



Commission for
Communications Regulation

Market Review

Voice Call Termination on Individual Mobile Networks

Response to Consultation and Decision Notice

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Redacted Information

Please note that this is a non-confidential version of the Response to Consultation and Decision. Certain information within the Response to Consultation and Decision has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol ✂.

Contents

1	Introduction.....	2
	Overview.....	2
	Legal basis and regulatory framework.....	4
	Consultation with the Competition Authority and the European Commission.....	5
	Approach to finalising its review of the Relevant MVCT Markets.....	6
	Structure of the Decision.....	8
2	Executive Summary	10
	Overview.....	10
	Definition of the Relevant MVCT Markets and Competition Assessment.....	12
	Imposition of Regulatory Obligations on MSPs with SMP.....	13
3	Retail Mobile Market Trends.....	15
	Position set out in the MVCT Consultation	15
	Respondents' Views.....	18
	ComReg's Assessment of Respondents' Views.....	20
4	Assessment of the Retail Market.....	28
	Overview.....	28
	Factors affecting the impact of retail consumer behaviour in Relevant MVCT Markets....	29
	Assessing the impact of retail consumer behaviour on the Relevant MVCT Markets	47
5	Definition of Wholesale Relevant MVCT Markets	65
	Position set out in the MVCT Consultation	65
	Respondents' Views.....	69
	ComReg's Assessment of Respondents' Views.....	75
	ComReg's Position on the Definition of the Relevant MVCT Markets	83
6	Competition Analysis and Assessment of Significant Market Power	85
	Position set out in the MVCT Consultation	85
	Respondents' Views.....	90
	ComReg's Assessment of Respondents' Views.....	100
	ComReg's Position on SMP Assessments.....	126
7	Competition Problems and Impacts on Competition and Consumers.....	129
	Position set out in the MVCT Consultation	129
	Respondents' Views.....	130
	ComReg's Assessment of Respondents' Views.....	138
	ComReg's Position on Competition Problems and Impacts on Competition and Consumers	152
8	Remedies	153
	Overview of Approach to Remedies in the MVCT Consultation.....	153
	Imposition of Access Remedies.....	154
	Imposition of Non-Discrimination Remedies.....	162
	Imposition of Transparency Remedies	167
	Imposition of Price Control and Cost Accounting Remedies.....	171

ComReg's Position	178
Imposition of Accounting Separation Remedies	179
Overall Conclusions on Remedies in the Relevant MVCT Markets	181
9 Regulatory Impact Assessment	183
Position set out in the MVCT Consultation	183
Respondents' Views	186
ComReg's Assessment or Respondents' Views	188
ComReg's Position	192
10 Next Steps	193
Appendix A Legal and Regulatory Background	194
Appendix B Consultation with the Competition Authority	197
Appendix C European Commission Comments	200
Appendix D Updated Retail Trends Analysis	209
Appendix E Retail Mobile Pricing Structures	216
Appendix F Updated Interconnection and Termination Traffic Information	228
Appendix G Other SMP Criteria Considered	237
Appendix H Final Regulatory Impact Assessment	239
Appendix I Final Decision Instrument	255
Appendix J Glossary of Frequently Used Terms	267

1 Introduction

Overview

- 1.1 Mobile Voice Call Termination (**'MVCT'**) is a wholesale interconnection service offered by a Mobile Service Provider (**'MSP'**) to other MSPs or fixed service providers (**'FSP(s)'**), essentially involving the completion of the incoming leg of a voice call to a mobile subscriber. It is the MVCT service that allows retail subscribers, whose calls originate on the networks of MSPs or FSPs, the ability to connect to and call retail subscribers of other MSPs.
- 1.2 Consistent with the Commission for Communication's (**'ComReg'**) regulatory role to review certain electronic communications markets, this Response to Consultation and Decision¹ (the **'Decision'**) presents ComReg's final views on its analysis of the wholesale markets for the provision of MVCT on individual mobile networks (the **'Relevant MVCT Market(s)'**).
- 1.3 In so doing, the Decision considers the 8 submissions received (individually referred to as a **'Submission'** and collectively as the **'Respondents' Submissions'**²) in response to the initial consultation document entitled "Market Review, Voice Call termination on Individual Mobile Networks, Consultation and Draft Decision, ComReg Document 12/46, May 2012"³ (the **'MVCT Consultation'**). Such Submissions were received from the following respondents (together the **'Respondents'**),
 - Alternative Operators in the Communications Market (**'ALTO'**)
 - Eircom Group, being Eircom Limited and Meteor Mobile Communications Limited (**'Eircom Group'**);
 - Elea Group (**'Elea Group'**)
 - Hutchison 3G Ireland Limited (**'H3GI'**);
 - Lycamobile Ireland Limited (**'Lycamobile'**);
 - Telefónica Ireland Limited (**'O2'**);

¹ Market Review, Voice Call Termination on Individual Mobile Networks, Response to Consultation and Decision, [ComReg Document 12/124](#), Decision Number D11/12, November 2012.

² A non-confidential version of Respondents' Submissions has been published on ComReg's website. See "Market Review: Voice Call Termination on Individual Mobile Networks - Non-confidential submissions received from respondents, [ComReg Document 12/102](#), September 2012.

³The MVCT Consultation is published at <http://www.comreg.ie/fileupload/publications/ComReg1246.pdf>, with the public consultation running for 8 weeks over the period 23 May 2012 to 19 July 2012.

- Tesco Mobile Ireland Limited ('**TMI**')⁴; and
 - Vodafone Ireland Limited ('**Vodafone**');
- 1.4 The Decision, which should be read in conjunction with the analysis and discussion in the MVCT Consultation, now sets out ComReg's findings on the following matters having considered Respondents' Submissions:
- the definition of the Relevant MVCT Markets from both a product and geographic perspective; and
 - on the basis of an assessment of competition within the Relevant MVCT Markets, which MSPs are being designated as having significant market power ('**SMP**'); and
 - the specification and imposition of appropriate wholesale access, pricing and other related remedies on such SMP MSPs in order to address competition problems that have arisen or could arise in these Relevant MVCT Markets, absent regulation.
- 1.5 Further work has been ongoing in relation to the detailed specification of pricing remedies, with ComReg having also separately considered the responses received to the **Separate Pricing Consultation**⁵. ComReg has also issued its decision with respect to such pricing matters ('**Separate Pricing Decision**⁶') in which ComReg has set out its final position regarding the detail of the nature of the cost-orientation to be imposed on those MSPs found by ComReg (in this current MVCT Decision) to have SMP.
- 1.6 ComReg notes that some Respondents raised concerns in relation to the length of the consultation period. In particular, some Respondents considered that in light of the issues raised and the potential market impact of the proposals, a longer period should have been allowed for responses. Furthermore, issues were raised whereby it was considered that the MVCT Consultation and Separate Pricing Consultation should have been effectively run in parallel. ComReg notes these concerns but is satisfied that interested parties were given a reasonable and adequate opportunity to submit their views. ComReg has consulted in line with its statutory obligations and duties and its published consultation procedures.

⁴ ComReg would note that prior to, during and after the closing date for the MVCT Consultation, ComReg received correspondence from TMI (to which it responded) and met with them in relation to matters which have been the subject of the MVCT Consultation. This, in essence, involved TMI restating the views it ultimately expressed in its Submission and, where appropriate, ComReg has considered such in reaching the decisions set out in this Decision.

⁵ Voice Termination Rates in Ireland, Proposed Price Control for Fixed and Mobile Termination Rates, [ComReg Document 12/67](#), June 2012 (the '**Separate Pricing Consultation**').

⁶ Mobile and Fixed Voice Call Termination Rates in Ireland, Response to Consultation and Decision [ComReg Document 12/125](#), and Decision Number D12/12 November 2012 (the '**Separate Pricing Decision**').

Legal basis and regulatory framework

- 1.7 The legal and regulatory framework underpinning the review of the Relevant MVCT Markets was set out in section 1 of the MVCT Consultation⁷ and is set out in Appendix A.
- 1.8 In summary, this market review has been undertaken by ComReg in accordance with the obligation under the **Framework Directive**⁸ (which is transposed by the **Framework Regulations**⁹) that NRAs should analyse and define the Relevant MVCT Markets taking the utmost account of the **2007 Recommendation**¹⁰ (including the **Explanatory Note to the 2007 Recommendation**¹¹) and the **SMP Guidelines**¹².
- 1.9 The European Commission refers in the 2007 Recommendation to the wholesale Relevant MVCT Markets as follows:
- “Voice call termination on individual mobile networks.”*¹³
- 1.10 Overall, in preparing this Decision, ComReg has taken account of its functions and objectives under the **Communications Regulation Acts 2002 to 2011**¹⁴, in addition to requirements under the Framework Regulations and the **Access Regulations**¹⁵. ComReg has taken the utmost account of the 2007 Recommendation and the Explanatory Note to the 2007 Recommendation, the

⁷ See paragraphs 1.11 to 1.18 of the MVCT Consultation.

⁸ Articles 15 and 16 of 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**').

⁹ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the '**Framework Regulations**'). The Framework Regulations transpose the Framework Directive.

¹⁰ 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**').

¹¹ European Commission Staff Working Document, Explanatory Note accompanying the 2007 Recommendation (the '**Explanatory Note to the 2007 Recommendation**'), (C(2007) 5406).

¹² 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**').

¹³ Annex to the 2007 Recommendation, point 7.

¹⁴ Communications Regulation Act 2002 (No. 20 of 2002), as amended by Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) (the '**Communications Regulation Acts 2002 to 2011**').

¹⁵ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the '**Access Regulations**').

SMP Guidelines, the European Commission's **2009 Termination Rate Recommendation**¹⁶ and its associated **Explanatory Note**¹⁷, **2005 Accounting Separation and Cost Accounting Recommendation**¹⁸. ComReg has further taken account of the European Commission's **Notice on Market Definition**¹⁹ and any relevant common positions adopted by **BEREC**²⁰.

- 1.11 ComReg has also had regard to relevant European Commission comments made, pursuant to Article 7 of the Framework Directive, with respect to other National Regulatory Authorities' (**NRAs**) market analyses.

Consultation with the Competition Authority and the European Commission

- 1.12 Pursuant to Regulation 27(1) of the Framework Regulations, ComReg must also carry out an analysis of the relevant markets in accordance, where appropriate, with an agreement with the Competition Authority under section 34 or 47G of the Competition Act 2002 (as amended). ComReg has consulted with the Competition Authority concerning its proposed draft measures arising from its analysis of the Relevant MVCT markets. The Competition Authority issued its opinion (the 'Competition Authority Opinion') to ComReg on 10 October 2012 in which it set out its agreement with ComReg's proposed draft measures. The Competition Authority Opinion is set out in Appendix B.
- 1.13 ComReg is also obliged to make draft measures accessible to the European Commission, BEREC²¹ and the NRAs in other Member States pursuant to Regulation 13(3) of the Framework Regulations. Pursuant to Regulation 13(6) of the Framework Regulations ComReg is then obliged to take utmost account of comments received. In this regard, ComReg notified the European Commission

¹⁶ 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**').

¹⁷ European Commission Staff Working Document accompanying the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the E, C (2009) 3 359 final, SEC(2009) 599 (the '**Explanatory Note to the 2009 Termination Rate Recommendation**').

¹⁸ 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**').

¹⁹ 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.

²⁰ Body of European Regulators for Electronic Communications (**BEREC**) as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

²¹ Body of European Regulators for Electronic Communications (BEREC) as established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

of its draft measures on 12 October 2012²² with the European Commission providing comments²³ on 12 November 2012. A copy of the European Commission's comments is set out in Appendix C (the 'European Commission Comments').

- 1.14 Insofar as the draft measures which are the subject of this Decision are concerned²⁴ (definition of the Relevant MVCT Markets, SMP assessments and designations and the imposition of remedies) the European Commission has fully accepted ComReg's position without comment.
- 1.15 To the extent that the European Commission has provided comments, these relate to matters which are entirely the subject of the detail of the price control obligations as set out in the Separate Pricing Consultation (and as separately notified to the European Commission²⁵) and now subsequently in the Separate Pricing Decision.
- 1.16 ComReg has taken utmost account of the European Commission Comments insofar as they related to matters which are the subject of this Decision and ComReg does not see a reason to materially deviate in its final decision from the draft measures that were notified to the European Commission.

Approach to finalising its review of the Relevant MVCT Markets

- 1.17 ComReg, in reaching the conclusions set out in this Decision, has carefully considered the views expressed in Respondents' Submissions. In the sections that follow, ComReg presents its analysis in the following general manner:
- **Position set out in the MVCT Consultation:** Firstly, ComReg summarises the key issues highlighted by ComReg in its analysis as set out in the MVCT Consultation.
 - **Respondents' Views:** Secondly, ComReg highlights the key issues raised in Respondents' Submissions.
 - **ComReg's Assessment of Respondents' Views:** Building on the analysis set out in the MVCT Consultation, ComReg considers and presents its views

²² Note that the draft measures were notified on 11 October 2012 but were registered as being received by the European Commission on the 12 October 2012.

²³ Note that the European Commission's Comments relate to two separate but near parallel notifications by ComReg. Firstly, a notification registered under case reference IE/2012/1371 which deals with the draft measures that were the subject of the MVCT Consultation and this Decision. Secondly, a notification registered under case references IE/2012/1372 and IE/2012/1373 which deal with the notification of pricing remedies draft measures that were the subject of the Separate Price Control Consultation (and the associated decision).

²⁴ European Commission case reference IE/2012/1371.

²⁵ European Commission case references IE/2012/1372 and IE/2012/1373.

on Respondents' comments, where appropriate updating the presentation of information and data to reflect to most up-to-date position.

- **ComReg's Position:** Having regard to the consideration above, ComReg presents its final position on issues, where appropriate.

- 1.18 The analysis and final views as set out in this Decision should also be read in conjunction with the analysis set out in the MVCT Consultation. In this regard, rather than repeating the detailed analysis in the MVCT Consultation, in a number of places throughout this Decision ComReg cross references to it, as appropriate.
- 1.19 As was the case in the MVCT Consultation²⁶, in reaching the conclusions set out in this Decision, ComReg has obtained qualitative and quantitative information from Service Providers through a series of formal and informal information requests, as well as meetings with industry participants. Further information has also been provided to ComReg on foot of additional formal information requests²⁷. These statutory information requests are collectively referred to throughout this Decision (unless identified individually) as the '**Statutory Information Requests**'.
- 1.20 Information obtained from these abovementioned sources supplements information which is also provided to ComReg in the performance of its regular operations (e.g. for the Irish Communications Market Quarterly Key Data Reports²⁸ ('**Quarterly Key Data Report(s)**'). ComReg has also reviewed, in detail, the experience of regulating Relevant MVCT Markets in other jurisdictions and has carefully analysed guidance available from the European Commission, BEREC and other relevant commentators before arriving at its final views in this Decision.
- 1.21 As noted in the MVCT Consultation, ComReg has also carried out market research to inform its understanding of consumer and business attitudes/behaviours in the retail mobile market, a copy of which was set out in Appendix A of the MVCT Consultation²⁹ (the '**2011 Market Research**'). As noted at that time, ComReg is mindful that surveys, while a useful practical means of gathering information on consumers' preferences/behaviours, need to be

²⁶ See paragraphs 1.21 and 4.8 of the MVCT Consultation. ComReg issued further information requests to Service Providers pursuant to statutory information requests issued to service providers pursuant to its powers under section 13D of the Communications Regulation Acts 2002 to 2011 in November 2010, July 2011 and October 2011.

²⁷ ComReg issued further information requests to Service Providers pursuant to its powers under section 13D of the Communications Regulation Acts 2002 to 2011 in August 2012 (the '**August 2012 Statutory Information Requests**').

²⁸ The most recent publication of the Irish Communications Market Quarterly Key Data Report is [ComReg Document 12/101](#), 13 September 2012, and covers the period Q2 2012.

²⁹ See Appendix A of the MVCT Consultation which is available at <http://www.comreg.ie/fileupload/publications/ComReg1246a.pdf>.

interpreted with care and the stated preferences of survey respondents can overestimate what they will actually do in practice.

