Commission for
Communications Regulation

Submissions received in response to Consultation

Market Review: Voice Call Termination on Individual Mobile Networks

Non-confidential submissions received from respondents

Document No:	**12/102**
Date:	**13 September 2012**

Consultation:	**12/46**

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

Contents

This publication of non-confidential submissions has been updated on 10 October 2012 to include page numbers for reference in ComReg's MVCT Decision Paper.

For reference, the updated numbering sequence supersedes numbering on individual operator responses.

1 Alternative Operators in the Communications Market (ALTO)

alto

alternative operators in the communications market

Response to Consultation - Market Review: Call Termination on Individual Mobile Networks. Ref:12/46

Submission By ALTO

Date: July 19th 2012

ALTO is pleased to respond to the Consultation and Market Review on Call Termination on Individual Mobile Networks in Ireland.

Response to Consultation Questions:

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

A. 1. ALTO agrees that ComReg give a good overview of the state of the retail mobile phone market. It shows market entry and significant switching supported by mobile number portability.

Notably, the chapter does not cover price or Average Revenue Per User - ARPU, evolution in the same period that is declining in line with increasing competition. ComReg also do not conclude or offer a view on the prospective trends in mobile.

A key trend in mobile markets, not properly recognised by ComReg is the growth of mobile data, which has historically been higher in Ireland. ComReg's data in figure 11 shows a small decline in mobile voice minutes in recent quarters. This decline is driven by the update of data and the substitution of mobile voice for alternative data driven Voice over Internet Protocol – VoIP, services and/or substitution for voice calls with social media updates including tweets and facebook comments. These trends are not picked up in the chapter, other than a passing reference to Smartphone use.

A further prospective issue, which ALTO believes is missing from the ComReg analysis, is any mention of investment. There is a major investment challenge in the sector through the spectrum auction and the needs to increase investment to support increased data usage and the evolution to Long Term Evolution – LTE, products. The current economic climate, declining voice minutes and increased competition reduce the capacity of the industry as a whole to invest in these developments.

ALTO encourages ComReg to offer prospective views on the evolution of the retail mobile market in this chapter and link those views and objectives, which are the objectives of the regulatory interventions proposed.

Obviously, ComReg is aware of the level of handset penetration in the mobile sector in Ireland. To that extent, perhaps consideration of the above remarks should be taken into account.

Q. 2. Do you agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 2. ALTO agrees with ComReg that the Calling Party Pays – CPP, principle is key to the analysis of the relevant MVCT as the called party belonging to the terminating Mobile Service Provider – MSP, has no interest in the Mobile Termination Rate – MTR, as they are not exposed to this cost.

ALTO points out that low awareness of the mobile network called is a direct consequence of Mobile Number Portability – MNP. There is high recognition of mobile customers when they call or receive a call from a fixed number. Consumers are aware of numbers dialled and whether they are fixed and mobile. It would be expected if number portability did not exist there would be high visibility of the costs of calls to other networks. In conducting a market definition analysis using Hypothetical Monopolist or Small but Significant Non-transitory Increase in Prices – SSNIP, rules it is important, therefore, to ensure no regulatory decisions such as Mobile number portability which are capable of being reversing are influencing the market definition decision. ComReg should review paragraphs 4.30 to 4.52 assuming MNP does not exist or could be reversed in the timeframe of the market review and assess whether the level of awareness of a called network influences the market definition.

Q. 3. Do you agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets?

A. 3. ALTO agrees with ComReg preliminary assessment of these retail consumer behaviours based on the detailed analysis provided in the consultation and the various impacts of the Calling Party Pays principle. Please note comments in relation to MNP in A. 2, above.

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

A. 4. ALTO agrees with preliminary conclusion that the markets are national based on the analysis provided and from experience in the wholesale market as we are not aware a sub-geographic or regional service retail mobile market. For example our experience is Mobile Termination Rates – MTRs, apply nationally.

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

A. 5. ALTO agrees with ComReg's preliminary conclusions on the wholesale MVCT product market assessment, as there is no obvious substitute product at this time and for the foreseeable future. The market, as defined by ComReg clearly has low barriers to entry that is evident from the market entry and exit in recent years. The ability of new Mobile Virtual Network Operators – MVNOs, to enter the market with regulated termination rates may reduce the level of competition in the retail mobile and ComReg do not assess the impact of this on the retail mobile market of the this market definition.

Q. 6 Do you agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 6. ALTO agrees that ComReg's proposed definition of the Relevant MVCT Market adequately identifies the economic bottleneck represented by MVCT.

Q. 7. Do you agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 7. ALTO agrees with ComReg's preliminary conclusion on the Wholesale MVCT geographic market assessment is national. The reason is this is how the market is operating as the same MTRs are offered nationally for all mobile providers and mobile phones move around the country without any apparent boundaries of different charges.

Q. 8. Do you agree with ComReg's assessment of SMP and the associated proposed SMP designations above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.8. ALTO agrees with ComReg's assessment of SMP given the lack of incentive for the operators to negotiate reduced MTRs with the wider industry and the issues with Countervailing Buyer Power – CBP, i.e., it's not possible to buy the MVCT service from another provider for customers whose calls terminate on that network.

ALTO considers that in the absence of regulation, there is no incentive for the Mobile Service Providers – MSPs, in the MVCT to negotiate lower MTRs with other operators hence *ex ante* regulation is required. We also agree that *ex post* regulation takes too long and by the time the issue is resolved the market and competitors within that market could be seriously damaged.

ALTO members obviously have a difficulty in passing constructive comment on text, or financial modelling that has been redacted. This might be considered in future.

Perhaps, as requested in the ALTO Next Generation Access – NGA, response, hypothetical models could be used in order to achieve more complete debate on issues such as these. ALTO members completely agree with the redaction, where it is deemed to be necessary in the circumstances.

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

A. 9.   ALTO agrees that the MSP has the ability to charge excessive prices for call termination services in the relevant MVCT Market, as the countervailing buyer power is low. We note the standard for the European Commission to highlight markets for ex ante regulation is high, and the measures proposed by ComReg align with best practice.

Q. 10. Do you agree with ComReg's approach to imposing access remedies? Are there other approaches that would address the identified competition

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

A. 10. ALTO agrees with ComReg's approach to impose access remedies as this aligns with international best practice. Without such a remedy the MVCT market could be restricted or foreclosed to other providers through a direct or constructive refusal to supply.

ALTO agrees with the access remedy addressing the associated facility requiring the MSPs to provide access to the Mobile Number Porting Centralised Database – MNPCD, as this enables other provides including transit providers to efficiently route calls to the correct network avoiding unnecessary cost using other networks.

Q. 11. Do you agree with ComReg's approach to imposing non-discrimination remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 11. ALTO agrees with ComReg's approach to impose non-discrimination remedies as this aligns with international best practice.

ALTO notes ComReg's position in clause 8.49 that the implementation of a cost orientated price control will apply to both on-net and off-net calls removing the potential for non-discrimination. We also agree with this position on the condition that the outcome of the future price control consultation does not lead to a discriminatory on-net vs. off net solution.

Q. 12 Do you agree with ComReg's approach to imposing transparency remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly

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

A. 12. ALTO agrees with ComReg's approach to impose transparency remedies as this aligns with international best practice. As ComReg are aware from numerous other consultations we are of the view that strong transparency remedies make the non-discrimination remedy work more effectively given the natural inclination of provider and customer towards secrecy.

ALTO welcomes the publication of a Reference Interconnect Offer – RIO, as the basis for a standard interconnect contract for access to MVCT and associated facilities. ALTO expects and anticipates variations to the actual contract signed to be minimal and not leading to a discriminatory outcomes or scenarios.

Notification

We agree with ComReg that a notification notice period is required as changes to the MVCT and associated facility prices can cause changes to downstream provider pricing and to retail customer pricing. It is also important retail providers can meeting their obligations to notify consumers.

Q. 13 Do you agree with ComReg's approach on price control and cost accounting remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A. 13. ALTO agrees in principle with ComReg's preliminary view for a cost orientation price control as such aligns with the advice of the European Commission and it should remove the potential for on-net vs. off-net discrimination. As the detail of price control is for future consultation we limit our agreement to the use of cost orientation price control at this time.

Q. 14. Do you agree with ComReg's approach not to impose accounting separation remedies at this time? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.14. ALTO agrees that regulation should not apply where it is not necessary, and agrees with ComReg's position.

Q. 15. Do respondents agree with ComReg's draft Decision Instrument set out in Appendix D? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I of the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

A.15. ALTO agrees with ComReg's draft Decision in Annex D. ALTO would also note that the decision instrument does not purport to impose a price control obligation that is subject to a further consultation.

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

A.16. ALTO agrees with the Regulatory Impact Assessment which is clear and logical.

Q. 17. Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and

Interpretations as set out above in Part I? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

A.17. Please see response to question 15.

ALTO

19th July 2012

2 Eircom Group Limited

eircom

Response to ComReg Consultation Paper:

Market Review - Voice Call Termination on Individual Mobile Networks

ComReg Document 12/46

19 July 2012

The comments submitted to this consultation are those of Meteor Mobile Communications Ltd. (MMC) and eircom Ltd (eircom) collectively referred to as eircom.

Executive Summary

eircom welcomes the opportunity to respond to this consultation on the Market Review – Voice Call Termination on Individual Mobile Networks. Mobile voice call termination rates (MTR) impact on numerous markets both retail and wholesale. As demonstrated in ComReg's market analysis, SMP in the markets for mobile voice call termination (MVCT) on individual mobile networks has implications not just for the downstream mobile access and call origination market but also fixed retail markets. We find that the impact on fixed subscriptions and usage has been underestimated in the consultation document.

Given the significance of mobile termination rates to competition in retail markets, we consider the eight year interval since the last complete review of these markets to be entirely unacceptable. It is more than double that normally required under Article 6 of the Framework Directive[1] and significantly exceeds the six year interval that is permitted only exceptionally under the Directive. This has allowed new entrants in the intervening period to maintain excessive MTRs to the detriment of other market players. During the period of review, there has been a 79% growth in mobile subscriptions and volumes while over the same period fixed volumes have declined by 38%. We believe that this divergence is being driven to a significant degree by high MTRs which in particular underpin the network effect enjoyed by the larger mobile service providers (MSP) to the detriment of fixed operators and the smaller Mobile Service Providers (MSPs).

Existing price controls in the form of MTR glide paths has increasingly facilitated the inclusion of off-net mobile calls in bundled price plans and this has gone some way towards addressing the network effect. However until such time that MTRs are set at a truly cost oriented level, such offerings impose a unilateral cost burden on fixed and smaller mobile operators to the benefit of larger mobile operators, resulting in distortions in the downstream retail markets. Furthermore the benefits to downstream markets can only be fully realised when symmetry in MTRs is achieved across all MSPs. eircom therefore calls for an immediate move to symmetrical MTRs for all MNOs and MVNOs which ComReg proposes to designate with SMP. Similarly and in light of the delay in designating established MVNOs with SMP we call for immediate action to designate Postfone and Blueface with SMP as soon as they have the ability to set their own MTRs.

In relation to the analysis concerning the potential for SMS to substitute voice calls we highlight the fact that current distortions in the wholesale markets for SMS termination have implications for ComReg's analysis of the MVCT market. While we do not believe that consideration of the distortions in the SMS termination markets would alter the outcome of the analysis of the MVCT markets, there is an urgent need for a review of the markets for SMS termination without further delay.

We agree with the suite of remedies being proposed by ComReg, however, consistent with ComReg's objective to ensure regulatory certainty, we urge ComReg to adopt a definition of

[1] Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, as amended by Directive 2009/140/EC (the '**Framework Directive'**)

access that is clear and consistent with the outcome of its market analysis. This means that any obligation of Access should be limited to Access to MVCT and Associated Facilities.

Response to Consultation

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

eircom agrees with ComReg's interpretation of the main developments in the market. Of particular importance is the marked growth in mobile traffic, driven by the growth in on-net mobile traffic. In relation to this, we note a significant oversight however in paragraph 3.47 which addresses the dynamics behind the decline in fixed line ownership and fixe line minutes. Here, ComReg refers to competition from other platforms, referring to cable (UPC). The growth in mobile subscriptions and volumes is presented in stark contrast to the decline in fixed volumes in Figure 11, showing a 79% growth in the former alongside a 38% decline in the latter. This points to mobile services as being an important factor in the decline in fixed line ownership. ComReg's own analysis shows that 30% of households do not have a fixed line and 39% of consumers with mobile phones did not have a fixed line at home with this trend being driven to a large extent by demographics as this rises to more than 52% of those aged 35 or less.

The above analysis highlights the importance of ensuring that MTRs are cost oriented. eircom believes that such cost orientation will remove the distortion in the retail market that is created by the network effect enjoyed by the larger mobile service providers (MSP) to the detriment of fixed operators and the smaller MSPs competing in the mobile market. While we have seen a growth in common off-net mobile pricing (particularly across billpay offerings), the perceived premium that applies to calls to fixed lines and off-net mobiles, referred to in paragraph 4.56, reflects very real cost differences that are ultimately driven by MTRs that are not fully cost-oriented.

Q. 2 Do you agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis. We agree that the calling party pays principle creates a disjoin that operates against economic efficiency, particularly in respect of cost causation. ComReg has adequately demonstrated that the called party will typically have a low sensitivity to the costs faced by the calling party, while further demonstrating that even if the called party had a higher level of concern it is likely that they would be unaware of what costs the caller would incur.

We also agree that the most relevant market characteristics have been identified. In eircom's opinion, the key characteristics of a call made to a mobile phone are the immediacy and convenience afforded by such calls. The alternatives; mobile to fixed, fixed to fixed, on-net mobile, shortened/delayed calling, SMS and email act as substitutes for voice calls but only in a very limited way.

VoIP offerings such as Skype however, may have the potential to develop into a real substitute over time. We have seen rapid growth in the penetration of smart phones. In parallel with the growth in 3G coverage and the imminent liberalisation of spectrum, VoIP has the potential to substitute circuit switched voice calls. However the presence of any-network call plans is likely to suppress demand for third party VoIP offerings. Nonetheless, spectrum developments and smart phone penetration over the next three years are such that a review of VoIP as a form of demand side substitution may well be warranted thereafter. We therefore welcome ComReg's commitment in paragraph 5.80 to keep such developments under review.

We note ComReg's assessment of sending an off-net SMS as an effective substitute for an off-net mobile to mobile call. We agree with ComReg's conclusion that it is not an effective substitute but not for the same reasons. We have serious concerns regarding the negative effects on the competitive functioning of the retail mobile market arising from the current wholesale charges for inter-operator SMS termination. We would observe that wholesale SMS termination rates (SMSTRs) in Ireland, which are symmetric across the industry, are 3.17 cent per SMS and have remained at this level since their introduction. We have sought through commercial negotiation over the last two years a review of SMSTRs.

As a result current termination rates are well in excess of the cost of termination and competitive levels. ComReg's proposals in respect of MTRs (as set out in ComReg 12/67) when implemented will mean that the cost of terminating a 160 character SMS will be significantly higher than the cost of terminating a minute of voice conservation. This is entirely wrong.

We also note that the European Commission has established price caps for the origination of wholesale SMS services with a glide-path to safeguard level of 2 cent per SMS (which is set at a level to ensure it is not below relevant cost in any Member State)[2].

Having regard to SMS termination rates that are now excessively high and on the basis that the market for the provision of SMS Termination Services shares many of the economic characteristics of MVCTS, Meteor is of the view that ComReg should undertake an analysis of the markets concerned and request ComReg to take this forward in a timely manner. Meteor notes that there is a significant imbalance in the SMS traffic flows such that the current arrangements result in very significant money transfers from Meteor and in significant competitive distortions for the same reasons as outlined in sections 7.23 to 7.32 of ComReg Doc. 12/46 in relation to mobile voice call termination. For the avoidance of doubt, while the unduly high SMS termination rates distort the downstream retail market and this should be taken into consideration in the market analysis, we do not believe that this affects the conclusion that SMS is not an effective substitute for voice.

Q. 3 Do you agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets?

[2] BEREC Analysis of Wholesale Roaming Costs BoR12(14) suggests based on cautious estimates that cost oriented rates can be easily justified in the region of 1 cent per SMS

eircom does not disagree with ComReg's preliminary assessment of these retail consumer behaviours and market characteristics in terms of their potential to impact the Relevant MVCT Markets. As stated in response to question 2, we consider none of the candidate substitutes that have been considered to substitute voice calls sufficiently to constrain MTRs absent regulation. The analysis of the potential for substitution of a call to a mobile with call to a fixed line demonstrates this well.

As outlined in paragraph 4.134, the substitution of a call to a fixed line for a call to a mobile depend on the called party having access to a fixed line (which ComReg suggests could exclude 31%-39% of cases) and being present at the fixed line to take the call. Therefore from a functional perspective their substitutability is very low. As regards price, the fact that most price plans do not differentiate between calls to fixed lines and calls to mobiles means that any cost difference is masked. Given the prevalence of any network price plans and the fact that even if the entire increase were passed through to the retail price it would represent a very small percentage retail price increase, we do not consider any effect on retail consumer behavior to be sufficient to make such a price increase unprofitable for the terminating MSP.

Since 2007, the regulatory environment has facilitated the emergence of common off-net price plans by reducing the MTR input cost. However the economics of supporting such tariffs continue to be challenging for smaller MSPs with market shares in the region of 20% or lower whilst MTRs remain above the efficient level. It is the expectation of further MTR declines to cost oriented levels, that maintains common off-net price plans. Therefore, contrary to the suggestion in paragraph 4.131 of the consultation document, we do not believe that common off-net pricing approaches would necessarily persist absent regulation because MTRs could increase dramatically absent regulation, given the high MTRs that applied prior to regulatory intervention and those applied today by unregulated MSPs.

The any network offers have been driven by challengers in the retail market such as Meteor and eMobile with the objective of undermining the on-net offers of Vodafone and O2 in particular. These offers were launched in the knowledge that the cost of any network plans (driven by MVCT costs) would be greater than the equivalent cost to Vodafone and O2 to offer equivalent plans bearing in mind that their combined retail market share exceeds 71%. However in the context of the anticipated glide path for mobile termination rates, Meteor was prepared to take the initiative with this tariff innovation. Absent any prospective reduction in MTRs, such tariff innovation would likely not have happened. In the last two years the average Irish MTR has been halved and this has increased the feasibility of such offers, however the smaller MSPs will continue to face a disproportionate cost burden in competing on these now popular price plans, until such time as MTRs are set at an efficient level with symmetry across all MSPs.

As outlined in response to question 1, the argument above highlights the need to move rapidly to cost oriented MTRs in order to remove the unwarranted cost burden on fixed operators and smaller MSPs that are at a disadvantage when competing with the common off-net pricing of larger MSPs.

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

eircom agrees with ComReg's preliminary conclusions that the geographic market is national in scope on the basis of the equivalence in network coverage of the MSPs, the fact that MTRs are generic regardless of the underlying technology or the location within Ireland and the likelihood that these aspects will remain unchanged over the next three years.

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

eircom agrees with ComReg's preliminary conclusions on the wholesale MVCT product market assessment. We support that the definition of an MSP based on the three criteria, spectrum access, interconnection with at least one other network and the control of access to mobile subscribers through either a primary or secondary allocation of mobile numbers. We also concur that the mobile voice call termination (MVCT) market consists of interconnection of networks involving the termination of voice calls where the supplier has the ability to set the associated charges. We agree with the definition of the market at a network rather than an individual subscriber level and in accordance with the overarching regulatory framework a technology neutral approach must be applied. Therefore 2G, 3G and 4G standards should be equally subject to MTR regulation for the relevant period though beyond this three year period consideration may need to be given to the implications of higher data speeds on 4G for the substitutability of services such as 3^{rd} party VoIP.

We consider the demand and supply side substitute analysis in section 5 of the consultation document to have identified the most salient potential substitutes and would agree that none of these would be sufficient to constrain MTR price setting by an MSP. We also consider ComReg's expectations in respect of market entry to be correct as any new entrant would likely have similar incentives to maximise MTRs as has been exemplified by recent entrants.

ComReg is proposing that self-supply should be excluded from the wholesale product market definition on the basis of the current technical nature of MVCT provides no means for an entity to switch to call termination to subscribers of another MSP and in light of the fact that contrasting incentives exist in relation to price setting for on-net calls (which of course involve self-supply of call termination) and MVCT supplied to other networks. For the above reasons eircom agrees with ComReg's proposal to exclude self-supply form the market definition. Furthermore we do not believe that the need will arise for either ex-ante or ex-post remedies in respect of discrimination between self-supply and the supply of MVCT to third parties, provided that all MSPs are simultaneously required to bring their MTRs to cost oriented levels.

Q. 6 Do you agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination for the reasons outlined in response to the previous questions.

Q. 7 Do you agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment that the geographic scope of the market is the Republic of Ireland. .

Q. 8 Do you agree with ComReg's assessment of SMP and the associated proposed SMP designations above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

eircom agrees with ComReg's assessment of SMP and the associated proposed SMP designations. We concur with ComReg's proposal not to designate Postfone and Blueface as having SMP on the basis that they currently are unable to set their own MTRs.

Furthermore, eircom welcome's ComReg's indication that if these service providers were to acquire the ability to set their own MTR, that a strong case could be made that Postfone and Blueface would immediately fall within the definition of the Relevant MVCT Market. In such circumstances we would call on ComReg to take immediate steps to so designate these or any future new entrant that is able to set its own MTR with SMP, noting in particular that Tesco is approaching its fifth anniversary in Ireland without having been designated with SMP for call termination on its network. In light of this, we seek assurances from ComReg that such immediate action would be taken.

We note in paragraph 6.167 of the consultation document that during the time period analysed, ComReg identified an asymmetry in interconnect traffic flows between Meteor and Vodafone and O2 respectively that operated in favour of Meteor, with fewer minutes of MVCT being purchased by Meteor from each of the other operators than vice versa. This situation has changed in the intervening period to the extent that we now see a sustained asymmetry in the other direction that operates to the detriment of Meteor.

This is further compounded by the fact that Meteor has a significantly higher portion of calls to mobile in its outbound interconnect traffic mix when compared to the dominant operators in the retail market, O2 and Vodafone. This is driven by the "any network offers" and the fact that Meteor (like other challenger MSPs) has a customer base with a predominance of younger and non-business customers. The change in interconnect traffic flow dynamics coincided with the removal of the asymmetry between Meteor and the larger operators' MTRs in mid 2011. This places even greater emphasis on the need for MTR reductions to an efficient level, if Meteor is to remain a driving force for competition in the retail market. We believe that this applies similarly to any other challenger operator (whom we expect will be required to set symmetrical MTRs at the efficient rate).

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

eircom agrees with much of ComReg's assessment of the competition problems and the associated impacts on competition and consumers Some of the key effects of MTRs that are set above the efficient level echo the concerns highlighted in our response to previous questions, in particular, the reference to the distributional impacts for fixed and smaller mobile operators and the limitations that this imposes on flexibility in retail pricing.

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

eircom is concerned by the access definition that is being proposed. In the draft Decision Instrument, ComReg proposes to include in the Access definition the following wording

"for the avoidance of doubt, Access shall include (but shall not be limited to) Access to MVCT and Associated Facilities".

It is not clear from the ComReg Consultation Doc. 12/46 what forms of access other than access to MVCT an Associated Facilities could be imposed. eircom does not accept that there are any other forms of access than access to MVCT and Associated Facilities that could be imposed by ComReg as a result of the market analysis set out in the consultation. eircom notes further that ComReg's proposed wording is not sufficiently specific and raises significant issues in terms of regulatory certainty. In this regard, eircom does not believe that the proposed remedy, in the manner it is expressed, is consistent with ComReg's statutory objectives. We suggest accordingly that access should be limited to access to MVCT and Associated Facilities.

Q. 11 Do you agree with ComReg's approach to imposing non-discrimination remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

For the reasons highlighted above we have no objection to the proposal.

