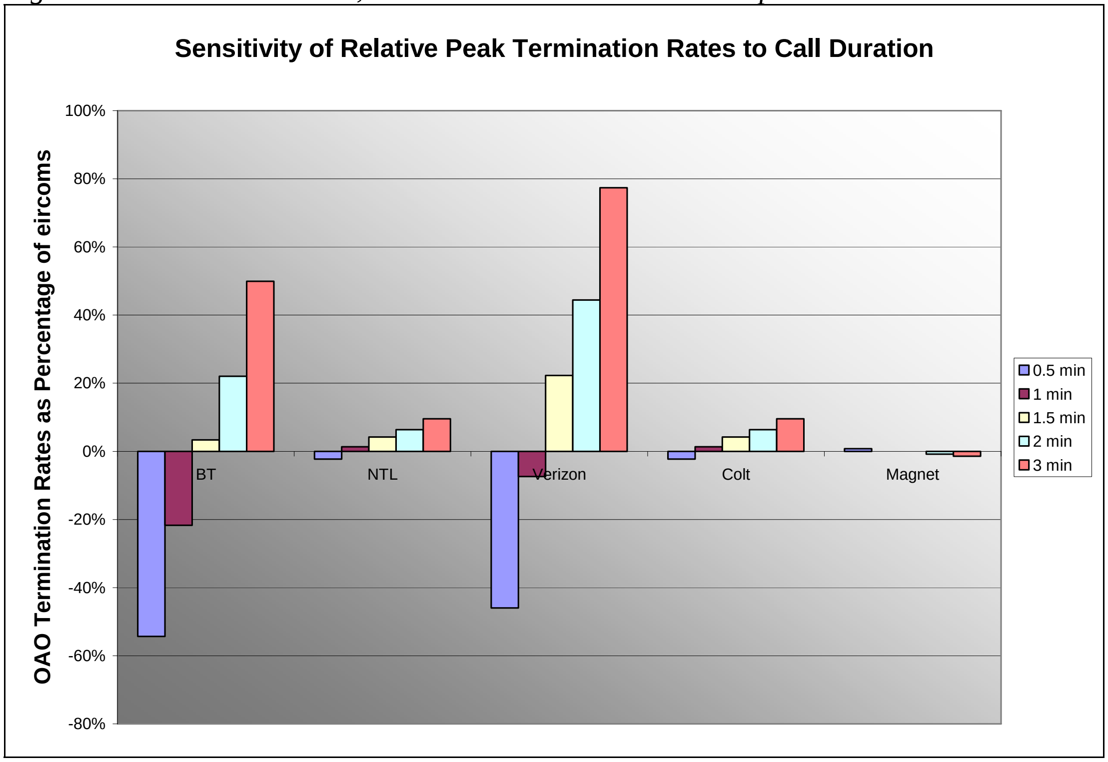


Figure 4.3: termination rates, OAOs at various call durations-off-peak rates

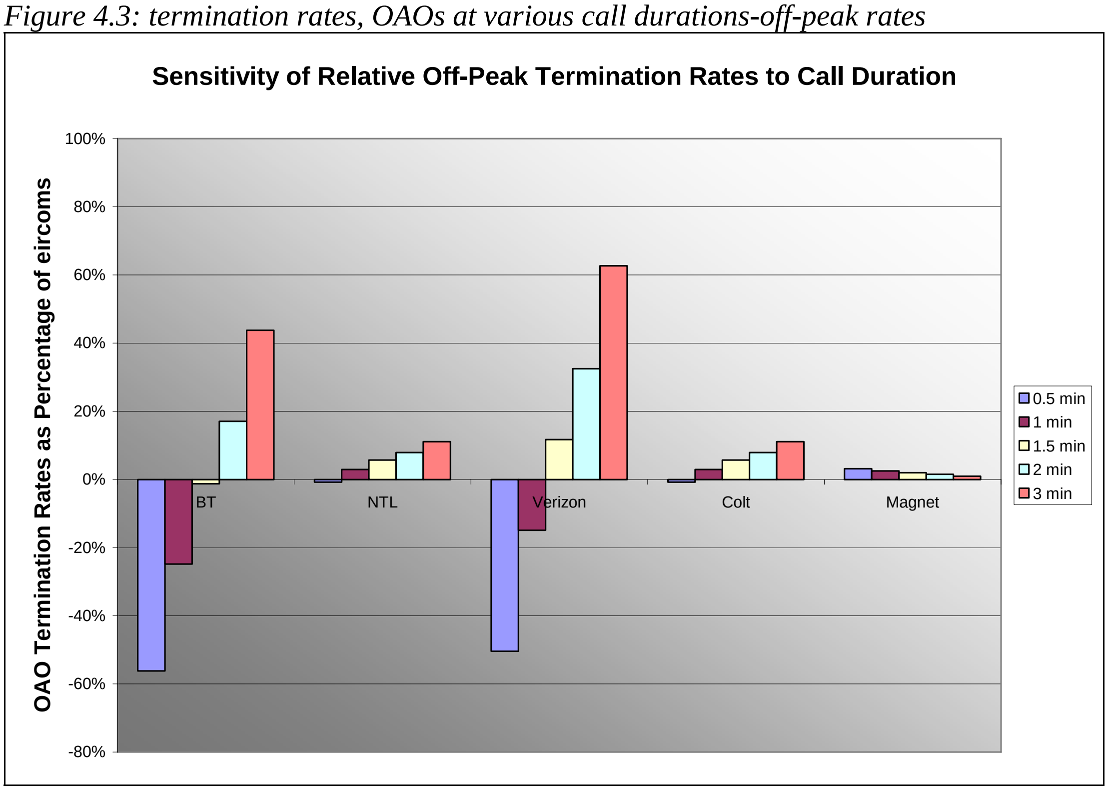
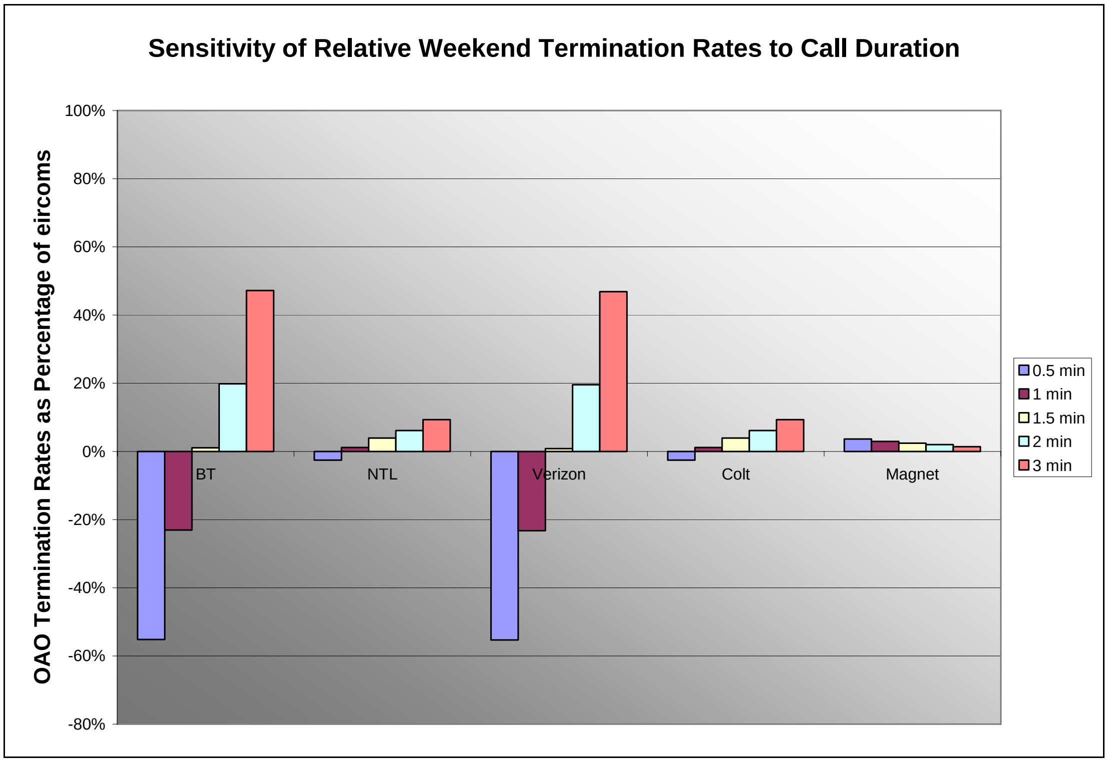


Figure 4.4: termination rates, OAOs at various call durations-weekend rates



Source: Figures 4.2-4.4, eircom's switched transit and routing price list, version 54, 8-12-06.

4.36 The above figures show that the OAOs' termination rates have, in general, been consistently higher than eircom's rates. This effect is more prominent for calls of longer duration. The latest entrant into the market, Magnet, has the smallest variation in pricing as it entered at rates that were the equivalent to eircom's up to July 2006. What follows is a summary examination of the pricing and negotiation history for each of the individual OAOs, based on information submitted by both eircom and the OAOs. In general little commercial negotiation took place over setting these rates.

4.37 **BT Ireland:** BT published termination rates in 2000. In the intervening period from July 2000 to May 2005, BT's rates remained unchanged at approximately 180 percent above eircom's 2004-2006 rates for a three minute peak call.

4.38 ComReg has obtained evidence to suggest that eircom attempted to reach an agreement with BT for the latter to reduce its rates. This included the referral by eircom of a dispute to the ODTR (now ComReg) in 2002 requesting, among other things, that ComReg direct Esat (now BT) to engage with eircom for the purposes of negotiating a reduction of BT's national termination rates.[36] eircom did not succeed in effecting rate changes from BT during this period. In May 2005, BT introduced a new reduced termination rate, but ComReg is of the preliminary view that this was the result of regulatory pressure rather than any commercial pressure exerted by eircom[37]. BT's rates remain approximately fifty percent above eircom's regulated rates from

[36] ComReg Dispute Resolution 04/02 in June 2002, determined that the issues were more appropriately addressed through bi-lateral negotiations between the two parties.

[37] This rate reduction was BT's first in almost five years and came into effect in the same month as ComReg's notification to the Eurcopean Commission that BT enjoyed a position of dominance in this market – ComReg Doc 05/37.

July 2006. Furthermore, according to information submitted by BT, it is not aware that it or another party has cancelled an interconnect agreement with it due to a disagreement on termination rates.

4.39 **Verizon:**[38] Verizon's published termination rates which were first agreed in July 2000 have not changed in the intervening period. Verizon's rates are approximately seventy seven percent above eircom's current cost oriented rates for a three minute peak call from July 2006.

4.40 **ntl**: ntl's published termination rates in 2000 were equivalent to the prevailing rates in eircom's STRPL, and ntl stated in information submitted to ComReg that it viewed these rates as the industry standard. Unlike other OAOs, ntl had rates differentiated between primary, tandem and double tandem termination. From 2000 to 2003 these rates remained unchanged and approximately 105 percent above eircom's 2003 cost oriented rates for a three minute peak call.

4.41 After three years, in August 2003 ntl combined its differentiated rates into one single termination rate similar to eircom's then primary rates. ComReg has not received evidence to date to suggest that eircom exerted any pressure on ntl to make these changes. ntl's rates have remained unchanged for the past three years and are currently approximately ten percent above eircom's for a three minute peak call from July 2006.[39]

4.42 **Colt**: The call termination rates for Colt telecom came into effect in May 2002. Colt's rates have not changed since that time. Colt's rates are approximately ten percent above eircom's regulated rates for a three minute peak call prevailing in July 2006.

4.43 **Smart Telecom:** Smart's termination rates were, during 2005, the subject of commercial negotiation between eircom and Smart. ComReg received from Smart copies of the correspondence between the two parties at that time. Rates were agreed at the end of the negotiations but a final consolidated interconnect agreement was never signed for reasons not elaborated upon by either Smart or eircom in their correspondence. Smart indicated in its response to the data direction that an interconnect agreement had not been signed because the terms were unfavourable to Smart. A signed agreement would have brought into effect the payment of geographic termination charges to Smart at the agreed 2005 rates. Then in October 2006, a final interconnection agreement was signed between the two parties, with termination rates that were higher than those agreed in the 2005 correspondence. Smart's termination rates are now [•] percent above those of eircom for a three minute peak call.[40]

4.44 **Magnet:** Magnet agreed termination rates with eircom in 2006. These rates were the same as eircom's primary rates at the time. Magnet stated in its response to the data direction of June 2006 that currently [•]. There is little price difference between Magnet and eircom's termination rates as of July 2006.

[38] Formerly MCI.

[39] ntl Ireland and Chorus are now owned by UPC Group. Chorus' termination rates had remained unchanged for six years at approximately eighty percent above eircom's rates for a three minute peak call since entering the market in 2000.

[40] ComReg would note that the rates listed in the copy of the interconnect agreement are different to those currently published on eircom's STRPL for Smart. However, to date ComReg has not received any more up to date signed agreement on rates that would indicate those agreed in October 2006 were amended by agreement of both parties. ComReg would welcome any additional information on this issue in the responses to consultation.

Assessment of Negotiations

4.45 In the case of BT, Verizon, ntl, Colt and Smart, ComReg is of the preliminary view that the empirical evidence suggests that eircom has insufficient CBP to exert pressure on the OAO rates. This is supported by historical pricing evidence, data on the process for setting these rates, along with information submitted to ComReg by at least two of these OAOs which states that they retain control over setting their rates and that there is no downward pressure on their rates.

4.46 One of the OAOs asserted that there is continual downward pressure on rates from competitive positioning and customer requirements, but on request, no empirical or qualitative evidence has been provided to date, to suggest that eircom or any other party exerted any pressure on the OAO to make changes in their rates. In addition, its rates have remained unchanged for the past three years and are currently approximately ten percent above eircom's for a three minute peak call.

4.47 Another OAO stated that eircom exerted downward pressure on its rates, but again ComReg does not have evidence to date that suggests the OAO was forced to change its rates as a result of this pressure, its rates not having changed since entry to the market. In fact this OAO indicated that the statement referred to the existing contract in place with the incumbent, effectively meaning that its rates could not be any different unless changed within the terms of the contract, which would require eircom's agreement. However, neither eircom nor the OAO have sought to re-negotiate these rates since the contract came into force.

4.48 Another of the OAOs also stated that eircom exerted sufficient downward pressure on its rates. However, ComReg does not have sufficient evidence to support this statement at present. The OAO's termination rates were first the subject of commercial negotiation. There was some indication that eircom may have attempted to exert some pressure in these initial negotiations by proposing a rate and structure which was subsequently partially accepted by the OAO. However, further negotiations took place where the OAO managed to achieve rates that were significantly higher than others in the overall fixed market and higher than those originally proposed by eircom.

4.49 In terms of any negotiations over the timeframe of the review, ComReg is of the preliminary view that the contracts in place between these five OAOs and eircom provide the framework whereby the OAOs could negotiate rates at least as high as their existing rates. This is further supported by the necessity for eircom to ensure that its subscribers can call the subscribers of the OAOs' networks, a factor that only becomes more important as the subscriber base of the OAOs increases, which would mean there would be a greater negative impact on eircom, if its customers could not call other OAOs.

4.50 Given that eircom is a price sensitive customer and has in the past expressed a desire to achieve rate reductions from OAOs, ComReg is of the preliminary view that the evidence from the negotiations, the existence of contracts and the persistence of the higher rates for BT, Verizon, ntl, Colt and Smart provides evidence that eircom does not have sufficient bargaining strength to force a change in these OAO rates. ComReg is of the preliminary view that there is no incentive for the OAOs to accept a constraint on their price setting behaviour over the period of this review and there is little evidence that the OAOs have engaged in self-regulation of termination rates in the past. However, ComReg will examine in part 4.57 below whether there are other factors affecting the relative bargaining strengths of these operators, which would impact on this preliminary assessment of the evidence.

4.51 In respect of Magnet, although at the time of entering the market, Magnet appears to have been a price taker, the contract agreed with eircom allows for the re-negotiation of those rates. In essence, the evidence to date does not test the exercise of SMP by Magnet and it could be that Magnet was unaware of its potential leverage over negotiations but this equally does not provide evidence that eircom would be able to exert sufficient CBP over the period of this review.

4.52 ComReg has given some consideration as to why Magnet entered the market at rates equivalent to eircom. Magnet is a triple play operator [•]. This could indicate that voice services, while an important feature of its bundled offering, are not the only, or indeed the primary, element of its business strategy. To the extent that this is a valid point, fixed termination services and revenues may not be of primary concern to it, rather [•]. However, without evidence of sustained high prices as a supporting factor in the analysis of CBP, it is more difficult to be as decisive on the insufficiency of CBP. This pricing evidence is not available in Magnet's case, given its recent entry. Magnet's rates for a 3 minute peak call are currently slightly below eircom's by 1%. For off-peak and weekend calls however, Magnet's rates for a three minute call are above eircom's.[41]

4.53 ComReg is of the preliminary view that it is minded to propose that eircom has insufficient CBP to constrain Magnet from acting to an appreciable extent independently from its customers, competitors and consumers. This is predominantly because on a forward-looking basis ComReg is of the preliminary view that there would be insufficient means by which eircom could exert sufficient CBP over the period of this review. This is because contracts are in place between the two parties, Magnet's subscriber base is increasing (meaning interconnection with it is important and will become more so) and it is the ability and not the actual exercise of SMP, for example though excessive pricing, that is important. Further, there is no indication that eircom was successful in achieving rate reductions from other OAOs once those operators were in the market, which could serve to act as a precedent in relation to Magnet's termination market. ComReg would note however, that in the latest mobile termination analysis, emphasis has been placed on H3GI's ability to extract high prices from the negotiations as an indicative factor that the analysis of the insufficiency of eircom's CBP has merit. Similarly to the other OAOs, ComReg will examine in 4.57 below, whether there are other factors affecting the relative bargaining strengths of the two operators that would affect ComReg's preliminary assessment of the evidence.