Structure of the Decision

1.22 The remainder of this Decision is structured as follows:

- Section 2:** This section contains the executive summary of the key issues and ComReg's ultimate approach for the regulation of the Relevant MVCT Markets.
- Section 3:** This section provides an updated overview of the main trends that have occurred in the retail mobile market over the last four years.
- Section 4:** This section provides an assessment of the structural and behavioural characteristics in the retail mobile and other markets, with a view to informing the subsequent definition and Significant Market Power (SMP) analysis of the wholesale Relevant MVCT Markets.
- Section 5:** This section defines the wholesale Relevant MVCT Markets from both a product and a geographic perspective.
- Section 6:** This section assesses competition within each of the defined Relevant MVCT Markets and identifies those MSPs operating within such markets that hold a position of SMP.
- Section 7:** This section sets out the main competition problems that could, absent regulation, occur within the Relevant MVCT Markets, along with the likely consequential impacts on competition and consumers.
- Section 8:** This section sets out regulatory remedies to address competition problems, namely, in the form of obligations that are now imposed on MSPs having SMP.
- Section 9:** This section sets out ComReg's consideration of the Regulatory Impact Assessment ('RIA') of the approaches to regulation in the Relevant MVCT Markets.
- Section 10:** This section sets out the next steps that will follow the publication of this Decision.
- Appendix A:** This appendix sets out the legal and regulatory framework underpinning ComReg's analysis of the Relevant MVCT Markets.
- Appendix B:** This appendix contains a copy of a letter from the Competition Authority setting out its Opinion that it is in agreement with ComReg's draft findings with respect to the definition of and assessment of competition within the Relevant MVCT Markets.

Appendix C: This appendix sets out a copy of the European Commission's comments concerning ComReg's notified draft measures with respect to ComReg's analysis of the Relevant MVCT Markets.

Appendix D: This appendix updates the retail trends set out in section 3 of the MVCT Consultation which are also discussed in section 3 of this Decision.

Appendix E: This section updates the non-exhaustive overview of the key characteristics of retail price plans offered by MSPs and FSPs that was presented in Appendix B of the MVCT Consultation.

Appendix F: In the context of the assessment of countervailing buyer power in section 6, this appendix contains updated information with respect to MSPs' interconnection arrangements and the termination traffic flows between such MSPs and MVCT purchasers.

Appendix G: This section provides an analysis of a range of criteria considered other than those set out in section 6 of the MVCT Consultation and this Decision when assessing whether and MSP has SMP.

Appendix H: This section sets out ComReg's final RIA of the approaches to regulation in the Relevant MVCT Markets, having considered Respondents' views in section 9 of this Decision.

Appendix I: This section sets out the final Decision Instrument which specifies, in legal terms, the nature of the regulatory remedies to be imposed and as discussed in section 8 of this Decision, having regard to the market definition and competition assessment in sections 5 and 6.

Appendix J: This section contains a glossary of the most frequently used terms within the Decision.

1.23 We have also noted earlier that this is a non-confidential version of the Decision. Certain information within the Decision has been redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol ✂. Should an individual Service Provider wish to review its own redacted information, it should make a request for such in writing to ComReg (to jonathan.duggan@comreg.ie) and indicate the specific paragraph numbers within which the redacted information being requested is contained. ComReg will consider requests for redacted information and will, subject to the protection of commercially sensitive and confidential information, respond accordingly.

2 Executive Summary

Overview

- 2.1 There are currently 8 mobile service providers (**'MSPs'**) operating within the retail mobile market, four of whom do so on the basis of having their own mobile networks, with the remaining MSPs doing so on the basis of having commercially negotiated Mobile Virtual Network Operator (**'MVNO'**) access to other MSPs' networks. Together, these MSPs provide mobile voice services to just over 4.9 million subscribers³⁰ in Ireland.
- 2.1 MSPs and fixed service providers (**'FSPs'**) (together **'Service Providers'**) provide the ability for their subscribers to make calls to subscribers of other Service Providers. Similarly, MSPs' subscribers also expect to be able to receive calls from subscribers of other Service Providers. To facilitate the ability for subscribers to make and receive calls, at the wholesale level, one Service Provider is responsible for originating calls whereas the other Service Provider receiving the call is responsible for terminating it.
- 2.2 In the context of facilitating subscribers' ability to make calls to mobiles, the originating Service Provider, through commercial interconnection arrangements, will pay a wholesale charge to the terminating MSP, known as a Mobile Termination Rate (**'MTR'**). This MTR is to allow the terminating MSP to recover its relevant costs associated with the provision of the mobile voice call termination (**'MVCT'**) service, essentially being the terminating MSP's completion of the incoming leg of a call to its mobile subscriber.
- 2.3 ComReg is required to review certain electronic communications markets in order to decide whether regulation is appropriate and, if so, what form such regulation should take. The European Commission has established that the wholesale MVCT market is susceptible to *ex ante* regulation and, having considered Respondents' views, this Decision presents ComReg's position on its analysis of the wholesale markets for the provision of MVCT on individual mobile networks (the **'Relevant MVCT Market(s)'**).
- 2.4 Following previous analyses of Relevant MVCT Markets in Ireland in 2004/2005 and 2008, certain MSPs have been subject to wholesale regulation, notably Hutchison 3G Ireland, Meteor, O2 and Vodafone. Other MSPs such as Blueface, Postfone, TMI and Lycamobile (all of which are MVNOs) have not, to date been subject to regulation, Having regard to developments since those previous reviews, ComReg has, following the publication of its MVCT Consultation, now completed its analysis to assess whether regulation of MVCT provided by such MSPs continues to be warranted and whether it needs to be extended, for the first time, to other MVNO MSPs.

³⁰ As at Q2 2012.

- 2.5 Having considered these matters in the MVCT Consultation and further considering the issues on foot of the receipt of Respondents' Submissions, this Decision sets out ComReg's final views on the definition of the Relevant MVCT Markets; identifies those MSPs that have significant market power ('**SMP**') in such markets; identifies competition and consumer impacts that could arise as a consequence of such an SMP position; and imposes proportionate regulatory obligations on SMP MSPs in order to address these impacts.
- 2.6 ComReg's position is that each of Hutchison 3G Ireland Limited, Meteor Mobile Communications Limited, Telefónica Ireland Limited, Lycamobile Ireland Limited, Tesco Mobile Ireland Limited and Vodafone Ireland Limited has SMP in the Relevant MVCT Markets within which they operate (together the '**SMP MSPs**').
- 2.7 Amongst the main competition problems arising in the Relevant MVCT Markets is the ability for an SMP MSP, by virtue of its market power, to set its wholesale MTRs above the competitive level. At the retail level, because of what is known as the Calling Party Pays ('CPP') principle, the subscriber making the call to a mobile subscriber bears the entire cost of the call, i.e. the subscriber receiving the call does not pay for it. As MTRs feed into the retail costs of making 'off-network' calls to mobiles (and potentially other services), whether from a fixed line or mobile phone, they ultimately feed into retail prices charged by other Service Providers for making 'off-network' calls to mobiles.
- 2.8 Because of the CPP principle, the subscriber receiving the call is not typically sensitive to the MTR set by its MSP (as the MTR is paid for by the originating Service Provider). This, coupled with above efficient cost MTRs can ultimately lead to distortions in competition between MSPs or indeed between MSPs and FSPs, as such above efficient cost MTRs effectively raise the costs (or reduce the profitability) of rival Service Providers with whom the terminating MSP is, to a greater or lesser extent, in competition.
- 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 efficient 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.
- 2.10 While ComReg is imposing specified obligations in detail in this Decision with respect to access, transparency and non-discrimination remedies, it is, within this Decision, imposing a price control obligation of cost orientation in principle. A Separate Pricing Consultation issued in June 2012 which considered the type of

cost orientation obligation that should be imposed. On foot of the consideration of Respondents' views to this Separate Pricing Consultation, a Separate Pricing Decision has been issued which further specifies the detailed nature of the cost orientation obligation now being imposed in this Decision, taking utmost account of the European Commission's 2009 Termination Rate Recommendation.

2.11 In view of the above overview, the main issues set out in this Decision, upon which ComReg has now finalising its position, are further summarised below.

Definition of the Relevant MVCT Markets and Competition Assessment

2.12 Prior to assessing whether a MSP has SMP, ComReg must first define the wholesale Relevant MVCT Markets. In this regard, ComReg has, as a first step, carried out an assessment of retail markets, principally to examine whether any retail consumer behaviour, including whether effective retail substitutes for a call to a mobile exist, is likely to constrain an MSP in setting its MTRs above the competitive level. Similar to the retail market assessment, the subsequent analysis of the Relevant MVCT Markets considers whether there are any wholesale products or services which might be considered by a Service Provider as an effective substitute for MVCT, taking account of demand-side and supply-side considerations.

2.13 It is ComReg's position, having considered Respondents' views, that neither retail nor wholesale constraints are likely to be effective in preventing a MSP who supplies MVCT from setting its MTRs above the efficient level that would occur in a competitive market outcome. As a consequence of this and having considered a range of factors, including Respondents' views, ComReg has defined six separate national Relevant MVCT Markets, in particular, by reference to characteristics related to the allocation to MSPs of mobile numbers (used by subscribers and key to the routing of the final leg of an inbound call to a subscriber's mobile) and the MSP's ability to set the MTR.

2.14 Having regard to the proposed approach on market definition above, it is ComReg's position that the following separate Relevant MVCT Markets exist:

- Wholesale MVCT supplied by Hutchison 3G Ireland Limited;
- Wholesale MVCT supplied by Lycamobile Ireland Limited;
- Wholesale MVCT supplied by Meteor Mobile Communications Limited³¹;
- Wholesale MVCT supplied by Telefónica Ireland Limited³²;
- Wholesale MVCT supplied by Tesco Mobile Ireland Limited;

³¹ Note that this includes MVCT supplied by Meteor Mobile Communications Limited for the purposes of completing calls to Eircom's 'emobile' subscribers.

³² Note that this includes MVCT supplied by Telefónica Ireland Limited for the purposes of completing calls to O2's '48' subscribers.

- Wholesale MVCT supplied by Vodafone Ireland Limited;
- 2.15 Given the definition of the Relevant MVCT Markets, it is ComReg's position that neither Postfone nor Blueface fall within the scope of a Relevant MVCT Market, in particular, given they do not charge, nor do they currently have the ability, to set an MTR. However, were they (or new entrant MSPs) to do so, then ComReg considers that there is a strong case to be made that Postfone and Blueface (or a new entrant) would each constitute a defined Relevant MVCT Market in their own right.
- 2.16 Having considered Respondents' views, ComReg has assessed whether each of the MSPs operating within the above separate Relevant MVCT Markets has SMP, that is, the ability to act, to an appreciable extent, independently of its competitors, customers and consumers. Having considered existing competition, the potential for competition to emerge over the medium term, along with other factors (such as MSPs' MTR pricing behaviour and the strength of any Service Provider's buyer power in its MVCT negotiations with MSPs), it is ComReg's position that each of the Relevant MVCT Markets is not effectively competitive. Consequently, ComReg has designated each of the MSPs operating within each Relevant MVCT Market as having Significant Market Power.

Imposition of Regulatory Obligations on MSPs with SMP

- 2.17 To mitigate identified potential competition problems that could arise from the exercise of market power by SMP MSPs, ComReg has, following consideration of Respondents' views, imposed a range of proportionate *ex ante* regulatory remedies, ultimately designed to ensure the development of effective competition amongst Service Providers, to the ultimate benefit of consumers.
- 2.18 Furthermore, in order to promote regulatory certainty and predictability, and to ensure a non-discriminatory approach to regulation, ComReg has considered it justified to impose the same obligations on all SMP MSPs. In this regard, amongst the obligations that ComReg has now imposed on SMP MSPs are:
- **Access Obligations:** the requirement to provide access to MVCT and associated facilities, and to do so in a fair, reasonable and timely manner; the requirement to negotiate in good faith with Service Providers requesting access to MVCT; the requirement not to withdraw access to facilities already granted; the requirement to grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services.
 - **Non-Discrimination Obligations:** requirements to ensure that other Service Providers being provided with MVCT are not treated differently, for example, with respect to the level of MTRs charged, the quality of service provided and the provision of information concerning MVCT.
 - **Transparency Obligations:** requirements to publish a Reference Interconnect Offer setting out the contractual terms and conditions and technical basis upon which Service Providers can obtain access to MVCT

and associated facilities; requirements to publish MTRs and provide advanced notice of changes to them.

- **Price Control:** requirements that prices for access to MVCT and associated facilities, including MTRs, are cost oriented, with the detailed nature of the specific costing methodology to be adopted in light of the proposed cost orientation obligation having been the subject of the Separate Pricing Consultation, with a decision on this being published in parallel with this Decision. i.e., we have imposed cost orientation in principle in this Decision and this has been further specified through the Separate Pricing Decision.

2.19 ComReg has also given consideration to other potential obligations relating to maintenance of cost accounting systems and separated accounts and considers that such remedies are not warranted at this time having regard to proportionality grounds and given that the remedies specified above should, if properly applied, address the relevant competition and other concerns.

2.20 In Appendix I, ComReg has set out the Final Decision Instrument which sets out, in legal terms, the various decisions now made in this MVCT Decision, including the regulatory obligations that MSPs designated as having Significant Market Power will have to comply with, once this Decision Instrument comes into effect³³.

³³ The effective date is 28 days from the date of its publication and notification to each SMP Mobile Service Provider.

3 Retail Mobile Market Trends

3.1 In section 3 of the MVCT Consultation, ComReg described the main developments in retail mobile markets since the previous analyses of the wholesale MVCT markets and invited interested parties' views on them. ComReg considers below the responses to the issues raised and, as appropriate, sets out its final position on such matters.

Position set out in the MVCT Consultation

Structure of the Retail Mobile Market

3.2 In the MVCT Consultation³⁴ ComReg examined the structure of the retail mobile market, in particular noting that there are four mobile network operators³⁵ (MNOs) in Ireland, namely, Hutchison 3G Ireland Limited³⁶ ('**H3GI**'), Meteor Mobile Communications Limited³⁷ ('**Meteor**'), Telefónica Ireland Limited³⁸ ('**O2**') and Vodafone Ireland Limited³⁹ ('**Vodafone**'), each of which provide both prepay and billpay retail mobile services (which include voice, SMS (text messaging) and data services) to both business and consumer segments. It was noted that each of these MNOs is:

- effectively providing national voice coverage⁴⁰ using 2G and/or 3G spectrum;
- directly interconnected with a number of other authorised undertakings;
- providing voice services to their customers using a Primary Allocation/Reservation⁴¹ of mobile numbers⁴² allocated to them by ComReg, commencing with the number range '08X YYYYYYYY'.

3.3 ComReg also noted that there are a number of mobile virtual network operators ('**MVNOs**'⁴³) in Ireland which have entered into commercial wholesale network

³⁴ See paragraphs 3.2 to 3.14 of the MVCT Consultation.

³⁵ By MNOs we refer to those mobile service providers which own and operate radio access networks for the purpose of the provision of retail mobile phone and other services.

³⁶ See www.threeireland.ie.

³⁷ See www.meteor.ie. For the avoidance of doubt Meteor includes the 'emobile' brand.

³⁸ See www.o2.ie. For the avoidance of doubt, O2 includes its brand '48'.

³⁹ See www.vodafone.ie.

⁴⁰ It was noted that in some cases, MSPs national coverage (in particular, H3GI and Meteor) has been achieved through entering into national roaming agreements with other MNOs.

⁴¹ As defined under the National Numbering Conventions, Version 7.0, [ComReg Document 11/17](#), as may be amended from time to time. In summary it provides for the direct allocation or reservation of numbers by ComReg to individual network operators, service providers or users.