Q. 12 Do you agree with ComReg's approach to imposing transparency remedies? Are there other approaches that would address the identified competition problems? Please

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

We have no principled objections to the proposed transparency remedies although we would query the proposed 35 day notice period for MTR changes. Normal commercial practice is one month's notice.

Q. 13 Do you agree with ComReg's approach on price control and cost accounting remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidencesupporting your views.

As highlighted throughout this response we believe there is a clearly justified need for MTRs to be set at truly cost oriented levels. We note ComReg's detailed proposals to implement cost oriented MTRs as set out in ComReg 12/67 and we will be responding to that consultation.

Q. 14. Do you agree with ComReg's approach not to impose accounting separation remedies at this time? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

We agree it is not necessary to impose accounting separation remedies on any MSP at this time. The application of such remedies would impose a high administrative cost on MSPs that would likely outweigh any resulting benefits. A Bottom Up cost model, for the purpose of determining cost oriented MTRs can be done without the complexity of accounting separation. While we appreciate that accounting separation would be required to confirm undue cross subsidisation, the imposition of truly cost oriented MTRs should negate concerns that might arise in respect of undue cross subsidisation. Nonetheless, we welcome ComReg's commitment to keep this under review should any market distortion be found to persist as a result of discrimination between off-net and imputed on-net MTRs.

Q. 15. Do respondents agree with ComReg's draft Decision Instrument set out in Appendix D? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I of the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Please see the response to question 10 with regard to the definition of access**.**

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

Whilst we do not disagree with the broad conclusions we are disappointed by the approach adopted in the regulatory impact assessment (RIA). The approach is wrong because the RIA is little more than a qualitative discussion. No attempt has been to quantifiably assess the efficiency or cost of ComReg's proposals. Thus whilst on this occasion we do no disagree with the conclusions, we believe there is a clear need for the quantitative standard of RIAs to be raised.

Q. 17. Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Please see our response to question 15.

3 Elea Group Consultants

Response to Comreg Consultation:

Document 12/46 - Market Review: Voice Call Termination on Individual Mobile Networks

Elea Group Consultants

July 2012

email: monomer2000-55@yahoo.co.uk

Executive Summary:

The current regulatory regime finds that the markets for Mobile and Fixed line telephony are distinct and separate. However, Comreg data analysed in this report strongly suggest that Mobile and Fixed telephony are products of a single market. This analysis found that the behaviour of Fixed Line Usage in response to changes in Mobile Telephony Prices over a 24-quarter period was highly correlated. Given that the mobile termination regime is based on this separate market principle, it is a serious concern that this type of data analysis has not been performed before. As such, this report aims to initiate a re-evaluation process of the separate market principle, and the underpinning of the mobile termination regime itself. The scale of the issue is sizeable, for in the twelve months to June 2010 the termination payments made to telecommunications operators by eircom's fixed line business was EUR231 million. If, as is strongly suggested by the data, the underpinning of the termination regime is unjustified, Irish and European fixed line operators could look to be reimbursed for these payments.

Response to Comreg Consultation: Document 12/46 – Market Review: Voice Call Termination on Individual Mobile Networks

Question 1: Do you agree that the above identifies the main relevant developments in the retail mobile market since the previous reviews of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

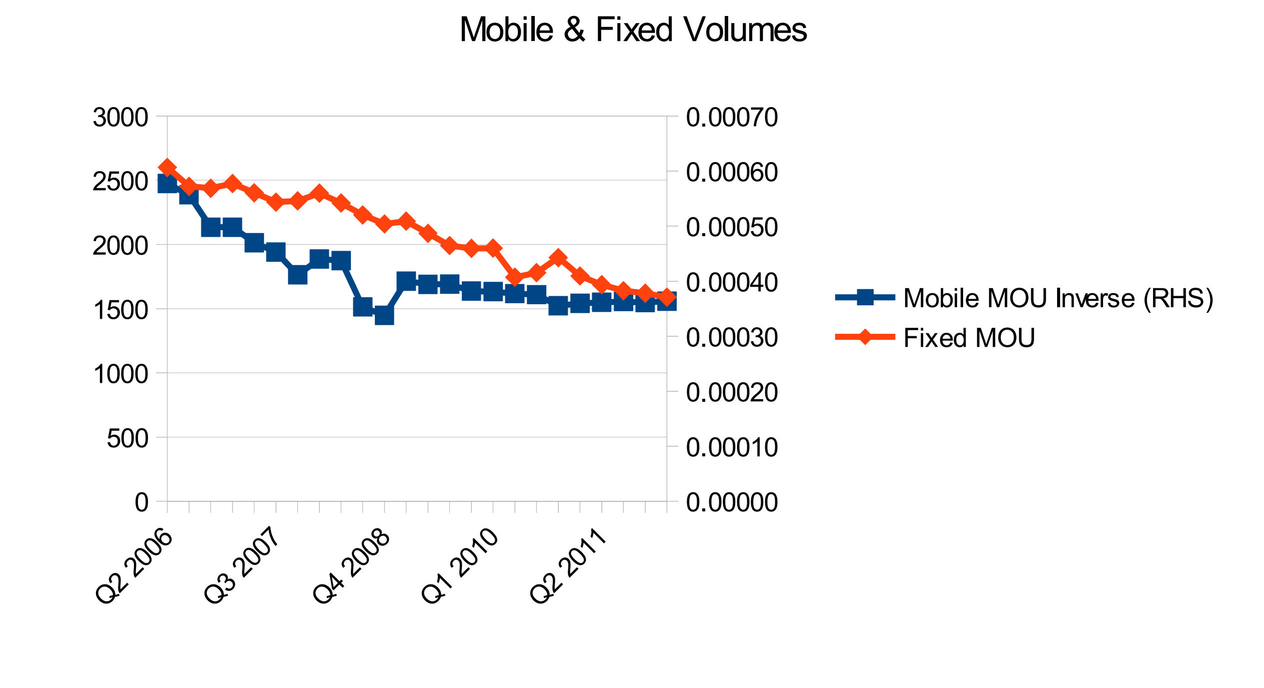
According to Paragraph 2.2 of Comreg's Executive Summary of the Consultation and Draft Decision (Reference: ComReg 12/67), currently, the wholesale market for call termination on individual public telephone networks provided at a fixed location is referred to as Market 3 (also referred to as the fixed voice call termination („FVCT") market). While the wholesale market for voice call termination on individual mobile networks is referred to as Market 7 (also referred to as the mobile voice call termination („MVCT") market).

In Section 3.47 (Decline in fixed line ownership) of the consultation Comreg 12/46 the position is that "Based on information from ComReg's Quarterly Key Data Report, Figure 12 below shows that total fixed access paths (direct and indirect PSTN and ISDN), which are usually used for voice services and internet access, have declined by 11.8% since Q1 2006 and stood at 1.76m in Q4 2011. It should be noted that these figures exclude UPC's telephony subscribers (provided over their cable broadband network which, as at Q4 2011, amounted to 162,200 subscribers). The reduction in the number of fixed access paths below could be due to a number of reasons such as an increase in the number of business failures, competition from other platforms (such as UPC) and fixed line disconnections due to emigration and/or cut backs in personal expenditure habits."

Given the above, there are two separate telephony markets, with separate products, therefore the prices of one should have no bearing on the volume sales of the other. This would be supported by the position stated in Section 3.47, where, inter alia, business failures, emigration etc. have led to disconnections and a decline in fixed line connections.

However, from the table below it is clear that Mobile Minutes of Use is inversely proportional to Fixed Voice Minutes of Use, why? Have business failures and emigration contrived to produce a Pearson correlation of approximately 80% between the two, or is there another reason?

Table 1: Mobile Minutes Million Inverse (Right Hand Scale) & Fixed Minutes Million



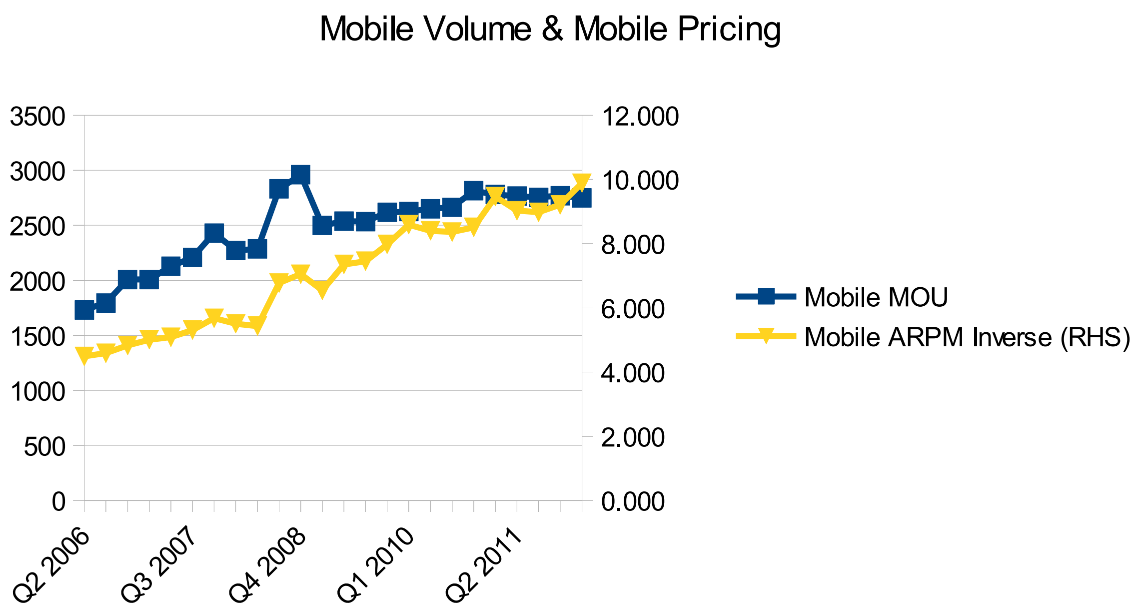
Source: Comreg Quarterly data, Elea Group Calculations

For the purposes of showing the influence of mobile pricing within its own product range, below is plotted the relationship between Mobile Pricing and Mobile Volumes.

The Minutes of Use (MOU) figure for Mobile traffic is plotted on the Left Hand Side, while the pricing data for Irish Mobile (Right Hand Side) is calculated by dividing Mobile Voice & Other Revenue (ex. SMS & MMS) by Mobile Minutes of Use. This gives an Average Revenue per Minute (ARPM, i.e. Price) for the mobile market as a whole.

The Pearson correlation for these datasets is approximately 86%, illustrating how, as prices have fallen for Mobile, the volume of minutes has grown, therefore demonstrating normal market behaviour. The inverse of ARPM was used in this instance, as Price is generally inversely correlated with Demand.

Table 2: Mobile Minutes Million & Average Revenue per Minute Inverse (Mobile)



Source: Comreg Quarterly data, Elea Group Calculations

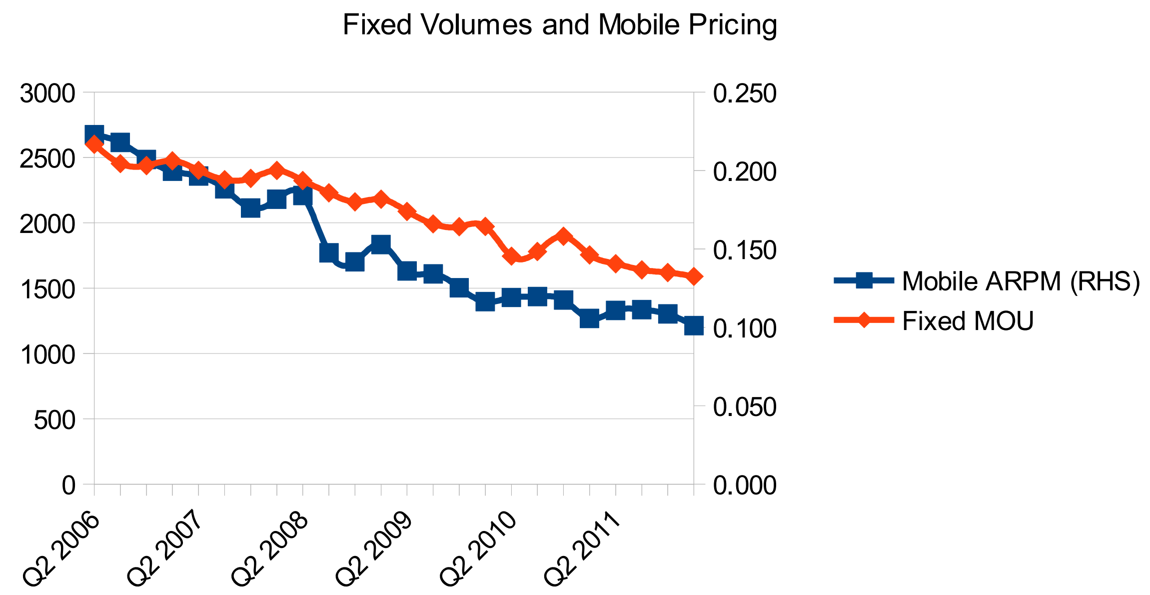
Unsurprisingly therefore, as the price of mobile minutes became more affordable their usage went up.

On the other hand, if business failure and other macro dynamics are the supposed reasons for a move away from fixed line usage, why is it that when a cross price elasticity graph is plotted, the Volume of Minutes of Use in the Irish Fixed line market is directly proportional to the price of Mobile Minutes?

The graph below was calculated using Comreg Quarterly Data exclusively.

The Minutes of Use (MOU) figure for Fixed Line traffic is plotted on the Left Hand Side, while the pricing data for Irish Mobile (Right Hand Side) is calculated by dividing Mobile Voice & Other Revenue (ex. SMS & MMS) by Mobile Minutes of Use. This gives an Average Revenue per Minute (ARPM, i.e. Price) for the mobile market as a whole.

Table 3: Fixed Line Minutes Million & Average Revenue per Minute EUR (Mobile)



Source: Comreg Quarterly data, Elea Group Calculations

The Pearson Correlation of the two datasets is approximately 95%. Very clearly there is a strong relationship between the two. What may be surprising to some is that Mobile Prices have an identifiable impact on the Volume of Fixed Minutes. The first order conclusion of this is that Mobile and Fixed minutes occupy the same market.

To predict Fixed Line volumes of minutes, an exponential regression was calculated. This is to be found in Appendix 3. This formula should be used to test the hypotheses that Fixed and Mobile Telephony markets are one and the same. Given that the R^2 is over 93% for the two datasets, it is likely that the formula will prove to be an accurate predictive tool for Fixed Volumes in response to changes on Mobile Prices.

In summation, to suggest that the two markets coincidentally have this correlation without any causative effect ignores the strength of the relationship (R^2 over 93%). The burden of proof for any counter argument is sizeable, and would have to prove clearly (with data, not emigration hearsay) that this relationship was the product of other factors acting in concert to produce (and continuing to produce) such closely aligned movement. It is hoped that this report will go some way to re-evaluating the current view that there exists two independent markets, when clearly there is very strong evidence that this is not the case.

Finding that Mobile and Fixed are in the same market would raise the following questions:

- Why was this analysis not done before?
- Was there no intuitive view that held that the services occupied the same market?
- How much value was transferred from Fixed Line operations to MNOs by way of the Termination Regime?
- Are the fixed line operators entitled to compensation for being incorrectly designated as belonging to a separate market, and having had to pay a subsidy by way of MTRs to MNOs?
- Should not Mobile Termination Rates be reduced to zero immediately?
- Are there other market definitions that require similar testing?

If the fixed line operators (notably eircom in Ireland) are entitled to compensation, the sums could be very large. For example, in the year to June 2010 the termination payments made to telecommunications operators by eircom's fixed line business was EUR231 million. Were this compensation to apply equally to European Networks, then there the ramifications would be staggering.

Please find the Comreg data used and the calculations used thereon, including the results from an Exponential Regression, in the appendices.

Answer to Consultation Question 1: No

Appendix 1 – Irish Telephony Minutes of Use and Revenue data (Comreg)

		Q2 2006	Q3 2006	Q4 2006	Q1 2007	Q2 2007	Q3 2007	Q4 2007
Mobile Revenue	**EURm**	386	391.1	415.7	400.5	418.2	415.9	427.9
Mobile MOU	**Mins M**	1732	1795	2007	2007	2128	2208	2430
Mobile MOU Inv	**Mins M**	0.000577	0.000557	0.000498	0.000498	0.000470	0.000453	0.000412
Mobile ARPM	**EUR**	0.223	0.218	0.207	0.200	0.197	0.188	0.176
Mobile ARPM Inv.	**EUR**	4.487	4.590	4.829	5.012	5.088	5.310	5.679
Fixed MOU	**Mins M**	2600	2453	2437	2474	2402	2330	2340

		Q1 2008	Q2 2008	Q3 2008	Q4 2008	Q1 2009	Q2 2009	Q3 2009
Mobile Revenue	**EURm**	412.7	420.7	417.8	419.8	381.9	345	339.9
Mobile MOU	**Mins M**	2272	2286	2831	2960	2500	2537	2534
Mobile MOU Inv	**Mins M**	0.000440	0.000438	0.000353	0.000338	0.000400	0.000394	0.000395
Mobile ARPM	**EUR**	0.182	0.184	0.148	0.142	0.153	0.136	0.134
Mobile ARPM Inv.	**EUR**	5.505	5.433	6.776	7.051	6.545	7.354	7.455
Fixed MOU	**Mins M**	2400	2323	2230	2160	2181	2087	1992

		Q4 2009	Q1 2010	Q2 2010	Q3 2010	Q4 2010	Q1 2011	Q2 2011
Mobile Revenue	**EURm**	328.1	305.4	315.4	318.5	330.6	293.7	306.3
Mobile MOU	**Mins M**	2618	2625	2650	2663	2814	2780	2766
Mobile MOU Inv	**Mins M**	0.000382	0.000381	0.000377	0.000376	0.000355	0.000360	0.000362
Mobile ARPM	**EUR**	0.125	0.116	0.119	0.120	0.117	0.106	0.111
Mobile ARPM Inv.	**EUR**	7.979	8.595	8.402	8.361	8.512	9.466	9.029
Fixed MOU	**Mins M**	1970	1972	1745	1780	1897	1755	1687

		Q3 2011	Q4 2011	Q1 2012
Mobile Revenue	**EURm**	306.8	300.7	278.0
Mobile MOU	**Mins M**	2755	2770	2749
Mobile MOU Inv	**Mins M**	0.000363	0.000361	0.000364
Mobile ARPM	**EUR**	0.111	0.109	0.101
Mobile ARPM Inv.	**EUR**	8.978	9.212	9.887
Fixed MOU	**Mins M**	1640	1620	1590

Appendix 2: Mobile Pricing Formula

$$\frac{Mobile\ Revenue}{Mobile\ Minutes\ of\ Use} = Average\ Revenue\ per\ Minute\ Mobile$$

Appendix 3: Mobile Average Revenue Per Minute and Fixed Line MOU Exponential Regression

Formula for Exponential Regression Plot:

$$y = b * \exp(a * x)$$

Where:

b is intercept

a is slope

y is Mobile ARPM

x is Fixed Line MOU

Exp Regression results:

$$a = 0.000792051$$

$$b = 0.0279879153$$

$$r^2 = 0.9338334887$$

END

4 Hutchison 3G Ireland Limited

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

Three.ie

Mr Jonathan Duggan
Commission for Communications Regulation
Abbey Court, Irish Life Centre
Lower Abbey Street
Dublin 1
BY REGISTERED POST AND EMAIL: jonathan.duggan@comreg.ie

16 July 2012

Dear Jonathan

RE: SUBMISSION RE MARKET REVIEW – VOICE CALL TERMINATION ON INDIVIDUAL MOBILE NETWORKS COMREG 12/46

I refer to ComReg Doc. No. 12/46, *"Market Review, Voice Call Termination on Individual Mobile Networks"* ("ComReg's Consultation").

For the reasons set out in previous correspondence with the Commission for Communications Regulation ("ComReg") and below, Hutchison 3G Ireland Limited ("H3GI") maintains its position that it should not be designated as having Significant Market Power ("SMP") on the wholesale market for voice call termination on its network and as a result, subject to access, non-discrimination, transparency and price control obligations. H3GI responds to ComReg's specific consultation questions in an annex to this letter.

Given the publication of the 800, 900 and 1800 MHz auction information memorandum and related documents within days of the publication of ComReg's Consultation and notwithstanding the fact that ComReg provided seven as opposed to four weeks for the purposes of its consultation, H3GI reserves the right to make additional submissions in respect of ComReg's Consultation. H3GI reserves all rights in respect of this matter pending the outcome of ComReg's proposed separate consultation on the detailed nature and implementation of the proposed price control obligation of cost orientation contained in ComReg's Consultation.

Yours sincerely

MARK HUGHES
Head of Regulatory

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

Three.ie

ANNEX

CONSULTATION QUESTIONS

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

H3GI agrees that the above identifies the main relevant developments in the retail mobile market since the previous reviews of the Relevant MVCT Markets.

Q. 2 Do you agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

H3GI agrees that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets.

Q. 3 Do you agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets?

H3GI does not agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets. ComReg has relied to a significant extent on the market research that it commissioned from The Research Perspective, the terms of reference of which were not consulted upon and H3GI does not believe that this research provides a sound basis for regulation over the next two-three years. As stated by ComReg, only 1128 non business/consumer mobile phone users and 500 SMEs were surveyed. This research is also already one year old. H3GI would expect ComReg to conduct several such surveys and ensure the representative nature of any results.

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

H3GI does not agree with ComReg's preliminary conclusions on the retail product and geographic market assessment. At paragraph 4.102 of ComReg's Consultation, ComReg states:

"As part of the demand-side substitution assessment, ComReg considers the 2011 Market Research discussed earlier, information provided by Service Providers in response to ComReg requests for information (using our statutory information gathering powers), as well

[redacted]

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

as other data available. ComReg has used this information to inform its retail analysis, rather than acting as a definitive source for the definition of a relevant retail market. In addition, given the absence of the availability of clear and precise data regarding elasticities of demand for calls to mobiles (the narrowest retail service driving demand for the Candidate Product at wholesale level) and potential substitutes, ComReg considers the HMT in a general sense, and uses this as an additional tool to help inform its consideration of relevant issues along side other available qualitative and other data."

H3GI reiterates its comments above in respect of the market research that ComReg commissioned from The Research Perspective.

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

For the reasons set out above, H3GI does not agree with ComReg's preliminary conclusions on the wholesale MVCT product market assessment.

Q. 6 Do you agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

For the reasons set out above, H3GI does not agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination.

Q. 7 Do you agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

For the reasons set out above, H3GI does not agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment.

Q. 8 Do you agree with ComReg's assessment of SMP and the associated proposed SMP designations above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

H3GI does not agree with ComReg's assessment of SMP and the associated proposed SMP designations above as they relate to H3GI.

At paragraphs 6.23 and 6.33 of ComReg's Consultation, ComReg states:

[redacted]

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

"As noted in paragraph 6.13, in assessing whether an MSP has SMP, ComReg needs to consider how MVCT may have been priced absent SMP regulatory controls and whether resultant MTRs would approximate those which would arise in a competitive market. This is a difficult task, given some MSPs' MTRs have been set, since as far back as 2005, in the presence of regulation. In addition, ComReg has set out its preliminary view in section 5 that, given the market definition, MVCT is an individual MSP-based market and, as such, there are no actual competitors against which the impact of competition on the level of MTRs can be readily assessed. In addition, for those MSPs providing MVCT and not subject to regulation, they may consider the potential threat of regulation in their MTR setting behaviour. Nevertheless, in the context of the SMP assessment, ComReg has considered trends in MSPs' pricing behaviour to date.

...

Eircom Group Mobile, H3GI, O2 and Vodafone have been subject to MTR price controls. The fact that ComReg has accepted the adoption of a glide path to reduce MTRs towards an efficient cost-oriented level does not mean that ComReg accepts that such rates actually represent what would be achieved were efficient cost-oriented mobile termination rates to be derived from a cost model. However, it is worth noting that even in the presence of the existing price control obligations and, having regard to the MTR reduction commitments identified in paragraph 6.22(a) and 6.22(b) above, all MSPs designated to date with SMP have set their MTRs at or just slightly below the maximum blended average MTR permissible/committed.