4.54 ComReg is of the preliminary view that the history of negotiations and empirical evidence suggests that BT, Verizon, ntl, Colt and Smart are able to maintain their own price-setting behaviour. That is, eircom does not have sufficient CBP to constrain these operators from acting to an appreciable extent independently of their customers, competitors and consumers on their respective markets for wholesale call termination.

4.55 In respect of Magnet, ComReg is of the preliminary view that the analysis of the evidence of negotiations and pricing does not provide an adequate test of the sufficiency of CBP. However the evidence to date equally does not provide evidence that eircom has sufficient CBP over the period of this review to constrain Magnet from acting to an appreciable extent independently of its customers, competitors and consumers. Further, it is of note in this context that the SMP Guidelines state that

[41] Switched Transit and Routing Price List (STRPL), version 54, 8-12-06.

market shares in excess of 50% are indicative of SMP, save in exceptional circumstances.

4.56 ComReg is of the preliminary view that the empirical evidence shows that BT, Verizon, ntl, Colt and Smart have the ability to set prices independently but that the evidence for Magnet is less decisive. ComReg now examines specifically the market dynamic including the commercial incentives for interconnection, to further assess whether there is evidence that these OAOs are in a strong bargaining position with respect to setting their termination rates.

4.56.1 ***Relative Bargaining Strengths of the Operators as evidenced by the negotiations***

4.57 The following paragraphs examine, to what extent eircom did, or could in fact, credibly threaten to refuse to purchase or delay negotiations with the OAOs. This is in addition to the empirical evidence detailed above, to ascertain whether there are specific circumstances pertaining to the termination markets that would influence the operators' relative bargaining strengths. The recent Independent Report on the EU Commission relevant markets[42] stated that CBP may take the following forms: refusal to interconnect, refusal to buy termination services and/or a reciprocal increase in the termination rate. These issues are explored below in the context of the wholesale termination markets.

Option not to purchase or to delay

4.58 In respect of an option not to purchase, ComReg examined whether eircom could credibly threaten not to buy termination from a particular OAO. This threat would be more credible where there would be no disturbances to outgoing (and incoming) connections for the buying operator and its customers. In theory eircom because it has a larger subscriber base, could manage more easily without interconnection of the OAOs. eircom originates a greater proportion of total calls, than any other fixed operator so it is likely that an OAO would experience more disturbance to its customers than eircom would. However, from the evidence presented by the OAOs in response to ComReg's data gathering exercise, it does not appear that eircom has at any time refused to purchase termination from the OAOs that have entered the market. eircom has interconnection agreements with a number of OAOs and ComReg has not been provided with any information that indicates it is likely that eircom would sever those business relations.

4.59 Multiple networks coexist and these networks need to connect to facilitate off-net calling. This means that network operators are often not able to provide a full service unless they purchase call termination services from other networks. eircom would likely face pressure from its own customers if they discovered they were not able to make calls to all networks. This is particularly true of the larger OAO networks as similarly to the argument for eircom, the more subscribers there are to a particular OAO network the more disturbance would be experienced by eircom's subscribers in the event that eircom chose not to purchase or to delay renewal of an agreement, which would make the threat less credible.

4.60 In light of the commercial realities and the existing contracts between OAOs and eircom, ComReg's preliminary view is that it does not seem likely that either party would refuse to interconnect. ComReg's preliminary conclusion is that eircom would

[42] A Review of certain markets included in the Commission's Recommendation on Relevant Markets subject to *ex ante* regulation, An Independent report by Cave M. et al, July 2006.

be unlikely to threaten not to purchase, nor has it an option not to interconnect, thus suggesting that it would be unlikely to attempt to exercise its CBP in this way.

The buyer as an important outlet for the seller:

4.61 It would be important for any new fixed entrant to have an agreement with any originating OAO of significant size, in this case, eircom, so their customers can make and receive calls from eircom subscribers. It is theoretically possible for a new entrant to launch without interconnection to eircom but, to date, operators have not positioned themselves in this way, and it is commercially prudent for all OAOs to have an interconnect agreement for termination with eircom.

4.62 eircom's buyer power could be enhanced if there was the possibility that it could leverage from other markets in which it operates, by developing obstruction strategies or raising issues in other markets on which it is dominant. Its buyer power could also be increased if it could raise its own termination rates in response to an OAO termination increase. However, in the former case because at present eircom is regulated for the provision of services in other areas, this is not likely to provide the incumbent with significant bargaining strength, which is supported by experience in the market to date. In the case of retaliation by raising its own termination rates, because eircom's rates are at present regulated at cost oriented levels this is not a source of bargaining strength for the operator.

4.63 ComReg's preliminary view is that eircom is likely to be an important buyer for an OAO but that it is essential for all originating operators including eircom to provide their customers with the ability to make calls to all other operators, fixed or mobile. From the evidence to date, it does not appear that eircom, being an important interconnection partner, has prevented OAOs from pricing independently.

Regulatory Factors

4.64 In the recent market analysis for mobile termination on H3GI's network, ComReg identified two relevant areas of regulation which it deemed may be appropriate to review in the context of a modified Greenfield approach and in terms of assessing the relative bargaining strengths of the operators. Firstly were the cost orientation obligations on eircom and secondly the option for referring a dispute over termination rates to ComReg. For consistency of approach ComReg has also examined these issues in the fixed termination review to the extent they are relevant and the analysis of dispute resolution draws on the analysis in ComReg document 07/01 referred to above.

4.65 **Existing obligations on eircom:** To date, in respect of negotiating termination rates with OAOs, eircom is not in a position to offer more advantageous or different termination rates to one OAO over another because it is subject to regulation in the interconnection markets. So for example it is obliged to treat operators in equivalent circumstances in an equivalent way. In addition, as its rates are also cost oriented at present it is not in a position to raise its termination rates in response to a rise in prices of another operator, thus removing a significant source of bargaining strength.

4.66 **Dispute resolution:** In any negotiation over termination rates or attempt to implement a change in the termination rates of a particular operator, operators will have recourse to referring a dispute to ComReg for a decision.[43] As detailed in the

[43] ComReg has the power to undertake dispute resolution under Regulation 31 of the Framework Regulations.

abovementioned mobile termination review, given the regulator has the power to intervene in a dispute, economic bargaining theory would suggest the outcome of any bargaining process would be likely to approximate what the parties' anticipate the regulator would decide in respect of a pricing determination. (Irrespective of whether a dispute was actually referred to the regulator or not). To the extent that this theory would be valid, ComReg has carried out a brief assessment of its implications for SMP analysis in the fixed markets and bargaining over rates in any future period over the timeframe of this review.

4.67 Firstly, it is ComReg's view that dispute resolution is no substitute for SMP obligations as it would be contrary to the policy underpinning the regulatory framework for electronic communications if regulators were to proceed in this manner in relation to markets that are susceptible to *ex ante* regulation. Relying on a dispute resolution framework in place of SMP obligations would likely be wholly unsuitable for creating legal certainty in the market place, especially where the compliance requirements of an intervention to redress a market failure are extensive, and where frequent or timely intervention would be required. In addition, while any determinations under dispute resolution might ultimately be effective in resolving a dispute between the parties to it, it would not necessarily prevent an SMP operator from leveraging its market power against other operators in the market who had not notified a similar dispute to ComReg or from leveraging market power to the detriment of consumers (indirectly by charging excessive termination rates that linked into retail prices of other operators). *Ex ante* measures, however (if they were deemed appropriate as a consequence of any finding of SMP), would be effective at preventing in advance the leverage of such market power.

4.68 In the context of this consultation, ComReg is of the preliminary view that it is not appropriate to consider dispute resolution procedures as having a mitigating effect on the market power of terminating operators, or to regard such procedures as being a surrogate for SMP obligations.

4.69 However, for thoroughness, if it is valid to ask to what extent dispute resolution will affect the bargaining power between two parties (and hence the sufficiency of CBP), then ComReg would need to assess in advance how it would resolve a particular dispute. Clearly ComReg could not be expected to decide in advance what the outcome of any dispute would be as this would contravene its obligation to be unbiased in its decisions. Further, the regulator has the discretion not to accept disputes along with a number of options open to it in resolving a dispute. This coupled with the system of courts and appeals available to both parties to any dispute would make any such *ex ante* analysis difficult, irrespective of the fact that ComReg could not be expected to suggest in advance what the outcome of a particular dispute would be.[44]

4.70 Notwithstanding the preceding comments, in a dispute resolution situation involving at least one non-SMP operator, it is likely that ComReg would have to adopt lighter touch regulation with respect to setting the termination rates of a fixed termination OAO if it was a non-SMP operator(s) (should its determination in the dispute require such intervention). This is because ComReg would be addressing the dispute in the absence of the relevant fixed termination OAO having SMP, in these circumstances it

[44] ComReg has a clear discretion not to accept disputes under Regulation 31 (3) of the Framework Regulations. In addition, the procedure under Regulation 31 does not preclude a party taking an action before the courts. Nor does it remove a party's right to appeal any determination made by ComReg.

could not set a cost oriented termination rate for the non-SMP operator under Articles 9-13 of the Access Directive.[45] The obligation to offer cost oriented termination rates can only be imposed on operators having SMP.[46] Awareness of this fact on the part of the OAOs (or indeed eircom) could have the effect of somewhat increasing the bargaining power of the non-SMP operator. However, overall because it would be inappropriate for ComReg to suggest or factor in that it would be predisposed to favour any possible outcome in advance of a dispute, ComReg is not convinced that an explicit analysis of the effect of dispute resolution on CBP is necessarily helpful.

4.71 ComReg does not have any evidence to date to suggest that the prospect of dispute resolution has been a factor used by eircom in its favour. In one incident where eircom did refer a dispute over BT's rates to ComReg in 2002, it doesn't appear that the prospect of regulatory intervention exerted downward pressure on BT's rates at that time. As mentioned above, BT's rates remained unchanged until the same month as ComReg's notification to the European Commission that BT enjoyed a position of dominance in this market in 2005

4.72 ComReg is of the preliminary view that an assessment of the forms in which CBP might manifest such as refusal to interconnect, refusal to buy termination or to retaliate by increasing termination rates are not available to eircom in these markets. As such, ComReg is of the preliminary view that the commercial and regulatory environment support the argument that eircom has insufficient CBP to off-set the ability of OAOs to price independently.

4.72.1 Preliminary conclusion on CBP - OAOs

4.73 In order to evaluate the potential exercise and sufficiency of CBP in the wholesale termination markets of the OAOs, ComReg has carried out a detailed assessment of the historical evidence of negotiations between eircom and OAOs. ComReg is of the preliminary view that for BT, Verizon, ntl, Colt and Smart, the continuing higher rates charged by these OAOs suggests that eircom cannot exercise CBP over their price setting ability. ComReg has also considered further the criteria proposed by the EU Commission Independent Report to assess whether there are additional factors that might indicate that eircom has sufficient CBP to off-set the independence of these OAOs. As detailed above, ComReg is of the preliminary view that the commercial and regulatory environment in which eircom operates provides additional support for the preliminary view that eircom does not have sufficient CBP to off-set the market power of BT, Verizon, ntl, Colt and Smart.

4.74 While the different OAOs examined have slightly varying experiences of setting termination rates, ComReg is of the preliminary view that the evidence indicates that

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[45] The Access Directive contains a legal prohibition on imposing SMP obligations on non-SMP operators. Article 8 (3) provides that *"…national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2."*

[46] ComReg notes the provisions of Article 5 (1) of the Access Directive, which enable obligations to be imposed on undertakings that control access to end users, to the extent that it is necessary to ensure end-to-end connectivity. The obligations include, in justified cases the obligation to interconnect their networks, where this is not already the case. Given that these provisions are exceptional, they should be narrowly construed. The criteria for their application would also need to be first present. Even if it were (a) permissible and (b) appropriate to impose price related obligations pursuant to this provision and (c) given the discretionary nature of the provision, Article 5 (1) would and could not oblige ComReg to require an operator to offer cost oriented termination rates.

eircom does not have sufficient CBP to off-set the ability of these OAOs to price independently.

4.75 In respect of Magnet, there are clearly factors, as highlighted by the Independent Report on the Draft recommendation on markets, which are capable of negating any CBP that eircom might possess. However, in common with the analysis for the other operators, ComReg has also carried out an examination of the facts in respect of the setting of termination rates by the operator to ascertain whether the above factors are sufficient to illustrate that eircom has insufficient CBP. In Magnet's case, the latter analysis did not provide evidence of the exercise of CBP by eircom or indeed an attempt by Magnet to leverage its market power. As such, ComReg is not in possession of evidence that would definitively suggest that eircom has insufficient CBP to exert a constraint on Magnet's ability to price independently of customers, competitors and consumers. However, ComReg is minded to suggest that on a forward-looking basis there would be insufficient means by which eircom could exert CBP to constrain Magnet from acting to an appreciable extent independently. This is predominantly because of the existing contracts in place between the parties that allow for renegotiation of rates, the growing subscriber base of Magnet (which makes interconnection more important) and the lack of evidence from other termination markets that eircom has been in a position to successfully achieve rate reductions once operators are in the market.

4.76 Overall, ComReg is of the preliminary view that there is insufficient CBP in the markets for wholesale voice call termination on the individual fixed networks of BT, Verizon, ntl, Colt and Smart. ComReg is also minded to suggest that on a forward looking basis, there is insufficient CBP to constrain Magnet from acting to an appreciable extent independently of its customers, competitors and consumers.

Preliminary Conclusions on SMP Analysis for Termination

4.77 In examining the market for wholesale call termination, ComReg has noted that all operators have 100% market share of termination on their own networks, and that there is, currently and prospectively, no likely demand or supply side substitution. While recognising that a high market share may be indicative of market dominance, ComReg has carried out a detailed analysis of factors which may qualify an undertaking's potential dominance.

4.78 ComReg has established that a key factor to be examined in assessing market power in the termination markets is countervailing buyer power. In general, the OAOs entered the market early, generally at termination rates equivalent to those of eircom. These rates have been sustained even when eircom's rates have fallen. This suggests that eircom cannot exert countervailing buyer power, as it has not affected the price setting behaviour of its competitors. Two other OAOs entered the market more recently, at rates at a similar level to eircom's cost oriented rates.

4.79 ComReg is of the preliminary view that eircom and the OAOs have SMP in the markets for wholesale call termination on their individual networks.

- **eircom:** eircom has one hundred percent share in the relevant market, there is no potential competition and it has control over infrastructure not easily replicated.
- ComReg does not have evidence to suggest that any other operator could exert sufficient CBP on eircom to constrain its ability to act to an appreciable extent independently of its customers, competitors and consumers. Given the analysis

as carried out above, no operator would have sufficient scope to constrain eircom in the exercise of market power, given that it is likely that OAOs would always prefer to interconnect with eircom to enable their subscribers to make and receive calls to eircom. ComReg is of the preliminary view that the case for eircom having SMP is therefore quite strong as there is no credibly large buyer sufficient to constrain eircom from acting to an appreciable extent independently.

- **OAOs:** Each individual OAO has one hundred percent share in the relevant market, there is no potential competition and each OAO has control over infrastructure not easily replicated.

- ComReg's pricing analysis shows most OAOs obtaining prices well above the level of eircom's cost oriented rate, which is consistent with the exercise of SMP. Furthermore, it appears that these rates are sustainable, there having been no change in many of these rates despite requests from eircom to initiate rate reductions and a continuous fall in eircom's own regulated rates. ComReg is of the preliminary view that there is insufficient evidence to suggest that the following OAOs - BT, Verizon, ntl, Colt and Smart could not obtain rates at least as high as their current rates over the timeframe of this review. In respect of Magnet, ComReg is also of the preliminary view that there would be little to suggest that Magnet could not act to an appreciable extent independently of its customers, competitors and consumers over the period of this review, given the existing contract in place and the growth of its subscriber base.

- ComReg is of the preliminary view that the commercial incentives and regulatory obligations to engage in interconnect negotiations also limit any CBP that eircom might have and that, again, this is likely to be a stronger trend as an OAO's subscriber base grows.