⁴² A mobile number is defined under the National Numbering Conventions (currently version 7.0, [ComReg Document 11/17](#)) as "a number from the national numbering scheme commencing with the network code 08X, where 'X' can represent any digital character 0-9, except 1".

access arrangements with MNOs which permit them to offer their own branded retail mobile services to customers. Such MVNOs include Tesco Mobile Ireland Limited⁴⁴ ('**TMI**') (providing both prepay and billpay retail mobile services), Lycamobile⁴⁵ Ireland Limited ('**Lycamobile**') (providing a SIM⁴⁶ only service), Postfone Limited⁴⁷ ('**Postfone**') (providing prepay retail mobile services) and Blueface Limited⁴⁸ ('**Blueface**') (providing pre-pay and post-pay mobile services to business customer segments).

- 3.4 These MVNOs either have a Primary Allocation/Reservation or a Secondary Allocation/Reservation⁴⁹ of mobile numbers which are utilised in providing services to their subscribers. The MVCT Consultation also noted⁵⁰ that the nature of the MVNO arrangements differed in terms of the switching infrastructure and interconnection arrangements employed and that TMI and Lycamobile were the only MVNOs charging an MTR.
- 3.5 The retail market shares⁵¹ of the four main MNOs and TMI (the remaining MVNOs' market shares were too small to report) had, in the period Q1 2008 to Q4 2011, remained relatively stable.
- 3.6 Lastly, it was noted that in the context of the analysis of the Relevant MVCT Markets, and having regard to the underlying wholesale network and technical arrangements between MSPs described in paragraphs 3.2 to 3.4 above, in identifying the economic bottleneck associated with MVCT, it is important to consider:

⁴³ While it is unnecessary to precisely specify an MVNO definition for the purposes of this Decision, it is useful to note that MVNO arrangements essentially involve a commercial arrangement with an MNO through which the MNO provides call conveyance and other services to the MVNO over its radio access network. The MVNO arrangement can be differentiated according to the nature and level of wholesale network access provided by the host MNO to the MVNO.

⁴⁴ Tesco Mobile Ireland was established through a 50/50 joint venture between Tesco Ireland and O2 Ireland and it has an MVNO arrangement with Liffey Telecom, a wholly owned subsidiary of O2. See www.tescomobile.ie.

⁴⁵ Lycamobile has entered into an MVNO arrangement with O2.

⁴⁶ Subscriber Identity Module ('SIM') being the card inserted into a mobile phone and which contains personal data of the phone user and other details necessary to support the mobile telephony service.

⁴⁷ Postfone has entered into an MVNO arrangement with Vodafone.

⁴⁸ Blueface has entered into a commercial arrangement with X-Mobility Limited which is a Mobile Virtual Network Enabler (MVNE). X-Mobility, in turn has entered into an MVNO arrangement with H3GI which allows it to have its wholesale traffic carried on H3GI's network.

⁴⁹ This is known as a Secondary Allocation/Reservation within the meaning of the National Numbering Conventions, Version 7.0, [ComReg Document No. 11/17](#), as may be amended from time to time. In summary it is the allocation or reservation of numbers to a downstream Undertaking or to an End-User, by an Undertaking to whom a Primary Allocation/Reservation has already been made.

⁵⁰ See paragraphs 3.6 to 3.13 of the MVCT Consultation.

⁵¹ As measured by subscribers.

- the nature of the arrangements governing the control of the final routing of an incoming call to a MSP's subscribers; and
- who sets/controls the MTR associated with the supply of the wholesale MVCT service.

3.7 The questions above were further discussed in section 5 of the MVCT Consultation (and are also discussed in section 5 of this Decision).

Behavioural trends in the Retail Mobile Market

3.8 In the MVCT Consultation⁵², ComReg also set out what it considered were the main behavioural trends which had occurred in the retail mobile market since the conduct of the previous analyses of the mobile termination markets. In this regard, the following was noted:

- **Growth in mobile phone subscriptions:** Mobile subscriptions (excluding mobile broadband subscriptions), while having declined somewhat for a time, at Q4 2011 had broadly returned to the same levels experienced at Q1 2008. It was also noted that at Q4 2011 63% of mobile phone subscriptions were prepaid having fallen from 72% in Q1 2008. Similarly, in Q4 2011 37% of mobile phone subscriptions were billpay, having risen from 28% in Q1 2008.
- **Growth in use of mobile voice services:** The average number of minutes of use ('MoU') by Irish mobile subscribers had grown by 10.8% in the period Q1 2007 to Q4 2011, and stood at 251 minutes.
- **Mobile on-net and off-net traffic trends:** All MSPs had seen an increase in their on-net retail traffic between H2⁵³ 2007 and H2 2011, with a corresponding decrease in off-net traffic over this period. It was noted that the growth in on-net traffic for H3GI and TMI had not been as significant in comparison to other MSPs (Vodafone, Eircom Group Mobile and O2).
- **Switching Trends:** The level of Mobile Number Portability (MNP), being the process according to which subscribers can keep their mobile number when switching MSP, showed that 453,098 numbers had been ported in 2011 and was somewhat indicative of the level of switching in the retail mobile market. However, the 2011 Market Research suggested that switching amongst consumers and SMEs was somewhat lower than suggested by the MNP figures and also suggested that such consumers/SMEs had been with their current MSP for 3 or more years. Overall, this tended to suggest that customer switching could be concentrated amongst a group of mobile subscribers rather than the broader mobile subscriber base.
- **Retail Price Plans:** The MVCT Consultation noted that (based on an analysis set out in Appendix B of the MVCT Consultation) the structure of

⁵² See paragraphs 3.16 to 3.57 of the MVCT Consultation.

⁵³ Throughout the MVCT Consultation and this Decision, 'H' refers to half year. For example, H1 refers to the half year ending 30 June, whereas H2 refers to the half year ending 31 December.

retail mobile price plans had changed somewhat since the previous reviews of the MVCT markets, with the key trends including the widespread emergence of features such as billpay plans' inclusive minutes capable of being used for calls to any network; the cost of off-net calls within prepay and billpay plans tending not to vary by network called; and the prevalence of free on-net calls amongst prepay and billpay plans. Features of fixed to mobile price plans were also noted and included differential pricing for calls to fixed and mobile networks; differential pricing depending on which mobile network was being called; and evidence of some inclusion within fixed line call bundles of inclusive (but low in number) minutes for calls to mobiles;

- **Other Developments:** Other developments noted in the MVCT Consultation included a decline in the overall volume of fixed line originated voice minutes and an increase in volume of mobile originated voice minutes over the period Q1 2007 to Q4 2011; a decline in fixed line ownership of around 6%⁵⁴, potentially somewhat due to economic conditions which also may reflect the decline in the volume of fixed line originated minutes; growth in smartphone usage and associated applications. The future assignment of spectrum rights of use in the 800MHz, 900MHz and 1800MHz spectrum bands through a forthcoming auction were also highlighted and that this would likely facilitate the development of advanced wireless technologies thereby enabling further advanced mobile services/applications.

3.9 Having outlined the above structural and behavioural trends in the retail mobile market, ComReg then asked⁵⁵ the following question.

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.

Respondents' Views

3.10 Of the **eight responses** received on this question, **five Respondents agreed** (ALTO, H3GI, Eircom Group, O2, and Vodafone) with ComReg's overview of the main relevant developments in the retail market and, in some cases suggested additional developments and/or supplemented the analysis of developments already identified.

3.11 **One Respondent disagreed** (Elea Group) with one specific aspect of the analysis, namely, the manner in which it suggested that ComReg had presented

⁵⁴ When accounting for growth in the subscribers to the telephony service provided by UPC on its cable network.

⁵⁵ See Question 1 on page 35 of the MVCT Consultation.

the analysis with respect to the decline in fixed line ownership⁵⁶. **Two Respondents did not express detailed views** (Lycamobile and TMI), although the latter indicated this should not be taken as acceptance or agreement with ComReg's presentation of the issues. Given that it is a new entrant, Lycamobile indicated that it is not in a position to identify the main developments in the retail mobile market since the previous reviews of the Relevant MVCT markets.

- 3.12 Rather than commenting in detail on all of the main developments identified in the MVCT Consultation, Respondents' views primarily focussed on the issues which can be generally captured under the broad themes identified below.
- Respondents' comments on other developments which they considered should have been noted; and
 - Respondents' comments on reasons for the decline in fixed line ownership;
- 3.13 A summary of the issues arising within these themes is set out below.

Other developments could have been noted

- 3.14 Three Respondents (ALTO, O2 and Vodafone), while agreeing that ComReg had identified the main structural and behavioural trends in the retail market since the previous reviews of the wholesale MVCT markets, also referred to other developments that they considered could have been noted.
- 3.15 ALTO and O2 presented similar views and, while agreeing that the MVCT Consultation provided a good overview of the main developments in the retail mobile market, also referred to a number of other developments that could have been noted, including
- the decline in mobile Average Revenue Per User (ARPU) over the period, with the suggestion being that this was as a consequence of increasing competition;
 - the growth in the use of mobile data services and the decline in voice was being driven by substitution from mobile voice services to VoIP and/or the substitution of voice calls with social media services (all of which are dependent on data usage); and
 - the investment challenge faced by the mobile sector given the upcoming spectrum action process and the consequential need to support increased data usage and the evolution to LTE products.
- 3.16 ALTO and O2 also encouraged ComReg to offer prospective views on the evolution of the retail mobile market and to link those to the objectives of the regulatory interventions imposed.
- 3.17 Vodafone referred to the growth in over the top SMS applications (such as 'WhatsApp' etc), as well as the increasing use of VoIP services and indicated that further acceleration in the growth of such services in the short to medium term

⁵⁶ See paragraph 3.47 to 3.50 of the MVCT Consultation.

could result in effective substitutes for MVCT becoming increasingly available (in the context of these services placing an indirect constraint on the supply of MVCT). In view of the potential for such developments, Vodafone urged ComReg to undertake its next analysis of the Relevant MVCT Markets within 3 years of the completion of the current analysis in order to ensure that regulation remained appropriate. O2 also suggested that a VoIP was an effective substitute for a call to a mobile.

- 3.18 Vodafone, in agreeing that ComReg had identified the main trends in the mobile market since the last review, noted that larger inclusive bundles, any network voice and text offers and free on-net offers and add-ons have become ubiquitous since the previous market review. Vodafone also considered that Eircom's participation in both the fixed and mobile market gives Eircom 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.

The decline in fixed-line ownership

- 3.19 Two Respondents (Elea Group and Eircom Group) commented on the discussion in the MVCT Consultation regarding the decline in fixed line ownership and the suggestion therein that this could be due to a number of reasons such as an increase in the number of business failures, competition from other platforms and the cut backs in personal expenditure habits.
- 3.20 The Elea Group considered that the decline in fixed line ownership could be due to mobile and fixed services being substitutable and, therefore, in the same retail product market. In suggesting this was the case, it had carried out an analysis which, in its view, suggested a strong correlation between the decline in mobile pricing and the decline in the volume of minutes of use on fixed networks.
- 3.21 Eircom Group suggested that, apart from the issues already identified in the MVCT Consultation, above cost MTRs had also contributed to the decline in fixed line ownership and fixed line originated minutes, principally by distorting competition between FSPs and MSPs, as well as amongst larger and smaller MSPs.

ComReg's Assessment of Respondents' Views

- 3.22 ComReg has updated the trends in the main developments originally presented in section 3 of the MVCT Consultation, with this now set out in Appendix D of this Decision (the '**Updated Retail Trends Analysis**').
- 3.23 In general, apart from that which is noted below, the Updated Retail Trends Analysis shows no major changes to those trends identified in the MVCT Consultation, such that they would materially impact upon the analysis set out in the MVCT Consultation or in this Decision. However, the following is noted:

- Both H3GI and TMI have seen increases in the percentage of their on-net traffic (with a corresponding reduction in off-net traffic).

3.24 In formulating its final view on the main developments that have occurred in the retail mobile market (and other markets impacted by MVCT), ComReg considers below the issues raised by Respondents, having regard to the Updated Retail Trends Analysis.

Other developments that should have been noted

ARPU Decline

3.25 ComReg has considered the comments by ALTO and O2 in paragraph 3.15 above and would note that ARPU is a function of both the price of mobile services (which can include a range of mobile services provided) and the level of usage of such mobile services. In the Quarterly Key Data Report⁵⁷ it was noted that

“In Q2 2012 mobile ARPU⁵⁸ was €29 per month, similar to last quarter but down from €30 in Q2 2011. This decline is in line with a general downward trend in ARPU across Western European countries. Based on data from Analysys Mason’s Telecom Matrix for Western European countries, monthly mobile ARPU fell by 4% in Q1 2012 compared to Q1 2011.”

3.26 However, it should be noted that the ComReg ARPU figures above includes revenues associated with non-voice domestic voice services such as international roaming and data services. However, in order to illustrate a consistent, ‘voice-only’ ARPU trend (voice services are most relevant to MVCT consumed and sold by MSPs given it is an input to the retail cost of a call), ComReg uses data collected by the market intelligence company Analysys Mason⁵⁹ which uses a different ARPU definition⁶⁰ than that employed in the Quarterly Key Data Report above.

⁵⁷ See paragraph 4.6 of the Quarterly Key Data Report.

⁵⁸ For the purpose of the Quarterly Key Data Report, ARPU is calculated by dividing the total service revenue from sales to customers for the preceding 3 months by the mid-term installed base (sum of the opening and closing customer bases for the quarterly period divided by two). Total service revenue are revenues accruing to network operators from traffic, subscription and access fees, roaming, interconnect, mobile data and related value-added services. Excludes handsets and other equipment sales, business professional services (where possible), and extraordinary income. Data revenues are revenues from mobile data services as recognized by the carrier (i.e. excluding content provider revenue); voice service revenue includes network operators' revenue from subscription and access, voice traffic and roaming- both inbound and outbound.

⁵⁹ <http://www.analysismason.com>.

⁶⁰ Average revenue generated by voice services per user is calculated as the average total monthly mobile voice service revenue (including interconnection charges) divided by average active subscribers in the quarter. ARPU figures for the total market are weighted averages.

3.27 In the eight year period shown in Figure 1 below (Q1 2004 – Q1 2012), ‘voice-only’ ARPU for Irish consumers fell by 49%, yet Irish ‘voice-only’ ARPU is still approximately 32% higher than the European average figure estimated by Analysys Mason in its Telecoms Market Matrix database⁶¹.

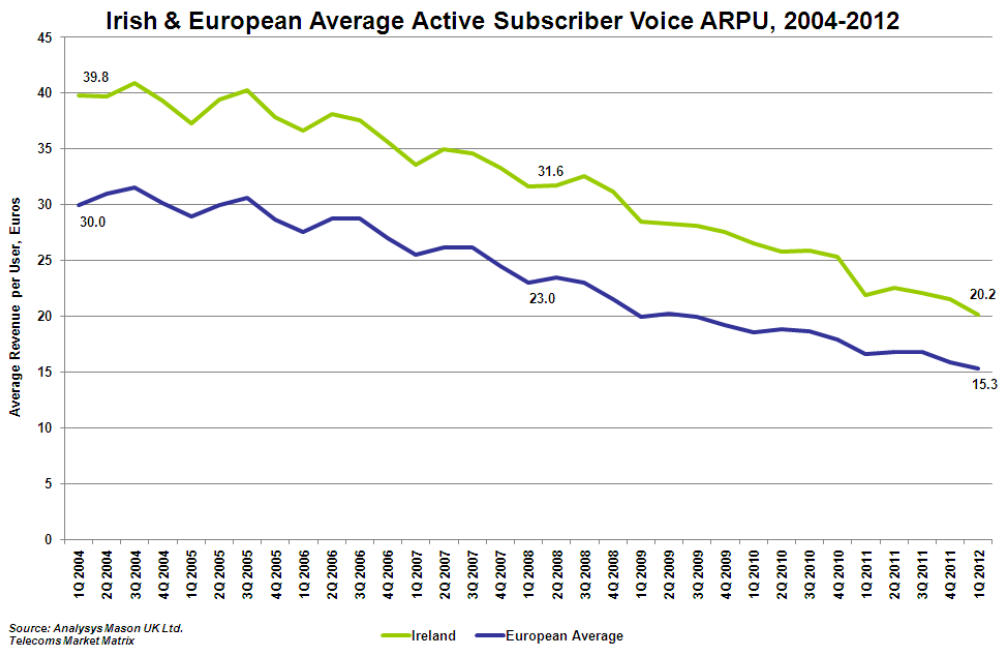


Figure 1: Voice only ARPUs in Ireland and the European Average

3.28 Insofar as Irish voice services are concerned, as shown in Appendix D⁶² in the period Q1 2007 to Q2 2012, MoU by Irish mobile phone customers grew by 13.9%, and, at Q2 2012 stood at 255 minutes of usage per month.