H3GI, prior to its designation with SMP in 2008, had set MTRs that were in excess of those MTRs of other SMP MSPs (i.e. Vodafone, O2 and Meteor). As set out in Table 11, H3GI's MTRs, since their regulation, have also continued to be in excess of other MSPs' regulated MTRs. Table 14 shows that H3GI's current blended average MTR is 95% higher than the MTRs of each of Meteor, O2 and Vodafone. Over the period H2'07 to H1'12 H3GI's MTRs have, on average, been between 38% and 60% higher than other SMP MSPs' MTRs. ComReg notes that H3GI's MTRs have also been lower that the MTRs of non-SMP MSPs since H1'10.

Table 13 also shows that between H2'07 and H1'10, Meteor's MTRs ranged between 34% and 0% above those MTRs of Vodafone and O2.

It is ComReg's preliminary view that, absent regulation, it is more likely than not that the existing SMP MSPs (Vodafone, O2, Meteor and H3GI) would not have reduced their MTRs to the levels experienced so far or to the levels anticipated in their remaining voluntary commitments. The review of historic pricing for Vodafone, O2, Meteor and H3GI (along with other factors already considered) suggests to ComReg that these MSPs have the power to behave, to an appreciable extent, independent of each other (and other MSPs and undertakings) when setting their MTRs.

...

The analysis in paragraphs 6.19 to 6.32 above shows that there have been wide variations between the MTRs charged by each of the MSPs. Non-regulated MSPs have charged

[redacted]

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

substantially higher MTRs than regulated MSPs, with the difference increasing over time as regulated MSPs have reduced their MTRs. There have also been differences between the MTRs charged by regulated MSPs, however, this has eroded over time (although in the presence of regulation). In light of this analysis and having regard to the definition of the Relevant MVCT Markets (i.e. based on individual MVCT markets), it is ComReg's preliminary view that absent SMP regulation, it is more likely than not the case that Vodafone, O2, Meteor, H3GI, TMI and Lycamobile individually have the power to set their MTRs, to an appreciable extent, independently of each other and consumers. The review of trends in MTR pricing behaviour, and ComReg's view that such power would continue on a prospective basis (absent regulation), support the strong presumption of SMP in the Relevant MVCT Markets."

ComReg has failed to properly apply a 'modified greenfield' approach. Rather than considering "*how MVCT may have been priced absent SMP regulatory controls*", it is drawing conclusions from pricing in the presence of regulation. In addition and without prejudice to the foregoing, whilst ComReg may not have accepted that *"such rates actually derived from a cost model"*, it did determine that such rates were appropriate. ComReg cannot now penalise operators for charging in accordance with what it agreed. ComReg fails to adduce any evidence from similar markets absent SMP regulatory controls.

At paragraph 6.66 of ComReg's Consultation, ComReg states: *"Overall, for the reasons outlined in paragraphs 6.57 to 6.65, ComReg considers that the actual or potential impact of dispute resolution is not a factor for consideration in terms of its actual or potential impact on the bargaining dynamic between parties and ultimately CBP"*. H3GI disagrees. The existence of ComReg's dispute resolution function and resulting powers is a relevant factor to be examined in each case.

Table 11 at page 112 of ComReg's Consultation as it relates to H3GI is factually inaccurate. The correct figures are as follows:

H3GI	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12
Peak	17.78	17.78	17.78	17.78	17.78	17.78	17.78	13.88	13.88	13.88
Off peak	11.43	11.43	11.43	11.43	11.43	6.9	6.9	2	2	1
Weekend	8.89	8.89	8.89	8.89	8.89	8.89	8.89	8.89	3.91	2

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

H3GI does not agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Relevant MVCT Markets as they relate to H3GI. At paragraph 7.15 of ComReg's Consultation, ComReg states:

"As noted in the analysis in section 6, the MTRs of Vodafone, O2, Meteor and H3GI are currently regulated via a voluntary glide path arrangement, whereas TMI's and Lycamobile's

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

MTRs have not been regulated to date. ComReg's view is that this analysis has demonstrated that each of the proposed SMP MSPs have the ability and incentive to engage in excessive pricing. Absent regulation, MTRs would not likely be reduced to a competitive level. Price control and related non-discrimination obligations are, therefore, considered justified by ComReg to ensure appropriate MTRs are set at levels that are reflective of the underlying cost of providing MVCT and that there is not difference in the charging of such MTRs to other Service Providers."

For the reasons set out above, H3GI believes that ComReg has not demonstrated that H3GI has the ability and incentive to engage in excessive pricing. At paragraph 7.10 of ComReg's Consultation, ComReg states: *"According to EU competition case law, excessive pricing refers to a situation where the prices charged by a dominant undertaking are not closely related to the value of the relevant service to the consumer and/or the cost of producing or providing the relevant service"*. H3GI submits that ComReg has failed to do any analysis of the *"value of the relevant service to the consumer and/or the cost of producing or providing the relevant service"*. As a result, it cannot make a determination in respect of the risk of excessive pricing.

For the reasons set out above, H3GI believes that ComReg has not demonstrated that H3GI has the ability and incentive to leverage its market power in the Relevant MVCT Market into related downstream markets thereby reducing or distorting competition to the detriment of consumers.

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

For the reasons set out above, H3GI does not agree with ComReg's approach to imposing access remedies as it relates to H3GI. Without prejudice to the generality of the foregoing, ComReg should not include the mobile number porting centralised database (MNPCD) in associated facilities. Porting is provided for under regulation 25 of the European Communities (Electronic Communications Networks and Services)(Universal Service and End Users' Rights) Regulations, 2011. If ComReg wishes to provide access to the MNPCD, it should do so under this provision.

Q. 11 Do you agree with ComReg's approach to imposing non-discrimination remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

For the reasons set out above, H3GI does not agree with ComReg's approach to imposing non-discrimination remedies as it relates to H3GI.

[redacted]

[redacted]
Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

Three.ie

At paragraph 8.49 of ComReg's Consultation, ComReg states:

"ComReg has considered whether the non-discrimination obligations should be applied specifically to self-supplied termination and MVCT supplied to other undertakings, particularly in light of the competition problem of excessive pricing. In the context of the specific circumstances of the Relevant MVCT Markets, it is ComReg's view that this issue is more appropriately and proportionately dealt with in the context of an appropriate price control obligation. In particular, having regard to the need not to unduly fetter retail price competition, where a price control obligation results in an elimination of the risk of excessive pricing by ensuring MTRs are cost oriented, then the risks of competition problems arising as a consequence of MTR differences between self-supplied termination and MVCT supplied to other undertakings, and the impact of such MTR differences on downstream competition through differences in on-net/off-net pricing, would appear to be minimised."

H3GI reserves all rights in respect of this matter pending the outcome of ComReg's proposed separate, but near parallel, consultation on the detailed nature and implementation of the specific nature of the proposed price control obligation of cost orientation.

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

For the reasons set out above, H3GI does not agree with ComReg's approach to imposing transparency remedies as it relates to H3GI.

Q. 13 Do you agree with ComReg's approach on price control and cost accounting remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

For the reasons set out above, H3GI does not agree with ComReg's approach to imposing price control remedies as it relates to H3GI and H3GI agrees with ComReg's approach not to impose cost accounting remedies at this time as it relates to H3GI.

Q. 14. Do you agree with ComReg's approach not to impose accounting separation remedies at this time? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

For the reasons set out above, H3GI agrees with ComReg's approach not to impose accounting separation remedies at this time as it relates to H3GI.

[redacted]

Hutchison 3G Ireland Limited
Registered office

3rd Floor
One Clarendon Row,
Dublin 2, Ireland

Registered Number: 316982
Place of Registration: Republic of Ireland

Q. 15. Do respondents agree with ComReg's draft Decision Instrument set out in Appendix D? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I of the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Please see answers above.

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

For the reasons set out above, H3GI does not agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment as it relates to H3GI.

Q. 17. Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Please see answers above.

5 Lycamobile Ireland Limited

ComReg Questions – Market Review – Voice Call Termination – ComReg 12/46 – Non Confidential

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

A.1. Lycamobile as a new entrant is not in a position to identify developments in the retail mobile market since the previous reviews. However, regarding paragraph 3.45, the Lycamobile customer profile is heavily weighted towards Mobile Originating (as opposed to Mobile Terminating) and heavily weighted towards international calls. Because Lycamobile has only just launched in Ireland, we do not have sufficient historical traffic data. Nevertheless, if a similar traffic pattern develops in Ireland as has been the case with other countries, we would expect the ratio of MO/MT to be in the range of [redacted] to [redacted] Further, we would expect the ratio of international/national to be in the range of [redacted] to [redacted] with most of these international calls being made to non-European destinations.

Q.2. Do you agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.2. In respect of Lycamobile's customer base, Lycamobile agrees that ComReg has identified the retail consumer behaviours and retail market characteristics. However, Lycamobile has a simple, pre-paid SIM Card only proposition that caters to consumers seeking to make and send low cost, international calls and messages. Charges are a simple, per minute or per message cost to any given country. Sometimes a call set up charge is applied and sometimes not. In the case of Lycamobile, and with reference to paragraphs 4.92 and 4.94, both the calling party and the called party have a high level of awareness and sensitivity to each of the three bullet points mentioned in the subject paragraphs (i.e., network awareness, cost awareness and cost sensitivity) when making an international call since the primary reason that a consumer chooses Lycamobile is the high cost of international calling. In the case of national calls, there remains a high to medium level of awareness and sensitivity, and a high network awareness due to the Lycamobile to Lycamobile (on-net) promotions.

Q.3. Do you agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.3. Lycamobile agrees in part and disagrees in part with ComReg's assessment of retail consumer behaviour and retail market characteristics in terms of the potential to impact the relevant MVCT markets. Lycamobile's consumers have a high propensity to make international calls – primarily to non-EU destinations. In paragraph 4.67 the cost of calls to international numbers was ranked as the most significant concern to consumers. The level of MTR itself is not relevant to Lycamobile's consumers since it is not transparent.

Lycamobile's pricing structure is very simple. A call to any particular international destination will be priced at €1 cent or more per minute. There may or may not be a call set-up charge. Thus, a €1 cent or €3 cent price increase would be immediately noticed by every Lycamobile consumer. We also consider that a much higher percentage of Lycamobile consumers (both calling and called) would

- reduce the number of calls made,
- reduce the length of the calls,
- send an SMS,
- switch networks, and
- not answer the call but phone back

than as described in the 2011 Market Research. (Ref. paragraphs 4.117 through 4.121).

Switching to on-net M2M is not relevant for international calling, nor would Lycamobile consumers be likely to choose an alternate technology (e.g., VoIP, email).

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

A.4. Lycamobile does not agree with ComReg's preliminary conclusion on the retail product and geographic market assessment (paragraphs 4.202 – 4.216). As stated, Lycamobile's customer base has a high propensity for making (as opposed to receiving) international calls – primarily to non-EU destinations. In many of the cases, the non-EU MSPs have a substantially higher average MTR than the average EU MTR. Lycamobile has no option but to purchase MVCT from these non-EU MSPs. Any reduction in the national MTR of an EU member state without a countervailing reduction in the MTR of a non-EU state, is in effect a comparative increase in the national MTR and a subsidy to the non-EU MSP.

Further, Lycamobile does not consider that the retail product offerings are homogeneous. This may be the case for the large mobile network operators' offerings, but not for niche MVNO's such as Lycamobile. Consequently, any MTR decision based solely upon nationally-driven pricing practices, and the perception that there is uniformity in mobile call product offerings, is inappropriate when applied to Lycamobile and Lycamobile's consumers.

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

A.5. Lycamobile agrees in part and disagrees in part with ComReg's preliminary conclusions. Lycamobile does not provide traditional bundles. Lycamobile's per minute tariff is consequently more transparent than is the case with mobile network operators who offer traditional bundles (that usually include a free or discounted mobile phone). Other mobile network operators can easily cross subsidize one service for another (including wholesale MCVT) where traditional bundles are offered. Also, contrary to paragraph 5.64 and as stated in response to Q.2. and Q.3., the Lycamobile called party does have a high sensitivity to the cost incurred by the Lycamobile calling party because the called party is typically a family member or friend. In some cases, both the calling and called are Lycamobile customers; however, even in various international locations where Lycamobile does not operate, a high level of awareness and sensitivity remain for this reason.

Q.6. Do you agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.6. Lycamobile does not agree with the proposed definition in paragraph 5.16 and paragraph 5.68 because too much credence is given to the ability of a new, (unregulated) MVNO entrant to set its own MTR. The choice faced by Lycamobile has been either to reduce its MTR or face refusal or delay by other operators in conditioning their respective networks or in implementing other network requirements such as mobile number portability. This has been Lycamobile's experience not just in Ireland, but in all European countries where Lycamobile has established an MVNO service. In Lycamobile's view, the economic bottleneck is the lack of effective regulation of wholesale access rates such that it is not uncommon for the wholesale access Mobile Terminating Leg per minute price to equal or exceed the MVCT received by the MVNO for terminating a call.

Q.7. Do you agree that ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.7. Lycamobile does not agree with ComReg's preliminary conclusions in paragraph 5.73 that the wholesale MVCT geographic market is national. Lycamobile operates using Global System for Mobile communications (the GSM standard). It is inconceivable that the market for MVCT is anything other than global. As stated in response to Q.4., Lycamobile's customer base has a high propensity for making (as opposed to receiving) international calls – primarily to non-EU destinations. In many of the cases, the non-EU MSPs have a substantially higher average MTR than the average EU MTR. Lycamobile has no option but to purchase MVCT from these non-EU MSPs. Any reduction in the national MTR of an EU member state without a countervailing reduction in the MTR of a non-EU state, is in effect a comparative increase in the national MTR and a subsidy to the non-EU MSP. Coverage by either national population or national land mass is not solely determinative to the geographic market.

Further, Lycamobile does not consider that the retail product offerings are homogeneous. This may be the case for the large mobile network operators' offerings, but not for niche MVNO's such as Lycamobile. Consequently, any MTR decision based solely upon nationally-driven pricing practices, and the perception that there is uniformity in mobile call product offerings, is inappropriate when applied to Lycamobile and Lycamobile's consumers.

Q.8. Do you agree with ComReg's assessment of SMP and the associated proposed SMP designations above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.8. Lycamobile agrees with the three factors referenced by ComReg in paragraph 6.249; however, Lycamobile disagrees with the conclusions drawn by ComReg in relation to Lycamobile (paragraph 6.251).

In relation to Countervailing Buying Power (paragraph 6.248), it is clear that Lycamobile experienced CBP in relation to Vodafone (paragraph 6.242 and paragraph 6.239). Lycamobile's MTR was also questioned by Tesco Mobile. However, since Lycamobile's MTR was essentially the Tesco Mobile blended rate, there was no further discussion (footnote 411). Moreover, in May 2011, when Lycamobile issued its introductory letter to the other network operators, these other network operators knew that the MTR Lycamobile was proposing was equal to or less than the MTR that these other network operators had been paying Tesco Mobile since H2'07, and that Lycamobile was not in position to launch commercial operations. Also, although Lycamobile advised its initial MTR in May 2011, Lycamobile was only operational in June 2012.

With regard to O2, CBP exists by virtue of the direct interconnection between the companies which was <u>necessary</u> (not desirable, cf. paragraph 6.219) for the effective operation of the MVNO arrangement.[1] Thus, ComReg's presumption that the existence of the MVNO arrangement works in favour of an absence of CBP is completely inverse. The fact is that the MVNO arrangement creates CBP in favour of O2 since O2 can cease the provision of wholesale services and transit. Although alternatives exist (i.e., direct interconnection), the timeframe to implement makes these alternatives commercially unviable.

Lycamobile is a new entrant. It has minimal retail market share. Lycamobile's situation as a new entrant is therefore no different than that experienced by Tesco Mobile when Tesco Mobile first started operations and experienced CBP. Looking forward, as Lycamobile's customer base increases, and as the amount of Lycamobile termination purchased by the other network operators increases, Lycamobile consider that the effect of CBP will decrease – particularly if the volume of traffic justifies a direct interconnection. Whether this will take five years (as is apparently the case with Tesco Mobile, cf. paragraph 6.177) may be questioned. However, it is not the case with Lycamobile today, having been in the market

[redacted]

barely one month, nor will it be the case within the timeframe to be covered by the forward looking analysis of the Relevant MVCT Market(s).

Lycamobile also does not agree with ComReg's conclusion with regard to Existing Competition in the Relevant MVCT Markets or Pricing Behaviour (paragraph 6.40). As stated above, Lycamobile proposed an MTR at a competitive rate, being the blended average of the prevailing MTR at the time for the MVNO, Tesco Mobile. Thus, contrary to pure independence, Lycamobile considered the competition in the Relevant Market. Further, since Lycamobile has been operational for barely one month, it will actively monitor any behaviour of the MSPs and consumers (e.g., taking Lycamobile number range out of bundle so that calls to Lycamobile customers are more expensive for the caller than they otherwise would be).

Further, contrary to the comments of ComReg stated in paragraph 6.32, ComReg ignores the fact that Lycamobile, as an MVNO, must rent the Radio Access Network of O2. For each minute of a Mobile Originating Call and for each minute of a Mobile Terminating Call, Lycamobile pays an access fee. The fact that these fees are classified as Opex (rental) rather than Capex (investment), ignores the commercial reality of an MVNO arrangement.

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

A.9. Lycamobile does not agree that the competition problems identified by ComReg are relevant to Lycamobile or that the associated impacts on competition would potentially arise in the Relevant MVCT Markets.

Lycamobile has a simple, pre-paid SIM Card only proposition that caters to consumers seeking to make and send low cost, international calls and messages. Charges are a simple, per minute or per message cost to any given country. Sometimes a call set up charge is applied and sometimes not. In many of the cases, the non-EU MSPs have a substantially higher average MTR than the average EU MTR. Lycamobile has no option but to purchase MVCT from these non-EU MSPs. Any reduction in the national MTR of an EU member state without a countervailing reduction in the MTR of a non-EU state, is in effect a comparative increase in the national MTR and a subsidy to the non-EU MSP (paragraph 7.24).

The ability and incentive for Lycamobile to engage in exploitive and exclusionary behaviours, given its retail market share, is not evident. On the contrary, the competition problems that have most affected Lycamobile are those relating to access and identified in paragraphs 8.25 through 8.28.

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

A.10. Lycamobile agrees with ComReg's approach subject to qualification. Lycamobile wish to clarify that more emphasis needs to be placed on the commercial viability of a direct interconnection. For a smaller, new entrant MVNO such as Lycamobile, the cost of acquiring and maintaining a direct interconnection may far outweigh any perceived competition benefit - for instance, where the volume of traffic to be exchanged is minimal making transit arrangements more cost effective. Dominant MSPs (with SMP) may each request direct interconnection simply to drive up the initial network costs of a smaller, new entrant MVNO such as Lycamobile. Also, if each dominant MSP (with SMP) requests a direct interconnection, the commercial launch of smaller, new entrant MVNOs such as Lycamobile can be purposefully delayed thus rendering the commercial launch unviable. Thus, ComReg must ensure stringent commercial safeguards are in place when imposing any access remedy or obligation (in addition to technical feasibility or the need to maintain network integrity) to protect smaller, new entrant MVNOs from the dominant MSPs (with SMP) that are already in the market.

Q.11. Do you agree with ComReg's approach to imposing non-discrimination remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.11. Lycamobile does not agree with ComReg's approach. Lycamobile is an MVNO and as such must rent the Radio Access Network of its MVNO Host Network Provider through the payment of wholesale access charges for Mobile Originating and Mobile Terminating calls, SMS, and data. Insisting that the MVNO Host Network Provider and the MVNO apply identical conditions (including MTR) to all other MSPs will adversely affect the ability of the MVNO Host Network Provider and the MVNO to freely negotiate a National Roaming Agreement on commercial terms, and would restrict the pricing options potentially available. If ComReg is to impose any non-discrimination remedy or obligation, ComReg must ensure stringent commercial safeguards are in place when before imposing same to protect smaller, new entrant MVNOs from the dominant MSPs (with SMP) that are already in the market.

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

A.12. Lycamobile does not agree with ComReg's approach.

In relation to paragraph 8.59 (a) – the publishing of a Reference Interconnect Offer on its public website – is of no benefit to the consumer and is highly likely to confuse the consumer. Further, in the event any dominant MSP (with SMP) wants to directly interconnect with Lycamobile, the dominant MSP (with SMP) will require that its own contract apply. The remedy and obligation is inappropriate for an MVNO and is disproportionate – only serving to drive up costs which ultimately must be borne by the consumer.

In relation to paragraph 8.59 (b) – ensuring the RIO is sufficiently "unbundled" – is likewise an inappropriate remedy and obligation for an MVNO and is disproportionate – only serving to drive up costs which ultimately must be borne by the consumer.

In relation to paragraph 8.59 (c) – the publishing of MTRs on its public website – is of no benefit to the consumer and is highly likely to confuse the consumer. Moreover, the remedy and obligation is unnecessary and is disproportionate since the MTR is already published via the eircom Switched Transit and Routing Price List. In addition, Lycamobile does not consider a 35 day notification period sensible. A 30 day period is more than sufficient and will also align itself with the usual monthly, rolling traffic forecast obligations.

In relation to paragraph 8.59 (d) – to provide undertakings with 35 days' notice of a change in the MTR – is likewise an inappropriate remedy and obligation and is disproportionate. Lycamobile does not consider a 35 day notification period sensible. A 30 day period is more than sufficient and will also align itself with the usual monthly, rolling traffic forecast obligations.

Q.13. Do you agree with ComReg's approach on price control and cost accounting remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.13. Lycamobile agrees with ComReg's approach as stated in paragraph 8.87 that it would not be proportionate to impose cost accounting obligations on MVNOs due to the nature and scale of operations.

Lycamobile agrees with ComReg's approach as stated in paragraph 8.88 that it is neither proportionate nor necessary to impose an obligation to maintain appropriate cost accounting systems on any MSP (with SMP), and further that in any event it would not be proportionate to impose cost accounting systems on MVNOs due to the nature and scale of operations.

Lycamobile does not agree with ComReg's approach as stated in paragraph 8.74 to impose a price control remedy of cost orientation. Although a Separate Pricing Consultation is to be issued detailing the requirements, any cost orientation remedy or obligation that will require substantial investment in cost accounting systems or financial experts would not be proportionate due to the nature and scale of the operations of MVNOs.

Q.14. Do you agree with ComReg's approach not to impose accounting separation remedies at this time? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

A.14. Lycamobile agrees with ComReg's approach not to impose accounting separation remedies on MVNOs as set out in paragraphs 8.94 -8.96. Any accounting separation obligation will require substantial investment in cost accounting systems. Due to the nature and scale of the operations of MVNOs, the obligation would not be proportionate.

Q.15. Do you agree with ComReg's draft Decision Instrument set out in Appendix D? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I of the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

A.15. Lycamobile does not agree with ComReg's draft Decision Instrument set out in Appendix D.

With reference to paragraphs 4.2.2 and 5.1, for the reasons stated in answer to Question 8, the Countervailing Buying Power encountered by Lycamobile is such that a presumption cannot be made that Lycamobile is able to act independently of MSPs and consumers. Further, Lycamobile has been in the market for barely one month. This is an insufficient period to make a determination that Lycamobile is able to act independently of MSPs and consumers. Therefore, the imposition of SMP at this time is not warranted.

With reference to paragraph 9, for the reasons stated in answer to Question 10, ComReg has not ensured more stringent commercial safeguards are in place when imposing any access remedy or obligation (in addition to technical feasibility or the need to maintain network integrity) to protect smaller, new entrant MVNOs from the dominant MSPs (with SMP) that are already in the market.

With reference to paragraph 10, for the reasons stated in answer to Question 11, ComReg has not ensured stringent commercial safeguards are in place when imposing any non-discrimination remedy or obligation to protect smaller, new entrant MVNOs from the dominant MSPs (with SMP) that are already in the market.