- On balance, while there is unlikely to be an OAO of significant strength to constrain eircom from acting to an appreciable extent independently, the case for the OAOs may require more in depth analysis. Therefore ComReg has carried out such an examination and based on an examination of the relevant SMP criteria, ComReg's preliminary view is that the evidence does not indicate that there is sufficient CBP in these markets. Accordingly, it is of the preliminary view that BT, Verizon, ntl, Colt and Smart have significant market power in the markets for wholesale voice call termination on their individual fixed networks. ComReg is minded to suggest that there is also insufficient CBP to constrain Magnet from acting to an appreciable extent independently of its customers, competitors and consumers over the period of this review. This finding, coupled with the high and non-transitory barriers to entry would indicate that Magnet has SMP in the market for wholesale voice call termination on its fixed network. ComReg would welcome operators responses to these preliminary views.

Q. 3. Do you agree with ComReg's preliminary analysis of the relevant individual SMP criteria and that the relevant SMP criteria have been sufficiently examined? Please provide a reasoned response supported by empirical and/or technical and economic evidence.

Q. 4. Do you agree with ComReg's preliminary conclusions on Significant Market Power (SMP) in the individual markets for wholesale call termination to end users on individual fixed networks? Please provide a reasoned response supported by empirical and/or technical and economic evidence.

5 Proposed Designation of Undertakings with Significant Market Power

5.1 Having regard to the sections above, particularly sections 3 and 4, ComReg is of the view that, in accordance with the *Framework Regulations*:

- eircom Ltd should be designated as having SMP in the market for wholesale call termination on its own network.
- the following OAOs should be designated with SMP in the market for call termination on their own networks
    - BT Ireland;
    - Verizon;
    - Ntl Ltd.;
    - Colt Telecom;
    - Smart Telecom; and
    - Magnet.

5.2 A reference in this section to any given undertaking shall be taken to include any and all undertakings which are affiliated with, or controlled by, the undertaking in question.

6 Proposed Market Remedies

Regulatory background

6.1 The initial consultation[47] and response to consultation[48] outlined the basis for the setting of remedies proposed by ComReg.

6.2 ComReg is obliged, under Regulation 9(1) of the *Access Regulations*[49], where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the *Framework Regulations*, to impose on such an operator some of the obligations set out in Regulations 10 to 14 of the *Access Regulations* as ComReg considers appropriate.

6.3 In the initial review, ComReg noted that additional obligations from those set out in the Access Regulations could be proposed, for example to ensure end-to-end connectivity. These non-SMP obligations would be applied with the permission of the EU Commission per Regulation 6 of the *Access Regulations*.

6.4 In determining the appropriateness of SMP obligations, ComReg is guided by the objectives set out in Section 12 of the Communications Regulation Act 2002 and those set out in Regulation 6 of the *Access Regulations.*

6.5 In this current review, ComReg has revisited its analysis of the wholesale interconnection markets, and has taken into account changes in the markets since the time of the last review. This section goes on to assess any changes in the scope of the possible competition problems which were previously identified to arise, and in the light of this assessment, to propose remedies for any potential market failures.

Competition problems in the overall interconnection markets

6.6 In the initial review, ComReg outlined actual and potential competition problems in the interconnection markets. The approach taken to the assessment of competition problems was forward-looking, and followed the recommendations of the SMP Guidelines. ComReg must carry out the assessment on competition problems in the absence of regulation. While evidence of past market behaviour can contribute to this analysis, account must also be taken of the fact that this market is already regulated. Thus, firms cannot behave as they would if their behaviour were unconstrained by regulation. Therefore, ComReg is of the view that the justification for considering *ex ante* remedies must be broader than if solely based on demonstrable acts of past behaviour. ComReg instead has to anticipate the appearance of a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour, which in turn will be based on the results of the market analysis. ComReg suggests that this is a key difference in approach between *ex ante* and *ex post* analysis and ComReg notes that its approach is similar to that of other NRAs as is clear from their notifications to the EU Commission.

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[47] Market Analysis: Interconnection markets (04/106)

[48] Market Analysis: Interconnection markets, Response to Consultation and Draft Decision (05/37a)

[49] S.I. No 305 of 2003 – European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

6.7 The analysis has proposed that eircom, BT Ireland, Verizon, ntl, Colt Telecom, Smart Telecom and Magnet should be designated with SMP for call termination on their own networks. In this review, the concern is to examine developments in the market since the time of the initial review, and to assess whether the types of competition problems identified are still evident.

6.8 According to settled case law,

" dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."[50]

6.9 An undertaking which is dominant has the potential ability to influence a range of competition parameters including prices, innovation, output and the variety or quality of goods and services. Absent regulation, a dominant firm would rationally have the incentive to raise prices, as there would be no competitive pressure to prevent this. In addition, a firm which was dominant in an upstream market could use its market power to leverage into a downstream market. A firm which was dominant in one market could attempt to leverage power horizontally into a related market.

6.10 It is however important to note that in any discussion of competition problems and of the incentives for an operator to exert its SMP, it is not necessary for ComReg to point to examples of abuse that have occurred. While such examples would be corroborative, the nature of *ex ante* regulation is that it is concerned with guarding against such abuses in advance.

6.11 In the initial review, ComReg described the types of competition problem which may arise in the interconnection markets, and provided examples of these problems in the Irish markets. This review draws on the previous analysis, and focuses on assessing any changes in the nature of the competition problems from the time of the initial review.

6.12 Generally, competition problems in the interconnection markets are associated with vertical and horizontal leveraging as well as excessive pricing.

6.13 Vertical leveraging arises where an operator has dominance at a wholesale level and can potentially transfer this power into related retail markets. In the interconnection markets, a vertically-integrated SMP operator has control of the wholesale inputs necessary for an entrant to offer a retail service, and is in a position to control the use of these inputs and so affect the competitive conditions in the downstream retail markets.

6.14 Horizontal leveraging involves an undertaking which is dominant in one market using its market power to exert undue influence in other markets.

6.15 Excessive pricing arises where, absent SMP regulation, price levels are likely to be persistently high with no effective pressure (e.g. from new entry/expansion or innovation) to bring them down to competitive levels nor is there likely to be over the period of the review. In light of the fact that barriers to entry in the wholesale call termination markets are high and non-transitory, there is limited scope for potential competition and there is insufficient countervailing buyer power. It may be argued that there is significant scope and incentives for an SMP operator to sustain prices above competitive levels for the period of the review. This is

[50] DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, Dec 2005, p.9.

because such high prices would be unlikely to be undermined by significant new entry or expansion in the market given the obstacles involved. This would ultimately be detrimental to end users.

6.16 eircom's position as a vertically integrated operator and market power in the retail access and wholesale interconnection markets means that, absent regulation, it would have the potential and the incentive to leverage market power into related markets, both those horizontally and vertically linked.

Principles to be applied when selecting obligation

6.17 In the initial review, ComReg noted its obligations under the Framework Regulations, the Access Regulations and the Universal Service Regulations in relation to market assessment and the imposition of remedies. Given the identified actual and potential competition problems arising from SMP in the interconnection markets, ComReg is obliged to impose obligations on undertakings identified as having significant power in those markets. ComReg does not believe that, within the period of this review, there will be developments which will prevent eircom from acting independently from its competitors. Accordingly, ComReg proposes to impose appropriate obligations on the SMP operator that ComReg believes will encourage efficient investment and innovation, protect consumers and further promote competition in the interconnection markets.

6.18 Where problems have been identified in specific markets and an undertaking(s) has been designated as having SMP, ComReg will select remedies based on the nature of the potential competition problem identified and ensure they are proportionate and justified. Where possible, consideration will be given to a range of remedies so that the least burdensome effective remedy can be selected thus conforming to the principle of proportionality. In the initial consultation, ComReg presented alternative regulatory options to address identified competition problems. This included a discussion of less onerous alternatives and why these would not achieve ComReg's objectives and a discussion of more onerous alternatives and why they would be disproportionate or overly burdensome. In the response to consultation, ComReg adopted a preferred option. The current review focuses upon the preferred option and assesses whether market conditions justify an amendment to these proposals.

6.19 In choosing remedies, ComReg has also taken account of their potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg has conducted, *inter alia*, Regulatory Impact Assessments (RIA) (see section eight) in line with the Ministerial Direction (issued by the Minister for Communications, Marine & Natural Resources in accordance with Section 13 of the Communications Regulation Act, 2002) published in February 2003.

6.20 The remedies chosen will be incentive compatible. This means that the remedies will be selected and designed in a manner which ensures that compliance with regulation outweighs the benefits of evasion. As outlined above, remedies must be based on the nature of the problem identified, proportionate and justified in light of the objectives set out in S.12 of the Communications Regulation Act, 2002.

Q. 5. Do you agree with the principles ComReg proposes to adopt when selecting obligations in this market?

Proposed Remedies

6.21 In the following sections, ComReg addresses the potential competition problems which it considers could arise in the relevant markets, in the absence of regulation, as a result of the preliminary designation of SMP. ComReg is of the preliminary view that the relevant market data collected prior to this consultation suggests as in the initial consultation, that each operator offering fixed termination to end-user numbers should be designated with SMP. This is for the reasons detailed in the market analysis section above.

6.22 ComReg then sets out the detailed remedies that it proposes to impose on SMP operators to address the potential competition problems identified. ComReg has set out remedies that it considers appropriate at this time and in the prevailing market conditions. It is important that the selection of remedies will encourage efficient investment and innovation. The potential competition problems will be closely associated with the possible abuse of market power.

The wholesale call termination market

Potential competition problems in the wholesale call termination markets

6.23 In the initial consultation, ComReg proposed to continue to impose appropriate remedies designed to address the continuing high rates in the markets for the termination of calls to end users.

6.24 ComReg is of the preliminary view that the following are the main competition problems in the relevant termination markets:

Possible Exploitative Behaviour

6.25 The main potential competition problem associated with termination markets is excessive pricing. Operators with market power may have incentives to charge an excessive price for their termination services. As outlined in the preceding market definition and analysis this is because of the CPP, high and non-transitory barriers to entry and insufficient CBP to constrain operators to an appreciable extent in their pricing behaviour. For example, some OAOs have maintained termination rates higher than the eircom regulated rate, which could suggest that the smaller operators, in addition to eircom are capable of exercising some market power over their termination rates. In order to prevent any potential abuse of such power, such as by pricing above a competitive level, it would be necessary to impose some level of regulation on OAO termination rates also. ComReg has addressed this issue later in the paper.

Possible Vertical Leveraging

6.26 Vertical leveraging may arise when a firm controls an input that is essential for a potentially competitive downstream industry in which it is also active. The main type of vertical leveraging that may arise in these markets is denial of access. Examples include an outright denial of access or a constructive refusal of access by way of offering access on unreasonable terms for example. Where the majority of traffic flows terminate on eircom's network, and its main wholesale customers are its downstream competitors, eircom could have the scope and incentive to influence competitive conditions. The incentive for eircom may be greater than for the OAOs because as discussed above in the Market Analysis section 4, the larger the operator in terms of subscribers relative to other operators the less it may have to lose by not facilitating calls to and from the OAOs subscribers. Therefore while ComReg is of the preliminary view that it is unlikely that operators would chose to exercise this market power as there are also incentives to interconnect with each other, it is possible that incentives remain for example to offer access on unreasonable terms, absent regulation and as such obligations may be appropriate.

6.27 ComReg recognises that the imposition of obligations which seek to address or deal with problems related to excessive pricing, are not, on their own, likely to deal effectively with other problems, such as competition problems of a non-price nature. Termination in the fixed market largely occurs on eircom's network, given its relative size in the overall fixed services market and the history of eircom having an exclusive monopoly. Given the imbalance in termination traffic flows, ComReg is of the preliminary view that vertical leveraging would be more likely to have a detrimental effect on competition in the overall fixed market if carried out by eircom. Non-price abuses could include the potential discriminatory use of, or withholding of information, delaying tactics, and the application of undue requirements in interconnect contracts.

Appropriate Obligations: wholesale call termination markets for calls to end users

6.28 The market analysis carried out in the current review came to the preliminary view that all relevant fixed network operators have SMP for termination of calls to end users on their networks. ComReg will apply remedies in a similar manner where appropriate, however when ComReg examines the detailed nature of these obligations it needs to be proportionate. Some obligations or some detail of the obligations imposed on eircom may be too burdensome to impose on the OAOs (that in general have a smaller market share of the total fixed market) and so would not be appropriate.

6.29 The EU Commission Guidelines on Market Analysis and SMP state that where an NRA finds an operator with SMP, it is obliged to impose one or more regulatory obligations outlined in the Access Directive, taking into account the principle of proportionality and other factors outlined in the Access Directive. Thus, ComReg is under an obligation to impose appropriate SMP obligations on all operators designated as having SMP in this market.

6.30 ComReg examines in sub-section A below the obligations it proposes as appropriate to apply to the proposed SMP operators defined as OAOs and this is followed in sub-section B with an examination of the obligations it proposes to apply to eircom.

A: Proposed remedies: OAOs in the wholesale call termination market

6.31 Given the preliminary finding of SMP on the individual OAO networks in the call termination markets, ComReg is obliged to impose obligations which ensure that operators can interconnect appropriately to each others network. As analysed in the section on Market Analysis, a number of OAOs are preliminarily assessed to have SMP on their own network for call termination services to end users. Appropriate obligations are discussed below and the principles behind the selection of remedies were outlined above.

6.32 ComReg has the following remedy options available in considering the appropriate remedies to impose on OAOs in the terminating market:

- Access to and use of specific network elements;
- Transparency;

- Non-discrimination;
- Price Control and Cost Accounting; and
- Accounting Separation.

6.33 ComReg proposes that OAOs should have the following obligations imposed on them in their individual markets for wholesale call termination to end users at a fixed location:

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

6.34 For a discussion of the obligations that ComReg proposes not to impose on the OAOs (i.e. access, cost accounting and accounting separation) see the RIA section 8 below.

Transparency - OAOs

6.35 ComReg propose that the OAOs listed in Section 5 above be required, in accordance with Regulation 10 of the *Access Regulations*, to make public, in detail, the termination rates they apply to all other operators in the termination market. This would take the form of requiring the publication of rates on a publicly accessible website. The Access Directive states that transparency may be used in relation to 'interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices'.

6.36 Transparency is not regarded as an onerous burden because for many of the OAOs the imposition of this obligation would result in them being required to publish the termination charges that they levy on eircom only, as traffic is mainly terminated from the eircom network. In some cases, an OAO might be required to publish other termination rates when it is directly interconnected with an operator other than eircom and the termination rates are different. However, in the absence of a transparency obligation ComReg would have no guarantee that this would continue and ComReg would have no means of remedying any deficiencies in the information provided as a result.

6.37 Having transparent prices in the market will make it easier for customers to make informed choices. Furthermore, the disclosure of termination rates will also enable ComReg to monitor more easily the state of competition in the call termination market. Transparency is the least burdensome obligation that can be imposed on SMP operators.

6.38 The publication of prices and advance notice of proposed changes to those prices can assist purchasers of wholesale termination services, who may need to restructure their retail prices in response to tariff changes at the wholesale level.

6.39 ComReg is of the preliminary view that the imposition of a transparency obligation would enable negotiations between operators to be undertaken more speedily and reduce potential complaints.

6.40 ComReg's further preliminary view is that the benefits of a transparency remedy far outweigh the costs. Indeed, by only requiring the OAOs to publish their prices on their websites the cost is minimised. ComReg is of the preliminary view that a transparency obligation on SMP operators is appropriate for this market.

6.41 **Preliminary Conclusion: ComReg proposes that OAOs with SMP on their individual networks (see Section 5 above) be required to make public, in detail, the termination rates they apply to all other operators in the termination market as part of their Transparency obligation.**

Q. 6. Do you agree with ComReg that transparency is desirable and proportionate and therefore an appropriate obligation to impose on OAOs in this market? If not, please elaborate.

Q. 7. Do you agree with ComReg's proposal that a transparency obligation would be met by OAOs publishing termination rates on their websites?

Q. 8. Where OAOs have an obligation to publish termination rates, what form should this take and should advance notice be given to other operators to changes in these termination rates? Please support your response with detail.

Non-Discrimination - OAOs

6.42 ComReg proposes that every OAO in this market should be required, in accordance with Regulation 11 of the Access Regulations, to apply similar terms and conditions on interconnecting operators where they avail of call termination services having equivalent characteristics. Without this obligation ComReg would not have the ability to require that SMP operators behave in a non-discriminatory manner and exercise their SMP.

6.43 **Preliminary Conclusion: ComReg proposes that a non-discrimination obligation should be imposed on OAOs with SMP**

Q. 9. Do you agree that OAOs should be subject to an obligation to offer similar terms and conditions to all interconnecting operators?

Price control - OAOs

6.44 ComReg has examined whether a cost orientation obligation in relation to termination charges should be applied across the industry to include OAOs where SMP is found on individual OAO networks.

6.45 ComReg also examined the setting of termination rates for OAOs, and the fact that a solution was proposed by eircom whereby OAOs should be allowed to charge the current eircom Single Tandem call termination rates for an interim period.