3.29 ComReg considers that the decline in Irish ARPU figures (whether voice only or broader ARPU) have been generally in line with European trends and is likely to be due to a number of factors, including the decline in economic conditions in Ireland (reduced consumer spending), lower priced mobile plans, increased sales of bundled products (combining mobile with fixed calls and sometimes broadband) and reductions in roaming and mobile termination rates, among others.

Prospective views on the evolution of the retail mobile market

3.30 With regard to O2’s comment that ComReg should offer prospective views on the evolution of the retail mobile market and to link those to the objectives of the regulatory interventions imposed, ComReg would note that the nature of MVCT is such that it impacts not only the retail mobile market but also fixed markets, given

⁶¹ See www.analysismason.com.

⁶² See paragraph D.5 in Appendix D.

that MVCT is an input to the cost base for retail charges for calls to mobiles from both fixed line and mobile phones.

- 3.31 While it is difficult to be absolutely definitive about the effects of the impact of wholesale regulatory interventions on retail markets (for example, the degree to which and how MTR reductions are passed on by MVCT purchasers to their subscribers is ultimately outside ComReg's direct control as is the structure of retail pricing plans), throughout the MVCT Consultation (and subsequently in this Decision⁶³) ComReg has explained the reasons for its interventions in the Relevant MVCT Markets and its expectation as to why they will benefit competition and ultimately consumers.
- 3.32 This includes that by ensuring that MTRs are cost based, it thereby minimises the possibility of competitive distortions occurring amongst MSPs (in particular larger and smaller MSPs or those with asymmetric traffic flows) and between MSPs and FSPs; ensuring consumer choices are not distorted between the consumption of mobile and fixed calling services due to differences in the relative price of mobile to mobile and fixed to mobile services (that are not reflective of underlying cost differences). As has been acknowledged by some MSPs⁶⁴ to ComReg, reductions in MTRs to date (as well as asymmetries in MTRs) have also facilitated MSPs in offering any network price plans whereby the cost of calling a particular mobile subscriber does not differ based on the called party's MSP. The MVCT Consultation Paper also acknowledged the relationship between retail pricing structures and MTRs.

Investment challenge faced by MSPs

- 3.33 With regard to ALTO's and O2's similar comments regarding the investment challenge faced by the mobile sector, ComReg would note that this was acknowledged in the MVCT Consultation⁶⁵ in the discussion on the auction of the 800MHz, 900MHz and 1800MHz radio spectrum bands and how this would facilitate the deployment of advanced wireless technologies (which would have to be rolled-out by MSPs).
- 3.34 ComReg collects data from most MSPs annually regarding their investments⁶⁶. On average, over the last three years, the four MNOs (H3GI, Meteor, O2 and

⁶³ See section 7 of this Decision.

⁶⁴ MSPs' responses to Statutory Information Requests and Respondents' Submissions to the MVCT Consultation.

⁶⁵ See paragraph 3.57 of the MVCT Consultation.

⁶⁶ Investments for this purpose are defined as "Total value of tangible investments by mobile operators is defined as the total gross investment during the preceding year i.e. over the last 12 months, (in national currency, in millions) in tangible assets in mobile telecommunication networks (excluding licences) undertaken by mobile operators in the Irish market, i.e. investments acquiring property (land and building) and plant (e.g. switching equipment, transmission equipment, office machinery and motor vehicles)."

Vodafone) combined have invested approximately⁶⁷ [§] million annually. This peaked in 2010 with a combined value of tangible investments worth [§] million, up [§] on the previous year. In 2011 investment levels dropped back to those seen in 2009 with the four MNOs combined investing approximately [§] million. Such investments primarily relate to that which is necessary to support MSPs retail services.

- 3.35 In considering the appropriate form of *ex ante* regulation on a forward-looking basis, in the MVCT Consultation⁶⁸ and this Decision ComReg has, in line with its statutory objectives under the Communications regulation Acts 2002 to 2011, considered the promotion of competition and investment in the communications sector as a whole, i.e., in both the fixed and mobile markets, as well the furtherance of the internal market objectives, and the protection of the interests of all users of electronic communications services (both fixed and mobile). As noted in the MVCT Consultation, ComReg indicated that it would further factor in investment impacts in the context of the specification of the detailed nature of the cost-orientation obligation, a matter which was subsequently considered in the Separate Pricing Consultation and the Separate Pricing Decision.

VoIP Services as a substitute for a call to a mobile

- 3.36 ComReg notes Vodafone's and O2's comments on this issue. Whether VoIP and social media services are an effective substitute for a call to a mobile is discussed in section 4⁶⁹ of this Decision. For the reasons set out therein, within the period considered for this market analysis, ComReg does not consider that a VoIP to VoIP call or the use of social media services are or would be an effective demand side substitute for a call to a mobile or that it would place an indirect constraint on a Hypothetical Monopolist (HM) supplier of MVCT such that it would prevent it from increasing its MTR by a small but significant amount above the level that would pertain in a competitive market outcome.

The decline in fixed line ownership

Fixed and mobile services are substitutes

- 3.37 In relation to the comments made by Elea Group at paragraph 3.20 above, ComReg does not consider that fixed line and mobile services are in the same market. As noted in the MVCT Consultation⁷⁰ and later in this Decision⁷¹, there may be some substitutability between these services but this is not likely to make

⁶⁷ Based on figures supplied by MSPs to ComReg on an annual basis (as part of their submissions to ComReg's Quarterly Key Data Report).

⁶⁸ See sections 7 to 9 of the MVCT Consultation dealing with competition problems, remedies and the Regulatory Impact Assessment of ComReg's proposed approach. Within these sections, ComReg considered the impact of regulation on a range of parameters, including investment, competition and consumers.

⁶⁹ See paragraphs 4.117 to 4.120 of this Decision.

⁷⁰ See paragraphs 4.141 to 4.146 of the MVCT Consultation.

⁷¹ See paragraph 4.150 of this Decision.

- them sufficiently close substitutes. In this regard, ComReg highlighted that the functional product characteristics of fixed and mobile services are notably different, including with respect to mobility and the benefits this brings in terms of consumers' likely desire for immediacy of contact. i.e., a mobile subscriber is contactable irrespective of its location whereas a fixed line subscriber is only contactable when at a premises.
- 3.38 Market research conducted for the fixed voice call termination (FVCT) market analysis (the '**FVCT Market Research**'⁷²) also revealed that most survey respondents with a fixed phone believe fixed voice charges are lower than charges for calls from mobile phones for most call categories⁷³. The FVCT Market Research also demonstrated⁷⁴ a preference amongst survey respondents for F2F and M2M communications respectively⁷⁵. i.e., fixed line phones tend to be used predominantly to call other fixed subscribers, whereas mobile phones are used to predominantly contact other mobile subscribers. For those categories of calls which were made from their home, survey respondents were asked⁷⁶ what their preferred telecommunications service (fixed line or mobile) would be for making each call type. 77% and 80% of survey respondents indicated their preference for using their fixed voice service for calling other local and national fixed numbers respectively. Whereas, 78% of survey respondents indicated a preference for using a mobile phone for calling other on-net mobile numbers, while 62% indicated a preference for using a mobile phone for calling off-net mobile numbers. These survey results are informative in that they suggest that consumers use their fixed line and mobile phones for different calling purposes.
- 3.39 ComReg would also note that in its ongoing analysis of the retail narrowband access market⁷⁷ it has set out the preliminary view that, having considered relevant demand-side factors including functionality, price and consumer usage, as well as relevant supply-side factors, ComReg's preliminary view is that mobile access is not a sufficiently effective substitute for fixed voice access.
- 3.40 In relation to the correlation analysis conducted by Elea Group, ComReg would note that if fixed and mobile services were to be close substitutes, the price of one product (say fixed) should constrain the price of another product (say mobile)

⁷² Market Research prepared by The Research Perspective Ltd. on behalf of Com Reg, August 2012 <http://www.comreg.ie/fileupload/publications/ComReg1296a.pdf>.

⁷³ See slide 36 of the FVCT Market Research.

⁷⁴ See slide 25 of the FVCT Market Research.

⁷⁵ According to the FVCT Market Research, "Consumers exhibit clear selection of mobile-to-mobile and fixed line-to-fixed line calls over mobile-to-fixed and fixed-to-mobile."

⁷⁶ See slide 26 of the FVCT Market Research

⁷⁷ Market Review – Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non Residential Customers, ComReg Document 12/117, October 2012. See paragraphs 4.169 to 4.202.

and vice versa. Thus, in theory, the prices of both services prices should move together. However, this does not appear to have been the case with fixed and mobile prices. As mobile prices were decreasing, the prices of fixed calls were stable or even increasing. Indeed, based on monthly data provided to ComReg by the Central Statistics Office⁷⁸, since 2003 the mobile telephony element of the Consumer Price Index has fallen by [REDACTED] while the fixed telephony element of the Consumer Price Index has increased by [REDACTED]⁷⁹. Similarly with quantities, as fixed line originated traffic was decreasing, mobile traffic was increasing. This traffic trend is observed in Figure D which illustrates the 79% growth in the volume of mobile voice traffic between 2006 and 2012 and the decline of fixed voice traffic volumes of 43% over the same period⁸⁰. Presumably, this is why Elea Group used inverse quantities for mobile minutes.

- 3.41 ComReg would also note that the mobile ARPU and Average Revenue Per Minute (ARPM) figures used⁸¹ by the Elea Group (which it uses throughout in its price-minute volume correlation analysis) include revenues which are not directly associated with mobile voice telephony services⁸² and are based on revenues which would include revenues from data services, international roaming etc..

Above cost MTRs had led to the decline in fixed line services

- 3.42 In paragraph 3.21 above, it was noted that Eircom Group suggested that above cost MTRs had contributed to the decline in fixed line ownership by distorting competition between FSPs and MSPs.
- 3.43 As was noted in the MVCT Consultation⁸³, ComReg has recognised that above cost MTRs can give rise to distortion in and distributive effects on consumers' use of mobile and fixed services, and in how such services are used in calling mobile subscribers. ComReg notes Eircom Group's views, and while above cost MTRs are likely to be one of a number of contributory factors leading to the decline in fixed line ownership, as set out in the MVCT Consultation, it is also likely to be as a result of a combination of other factors such as an increase in competition from other platforms (such as UPC) and fixed line disconnections due to business failures. As was noted in the MVCT Consultation⁸⁴, the decline in fixed line ownership may also somewhat explain the fall in the volume of fixed line originated voice minutes to mobiles and other domestic fixed lines.

⁷⁸ <http://www.cso.ie/en/index.html>. These figures show a range (i.e. difference between the decline of mobile prices and the increase in fixed telephony prices) of greater than 25%.

⁷⁹ Figures correct as at period ending August 2012.

⁸⁰ ComReg presumes this is why Elea Group used inverse quantities for mobile minutes in its Submission (see Table 1 of Elea Submission).

⁸¹ See Table 1 to Table 3 and Appendix 1 of the Elea Submission.

⁸² See discussion at paragraph 3.26 above.

⁸³ See, for example, paragraphs 7.25 to 7.28 of the MVCT Consultation Paper.

⁸⁴ See paragraph 3.50 of the MVCT Consultation.

ComReg's Position

- 3.44 In the MVCT Consultation ComReg's set out its preliminary views on the main structural and behavioural trends that have occurred in the retail mobile market (and fixed line markets) since the previous reviews of the MVCT markets. Having considered Respondents' views in paragraphs 3.22 to 3.43, ComReg considers that its presentation and analysis of such developments (coupled with the additional analysis in this Decision) and their relevance to the subsequent analysis of the Relevant MVCT Markets remains valid.
- 3.45 For the avoidance of doubt, it is ComReg's view that VoIP is not likely to be an effective substitute for a call to a mobile or that fixed and mobile telephony services are likely to be sufficiently substitutable such that they would form part of the same retail product market. However, given comments were raised by Respondents in response to the issues set out in Section 3 of the MVCT Consultation these are addressed here. However, as such matters are discussed later in this Decision, ComReg does not conclude on these issues in this section.

4 Assessment of the Retail Market

Overview

- 4.1 In section 4 of the MVCT Consultation ComReg described some of the main structural and behavioural characteristics in the retail mobile market, with a view to informing the subsequent definition and SMP analysis of each of the wholesale Relevant MVCT Markets. ComReg briefly describes below the position set out in the MVCT Consultation and then goes on to consider Respondents' views before setting out its position on such matters.
- 4.2 The MVCT Consultation noted⁸⁵ that while the objective is to define and analyse competition within the wholesale Relevant MVCT Markets, given wholesale demand for MVCT is largely derived from retail demand associated with the ability to make calls to mobile subscribers, it is necessary to consider the dynamics of the retail market and whether and how these dynamics impact at the wholesale level. In particular, it is necessary to consider whether any effective demand-side and supply-side substitutes exist (at both the retail and wholesale level as appropriate) such that they would directly or indirectly constrain the MTR/price setting behaviour of a hypothetical monopolist⁸⁶ ('HM') supplier of MVCT. In this regard, ComReg considered whether any effective retail demand-side substitutes exist such that they might effectively constrain MVCT pricing behaviour at the wholesale level.
- 4.3 In setting out its analysis and views on consumer behaviour, ComReg noted that it had relied on data from a number of sources, including attitudinal surveys of retail consumer and SME users of mobile services; information provided by Service Providers in response to detailed statutory information requests⁸⁷; information provided to ComReg in subsequent follow-up correspondence and discussions in relation to statutory information requests; information provided to ComReg by Service Providers for the purpose of ComReg's publication of its Key Quarterly Data Reports; and other information in the public domain.
- 4.4 To inform its consideration of the retail consumer impacts on the wholesale Relevant MVCT Markets, ComReg also commissioned The Research

⁸⁵ See paragraph 42 and 5.3 of the MVCT Consultation.

⁸⁶ This is assessed through what is known as the Small but Significant Non-transitory Increase in Price (SSNIP) test and provides a conceptual framework within which to identify the existence of close substitutes. The SSNIP test examines whether, in response to a permanent price increase in the range of 5% to 10% by a hypothetical monopolist (HM) of a given product set, sufficient customers would switch to readily available alternative substitute products such that it would render the price increase unprofitable. If the level of switching to alternative products is sufficient to render the price increase unprofitable (say because of the resulting loss of sales) then the alternative products are included in the relevant product market.

⁸⁷ ComReg issued a series of information requests to Service Providers pursuant to its powers under section 13D of the Communications Regulation Acts 2002 to 2011. Such requests were issued in November 2010, July 2011 and October 2011.

Perspective⁸⁸ to carry out two separate pieces of research in the Irish retail mobile market. The research field work took place in March/April 2011 (the ‘**2011 Market Research**’) with the results being presented to ComReg in June 2011. These were set out in Appendix A of the MVCT Consultation.

- 4.5 The MVCT Consultation then considered the following two issues, namely,
- What factors are likely to affect the impact of retail consumer behaviour in Relevant MVCT Markets?; and
 - What is the likely impact of retail consumer behaviour on the Relevant MVCT Markets?
- 4.6 ComReg’s preliminary views on the above issues, as set out in the MVCT Consultation, are summarised below, along with Respondents’ views on this. ComReg then goes on to set out its consideration of these views before then setting out its final position.