With reference to paragraph 11, for the reasons stated in answer to Question 12, Lycamobile does not consider it necessary or proportionate (but burdensome) to impose transparency obligations on Lycamobile. The information is readily available via other means (e.g., eircom's STRPL). The dominant MSPs (with SMP) already in the market that seek a direct interconnection with Lycamobile will use their own contract template as the baseline for negotiations. The 35 day notice period for MTR changes is unworkable and not aligned with the typical monthly rolling forecast obligations.

With reference to paragraph 12, for the reasons stated in answer to Question 13, although a Separate Pricing Consultation is to be issued detailing the requirements, any cost orientation obligation imposed on Lycamobile will require substantial investment in cost accounting systems. Due to the nature and scale of the operations of MVNOs, the obligation would not be proportionate. Section 12 should be deleted pending the conclusion of the Separate Pricing Consultation.

Lycamobile agrees with ComReg's Definitions and Interpretations set out in Part I of the Draft Decision.

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

A.16. For the reasons stated in response to Questions 1 to 14, Lycamobile does not agree with ComReg's Regulatory Impact Assessment.

Regarding the "impact on consumers" ComReg underestimates the negative effect on consumers. Lycamobile's offering is a very simple, pre-paid SIM Card that caters to consumers seeking to make and send low cost, international calls and messages. Any reduction in MTR, without a corresponding reduction in non-EU MTR will result in a corresponding increase in the retail tariff.

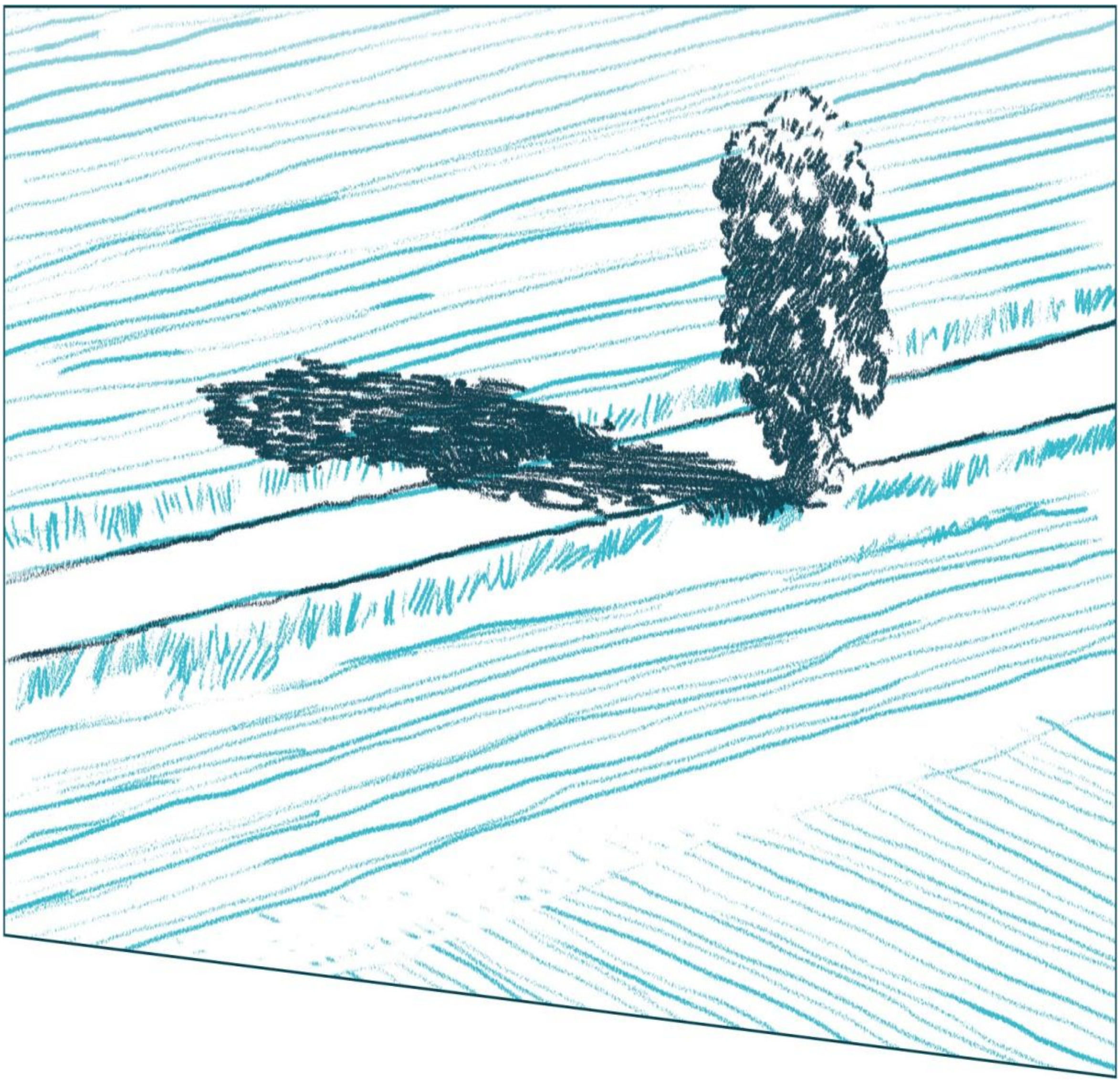
Regarding the "impact on SMP MSPs", due to the ratio of national to international calls, and due to the ratio of MO to MT calls, the reduction in MTRs paid to other national MSP's will not offset the reduction in wholesale revenues. On the contrary, Lycamobile will be subsidizing the non-EU international MSPs.

The combined effect of imposing transparency obligations, access obligations (in the manner proposed), non-discrimination obligations (in the manner proposed) and price control (the details to be latter defined) are such that in Lycamobile's opinion, new entrants will not come venture into the Irish market.

Q.17. Do you agree with ComReg's draft Decision Instrument? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I of the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

A.17. Refer to Question 15 and the answer thereto.

6 Telefonica Ireland Limited



Response to Voice Call Termination on individual mobile networks

Comments on Document 12/46

Telefónica

Introductory Comments

Telefonica welcomes the publication of the wholesale mobile voice call termination market. Responses to the questions are detailed below.

Response to Consultation Questions

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

Telefonica agrees the chapter gives a good overview of the state of the retail mobile phone market. It shows market entry and significant switching supported by mobile number portability. The chapter does not cover price or ARPU evolution in the same period which is declining in line with increasing competition. The chapter also does not conclude or offer a view on the prospective trends in mobile. A key trend in mobile, not recognised in the chapter is the growth of mobile data, which has historically been higher in Ireland. ComReg's data in figure 11 shows a small decline in mobile voice minutes in recent quarters. This decline is driven by the update of data and the substitution of mobile voice for alternative data driven VoIP services and/or substitution for voice calls with a social media update including tweets and facebook comments. These trends are not picked up in the chapter, other than a passing reference to Smartphone use.

A further prospective issue which is missing from the analysis is any mention of investment. There is a major investment challenge in the sector through the spectrum auction and the needs to increase investment to support increased data usage and the evolution to LTE products. The current economic climate, declining voice minutes and increased competition reduce the capacity of the industry as a whole to invest in these developments.

Telefonica would encourage ComReg to offer prospective views on the evolution of the retail mobile market in this chapter and link those views and objectives which the objectives of the regulatory interventions proposed.

Q. 2. Do you agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees broadly with the retail consumer/SME behaviours identified in the analysis. These behaviours are not unexpected and have been evident in previous studies in other markets, quarterly reports, market research published by ComReg in the past. Telefonica would express concern at the need for a further market research study to ask the same questions and would question the need to incur the additional cost of this study for no apparent benefit.

Telefonica agrees with ComReg that the Calling Party Pays – CPP, principle is key to the analysis of the relevant MVCT wholesale market. As a pricing protocol agreed it creates the call termination market. However, ComReg does not go further and examine other options such as bill and keep and called party pays. As arguably CPP is the key reason call termination bottlenecks exist it is incumbent on ComReg to address the feasibility or otherwise of different pricing approaches. These approaches are well known and it is therefore surprising in a Wholesale Market definition they are not at least referred to and assessed within the timeframe of the review.

Telefonica would point out that low awareness of the mobile network called is a direct consequence of mobile number portability. There is high recognition of mobile customers when they call or receive a call from a fixed number. Consumers are aware of numbers dialled and whether they are fixed and mobile. It would be expected if number portability did not exist there would be high visibility of the costs of calls to other networks. In conducting a market definition analysis using SSNIP rules it is important, therefore, to ensure no regulatory decisions such as Mobile number portability which are capable of being reversing are influencing the market definition decision. ComReg should review paras 4.30 to 4.52 assuming MNP does not exist or could be reversed in the timeframe of the market review and assess whether the level of awareness of a called network influences the market definition.

Q. 3. Do you agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets?

In addition to the points made above it is unclear what benefit this analysis brings to a decision on market definition in wholesale voice call termination. In recent years 'any network, any plan' pricing policies have reduced the off-net, on-net behaviours of consumers. This is recognised by ComReg. Mobile number portability further reduces the ability of consumers to distinguish between on and off net calls. It is difficult therefore to argue that consumer welfare is impacted either awareness of called network.

The called party pays leads to a low awareness of the cost of calls by the called party. However, low awareness of cost of individual calls is not unexpected given that consumers/SMEs, as ComReg admit, as more concerned with overall monthly costs. Consumers do not seek to find out the cost of running a washing machine or cooker but look to the level of the monthly electricity bill to measure their consumption. This is despite a wide range of information available to consumers through operator websites, monthly bills, ComReg websites and initiatives such as balance on screen services.

Q. 4. Do you agree with ComReg's preliminary conclusions on the retail product and geographic market assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your

comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with preliminary conclusion that the markets are national based on the analysis provided and from experience in the wholesale market as we are not aware a sub-geographic or regional services in the retail mobile market. Telefonica agrees with the analysis on retail demand side substitution however as there are no wholesale demand substitutes the analysis of the retail market substitutes is somewhat academic. It is clear from the data in recent years that retail prices have been falling as competition has intensified. There is no evidence, other than theoretical, that MTRs are an indirect pricing constraint on retail prices. Arguably, energy costs have accounting for significant increases in wholesale costs but the ability of mobile operators to pass on wholesale price increases is constrained by increasing competition. Taking this argument further if wholesale call termination rates were increased and given the level of retail competition, it would be very unlikely if operators were to pass on such increases. Whereas MTRs are reducing there is no evidence of any correlation between the reduction in wholesale call termination and retail prices.

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

Telefonica agrees with ComReg's preliminary conclusions on the wholesale MVCT product market assessment as there is no obvious substitute product at this time and for the foreseeable future. Telefonica however would express concern at the broadening of the market definition from the market defined in the 2007 Recommendation on relevant markets. The market as defined includes all operators with the ability to set their own termination rate. This market does not meet the 3-criteria as set out by the European commission in the recommendation of 2007 on relevant markets. The market defined by ComReg clearly has low barriers to entry which is evident from the market entry and exit in recent years. The ability of new

MVNOs to enter the market with regulated termination rates may reduce the level of competition in the retail mobile and ComReg do not assess the impact of this on the retail mobile market of the this market definition.

Q. 6 Do you agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees that ComReg's proposed definition of the Relevant MVCT Market identifies the economic bottleneck represented by MVCT subject to the overall concerns highlighted above.

Q. 7. Do you agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's preliminary conclusion on the Wholesale MVCT geographic market assessment is national.

Q. 8. Do you agree with ComReg's assessment of SMP and the associated proposed SMP designations above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's assessment of SMP in relation to Telefonica O2, subject to the comments on market definition in earlier answers. The degree of dominance and potential abuse of dominance differs however across the SMP designations and this needs to be recognised in the assessments of market power and specifically in relation to Countervailing Buyer Power – CBP . The ability to use countervailing buyer power is linked closely with the size and scale of the operation. An operator like Telefonica which has scale and a customer base can exert influence on smaller operators if commercially it was in Telefonica's interests. ComReg accept this point when they comment on the pressure TMI was under to complete interconnection agreements prior to a retail launch.

Telefonica believe the arguments used for CBP for TMI and Lycamobile are not convincing. TMI have reduced their MTRs on two occasions. ComReg do not offer any reasoning why a profit maximising firm, with ability to abuse its dominant position through high MTRs, would voluntarily reduce it MTRs unless CBP was exerted on its pricing behaviour. ComReg argue that some CBP is evident in TMI's case. In that case to what extent can ComReg then argue that TMI can set MTR's to an appreciable extent independently of competitors? Similar arguments must surely apply to Lycamobile given that they have yet to launch. Given the narrow market definition and high market share ComReg have an obligation to ensure they are not over regulating and imposing costs and obligations on the industry unnecessarily. With that in mind, Telefonica would point out in para 6.21 that the percent reductions are incorrect and may lead ComReg to incorrect conclusions.

Telefonica are also concerned that given the narrow market definition there has been little comment in the market review on potential competition. ComReg assert that there are high and non-transitory barriers to entry in this market. However, the market has seen 5 new entrants in the past 4 years and one exit. The roaming regulation obliges MNOs to offer MVNO access for roaming services from 2014 which will result in a number of new MSP offerings potentially offering roaming services to Irish consumers. There would appear to be significant potential for new entrants. It is difficult to assess the impact a number of new MSPs would have on the competitive landscape and the ability of any one MSP to behave to an appreciable extent independent of other operators, customers and consumers. What is clear is that an automatic SMP designation imposes price controls which will disincentivise MSPs to enter the market and so deny more competitive activity in retail mobile markets.

Telefonica would make a final comment in relation to the practise of redacting consultation text. Telefonica appreciates the obligation on ComReg to protect commercially sensitive information but it appears ridiculous to seek views on arguments where the significant sections in the consultation are redacted. Telefonica would encourage ComReg in consultation documents to draft documents which protect commercially sensitive information but at the same time gives a comprehensive account of the issue being discussed. Telefonica are not in a position to pass comment on text that is redacted and therefore cannot respond fully to the consultation.

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

Telefonica agrees that ComReg have detailed the theoretical competition problems which exist in the relevant market. Telefonica would disagree that vertical integration is an issue in this market. It is difficult to see the risk of MSP's exercising market power in other related markets where they clearly have no such leveraged market power. A significant amount of interconnection and access issues are regulatory obligations which pre-exist irrespective of any regulations imposed on this relevant market so the likelihood of competition problems from vertical leveraging is very low.

Q. 10. Do you agree with ComReg's approach to imposing access remedies?

Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's approach to impose access remedies.

Q. 11. Do you agree with ComReg's approach to imposing non-discrimination remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's approach to impose non-discrimination remedies.

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

Telefonica generally agrees with ComReg's approach to impose transparency. Telefonica would question the need for a notification to contracted undertakings of 35 days' notice of changes in MTR rates. Interconnection contracts have negotiated clauses which require changes to be notified to affected parties in good time. The additional regulation is disproportionate and unnecessary. Equally the regulation appears to have no basis in evidence either as a competition problem or evidence of disputes raised around lack of notification of price changes.

Q. 13 Do you agree with ComReg's approach on price control and cost accounting remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees in principle with ComReg's preliminary view for a cost orientation price control however the existing arrangement of voluntary reductions has been effective and efficient in terms of cost of implementation.

Telefonica reserves its rights in relation to price control obligation as the remedy is subject to a further consultation.

Q. 14. Do you agree with ComReg's approach not to impose accounting separation remedies at this time? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Telefonica agrees with ComReg's approach in relation to accounting separation.

Q. 15. Do respondents agree with ComReg's draft Decision Instrument set out in Appendix D? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I of the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Telefonica agrees with the decision instrument as detailed in Appendix D subject to the comments on market definition, SMP and Remedies above. Telefonica would also note that the decision instrument does not purport to impose a price control obligation which is subject to a further consultation.

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

Telefonica has no comments on the Regulatory Impact Assessment.

Q. 17. Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.

Please see response to question 15.

7 Tesco Mobile Ireland Limited

“Reference: Submission re Market Review – Voice Call Termination on Individual Mobile Networks ComReg 12/46”

Submission by Tesco Mobile Ireland ("TMI")

19 July 2012

A. Introduction

1. This submission is made by Tesco Mobile Ireland ("TMI") in response to the Commission for Communications Regulation's ("ComReg") "Market Review – Voice Call Termination on Individual Mobile Networks ComReg 12/46"[1] and the accompanying draft decision (the "Review").

This submission addresses the issues raised in the Review. Rather than comment on each of the 17 questions raised in the Review, we have instead focused on the issues of greatest concern, namely, that TMI could be designated as having Significant Market Power ("SMP").

For the convenience of ComReg in studying this submission, we have also cross-referred the questions in the Review to the relevant sections of this submission. While we have not addressed every question in the Review, this should not be taken to as acceptance of, or agreement with, ComReg's assessment and conclusions.

B. Overview of the Submission

2. This submission is primarily concerned with ComReg's market definitions and its assessment of SMP, most notably in regard to TMI. This submission demonstrates that:

2.1. TMI should not be designated as having SMP because there are no competition problems to be resolved which warrant the designation of Tesco having SMP. Therefore TMI should not be subject to obligations which would be damaging to consumers and competition. Competition and consumers would be adversely affected in a material manner if the approach advocated in the Review were to be implemented. [redacted] and there is a risk that recent or small incumbents would be forced to exit the market, while potential new entrants could be deterred from entry or expansion. This would be a very perverse outcome of the Review process and counterintuitive given ComReg's remit and role to encourage and support competition;

2.2. TMI has no difficulty with being designated as having SMP at the appropriate time and when the facts justify it. However, the approach taken in the Review would be fatally flawed if it were ComReg's final position:

1. the European Commission Recommendation[2] is not binding and ComReg appears not to be willing to exercise its discretion appropriately to take account of the actual circumstances in the Irish market;[3]
2. the European Commission Recommendation must not be applied mechanically and a broad overview of the sector is insufficient. This broad brush approach which has been followed in the Review is entirely unsatisfactory and not robust enough to withstand review;
3. ComReg's approach to defining the relevant market is defective. A proper market definition exercise for each affected party must, as a matter of law, be undertaken before proceeding further; and
4. ComReg has failed to provide the necessary analysis to demonstrate that TMI has SMP.

2.3. SMP should not be used as a tool of price regulation and to do so would be unreasonable. To borrow ComReg's own terminology, a more "appropriate" regime ought to be put in place in relation to TMI rather than the simplistic designation of SMP and the blanket imposition of all the obligations which would follow. TMI is ready to discuss with ComReg such an appropriate regime and will respond to the Pricing Review; and

---

[1] http://www.comreg.ie/publications/market_review_-_voice_call_termination_on_individual_mobile_networks.583.104101.p.html.

[2] See footnote 6 below.

[3] All decisions must take account of the actual circumstances on the case and not be based on a mechanical application of findings or facts in other cases – the principle is illustrated by the observation of the European Commission in *Bratislava*: "the question of whether [an agreement] involves an advantage…has to be assessed in relation to the conditions at [the] airport, and not by a simple comparison of the charges applied at other European airports whose characteristics may be different." (OJ L27/24, 1.2.2011) and the same principle applies in the present context.

2.4. the Review and the process accompanying it suffer from material errors of law. When ComReg is developing a policy which has such an extraordinary consequences, it must do so in a manner which involves a full and complete consultation with all parties have a full and complete opportunity to participate and comment on all possible outcomes; to do otherwise, would result in a failure on a matter on due process. It is clear that many outcomes of the Review are still unclear and are dependent on consultation and engagement by ComReg with others and there will not be any opportunity, based on the current Review timetable, for TMI and others to comment and therefore, it is submitted, that an additional round of consultation is needed to comply with the principles of Constitutional Justice.

C. Response to Review Questions

1. *Do you agree that the above identifies the main relevant developments in the retail mobile market since the previous reviews of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

While TMI has not addressed this question in the Review, this should not be taken to as acceptance of, or agreement with, ComReg's assessment and conclusions

2. *Do you agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

TMI does not agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets. Please see section D for further explanation.

3. *Do you agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

TMI does not agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets. Please see section D for further explanation.

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

TMI does not agree with ComReg's preliminary conclusions on the retail product and geographic market assessment. Please see sections E, F, G and L for further explanation.

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

TMI does not agree with ComReg's preliminary conclusions on the wholesale MVCT product market assessment. Please see sections E, F, G and L for further explanation.

6. *Do you agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

TMI does not agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination. Please see sections E, F, G and L for further explanation.

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

TMI does not agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment. Please see sections E, F, G and L for further explanation.

8. *Do you agree with ComReg's assessment of SMP and the associated proposed SMP designations above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

TMI does not agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment. Please see sections G and M for further explanation.

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

TMI does not agree that the competition problems and the associated impacts on competition consumers identified are those which could potentially arise in the Relevant MVCT Markets. Please see sections H and J for further explanation.

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

While we have not addressed this question in the Review, this should not be taken to as acceptance of, or agreement with, ComReg's assessment and conclusions.

11. *Do you agree with ComReg's approach to imposing non-discrimination remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

While we have not addressed this question in the Review, this should not be taken to as acceptance of, or agreement with, ComReg's assessment and conclusions.

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

While we have not addressed this question in the Review, this should not be taken to as acceptance of, or agreement with, ComReg's assessment and conclusions.

13. *Do you agree with ComReg's approach on price control and cost accounting remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

14. *Do you agree with ComReg's approach not to impose accounting separation remedies at this time? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.*

While we have not addressed this question in the Review, this should not be taken to as acceptance of, or agreement with, ComReg's assessment and conclusions.

15. *Do respondents agree with ComReg's draft Decision Instrument set out in Appendix D? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I of the draft Decision Instrument? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.*

TMI does not agree with ComReg's draft Decision Instrument set out in Appendix D. Please see sections E, F and G for further explanation.

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

TMI does not agree with ComReg's preliminary conclusions on the Regulatory Impact Assessment. Please see sections E, F G and H for further explanation.

17. *Do respondents agree with ComReg's draft Decision Instrument set out above? Do respondents agree with ComReg's Definitions and Interpretations as set out above in Part I? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer.*

TMI does not agree with ComReg's draft Decision Instrument. Please see sections E, F and G for further explanation.

D. The Proposed Decision would be Damaging to Consumers and Competition Alike

3. While the Review has purported to identify the retail consumer/SME behaviours and retail market characteristics and their potential impact on the Relevant MCVT markets (Questions 2 and 3 of its Review), TMI submits that the Review fails to take account of other relevant factors in relation to the markets at issue. More importantly, if the market is not correctly defined and TMI is designated as having SMP, this will have detrimental effect on consumers and competition.

4. As ComReg has established, through independent benchmarking, TMI offers the best value mobile service in Ireland.[4] TMI is making this submission to help ensure that the Irish-based consumer continues to receive the best value service. As an example of the way that TMI are leading the market in providing competitive and compelling value to customers, TMI offers five out of the top eleven Pay-Monthly tariffs.

5. TMI wants to avoid a situation where there is unnecessary and inappropriate regulation imposed on competitive mobile virtual network operators ("MVNOs"), such as TMI, because such onerous regulation would be to the prejudice of consumers and competition [redacted]

6. Furthermore, there is a risk that recent or small incumbents may leave the retail and wholesale markets or decide against expansion while potential new entrants would be deterred from entering at all. This would be a very unfortunate and perverse outcome of the Review process.

E. The European Commission Recommendation is not Legally Binding and instead ComReg must comply with EU and Irish Law

7. Further to Questions 4, 5, 6 and 7 of ComReg's Review, TMI does not agree with ComReg's preliminary conclusions as regards its various market assessments and its proposed market definitions, nor do we agree with its draft Decision Instrument or its preliminary conclusions on the Regulatory Impact Assessment (Questions 15-17). TMI submits that ComReg has failed to carry out adequate market analysis both at the retail and , importantly, wholesale level, electing instead to follow the European Commission's Recommendation, without due regard to the relevant characteristics of the Irish market.