6.46 A common position[51] to the setting of termination rates for alternative operators is to allow new entrants to charge higher than the regulated termination rates of the incumbent initially and to apply a price cap system or a glide path to achieve a competitive level over a reasonable period of years. The period of the glide path must be strictly limited in time to that appropriate to the particular market conditions. The aim of a glide path is to allow new entrants to set higher than

[51] Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, May 2006

competitive charges on market entry in order to recover from the level of initial investment and potential inability to achieve economies of scope and scale. The glide path is a mechanism for bringing all termination rates in the market into line, over a certain period. The outcome of the price control remedy will be addressed in the response & draft decision to this consultation paper.

6.47 According to the market definition and market analysis there are preliminarily six SMP OAOs each with their own terminating rates in the fixed market. The terminating rates can vary considerably from operator to operator and in some instances the differences do not necessarily reflect underlying causes such as economies of scale and scope etc. As such ComReg proposes that the appropriate competitive termination rate is the current regulated rate of the incumbent and that all operators should achieve this level of charging following the glide path period decided upon. Therefore, at the end of the glide path period, the current regulated rate of the incumbent should be used by all operators, including both the incumbent and OAOs.

6.48 An alternative solution to reciprocal rates would involve OAOs setting their termination rates at an equivalent level to the eircom Single Tandem call termination rate over the glide path period decided on.

Q. 10. In your opinion do you think that it would be appropriate to impose an obligation on OAOs to charge equivalent termination rates to the regulated termination rates of eircom where an OAO is found to have SMP on their individual network? Please support your response with detail.

Q. 11. In your opinion if a glide path approach were to be adopted, which period do you think is reasonable, two, three or four years?

Q. 12. In your opinion would you agree that other operators should achieve the same termination rates as the regulated termination rates of the incumbent at the end of the glide path period? If not, please suggest an alternative means.

Q. 13. Do you consider the alternative solution with regard to setting termination rates at the current eircom Single Tandem rate for an interim period, i.e. the glide path period agreed upon, to be an appropriate means of setting termination charges for OAOs where there is SMP on their individual network? Please support your response with detail.

B: Proposed remedies: eircom in the wholesale call termination market

6.49 Given the preliminary finding of SMP on eircom in the call termination market, ComReg is obliged to impose obligations which ensure that operators can interconnect appropriately with the eircom network. As analysed in the section on Market Analysis, eircom has been preliminarily found to have SMP in the call termination market. Appropriate obligations are discussed above and the principles behind the selection of remedies were discussed at the beginning of the remedies section.

6.50 ComReg's examination of appropriate remedies in this market is discussed below in terms of :

- Access to and use of specific network facilities;
- Transparency;
- Non-discrimination;
- Price Control and Cost Accounting; and
- Accounting Separation.

Access to and use of specific network facilities - eircom

6.51 ComReg proposes that an access obligation for call termination services should continue to be imposed on eircom. Obligations can be imposed on operators 'to meet reasonable requests for access to, and use of, specific network elements and associated facilities. That is, *inter alia* in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

6.52 ComReg's analysis of the competition problems suggests that wholesale access obligations are necessary to promote more effective competition in retail markets. Absent regulation it is possible that eircom would have incentives not to offer sufficient wholesale products on reasonable terms through commercial negotiations with OAOs. ComReg is of the preliminary view that without appropriate access obligations eircom could have an incentive to apply unreasonable contractual terms on other operators, and exercise non-price forms of discrimination that would likely delay the offering of access to other operators.

6.53 The transparency and non-discrimination obligations are necessary but insufficient on their own for dealing with the competition problems in this market. A key competition concern in the eircom wholesale end-user call termination market relates to the denial of access for facilities or the application of excessive pricing by eircom.

6.54 In the absence of regulation, ComReg is concerned that there may be a risk that eircom could leverage its market power from the wholesale market into the potentially competitive retail calls market.

6.55 ComReg has considered the effect of imposing an obligation of non-discrimination, but not imposing an access obligation on eircom. It is of the preliminary view that this could mean that ComReg would not be in a position to require eircom to negotiate in good faith with requesting undertakings, or to require eircom to continue to provide existing services on existing terms and conditions in accordance with Regulation 13 of the Access Regulations. Furthermore, it would mean that ComReg would not be able to impose a requirement on eircom, in accordance with Regulations 13 of the Access Regulations, to provide call termination services on terms and conditions which are fair, reasonable and timely.

6.56 **Preliminary Conclusion: An access obligation for call termination services should continue to be imposed on eircom.**

Q. 14. Do you agree that an access obligation for Call Termination services should be imposed on eircom pursuant to Regulation 13? Please support your response with detail.

6.57 ComReg proposes to ensure that eircom is required to continue, pursuant to Regulation 13(2)(i) of the Access Regulations, to interconnect networks or network facilities where necessary. ComReg is of the view that the imposition of this obligation is necessary to maintain eircom's obligation to interconnect with existing and new OAOs. eircom may suggest that it would have an incentive to interconnect and in that case, this obligation should impose no significant burden on eircom, while ensuring, *ex ante*, that any possible harmful exercise of dominance is prevented.

6.58 **Preliminary Conclusion: ComReg proposes to continue to require eircom to interconnect networks or network facilities as part of its Access obligation.**

Q. 15. Do you agree with ComReg's proposal to require eircom to interconnect networks or network facilities? Please support your response with detail.

6.59 ComReg proposes that eircom should continue to have an obligation pursuant to Regulation 13(2)(c), not to withdraw access to facilities already granted, unless this has been approved by ComReg. If the withdrawal has a significant impact on the market ComReg may then decide that a public consultation is necessary as a means of approval for withdrawal of the facility.

6.60 ComReg is of the preliminary view that this obligation is necessary to ensure that OAOs have the certainty to provide retail services to the marketplace and so compete with eircom.

6.61 In addition, ComReg notes that the gradual migration to next generation network ('NGN') technology might well give rise to an increase in possible cases where eircom might wish to withdraw access to existing facilities. ComReg has examined the issue with regard to withdrawal of access where an operator may be required to retain facilities already in place in a time when it is re-designing its network architecture and redeploying network infrastructure and where, access facilities, if not withdrawn, could impede development.

6.62 ComReg's preliminary view is that eircom should continue to seek ComReg approval before withdrawing access to existing facilities, and that ComReg's decision will be proportionate and justifiable and will take into account the potential impact on the market.

6.63 **Preliminary Conclusion: ComReg proposes that eircom should continue to have an obligation not to withdraw access to facilities already granted, unless this has been approved by ComReg as part of its Access obligation.**

Q. 16. Do you agree that eircom should be required not to withdraw access to facilities already granted, save without prior ComReg approval? Please support your response with detail.

6.64 ComReg proposes to require eircom, pursuant to Regulation 13(2)(c) and 13(3) of the Access Regulations, to continue to provide specified information which supports existing call termination services. Specified information should include such information as technical specifications, network characteristics, terms and conditions for supply and use, and prices which are necessary for the provision of existing end-user call termination services.

6.65 ComReg is of the preliminary view that this obligation would be met by the continued offering of the relevant facilities in accordance with following the terms, conditions and specifications. These are contained in the Main body clauses, Annex A definitions, Billings and Payments annex, located in the recent version of eircom Core RIO document on the eircom wholesale website. In addition, the billing forms, Network Plan, Technical Manual, Calling Line Identification Code of Practice (CLI CoP), Call Origination and Termination Routing Scheme, Non Disclosure Agreement as published as stand alone documents on eircom's wholesale website and prices contained in the most recent version of eircom RIO Price List also on the eircom wholesale website.

6.66 ComReg notes that the RIO is an evolving document and that the specific information required to support call termination services will change over time.

6.67 **Preliminary Conclusion: ComReg proposes to require eircom to continue to provide specified information which supports existing call termination services as part of its Access obligation**.

Q. 17. Do you agree with ComReg's proposal to require eircom to provide specified information which supports call termination services? Please support your response with detail.

6.68 ComReg proposes to continue to impose the obligation on eircom to meet reasonable access requests and to address any disputes accordingly. This obligation is pursuant to Regulation 13(1) of the Access Regulations.

6.69 ComReg is of the preliminary view that access seekers may need to avail of other products which are included within the definition of the relevant wholesale market that will allow them to develop retail offerings to compete in the retail market. An access remedy is the only remedy which allows OAOs to make reasonable requests for products according to their specifications pursuant to Regulation 13 (2) (a) or (f) of the Access Regulations. In cases where commercial negotiations are not successful any such requests will be reviewed in the context of Regulation 13(4) of the Access Regulations.

6.70 ComReg is of the preliminary view that an SMP operator should not have to meet requests that are unreasonable, or are not technically feasible. In assessing whether requests are reasonable, ComReg notes that such requests should not constitute an undue burden on the SMP operator. This means that a request which is technically feasible should allow the SMP operator to receive a reasonable rate of return on any necessary investments made to supply a product at a price the requesting operator is willing to pay. If an issue arises between either party in this regard the option is available for it to be brought to the attention of ComReg.

6.71 **Preliminary Conclusion: ComReg proposes to continue to impose the obligation on eircom to meet reasonable access requests as part of its Access obligation.**

Q. 18. Do you agree that eircom should have an obligation to meet reasonable requests for access as described above? Please support your response with detail.

6.72 ComReg is of the preliminary view that, pursuant to Regulation 13 (3) of the Access Regulations, eircom's call origination services should be provided on terms and conditions which are fair, reasonable and timely. In this regard, ComReg believes that the terms and conditions should be supported by the Service Level Agreement ('SLA'). SLAs should ensure that eircom has an incentive to provide products and services which are fit for purpose and treat OAOs the same as its own retail arm. ComReg proposes to consult with industry on SLAs once the market reviews have been completed. The proposed consultation will focus on the terms and conditions of the SLA and will ensure that the SLA remains useful and effective. Currently, ComReg's view is that the SLA is important in order to allow OAOs to approach eircom and ensure that their requests for new or amended products are treated promptly and appropriately. Additionally, pursuant to Regulation 13(2)(b) of the Access Regulations ComReg is also of the preliminary view that eircom should have the obligation to negotiate in good faith with the undertakings requesting access.

6.73 **Preliminary Conclusion: eircom should continue to provide call termination services on terms and conditions which are fair, reasonable and timely. These terms and conditions should be supported by Service Level Agreements as part of its Access obligation.**

Q. 19. Do you agree that eircom should be required to provide call termination services on terms which are fair, reasonable and timely? In addition, do you agree with ComReg's proposal that these terms and conditions should be supported by Service Level Agreements? Please support your response with detail.

Q. 20. Do you agree that ComReg should consult with industry on the terms and conditions of the SLA? Please support your response with detail.

6.74 Pursuant to Regulation 10(2) of the Access Regulations ComReg proposes that eircom should be required to continue to provide call termination services on an unbundled basis. The level of unbundling should not be less than that offered at the time to its retail division or subsidiaries.

6.75 The basis for this provision is to ensure that OAOs are not required to buy products that they do not need for their services, as this may have the effect of reducing their efficiency and ability to compete.

6.76 **Preliminary Conclusion: eircom should be required to continue to provide an unbundled call termination service as part of its Access obligation**.

Q. 21. Do you agree that eircom should be required to provide an unbundled call termination services as part of its access obligation? Please support your response with detail.

6.77 ComReg proposes that eircom should continue to be required to provide access and information necessary for the provision of call termination services to competitors at an equivalent standard and at an equivalent time as that provided to its own retail arm.

6.78 In the current review, ComReg emphasises that OAOs should be given the same notice/information in relation to the provision of wholesale call termination services as eircom provide to its retail arm. In addition to this ComReg, as well as OAOs, should be given reasonable pre notification of plans which the incumbent may have with regards restructuring of their network where interconnection services will be affected.

6.79 **Preliminary Conclusion: ComReg proposes that eircom should continue to be required to provide access and information necessary for call termination services to competitors at an equivalent standard and equivalent time as that provided to its own retail arm as part of its Access obligation.**

Q. 22. Do you agree that eircom should provide access and information necessary for call termination services to competitors at equivalent times and standards as it provides to its retail arm? Please support your response with detail.

Q. 23. Do you agree that where there will be a direct impact on OAOs, that both OAOs and ComReg should be notified of plans which eircom may have with regard to restructuring of their network? If so, what form should this take?

6.80 ComReg is of the preliminary view that, pursuant to Regulation 13(2)(e), eircom should continue to be required to grant open access to technical interfaces, protocols, or other key technologies and systems and should also be required to provide access to such Operational Support Systems ('OSS') or similar software necessary to ensure fair competition in the provision of services.

6.81 Unless the provision of services by eircom of certain products is mandated, ComReg's preliminary view is that there may be an incentive for eircom to limit access or make access more difficult. It is obviously necessary for OAOs to have open access to technical interfaces, protocols, and OSS such as is necessary for them to take up the mandated product and allow them to compete with eircom at the retail level.

6.82 **Preliminary Conclusion: eircom should continue to be required to grant open access to technical interfaces, protocols, or other key technologies and systems and should also be required to provide access to such Operational Support Systems or similar software necessary to ensure fair competition in the provision of services as part of its Access obligation**.

Q. 24. Do you agree that eircom should be required to grant open access to technical interfaces, protocols, or other key technologies and should also be required to provide access to such OSS or similar software necessary to ensure fair competition in the provision of services? Please support your response with detail.

6.83 In addition to the access obligations, ComReg proposes to impose obligations relating to transparency, non-discrimination and price control on eircom. These obligations are justified means of addressing competition problems in the call termination market, and are also necessary to support the access obligations

Transparency - eircom

6.84 ComReg proposes that a transparency obligation should continue to be imposed on the SMP operator, eircom. It is stated as part of the Access Directive[52] that transparency may be used in relation to 'interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices'.

6.85 Transparency is a necessary means of ensuring that ComReg and OAOs can observe price and non-price terms and conditions for eircom's wholesale call termination products. A transparency obligation is required to support any accounting separation obligations, as this would allow the calculation of costs and prices (i.e. internal price transfers) to be rendered visible. This would also allow ComReg to monitor compliance with any non-discrimination obligations, and address competition problems relating to cross subsidisation, price discrimination and the application of price squeezes.

6.86 ComReg has considered the existing level of publication of data per the Reference Interconnect Offer ('RIO'). eircom currently publishes a full suite of reference documentation in relation to interconnect products, including call termination services. However, ComReg is of the preliminary view that, in the absence of an enforceable obligation, there would be no guarantee that eircom would continue to publish a RIO and ComReg would have no means of remedying any deficiencies in the RIO as a result.

6.87 **Preliminary Conclusion: ComReg proposes that a transparency obligation should continue to be imposed on the SMP operator.**

Q. 25. Do you agree that transparency, and in particular the requirement to make public interconnection terms and conditions, is a necessary remedy to address problems actual and prospective in this market? Please support your response with detail.

6.88 In considering the implementation of the transparency obligation, ComReg proposes that eircom should continue to publish a Reference Offer for call termination

[52] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, Article 9.

services on its wholesale website pursuant to Regulation 10(3) of the *Access Regulations*.

6.89 **Preliminary Conclusion: ComReg proposes that eircom should continue to publish a Reference Offer for call termination services on its wholesale website as part of its Transparency obligation**.

Q. 26. Do you agree that eircom should publish a Reference Offer for Call Termination services on its wholesale website? Please support your response with detail.

6.90 In considering the imposition of an access obligation, ComReg noted that eircom should be required to continue to provide information necessary to support call termination services. It is proposed that a transparency obligation would continue eircom's obligation to publish the set of specified information as described above, and would make provision for the evolution of the RIO documentation, as published on the eircom wholesale website[53], and for the introduction of new products and services.

Q. 27. Do you agree that eircom should publish specified information which supports call termination services? Please support your response with detail.

6.91 ComReg proposes to ensure that eircom continues to publish appropriate manuals and supporting documentation for new and existing call termination services. This would include manuals, order forms and processes for new and existing services, the detail to be determined on a case by case basis.

6.92 **Preliminary Conclusion: ComReg proposes that eircom should be required to continue to publish appropriate manuals and documentation for new and existing call termination services as part of its Transparency obligation.**

Q. 28. Do you agree that eircom should be required to publish appropriate manuals and documentation for new and existing Call Termination services? Please support your response with detail.

Q. 29. Is there any additional information which eircom should provide to ComReg or industry or both to further support products and services in the RIO? Please support your response with detail.

6.93 As provided for by Regulation 10 (2) of the Access Regulations, the RIO shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and such offer shall include:

i. A description of the relevant offerings broken down into components according to market needs; and

ii. A description of the associated terms and conditions, including prices.

[53] www.eircomwholesale.ie/regulatory/

6.94 eircom shall publish any proposed textual changes to the RIO text on its website for the purpose of notifying all interested parties of such changes. Comments on the proposed changes by OAOs should be submitted to ComReg within 21 (twenty one) calendar days of any such notice and ComReg will either approve or amend the proposed changes within a further 3 (three) weeks. eircom shall amend and re-publish its RIO in accordance with the obligations set out in this section. As provided for by Regulation 10 (5) of the Access Regulations, ComReg may issue directions requiring eircom to make changes to the RIO to give effect to obligations imposed in the Decision Instrument (see Annex A) pursuant to the Access Regulations and to publish the RIO with such changes.