Factors affecting the impact of retail consumer behaviour in Relevant MVCT Markets

Position set out in the MVCT Consultation

- 4.7 In the MVCT Consultation⁸⁹ ComReg identified a range of factors which were likely to affect how retail consumer behaviour might impact on the Relevant MVCT Market(s). These factors were particularly discussed in the context of the degree to which calling parties and called parties would
- be responsive to changes in retail prices which stem from small but significant increases in wholesale MTRs (set by the terminating MSP of the called party); and
 - the degree to which any resultant changes in consumer behaviour might impact on the ability of a HM supplier of MVCT to sustain such increases in MTRs.
- i.e., those factors which are likely to affect retail demand-side substitution.
- 4.8 These factors included:
- **Calling Party Pays (‘CPP’) Principle⁹⁰**: In the presence of the CPP Principle⁹¹, given MTRs are reflected in call charges it is the calling party and not the called party (of the terminating MSP) that is mainly impacted by changes in MTRs⁹². The subscribers of the terminating MSP (i.e. the called

⁸⁸ See www.theresearchperspective.com

⁸⁹ See paragraphs 4.9 to 4.89 of the MVCT Consultation.

⁹⁰ See paragraphs 4.14 to 4.23 of the MVCT Consultation.

⁹¹ The CPP principle effective means that it is the party making the call (rather than the receiving party) that pays for the entire cost of the call.

⁹² Although, the called party could also be impacted if it results in fewer people calling them.

parties) have no direct visibility of MTRs and are unlikely, therefore, to react significantly to changes in such MTRs. Given the strong likelihood of an absence of direct MTR price signals to called party subscribers (of the terminating MSP), ComReg's preliminary view was that this would likely impact the ability and the degree to which the terminating MSP can profitably sustain an increase its MTRs above the competitive level. This was because the impact of any increase in wholesale MTRs (subject to the degree to which it is being passed through into retail prices) is felt by the subscriber of the originating Service Provider (i.e. the Calling Party) and not the called party. However it was noted that calling party subscribers could, depending on a number of factors, react to MTR driven retail price increases in a number of ways. For example, substitution to an alternative means of communication etc.).

- **Mobile Pricing Structures⁹³**: The MVCT Consultation noted that the ability for calling parties to react to retail price increases resulting from an increase in MTRs by particular MSPs will likely be influenced by retail pricing structures, including factors such as specific or unlimited amounts of minutes being included in individual subscribers' price plans; free or reduced rate on-net calling; the absence of any price distinctions for calling off-net mobiles or fixed lines; the cost of calls for both prepay and billpay customers not tending to vary based on the time of day called; and there being differences in the cost of calling a mobile from a fixed line based on the identity of the called party's MSP.
- **Levels of Network Awareness⁹⁴**: The MVCT Consultation noted that in order to be able to react to retail price increases stemming from an increase in MTRs (say by reducing consumption or switching to alternative forms of communication), the called party would need to be able to identify the called party's MSP (which levies the MTR). The called party, if it was concerned about the cost to the calling party, could also react to increases in MTRs by its MSP were it able to identify the calling party's MSP. Having regard to the 2011 Market Research and the existence of Mobile Number Portability (MNP)⁹⁵, ComReg's preliminary view was that both consumers and SMEs tended to have relatively low levels of awareness of the calling party's MSP and the called party's MSP.
- **Awareness of cost⁹⁶**: The MVCT Consultation noted that in order for the calling party to be in a position to react to changes in the retail price for calls to subscribers on specific mobile networks or to react to those retail price

⁹³ See paragraphs 4.24 to 4.29 of the MVCT Consultation.

⁹⁴ See paragraphs 4.30 to 4.52 of the MVCT Consultation.

⁹⁵ MNP is the facility that allows consumers to retain their entire mobile number when they switch MSP.

⁹⁶ See paragraphs 4.53 to 4.62 of the MVCT Consultation.

increases stemming from an increase in wholesale MTRs, they would also need to be aware of the retail call costs, including the costs associated with making an off-net call to subscriber of a particular MSP (who levies the MTR). Having regard to the 2011 Market Research and other identified factors, ComReg's preliminary view was that there were likely to be low general levels of awareness of the cost of making calls amongst both consumers and SMEs. It was considered that the low level of awareness of cost, rather than suggesting cost is not important to consumers/SMEs, may be somewhat related to retail mobile call pricing structures as, in circumstances where prices for on-net and/or off-net calls tended not to differ (or are free) or vary by time of day, it may lessen the degree of importance that consumers attach to call cost awareness. It also appeared to ComReg that consumers and SMEs had a general level of awareness of the differences in cost in making on-net and off-net calls from their mobiles, as well as the cost of making calls from their fixed line phones to mobiles and other landlines.

Sensitivity to Cost⁹⁷: The MVCT Consultation noted that while cost of making calls is likely to be one of the most important factors for subscribers when selecting an MSP, subscriber sensitivities to cost will undoubtedly differ based on individual preferences, calling patterns and the costs arising under particular retail price plans. Subscriber sensitivities to cost may also differ across time. It was noted that in order for the called party or the calling party to be in a position to react to any retail price increases generally or from any retail price increases stemming from the pass through of a wholesale SSNIP in MVCT by a particular MSP to subscribers, consumers/SMEs would need to be aware of the retail call costs, be aware of the called party's or calling party's MSP (as appropriate) and be sufficiently concerned about cost such that it warrants some change in behaviour. Having regard to the 2011 Market Research, ComReg's preliminary view was that consumers and SMEs were least concerned about the cost of on-net mobile calls, and most concerned about the cost of calling international and premium rate numbers. ComReg's preliminary view was that consumers and SMEs have low levels of concern for the cost faced by the calling party and that the level of any consequential behavioural change in the treatment of such calls is not likely to be significant.

- 4.9 Having identified and assessed the above behaviours and characteristics, ComReg asked⁹⁸ the following questions.

⁹⁷ See paragraphs 4.63 to 4.89 of the MVCT Consultation.

⁹⁸ See Questions 2 and 3 on page 63 of the MVCT Consultation.

Question 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.

Question 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.

Respondents' Views on Relevant Consumer Behaviours and Market Characteristics

4.10 Given the overlap of issues raised by Respondents with respect to Question 2 and Question 3 above⁹⁹, ComReg has presented the main views of Respondents' on these issues together, in particular:

- In paragraphs 4.11 to 4.24 below we summarise Respondents' views on whether ComReg had identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets; and
- In paragraphs 4.25 to 4.38 below we summarise Respondents' views on whether they agreed 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.

Whether the relevant retail consumer/SME behaviours and retail market characteristics had been identified

4.11 **Seven Respondents expressed views**¹⁰⁰ on whether ComReg had identified the most relevant retail consumer/SME behaviours and retail market characteristics that are of most relevance to the analysis of the MVCT Market (Question 2 above). **Six Respondents broadly agreed** (ALTO, H3GI, Lycamobile, Eircom Group, O2, and Vodafone) with ComReg's analysis while **one Respondent disagreed** (TMI). In some cases, Respondents suggested other behaviours and characteristics and/or supplemented the analysis presented by ComReg.

⁹⁹ See paragraph 4.9 above.

¹⁰⁰ Other than Question 1 (in section 3), Eircom Group did not comment on any of the remaining questions in the MVCT Consultation.

4.12 Respondents' views primarily focussed on the issues which can be generally captured under the broad themes identified below.

- Issues related to ComReg's approach to identifying the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets; and
- Various issues concerning the assessment of network awareness, cost awareness and cost sensitivity; and
- Suggestions that ComReg had failed to adequately define the retail market; and
- Additional issues not directly relevant to the assessment of the Retail Market.

4.13 Respondents' views under the above themes are summarised below.

Approach to identifying relevant retail consumer behaviours and market characteristics

4.14 Two Respondents raised issues with ComReg's approach to identifying the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets.

4.15 O2, while broadly agreeing with the retail consumer/SME behaviours and retail market characteristics identified, noted that the CPP principle was an important factor in the analysis of the Relevant MVCT Markets and in determining that call termination is a bottleneck. However, it stated that ComReg should have examined what the impact of retail behaviour might have been in circumstances where alternative pricing approaches such as wholesale 'Bill and Keep' (B&K)¹⁰¹ arrangements and retail 'called party pays' arrangements were to be in place.

4.16 ALTO and O2 also agreed that low awareness of the mobile network called was a direct consequence of mobile number portability (MNP). However, they individually expressed the view that, given mobile number portability arose as a consequence of a regulatory decision, it would have been more appropriate for ComReg to have effectively discounted actual or potential existence of MNP in assessing network awareness and its impact in defining the Relevant MVCT Markets.

Network Awareness, Cost Awareness and Cost Sensitivity

4.17 4 Respondents commented (with varying degrees of detail) on retail consumers' network awareness, cost awareness and cost sensitivity issues and the impact of these on the definition of the Relevant MVCT Markets.

4.18 Eircom Group agreed that ComReg had identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets, in particular that the CPP principle creates a

¹⁰¹ Under a B&K arrangement call termination rates are effectively set to zero, with originating Service Providers not having to pay the terminating Service Provider for call termination services.

disjoin between the MSP (and its subscriber) levying the MTR and the subscriber of the Service Provider paying the MTR. Eircom Group also agreed that the most relevant market characteristics were identified and that none of the identified alternatives to calling a mobile phone were likely to be effective substitutes. Eircom Group also stated that VoIP may have the potential to develop into an effective substitute for a circuit switched voice call but consumer demand for such services is likely to be suppressed by the presence of any-network price plans.

- 4.19 Lycamobile, while agreeing with the analysis in the MVCT Consultation, noted that it offered a pre-paid SIM only retail proposition and that its typical customer seeks to make outbound international calls and messages. In view of this and contrary to ComReg's preliminary view in the MVCT Consultation, Lycamobile considered that its subscribers typically have a high level of network awareness, cost awareness and cost sensitivity when making an international call. In case of national calls, Lycamobile considered that its subscriber base had a high to medium level of cost awareness and cost sensitivity and high network awareness due to Lycamobile on-net promotions.
- 4.20 O2 noted that the consumer behaviours identified in the MVCT consultation were not unexpected and had been evident in previous studies in other markets, reports and research published by ComReg. It therefore questioned the benefit of undertaking the 2011 Market Research, including on cost grounds. O2 also noted that low awareness of the cost of individual calls is not unexpected given its view that consumers are more concerned with overall monthly costs. It also noted that such low awareness was despite a range of information being available on operator websites, monthly bills and ComReg websites.
- 4.21 Vodafone considered that most retail mobile subscribers are highly sensitive to the cost of making calls, particularly in minimising expenditure while maximising the economic value of their retail packages. It noted that its own market research shows that the cost of calls is the number one reason why customers leave their network. It further suggested that price sensitivities can differ amongst billpay and prepay consumers, as well as between on-net and off-net calls (including to landlines), all of which influence a subscriber's choice of price plan. Vodafone also agreed that retail mobile subscribers do not appear to be highly sensitive to the costs faced by people when calling them. However, it noted that this may not be the case for subscribers that are part of the same interest of closed user group (e.g. family or friends) who, by extension, may implicitly consider the cost faced by the calling party.
- 4.22 Vodafone also agreed that retail mobile subscribers do not appear to be highly sensitive to the costs faced by people when calling them. However, it noted that this may not be the case for subscribers that are part of the same interest of closed user group (e.g. family or friends) who, by extension, may implicitly consider the cost faced by the calling party.

ComReg's alleged failure to adequately define the retail market

4.23 TMI did not specifically comment on the behaviours and characteristics identified in the MVCT Consultation. However, TMI considered that the MVCT Consultation had failed to consider other relevant factors, although its comments were principally directed at an alleged failure by ComReg to adequately define the retail market and the purported consequences on consumers and competition arising from TMI potentially being designated as having SMP in the Relevant MVCT Market and the imposition of regulatory obligations upon them. It further highlighted the risk that recent or small incumbents would be forced to exit the market, while potential new entrants could be deterred from entry or expansion. TMI suggested that ComReg had not correctly defined the retail market.

Additional Issues not of direct relevance to assessment of the retail market

4.24 The Eircom Group also highlighted SMS termination market issues based on its experience in seeking to negotiate lower SMS termination rates with other MSPs. It considered, therefore, that SMS termination exhibited many of the competition problems and consumer impacts identified in the Relevant MVCT Markets and urged ComReg to review this wholesale market.

Whether ComReg's assessment of the potential for certain retail consumer behaviours and retail market characteristics to impact on the Relevant MVCT Markets is agreeable

4.25 In paragraphs 4.11 to 4.24 above, we set out Respondents' views on whether ComReg had identified the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets. We now set out below the views of Respondents as to whether they agreed with ComReg's assessment of the potential for such behaviours/characteristics to impact on the Relevant MVCT Markets.

4.26 **Seven Respondents expressed views** on ComReg's preliminary assessment of the potential for the identified retail consumer behaviours and retail market characteristics to impact the Relevant MVCT Markets. **Four Respondents broadly agreed or did not disagree** (ALTO, Eircom Group, O2, and Vodafone) with ComReg's preliminary assessment, in some cases, suggesting additional developments and/or supplemented the analysis presented by ComReg.

4.27 **One Respondent partially agreed** (Lycamobile) with ComReg's preliminary assessment but, in referring to the particular circumstances of its typical retail subscriber base, Lycamobile noted that its subscribers generally had a high propensity to make calls to international destinations, were aware of the network being called, were aware of the cost of making such calls and were sensitive to the cost of calling.

4.28 **Two Respondents disagreed** (H3GI and TMI) with ComReg's preliminary assessment. H3GI considered that ComReg's analysis had relied too significantly on the 2011 Market Research and it did not provide a sound basis for regulation over the next two to three years. H3GI also indicated that it would expect ComReg to conduct further surveys to ensure the survey results were

representative. TMI did not specifically comment on ComReg's assessment of these retail consumer behaviours and retail market characteristics in terms of their potential to impact the Relevant MVCT Markets, but repeated its views as expressed in relation to the previous Question 2, which were principally directed at an alleged failure by ComReg to adequately define the retail market and the purported consequences on consumers and competition arising from the potential designation of TMI with SMP and the imposition of regulatory obligations upon them.

4.29 Respondents' views on Question 3 primarily focussed on issues which can be generally captured under the broad themes identified below.

- Issues related to network awareness, mobile pricing structures and cost sensitivity;
- The robustness of the 2011 Market Research and ComReg's reliance on it; and
- Suggestions that ComReg had failed to adequately define the retail market;

4.30 Respondents' views expressed under the above themes are summarised below.

Network awareness, mobile pricing structures and cost sensitivity

4.31 Five Respondents (Eircom Group, Lycamobile, O2 and Vodafone) provided comments on issues related to network awareness, mobile pricing structures and cost sensitivity.

4.32 Eircom Group made a number of comments, although it agreed with ComReg's overall analysis. As regards price, it indicated that 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. It also noted that given the prevalence of any network price plans and the fact that even if the entire increase in wholesale MTRs (in the context of a SSNIP) were passed through to the retail price, it would represent a very small percentage of the retail price increase, and Eircom Group do not consider any effect on retail consumer behaviour to be sufficient to make such a price increase unprofitable for the terminating MSP.

4.33 Eircom also noted that 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 maintain common off-net price plans.

4.34 As with its response to Question 2¹⁰², Lycamobile referred to its typical retail subscriber base noting that its subscribers generally had a high propensity to make calls to international destinations and were, therefore, aware of the network being called, the cost of making such calls and were sensitive to the cost of

¹⁰² See paragraph 4.19 above.

calling. Insofar as outbound international calls from mobiles were concerned, in response to €1c and €3c increases in retail prices (stemming from a SSNIP in MTRs) Lycamobile considered that a higher percentage of Lycamobile consumers (both called and called parties) would switch to alternative communications methods (reducing the number or length of calls, send an SMS etc) than was described in the MVCT Consultation, and thus make MTR increases unprofitable.

- 4.35 O2 questioned the need to conduct the analysis (including on cost grounds) of the retail market in terms of the benefits it brings to the definition of the wholesale Relevant MVCT markets. In so doing, it noted that 'any network, any plan' pricing policies (coupled with the impact of MNP on network awareness) have reduced the impact of off-net/on-net behaviours of consumers. It also considered that low awareness of the cost of calls was not unexpected given consumers are more concerned with overall monthly costs rather than individual call costs. It further noted that such lack of call cost awareness was despite the existence of a range of information available to consumers through operator websites, monthly bills, ComReg websites and other means.
- 4.36 Vodafone expressed the view that 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 on a mobile phone and the other services and to the differences in relative pricing between the different types of platforms. It also referred to 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.), which, in its view, had increased this customer expectation of personalised communications services from mobile devices which could not be matched by the fixed line phones.