[4] Unfortunately, the Review in Chapter 3 ("Retail Mobile Market Trends") does not pay any attention to the positive impact of Mobile Virtual Network Operators ("MVNOs"), and in particular TMI, on competition in the market.

8. It is important to recall that the European Commission's approach to SMP is not legally binding – it is contained in a "recommendation" which is, according to Article 288 of the Treaty on the Functioning of the European Union ("TFEU"), a non-legally binding instrument. ComReg will recall that Article 288 of the TFEU states: "…Recommendations and opinions shall have no binding force." Equally, guidelines have no binding force. No amount of the European Commission asking ComReg to take the "utmost account"[5] of recommendations or guidelines would ever convert those non-binding documents[6] into legally binding ones.

9. By contrast, ComReg is obliged to comply with legally binding measures including EU law and Irish law including, in particular, Irish administrative law (e.g., to act reasonably, not to treat different parties in an identical manner and to decide matters in a non-discriminatory manner). As ComReg knows, some other telecoms regulators around Europe (e.g., OPTA in The Netherlands) in comparable circumstances have recognised that they are bound by national law and they have chosen not to follow the European Commission's non-binding recommendation mechanically but rather to take their own decisions. Indeed, ComReg rightly identifies in the Review[7] that it may deviate from the European Commission's recommendation, which is not legally binding. Put simply, any decision by ComReg as part of this process must be robust enough to withstand judicial review by the Irish courts. ComReg is urged to consider alternative less draconian and more reasonable approaches which would be more in keeping with ComReg's admirable desire to only "impose on such undertaking(s) such specific obligations as it considers *appropriate*".[8] In the circumstances, ComReg must balance the non-legally binding guidance in the Commission's recommendation against ensuring that any approach it takes is appropriate to the Irish market.

F. The European Commission Recommendation must not be Applied Mechanically, a Broad Overview of the Sector is Insufficient and Instead a Specific TMI-Focussed Market Definition Analysis is Required

10. Further to Questions 4, 5, 6 and 7 of ComReg's Review, TMI does not agree with the Review's preliminary conclusions as regards its various market assessments and its proposed market definitions nor do we agree with its draft Decision Instrument or its preliminary conclusions on the Regulatory Impact Assessment (Questions 15-17). TMI submits that ComReg has failed to carry out adequate

[5] E.g., Review, para.1.6. It will be recalled that Recital 28 of Directive 2002/21/EC (Framework Directive) provides that: "In determining whether an undertaking has significant market power in a specific market, national regulatory authorities should act in accordance with Community law and take into the utmost account the Commission guidelines", Article 15(3) of the Framework Directive provides that: "National regulatory authorities shall, taking the utmost account of the Recommendation and the Guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law. National regulatory authorities shall follow the procedures referred to in Articles 6 and 7 before defining the markets that differ from those identified in the Recommendation" and Article 16(1) of the Framework Directive provides that: "National regulatory authorities shall carry out an analysis of the relevant markets taking into account the markets identified in the Recommendation, and taking the utmost account of the Guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities."

[6] I.e., the European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344 (the '2007 Recommendation'); the European Commission Staff Working Document, Explanatory Note accompanying the 2007 Recommendation (the 'Explanatory Note to the 2007 Recommendation'), (C(2007) 5406); the European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3 (the 'SMP Guidelines'); the European Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC) (OJ L124/67 20.5.2009) (the '2009 Termination Rate Recommendation'); the European Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC) (the '2005 Accounting Separation and Cost Accounting Recommendation'); and the Commission notice on the definition of relevant market for the purposes of Community competition law, (the 'Relevant Market Definition Notice'), Official Journal C 372, 09/12/1997 P. 0005 – 0013.

[7] E.g., para.2.9: "Regulation within the Relevant MVCT Markets ultimately seeks to address these pricing and other issues associated with the exercise of SMP by MSPs, for example, by imposing price control obligations that seek to ensure MTRs are reflective of costs. In this regard, there has been much discussion across Europe as to the appropriate economic and regulatory basis upon which National Regulatory Authorities (NRAs), such as ComReg, should set MTRs. This resulted in the 2009 publication by the European Commission of a recommendation on the appropriate cost methodology to be employed by all NRAs when setting termination rates, including MTRs ('2009 Termination Rate Recommendation'). ComReg is required to take utmost account of the 2009 Termination Rate Recommendation in establishing its national approach with respect to MTR price control obligations *and, where it deviates from it*, is required to provide the reasoning for its position to the European Commission." (Emphasis added)

[8] Review, para.1.14 (emphasis added). The need for any intervention to be appropriate is reflected again in, for example, paras.1.4, 1.9, 1.12, 1.14, 1.15, 1.17, 2.3, 6.62, 7.1, 7.32, 8.1 and 8.2.

market analysis both at the retail and wholesale level, electing instead to follow the European Commission's Recommendation, without due regard to the relevant characteristics of the Irish market.

11. It is important to say at the outset that ComReg must not follow any European Commission policy (including a recommendation or a guideline) in a mechanical manner. Instead, ComReg must reach specific conclusions in the context of specific cases. For example, ComReg must establish, in specific terms, the markets that TMI operates in, AND that TMI really does have SMP in the specific markets and circumstances in which TMI operates (a finding which would seem counterintuitive). It is not enough that the European Commission has recommended or expressed the hope that mobile operators would be designated to have SMP. The approach taken in the Review to market definition currently is neither sustainable nor robust enough to withstand judicial scrutiny.

In this context, even previous findings of market definition are insufficient. It has been stated repeatedly by European and Irish courts and competition agencies that findings of market definition are not binding precedent. Instead, a market definition analysis must be undertaken in each and every case. For example, the European General Court stated in *The Coca-Cola Company and Coca-Cola Enterprises Inc. v Commission of the European Communities*:

> "82. Moreover, in the course of any decision applying…the Treaty, the Commission must define the relevant market again and make a fresh analysis of the conditions of competition which will not necessarily be based on the same considerations as those underlying the previous finding of a dominant position."[9]

The legal position has been summarised neatly in the 2012 edition of *Competition Law* by Whish & Bailey:

> "Not unnaturally, an undertaking in need of guidance on the Commission's likely response to a matter of market definition will wish to find out what it has had to say in the past in actual decisions; however the caveat should be entered that the General Court has established that the market must always be defined in any particular case by reference to the facts prevailing at the time and not by reference to precedents."[10]

In an Irish context, Hogan and Morgan have stated:

> "..the European Commission has issued a list (as of 2009) of seven defined markets….ComReg must take each recommended market and consider it in accordance with the principles of competition law, bearing in mind the national circumstances and the relevant geographic markets….."[11]

However ComReg's Review takes a different – and, with respect, indefensible - approach to market definition:

> "…the European Commission's 2007 Recommendation has already identified mobile voice call termination on individual mobile networks as a relevant wholesale market that is susceptible to ex ante regulation. In doing so, the European Commission's Explanatory Note to the 2007 Recommendation took, as its starting point, a characterisation of retail markets, followed by a description and definition of related wholesale markets. *ComReg is not, therefore, obliged per se to conclude on a precise definition of the retail market for the purposes of its present MVCT assessment*."[12] (Emphasis added)

It is imperative that no decision is taken on the basis of this inadequate and unsound approach. Instead, a proper and full analysis needs to be undertaken of the specific and actual circumstances in which TMI operates.

Failure to Conclude an Appropriate Market Definition

9 Joined Cases T-125/97 and T-127/97 [2000] ECR II-1733, [2000] 5 CMLR 467.
10 7th ed., 2012, page 37 (footnote omitted).
11 *Administrative Law in Ireland*, 4th ed, 2010, pg 181.
12 Review, para.4.2 (footnote omitted).

In the circumstances, we do not accept the findings in relation to Questions 4, 5, 6 and 7 of the Review as they are not based on a correct definition of the relevant markets in the appropriate manner, nor do we agree with its draft Decision Instrument or its preliminary conclusions on the Regulatory Impact Assessment (Questions 15-17). In particular, ComReg cannot ignore the market definition and activity on the retail market and its effect on the wholesale market because the two are inextricably linked.

As stated in paragraph 4.97 of its Review:

> "As noted in paragraph 4.2, the European Commission's 2007 Recommendation has already identified voice call termination on individual mobile networks as a relevant wholesale market that is susceptible to ex ante regulation. *ComReg is not, therefore, obliged per se to conclude on a precise definition of the retail market for the purposes of its present MVCT assessment.* However, a characterisation of retail markets is being carried out to inform ComReg's subsequent definition of the wholesale Relevant MVCT Markets and, in particular, to inform ComReg's assessment of whether, through substitutability at the retail level, other forms of communication potentially exercise an indirect constraint on the provider of the candidate product at wholesale level." (Emphasis added)

Put simply, ComReg failed to conduct its own substantive analysis before defining the wholesale markets or clearly articulating how the retail and wholesale markets are interrelated. Its failure to carry out market analysis in a rigorous and thorough manner is entirely unsatisfactory, particularly given the potentially catastrophic effects which a rushed finding of SMP may have on the commercial operations of the operators involved, particularly TMI. However, not only is it unsatisfactory, it is not in compliance with the requirements of law.

When ComReg has a chance to study the Review afresh, it will see that the Review takes the *a priori* view that what the European Commission has recommended (or hoped for) must apply in this case (i.e., to TMI) without detailed analysis and with the result that the Review has the slimmest of commentary and a dearth of analysis as to what is the correct market definition in the case of TMI.

ComReg will recall that the very detailed and meticulous approach, spanning 152 pages, of the Irish Competition Authority in defining the markets in the *Kerry/Breo* merger was annulled by Cooke J in the High Court in *Rye Investments v Competition Authority*[13] and it is clear that the much thinner, almost non-existent, "market definition" analysis specific to TMI in this Review would not withstand scrutiny and therefore needs to be undertaken properly and for the first time.

ComReg will be aware that there is an intrinsic link between the relevant wholesale market and the position of TMI at a retail level (where TMI certainly does not have SMP). TMI's actions at a wholesale level are subject to pressures at the retail level. The pressures at a retail level are exerted by much larger and more significant competitors on the retail market. The competitors at a retail level are the same entities that purchase at a wholesale level. At a wholesale level, for a small player, there is significant countervailing buyer power where buyers: negotiate the price; can refuse to pay MTRs that they consider unreasonable (especially one were to raise prices); and can furthermore take action at a retail level to put pressure on the wholesaler, such as excluding TMI calls from exclusive minute bundles (similar to how American Express is not accepted by all retailers).

The countervailing influences felt by TMI at a retail level must be taken into consideration when defining and analysing the wholesale market in relation to mobile termination rates on the TMI network. Thus a more precise definition of the retail markets is essential to ComReg's market definition at a wholesale level.

ComReg is therefore urged to revise this process and to identify a specific market definition in regard to TMI rather than simply following the European Commission's non-binding recommendation. TMI is confident that if ComReg reviews its current approach, it will recognise the error of designating TMI as having SMP. It is with regret that TMI must request that the process is paused and a proper analysis undertaken, with adequate time afforded to market operators, including TMI in relation to ComReg's revised analysis.

---

[13] [2009] IEHC 140.

Moreover, it is clear that there must be not only a definition of the market in which TMI operates but the definition process must be adequate and take into account the specific circumstances of each participant in each possible market. A broad overview of the sector does not suffice. What is contained in the Review is a broad overview of the sector generally and not the forensic analysis which is required, which as outlined below is essential in concluding any market definition.

G. TMI Does not Have SMP

12. It is important to go back to basics on the concept of SMP and recognise that any analysis of SMP is made up of, at least, two parts:

a. the definition of the market, and as outlined above, the Review's "analysis" is not credible; and
b. whether a specific undertaking has SMP/dominance in that market (i.e., has the ability to act in that market to an appreciable extent independently of others), which is explored further below.

SMP is a blunt instrument which, given the far-reaching effects of a designation from both a commercial and legal perspective, cannot be applied without, among other steps, the appropriate degree of market analysis.

There are numerous less onerous and draconian alternatives open to ComReg to assist it in achieving its objectives on the market rather than formulaically designating various operators as having SMP and imposing price control within a matter of mere weeks. Other options include the negotiation of gradual glidepaths as a deed of arrangements. In this context, there is an obligation on ComReg to act proportionately and take the less dramatic steps available. For the avoidance of doubt, further to Question 8 of its Review, TMI wholly rejects ComReg's assessment of SMP with regard to TMI.

13. The Commission in its *Guidelines on Market Analysis and the Assessment of Significant Market Power under the Community Regulatory Framework for Electronic Communications Networks and Services*[14] (the "SMP Guidelines") recalls that Article 14 of the Framework Directive provides:

> "an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors customers and ultimately consumers".[15]

14. As the European Commission has made clear in its SMP Guidelines:

> "under the new regulatory framework, in contrast with the 1998 framework, the Commission <u>and the NRAs will rely on competition law principles and methodologies to define the markets</u> to be regulated ex-ante <u>and to assess whether undertakings have significant market power ("SMP") on those markets</u>." (emphasis added)

This is also the approach taken by the European Commission and the Court of Justice of the European Union in defining the concept of dominance when construing and applying Article 102 of the TFEU.

15. SMP or dominance must be assessed in the context of a particular market and having regard to all the surrounding circumstances. As the CJEU held as recently as 19 April 2012 in Case C-549/10 P *Tomra Systems ASA v Commission*:

> "18…the Commission, as part of its examination of the conduct of a dominant undertaking and for the purposes of identifying any abuse of a dominant position, is obliged to consider all of the relevant facts surrounding that conduct (see, to that effect, C-95/04 P *British Airways v Commission* [2007] ECR I-2331, paragraph 67)."

Finding dominance or SMP is not a simple mechanical act. Instead, there must be a detailed and specific analysis in the context of the particular undertaking, market and facts. It is clear that the analysis to date by ComReg does not adequately or precisely deal with the situation of TMI.

[14] OJ C 165, 11.7.2002, p.6–31.
[15] Guidelines, para.70. See Art.4 of the Framework Directive.

16. The CJEU also made the following observation in the same case which is very telling:

> "17…it must be recalled that the concept of abuse of a dominant position prohibited by Article 102 TFEU is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, *through recourse to methods different from those governing normal competition in products or services* on the basis of the transactions of commercial operators, *has the effect of hindering the maintenance of the degree of competition* still existing in the market or the growth of that competition (see Case C-52/09 *TeliaSonera* [2011] ECR I-0000, paragraph 27…)." (emphasis added)

In essence, the CJEU is stating that there must be a weakening of competition through recourse to methods different from the normal competitive methods. It is submitted that TMI is not engaging in any methods of competition different from the normal methods of competition and moreover, there is no distortion of competition.

SMP is tantamount to "dominance". SMP or dominance is therefore understood, as a matter of law, to mean 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. This is certainly not something which TMI has experienced.

17. As three European Commission officials wrote in DG Competition's own newsletter: "[w]hat is important is to ensure that the appropriate regulation of electronic communications markets, if necessary, on the basis of a thorough economic analysis in accordance with Community competition law principles."[16] In the context of the present Review, imposing extra regulation is unnecessary and the economic analysis undertaken was not thorough. Indeed, the Commission has intervened, vetoing decisions where national regulators failed to apply rigorous standards of review, irrespective of the outcome of the regulators' decision making process, which demonstrates that rigorous analysis is required.[17] It is inconceivable that imposing SMP on TMI but only mentioning TMI in a relatively broadbrush manner in the 250-page document is either rigorous or specific enough.

18. Again, TMI is not engaging in any methods of competition different from the normal methods of competition and submits that there is no distortion of competition. TMI certainly does not have the ability to act to an appreciable extent independently of wholesale buyers, retail competitors, retail customers and consumers. If the other Irish service providers (e.g., Vodafone, Meteor etc.) decided that they did not want to pay the MTR charged by TMI (especially if TMI tried to raise its MTR) then TMI would have no ability to maintain the MTR, as outlined in greater detail in paragraph 20 below.

19. In its consultation paper/Review, ComReg has listed the potentially relevant criteria for assessing the existence of SMP. However, for the purposes of the analysis of the Relevant MVCT Markets, ComReg examines only four of these criteria in any degree of detail, namely: market shares; control of infrastructure not easily duplicated; absence of potential competition; and absence of or low countervailing buying power. In the context of the remaining criteria, these are dealt with summarily in an appendix. The remaining criteria are acknowledged as being factors which could be used to indicate SMP, but are dismissed, without explanation, as being of "little or no relevance" for the purposes of the SMP assessment with merely a cursory discussion of their application to the relevant market. Such an approach is entirely at odds with ComReg's obligation in respect of a finding of SMP, which could have devastating consequences not only for TMI, but also for the consumers who rely on TMI to generate competition and lower prices in the market.

---

[16] Grewe, Inotai and Kramer, "Two Recent Veto Decisions under the New Regulatory Framework for Electronic Communications: The Importance of Competition Law Principles in Market Analysis", European Commission's Competition Policy Newsletter, Spring 2005, page 49.

[17] Grewe, Inotai and Kramer, "Two Recent Veto Decisions under the New Regulatory Framework for Electronic Communications: The Importance of Competition Law Principles in Market Analysis", European Commission's Competition Policy Newsletter, Spring 2005, page 49 state at page 49: that the Commission intervened in two cases (one Austrian, the other Finnish) and the two cases "are…examples of a regulatory (designation of an undertaking with significant market power (SMP)) and a deregulation (non-designation of an undertaking with SMP) measure which were subsequently considered incompatible with Community law. In other words, the Commission's assessment of the draft measure has been independent of the fact whether it has a regulatory or deregulatory effect on the market."

Reasons why TMI does not have SMP

20. Further to Questions 8, 15 and 17 of its Review, TMI can demonstrate that there are no grounds to support the Review's preliminary assessment of SMP with regard to TMI. TMI does not have the ability to act, to an appreciable extent, independently of its competitors or consumers. This is amply demonstrated by the following examples:

a. TMI faced difficulties establishing interconnection agreements with [redacted] if TMI did have SMP in regard to call termination on its network then presumably [redacted] would have needed to conclude interconnection agreements with TMI but the factual evidence demonstrates otherwise;

b. TMI faced particular difficulties with 3G Ireland which necessitated the involvement of ComReg. For a period of approximately 18 months, TMI could not effectively launch in Ireland as customers were not able to call all numbers which thereby negatively affected [redacted] and ability to compete in the market but also, more importantly, delayed the introduction of lower prices for consumers. This shows TMI's lack of SMP. Moreover, if today, a new entrant were to seek to connect with TMI, the new entrant might well decide to ignore TMI and proceed with its launch but it could not do the same with the established operators such as Vodafone, o2 and so on – thereby demonstrating that TMI still does not have SMP;

c. TMI was subject to using [redacted] The fact that [redacted] demonstrates that TMI had little or no countervailing power/ negotiating power / SMP;

d. TMI has had to rely on ComReg (for whose assistance TMI is very grateful) to help it operate in the Irish market place. It is counterintuitive that a new and small entrant which needs the assistance of the regulator would be said to have SMP. It is counterintuitive that ComReg would assist a party with SMP if the set up could in any way affect or distort competition;

e. TMI is not in a position to act independently in setting its own price, rather TMI follows the market as it is subject to significant countervailing market forces;

f. TMI could not raise its MTR by anything like [redacted] (the usual benchmark for dominance); indeed, if TMI were to embark on such a course of action, the likely result would be that the incumbents would refuse to pay the higher price; either maintaining the existing price or refusing to pay at all, which could, in due course result in the termination of the interconnection agreement;

g. if there was a price increase, other service providers ("SPs") could threaten to terminate interconnection (irrespective of any pricing disputes process). If interconnection was terminated, this would mean that TMI customers could not call the customers of other mobile operators and vice versa,[18] resulting in TMI customers migrating to other networks – with TMI being unable to react (a situation inconsistent with SMP or dominance);

h. conversely, this would not be the case with the likes of Vodafone or Meteor because no SP could be realistically able to operate without having the ability to terminate calls on their networks;

i. the other SPs, in addition to refusing to pay the increase, or the MTRs at all, could threaten to exclude TMI customers from their inclusive bundles, and in doing so incentivise customers away from TMI and their own customers from calling known TMI numbers. [redacted] If other SPs were to take this course of action, it would be far more damaging to TMI than to its competitors and could not be countenanced by TMI. TMI is, in many ways, [redacted] network;

j. one of the defining differences between TMI with a [redacted] retail market share connected to its wholesale market share and for instance Vodafone with 30% retail market share, is that TMI

[18] I.e., TMI would not be the "essential trading party" for the other operators

does not have the same retail threat when buying at wholesale that Vodafone would have over TMI. This results in a different TMI wholesale market definition and/or a reduction in any "dominance" TMI has in this market;

k. it is true that there is no alternative for a call to reach a customer on a particular mobile network than through a route controlled by that mobile operator. However, that does not mean that the network operator has SMP. At the simplistic level, each operator has SMP in regard to termination of calls on its network but there is a competitive choice and other mobile operators can treat TMI's callers differently, while TMI would be powerless to react and would have to watch its customer base migrate to other operators. This could be seen where mobile operators provide pressure on TMI by offering cheaper on-net calling or excluding TMI calls from inclusive minutes. Indeed, ComReg will recall that the Irish Competition Authority found in *Ticketmaster* a company with nearly 100% of the market is not necessarily dominant.

21. SMP or dominance is consistent with having the ability to *raise* prices but TMI's MTR prices are falling not rising. Conversely, the inability to raise prices is consistent with not having SMP or dominance. For example, TMI's MTR prices fell in January 2010 and again on 1 February 2012. This is not consistent with having the *power* to keep prices up.

Issues which ought to have been taken into account

22. In relation to Questions 4, 5, 6, 7, 8 and 15-17 of the Review, it is submitted that ComReg's analysis failed to take account of various factors which impact on market definition and the designation of SMP.

23. ComReg has acknowledged in para 6.208 of its Review that other operators exert countervailing buyer power against TMI. However, ComReg's analysis was limited and it did not take account of what could happen if TMI elected not to follow the market or if TMI tried to increase its MTR, which TMI does not consider remotely feasible. ComReg's analysis of countervailing buyer power is therefore flawed as it only considers a situation where the market and MTRs are static, which is not reflective of real market conditions.

24. ComReg must have regard to the circumstances which are applicable and operate in the particular market.[19] Comreg must take into account that large incumbent MNOs have scale advantages particularly with on-net pricing which can make it more difficult for smaller MVNOs, such as TMI to compete via lower prices. Larger incumbents are not as concerned with MTR as smaller MVNOs because the MNOs can net off the MTR payments against each other to a greater extent.

25. A finding of SMP was not contemplated by TMI [redacted] nor was the proposed imposition of price control within the radically short timeframe contemplated. Of course, TMI like any prudent operator must contemplate changes in the regulatory landscape but the imposition of SMP and the proposed imposition of price regulation within a six month window were never contemplated by TMI, when the majority of other MNOs and MVNOs across Europe have had far longer to prepare. The fact that this this matter has been left so late is not an excuse not to conduct a fair and thorough analysis, which would deprive TMI of the same opportunity to prepare for regulatory change which has been afforded to others in the past.

26. Tesco Mobile, while small in an Irish context is part of a very experienced MVNO operating in a number of countries with over 3.5 million customers and specialist in-house telecoms and competition lawyers. TMI is not aware of any other NRA approaching SMP and price regulation in this manner, with such unrealistic and unworkable timeframes for the designation of SMP and the subsequent application of price regulation. ComReg's proposed approach is untenable, particularly in the context of the Irish market. In other EU jurisdictions, the relevant NRAs have imposed glide paths on operators which were designated as having SMP, often over a number of years, before imposing elements of price regulation on those operators. There is a real risk that an imposition of SMP could [redacted] leave the Irish consumer and the Irish marketplace without the competitive and challenging offering provided by TMI.

[19] See *Tomra Systems ASA v Commission* above. Equally, ComReg needs to have regard to the whole market context (e.g., MTRs generally) as well as a specific or limited market.