6.95 With regard to pricing, under the current process for updating the RIO, eircom advises ComReg 7 days in advance of its intentions to publish an updated RIO price list. The updated RIO price list is circulated to OAOs 21 days before the changes come into effect[54].

6.96 The RIO Price List is published on the eircom wholesale website, and consists of the following documents –

- RIO Change Matrix;
- RIO Price List marked version; and
- RIO Price List unmarked version.

6.97 ComReg is of the preliminary view that these obligations should be maintained as it is necessary to provide OAOs with sufficient notice of any changes to the eircom RIO, and it is useful for ComReg to be notified in advance. It is proposed that this process should apply to all the documents relating to the call termination market.

6.98 **Preliminary Conclusion: ComReg proposes to continue to ensure that the current process for publishing and updating the RIO is maintained as part of its Transparency obligation.**

Q. 30. In your opinion is the current process for updating of the RIO adequate? Please support your response with detail.

6.99 ComReg proposed in the initial response to consultation to consult further on the issue of itemised billing. Since the time of the initial consultation, eircom has been providing itemised billing on an ad hoc basis as requested by other operators. There have been no recent complaints. ComReg therefore is of the preliminary view that a consultation on this issue is disproportionate and unjustifiable at this time.

6.100 It must be noted however that it is general practice in any industry that prior to payment of any bill a full breakdown of what the bill relates to is required by the paying party. Following from this, the paying party should be able to reconcile the bill in an efficient manner to their in-house system.

6.101 ComReg will continue to monitor the process and will ensure that eircom continues to provide a satisfactory level of granularity so that eircom bills can be reconciled in an efficient manner to operator systems.

[54] International Access Rates are the exception to this.

6.102 **Preliminary Conclusion: ComReg proposes that eircom's billing should be sufficiently granular for OAO purposes, but that a public consultation on this issue at this time is neither necessary nor proportionate.**

Q. 31. Do you agree that the eircom billing reports in relation to call termination services to wholesale customers are sufficiently granular so that operators are in a position to reconcile their bills in an efficient manner to their in-house systems? Please support your response with detail.

Q. 32. If you believe that the current level of detail on wholesale bills for call termination services provided by eircom is not sufficient please demonstrate by example material shortfalls in the reconciliation process.

Non- discrimination - eircom

6.103 ComReg proposes to continue with the imposition of a non-discrimination obligation on eircom.

6.104 Non-discrimination requires that the SMP undertaking 'applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent 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'. The general non-discrimination obligation requires that third party access seekers are treated no less favourably than the operator's internal divisions.

6.105 ComReg is of the preliminary view that non-discrimination obligations should be imposed on eircom to prevent additional competition problems such as quality discrimination and undue use of information about competitors which the transparency obligation would not prevent. Further to this, non-discrimination is an essential complement to the transparency and access obligations.

6.106 The application of a non-discrimination obligation would require eircom to offer equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and require eircom to 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. In particular, ComReg considers that eircom must provide information and services to alternative operators in timescales, on a basis, and of quality, which are at least as good as those provided to eircom's retail arm and associates.

6.107 **Preliminary Conclusion: ComReg proposes to continue with the imposition of a non-discrimination obligation on eircom.**

Q. 33. Do you agree that eircom should be required to provide call termination information and services on a non-discriminatory basis to its retail arm and alternative operators? Please support your response with detail.

6.108 ComReg is of the preliminary view that eircom's downstream arms should not have privileged access to eircom wholesale. It is therefore important that information gained by eircom as a result of its provision of call termination services to another operator is not used by eircom's downstream arms in any manner. The main reason being that eircom wholesale would have visibility of information regarding calls from other operators and therefore may be in a position at a retail level to use this call information to target new customers hence giving eircom an advantage over OAOs. ComReg agrees that the relationship between eircom's wholesale and retail arms should be such that it is not susceptible to abuse through knowledge or other methods.

6.109 **Preliminary Conclusion: As part of the non-discrimination obligation eircom's downstream arms should not have privileged access to eircom wholesale.**

Q. 34. Do you agree that eircom's downstream arms should have the same access to eircom wholesale as alternative operators? Please support your response with detail.

Q. 35. Can eircom please provide examples of where and how it might be appropriate to make different levels of information available in this regard?

6.110 ComReg proposes that eircom should be required to continue to apply a standard process for the development and introduction of new call termination services and elements, including standard documentation and timescales. ComReg's preliminary view is that it is desirable to have a process in place regardless of whether or not there is an immediate need for such a process. ComReg takes a proactive view that future requirements cannot always be foreseen in detail, but can be prepared for.

6.111 **Preliminary Conclusion: eircom should be required to continue to apply a standard process for the development and introduction of new call termination services and elements, including standard documentation and timescales as part of its non-discrimination obligation**.

Q. 36. Do you agree that eircom should be required to apply a standard process for the development and introduction of new call termination services and elements? Please support your response with detail.

Price control and Cost Accounting - eircom

6.112 The transparency, non-discrimination and access obligations discussed above would assist in creating a level playing field enabling greater service-based competition in the retail calls market. However, on their own these obligations would not be able to tackle the possibility of the setting of excessive prices by a dominant operator, or deal with problems related to possible inefficient investments undertaken by a dominant operator. As such, while competition in service provision may be fostered, consumer benefits may not be maximised, due to the setting of excessive prices or occurrence of excessive costs.

6.113 ComReg has continued to apply regulation of call termination since the last review and this has helped to facilitate indirect competition in the retail calls market.

6.114 There are a number of forms of price control options open to a regulator. The current price control regulation applied in this market mandates cost oriented tariffs based on a Forward Looking-Long Run Incremental Costing (FL-LRIC) methodology.

6.115 Competition in the retail calls market has increased since the introduction of CPS and SB-WLR products. However, the ability of the other operators to be in a position to compete is reliant to a large extent on reaching price points at a wholesale level that allow for adequate returns while also encouraging direct investment where commercially feasible by OAOs.

Principles of Price Control

6.116 Based on experience to date of regulating interconnect rates in the Irish market and on the conclusions of the market analysis data, ComReg proposes to continue the obligation that interconnection services are offered at cost oriented prices. This will help ensure that the provision of interconnection is on fair and efficient terms and that costs are soundly derived from appropriate costs and give proper economic signals to operators to guide their investment decisions.

6.117 ComReg has to date reviewed the rates set by eircom based on the eircom Top Down LRIC model. This has been the case since 1999 and the model has evolved considerably since its introduction. The existing model sets prices for call origination, call termination and call transit services. Up until 2006 the rates for the relevant financial year were set as interim for the period until the actual costs and volumes were available from the eircom separated accounts. ComReg would review the final model and where appropriate changes were made which may have on occasion given rise to a change to the interim rates charged to operators. Where these changes were material, operators may have received refunds or made additional payments depending on the changes to rates.

6.118 The principle that only efficiently incurred costs can be recovered through interconnection charges is one that, in ComReg's preliminary view is of vital importance. eircom at an operational level is free to manage its network, and to route calls across the network however it sees fit (subject to the non-discrimination obligation). However, should eircom for its own reasons choose to manage its network in a manner that deviates from the standard of efficient operation then it shall only be allowed to recover those costs that would have been incurred had it operated efficiently.

6.119 In the initial consultation, ComReg discussed the principles adopted when setting prices and these principles have not altered since then. These were broadly to ensure the following:

- encouraging efficient competition;
- sending appropriate signals that promote forward looking investment decisions;
- enabling cost recovery by eircom;
- facilitating effective means of interconnection;
- being sufficiently transparent; and
- being non-discriminatory and non-preferential.

Products subject to price control

6.120 eircom is required to offer wholesale interconnection services at the termination level as set out on their wholesale website (www.eircomwholesale.ie). The suite of interconnection services being offered to operators at a wholesale level by eircom has not changed since 2004. eircom is obliged to meet reasonable requests for these products. ComReg is of the preliminary view that it is necessary to continue with the mandatory access to these interconnect services.

6.121 ComReg is of the preliminary view that any new services introduced into the call termination market subsequent to this market review will be covered by the same pricing principles.

Form of Price control

6.122 ComReg proposes to continue with the application of FL-LRIC costing methodology, pending the outcome of the consideration of a wholesale price cap (Annex D).

6.123 ComReg is of the preliminary view that all operators have significant market power in the provision of their own network fixed end user call termination services. This includes all termination to primary level interconnection.

6.124 ComReg is of the preliminary view that as part of the current review the importance of entering into discussions with industry on the future price control mechanism appropriate to the market in light of technological change to the core network is of high relevance.

6.125 Further, ComReg's preliminary view is that the absence of a requirement on eircom to provide fixed call termination on a cost oriented basis would severely impede competition in the downstream markets, as it could result in the levying of excessive prices. This would in turn increase competitors' retail costs. Imposing an obligation of non-discrimination, on its own, would not in ComReg's preliminary view, be sufficient in that while the imposition of such an obligation might exert downward pressure on charges, there would still be incentives for dominant operators to set excessive prices to improve profitability.

6.126 The interconnection rates arrived at in recent years would appear to have achieved the aim of encouraging competition and investment. The rates have not seen material change and more recently the market saw a further progression with the setting of forward looking rates to March 2007.

6.127 ComReg would like to take the opportunity presented by a transitional period to next generation technology, of entering into discussions with industry on the future price control mechanisms appropriate to the market in light of technological changes to the core network and consumer usage thereof. Such changes could have a significant impact on the pricing models used to arrive at interconnection rates.

6.128 The application of the forward looking long run incremental cost (FL-LRIC) method has been preferred to other cost methods such as fully distributed historical costs. It has also been recommended by regulatory organisations such as the Independent Regulators Group (IRG)[55], as it leads to a set of prices that reflect the real resource costs taken into consideration by operators in making investment decisions. The application of this method has been used in the past and is commonly seen in other countries as the most appropriate to achieve the desired results.

6.129 **Preliminary Conclusion: ComReg believes that the current FL-LRIC Top Down Model should be maintained as an approach to setting call termination rates pending the outcome of the consideration of a wholesale price cap.**

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[55] Regulatory Accounting in Practice, A Report prepared by the IRG Accounting Separation Working Group, ERG (06) 23, April 2006.

Q. 37. In your opinion, do you have believe that the current FL-LRIC Top Down model approach to setting call termination rates should be maintained pending the outcome of the consideration of a wholesale price cap? Please detail your response giving substantive arguments for or against as appropriate.

6.130 In the responses to the 2004 initial consultation there was general agreement among operators that moving to a wholesale price cap regime would be desirable. ComReg has taken note of this and has over the past two years been engaged in a significant project in preparation for such a move. It is hoped that a decision on whether to implement such a cap and the details of any such cap will be concluded in the coming months. In light of this, ComReg has decided to consult industry on the principle issues surrounding a wholesale price cap and this is attached in Annex C to this consultation.

Q. 38. Do you agree that ComReg should consider possible approaches to, and implementation of, a wholesale price cap?

Cost Accounting Systems - eircom

6.131 A cost accounting[56] system will be necessary where an obligation has been imposed on a dominant operator in relation to cost oriented pricing, price controls, recovery of costs and/or retail tariff controls. With regard to the interconnection markets, the obligation of cost orientation has been proposed as an appropriate obligation to be imposed on eircom and therefore ComReg proposes to impose a further obligation with regard to cost accounting systems on eircom.

6.132 ComReg is of the view that eircom could maintain some or all of its prices at an excessively high level, or impose a margin squeeze which would have adverse consequences for end users. If ComReg were to relax this obligation, it would not have any means of ensuring the cost orientation of prices in the market and prevent such potential market failure. Further to this, Cost Accounting Systems can provide greater assurances in monitoring non-discrimination and address the competition problems identified.

6.133 ComReg does not consider that this obligation will be overly time consuming and impose a heavy burden on eircom as they already have such systems in place in order to prepare their existing set of separated accounts and these systems have been in place for some years now. Also, given the size of such organisations, it is generally accepted accounting practice to have systems in place to be in a position to prepare monthly and annual accounts that can support internal business decision making and price setting where appropriate.

6.134 **Preliminary Conclusion: ComReg proposes to consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. It should be noted that a comprehensive price control obligation is linked to the obligation for cost accounting systems and accounting separation. In the interim ComReg is proposing that it maintains the existing level of cost**

[56] Cost accounting is the process of tracking, recording and analysing costs associated with the products or activities of an organisation.

accounting system obligation on eircom until such time as any further consultations are completed.

Q. 39. Do you believe that the obligation to maintain cost accounting systems should be imposed on eircom? Please support your response with detail.

Accounting separation - eircom

6.135 Accounting separation[57] will help disclose possible market failures and provide evidence in relevant markets of the presence or absence of discrimination and price squeeze. It will make visible the wholesale prices and internal transfer prices of a dominant operator's products and services. It can also provide ComReg with relevant data which will allow it to perform its duties to ensure prices are not set in a predatory manner or at an excessive level and provide greater certainty about the costs and volumes for a given service.

6.136 An obligation of non-discrimination can require, inter alia, the imposition of financial reporting regimes in order to monitor eircom's compliance with such an obligation.

6.137 ComReg is proposing that eircom as an SMP operator should have an obligation not to unduly discriminate. The obligation of accounting separation will support ComReg in its monitoring of eircom's behaviour with regard to non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services.

6.138 ComReg proposes to implement the accounting separation obligation on a service and/or product basis. ComReg is of the preliminary view that it is not sufficient to implement such an obligation at a market level as it is important to discourage possible cross-subsidisation of pricing at a service level. If ComReg were to impose accounting separation at the market level, it would not be able to identify whether products and services were being provided on a non-discriminatory basis.

6.139 As discussed earlier, in deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the light of the objectives laid down in Section 12 of the Communications Regulation Act 2002. In this regard, the accounting separation obligation is designed to help provide evidence from eircom which may demonstrate the presence or absence of price discrimination. In this regard, ComReg believes the imposition of an obligation of accounting separation upon eircom would be justifiable and based upon the nature of the problem identified.

6.140 If ComReg were to withdraw this obligation, it would be difficult for it to effectively monitor compliance with any obligation of non-discrimination that may be imposed, or to obtain any information on margins in the retail business. ComReg does not consider that this obligation will be time consuming and impose a heavy burden on eircom, as, given eircom's size, it would already have management accounting systems in place to support internal business decision-making.

6.141 **Preliminary Conclusion: ComReg has entered into a public consultation on the detailed implementation of the accounting separation and cost accounting**

[57] The purpose of accounting separation is to provide an analysis of information derived from financial records to relect as closely as possible the performance of parts of the business as if they were operating as separate businesses.

remedies under the new framework. A significant amount of work and engagement with eircom has been carried out to date and based on this and responses received from industry a further response to consultation is proposed following the completion of all the outstanding market reviews. In the interim, ComReg is proposing that eircom be required to maintain the existing level of accounting separation, until any further consultations are completed.

Q. 40. Do you believe eircom should have an obligation of accounting separation in the wholesale call transit market? Please support your response with detail.

7 Other services necessary for the provision of Interconnection

Capacity Based Interconnection Products

7.1 Earlier in this document, ComReg has set out its views as to the appropriate obligations to be imposed on the markets for call origination and transit markets. It is important to note that these obligations cannot be availed of without certain 'supporting' products which are necessary in order to avail of mandated obligations. These are known as capacity based interconnection products.

7.2 ComReg considers the products described in Service Schedules 002 (Interconnect Paths) and 005 In Span Interconnection ('ISI') in eircom's current Reference Interconnect Offer on the eircom wholesale website (www.eircomwholesale.ie) and eircom RIO Network Price List (also on the eircom wholesale website) fall within the definition of these capacity based products. The existing Interconnect Operations & Maintenance ('O&M') Manual and the Service Level Agreement ('SLA') for Interconnect Paths and Traffic Designation for Inbound & Outbound Interconnection Paths document published on eircom's wholesale website, support provision and operation of these services.

7.3 Without these services, interconnection for the purposes of origination, termination and transit cannot be effected and therefore ComReg intends to mandate the provision of capacity based interconnection products outside the market review process; that is without a designation of SMP or without definition of a relevant market. ComReg notes the statement of the EU Commission in its *Explanatory Memorandum to the Recommendation on Relevant Markets*, in which it explicitly addresses the question of imposing SMP remedies in an area outside a defined market. The EU Commission recognised that in dealing with lack of effective competition in an identified market, it may be necessary to impose several obligations to achieve an overall solution. *The Explanatory Memorandum* states:

"For instance, it may often be the case that adjacent or related remedies are applied to technical areas as part of the over all obligation that addresses SMP on the analysed market. If specific remedies are thought to be necessary in a specific narrow technical area, it is not necessary or appropriate to identify each technical area as a relevant market in order to place obligations in that area."

7.4 ComReg considers its approach in mandating capacity based interconnection products to be consistent with the approach set out in the *Access Regulations* and the *Explanatory Memorandum.*

7.5 In addition, Regulation 6(2) of the *Access Regulations* provides ComReg with discretionary powers to ensure adequate access, interconnection and interoperability. In particular, without prejudice to measures that may be taken regarding undertakings with significant market power, ComReg is able to impose, to the extent that it is necessary to ensure end to end connectivity, obligations referred to in Regulations 10 to 14 of the Access Regulations 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.