The robustness of the 2011 Market Research and ComReg's reliance on it

- 4.37 H3GI considered that ComReg had relied too significantly on the 2011 Market Research and stated that it did not provide a sound basis for regulation over the next two to three years. In so doing, it noted that the terms of reference for the 2011 Market Research were not consulted upon and questioned the statistical significance of the survey given the relevant sample sizes and on the basis that it was over one year old. H3GI also indicated that it would expect ComReg to conduct further surveys to ensure the results were representative.

ComReg's alleged failure to adequately define the market

- 4.38 TMI repeated the views that it expressed in response to Question 2¹⁰³ (in which it did not specifically comment on the behaviours and characteristics identified in the MVCT Consultation and commented on an alleged failure by ComReg to adequately define the retail market and the purported consequences on consumers and competition arising from TMI potentially being designated as having SMP and having regulatory obligations imposed upon it).

¹⁰³ See paragraph 4.23 above.

ComReg's Assessment of Respondents' views on Relevant Consumer Behaviours and Market Characteristics

- 4.39 In paragraphs 4.10 to 4.38 above, ComReg has summarised the key issues raised by Respondents concerning its identification and assessment of those retail consumer behaviours and market characteristics that are likely to be most relevant in terms of their potential to impact the Relevant MVCT Markets (i.e. issues raised in response to Question 2 and Question 3 of the MVCT Consultation).
- 4.40 ComReg has noted Respondents' views and it sets out below its consideration of the key issues raised which can be categorised according to the following themes (which broadly relate to those themes identified earlier):
- ComReg's approach to identifying the retail consumer/SME behaviours and retail market characteristics that are most relevant to the analysis of the Relevant MVCT Markets;
 - ComReg's purported failure to adequately define the retail market;
 - The robustness of the 2011 Market Research and ComReg's reliance on it;
 - Comments concerning the assessment of network awareness, cost awareness, mobile pricing structures and cost sensitivity; and
 - Additional issues not directly relevant to the assessment of the Retail Market.

Approach to identifying relevant retail consumer behaviours and market characteristics

4.41 Two issues are considered here, namely the impact of

- CPP and 'Bill and Keep' (B&K) arrangements; and
- MNP

on the assessment of retail consumer behaviours and market characteristics

CPP and 'Bill and Keep' arrangements

- 4.42 In paragraph 4.15 above, it was noted that O2 expressed the view that ComReg should have examined what the impact of retail behaviour might have been in circumstances where alternative wholesale/retail pricing approaches such as 'bill and keep' and 'called party pays' were to be in place.
- 4.43 As part of the Statutory Information Requests issued to Service Providers in November 2010 and August 2011, ComReg sought details from MSPs (including O2) as to whether they had intentions over the next 18 to 24 months to move to a receiving party pays (RPP) model (being the same thing as a 'calling party pays' model), whereby mobile subscribers would be charged for receiving calls. Of the responses from six MSPs, no MSP indicated that it had an intention of doing so, with some MSPs questioning whether there was consumer demand for a RPP pricing regime, citing the impact that this would have on retail customers and the potential need for industry agreement to facilitate such an approach. However,

one MSP [redacted] ¹⁰⁴ reserved its position to explore RPP options should its MTRs be reduced by regulatory intervention by ComReg.

- 4.44 The move to RPP would, therefore, likely involve a significant and potentially disruptive change for retail consumers and, because of this, in ComReg's view, it is not likely to emerge within the timeframe covered by this review (the medium term). The facts of the matter are also that the CPP regime for calls to mobiles is that which has always been in existence in the Irish market (and throughout the EU) and, in the absence of concrete signals to the contrary, it is ComReg's position that this likely to remain the case for the medium term.
- 4.45 Furthermore, it is possible, that were a RPP model were to be implemented by MSPs (this has not been the case to date in the EU), this could potentially lead to a different outcome to the market definition and SMP assessment arising from the analysis set out in this MVCT Decision. This is because the receiving party (being the subscriber of the terminating MSP) would now face a price signal for, and potentially be sensitive to, the cost of receiving calls. This, in turn, could lead to changes in retail receiving call party behaviour which may result in some degree of indirect constraint being placed by the terminating MSP's own subscribers on the level of its MTR (which is not currently the case).
- 4.46 Nevertheless, if a RPP regime were to credibly emerge, ComReg would consider the precise circumstances of the situation and, as appropriate, it may lead to a review of the Relevant MVCT Markets and an assessment as to whether regulation was still warranted.
- 4.47 With regard to O2's comments on 'Bill and Keep' (B&K) ¹⁰⁵, as noted in the Explanatory Note to the 2007 Recommendation:
- "Bill and Keep may be related to the Receiving Party Pays, ... as it allows operators to directly charge their customers for receiving calls without reporting to wholesale charges from other operators, although it is not a necessary consequence."* ¹⁰⁶
- 4.48 B&K arrangements are not currently in place within Ireland (or indeed in the EU) and, would likely involve a significant change in current wholesale charging arrangements, as well as potentially giving rise to negative effects (given termination rates would be set at zero, it could, for example, give rise to an increase in the volume of unsolicited phone calls/spam) as well as positive effects (at zero MTRs there are potential administrative savings resulting from the absence of the need for billing).
- 4.49 While ComReg acknowledges (and as noted in the Explanatory Note to the 2007 Termination Rate Recommendation) that cost orientated MTRs that involve

¹⁰⁴ Note that this MSP was not O2.

¹⁰⁵ Under a B&K arrangement call termination rates are effectively set to zero, with originating Service Providers not having to pay the terminating Service Provider for call termination services.

¹⁰⁶ See paragraph 6.1.2 of the Explanatory Note.

significant reductions from current levels may create appropriate incentives for the voluntary evolution of B&K type arrangements, ComReg has no credible evidence to suggest that B&K arrangements are likely to emerge in the medium term.

- 4.50 For the reasons above, ComReg does not consider that the RPP and/or B&K arrangements are credible within the medium term and, consequently that such possibilities would not materially impact on its assessment of the retail market or definition of the Relevant MVCT Markets.

Approach to considering the impact of MNP

- 4.51 In paragraph 4.16 above, ALTO and O2 also indicated that it would have been appropriate for ComReg, in assessing network awareness and its impact in defining the Relevant MVCT Markets, to have effectively discounted the actual or potential existence of MNP.

- 4.52 ComReg does not consider such an approach to be correct. Throughout the MVCT Consultation, ComReg adopted the so-called 'modified greenfield approach'¹⁰⁷ whereby it discounts the effects of SMP regulation in the Relevant MVCT Markets, but considers SMP regulation present in other related markets, as well as non-SMP type regulation on all markets (including that present in the Relevant MVCT Markets) as applied through the general regulatory framework. In this regard, ComReg would note that MNP obligations, which stem from Regulation 25 of the Universal Service Regulations 2011¹⁰⁸, apply to all MSPs (and indeed other undertakings), and are not dependent on or related to the imposition of SMP based regulation in the Relevant MVCT Markets. MNP obligations, therefore apply, irrespective of whether an MSP has or has not been subject to SMP type regulation in Relevant MVCT Markets.

Having regard to the above, and contrary to the views of ALTO and O2, it is ComReg's position that MNP obligations fall to be considered in its assessment of retail consumer/SME behaviours and retail market characteristics and their impact on the analysis of the Relevant MVCT Markets.

ComReg's purported failure to adequately define the retail market

- 4.53 As noted in paragraphs 4.23 and 4.28, TMI, while not commenting specifically on the analysis of the consumer behaviours and market characteristics identified in the MVCT Consultation, considered that ComReg had purportedly failed to adequately define the retail market. While noting that TMI has not commented specifically on the retail consumer/SME behaviours and retail market characteristics or otherwise provided ComReg with material information in this regard, ComReg has again re-examined its position and does not consider there to be any justified reason as to why it should adopt an approach which differs to that set out in the MVCT Consultation.

¹⁰⁷ See paragraphs 5.4 and 6.51 to 6.66 of the MVCT Consultation.

¹⁰⁸ European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (the 'Universal Service Regulations').

- 4.54 With respect to TMI's comments that ComReg has essentially failed to adequately define the retail market, as TMI has raised this issue in its response to Question 4 (which asked Respondents' whether they agreed with ComReg's preliminary conclusions regarding its retail product and geographic market assessment) , ComReg considers it more relevant and appropriate to address these issues in that section¹⁰⁹. However, for the avoidance of doubt, ComReg does not accept TMI's opinion on this matter.
- 4.55 TMI has raised other issues which primarily relate to the proposed wholesale Relevant MVCT Market Definition, subsequent SMP assessment and the imposition of remedies, and these are considered later in this MVCT Decision¹¹⁰.
- 4.56 Insofar as TMI's comments are concerned regarding the possibility that recent entrants might leave the market or potential new entrants might be deterred from entering in the first place, such comments appear to relate to the purported consequences of the imposition of regulatory remedies, in particular, as a consequence of price control remedies. These are also dealt with later in the MVCT Decision¹¹¹, but ComReg would note that, in general, above efficient cost MTRs may result in inefficient retail market entry, whereby the resultant wholesale revenues in excess of costs earned from above efficient cost MTRs (through MTR payments from actual or close retail competitors) are being used to support an individual MSP's position in the retail market (for example, being used to subsidise retail operations, or customer acquisition/retention costs). ComReg would also note that in the MVCT Consultation and this Decision, it has comprehensively assessed the impacts of proposed regulation on all stakeholders¹¹² and does not take a partial approach to impact assessment which solely focuses on the position of individual MSPs. In this regard, ComReg's analysis draws on a holistic and inclusive assessment considering the net impact on the (fixed and mobile) sector and consumers as a whole.

The robustness of the 2011 Market Research and ComReg's reliance on it

- 4.57 Two Respondents raised issues concerning the 2011 Market Research. As noted in paragraph 4.37, H3GI considered that ComReg had relied too significantly on the 2011 Market Research and questioned its significance, indicating that it did not provide a sound basis for regulation over the next two to three years. In paragraph 4.20 we also noted that O2, on the other hand, questioned the benefit of undertaking the 2011 Market Research, including on cost grounds, given its view that the consumer behaviours identified were not unexpected.
- 4.58 As noted in the MVCT Consultation¹¹³, ComReg considered a wide range of factors in assessing the impact of retail consumer behaviour on its subsequent

¹⁰⁹ See paragraphs 4.132 to 4.145 of this Decision.

¹¹⁰ See sections 5 to 8 of this Decision.

¹¹¹ See Section 8 of this Decision, including paragraphs 8.81 to 8.117.

¹¹² See sections 7, 8 and 9 of the MVCT Consultation and sections 7 to 9 of this Decision.

¹¹³ See paragraph 4.8 of the MVCT Consultation.

definition of the Relevant MVCT Markets (and has not relied solely on the 2011 Market Research). These factors included, information provided to it pursuant to Statutory Information Requests (which included SP's own market research), quantitative information, as well as a consideration of retail product characteristics and prices (in context of potential for indirect constraints). ComReg's 2011 Market Research is, therefore, but one element which factored into the analysis and was not, in itself, solely determinative of ComReg's preliminary conclusions. ComReg considers that the 2011 Market Research was carried out in a robust manner and is reliably informative to its analysis.

- 4.59 Contrary to H3GI's view, ComReg does not consider it necessary to consult on the terms of reference for the 2011 Market Research. However, ComReg would point out that it has transparently provided an opportunity, through the consultation process, for interested parties to consider it and to comment on its findings. In this regard, H3GI has not commented on the outputs of 2011 Market Research. Furthermore, ComReg would also note that no Service Provider has provided any market research or offered other evidence which would materially suggest that the outputs from the 2011 Market Research are unreliable, insofar as they relate to the analysis of the Relevant MVCT Markets.
- 4.60 Contrary to O2's view, ComReg considers that an assessment of the retail market is useful in informing the subsequent definition and analysis of the Relevant MVCT Markets, in particular, in considering whether there are any indirect constraints which might impact wholesale behaviour.

Network Awareness, Cost Awareness and Cost Sensitivity

- 4.61 Respondents' commented on a number of issues associated with network awareness, cost awareness and cost sensitivity, usually concerning the position of their subscribers on such matters. These, and other issues raised, are considered by ComReg below.

Lycamobile subscriber sensitivities

- 4.62 In paragraphs 4.19 and 4.34 we noted Lycamobile's views on its subscribers' purported high network awareness, high cost awareness and high cost sensitivity in making outbound international calls. We also noted Lycamobile's view that its subscribers would switch to alternative means of communication in response to a SSNIP in the price of such services.
- 4.63 If and to the extent that Lycamobile's subscribers have high network and cost awareness, as well as cost sensitivity for outbound international calls (Lycamobile did not provide evidence to support its views), ComReg does not consider that it is materially relevant in the context of the analysis of the Relevant MVCT Markets in Ireland. This is because outbound international calls go to either fixed line subscribers or mobile subscribers in other jurisdictions and, to the extent that there is any indirect constraint exerted by Lycamobile's Irish based subscribers on non-Irish MSPs, it falls to be considered in the analysis of MVCT markets in such non-Irish jurisdictions.

- 4.64 Furthermore, ComReg has no evidence to suggest that international calls originating outside Ireland (whether from fixed line or mobile subscribers) that are destined for Irish Lycamobile subscribers, places any effective constraint on Lycamobile's MTR setting behaviour.
- 4.65 In terms of Lycamobile's views on its subscribers' purported network awareness, cost awareness and cost sensitivity for outbound national calls, in particular, due to Lycamobile's 'on-net' promotions, ComReg's set out its preliminary view in the MVCT Consultation¹¹⁴ (and further in section 5 of this Decision) that an MSP's self-supply of mobile termination (associated with its retail supply of on-net calls) does not fall within the Relevant MVCT Market given it is not likely to constrain its external supply of MVCT to other Service Providers. Furthermore, while it is possible that Lycamobile subscribers could be aware of the identity of other Lycamobile subscribers (either as a called or calling party), this relates to the making of on-net calls and is not likely to sufficiently constrain Lycamobile's MTR pricing behaviour in its supply of MVCT to other service providers (i.e. indirect constraints from a Lycamobile subscriber making a call to another Lycamobile subscriber are not likely to constrain Lycamobile's ability to set its MTRs independently of its competitors, customers and consumers).
- 4.66 Related to the above, ComReg does not agree with Lycamobile's view on the behaviour of its subscribers in response to the impact of a SSNIP in MTRs. The assessment undertaken by ComReg in the MVCT Consultation (and in this Decision) seeks to address whether and to what extent a SSNIP¹¹⁵ in MTRs by a domestic MSP might impact upon retail subscribers' behaviour in making calls to Irish mobile subscribers and whether this is likely to sufficiently constrain the MSP from setting its MTR above the level that would occur in a competitive market outcome. As suggested by Lycamobile, the scenario examined by ComReg in its analysis does not, therefore, relate to the impact of retail subscriber behaviour in making outbound international calls (for which MTRs set by an Irish MSP are not directly relevant).

¹¹⁴ See paragraph 5.56 to 5.61 of the MVCT Consultation.

¹¹⁵ An economic analytical mechanism for defining a relevant product through demand side substitution analysis consists of an examination of consumer behaviour in response to price increases and is known as the hypothetical monopolist test (HMT). This HMT consists of observing whether a small but significant non-transitory increase in price (SSNIP) above the competitive level - taken to be in the range of 5 to 10% - of a candidate product supplied by a hypothetical monopolist (HM) would provoke a sufficient number of consumers to switch to an alternative product (a substitute product) such that it would make the price increase unprofitable. If a sufficient number of subscribers switching to the alternative product makes the price increase unprofitable, then the alternative product is included in the relevant product market. The HM is carried out for any given number of alternative products which, by their characteristics, prices and intended use, may constitute an effective substitute to the candidate product. If switching to these alternative products is sufficient to also render the SSNIP (above the competitive level) of the candidate product unprofitable, then these are also included in the definition of the relevant product market.