H. It would be Erroneous to Impose SMP on TMI because of the Consequences which would Flow –

27. As outlined above, TMI does not agree with ComReg's assessment in relation to SMP. Furthermore, TMI does not agree with ComReg's analysis as regards the competition problems and the associated impacts on competition/consumers which are identified and outlined in section 7 of the Review and addressed in Questions 9 and 16 of the Review.

28. Even if TMI has SMP (which is denied), then:

a. SMP exists in only one of the several "markets" in which TMI operates and it would be wrong for the SMP regime to have *effects* on the other "markets" in which TMI operates even if, as a matter of formality, it is only applied in one particular market;

b. the conditions associated with SMP that are proposed to be imposed on TMI should instead be much less onerous than for the large mobile operators which clearly have SMP (either because such operators have accepted SMP or that SMP has been found to exist after due process and a robust examination). TMI is a MVNO with a small single digit market share on the retail market which cannot act independently of others across its operations. TMI should therefore be treated appropriately (i.e., differently and not subjected to onerous SMP obligations). Such a differentiation of regulation would be perfectly in line with European Union ("EU") practice. Given the nature of MTRs which favour those with the highest volume differential between inbound to outbound calls, treating all parties in the retail market equally would create a barrier to entry, significantly favour the incumbents and risk recent entrants, [redacted] being forced out of the market;

c. ComReg would be acting in breach of its administrative law obligations were it to seek to regulate all market participants in the same way regardless of their specific circumstances (e.g., regulating Vodafone and TMI in the same manner would be contrary to administrative law because it would involve ComReg acting unreasonably and treating different situations in the same way);

d. if TMI has SMP in one particular aspect of its operations, the risks and regulatory regime associated with SMP should not apply to other markets or aspects of TMI's business (i.e., this would be a breach of the principles of non-discrimination and proportionality);

e. ComReg has not been clear or precise enough in its exposition of its "reasoning" to date thereby depriving TMI and all others of an adequate timeframe to appreciate their legal position;

f. the Irish market place may be usefully divided into the large established operators (i.e., Vodafone, o2, Meteor and 3) and the MVNOs (i.e., TMI and Lycamobile). The possibility of the first group having SMP is very high. However, before there could be a finding that the other two MVNOs have SMP, as one has a retail market share of [redacted] and the other has barely entered the market, there would have to be a very thorough analysis - however, in the 257-page document, TMI is mentioned relatively rarely and then often in a general manner. One can hardly say that the analysis was robust or rigorous enough;

g. TMI understands that ComReg is seeking comments by mid-July 2012 but will not publish its decision until November 2012 with the new regime coming into effect a few weeks later on 1 January 2013 thereby depriving TMI and all others of an adequate timeframe to appreciate their legal position after the publication of its decision (i.e., it would amount to a defective process which in contravention with the principles of legal certainty and good administration). The inadequacy of the time allotted to market participants is clear from the fact that the extensions have had to be granted already. Moreover, with such short notice and unreasonable timeframes, [redacted]

h. given the circumstances of the marketplace in Ireland and the role of TMI in bringing competition to that marketplace, any designation of SMP should be delayed, limited and should be consistent with an extended and reasonable path towards cost oriented levels.

I. TMI does not have Adequate Information to Vindicate its Position

29. TMI does not have adequate information to vindicate its position because, for example:

a. ComReg describes its views as purely "preliminary"[20] and while any view is clearly an interim view before the final decision is made, the views of ComReg as set out in the Review are not complete enough to enable TMI to form a complete view of its legal position;

b. it is clear that the outcome of the Review could, if inappropriate designation and regulation were to result, have very serious consequences for TMI. It is also clear that the consultation on which TMI has been asked to comment is incomplete[21] so TMI is not in a position to vindicate its rights fully as it does not know the changes which are proposed;

c. the Review only identifies examples of potential problems but none relates to TMI in any credible manner;[22]

d. the Review gives inadequate information on the alternatives which were considered by ComReg – there is a fleeting reference in para.2.20 to "other potential obligations" being considered but they were dismissed without the likes of TMI having the opportunity to comment on them;

e. very importantly, TMI is not in a position to understand precisely which arguments it needs to make in response to the Review because not only is the picture incomplete in regard to the current Review but, moreover, TMI does not have the "full picture" – this is clear from para.2.10 of the present Review which states:

> "While ComReg has specified proposed obligations in detail in this Consultation Paper with respect to access, transparency and non-discrimination remedies, it is, at this stage, proposing to impose a price control obligation of cost orientation in principle. A separate but parallel consultation is expected to issue shortly and will consider, in detail, the further specification of the detailed nature of the cost orientation obligation to be imposed, taking utmost account of the European Commission's 2009 Termination Rate Recommendation."

How could TMI be expected to respond fully to a process which it cannot see? As Hogan and Morgan state:

> "[The term "equality of arms] is a useful term which has been developed mainly in European Human Rights Convention jurisprudence, examples of which have nevertheless been glimpsed in Irish law. It connotes the idea that the individual and the official side should each be allowed the same opportunity to make their case. (…) under the equality of arms principle, the weight is on the private individual not being put at a disadvantage, compared to the public body."[23]

Or as was stated by the High Court in *Kiley v Minister for Social Welfare (No 2)*[24] "natural justice is not observed if the scales of justice are tilted against one side". Indeed, the approach taken in the Review is at variance with a long and powerful line of Irish case law on the need to give reasons and supply information so as to allow a suitable response. In *State (Daly) v Minister for Agriculture* Barron J stated:

> "The court must ensure that the material upon which the minister acted is capable of supporting his decision. Since the Minster has failed to disclose the material upon which he acted or the reasons for his action, there is no matter from which the court

[20] E.g., Review, paras.1.4 and 2.14.
[21] E.g., see paras.1.20-1.23 which outline work yet to happen.
[22] E.g., Review, para.2.7.
[23] Hogan and Morgan, *Administrative Law in Ireland* (4th edition, 2010) page 576.
[24] [1977] IR 267 at 288.

can determine whether or not such material was capable of supporting his decision. Since the Minister continues to refuse to supply this material, it must be presumed that there was no such material."[25]

In *McCormack v Garda Síochána Complaints Board* Costello P stated:

> "There may be exceptional cases in which the refusal to give reasons for a decision might justify the court in inferring that no good reasons for the decisions existed and that therefore it was arbitrary and irrational and should be quashed on this ground." [26]

Laffoy J stated in *Dunnes Stores v Maloney*:

> "In the absence of reasons [the applicants] cannot explore the possibility of or pursue redress by way of judicial review". [27]

Keane J in *Rajah v Royal College of Surgeons* stated:

> "In general, bodies which are not courts but which exercise functions of a judicial or quasi-judicial nature determining legal rights and obligations must give reasons for their decisions because of the requirements of constitutional and natural justice and in order to ensure that the superior courts may exercise their jurisdiction to enquire into and, if necessary, correct such decisions (….) The requirement to give reasons may extend even further to purely administrative bodies, at least where there decisions affect legal rights and obligations(…)."[28]

Hogan and Morgan state:

> "The link between the right to reasons and their utility in facilitating judicial review on substantive grounds (in this case jurisdiction) was eloquently put in *Clare v Kenny*[29], where MacMenamin J stated:
>
> > "…. A court in judicial review proceedings cannot act on… a hypothesis as tot eh possible rationale for the [Circuit Court judge's] decision, particularly so in the context of the array of possible reasons, some of which would go beyond jurisdiction…The situation required a decision so that all parties would be aware precisely of their positions. The reason or rationale for the decision as to jurisdiction unfortunately cannot be inferred from what was said by the respondent"[30]

And on the right to see relevant information, Hogan and Morgan state:[31]

> "An important practical point is that the right also extends to ensuring that the applicant is aware of what it is the decision-maker regards as defective in the applicant's case: the applicant must be appraised of what is bothering the respondent and allowed the opportunity, if possible, to meet the difficulty. In addition, any policy or principles in the light of which the case is to be decided must be communicated to the applicant so as to allow them "the opportunity of conforming with or contesting such a principle or policy".[32]

J. In any Event, no Action is Needed

30. Further to Question 9, TMI does not agree that the competition problems and the associated impacts on

[25] [1987] IR 165 at 172
[26] [1997] 2 ILRM 321 at 331
[27] [1999] 3 IR 542 at 563
[28] [1994] 1 IR 384 at 395
[29] [2009] 1 IR 22 at para 53
[30] *Hogan and Morgan*, Administrative Law in Ireland *(4th edition, Roundhall, 2010) page 679*
[31] *Hogan and Morgan*, Administrative Law in Ireland *(4th edition, Roundhall, 2010) page 643*
[32] State (McGeough) v Louth County Council (1973) 107 ILTR 13 at 28 per O' Daly

competition consumers identified are those which could potentially arise in the Relevant MVCT Markets. In the circumstances, no action is needed because, for example:

a. ComReg says that the:

> "objective of this review is ultimately to decide if, absent regulation, any [Mobile Service Provider] ('MSP') has significant market power ('SMP') in a Relevant [Mobile Voice Call Termination] ('MVCT') Market and, if so, to impose appropriate remedies to address competition problems that have arisen or could arise in that market. Such competition problems could, for example, include:
>
> - refusal to supply MVCT resulting in an undermining of competition and the inability for consumers to make calls across networks;
> - the levying of excessive MVCT charges resulting in higher costs for those network operators handing over calls, with such higher costs fed through to consumers in the form of higher call or other charges."[33]

It is submitted that no remedies are needed because there are no actual or potential competition problems in the case of TMI's position and situation in the market. Neither of the competition problems identified are in any way realistic in the case of TMI[34] - however, if ComReg requires reassurance on those two examples, TMI is willing to engage with ComReg to reach a situation where TMI is legally bound to avoid any such breach without the need to impose SMP. In any event, the Review only sets out these two examples – neither of which are remotely relevant to TMI – thus TMI has inadequate information by virtue of the Review to vindicate its position and requests that more relevant examples or information are provided to TMI with an adequate opportunity to comment on such examples. It is also submitted that if remedies are needed (which is denied) then they should be, in ComReg's own word, "appropriate" which is not universal or uniform but rather targeted and specific;

b. TMI has historically lowered its pricing in line with the market as set out in paragraph 21, so if ComReg was to regulate the rest of the market, TMI would [redacted] Furthermore, as TMI's customer numbers and outbound call volumes increase, there would be [redacted]

c. any obligation imposed must be, as a matter of EU law[35] (and recognised by the Review[36]) that the obligations must be:

(i) based on the nature of the problem identified – but no competition problem whatsoever has been identified relating to TMI;[37]

(ii) proportionate and justified in the light of the objectives laid down in Section 12 of the Communications Regulations Act 2002[38] and Regulation 16 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011[39] – but no issue has been identified (or is relevant to TMI); and

(iii) imposed only following consultation in accordance with Regulations 12 and 13 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 but the consultation in the present Review is not complete.

---

33 Review, paras.1.4, 1.6, 1.24.

34 E.g., TMI could not refuse to supply MVCT because it has only [redacted] of customers, the other operators would advise their customers that TMI customers are not reachable and then TMI customers would move to other networks which would be reachable. Equally, TMI does not have the market power (given its lack of market share) to levy an excessive MVCT charge because the other operators would simply refuse to pay it.

35 As implemented into Irish law by Reg.8(1) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (SI No.334 of 2011).

36 Review, para.1.15.

37 The issues identified in the Review are generic and not specific to TMI.

38 Indeed the interests of users (as contemplated by Section 12(1)(a) of the 2002 Act) would be harmed by the higher costs which would be imposed on TMI as a result of being designated as having SMP. Equally, there has been no actual competition problem identified (as contemplated by Section 12(1)(a) of the 2002 Act) so no issue arises. There is also the possibility that other operators from other Member States may be deterred from entering the Irish market if SMP is imposed **.

39 S.I. No. 333 of 2011.

K. The Proposed Outcome would be in Breach of the Principle of Non-Discrimination

31. This submission demonstrates that ComReg could be, were it to continue to proceed on the current path, acting in breach of EU law[40] as well as Irish law to be treating manifestly different types of operator (e.g., Vodafone and TMI) in an identical manner and that a differentiated and holistic approach, taking into account the objectively justified reasons for the differences and in terms of achieving the public policy aim of ensuring competition, is not only consistent with EU and Irish law and policy but also consistent with practice elsewhere in the EU (e.g., the UK). The EU recommendation (and it is only a non-binding recommendation) does not require all parties to be treated the same irrespective of their nature or circumstances.

32. Even if TMI has SMP/dominance in one “market” (e.g., call termination on its own network) this should not mean that SMP follows to other “markets”. This submission is in line with the approach taken by the European Commission and the European courts which make it clear that dominance/SMP[41] must be established in the context of a particular market and each situation must be assessed separately. This means, for example, that even if TMI had SMP for call termination on its own network, it would not have SMP for retail sales and therefore any final determination by Comreg should clearly set out that the SMP obligations should not be carried across to other “markets” nor should the level of regulation be uniform. For example, the designation of TMI as having SMP in the wholesale market would have a disproportionate and detrimental effect on TMI in the mobile retail market even if SMP was not formally applied in the retail market. This idea of market specific analysis (i.e., not simply a “one size fits all” policy) is entirely consistent with the more “economic approach” espoused and advocated in recent years by the European Commission and the European Courts.

33. TMI welcomes ComReg’s work in this context in so far as it reduces prices for consumers but TMI does, as ComReg will hopefully understand, disagree with any proposal which would result in higher prices, reduced competition, deterred entry, limited expansion as well as possibly even exits from the market.

L. A Finding that TMI has SMP and should be subject to various obligations would be contrary to the Principles of Equal Treatment and Non-Discrimination

34. ComReg would be wrong to find in a mechanical or literal manner that TMI has SMP, which TMI submits has occurred in relation to its approach to market definition in Questions 4, 5, 6 and 7 of its Review. ComReg cannot simply assume that because others have SMP then TMI must also have SMP. Irish administrative law requires the circumstances of each company to be taken into account.

35. If the assumption is that every MNO or MVNO has SMP in the context of voice call termination on its own network, it is important that where such an assumption is made, it applies only in relation to MTRs and not in relation to the retail or other markets.

36. To treat the likes of Vodafone and TMI in the same manner would be discriminatory. ComReg has to comply with the principle of non-discrimination both at an Irish and EU level because the regime being applied is rooted in EU law but applied in an Irish context. As stated by Chalmers, Davies and Monti:

> “The prohibition on discrimination will prohibit not just like cases being treated differently but also different cases being treated in a like manner.” [42]

M. A Finding that TMI has SMP and should be subject to various obligations would be contrary to the Principle on Proportionality

[40] ComReg will recall that it is obliged to comply with EU law (being an emanation of a Member State): Article 4(3) of the TEU provides: “Pursuant to the principle of sincere co-operation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives."

[41] Dominance and SMP are the same for this purpose (as confirmed by the European Commission).

[42] Chalmers, Davies and Monti, *European Union Law* (2nd edition, Cambridge University Press, 2010), page 411.

37. As regards Question 8 of ComReg's Review, there are clear and objectively justifiable reasons why TMI ought to be treated differently to the established MNOs in regard to mobile termination rates. ComReg has identified six of the eight operators as having SMP, however, these operators are not comparable and in establishing a revised regulatory regime, it would breach the principle of proportionality to subject them to the same regulatory regime in the same timeframe. The need for proportionality is acknowledged in the Review.[43] However, if the proposed conclusion were adopted then it would be a sledgehammer to crack a nut.

38. The four MNOs have been designated as having SMP for many years. They operate both as a significant network operator (with allocations of spectrum and/or radio access network infrastructure) and have a substantial retail presence, with high market shares in the mobile retail market. Conversely, TMI has a relatively small market share at a retail level and lacks the infrastructure and related benefits of the MNOs.

39. If a finding of SMP is to be made in respect of TMI, which would be unjustified, ComReg's proposed regulatory regime in respect of mobile termination rates must reflect the obvious differences as between TMI and the major MNOs, not least their high retail market shares, complex and advanced infrastructure and cost base. Furthermore, ComReg must take account of the fact that the MNOs have had been subject to previous consultations and determination in relation to SMP and price control and have been afforded adequate time to adjust to their implications. Conversely, the proposed timeframes laid down by ComReg would see TMI being designated with SMP in November 2012 and being subject to price regulation within mere weeks or months, depriving TMI of its opportunity to take adapt both legally and more importantly commercially.

40. The European Commission has expressly recognised that the NRAs have a margin of discretion to propose any alternative methodology to regulate termination rates. The Commission merely requires that any alternative methodology has to be duly justified, in order to show that it fully complies with the policy objectives and regulatory principles of the Regulatory Framework.[44] In the circumstances, a graduated approach or glide path in mobile termination rates needs to be agreed to allow TMI to transition to the new arrangements.

41. There is international precedent for subjecting different operators to different forms of regulation, particularly in the context of those who have been designated with SMP for the first time. For example, in Spain, the CMT designated: (i) the three largest MNOs; (ii) a later entrant in 3G only: and (iii) ten full mobile virtual network operators, as having significant market power on the markets for call termination on individual mobile networks. The CMT did not propose identical price controls in accordance with the 2009 Recommendation and the Commission accepted an extended glide path until July 2013.

42. It will be recalled that ComReg is not bound by the EU's Recommendation. It may certainly wish to have the utmost regard to it but it is not bound by it. Indeed, for ComReg to apply it when it is not appropriate would be to breach EU law.

43. With respect, ComReg has not set the position out fully as to why and how TMI could have SMP. The explanation does not contain sufficient detail or reasoning so as to enable TMI to appreciate its position or vindicate its rights. The Consultation and Draft Decision only "presents ComReg's *preliminary* views on its analysis" (emphasis added).[45] Even the letter of 3 July 2012 from ComReg to TMI which may have been aimed at clarifying matters fails to do so because, for example, it states that the MCVT Consultation does not relate to the *retail* mobile market but then instead of saying that it relates only to the wholesale MVCT markets, the letter says that the MVCT Consultation "is *primarily* related to wholesale MVCT markets" (emphasis added) but the word "primarily" dilutes the clarity of the explanation with the result that TMI is not able to fully appreciate its position. ComReg is requested, as a matter of urgency, to set out in detail the rationale for such a finding and to give TMI adequate time to respond or, better still, recognise that it would be inappropriate to find that TMI has SMP. The current consultation should be paused with the necessary market definition and other remedial work undertaken so at to lay

[43] E.g., Review, para.2.5.

[44] *Commission decision concerning case NL/2012/1284: Call termination on individual public telephone networks provided at a fixed location in the Netherlands; and Commission decision concerning case NL/2012/1285: Call termination on individual mobile networks in the Netherlands; dated 13 February 2012.*

[45] E.g., paras.1.4 and 1.6.

the path for a robust and sustainable consultation process.

44. It is therefore, with regret that TMI must request that the consultation is stalled and a new round of consultation initiated, with more detailed and accurate analysis of relevant markets and greater investigation into the impact (or lack thereof) of ComReg's proposals on competition at a wholesale and retail level.

N. A Finding that TMI has SMP and should be subject to various obligations would be contrary to the Principle of Good Administration

45. It is a principle of good administration that timelines granted by administrative agencies are appropriate. ComReg published a draft decision on 23 May 2012 and wanted a response six weeks later by 5 July 2012 (now extended, after at least two extensions were requested, by two weeks to 17 July 2012) but it will then only publish its decision four months weeks later in November 2012 but with the decision to take effect on 1 January 2013 thereby leaving the likes of TMI with little or no time to address the issues involved.

46. It is equally a principle of good administration that a party (such as TMI) who is invited to make a submission is provided with the "complete picture" to enable to make an appropriate submission. However, TMI has not been given the full picture – para.8.73 of the Review encapsulates the problem neatly:

> "ComReg intends to carry out a separate, but near parallel, consultation on the detailed nature and implementation of the specific nature of the proposed price control obligation of cost orientation (the 'Separate Pricing Consultation'). This is expected to issue shortly and will take utmost account of the 2009 Termination Rate Recommendation. Having regard to the eventual specification of the detailed specification of the cost orientation remedy, ComReg considers that an obligation of cost accounting may not be necessary. However, ComReg may revisit the matter further once a decision on the precise nature of the cost orientation remedy has been finalised as part of the Separate Pricing Consultation. It may consider at that stage (or at some later stage) that it is appropriate to impose a cost accounting obligation."

As mentioned above, how can TMI respond adequately to such an incomplete picture?

O. A Finding that TMI has SMP and should be subject to various obligations would be contrary to the Principle of Legal Certainty

47. As in any market, companies must be able to make their investment decisions with confidence, and regulators should facilitate this by ensuring legal certainty and consistency in approach.

48. ComReg has published a consultation paper for comments in May 2012, with a view to having a decision in November 2012. Contrary to the principle of legal certainty, the proposed decision will result in TMI being subject to an entirely different legal and regulatory regime in terms of price control within a matter of weeks. The new regulatory regime undermines TMI's business model and may ultimately force its exit from the Irish market. It would be very unfortunate for the Irish consumer if that were to occur. ComReg will recall that bodies have a duty to comply with law and are liable in damages where they breach either EU or Irish law. In the circumstances, ComReg's proposed timeframes for making determinations in respect of SMP and price regulation, if followed, will potentially have [redacted] TMI, like operators in other jurisdictions and other operators in the Irish market, will need adequate time to take account of any determinations in terms of SMP and price regulation, particularly if these determination result in a radically different regulatory regime. If so, it is [redacted] that a glide path is put in place to facilitate TMI in adapting to a new regulatory environment.

P. Conclusion

49. TMI seeks confirmation from ComReg that it will not do anything to undermine competition and will not

impose SMP on TMI or, if does then it (a) sets out the rationale in clearer and more precise terms so as to enable TMI to understand and vindicate its legal rights and (b) if it does impose SMP then the imposition will be limited to a specific market (without spill over effects) and the accompanying conditions would be specific, limited and introduced on a phased basis.

8 Vodafone Ireland Limited

Vodafone response to ComReg 12/46 – Market Review: Voice Call Termination on Individual Mobile Networks

Introduction

Vodafone welcomes this opportunity to respond to ComReg document 12/46 'Market Review: Voice Call Termination on Individual Mobile Networks'. At the time of responding, ComReg has issued a further consultation, ComReg 12/67 'Proposed Price Control for Fixed and Mobile Termination Rates' which from time to time addresses some of the same issues raised in ComReg document 12/46. Vodafone will respond separately to both of these documents but in relation to any proposed Price Control remedies, we will in general provide greater detail in our response to ComReg document 12/67.

Format of Vodafone's response

Vodafone will address in detail, and under Comreg's own headings, each of the main areas set out in the consultation. We will refer to the relevant sections within the areas as appropriate. To avoid repetition Vodafone will, in general, respond to the specific questions in summary form and will make reference to the relevant section of this response where the questions are addressed in further detail, However the responses to specific questions are comprehensive where the issues they deal with are not already covered in responses to the main headings.

The document is set out as follows:

Introduction

Executive Summary

1. Retail Mobile Market Trends
2. Assessment of the Retail Market
3. Wholesale Relevant MVCT Markets Definition
4. Competition Analysis and Assessment of Significant Market Power
5. Competition Problems and Impacts on Competition and Consumers
6. Remedies
7. Regulatory Impact Assessment
8. Draft Decision Instrument
9. Answers to ComReg questions

Executive Summary

- Vodafone welcomes ComReg's intention to designate with SMP all Mobile Service Providers (MSPs) with the ability to independently set mobile termination rates. Vodafone welcomes that this will be done on a technology neutral basis and that all remaining MTR asymmetries will be eliminated. This approach is appropriate and necessary given the conclusions on the market definition reached by ComReg.

- Notwithstanding the above, Vodafone has consistently disagreed with the market definition identified and used by ComReg, which relies on the proposed market definition in the 'Recommendation'[1] to the extent that any subsequent attempt to define or consider a different market is extremely limited. Vodafone believes that the proper market definition should include all mobile services (access, origination and termination). The relevant retail product, from which the relevant wholesale market should be derived, cannot be broken into its individual components. The market as defined is contrived to facilitate regulation on what is essentially a bottleneck rather than a legitimate economic market defined in accordance with the principles of competition law.