7.6 ComReg notes that with ISI, the precise position of the handover to eircom is not mandated by eircom but is determined by the OAO. Thus, at least in theory, the handover point could be anywhere from just outside the OAO to just outside the eircom interconnect node. To a large extent, therefore, ComReg would argue that if ISI is mandated, then the question of whether or not CSH/CSI is also mandated is largely academic. ComReg also notes that the relevant market for CSH/CSI would be a national one, whereas the fibre infrastructure being rolled out by the MANs and and by the ESB, only covers a limited number of routes and locations. Thus there is no guarantee that the MANs or the ESB would have the required infrastructure in the right place to always facilitate ISI.

7.7 ComReg is of the preliminary view that it is not the case that merely having the choice between CSH/CSI and ISI makes the market for interconnect links a competitive one. ComReg's reasoning is that the alternate fibre infrastructure is only available at a limited number of locations, whereas the relevant market for interconnect links is a national one. In areas where alternate infrastructure is not available, the only realistic product available to the OAO, as ComReg understands, would be CSH/CSI. If that product is not available at a realistic price, then the OAO would only be able to achieve interconnect by physically digging its own fibre link(s). Given the economies of scale and scope available to eircom, but not to the OAO, this would more than likely be cost prohibitive in many cases.

7.8 ComReg interprets this to mean that the products described in Service Schedules 002 (Interconnect Paths) and ISI in eircom's current RIO and eircom RIO Network Price List as well as the Interconnect O&M Manual, the SLA for Interconnect Paths and the Traffic Designation for Inbound & Outbound Interconnection Paths document published on eircom's wholesale website, will continue to be supplied under the current terms and conditions. This means the current obligation to provide such products on a reasonable request basis continues. Obligations in respect of transparency and non discrimination also continue. These products will remain subject to price control as in the current regime. Such charges are based on LRIC and must also be consistent with the principles applicable to charging of Partial Private Circuits given their deployment in provision of PPCs.

Q. 41. Do you agree that ComReg should mandate capacity based interconnection products in this manner? Please support your response with detail.

Fixed SMS

7.9 Fixed SMS is available at a wholesale level and is included as part of the RIO Service Schedule 401 – Single Billing through Wholesale Line Rental. Any request from another operator for the provision of the service should be considered a reasonable request and will be covered through the Wholesale Line Rental provision for non-discrimination. As such it is not considered necessary at this stage to impose any further remedies because take-up of the service at a retail level is not significant at this stage and therefore it is not considered proportionate or justifiable to impose further remedies at this time. However, ComReg will monitor the market for SMS from fixed lines and should problems arise this finding will be revisited.

Q. 42. Do you agree with the above position taken by ComReg in relation to Fixed SMS? Please support your response with detail.

Calls to directory enquiry (DQ) and operator assisted (OA) services and subsequent call completion services for calls originating on the eircom network

7.10 The charges for access to eircom's DQ and OA services in its RIO include both the costs of conveyance and the labour costs of the operator. Nothing has come to the attention of ComReg since the initial review that would indicate a need to investigate the labour costs of providing a DQ service and therefore no change is proposed currently in this regard.

Q. 43. Do you consider that in the period since the initial review that the market for the labour element of DQ services has been effectively competitive and therefore is not suitable for ex-ante regulation? Please support your response with detail.

8 Regulatory Impact Assessment

Introduction

8.1 According to ComReg's consultation on its Approach to Regulatory Impact Assessment (RIA), ComReg Document 06/69, the purpose of a RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. ComReg's proposed approach to RIA is that in the future it will continue to conduct RIAs in respect of any proposed statutory instruments which would impose regulatory obligations, or in respect of any market analyses which propose to impose, amend or withdraw obligations, through the finding of SMP or effective competition. Appropriate use of RIA should ensure the most effective approach to regulation is adopted.

8.2 In conducting RIAs ComReg will take into account the RIA Guidelines[58], adopted under the Government's Better Regulation programme. The RIA Guidelines are not formally or legally binding upon ComReg, however, in carrying out RIAs ComReg will have regard to them, while recognising that regulation by way of issuing decisions (e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation) may be different to regulation exclusively by way of enacting primary or secondary legislation. In conducting a RIA ComReg will take into account the six principles of Better Regulation that is, necessity, effectiveness, proportionality, transparency, accountability and consistency. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards RIAs. As decisions are likely to vary in terms of their impact, if after initial investigation a decision appears to have relatively low costs, then ComReg would expect to carry out a lighter RIA in respect of those decisions.

8.3 The Government's RIA Guidelines set out the stages it believes are necessary for minor impact regulations and a more detailed set of steps for a more comprehensive or full RIA, ComReg has taken these steps into consideration and has come up with a 5 step approach as follows which will be used:

(a) Description of policy issue to be addressed and identification of objectives;

(b) Identify and describe the regulatory options;

(c) Determine the impact on stakeholders;

(d) Determine the impact on competition; and

(e) Assess the impacts and select the best option.

8.4 In determining the impacts of the various regulatory options, current best practice appears to recognise that a full cost benefit analysis would only arise where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Such comprehensive review will be taken when necessary.

8.5 The following sections in conjunction with the rest of this document represent a RIA. It sets out a preliminary assessment of the potential impact of proposed SMP obligations for the national termination markets.

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[58] See "RIA Guidelines: How to conduct a Regulatory Impact Analysis", October 2005, www.betterregulation.ie

The RIA

8.5.1 *Description of policy context and objectives*

8.6 The EU Commission, in its adoption of a new common regulatory framework for electronic communications networks and services on 7th March 2002, acknowledges the need for *ex ante* regulatory obligations in certain circumstances in order to ensure the development of a competitive communications market. The EU Commission's Recommendation on Relevant Markets[59] identifies electronic communications markets, the characteristics of which may be such as to justify the imposition of such regulatory obligations. Regulation 26 of the *Framework Regulations*[60] requires that, as soon as possible after the adoption by the EU Commission of this Recommendation, ComReg shall define relevant markets in accordance with the principles of competition law, including the geographical area within the State of such markets. In addition, Regulation 27 requires that, as soon as possible after ComReg defines a relevant market, ComReg should carry out a market analysis of these markets and where ComReg determines that a recommended market is not effectively competitive, it shall designate undertakings with significant market power on that market, and it shall impose on such undertakings such specific obligations as it considers appropriate.

8.7 Regulation 9(1) of the Access Regulations[61] states that: *"Where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate."* Furthermore, paragraph 21 of The *SMP Guidelines*[62] states that, *"if NRAs designate undertakings as having SMP, they must impose on them one or more regulatory obligations, in accordance with the relevant Directives and taking into account the principle of proportionality."* ComReg is therefore compelled to impose at least one obligation where an undertaking is designated as having SMP.

8.8 ComReg can impose any or a combination of obligations from those obligations listed in Regulation 10 to 14 of the *Access Regulations*. Under Regulation 9(6) of the Access Regulations, obligations shall be *'based on the nature of problem identified; be proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations'*.

8.9 As part of the process of selecting appropriate obligations which satisfy the requirements of Regulation 9(6), ComReg is conducting, inter alia, a Regulatory Impact Assessment in accordance with the Ministerial Policy Direction on

[59] Commission Recommendation of 11/02/2003 On Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

[60] European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, S. I. No. 307 of 2003.

[61] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I No. 305 of 2003.

[62] Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

Regulatory Impact Assessment[63]. ComReg is also paying close attention to best practice, and specifically, to recent Guidelines on Regulatory Impact Assessment (the RIA Guidelines) issued by the Department of the Taoiseach.[64]

8.10 ComReg has undertaken a market analysis of the markets for wholesale call termination (one of the markets identified in the Recommendation as having characteristics which may be such as to justify the imposition of regulatory obligations). ComReg has made the preliminary finding that some of these markets are not effectively competitive and has preliminarily designated the operators in the table below with significant market power in their individual markets, as required under Regulation 27 of the *Framework Regulations*.

SMP Operator
eircom
BT Ireland
Verizon
ntl
Colt
Smart Telecom
Magnet

8.11 As such, ComReg is obliged to impose at lease one regulatory obligation on eircom and the OAOs in light of this finding.

8.12 It is proposed that the following regulatory obligations should be imposed on eircom:

- Transparency (Regulation 10);
- Non-discrimination (Regulation 11);
- Accounting Separation (Regulation 12);
- Access to and use of network facilities (Regulation 13); and
- Price control and Cost Accounting (Regulation 14).

8.13 It is proposed that the following regulatory obligations should be imposed on the OAOs:

- Transparency (Regulation 10);
- Non-discrimination (Regulation 11); and
- Price control and Cost Accounting (Regulation 14).

[63] Section 6 of the Directions by the Minister for Communications Marine and Natural Resources to the Commission for Communications Regulation under s. 13 of the Communications Regulation Act 2002, published in February 2003.

[64] See "RIA Guidelines: How to conduct a Regulatory Impact Analysis", October 2005, www.betterregulation.ie

8.14 ComReg's objectives as the national regulator are to promote competition, contribute to the development of the internal market and to promote the interests of end users within the EU Union.

8.15 It is proposed that the above obligations would be proportionate and justified based on the promotion of competition. The justification for imposing the above regulatory obligations on eircom and the OAOs is detailed further below.

8.15.1 Options for obligations on eircom

8.16 The regulatory options open to ComReg (Regulations 10-14 of the *Access Regulations*):

- **Access to and use of specific network facilities:** An obligation can be imposed on SMP operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, which is justified as a means of increasing competition. In terms of the Directives, this is by far the most extensively described of any of the regulatory obligations, reflecting the importance of this obligation and its central role in affecting competitive markets. A possible competition concern in this market is the denial of access to facilities or the application of unreasonable terms and conditions by eircom. In the absence of regulation, eircom could be free to deny access to its termination services or at the least offer such access on uncompetitive terms. While eircom does have incentives to interconnect, especially to maintain the ubiquity of its network, ComReg is of the preliminary view that the potential for any such refusal by eircom to provide access to termination would create such serious difficulties for its competitors competing on the retail voice market, that it is likely, at a minimum, an access obligation should be imposed. As such, it is appropriate to use the access obligation as a starting point for addressing the competition problems identified in this market.

- **Transparency & Non-discrimination**: In general, an access obligation will rarely operate as a stand alone obligation. Instead it is likely to be accompanied by a transparency obligation. Non-discrimination is also likely to accompany such an obligation as, often where access is required, vertically integrated entities are capable of acting in ways so as to leverage market power from the upstream to the downstream firm's advantage. The imposition of a non-discrimination obligation would guard against such behaviour. eircom currently publishes a full suite of reference documentation in relation to the interconnect products they provide, including termination services. However, in the absence of an enforceable transparency obligation on eircom, there would be no guarantee that it would continue to publish a RIO or a full RIO and ComReg would have no means of remedying any deficiencies in the RIO as a result. In addition, the general non-discrimination obligation currently imposed on eircom requires that third party access seekers are treated no less favourably than eircom's internal divisions. Finally, out of the five SMP obligations available to ComReg, these two obligations are the least burdensome as, together, they constitute a minimum intrusion on an SMP operator's business. As such, it is appropriate to next assess whether these two obligations together should continue to be imposed to complement an access obligation in this market. This is considered further below.

- **Accounting Separation**: NRAs should then consider whether sufficient information is available to ensure efficient monitoring of the non-discrimination requirement or whether additional obligations in terms of accounting separation are necessary to ensure effective compliance. In the past, it has been deemed appropriate to impose such an obligation on eircom to ensure effective compliance with the non-discrimination requirement. In particular, it would not be sufficient to investigate any potential abuses on a case by case basis in a timely manner because of the lead times for the preparation of high quality financial information. Also, this obligation is important to ensure the reconciliation of any cost model back to statutory accounts. The obligation would not necessarily impose additional costs on eircom as such reporting systems are already in place. While there may be some on-going costs of compliance, ComReg is of the preliminary view that these would be outweighed by the benefits of regulation in this area, to demonstrate that costs are appropriate and transparency and compliance with obligations is properly demonstrated, in addition to its importance for monitoring non-discrimination and fulfilling price control. ComReg is of the preliminary view that an accounting separation obligation is appropriate to impose on eircom.

- **Price Control and Costs Accounting Obligations:** Where a lack of effective competition means that the operator concerned might apply excessive prices to the detriment of end users then this obligation may apply. Absent regulation, the current termination market structure would appear to allow for such an outcome. In addition, a benefit of setting termination rates *ex ante* would be to provide certainty in the market in particular for operators when setting their retail prices, as the retail price is a function of the termination charge. The current termination markets do not provide sufficient constraints to ensure that prices reflect costs and are not excessive. As such, it is appropriate to assess whether this obligation should be imposed to complement the preceding obligations in addressing the competition problems in this market.

8.16.1 Options for eircom Termination Market:

Option 1: Do nothing (discontinue all existing SMP obligations).

Option 2: Impose Access obligation only.

Option 3: Impose Access, Transparency and Non-discrimination obligations.

Option 4: Impose Access, Transparency, Non-discrimination and Accounting Separation obligations.

Option 5: Impose Access, Transparency, Non-discrimination, Accounting Separation and Price Control & Cost Accounting obligations.

8.16.2 National Termination Market - eircom:

8.17 In relation to the market for wholesale call termination on eircom's network, it is proposed that the obligations set out above under Option 5 would be proportionate and justified on the basis of competition. ComReg again sets out the reasons as to why it is of the preliminary view that these obligations continue to be necessary for this market. In choosing obligations, ComReg has taken into account the potential impact of each option (see below) on consumers, competitors and on eircom.

8.17.1 Identification of costs, benefits and other impacts of each option being considered

Option 1*-Do Nothing			
eircom	**Competition**	**Consumers**	**Overall Impact**
Positive impact on eircom: eircom would benefit from a reduced regulatory burden. However, there would be an increased flexibility for eircom to use its market power at the wholesale level to influence market developments at the retail level.	**Negative impact on competition**: High risk that absent regulation resulting market strategy of the dominant firm would be to foreclose the market by charging OAOs higher termination rates than to those charged to its own retail arm.	**Negative impact on consumer welfare**: If foreclosure successful, consumers would have a much reduced choice of fixed telecoms provider and it is possible that prices of fixed telecoms services (and mobile services) would increase substantially if high termination rates were passed through.	Positive impact on eircom; Highly negative impact on competition and consumers.
Option 2-Obligation of Access			
eircom	**Competition**	**Consumers**	**Overall Impact**
Positive impact on eircom: As above.	**Negative impact on competition**: High risk that, even though access afforded, there would be insufficient regulation for ComReg to ensure that the SMP firm was not adversely affecting competition through its dominant position, resulting in foreclosure of the market by charging OAOs higher termination rates than those charged to its own retail arm.	**Negative impact on consumer welfare**: As above.	As above.
Option 3- Obligations of Access, Transparency & Non-discrimination			
eircom	**Competition**	**Consumers**	**Overall Impact**
Positive impact on eircom: As above.	**Negative impact on competition**: High risk that there would be insufficient transparency for ComReg to ensure	**Negative impact on consumer welfare**: As above.	As above.

	that competition was not adversely affected by the dominant firm, leading to the same issues as under Option 1 and 2 above.		
Option 4- Obligations of Access, Transparency, Non-discrimination and Accounting Separation			
eircom	**Competition**	**Consumers**	**Overall Impact**
Positive impact on eircom: As above.	**Negative impact on competition**: High risk of excessive pricing by dominant firm.	**Negative impact on consumer welfare**: Possible that the retail prices of making a fixed call would increase for consumers if high termination rates were passed through to retail prices.	As above.
Option 5- Obligations of Access, Transparency, Non-discrimination, Accounting Separation & Price Control & Cost Accounting			
eircom	**Competition**	**Consumers**	**Overall Impact**
Negative impact on eircom: Existing regulatory burden on eircom would remain. Wholesale price cap would afford eircom more flexibility in setting wholesale prices in response to market conditions	**Positive impact on competition**: OAOs would have certainty regarding eircom's wholesale pricing allowing them to compete more effectively at the retail level.	**Positive impact on consumer welfare**: Consumers benefit from ensuring increased choice of fixed provider and the risk of excessive pricing feeding into retail prices would be mitigated.	Negative impact on eircom (although regulation already in place); Highly positive impact on competition and consumers.

* *This option would leave ComReg open to legal challenge from the EU Commission for not imposing an obligation on an SMP operator.*

8.17.2 Options for obligations on the OAOs

- **Access to and use of specific network facilities:** Although ComReg's preliminary conclusion is that this obligation is necessary in eircom's termination market, ComReg is of the preliminary view that it would be dis-proportionate to impose this requirement on the OAOs. This is primarily because it is not in the commercial interests of the OAOs not to interconnect with eircom. In addition, the provisions of Regulation 6 of the Access Regulations go some way towards lessening ComReg's concern that OAOs could unreasonably deny access.
- **Transparency & Non-discrimination:** The same arguments as outlined in relation to eircom under paragraph 8.16 apply here.