Vodafone's comments on sensitivities of on-net subscribers

- 4.67 ComReg notes and agrees with Vodafone's comments in paragraphs 4.21 and 4.22 that certain closed user groups may be sensitive to the costs faced by people when calling them. As noted in the MVCT Consultation¹¹⁶, this sensitivity may differ over time, in particular, such sensitivities appear to be strongest at the time when people are switching MSP, but then, having switched, decline somewhat. It was also noted that it would also appear to accord with the significant weight attached by consumers (when switching) to friends and family being subscribers of the same MSP in order to reduce their respective costs in calling each other (somewhat due to pricing structure differences related to different costs of on-net¹¹⁷ and off-net calls), in particular, given this was the predominant reason suggested for selecting their MSP when switching (i.e. consumers' desire to internalise the externality of a perceived higher cost associated with calling off-net by creating an 'on-net community' through using the same MSP as their friends and family). However, to the extent that such closed user groups are on the same network then, for the reasons outlined in paragraph 4.65 above, this is not likely to impact an MSP's external supply of MVCT¹¹⁸.
- 4.68 The MVCT Consultation also considered the extent to which the called party's sensitivities to the cost faced by the called party (calling from a different network) might exercise some degree of constraint on a MSP's MTR setting behaviour. For the reasons previously set out (including low network awareness, cost awareness and overall sensitivity to costs faced by the calling party), ComReg maintains the view that any such constraints, including any constraints exerted by friends and family cross network, callers (i.e. not involving an on-net call), are not likely to be sufficiently strong to constrain an MSP's MTR setting behaviour.
- 4.69 It is also ComReg's view that, in the main, called and calling parties will likely have low levels of network awareness given Mobile Number Portability (although it is accepted that some subscribers may know which network their friends or family are on, particularly those they call most frequently¹¹⁹) and there will likely be low called party awareness of the cost faced by the calling party.

O2's comments on price awareness

- 4.70 While ComReg notes O2's view (in paragraph 4.20), regarding the widespread availability of mobile pricing information to consumers on Service Providers' websites and on ComReg's websites, this does not detract from the complexity of

¹¹⁶ See paragraph 4.89 of the MVCT Consultation.

¹¹⁷ For example, as noted in Appendix E, a significant number of MSPs' price plans offer free or reduced rate prices for calls to other subscribers on their network).

¹¹⁸ See section 5.10 of Decision.

¹¹⁹ ComReg would also note that MSPs have implemented a tone alert played at the start of an off-net call to a mobile to alert their subscribers that they are calling off-net. However, it is not possible from this to deduce to which MSP the called subscriber belongs.

mobile price plans and the resulting difficulties for consumers in seeking to understand them, including whether they match their individual consumption needs. For example, the MVCT Consultation noted well over 100 price plans offered by MSPs to non-business customers, many of which have further levels of un-recorded pricing complexity, including, for example, prices charged differing based on contract length, level of credit top-ups (for prepay customers), as well as the multiple add-on services which can be purchased by consumers as a top-up to their core service offering. Such complexity, in ComReg's view, makes MSPs' price plans difficult for many consumers to comprehend. While consumers may be concerned with overall monthly costs, ComReg also considers that consumers will be concerned with the cost of individual call types. However, as noted in the MVCT Consultation¹²⁰, the latter may be somewhat diminished in the presence of 'any network' price plans.

Additional Issues

- 4.71 While ComReg notes Eircom Group's views in paragraph 4.24 regarding its purported difficulties in negotiating lower SMS termination rates, it is likely that SMS termination (while exhibiting many of the same competitive characteristics and conditions of supply) falls into a market that is separate to the Relevant MVCT Markets.
- 4.72 ComReg notes that wholesale SMS Termination rates are currently just over 3 cent per SMS (with the same rate being charged by terminating MSPs) and such rates do not appear to be reflective of the underlying costs of providing such services. ComReg will consider the position on SMS termination, in due course, and reserves its right to intervene, as appropriate in this market. However, it would be ComReg's strong preference that MSPs should, in the first instance seek to address SMS termination rates through commercial negotiation (of which ComReg would have regard to in any subsequent analysis of this market).

ComReg's Position on Relevant Consumer Behaviours and Market Characteristics

- 4.73 In paragraphs 4.39 to 4.72 above, ComReg has considered Respondents' comments on ComReg's identification and assessment of those retail consumer behaviours and market characteristics that are likely to be most relevant in terms of their potential to impact the Relevant MVCT Markets. Having regard to the analysis set out in the MVCT Consultation¹²¹ and the consideration of Respondents' views, ComReg's position is set out below.
- 4.74 Given the Calling Party Pays (**CPP**) principle, the called party does not pay for incoming calls. Within this CPP environment and having regard to the overall retail pricing structures/characteristics in the Irish market, ComReg has considered both calling party and called party behaviours, in particular, in relation

¹²⁰ See paragraphs 4.27 and 4.28 of the MVCT Consultation.

¹²¹ See paragraphs 4.01 to 4.97 of the MVCT Consultation.

to network awareness, cost awareness, sensitivity to cost and frequency of any associated behavioural change.

- 4.75 ComReg's position is that the called party is likely to have
- low levels of awareness of the calling party's Service Provider, particularly with respect to cases in which the calling party is a mobile subscriber;
 - low levels of awareness of the retail costs faced by the calling party; and
 - low sensitivity to/concern for the costs faced by the calling party.
- 4.76 These factors are likely to affect the degree to which the called party would change how it treats incoming calls, in particular, in response to concerns regarding the costs (and changes to them) faced by the calling party when calling a mobile subscriber.
- 4.77 Similarly, ComReg's position is that the calling party is likely to have
- low levels of awareness of the called party's MSP;
 - low levels of awareness of the cost of making calls (perhaps driven, in the case of calls being made by mobile subscribers, by mobile pricing structures such as free on-net calls, charges not being differentiated by MSP called etc.);
 - varying (but high) degrees of sensitivity to the cost of making calls, in particular, amongst on-net (including to friends and family) and off-net (other mobile and fixed network) calls. Consumers/SMEs are likely to be sensitive to overall costs, however, price sensitivity to the cost of calling off-net to subscribers of one Service Provider over another is likely to be somewhat diminished given the nature and prevalence of any-network, any-time (of day) bill pay price plans (and, in some cases, pre-paid price plans) offered by MSPs, including the prevalence of free on-net calls and /or bundled minutes for billpay customers.
- 4.78 These factors are also likely to affect the degree to which the calling party may change its calling behaviour, in particular, in response to concerns regarding the costs faced when calling a subscriber of a particular MSP.
- 4.79 These called party and calling party behaviours, depending on their impact, are those which ComReg considers to be most relevant in terms of their potential to impact the definition and competition assessment of the Relevant MVCT Markets, in particular, the degree to which retail subscriber behaviour (either the calling party or the called party) and retail market characteristics can affect the MTR setting behaviour of a hypothetical monopolist supplier of wholesale MVCT.
- 4.80 The likely impact of any such indirect retail market constraints on the Relevant MVCT Markets are considered below.

Assessing the impact of retail consumer behaviour on the Relevant MVCT Markets

Position set out in the MVCT Consultation

- 4.81 In the MVCT Consultation, ComReg, having set out its preliminary view on those consumer behaviours and market characteristics which were most likely to have the potential to impact on the Relevant MVCT Markets, then went on to assess the likely impact of such retail consumer behaviour and market characteristics.
- 4.82 As part of this assessment, ComReg carried out a characterisation of retail markets¹²² to inform its subsequent definition of the wholesale Relevant MVCT Markets and, in particular, to inform its assessment of whether, through demand-side substitutability and/or supply side substitutability at the retail level, other forms of communication would potentially exercise an indirect constraint on the ability of a HM wholesale supplier of MVCT to profitably raise its MTRs by a small but significant amount (SSNIP).
- 4.83 The MVCT Consultation also noted¹²³ that the impact of a SSNIP in wholesale MTRs on retail prices would depend on a number of factors, including the degree to which such MTR increases are passed through to retail prices (if at all); the level of the MTR increase as a proportion of the overall retail price for calling a mobile; and the extent/intensity of competition in affected retail markets. In order to avoid a potentially overly narrow approach to market definition, ComReg adopted a prudent approach and assumed that an MTR increase would be passed through in full to retail prices.
- 4.84 Given the CPP, ComReg's preliminary view was that the called party was likely to have low levels of awareness of the network identity and sensitivity to the cost faced by the calling party. Called party reactions to small but significant increases in MTRs by its own MSP were not considered likely by ComReg to be sufficient to render such an MTR increase unprofitable.
- 4.85 ComReg also considered¹²⁴ calling parties' behaviours/reactions to retail price increases stemming from a SSNIP in MTRs. As part of the 2011 Market Research, ComReg asked consumers and SMEs about the extent to which they would, as mobile users, notice an increase of 1 and 3 cents in the cost of calling a subscriber of a particular MSP and to what extent they would change their behaviour as a result. It was also noted that it was more likely than not that this 1

¹²² See paragraphs 4.104 to 4.197 of the MVCT Consultation.

¹²³ See paragraphs 4.107 to 4.114 of the MVCT Consultation.

¹²⁴ See paragraphs 4.117 to 4.129 of the MVCT Consultation.

cent and 3 cent retail price increase exaggerates the effects of a retail pass-through of a 5% to 10% increase in MTRs (above the competitive level).¹²⁵

- 4.86 Consumers and SMEs that indicated that they would or maybe would change their behaviour were also asked to select their most likely behavioural responses and how often they would respond in such a way. Of those consumers that would notice the price increase and change their behaviour as a consequence, the most likely reactions were to reduce the number/frequency of calls being made to the other mobile network, with the frequency of such behaviour varying considerably. The stated impact of retail price increases by SMEs was to reduce outbound communication volumes (across a range of methods of communication) by between 2.1% to 7%. Consumer and SME reactions as called parties were also examined¹²⁶.
- 4.87 The MVCT Consultation, in assessing the impact of retail demand-side substitution on the Relevant MVCT Markets (i.e., the strength and effectiveness of any indirect constraints), went on to examine whether, instead of making an off-net call to a mobile subscriber of a specific MSP, the following are likely to be considered by consumers/SMEs as effective forms of substitute communication.
- Make a call from a mobile to a fixed line phone instead of an off-net mobile to mobile call;
 - Make a call from a fixed line to a fixed line instead of an off-net mobile to mobile call;
 - Make an on-net mobile to mobile call instead of an off-net call to a mobile;
 - Make a Voice over Internet Protocol ('VoIP') call instead of an off-net call to a mobile;
 - Send an SMS instead of an off-net mobile to mobile call;
 - Send an email instead of an off-net call to a mobile
 - Shorten an off-net call to a mobile and/or request a call back
 - Delay making the off-net call to a mobile to a time when it is cheaper to phone
- 4.88 Having regard to the factors likely to affect the impact of retail consumer behaviour on the Relevant MVCT Markets, ComReg's preliminary view was, for the reasons set out therein, that none of the above forms of communication were likely to pose an effective competitive constraint on MTRs.

¹²⁵ The then current highest peak MTR in the market was that of Tesco Mobile Ireland (TMI) and was just over 15 cent per minute (note TMI is not currently designated with SMP and its MTRs are, therefore, unregulated). ComReg expressed the view that it was also likely that this MTR is above the competitive level having regard to international MTR benchmarks. A 5% to 10% increase in a 15 cent MTR is in the range of 0.85 cent to 1.7 cent and assuming this is fully passed through to retail customers, it would give rise to an increase of 1 to 2 cent.

¹²⁶ See paragraph 4.123 and 4.127 of the MVCT Consultation.

- 4.89 After considering demand-side substitution ComReg went on to consider supply-side substitution¹²⁷, in particular, whether any suppliers not currently active within the retail mobile market would, within the short term, enter the market without incurring significant additional costs or risks in response to a SSNIP in prices. ComReg's preliminary view was that there were no supply-side substitutes and nor were their likely to be (within the medium term) a technically viable means which would allow a Service Provider to provide a voice call service to a mobile number which was not reliant on the provision of MVCT by the called subscriber's MSP. As such, retail supply-side substitution is not considered likely to pose an effective constraint on the MTR setting behaviour of a HM supplier of MVCT services.
- 4.90 ComReg also considered¹²⁸ the geographic scope of the retail mobile market to inform its position on the geographic scope of the wholesale Relevant MVCT Markets. In view of the nationally-driven pricing practices of the MSPs and, given the uniformity in mobile call product characteristics offered across different geographic areas, ComReg's preliminary conclusion was that the conditions of competition in the retail mobile market are sufficiently homogeneous to suggest that the geographic retail market is national in scope – in essence defined by the boundaries of each MSPs network which are effectively national.
- 4.91 Having set out its preliminary views on its assessment of whether, through demand-side substitutability and/or supply side substitutability at the retail level, other forms of communication would potentially exercise an indirect constraint on the ability of a HM wholesale supplier of MVCT to profitably raise its MTRs by a small but significant amount (SSNIP) and having set out its views on the geographic scope of the market, ComReg asked¹²⁹ the following question.

Question 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.

Respondents' Views on the Assessment of the Impact of Retail Consumer Behaviour on the Relevant MVCT Markets

- 4.92 Respondents' views on Question 4 above can generally be summarised as follows. **Seven Respondents expressed views** on this question.
- 4.93 **Four Respondents broadly agreed (or did not disagree)** (ALTO, Eircom Group, O2 and Vodafone) with ComReg's preliminary conclusions on the retail product and geographic market assessment, although some provided comments

¹²⁷ See paragraphs 4.198 to 4.214 of the MVCT Consultation.

¹²⁸ See paragraphs 4.202 to 4.197 of the MVCT Consultation.

¹²⁹ See Question 4 on page 90 of the MVCT Consultation.

on or supplemented specific parts of the analysis already undertaken by ComReg. The **three remaining Respondents did not agree** (H3GI, Lycamobile and TMI) with ComReg's preliminary conclusions.

- 4.94 ALTO agreed having regard to the analysis provided and its experience of the wholesale market which showed that there were no sub-geographic retail markets.
- 4.95 Eircom Group agreed that none of the retail products identified in the MVCT Consultation would be effective substitutes for voice calls to mobiles such that they would sufficiently constrain MTRs, absent regulation. Given the structure of mobile price plans, it considered that indirect constraints from the retail market would also be insufficient to make a SSNIP in MTRs unprofitable for an MSP. It also agreed 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.
- 4.96 O2 agreed that the markets are national based on the analysis provided and from its experience in the wholesale market. O2 commented that it is not aware of a sub-geographic or regional services in the retail mobile market. O2 also agrees with the analysis on retail demand side substitution and noted that as there are no wholesale demand substitutes, it considered that the analysis of the retail demand-side substitution to be somewhat academic.
- 4.97 Vodafone agreed with ComReg's conclusion on the product and geographic market assessment, in particular, it agreed in general with the findings of the 2011 Market Research and that alternative forms of communication (as a potential substitute for making an off-net call to a mobile), either individually or collectively are unlikely to provide an effective competitive constraint on MTRs. Due to the current absence of alternative technologies, Vodafone also agreed 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.
- 4.98 H3GI did not agree with ComReg's preliminary conclusions, principally given its previous comments¹³⁰ concerning the adequacy of the 2011 Market Research and ComReg's reliance upon it.
- 4.99 Lycamobile also did not agree, largely relating to issues concerning its particular subscribers' propensity to call international destinations and their related network awareness and cost sensitivities.
- 4.100 TMI also disagreed with ComReg's preliminary views, largely re-iterating its views on the previous question which mainly related to ComReg purportedly failing to adequately define the retail market prior to conducting its analysis of the wholesale Relevant MVCT Markets.

¹³⁰ See paragraph 4.37 above.

4.101 In summary, having regard to the above and Respondents' Submissions, ComReg considers that four key issues were raised by Respondents in relation to Question 4. Most of these relate to issues regarding the approach to or actual retail demand-side substitutability assessment and, in this regard, Respondents' views can be generally categorised according to the following themes.