- Vodafone would not agree with ComReg as to the extent to which MSPs are free to act independently when setting MTRs (for example, they must take account of the cost implications of off-net mobile traffic should their competitors also raise termination prices). In any event, Vodafone believes that the competitive nature of the Irish mobile market means that any excess profits from termination services will be returned to mobile users via lower retail prices. The competitive nature of the market also means that MSPs would be unable to pass through any MTR increase in their retail prices to end users. This is the case as the resulting price increases would likely trigger sufficient switching of their subscribers to other operators, and reductions in their revenues, such as to make this response unprofitable.

- We do agree that that demand and supply side substitution effects are currently weak in the retail mobile market and wholesale MVCT market, (due mainly to the absence of a competing technology for terminating calls on individual mobile networks). However, trends in market behaviour (c.f. our reference to OFCOM's[2] recent statement on the popularity of texting) mean that ComReg has a duty to take a forward-looking view when contemplating remedies which may have long term implications for market players and investment incentives.

- Vodafone agrees that the effects of CBP are likely to be weak in the terminating wholesale market.

- ComReg has a duty to ensure that any cost benefit analysis undertaken to examine the impact of different termination rates should consider with care the potential impact of changes in MTRs

1 European Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services OJ L 344 (the '2007Recommendation').

2 http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr12/uk/

on retail markets. Theoretical or presumptive outcomes – in the absence of supporting empirical evidence, or in the face of contrary evidence – cannot be used to justify imposing MVCT prices based purely on incremental costs. Any regulatory remedy should therefore only be considered after detailed analysis, including of its potential wider impacts on the market.

- Vodafone notes ComReg's stated intention to take utmost account – as ComReg is obliged to do - of the 2009 Termination Rate Recommendation[3] when proposing remedies in the event of its proposed findings of SMP. The Termination Rate Recommendation advocates that national regulatory authorities apply a LRIC methodology in setting termination charge controls and explains how such a LRIC methodology should be implemented i.e. on a purely incremental cost basis. Nevertheless, the Termination Rate Recommendation cannot and does not negate, or detract from, ComReg's obligation to exercise its regulatory functions in respect of the setting of price controls in pursuit of the obligations laid down in the Community Regulatory Framework (CRF)[4] , and in the Relevant SI[5]. In light of the fact that the obligations imposed on ComReg by the CRF ultimately take precedence over non-binding guidance from the Commission about the adoption of a particular cost methodology, ComReg must be satisfied that its proposed course of action in relation to the imposition of remedies is compatible with these primary duties.

3 European Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC) (OJ L124/67 20.5.2009) (the '2009 Termination Rate Recommendation').

4 Article 8 of the Framework Directive and Article 13 of the Access Directive (which govern the setting of price controls to be imposed on operators in a position of Significant Market Power)

5 SI 334 of 2011(section 8 and 13)

1. Vodafone's views on Retail Mobile Market Trends

In general, Vodafone agrees that ComReg has identified the main trends in the mobile market since the last review. Larger inclusive bundles, any network voice and text offers and free on-net offers and add-ons have become ubiquitous since the last market review. Also common, particularly in the mobile market, and increasingly so in the fixed retail markets. are tariffs which do not price differentiate for off-net calls to different MSPs. Eircom's participation in both the fixed and mobile market gives it an advantage over single technology players. This can be seen by its ability to offer larger inclusive bundles of fixed to mobile calls as part of standard phone tariffs or broadband bundles. It also permits eircom to offer lower prices for calls to Meteor and eMobile than to other MSPs, thereby maximising the internalisation of costs associated with its fixed to mobile calls.

Another important trend, not specifically mentioned in the consultation, is the increasing popularity of over-the-top (OTT) SMS applications (e.g. WhatsApp, IMO, Handcent). These services are increasingly viewed by mobile Smartphone and tablet customers as effective substitutes for traditional SMS, and by extension for voice services. This market trend combined with the increasing use of VoIP services means that effective substitutes for MVCT are becoming increasingly more widely available. This trend is likely to accelerate in the near to mid- term. This places a serious onus on ComReg to undertake another market review with an interval of no more than 3 years from the current exercise.

2 Vodafone's views on ComReg's Assessment of the Retail Market

(ComReg Question 2). Most retail mobile subscribers are highly sensitive to the costs they face when making calls. This is a key consideration for subscribers as they seek to minimise their expenditure, and maximise the economic value they obtain, from use of their mobile communications service. This is central to their decisions in relation to the tariff package they subscribe to. **[Redacted]** Post-paid mobile users choose the tariff packages and additional options that most closely reflect the profile of their call usage (particularly in terms of their average monthly number of calls made) as in-bundle minutes are cheaper on a per minute basis than call minutes that fall outside the bundle. Many pre-paid mobile customers that are particularly price sensitive avail of Vodafone offerings (such as the Advantage Plus price plan) that enable them to make unlimited free calls to other Vodafone mobiles, or unlimited free SMS to any network, provided that they apply for the offer and top up by the required minimum amount each month to avail of this.

Sensitivities differ between on-net and off-net calls (including calls to landlines) as a function of the relative pricing of on-net versus off-net calls. The nature and extent of differentials in the prices for on-net and off-net calls vary significantly across the different tariff plans offered by Vodafone. In the case of Vodafone post-paid mobile price plans, the inclusive minutes for most price plans are now any time and any network and there is no distinction between the effective price per minute for on-net and off-net calls. Moreover for these price plans, the per minute charges for calls once the inclusive minutes per month are used up do not discriminate between on-net and off-net calls (including calls to landlines) unless subscribers avail of options that introduce such a difference. This is in contrast to pre-paid price plans where there are significant differences in on-net and off-net call pricing (although for some tariffs, any calls to landlines are classified and priced as on-net calls). The differing sensitivities to on-net versus off-net call costs influence subscriber's choice of price plan.

Most retail mobile subscribers do not appear to be highly sensitive to costs faced by other parties when calling them **[Redacted]**. It does not appear to be a major reason for subscribers churning off Vodafone's network **[Redacted]**. However this is not universally the case as some subscribers, such as those that are members of the same interest group or closed user group (e.g., family or friends), will regard the minimisation of cost to other members of the group of calling them as being important and desirable. By extension, these customers will be acutely aware of the MSP of the calling customer.

In assessing the impact of consumer retail behaviour on the Relevant MVCT market (**Question 3**), the factors most likely to influence a customer's decision to use one service over the other relate to both the functional differences between a voice call from a mobile phone and the other services and to the differences in relative pricing between the different types of platforms. Between mobile and landline services, the main functional difference is the characteristic of mobility (access to communications services anywhere, or while on the move) conferred by the former, while the latter allows access to the communications services of voice calls only at a fixed location. Landline services serve a particular fixed location and multiple users at that location (e.g. all the members of the household) while the mobile service serves the individual and is much more personal. The increasing proliferation of Smartphones and the attendant increase in the variety and functionality of available applications (Facebook, Twitter, on-line services such as banking etc.) has increased this customer expectation of personalised communications services. The personalised experience available from mobile devices simply cannot be matched by the fixed connection. The utility that users obtain from their mobile devices across the full range of device functionality means that the mobile deice is becoming the reflexive first choice for making calls even where a fixed connection is also available.

In the case where both mobile and landline services are available to customers when they are present at the location of their landline service (i.e. in the home or office), the decision to use a mobile service instead of a landline service when making calls is in many instances driven by the superior convenience of use of the former. The greater convenience of use of the mobile service is due to the fact that as the mobile phone is carried with the customer at most times, it is immediately ready to hand, and also due to the fact that the storage of numbers of key contacts on the customer's mobile phone generally makes it quicker and easier for making calls than the landline service, even when the customer is at the fixed location of their landline service. In many cases the mobile communications service may for this reason be the clearly preferred method of making calls in most circumstances, and the landline service is availed of primarily as a means of accessing DSL broadband services rather than for the capability to make calls. Indeed Vodafone notes that a narrowband connection and voice access are a prerequisite for DSL access and have to be obtained even if they are not the actual driver of landline take-up, the main driver actually being DSL access.

In cases where customers choose to use a landline service instead of a mobile phone service, when they subscribe to both services, Vodafone considers that this decision may be influenced in some instances by lack of, or poor quality, mobile service coverage at the fixed location of the landline service.

Regarding price differences, Vodafone considers that there is a good general awareness among consumers of at least the relative (if not necessarily the absolute) level of charges for making different types of calls across the fixed and mobile platforms. For example customers are aware that fixed to fixed calls are generally cheaper than mobile to fixed calls, and that mobile to mobile calls are generally cheaper than landline to mobile calls. Therefore customers are more likely to use the landline service for calls to fixed numbers, and their mobile phone for calls to mobile numbers. The relative price differences apply in particular when customers use in-bundle calls and/or SMS within their fixed or mobile tariff packages, and in the case of pre-paid mobile phone services in particular – where customers have topped up by required amounts per month and make mobile to mobile calls to other customers on the same network.

The type of call that customers wish to make, in the context of the general awareness of the relative price differences between different types of calls between the mobile phone and landline platforms and their desire to maximise the value to them from use of both services, is therefore likely to be among the principal factors influencing customer use of one service over the other.

2.1 Retail Demand substitution

In response to a hypothetical monopolist (HM) increasing the cost of termination on its network and assuming that some or all of the additional costs are passed through in the form of a higher retail price, Vodafone would comment as follows on the likelihood of any the following substitutes being considered by consumers when making a call to the particular MSP.

(a) *Make a call from a mobile to a fixed line phone instead of an off-net mobile to mobile call;*

Vodafone believe that this is an unlikely scenario in most cases. Mobile services are associated with the individual being in communications access regardless of their location, while fixed landline services are associated with a fixed geographic location. A mobile to landline call is therefore not an effective substitute for a mobile to mobile call as, in many circumstances, the party to be called will not be present at the fixed location of their landline service, whereas in the case of a mobile to mobile call the called party would be generally contactable irrespective of their location. As a mobile to landline call is not an effective substitute for a mobile to mobile call in many circumstances, Vodafone does not believe that a price increase in the price of a mobile to mobile call implemented by a HM would lead a sufficient number of mobile subscribers to switch to making calls from a mobile to a landline such as to render the HM price increase unprofitable.

(b) *Make a call from a fixed line to a fixed line instead of an off-net mobile to mobile call;*

Please see answer to (a) above regarding substituting a call to fixed for a call to mobile.

(c) *Make an on-net mobile to mobile call instead of an off-net call to a mobile;*

This option would require the sender to change MSPs in order to avail of an on-net rather than an off-net rate. While some customers may and do make such a choice to avail of a community or closed user, it is unlikely that sufficient numbers would switch such as to make a HM price increase unprofitable.

(d) *Make a Voice over Internet Protocol ('VoIP') call instead of an off-net call to a mobile;*

This current usage of VoIP indicates that it is an effective demand side substitute for a mobile voice call for at least some customers. Vodafone considers that this option has increased over the last number of years, but particularly within the last 12-18 months, with the rapid growth in the take up of 3G devices (i.e. handsets, smartphones). This has correspondingly greatly increased the addressable market for use of VoIP services in terms of the number of customers that could install and operate VoIP clients on their communications devices (provided that they are subscribed to tariffs that enable them to make and receive functional VoIP calls). Moreover Vodafone notes that there is currently significant usage of VoIP applications on our network with traffic equivalent to **[Redacted]**.

(e) *Send an SMS instead of an off-net mobile to mobile call;*

There is undoubtedly scope for some substitution to SMS in place of an off-net mobile to mobile call. Most operators in the Irish market have cross-net SMS offers in both the prepay and pay monthly segments. For example, Vodafone prepay customers who top-up by €20 per month can choose all network SMS as a free add-on. Pay monthly customers – using Vodafone My Way - can purchase an any network text add-on for €6. Other examples of free prepay all networks texts are O2 'Experience More' (€20 monthly top up required) and Meteor 'All Text' (€20 monthly top up required).

Vodafone recognises the fundamental functional differences between SMS and mobile voice calls, in terms of their use by retail customers. While mobile voice calls are bi-directional, being initiated and paid for wholly by the calling party, each SMS is a single unidirectional transaction that the originator pays for. The general pattern of usage of SMS messages is 'conversational' with each party involved in the 'conversation' paying for each SMS that they originate in the chain of interactions. Therefore while mobile voice calls are characterised by the 'calling party pays' principle, Vodafone considers that SMS calls can accurately be regarded as being characterised by a 'talking party pays' principle, with each party involved in the SMS conversation paying for their talk time.

While some switching to SMS as a substitute for an off-mobile call is likely and would have some constraining effect, at this point in time it is unlikely to be of sufficient magnitude so as to render a HM MVCT price increase unprofitable. However, as mentioned above in relation to market trends, the increasing use of SMS (both traditional and OTT) means that for many users it is seen as an increasingly viable substitute for voice. This trend has been recognised OFCOM latest Communications Market report[6] outlining that for increasing popularity of SMS and penetration of smartphones and tablets. To quote OFCOM – 'Text-based communications are surpassing traditional phone calls or meeting face to face as the most frequent ways of keeping in touch for UK adults'.

These identified trends (which are occurring just as quickly and dramatically in the Irish market) mean it is incumbent on ComReg to conduct regular and periodic market reviews in order to ascertain the extent of viable demand-side substitutes for MVCT. Failure to do so risks the retention of onerous price control and other remedies for longer than is required or justified.

(f) *Send an email instead of an off-net call to a mobile*

In Vodafone's view, this is unlikely to be an effective demand side substitute

(g) *Shorten an off-net call to a mobile and/or request a call back*

In Vodafone's view, this is unlikely to be an effective demand side substitute

(h) *Delay making the off-net call to a mobile to a time when it is cheaper to phone.*

In Vodafone's view, this is unlikely to be an effective demand side substitute

In summary and in general agreement with the findings in ComReg's market research, other forms of communication, either individually or collectively are unlikely to provide an effective competitive constraint on MTRs. In addition, given the robust competitive conditions currently observed in the retail mobile services market, it is likely that moves by a wholesale purchaser of MVCT to pass through a 5-10% increase in the price of MVCT to their customers in the form of higher retail prices would undermine the competitiveness of their own retail service offerings. The resulting price increase would likely trigger sufficient switching of their subscribers to other operators, and reductions in their revenues, such as to make this response unprofitable. In such a scenario, a HM MVCT price increase in the range of 5%-10%, should it occur, it unlikely to be noticed by customers on other mobile networks or to trigger demand side substitution.

The dynamic is somewhat different for callers from fixed networks. A HM MVCT price increase in the range of 5%-10%, should it occur will most likely entail an increase in the retail price to the customer calling the HM network. This is because some fixed operators (e.g. eircom) have differentiated retail prices based on the terminating mobile network i.e. networks with higher MTRs are more expensive to call[7]. (Differentiated pricing between non-eircom mobile operators is not a feature of eircom's TALK tariffs or broadband bundles, though they do have lower prices for calls to Meteor and eMobile). This contrasts with mobile networks which do not differentiate retail pricing on the basis of the terminating

6 http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr12/uk/

7 http://www.eircom.ie/bveircom/pdf/Part2.1.pdf

network. If an MVCT increase leads to a retail price increase for certain fixed customers (exceptions could occur where calls to some or all mobile networks are included in a bundle), there is an obligation on the fixed network to inform customers of the increase and to allow customers to terminate contracts without penalty should they so wish. Customers of the fixed network in this case will be aware of the price increase and may choose to react through some form of demand substitution. The form this takes will depend on the customer's sensitivity to a price increase in calls to the HM – how often they call the HM, when they call and how long the calls last.

2.2 Retail supply-side substitution

Due to the current absence of alternative technologies, Vodafone agrees with ComReg that retail supply-side substitution is not likely to pose an effective constraint on the MTR setting behaviour of a HM supplier of MVCT services.

3 Vodafone's views on Wholesale Relevant MVCT Markets

Vodafone agrees with ComReg's definition of the candidate MVCT product market. A mobile service provider (MSP) should be subject to the current market review where:

(a) the MSP has been allocated mobile numbers (either through a primary or secondary allocation) and terminates calls on those numbers,
(b) where the MSP is either an MNO or an MVNO who sets its own terminating rate,
(c) where the termination service is provided over 2G, 3G or other mobile technology, or a combination of these technologies.

3.1 Demand and supply side substitution in the wholesale MVCT market

At this point in time, Vodafone does not consider that there is completely effective supply or demand side substitutes for MVCT services on mobile networks as alternative wholesale products are not offered by MSPs which would allow another authorised undertaking to terminate calls to the mobile numbers of subscribers on our network outside the terminating networks control. It is also not possible for wholesale alternatives to be supplied by third parties using alternative infrastructure given the need to direct traffic to the specific mobile numbers of terminating operator's customers.

In the context of supply side substitution, Vodafone believes that there are situations in the context of MVNE/MVNO relationships where there may be a supply side substitute for termination purchased from a MVNO in the form of termination purchased directly from the MVNE. This arises where the MVNE has been allocated the E.164 numbers used to effect MVCT but the MVNO offers MVCT to the market. In this case the MVNE may also have an obligation to negotiate interconnection when requested to do so based on the provisions of Regulation 5(2) of the Access Regulations.

The definition of Interconnection in the Access Regulations is as follows: "*interconnection" means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators*".

There is at least one example in the Irish market whereby there appears to be a difference between the undertaking operating the network and the undertaking providing the services. Tesco Mobile Ireland 'TMI' (a MVNO) holds out that it offers MVCT. However based on the number allocations database on the ComReg website, the numbers associated with TMI have in fact been allocated to Liffey Telecom. Liffey Telecom is a wholly owned subsidiary of O2 Ireland and is an MVNE hosting TMI's service. ComReg has not carried out any supply side substitutability analysis as to whether the same functional interconnect access for MVCT as offered by TMI must also be offered by Liffey Telecom. If this were in fact the case, the terms and conditions offered by Liffey would be determined by the SMP obligations imposed on O2 Ireland and Tesco could not practically offer terms less advantageous than these.

Vodafone also agrees with ComReg that supply side substitution through alternative technologies, while they may be theoretically possible, are still not sufficiently advanced or ubiquitous to act as a constraint on the setting of MVCT.

3.2 Self-Supply of MVCT

Vodafone agrees that self-supply should not form part of the wholesale product market definition.

3.3 MVCT as a Broader Service market

In section 5.65, ComReg's states the purchase of MVCT by other undertakings is a standalone service and not purchased as part of a bundle. This is not the always the situation in the case of services purchased by MVNOs from the host network. In launching its service, an MVNO will be required to purchase, call origination, call termination, SMS origination and termination and possibly data and roaming services. How the services are purchased will be subject to commercial contract but voice termination for example could be purchased as part of a bundle which includes both originating and terminating calls. MVNOs (particularly successful ones) have significant power in that they can attract additional terminating revenue to a host network when they win customers from its competitors. They can also protect to a degree - depending on the terms of the MVNO agreement – the terminating revenue of customers they have won from the host network. (A mobile network operator, who loses customers to a MVNO hosted on another network, forgoes all revenues associated with that customer including voice termination revenue.

4 Vodafone's views on Competition Analysis and Assessment of Significant Market Power

4.1 Existing Competition in the MVCT Market

Vodafone agrees with Comreg's preliminary conclusion in 6.34 regarding existing wholesale market shares and that wholesale competition or retail constraints are not likely to provide effective competition constraints. However, Vodafone does not agree that MSPs will continue to have the power to set MTRs independently of each other for a number of reasons outline here.

Regulation 5(2) of the Access Regulations (SI 334 of 2011)) states "*An operator shall negotiate interconnection for the purpose of providing publicly available electronic communications services when requested to do so by another undertaking, authorised in accordance with Regulation 4 of the Authorisation Regulations, in order to ensure provision and interoperability of services throughout the European Union.".*

Section 3.2.2.4 of the National Number Conventions also requires that all network operators: *"ensure, where technically and economically feasible, ... calling their networks ... are able to access all relevant numbers provided in the Community, regardless of the technology and devices used by the undertaking, including those in the national numbering plans of Member States, those from the ETNS and Universal International Freephone Numbers (UIFN). This obligation shall become effective following transposition of European Directive 2009/136/EC Article 28(1)(b);*"

The operation of these two obligations together means that MNOs have no option but to offer MVCT subject to economic feasibility. The question then arises as to whether the bounds of "economic feasibility" sufficiently constrain MNO's freedom of action on the market for MVCT to the extent that they cannot act appreciably independently of the market?

There are in addition, incentives on operators – particularly once they attain a certain market size - to take due regard with respect to mobile to mobile call termination rates to such an extent as to place an additional constraint on termination rates in general. Mobile termination payments are a major source of cost as well as revenue for operators. Mobile operators do not discriminate between fixed and mobile originating providers when setting termination rates. Mobile operators will wish to set low mobile to mobile termination charges because, to the extent that an operator's mobile to mobile termination charges are reciprocal, they will affect its own cost and retail tariff structure. Vodafone, O2 and Meteor have implemented voluntary MTR glidepath agreements since 2005. Part of the incentive to continuously implement these agreements was the recognition that mobile to mobile traffic costs have a direct impact on the structure and price level of tariffs and packages that MNOs can offer in an effort to win both enterprise and consumer customers in an increasingly competitive market place. This dynamic acts as an indirect constraint on the setting of MVCT rates and arises from the robust competitive environment in the retail market for the provision of mobile communications services. In this competitive market, mobile operators have strong incentives to maximise the consumer surplus of their customers in order to minimise customers switching to alternative suppliers. Mobile subscribers benefit from both receiving calls from subscribers to other networks and from making off-net calls. Depending on the structure of the tariff plan that customers are on, the volumes of both of these call types could be adversely affected by an increase in termination charges, so leading to a reduction in consumer surplus.

In 6.23, ComReg acknowledges that in order to designate an MSP with SMP, it is necessary to consider how MVCT may have been priced in the absence of regulation. In ComReg's own words, this is a difficult task since all MSPs are ex-ante considered to have 100% market share in the termination market on their own network and there are no actual competitors against whom to assess the extent of competition. Furthermore, even for those MSPs who were not designated with SMP over the period, ComReg has to acknowledge that the threat of regulatory intervention may affect their behaviour. From this somewhat shaky premise, ComReg, in 6.28, still feels able to give a preliminary view that the levels of MTRs set by Vodafone, O2, Meteor and H3GI over the period since 2007 would more than likely not have been achieved without the '*voluntary*' agreement overseen by ComReg. ComReg then states that '*the review of historic pricing for Vodafone, O2, Meteor and H3GI (along with other factors already considered (note: these factors are not identified here), suggests to ComReg that these MSPs have the power to behave, to an appreciable extent, independent of each other (and other MSPs and undertakings) when setting their MTRs*'.

It is difficult to see how ComReg has come to this conclusion. Since 2005, Vodafone, O2 and Meteor have signed up to a number of voluntary agreements. These were agreements where all parties accepted a glidepath of continuously reducing MTRs and which have now gone a considerable way towards eliminating the remaining MTR asymmetries (Vodafone, Meteor and O2 have the same MTR, H3GI who implemented a voluntary glidepath in 2009 remains the outlier at 3.9c above the other three operators average per minute MTR) . ComReg facilitated the negotiation of these agreements and considered there was no requirement for further intervention until the current review. If it was ComReg's belief over this period, that voluntary agreements were insufficient for MNOs to discharge there regulatory obligations in relation to cost-oriented rates, then it was incumbent on ComReg to intervene. There has been no intervention in relation to the voluntary agreement since 2010 making it a reasonable assumption that ComReg believed there were no material competition issues justifying such intervention. ComReg could have reasonably conducted a full market review from 2008 onwards but chose not to. In this current review therefore, it is incumbent on Comreg to demonstrate what new competition issues, either retail or wholesale, have arisen in the intervening period that would prevent ComReg from continuing the current system of voluntary agreements to include all designated MSPs, as an appropriate remedy.

In 7.14, ComReg re-iterates its view that it's '*analysis has demonstrated that has demonstrated that each of the proposed SMP MSPs have the ability and incentive to engage in excessive pricing. Absent regulation, MTRs would not likely be reduced to a competitive level. Price control and related non-discrimination obligations are, therefore, considered justified by ComReg to ensure appropriate MTRs are set at levels that are reflective of the underlying cost of providing MVCT*'.