- **Accounting Separation**[65]**:** ComReg is of the preliminary view that it is not proportionate to impose accounting separation on the OAOs. ComReg is of the preliminary view that the imposition of an accounting separation obligation on OAOs would be disproportionate and indeed a cost burden considering the volume of traffic terminated by OAOs on their networks. As there are 6 OAOs with SMP on their networks ComReg is of the preliminary view that the imposition of accounting separation would involve significant additional accounts preparation requirements, review and expense which would be an excessive burden on both OAOs and ComReg. Given the potential for abuse and the impact such an abuse might have on the market, ComReg is of the preliminary view that an obligation of accounting separation would not be proportionate or appropriate to the competition problems identified. ComReg is also of the preliminary view that the imposition of the price control remedy above should provide sufficient regulation to guard against the potential abuse of dominance by OAOs on their networks. In addition, the obligations of transparency and non-discrimination will ensure that operators can observe and easily compare the factors over which discrimination could take place. Transparency can assist in discouraging anti-competitive behaviour by supporting an implicit threat of regulation. While ComReg acknowledges the usefulness of imposing accounting separation for monitoring compliance with non-discrimination in relation to pricing and cost accounting, it is of the preliminary view that it would not be proportionate to impose an obligation of accounting separation on the SMP OAOs.
- **Price Control and Cost Accounting Obligations:** The same arguments as under the point in paragraph 8.16 apply here in respect of price control of the OAOs. However, ComReg is of the preliminary view that it would not be proportionate to impose a cost accounting obligation on the OAOs as the end result can be achieved more effectively in the manner outlined in section 6 of the consultation. This provides for a price control obligation on the OAOs but bearing in mind the subscriber numbers and the revenues earned from termination, it would not be proportionate to impose an obligation of cost accounting on the OAOs.

8.17.3 Options for OAO Termination Markets:

Option 1: Do nothing (maintain status quo i.e. no obligations at present).

Option 2: Impose Transparency and Non-discrimination obligations.

Option 3: Impose Access, Transparency and Non-discrimination obligations.

Option 4: Impose Transparency, Non-discrimination and Price Control obligations.

Option 5: Impose Transparency, Non-discrimination, Accounting Separation and Price Control & Cost Accounting obligations.

8.18 In relation to the options available to ComReg in achieving the objectives of the proposed regulatory obligations (i.e. to ensure the development of a competitive communications market), ComReg notes that the "do nothing" option is primarily

[65] The purpose of accounting separation is to provide an analysis of information derived from financial records to relect as closely as possible the performance of parts of the business as if they were operating as separate businesses.

being included for benchmarking purposes only. Therefore, it will not be examined in great detail as part of this RIA because it is not envisaged that this option would be pursued in practice. To impose no regulatory obligations on an undertaking designated as having SMP, or vice versa, would mean a failure to comply with our EU obligations and could result in legal challenge by the EU Commission.

8.18.1 OAO Termination Markets:

8.19 In relation to the proposed obligations in the market for wholesale call termination on individual OAO networks (i.e. Option 4) ComReg again sets out here reasons as to why it holds the preliminary view that these obligations are necessary for this market. In imposing obligations, ComReg has taken into account the potential impact of the removal of each obligation (see below) on consumers, competitors and on eircom.

8.19.1 Identification of costs, benefits and other impacts of each option being considered

Option 1-Do Nothing (impose no SMP Obligations on OAOs)			
OAOs	**Competition**	**Consumers**	**Overall Impact**
Positive impact on OAOs: OAOs would benefit from maintaining the status quo of no obligations. OAOs would have more flexibility than eircom in the setting of prices and the potential to use their market power at wholesale level.	**Negative impact on Competition**: Risk that excessive termination rates would be charged by OAOs to their competitors.	**Negative impact on consumers**: Potential for high retail prices.	Highly negative impact on competition and consumers; Positive impact on OAOs.
Option 2-Obligations of Transparency & Non-discrimination			
OAOs	**Competition**	**Consumers**	**Overall Impact**
Neutral impact on OAOs: OAOs would have lightest form of regulation imposed on them. Low cost of compliance as rates published already and to date no discrimination on rates charged to different operators.	**Negative impact on competition**: High risk that even though obligation of transparency and non-discrimination, there would be insufficient regulation to ensure that the dominant firm was not adversely affecting competition or exercising its market power through charging higher than efficient termination rates to its competitors.	**Negative impact on consumers**: As above.	Highly negative impact on competition and consumers; Neutral impact on OAOs.
Option 3-Obligations of Access, Transparency & Non-discrimination			
OAOs	**Competition**	**Consumers**	**Overall Impact**
Negative impact on OAOs:	**Negative impact on competition**:	**Negative impact on consumers**:	Negative impact on OAOs

OAOs would have additional obligation of Access imposed on them, to Option 2 which would not have the corresponding effect of targeting the competition problems.	As above, as access would not address the main competition problem.	As above.	Negative impact on competition and consumers
Option 4-Obligations of Transparency, Non-discrimination & Price Control			
OAOs	**Competition**	**Consumers**	**Overall Impact**
Negative impact on OAOs: Increased regulatory burden. However, ComReg notes that this would be minimised by the proposal to have a relatively less intrusive form of price control.	**Highly Positive impact on competition:** OAO wholesale termination pricing would be certain for customers and competitors and competition at the retail level would benefit.	**Highly Positive impact on consumers:** Consumers would benefit from ensuring that the risk of excessive pricing that would feed into retail prices was mitigated.	Negative impact on OAOs. Highly positive impact on competition and consumers.
Option 5-Obligations of Access, Transparency, Non-discrimination & Price Control & Cost Accounting & Accounting Separation			
OAOs	**Competition**	**Consumers**	**Overall Impact**
Highly Negative impact on OAOs: Disproportianate to impose the additional obligations on OAOs as while they target the competition problem they are not at the minimum level required to achieve the desired effect.	**Positive impact on competition:** Customers and competitors would have certainty regarding OAO wholesale termination pricing in the market and would benefit competition at the retail level.	**Positive impact on consumers:** As above.	Highly Negative impact on OAOs. Highly positive impact on competition and consumers.

* *This option would leave ComReg open to legal challenge from the EU Commission for not imposing an obligation on an SMP operator.*

8.19.2 Consultation

8.20 This document is subject to ComReg's formal public consultation procedures.

8.20.1 Enforcement and compliance

8.21 This is not relevant for eircom as all regulatory procedures for it are already in place. In respect of the OAOs, the publication of tariffs should impose a minimal burden on them. In respect of price control, similar procedures to eircom will be in force within ComReg to monitor enforcement and compliance.

8.21.1 Review

8.22 The obligations imposed under this market review are periodically reviewable at the end of the timeframe of the review or if market conditions change sufficiently to render the findings of the current review inappropriate. ComReg is obliged to continue to monitor developments in this market to assess whether the obligations in place remain appropriate.

Conclusion

8.23 The proposed maintenance of regulation in the wholesale market for voice call termination on eircom's network (i.e. **Option 5**) is justifiable, in that it is required to ensure that eircom does not exploit its market power at the wholesale level to the detriment of competition in both upstream and downstream markets, to the ultimate detriment of consumers. The regulatory obligations chosen do not unduly discriminate against eircom in that, while they only apply to eircom, the obligations are imposed in order to specifically address the competition problems which clearly exist in the national termination markets. They are proportionate in that they are the least burdensome means of achieving this objective.

8.24 The proposed imposition of obligations in the markets for wholesale voice call termination on individual OAO networks (i.e. **Option 4**) is justifiable in that these operators have been found to have SMP in this market, so obligations are required to ensure that these OAOs do not exploit their market power at the wholesale level. The regulatory obligations chosen do not unduly discriminate against the OAOs in that, while they only apply to each individual OAO, the obligations are imposed in order to specifically address the competition problems which clearly exist in the national termination markets. They are proportionate in that they are the least burdensome means of achieving the required objectives. For example, ComReg is of the preliminary view that the obligations of Access, Cost Accounting and Accounting Separation would not be proportionate to impose on the OAOs.

8.25 ComReg considers that it has met the condition of transparency by setting out the potential requirements on eircom and the OAOs, the justification for the proposed obligations, and issuing a public consultation on same.

8.26 **ComReg invites comments from interested parties on the above regulatory impact assessment and its underlying analysis.**

Annex A: Draft Decision Instrument

PLEASE NOTE: The Draft Decision Instrument below is set out for information purposes only. ComReg has set out its preliminary views in relation to the relevant markets and its initial views on any potential SMP obligations, both of which are subject to consideration of any views expressed during consultation by interested parties.

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 and is a market that differs from any defined in the EU Commission's Recommendation[66] and is made by the Commission for Communications Regulation ("ComReg"):

i. Having had regard to sections 10 and 12 of the Act of 2002[67];

ii. Having taken account, of its functions under Regulation 6 (1) of Access Regulations[68];

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 Minister[69];

vi. Having taken the utmost account of the EU Commission's Recommendation and the SMP Guidelines[70];

vii. Having taken account of the submissions received in relation to document No. [●]; and

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[66] 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.

[67] The Communications Regulations Act, 2002.

[68] S.I. No. 305 of 2003 the Access Regulations which transposes 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.

[69] Policy Directions made by Dermot Ahern T.D. (the then) Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

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

viii. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations[71], 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 provide retail calls to end users on each public telephone network provided at a fixed location, related to the consultation document entitled *Market Analysis: Interconnection Markets* (Document No. 04/106) dated 22 October, 2004. Document Nos. 05/37a, 05/37b, 05/37c and 05/37d form part of 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 as "the OAOs") are designated as having SMP in the Market:

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

3.2 In this Decision Instrument, any reference to eircom or any of the OAOs includes a reference to 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 relevant markets defined in this Decision Instrument.

4 SMP Obligations[72]

[71] S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes 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.

4.1 ComReg has decided to impose 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 undertakings requesting access or use of such access products, features or additional associated facilities, which form part of 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 without the prior approval of ComReg and continue to provide such facilities in accordance with existing terms and conditions and specifications;

iii. 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;

iv. 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

v. 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:

I. Service Schedules 002 relating to Interconnect Paths and 005 relating to In Span Interconnection (both as amended from time to time) in eircom's current Reference Interconnect Offer (Version 3.14) (as amended from time to time);

II. eircom's RIO Network Price List (Version 2.3)(as amended from time to time);

III. eircom's Interconnect O&M Manual;

[72] 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.

IV. eircom's service level agreement (SLA) for Interconnect Paths; and

V. eircom's document on Traffic Designation for Inbound & Outbound Interconnect Paths 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 service level agreements ("SLAs") with Other Authorised Operators ("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

7.1 Pursuant to Regulation 11 of the Access Regulations eircom and the OAOs shall have an obligation of non-discrimination in respect of the provision of those services and products described in section 5. Without prejudice to the generality of the foregoing, eircom and the OAOs shall:

i. Provide a wholesale equivalent for retail offerings;

ii. 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 and the OAOs provide for their own services or those of its subsidiaries or partners; and

iii. Ensure that information and services are provided, as between eircom and each OAO and vice versa and as between each OAO, according to timescales, on a basis, and of a quality, which are at least equivalent to those provided by eircom and the OAOs to their retail arms and their associates.

7.2 Without prejudice to the generality of paragraph 7.1, eircom and the OAOs 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 and the OAOs.

8 eircom and OAOs - Obligation of Transparency

8.1 Pursuant to Regulation 10 (1) of the Access Regulations and 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 reference offer ("RO") in respect of the services and facilities referred to in section 5;

ii. Ensure that the RO 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 RO 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 RO 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 origination 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)[73].

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 Note D10/02.

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

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. Without limiting the generality of the obligation to comply with all accounting separation obligations in force immediately prior to the effective date of this Decision Instrument, eircom shall with inter alia, the obligations described in the Decision Notices previously issued by ComReg.

10 eircom and OAOs - Obligations Relating to Price Control and Cost Accounting

[73] These documents are currently published on the eircom wholesale website – www.eircomwholesale.ie

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").

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.

10.3 Pursuant to Regulation 14 (1) of the Access Regulations, at the end of [an appropriate glide path period[74]] (that is to say, a graduated step approach) the OAOs prices in respect of wholesale call termination services in the Market shall not exceed eircom's cost oriented prices as determined in 10.1 above. ComReg may, in pursuance of the aim of establishing such OAO prices, issue directions to the OAOs for the purposes of establishing a glide path.

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 Continuation in Force of Decision Notices and Directions

12.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg relating to 'the Market' in force immediately to the effective date of this Decision Instrument, are contained in force by this Decision Instrument and eircom shall comply with same.

13 Effective Date

13.1 This Decision Instrument shall be effective from the [●] day of [●] 2007 until further notice by ComReg.

Mike Byrne
Chairperson
The Commission for Communications Regulation
Dated the [•] day of [•] 2007

[74] Please refer to Section 6 for a discussion on the appropriate glide path that is being consulted on in this document.

Annex B: Glossary of Terms

Broadband	A service or connection allowing a considerable amount of information to be conveyed, such as television pictures. Generally defined as a bandwidth > 2Mbit/s Broadband Integrated Services Digital Network (B-ISDN). The capability to integrate any type of communications signals (voice, data, image or multimedia) and carry them over a single broadband channel of 150-mbps and above, 4k (B-ISDN) regardless of their content.
Calling Party Pays Principle	The CPP principle means that the party making the call, i.e. the calling party, rather than the party receiving the call, i.e. the called party, pays the entire cost of the call at the retail level.
Direct Access	The situation where a customer is directly connected to a telecommunications operator by a wire, fibre-optic or radio link to connect that customer to the public telecommunication network. This includes access via LLU.
ECAP	Electronic Communication Appeals Panel: Panel set up under legislation for operators to appeal decisions of ComReg.
Fixed telephone Services	Means the provision to end users at fixed locations of a service for the originating and receiving of national and international calls, including voice telephony services and may include, in addition, access to emergency 112 services, the provision of operator assistance, directory services, provision of public pay telephones, provision of service under special terms or provision of special facilities for customers with disabilities or with special social needs but does not include value added services provided over the public telephone system.
Indirect Access	Where a customer's call is routed and billed through operator A's network even though the call originated from the network of operator B. It is the generic term for both easy access and equal access.
Interconnection services	Services provided by one telecommunications organisation to another for the purpose of the conveyance of messages and information between the two systems and including any ancillary services necessary for the provision and maintenance of such services.
Internet protocol (IP)	Packet data protocol used for routing and carriage of messages across the internet.
Internet telephony	A specific type of VoIP service that uses the public Internet to carry the IP traffic (also referred to as Voice over the Internet).
Local Loop	The access network connection between a customer's premises and the local exchange. This usually takes the form of a pair of copper wires.
Originating network	The network to which a caller who makes a call is directly connected.
Other Authorised Operators (OAOs)	Companies, other than eircom, which operate telecommunications systems.
Public switched telephone network (PSTN)	The telecommunications networks of the major operators, on which calls can be made to all customers of all PSTNs.
Public telecommunications network	A telecommunications network used, in whole or in part, for the provision of publicly available telecommunications services.

Switch	Relates to a telecommunications network comprising at least one exchange and capable of routing signals and messages from one line to all other lines comprised in the network.
Telecommunications	Conveyance of speech, music and other sounds, visual images or signals by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical means.
Terminating Operator	The operator on whose network a call terminates, that is to whom the called party subscribes and is directly connected.
Termination Rate	A terminating operator charges a fee for the termination of a call from an originating operator on its network. For the purposes of this consultation paper, this fee is known as the termination rate.
Transit	A transit service is a conveyance service provided by a network between two points of interconnection. It is, therefore, a service that links two networks that are not in themselves interconnected.
Voice over Internet protocol (VoIP)	The generic name for the transport of voice traffic using Internet Protocol (IP) technology. The VoIP traffic can be carried on a private managed network or the public Internet (see Internet telephony) or a combination of both. Some organisations use the term 'IP telephony' interchangeably with 'VoIP'.
Voice telephony service	A service available to the public for the commercial provision of direct transport of real-time speech via the public switched network or networks such that any user can use equipment connected to a network termination point at a fixed location to communicate with another user of equipment connected to another termination point.
Wireless Local Area Networks (WLAN)	Also known as ‘hotspot’ services. A WLAN access point provides Internet connection and virtual private network (VPN) access from a given location e.g. public places, such as airports, hotels, and coffee shops. Access is facilitated via the user’s own portable computer.

Annex C: Consultation Questions

Annex D – Wholesale Price Cap

8.27 In Section 6 of this consultation, ComReg asked whether operators think it is now a good time to consider in detail the move to a wholesale price control remedy. A wholesale price control would be necessary for the same reasons as the current price controls in place, to reduce the risk of excessive prices and would also serve to increase the incentive for the incumbent to operate efficiently. ComReg originally raised and discussed this issue in ComReg Document 03/16[75]. In the response to the initial Interconnection consultation paper and the consultation document 03/16 a majority of respondents expressed a desire to move the current pricing mechanism from a yearly review to a forward looking price cap regime.

8.28 As explained previously in this consultation the regime to date has involved an annual review of the eircom Top Down ("TD") model subsequent to the publication of the eircom Current Cost and Separated Accounts at the end of September. Operators will pay interconnection rates on an interim basis during the actual billing period. Where the actual rates arrived at subsequent to the relevant billing period are materially different to the interim rates paid, this may give rise to a "balancing" charge or payment depending on the profile of the traffic carried over the eircom network by each operator.