ComReg has conducted no such 'analysis' which supports the above assertion. Instead, ComReg has relied on theoretical or conceptual competition problems and\or exploitative practices that may exist in a hypothetical market in the presence of 'excessive' MTRs. However, real-life analysis provided by Vodafone in this consultation (for example, see section 5.3.2) shows that many of these conceptual problems (such as the effect of 'excessive' MTR on competition between MSPs or on the fixed to mobile calls market), show that the theoretical adverse outcomes predicted have not occurred.

4.2 Countervailing Buyer Power

If the current conclusions of the European Commission and of ComReg (following this and previous market analyses) - that there are wholesale markets for the provision of MVCT at the individual network level - is taken as given, then the nature of the market is such that each mobile network operator is the sole supplier of wholesale mobile call termination with respect to its subscribers. As high importance is attached by the customers of all mobile and fixed operators to the capability to make calls to any and all subscribers of both the network to which they are subscribed, and also to any and all subscribers of other fixed and mobile networks, it is virtually an imperative that telecoms operators be able, either directly or indirectly (via MVCT agreements concluded by another operator), to interconnect to terminate calls made by their own customers to the customers of all other mobile and fixed operators if they are to be able to meet their customer's service expectations and compete effectively with other operators. This is particularly the case where the other operators already have a material number of subscribers on their network. Accordingly and in relation to the situation as it currently exists in the Irish market, Vodafone considers that any countervailing buyer power that may exist at the wholesale level is very limited and would not be sufficient to render unprofitable a non-transitory MVCT price increase by a HM of 5% to 10%.

With regard to possible countervailing buyer power at the retail level, in the context of the use of the calling party pays charging principle in the retail market, Vodafone considers that the ability of individual retail customers (even large corporate customers) to exert CBP on a HM supplier of MVCT services exist to a limited extent, but is likely to be insufficient to render unprofitable a SSNIP of 5%-10% in MVCT charges by the HM.

5. Vodafone's views on Competition Problems and Impacts on Competition and Consumers

5.1 Exploitive Practices

In 7.9 (Exploitative Practices), ComReg states that firms with market power are in a position to exploit that market power by reducing output and\or charging of excessive prices. Excessive pricing of MVCT by MSPs, could in turn lead to a reduction in consumer welfare both through higher retail prices and lower demand for MVCT. It might also harm or distort competition in related downstream markets. Furthermore, it could reduce the incentive for productive efficiencies (since the costs of these inefficiencies could be recovered through higher MVCTs and hinder innovation which might in itself reduce costs. In summary, that is the economic theory and there is little there that could be rebutted. However, it is not reflective of the situation in practice.

The theory suggests that market power could be exercised through the reduction in output. This is not a likely scenario in relation to MVCT. MSPs have a commercial incentive to terminate the largest possible volume of calls on their network in order to maximise revenues. Realistically, MSPs could only limit supply by building insufficient capacity in terms of transmission links, switching capacity or coverage within their own network. This is likely to be just as harmful to their own customers in terms of overall quality of service (it's worth bearing in mind that the one of the Commission's basis for advocating a move to pure LRIC is the high value placed on inbound calls by the called party) and would not be conducive to attracting or retaining subscribers.

Excessive pricing, at least for larger MSPs is also likely to be counter-productive. What matters most to MSPs are the relative MTRs that exist between them and their competitors. An MSP with a higher relative MTR can use the excess revenue to increase handset subsidies and reduce prices and thereby attract customers from its competitors. This is likely to lead to retaliatory increase in rival providers MTRs and negate any acquisition and retention benefits arising from its own increase. It will also lead to higher costs for off-mobile traffic leading to a double hit on margins if it had previously reduced retail rates.

There can be little doubt that MSPs with higher relative MTRs utilise the additional revenue to lower prices and increase handset subsidies. This fact is recognised (even encouraged) by NRAs as new entrants are traditionally unregulated for a period of time and even after SMP designation are permitted to maintain higher MTRs than their longer established competitors. Irrespective of whether such an approach could ever be objectively justified, this situation has been brought to somewhat extreme lengths in Ireland, where H3GI – launched since 2003 - currently has an MTR that is 95% higher than Vodafone, O2 and Meteor having risen from 47% in late 2007 (see table 14 section 6.24). This asymmetry has occurred in the presence of regulation and 3 years after the Commissions Recommendation on termination rates and it is interesting to contemplate whether a similar asymmetry would have been sustainable in the absence of regulation.

In addition and specifically in relation to the Irish mobile market, increases in MTRs would be extremely difficult to pass on in the form of higher retail prices due to the highly competitive nature of the market. This can clearly be seen in the case of the higher MTRs now in situ for H3GI, TMI and Lycamobile. No existing Irish MSP differentiates its off-net mobile retail prices on the basis of the higher cost for terminating calls on these three mobile networks. It would appear that any MSP considering differential charging for off-net mobile calls believes there is a substantial risk of losing customers who value a single price point for the off-net mobile calls.

In 7.13, ComReg also alludes to the risk that absent competition, excessive pricing can reduce the incentive to innovate (or hinder innovation) and to reduce costs since the cost of such inefficiencies can be recovered through MTRs. ComReg does not offer any analysis or study to demonstrate that such inefficiency or lack of innovation is happening or is likely to happen in the Irish market. Regarding the incentive to introduce IP interconnection, it remains the fact that the fixed network is still the largest sink and source of voice traffic in the state. Most operators of any reasonable scale are interconnected with the fixed incumbent using TDM (and not IP connectivity). Until there is a sufficient market dynamic across fixed and mobile platforms to move to IP interconnect, it is unlikely to be efficient for many operators to run IP and TDM interconnect in parallel. Nor is there evidence that the protection of termination revenues (fixed or mobile) which is a significant barriers preventing a move to IP interconnection. Termination rates have for some time been significantly lower on fixed networks compared to mobile. As far as Vodafone is aware, there are no fixed-to-fixed IP interconnects in place in spite of the fact that there are a number of relatively new fixed operators with modern platforms interconnected with the fixed incumbent. Obviously, many other considerations also need to be taken into account such as the impact on billing and IT systems and the requirement for regulatory initiatives (consultations, industry working groups) to establish agreed technical interfaces and update reference offers.

Vodafone would also question ComReg's assertion that incentives may exist for MSPs to deliberately impair the quality on their networks (through insufficient investment) to a degree that would affect MVCT purchasers. It is Comreg stated position that absent regulation, MSPs are more than likely to set higher priced MTR and to earn excess profits from inbound calls. With no obvious substitute for termination on their network, it is difficult to see why MSPs would follow such a course and in the process reduce total profits.

5.2 Vertical Leveraging

Under this heading, ComReg describes a number of discriminatory and exclusionary practices which although theoretically possible, ComReg was unable to provide any real-life examples in the Irish markets. Refusal to supply, the withholding of relevant information or discriminatory treatment of an MVCT buyer's traffic relative to the MSPs own traffic can all be regulated via appropriate non-discrimination obligations. Likewise, any price discrimination between equivalent buyers, absent objective justification can be regulated via appropriate non-discrimination obligations.

5.3 Impact of Competition Problems on Consumers and Competition

5.3.1 Balance of interconnect traffic and payments

In 7.24, ComReg rightly notes that call termination is a situation of 2-way access with the level of MTRs influencing both revenues and costs for MSPs. This Comreg states could have important competitive and distributional implications for SPs who make more outgoing payments than they receive. For any two providers, their net interconnect financial position will be functions of both their relative MTRs and the respective levels of inter-operator traffic. A smaller operator sending more traffic to a larger operator than it receives in return, will clearly be at a disadvantage where terminating rates are reciprocal. Where the smaller operator has a higher rate, there is a cut-over point where its disadvantage for the traffic imbalance is out-weighed by the additional revenues it receives from its higher MTR. It is therefore not a given in all markets (and certainly not in Ireland) that smaller MSPs are disadvantaged by current termination rates and\or by an in-balance in traffic flows or that implementing large MTR reductions on all MSPs will ultimately benefit smaller operators in the Irish market.

As stated above, Vodafone welcomes the planned elimination of MTR asymmetries and the ending of the competitive distortion caused by the very large differences in the levels of MVCT between different MSPs . Particularly in the case of H3GI (launched in Ireland since 2003 and regulated since 2008), they have continued for too long and at too high a level, both in % terms but also in absolute value. Even in the current voluntary glidepath – implemented 18 months after the European Commission published its Recommendation on Termination Rates and which called for the elimination of asymmetries – ComReg permitted a situation to arise where the level of asymmetry between H3GI and Vodafone[8] has been allowed to increase from 68% to 95% (table 12: section 6.4). What this means in practice, is that from January to June 2012 (covering the 6-month period just before the introduction of the latest glidepath reductions),**[Redacted]**.

5.3.2 MTRs levels and competition in mobile markets

It is ComReg's contention in this consultation (c.f. 7.26, 7.27, 7.28) that a reduction of MTRs in line with the EC Recommendation on Termination Rates will be pro-competition and will in particular benefit smaller MSPs. One of the motivations advanced by ComReg (and other regulators), has been that MTRs above incremental costs create differences in the costs operators face when carrying off-net calls compared to on-net calls and that this in turn leads to differences in on-net and off-net call prices (with off-net calls being priced above on-net calls). Given that off-net calls account for a greater proportion of a smaller mobile operator's traffic than for a larger operator (i.e., an operator with more customers), it is argued that such price differentials impact the ability of smaller operators to compete for customers and hence affect the development of competition in the market for mobile communication services. Therefore, ComReg argues that by reducing MTRs to incremental cost, competition amongst mobile operators can be enhanced.

While there is a body of academic literature which develops theoretical models of the effect on competition of above cost MTRs and on-net/off-net pricing differentials, Vodafone are not aware of any studies that consider widely the extent to which these theoretical models accord with real life practice. Due to this lack of real life evidence, Vodafone commissioned research[9] to identify whether actual evidence from a range of jurisdictions supports the implicit hypotheses used by ComReg and other regulators. Our research, based on quantitative analysis from a number of mobile markets including Ireland), shows that:

- There is no evidence that markets with relatively higher price differentials between on-net and off-net calls, or where price differentials are more prevalent, are associated with smaller operators finding it more difficult to gain a share in that market, or finding it more difficult to earn positive returns. Indeed, price differentials may be indicative of competitive mobile markets, rather than an indicator of potential anti-competitive behaviour.

8 The same asymmetry gap existed between O2 and H3GI since the start of the current voluntary agreement and between Meteor and H3GI since July 2011.

9 The impact of mobile termination charges on competition between mobile providers – Frontier Economics, December 2011

- Although there is some evidence of mobile operators advertising their size to (potential) customers, mobile operators with higher market shares do not appear to attract relatively more on-net traffic. In addition, there appears to be no relationship between an operator's market share and its average prices; a finding not consistent with the hypothesis that differentials make it difficult for smaller operators to compete for customers.

- There is no evidence to suggest that higher termination rates lead to less effective competition between mobile operators, with there being no clear relationship between the level of termination rates and the market shares of operators.

Vodafone believe that these conclusions have important consequences for ComReg or any national regulatory and competition authorities. ComReg have concluded that MTRs should be reduced to a level based on (pure) incremental cost, in order to reduce the differential between on-net and off-net prices and so support the development of competition. However in our study, we found no evidence that suggests that a practice of pricing on-net and off-net calls differently puts smaller operators at a competitive disadvantage. Further, we found no evidence that large operators use on-/off net price differential to affect competition for customers. Therefore, national regulators should not use these grounds to reduce MTRs without other clear evidence to support their hypotheses. The purpose of this study was not to consider the appropriate level for termination charges (for example, the merits of pure-LRIC versus LRIC-plus). It was to demonstrate that any cost benefit analysis undertaken by ComReg or other regulators to examine the impact of different termination rates should consider with care the potential impact of changes in MTRs on retail markets. Any regulatory remedies that seek to reduce differentials should therefore only be considered after detailed analysis, including of their potential wider impacts on the market.

In Vodafone's response to ComReg 12/67, it is our intention to provide further information on our findings regarding the levels of MTRs and competition in mobile markets, including details of the methodologies used to produce the findings and support the conclusions.

5.3.3 Effects of current regime on fixed to mobile call traffic

In the previous section, Vodafone examined (and will do so further in our response to ComReg 12/67), whether there is any evidence to support the hypotheses that MTRs set above incremental costs have detrimental effects on the level of competition in mobile markets and are particularly damaging to smaller MSPs. It is Vodafone's contention that the evidence does not support either of these hypotheses.

In 7.26, ComReg states the following in relation to calls from fixed to mobile - *MTRs set above an efficient level of costs can still have important competitive and distributional impacts for fixed operators and smaller mobile operators with large traffic outflows to other more established mobile networks. In this regard, consumers would face inefficient signals on the pricing of on-net mobile calls, off-net mobile to mobile calls and fixed to mobile calls. These effects can lead to increased use of on-net mobile calls (and other services), as well as consumers being deterred from making off-net calls to mobiles, with such facilities being provided by MSPs and FSPs. This could have the effect of distorting competition amongst MSPs and between FSPs and MSPs. <u>In particular [emphasis added], consumer choices would be distorted between mobile and fixed calling services due to differences in the relative retail prices of fixed to mobile and mobile to mobile call services that do not reflect the underlying costs involved in providing MVCT.</u>*

It is ComReg's assertion that the current level of MTRs could distort the signals to customers contemplating making fixed to mobile calls, resulting in a lowering of demand for this call type. In other words, the cost of MTRs is excessive to the extent that its inclusion in the total cost of retail fixed to mobile calls may cause customers to switch to other call types or not make calls at all. Vodafone does not believe that this is the case in the context of the Irish market. We believe for example, that eircom's current high prices for fixed to mobile calls – which are significantly in excess of the MTRs that currently apply to 89% of mobile customers in the state[10] - supports this contention. This can readily be ascertained by reference to the retail prices given for calls to mobile networks in Eircom's current Telecommunications Scheme[11] and for calls to non- Eircom mobile networks included in Eircom's TALK off-peak and TALK weekend phone tariffs.[12]

Using both of these sources and based on Vodafone's estimate of eircom's relevant internal costs, we believe that the cost of mobile termination typically represents less than 20% of the total cost to an eircom fixed customer making a call to the Vodafone network at either peak or off-peak times. (It would be very similar for calls to O2 and Meteor\eMobile who have the same average termination rate). By far the largest element of the total call price is eircom's gross margin which we estimate to be in a range between 55% and 60% (or 11.6c and 12.9c in absolute terms) depending on the customer's tariff and the time of day. Our calculation looked at two examples of calls from an eircom fixed customer to Vodafone, the first based on the cost of a peak call to Vodafone as given in the eircom Telecommunication Scheme, the second an out-of-bundle off-peak call to Vodafone from a customer using eircom TALK off-peak.

In our response to ComReg 12/67, it is Vodafone's intention to provide more detailed analysis in relation to the costs of call mobiles from fixed networks. We believe that there is little evidence of any material level of pass-through by eircom of the significant reductions in MTR that have already take place and very little to support the contention that future falls in MTR will lead to an increase in the volumes of fixed to mobile calls. The Analysys Mason report (section 4.3.1) recognises that incomplete pass-through may occur in fixed-to-mobile calling. The report does suggest the possibility that any economic rents earned from this practice may be channelled back to customers as lower subscription charges or reduced charges from other types of calls rather than retained as profit. This may well be the situation in Ireland (we do not know since ComReg has not done the analysis for this consultation.) If it can be shown that eircom has not channelled the economic rents from MTR reductions back to customers but has retained them as profit (or has carried out some combination of both), ComReg cannot at the same time argue the case for reducing mobile termination rates to purely incremental cost on the basis that the price of fixed to fixed to mobile calls will fall and that usage will increase.

5.3.4 Inefficiencies paid for by excess MTRs

In 7.29, ComReg refers to the possibility that excessive MTRs may reduce MSPs incentives to innovate and increase efficiencies as inefficient MTRs are paid for by competitors and in turn, by consumers. ComReg offers no evidence to support such a contention in the case of the Irish or any other market. In 7.13, ComReg made a similar claim, namely that absent competition, excessive pricing can reduce the

10 Customers of Vodafone, O2, Meteor,eMobile – source: ComReg Quarterly report Q1 2012

11 http://www.eircom.ie/bveircom/pdf/Part2.1.pdf

12 https://secure.eircom.net/talktime/talktime-evolution-flow?execution=e2s1

incentive to innovate (or hinder innovation) and to reduce costs since the cost of such inefficiencies can be recovered through MTRs. It posited that the lack of IP interconnection may be indicative of this lack of efficiency and innovation. Vodafone rebutted that argument in our response above principally on the basis that even in the fixed call termination market where termination rates have been set on a LRIC basis for a number of years, there has as yet been no move to IP interconnection. There are many other issues to be resolved at an industry level including the establishment of an appropriate regulatory framework. It is simplistic and simply incorrect to imply that the excessive levels of termination rates are the barrier preventing IP interconnection becoming a reality.

Vodafone would add another observation. It is ComReg's view that a move to an efficient MTR level (pure LRIC in this case) would reduce the risks of inefficiencies and enhance innovation. To support this view, it is incumbent on ComReg to show how the delta between a LRIC+ rate and a pure LRIC rate could drive such a change in reality. ComReg would also have to demonstrate why the continuous and dramatic falls in MTR since H2 2007 (particularly for the three largest MSPs) have not achieved the posited efficiency and innovation effects which the deltas between LRIC+ to pure LRIC apparently will.

Vodafone's termination rate has fallen from an average of 9.59cpm in H2 2007 to the current 3.68cpm over the period (a fall of 5.57c or 58%). In revenue terms, Vodafone have seen a drop from **[Redacted]** for H2 2007 (i.e. the last 6 months of 2007) to **[Redacted]** for the last six-month period reported to ComReg (October 2011 to March 2012), a fall of **[Redacted]** in equivalent 6 month periods. ComReg does not explain why revenue impacts of this magnitude would not be sufficient to stimulate cost efficiencies and innovation on mobile networks while the smaller revenue effects (in absolute terms) which would follow a requirement to move to pure LRIC costing apparently would.

5.3.5 Asymmetries dampening investment

In 7.30, ComReg is correct to point out that the MTR asymmetries – not objectively justified – could create cross-subsidies and could dampen investment incentives. However, the level of net revenue transfers arising from asymmetries **[Redacted]** while material, are relatively small when compared to the revenue reductions arising from regulated MTR reductions. For example, Vodafone terminating revenue for the period April 2007 until March 2008 was **[Redacted]**, the amount for period April 2011 till March 2012 was **[Redacted]**. Revenue reductions of this magnitude arising directly from MTR reductions are likely to have more negative effects on investment incentives than asymmetries. However, this issue is not addressed by ComReg except to the extent that operators would have known large scale reductions were coming and should have accounted for them in any planned investment decisions. Undoubtedly, operators did account for the revenue reductions from falling MTRs and adjusted investment decisions accordingly.

5.3.6 MTR levels and retail tariffs

In 7.31, ComReg states that excessive MTRs may restrict pricing innovation by reducing the amount of inclusive minutes in any network bundles or unlimited call offerings. While the costs of out-payments are important when designing tariff bundles, of more importance is the competitive dynamics in the mobile market in Ireland and the desire to retain existing customers and acquire new ones. One indicator of extent of competition is the universal practice by MSPs to charge a single retail rate for calls to all other mobile networks, regardless of the MTR of the terminating operator. This practice continues even with the current average TMI rate at 12.55cpm because any attempt to introduce differential retail pricing will lead to a loss of customers who value the single rate and could move to competing MSPs in order to get it.

6 Vodafone's views on Remedies

(a) Access;

Vodafone believes there is no longer any need for a specific access remedies as this is already effectively mandated by a combination of the Access Regulations and Numbering conventions – please see section 4.1 above.

(b) Transparency;

Vodafone agrees in principal with ComReg's proposed Transparency remedies for all designated MSPs. However, Vodafone would have a concern with ComReg's intention to impose an obligation of a 35 day notice period for amendments to MVCT prices (11.5.1 of the Draft Decision Instrument). **[Redacted]** ComReg has not shown any reason why the price change notification terms of these agreements are not sufficient and require additional regulation. Regular MVCT changes have been a feature of the wholesale market for a number of years and Vodafone is not aware of any issues or problems arising in this context.

(c) Non-Discrimination;

Vodafone agrees with ComReg's proposed Non-discrimination remedies for all designated MSPs.

(d) Price Control and Cost Accounting; and

Vodafone will respond on this remedy in our response to ComReg 12/67. We agree with ComReg that - depending on the outcome of the Remedies consultation – there may be no requirement to introduce a Cost Account obligation.

(e) Accounting Separation.

Vodafone agrees with ComReg's assertion that, subject to the implementation of any appropriate price control, there is no current requirement to introduce an Accounting Separation Remedy.

7 Vodafone's views on the Regulatory Impact Assessment

Vodafone agree that of the three scenarios considered by ComReg in the RIA, option B represents the most reasonable, balanced and proportionate approach. However, while agreeing that a cost orientation obligation is appropriate for all designated MSPs, Vodafone would not agree that a move to pure LRIC pricing is either proportionate or justified. As ComReg acknowledges, endeavouring to assess what the state of competition or other market conditions would look like in the absence of regulation is difficult since all but the smallest MSPs (TMI and Lycamobile) have been subject to regulation in the period under review (i.e. since mid-2007). Because of this, ComReg has had to rely on theoretical or conceptual competition problems and\or exploitative practices that may exist in a hypothetical market in the presence of 'excessive' MTRs. However, real-life analysis of many of these conceptual problems (such as the effect of 'excessive' MTR on competition between MSPs or on the fixed to mobile calls market), show that the theoretical adverse outcomes predicted have not occurred. Vodafone has also posited above that an access remedy may not be required as the obligation is already covered in Access Regulations and SI.

The driver for a move from the current form of regulation (i.e. voluntary glidepaths tending towards a removal of asymmetries) is clearly the EC Recommendation on Termination Rates. However, this cannot and does not negate, or detract from, ComReg's obligation to exercise its regulatory functions in respect of the setting of price controls in pursuit of the obligations laid down in the Community Regulatory Framework, and in the Relevant SIs. In light of the fact that the obligations imposed on ComReg by the CRF ultimately take precedence over non-binding guidance from the Commission about the adoption of a particular cost methodology, ComReg must be satisfied that its proposed course of action in relation to the imposition of remedies is compatible with these primary duties.

8 Vodafone views on the Decision Instrument
Vodafone

Vodafone has no comments to make on the draft Decision Instrument except that in relation to the notice period for MVCT price changes as addressed in section 6 (a) above.

9 Answers to specific ComReg questions

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

Please see Vodafone's response to section 1 above.

Q. 2 Do you agree that ComReg has identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Please see Vodafone's response to section 1 above.

Q. 3 Do you agree with ComReg's preliminary assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets?

Please see Vodafone's response to section 2 above.

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

Vodafone agrees with ComReg's conclusion on the geographic market assessment. Regarding ComReg's conclusions on the relevant retail product assessment, please see our response in section 2 above.

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

Please see our response in section 3 above.

Q. 6 Do you agree that ComReg's proposed definition of the Relevant MVCT Markets adequately identifies the economic bottleneck represented by mobile voice call termination? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Please see our response in section 3 above.

Q. 7 Do you agree with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Vodafone agrees with ComReg's geographic market assessment.

Q. 8 Do you agree with ComReg's assessment of SMP and the associated proposed SMP designations above? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Please see our response in section 4 above.

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

Please see our response in section 5 above.

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

Please see our response in section 6 (a) above.

Q. 11 Do you agree with ComReg's approach to imposing non-discrimination remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual evidence supporting your views.

Please see our response in section 6 (c) above.

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

Please see our response in section 6 (b) above.

Q. 13 Do you agree with ComReg's approach on price control and cost accounting remedies? Are there other approaches that would address the identified competition problems? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments

Please see our response in section 6 (d) and section (e) above.