8.29 While this process has worked well over the past number of years (as is evident from the take up of CPS and WLR products), it has some disadvantages. The annual review has on occasion been time consuming and slow and both OAOs and the incumbent have complained about the consequent uncertainty. A wholesale price cap for a predetermined future period would be seen as a mechanism which could add the desired certainty and stability to the interconnect markets in the coming years.

8.30 Currently the main control in place that prevents excessive pricing and protects consumers is the obligation of cost-orientation.

8.31 ComReg has completed a full analysis of the wholesale termination markets to determine if eircom can act to an appreciable extent independently of its competitors and customers. It provisionally concludes that competition in these relevant markets does not yet appear effective. The main concern arising from a finding of SMP in interconnect markets is the ability of eircom, identified as an SMP provider, to set and/or maintain prices at a level higher than they would be if competition were effective. In the absence of competitive pressure, a firm with market power would be able to sustain prices above cost to the detriment of competition.

8.32 A price cap on fixed interconnection markets would constitute a remedy flowing from Regulation 14 of the **Access Regulations 2003**. In summary, ComReg proposes that the principal objectives for a price cap should be:

- to ensure that the prices charged by dominant operators to all other operators are brought closer to competitive prices than they would be in the absence of price controls;
- that only efficient costs of providing the interconnect services are recovered plus the regulated rate of return;
- to encourage the rapid development of effective competition in the supply of telecommunications services; and
- to achieve the above by the least intrusive means.

[75] Consultation Paper on Fixed Interconnection Charging Mechanisms

8.33 On the basis of the market analysis, ComReg believes it is appropriate to consult on the possibility of applying wholesale price controls (WPC) in the interconnection markets in order to determine the most appropriate and proportionate regulatory response as a result of any Significant Market Power ("SMP") designation that might be made following the interconnection market consultation.

8.34 **Preliminary conclusion: For the purposes of this market review, ComReg considers that some form of a wholesale price control measure is now appropriate when setting interconnection rates based on the eircom core network charges.**

Application of a Wholesale Price Cap Cost model

8.35 In order to implement a wholesale price cap it is necessary to agree on the correct basis for setting interconnect rates and to agree on the appropriate cap to be applied to those rates over an agreed period.

8.36 In order to decide on the correct basis it is necessary to consider the pricing mechanism appropriate to arrive at forward looking interconnection rates. To date a Top Down (TD) Forward Looking LRIC approach has been adopted. The TD modelling approach is based on the Current Cost Accounts ('CCA') - Separated accounts of eircom. (These accounts are available on the eircom website under Regulatory Information[76].) The most recent year, 1 April 2005 to 31 March 2006 was published on the 30 September 2006. These accounts are then fed into a Top Down model and following the modelling process the final interconnect rates are arrived at and are then published on the eircom RIO price list schedules 100, 101 and 102. ComReg however must review the eircom model for cost orientation prior to approving the final rates.

8.37 In January 2005, ComReg undertook a significant project to develop an in-house Bottom Up ("BU") model of the eircom core network in order to get a forward looking view of the potential implications of setting interconnect rates for the coming years based on forecast costs and volumes. ComReg are in the final stages of completing the modelling process. The primary purpose of this model is to evaluate proposals from eircom regarding wholesale pricing and to inform it as to likely future trends. However, in addition, there may be circumstances where a bottom up approach would be more appropriate.

8.38 ComReg would acknowledge that there are inherent uncertainties of cost modelling (both Top Down and Bottom Up) and the resultant implications for prudent decision taking. The majority of inputs to the BU model are sourced from eircom, however ComReg will have used external benchmarks in the BU modelling process and expert opinion in some instances where considered more appropriate. ComReg is of the preliminary view that basing modelling on the actual costs and network configuration/utilisation of the operator whose network was being modelled is the only way to avoid bias. It is commonly accepted practice when modelling a network that all reasonable endeavours should be made to ensure potential bias is limited through research and comparison within the telecoms industry. However, ComReg is of the preliminary view that in order to build a robust BU model which is not biased towards the actual costs of the incumbent other costs must be looked at so as to get an objective view. Following on from an operator response to the initial consultation, ComReg is of the preliminary view that it is not the case that the mere presence of uncertainties renders the cost modelling exercise worthless. The use of forward

[76] http://www.eircom.ie/bveircom/pdf/2006_cca_lric.pdf

looking cost estimates based on LRIC are very important tools to regulators when trying to assess the overall reasonableness of the incumbent's efficient cost base. ComReg has striven to reach a balance between the complete use of the actual costs and network configurations/utilisation of the incumbent by looking at other jurisdictions and taking a reasonable view of costs where appropriate.

8.39 It has also been highlighted across the industry that incumbents and other operators are entering into a period of transition from traditional network technologies to more up to date switched/other technology. This has the possibility of increasing uncertainty around the cost base of the core network and also on the most appropriate cost base to use when modelling the network on a forward looking basis. ComReg is of the preliminary view that it is not the case that the best way to address this issue of upgrading networks and investment in the network is to forbear from regulation as this contradicts the principle of technology neutrality. Having said this, ComReg is of the preliminary view that great care needs to be taken, for example when considering the selection of the rate of return if investment in new generation technology is to be encouraged.

8.40 ComReg understands that there may be a significant period where an incumbent will have little or no choice but to maintain two generations of technology within their networks. As the levels of traffic flowing over the legacy network decline and more traffic passes over the new network the respective unit costs could change dramatically. At this stage, one could question whether forward looking LRIC type modelling is the most appropriate price setting tool – at least in the way it is currently applied. Three possible modifications could be:

- To model the network based on current technology not taking into account possible future upgrades due to the uncertainty around their impact/cost etc. Any model developed would only take into account changes in volumes and current costs.
- To move to considering the legacy network as non-MEA (Modern Equivalent Asset) in the sense that the services carried across it should be costed as though they were carried across a fully NGN network.
- To have two costing models running in parallel, with the proper LRIC modelling applied to NGN services running over the NGN network, and a modified approach used for legacy services running over the legacy network. The modified approach would need to consider the need to keep the old network running for as long as is deemed necessary and to take a practical approach to the cost recovery of the investments (which in reality are probably largely written off by now).

Principles to adopt when setting a wholesale conveyance price cap (previously documented in ComReg 03/16)

8.41 Price cap type regulation of the format CPI+/-X has the merit of providing visibility of prices over an extended period and also of giving the incumbent an extra incentive in that it knows it can keep the benefits of over-achieving unit cost changes year on year. OAOs on the other hand, assuming reasonable efficiency improvements and volume growth, may have real price reductions over the timeframe of the cap. The financial forecasts used to facilitate the setting of X would use the LRIC costing methodology. However, all of these factors will require careful consideration by eircom/ComReg in the modelling process, whichever one is adopted.

8.42 A number of additional considerations would need to be addressed under this option:

- Duration: A longer price cap period increases certainty, increases the incentive to the incumbent and is administratively simpler. On the other hand it also increases the risk that prices will not be cost oriented at the end of the period.

- Structure and flexibility: Retail price caps usually allow the incumbent some flexibility in terms of an overall price basket target. This may be restricted by the use of individual service sub caps. In general, the greater the flexibility for eircom in setting rates, the greater the uncertainty for OAOs. In this case, a decision will need to be made as to whether each individual service (origination, termination and transit) is capped separately or whether some form of basket – possibly with sub caps - would be allowed.

- New Technology: Because of the lengthened duration of the control period it is possible that new technology may have a significant impact on interconnection – for example IP based networks. This will need to be addressed.

- The appropriate index for price control: The consumer price index has been used as part of the formula to determine retail rates. A decision will be required to establish if this is also appropriate for wholesale rates such as interconnection.

- Initial Rates: ComReg is of the preliminary opinion that opening rates should be the current rates in place and that changes should be phased in by way of glide paths. However, some step change adjustments cannot be ruled out entirely, depending on the outcome of detailed modelling work.

- The relationship to the retail price cap would be critical both in terms of timing and duration and in terms of permitted price movements.

- The extent to which eircom would still be required to submit detailed periodic cost submissions. ComReg would continue to monitor annual actual results against the costs recovered by the incumbent under the price cap regime.

Q. 44. Do operators foresee any particular difficulties with moving to a wholesale price cap regime since the original consultation (03/16) given current and possible future changes in the proposed regulated interconnection markets? Please detail your response.

Q. 45. In your opinion what is the most appropriate modelling approach to take when modelling the core network i.e. current network technology, complete NGN roll out or a hybrid approach of old and new? Please detail your response.

Q. 46. In the interests of reaching a wholesale price cap in a timely and efficient manner, do you agree that eircom and ComReg should enter into bi-lateral discussions on agreeing the most appropriate basis for a wholesale price cap to arrive at final rates for publication once agreement is reached? Please detail your response.

Q. 47. Where ComReg enters into a wholesale price process with eircom, do you agree that the year 2005/06 is the most appropriate base year on which to base a price cap setting model? Please detail your response.

Q. 48. What in your opinion would be the most appropriate time frame over which the price cap should be effective, two, three or four years? Please detail your response.

Q. 49. Do you agree that the Consumer Price Index should be used in setting "X" when arriving at the annual adjustment to most recent finalised interconnection rates? Please detail your response.

Q. 50. Do you agree that all interconnect rates as presented in the table 102/103/104 in the eircom RIO price list should be treated separately when applying the CPI +/-X control within the overall core network cost basket?

Q. 51. The current rate of return allowed is 11.5% which was set based on a network efficiency study carried out some years ago, in your opinion do you think this rate is still appropriate or should a more up to date study be carried out in light of the changing telecoms environment? Please detail your response.

Q. 52. The eircom RIO price list also includes other interconnect services such as FRIACO, NEHO, NTCs, products necessary for the provision of interconnection such as ISI's, CSI's etc. Should these in your opinion also be subject to the wholesale price cap for the same period? Please detail your response.

Annex E: Other SMP Criteria

In paragraph 78 of the *SMP Guidelines*, it is stated that ComReg should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. The SMP Guidelines also sets out a list of criteria which might be relevant in a dominance assessment. As such, a categorisation of the relevance of each criterion to the assessment of competition in the Termination market in Ireland is set out below. This categorisation is relied upon by ComReg in order to undertake a thorough and overall analysis of the economic characteristics of each of the relevant markets.

SMP Criteria	Relevance to SMP Assessment	Relevance to Termination market
Market shares	Market shares are not on their own determinative of SMP but are a useful starting point for defining instances where SMP is more likely to arise. It is clear from EU jurisprudence that concerns about SMP are more likely to arise where a large market share is held over time.	This criterion is relevant because the wholesale termination market is characterised by very high market shares which have persisted over time.
Barriers to entry	Barriers to entry are factors that prevent or hinder undertakings from entering a specific market. They generally comprise any disadvantage that a new entrant faces when entering a market that incumbents do not currently face. Entry barriers may result, for instance, from a particular market structure (structural barriers).	This criterion is relevant as in this market the infrastructure required to enable other providers to offer termination on a specific network, apart from the provider of that network, is not available nor is it replicable in the timeframe of the review.
Sunk costs	Sunk costs are costs which must be incurred in order to enter a market and which are not recoverable on exiting the market.	This criterion is of less relevance as call termination to a particular end user is not replicable during the timeframe of the market review, irrespective of costs of entry.
Control of infrastructure not easily duplicated	This indicator refers to a situation in which certain infrastructure is: • necessary to produce a particular product/service, • exclusively or overwhelmingly under the control of a certain undertaking, and • there are high and non-transitory barriers to substituting the infrastructure in question.	This criterion is relevant as it is clear that call termination to a particular end user is not replicable during the timeframe of the market review and wholesale termination access infrastructure is necessary to provide wholesale call termination and retail call services.
Economies of scale	Economies of scale arise when increasing production causes average costs (per unit of output) to fall. By producing above the level that a new entrant might be able to produce at, the incumbent can ensure lower unit costs than the entrant. Where economies of scale are large and/or barriers to expansion exist, the new entrant's expected profit from being in the market may fail to cover its sunk costs and entry may be deterred.	This criterion is of less relevance in this market as the presence of absolute barriers to entry indicates no operator would be facing potential competition, so cost advantages are of less relevance in this market.
Economies of scope	Economies of scope exist where average costs for one product are lower as a result of it being produced jointly with other products by the same firm. If the presence of	This criterion is of less relevance in this market as the presence of absolute barriers to entry indicates no operator would be facing potential

	economies of scope requires that entrants enter more than one market simultaneously to achieve similar cost savings as the incumbent, this can deter entry.	competition, so cost advantages are of less relevance in this market.
Overall size of the undertaking	This refers to the potential advantages and the sustainability of those advantages that may arise from the large size of an undertaking relative to its competitors.	This criterion can be relevant in this market in respect of the analysis of Countervailing Buyer Power (CBP). It is possible that the overall size of the undertaking can have an influence on the relative negotiating positions of operators in respect of bargaining strength.
Technological advantages or superiority	Such advantages may represent a barrier to entry as well as an advantage over existing competitors due to lower production costs or product differentiation.	This criterion is less relevant as by virtue of the market definition there are absolute barriers to entry and no potential competition in the market. Therefore no comparison between technologies is relevant.
Product/services diversification (e.g. bundled products or services)	There can be a positive relation between product/services diversification and market power. If the incumbent is able to differentiate their products and competitors are not able to imitate the differentiation, then scope for customer switching to alternative suppliers might be reduced. Conversely, if alternative suppliers are not able to sufficiently differentiate their own service offering from that provided by the incumbent, switching away from the incumbent may also be less likely.	This criterion is of less relevance because, typically, termination services are sold on a stand alone basis and in general are not bundled by terminating operators. The actual operators who purchase termination have no effective demand-side alternatives for reaching a specific end user and so the presence of bundles incorporating termination services confers no obvious advantage on a particular terminating provider, although it may be advantageous in associated markets.
Vertical integration	Vertical integration, while normally efficient, can make new market entry harder where the presence of a firm at multiple levels in the production or distribution chain increases the possibilities for it to foreclose one or more markets and/or where prospective new entrants may perceive the need to enter two or more markets simultaneously to pose a viable competitive constraint to the integrated operator.	This criterion may be relevant because the size of a vertically integrated terminating operator at the retail level may be linked to CBP at the wholesale level. The greater its position in the retail market vis-à-vis its competitors, the more prospect that countervailing buyer power would be exerted at the wholesale level.
Easy or privileged access to capital markets/financial resources	Easy or privileged access to capital markets may represent a barrier to entry as well as an advantage over existing competitors.	This criterion is less relevant because the presence of absolute barriers to entry indicates no operator would be facing potential competition and therefore the cost of capital to be faced confers no particular advantage. This criterion might be referred to in the context of CBP if easier access to capital conferred an advantage in respect of bargaining power.
A highly developed distribution and sales network	A well-developed distribution system may be costly to replicate and maintain and may even be incapable of duplication. This may represent a barrier to entry as well as an advantage over existing competitors.	This criterion is of less relevance because the service in question is acquired only by purchasers at the wholesale level and it would appear that no specialized sales network is required. Furthermore, it is not clear that implementing relevant billing, account management and/or customer service systems would pose a significant barrier to potential new entrants.
Absence of potential competition	This refers to the prospect of new competitors (which are in the position to switch or extend their line of production or to commence an entirely new line of production) entering the market (e.g. in response to a price increase) within the timeframe considered by the review.	This criterion is of relevance. By definition, call termination to a specific end user is not replicable. So a credible threat of potential entry is not present in the timeframe of the review.
Barriers to expansion	While growth and expansion is generally easier to achieve for individual firms (and	This criterion is of less relevance in this market as the presence of absolute

	in particular for new entrants) in growing markets, it might be inhibited in mature, saturated markets, where customers are already locked in with a certain supplier and have to be induced to switch.	barriers to entry indicates no operator would be facing potential/existing competition and competition in the market for termination is not likely to expand beyond the fixed operator in question, so it is irrelevant.
Absence of or low countervailing buying power	The existence of customers with a strong negotiating position, which is exercised to produce a significant impact on competition, can potentially restrict the ability of providers to set their prices and/or other commercial terms independently of their customers.	This criterion is relevant in this market. The EU Explanatory Memorandum to its Recommendation on Market Definition sets out that even a 100% market share in itself does not automatically imply that the undertaking in question has SMP. This is because an undertaking's ability to act independently depends, among other things, on the ability of its customers to influence its pricing decisions.
Evidence from behaviour and performance	According to the OFT Market Power Guidelines, an undertaking's conduct in a market or its financial performance may provide evidence that it possesses market power. While high prices or profits alone are unlikely to be sufficient proof that an undertaking has SMP, when considered with other factors, prices that are consistently above an appropriate measure of cost or returns that are persistently high relative to those that would prevail in a competitive market may suggest the existence of market power.	This additional criterion is of relevance but it should be noted that excessive pricing is not a prerequisite for a finding of SMP. However, an analysis of pricing can indicate whether any external competitive pressures induced fixed operators to reduce their charges and so whether they have the ability to act independently of their competitors and/or consumers in practice.