- The robustness of 2011 Market Research and ComReg's reliance on it;
- Whether VoIP is an effective demand side substitute that would indirectly constrain wholesale MTR setting behaviour;
- Lycamobile's business model and the impact of the behaviour of its subscribers;
- The linkage between MTRs and retail prices;
- Defining the retail market and TMI's position within it.

4.102 Respondents' views within these themes are set out below.

The robustness of the 2011 Market Research and ComReg's reliance on it

4.103 H3GI did not, comment specifically on the analysis of indirect constraints emanating from retail demand-side or supply-side substitutability. It did, however, raise the same issues as were set out in its response to Question 3¹³¹, with such views largely relating to the adequacy/robustness of the 2011 Market Research and ComReg's reliance upon it in conducting its analysis.

Whether VoIP is an effective demand side substitute that would indirectly constrain wholesale MTR setting behaviour

4.104 Vodafone noted that the current usage of VoIP indicates that, for at least some customers, it is an effective demand side substitute for a mobile voice call and considered that the use of such has increased over the last number of years, particularly within the last 12-18 months with the rapid growth in the take up of 3G devices (i.e. handsets, smartphones). Vodafone stated that the level of VoIP usage on its network had increased, with traffic now equivalent to [§< [REDACTED] minutes per month or [§< [REDACTED]] of total data usage.

Lycamobile's business model and the impact of the behaviour of its subscribers

4.105 Lycamobile did not agree with ComReg's preliminary conclusions, reiterating similar issues to those set out in its response to Question 3¹³² concerning the propensity of its subscribers to mainly call non-EU international destinations. It stated that such non-EU destinations have higher average MTRs than the EU average MTR and that it has no option but to purchase MVCT from these non-EU MSPs. It, therefore, argued that reductions in its MTRs, without a corresponding

¹³¹ See paragraph 4.37 above.

¹³² See paragraph 4.34 above.

reduction on non-EU MTRs was, in effect, a comparative increase in the national MTR and a subsidy to the non-EU MSP.

- 4.106 Lycamobile, in commenting on the geographic scope of the market, also did not consider that its retail product offerings are homogeneous, particularly, when applied to niche MVNOs such as Lycamobile whose subscribers mainly call international destinations. Consequently, it considered that any MTR decision based on nationally driven pricing practices was inappropriate when applied to Lycamobile customers.

The linkage between MTRs and retail prices

- 4.107 Eircom Group, while agreeing with ComReg's preliminary view that a call to a fixed line phone is not a substitute for an off-net mobile to mobile call, disagreed with one aspect of the analysis, namely the suggestion in the MVCT Consultation¹³³ that common off-net retail pricing approaches would limit a consumer's rationale for switching to making a mobile to fixed line call (in response to an increase in MTRs by a HM) instead of an off-net mobile to mobile call. In its view, this was because such common off-net pricing approaches (where there is little or no difference between prices charged by an MSP for making an off-net call to either a mobile or a fixed line) would not likely persist absent regulation as, in such an absent regulation scenario, MTRs would likely rise thereby eliminating the common off-net pricing approaches. i.e., common off-net pricing approaches have been facilitated through the impact of lower MTRs as a consequence of regulation and, absent this, such approaches would not exist.
- 4.108 Eircom Group also stated that actual and planned reductions in MTRs to date had facilitated its ability to offer any network price plans and, absent such reductions, it expressed the view that these retail offerings would not have happened, particularly given that smaller MSPs (those with lower relative market shares) have higher proportion of off-net traffic than larger MSPs.
- 4.109 O2 indicated that there was no evidence that MTRs indirectly constrained retail pricing and added that if MTRs were increased, given the extent of retail competition, an operator would be unlikely to pass on such increases. Additionally, it suggested that there was no evidence of any correlation between the reduction in wholesale MTRs and retail prices.

Defining the retail market and TMI's position within it

- 4.110 TMI did not comment in detail on the analysis of indirect constraints emanating from retail demand-side or supply-side substitutability. However, it considered that ComReg had failed to carry out an adequate analysis at both the retail and wholesale level (a view it also expressed in response to previous questions) and ComReg had followed the non-binding 2007 Recommendation without taking due regard of Irish market conditions and the specifics of TMI.

¹³³ See paragraph 4.131 of the MVCT Consultation.

- 4.111 According to TMI, ComReg has failed to conduct a substantive retail market analysis before defining the wholesale markets or clearly articulating how the retail and wholesale markets are interrelated. TMI also indicates that it is subject to pressures at the retail level that can impact its wholesale behaviour and that these should be taken into consideration in the analysis (although this appears to be in the context of the potential exercise of CBP rather than in a market definition context). In this regard, TMI cites the ability of other Service Providers to exclude TMI calls from inclusive minutes offered to retail subscribers within bundled price plans (as well as exercising CBP and negotiating MTRs).
- 4.112 TMI also raised other issues in its response which, in ComReg's view, are more relevant and appropriately considered in the context of the definition of Relevant MVCT Markets and the assessment of competition within them¹³⁴. For example, TMI considered that ComReg had mechanically followed the 2007 Recommendation, and raised issues concerning CBP and the imposition or remedies.
- 4.113 In a number of places within TMI's response it also appears to suggest or consider that ComReg is seeking to regulate the retail mobile market. For example, TMI states 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."*¹³⁵

and

*"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) [BY TMI] but the word "primarily" dilutes the clarity of the explanation with the result that TMI is not able to fully appreciate its position."*¹³⁶

ComReg's Assessment of Respondents' views on the Impact of Consumer Behaviour on the Relevant MVCT Markets

- 4.114 In paragraphs 4.92 to 4.113 above, ComReg has summarised the key issues raised by Respondents concerning its assessment as to whether retail behaviours (through demand-side and supply-side substitution) are likely to indirectly constrain wholesale MTR setting behaviour. ComReg has noted

¹³⁴ See sections 5 and 6 of this Decision.

¹³⁵ See paragraph 32 of the TMI Submission.

¹³⁶ See paragraph 43 of the TMI Submission.

Respondents' views and its sets out below its consideration of the key issues raised according to the themes identified in paragraph 4.101 above.

The robustness of 2011 Market Research and ComReg's reliance on it

- 4.115 As noted in paragraph 4.103, (and also in its response to Question 3), H3GI disagreed with ComReg's preliminary view on the basis that it considered that ComReg had relied too significantly on the 2011 Market Research.
- 4.116 ComReg has previously addressed H3GI's comments in this regard¹³⁷ and, for the same reasons set out therein, ComReg does not accept H3GI's view.

Whether VoIP is an effective demand side substitute that would indirectly constrain wholesale MTR setting behaviour

- 4.117 As noted in paragraph 4.104, Vodafone, while agreeing with ComReg's overall preliminary view, suggested that, for some customers, VoIP is an effective demand side substitute for an off-net call to a mobile.
- 4.118 The issue of whether the use of VoIP by retail consumers would constrain MTR setting behaviour was examined in detail in the MVCT Consultation¹³⁸ which found, on a preliminary basis, that VoIP was not likely to be or become an effective substitute for a call to a mobile. The reasons for such included the requirement for both the calling party and called party to have a data element to their price plan; a VoIP client installed on their phones with the called party having a 'Smart Phone'; differences in the quality of VoIP calls in comparison to traditional circuit switched calls; and a lack of evidence to suggest that VoIP had been a relevant consideration and had acted as a constraint on MSPs' MTR setting behaviour to date.
- 4.119 Following the consideration of Respondents' Submissions and to recent Statutory Information Requests to MSPs, no material evidence has been presented to ComReg to lead it to change its view. No MSP, in response to the August 2012 Statutory Information Request, was in a position to provide any meaningful evidence which showed that VoIP was being used (either by a mobile or fixed line calling party) to make a call to a mobile recipient (also receiving the call via a VoIP client¹³⁹). Where any evidence of VoIP usage by mobile subscribers was presented, this appears to ComReg to be of a general nature, shows that VoIP usage by mobile subscribers was falling¹⁴⁰ and, in ComReg's view, is more than likely related to VoIP usage for outbound international calls rather than for off-net calls to mobiles. Furthermore, no evidence has been presented to ComReg which showed that VoIP usage was a factor which was considered by MSPs

¹³⁷ See paragraphs 4.58 and 4.59 above.

¹³⁸ See paragraph 4.158 to 4.168 of the MVCT Consultation.

¹³⁹ Unless the called party receives the call through VoIP it would not bypass mobile termination and an MTR would be levied on the Service Provider originating the call.

¹⁴⁰ For example, data provided by H3GI and Vodafone shows a decline in general VoIP usage by their mobile subscribers.

when setting their existing MTRs, although it is recognised that many of these MSPs MTRs have been subject to regulation (although in the form of voluntary agreement by MSPs to reduce MTRs).

- 4.120 Overall, while some mobile subscribers might use VoIP to call each other, ComReg's maintains its position that a VoIP call to a mobile (whether from a fixed line or mobile calling party) is not likely to be an effective substitute for a traditional call to a mobile and, therefore, it is not likely to pose an effective competitive constraint on the ability of a HM provider of MVCT to profitably sustain a SSNIP in MTRs.

Lycamobile's business model and the impact of the behaviour of its subscribers

- 4.121 As noted in paragraphs 4.105 and 4.106, ComReg noted Lycamobile's views regarding its subscribers' propensity to call international destinations and its position, in commenting on the geographic scope of the market, that its retail call products were not homogenous.
- 4.122 ComReg has previously addressed¹⁴¹ Lycamobile's comments regarding the propensity of its customers to call international destinations and, for the reasons set out therein, ComReg does not consider it to be materially relevant to the analysis of the Relevant MVCT Markets in Ireland.
- 4.123 The assessment undertaken by ComReg in the MVCT Consultation¹⁴² (and this Decision) seeks to address whether and to what extent a SSNIP in MTRs by a domestic MSP might impact upon retail subscribers' behaviour in making calls to Irish mobile subscribers and whether this is likely to sufficiently constrain the MSP from profitably sustaining its MTRs (above the level that would occur in a competitive market outcome). The scenario examined by ComReg in its analysis does not, therefore, relate to the impact of retail subscriber behaviour in making outbound international calls (for which MTRs set by an Irish MSP are not directly relevant). ComReg has no jurisdiction over MTRs charged by MSPs in other EU or non-EU countries, however, ComReg would note that all EU countries have individually analysed their mobile termination markets and have, as appropriate to national circumstances, defined MVCT markets, designated MSPs with SMP and imposed price control obligations upon them. The MTRs paid by Lycamobile to other EU MSPs (in the context of the provision of outbound international calls to mobile subscribers in other EU countries) are, therefore, to a large extent regulated. While ComReg acknowledges that it is possible that subscribers in other jurisdictions (EU or otherwise) making inbound off-net calls to Irish Lycamobile mobile subscribers might theoretically exercise some degree of constraint on Lycamobile's MTR setting behaviour, ComReg does not consider it

¹⁴¹ See paragraphs 4.62 to 4.66 above.

¹⁴² See paragraphs 4.97 to 4.114 of the MVCT Consultation which set out ComReg's approach to assessing the impact of retail consumer behaviour on the ability of an terminating MSP to increase its MTRs above a competitive level.

plausible such that this would indirectly and effectively constrain Lycamobile's MTR setting behaviour such that it would prevent a profitable SSNIP in MTRs. For example, issues regarding network awareness would likely to be more exacerbated.

- 4.124 As regards Lycamobile's view¹⁴³ that retail product offerings are not homogeneous, while the cost of calling an Irish mobile subscriber may differ across Service Providers (including across MSPs), from a functional perspective, the product characteristics (quality and technical) are considered by ComReg to be broadly homogeneous. Furthermore, as noted in the MVCT Consultation¹⁴⁴, individual MSPs do not tend to differentiate their charges for calling a subscriber of another MSP based on the MSP called, i.e. all off-net calls to mobiles tend not to be differentiated based on the called party's MSP. This remains the case and ComReg has also not observed any differences in the pricing of calls to/from mobiles based on geographic considerations.

The linkage between MTRs and retail prices

- 4.125 In paragraph 4.107 we noted that O2 indicated that there was no evidence that MTRs indirectly constrained retail pricing and added that if MTRs were increased, given the extent of retail competition, an operator would be unlikely to pass on such increases. Additionally, it suggested that there was no evidence of any correlation between the reduction in wholesale MTRs and retail prices.
- 4.126 O2 on the one hand states that if MTRs were increased, given the suggested intensity of competition in the retail market, it would not be able to pass through MTR increases. On the other hand, O2's view is that there is no evidence that MTRs are an indirect pricing constraint¹⁴⁵ on retail prices and that there is no evidence of any correlation between the reduction in MTRs and retail prices.
- 4.127 ComReg would note that these statements appears to be somewhat contradictory, as if retail competition was sufficiently intense, then just as O2 would not pass on MTR increases, such intensity of competition would surely lead to the pass through of at least some of the MTR decreases¹⁴⁶ (it receives from purchasing termination from other MSPs) to its subscribers. However, as noted in the MVCT Consultation, how and to what extent MTRs feed through into retail prices depends on a number of variables, including the MTR change as a proportion of the overall retail price for calling a mobile; the decision by the individual service provider to pass through MTR changes to retail prices and how

¹⁴³ See paragraph 4.106 above.

¹⁴⁴ See paragraphs 4.24 to 4.29 of the MVCT Consultation.

¹⁴⁵ ComReg would note that the MVCT Consultation analysed whether retail customer behaviour might indirectly constraint wholesale behaviour in the Relevant MVCT Markets and not whether MTRs indirectly constrain retail pricing as was suggested by O2).

¹⁴⁶ As inputs to the overall cost of making a call, off-net MTRs create a floor to off-net retail pricing. Higher MTRs make it difficult for Service Providers to offer flat-rate calling plans due to the uncertainty regarding the likely level of customer take-up of such plans.

to do so (including whether it is applied to individual call prices or is spread across a portfolio of retail services and/or a reduction in customer acquisition/retention costs, which will be somewhat dependent on its ability to price discriminate); and the intensity of competition in affected retail markets. ComReg also recognised in the MVCT Consultation¹⁴⁷ that reductions in MTRs could also result in the terminating MSP having to selectively increase the price of some of their own retail services (such as access, handset or on-net call prices¹⁴⁸). It should also be borne in mind that retail pricing flexibility is not solely determined by MTRs, but would also be impacted by retail costs and other network costs associated with the provision of the services (such as call origination etc.).

4.128 ComReg has, however, received views from Service Providers (including MSPs) in response to Statutory Information Requests and the Respondents' Submissions to the MVCT Consultation which suggest that lower MTRs (and reductions in the levels of asymmetry of MTRs between MSPs) have facilitated changes to both the structure and levels of retail prices for calls to mobiles. In this regard, views have been expressed that, for example, lower MTRs

- have facilitated the ability of MSPs to offer any network price plans (with no differentiation between the charges for calling subscribers of different MSPs) by reducing the risk that a particular retail customer would incur a high MTR expense from a large number of off-net outgoing calls;
- have facilitated the offering by MSPs of any network bundled minutes (and increases in these) within billpay price plans¹⁴⁹.

4.129 While ComReg accepts that understanding the causal relationship between MTR changes and their impact on retail plans is complex, it does not accept that there is no relationship between MTRs and retail prices or that reductions in MTRs to date have not resulted in positive changes to the structure and levels of retail prices for calls to mobiles (either by MSPs or FSPs). Indeed, ComReg would note that, based on the analysis of retail trends in Appendix E that we have started to see the emergence (albeit limited) of some FSPs offering bundled plans with inclusive mobile call elements (by reducing the FSPs' risk that the amount of MTR expenses incurred by one of their subscribers making off-net calls to MSPs would exceed the FSPs' subscription price).

4.130 As noted in paragraph 4.107, Eircom Group disagreed with one aspect of ComReg's analysis, namely, the suggestion in the MVCT Consultation that

¹⁴⁷ See paragraph 7.25 and Section 9 of the MVCT Consultation.

¹⁴⁸ MSPs will also have the ability to rebalance their service offerings to recover part of that lost wholesale MTR revenue through, for example, achieving greater overall efficiency, increased retail access charges, reduction in handset subsidies/slower handset upgrades, and/or reduction in customer acquisition costs.

¹⁴⁹ ComReg would note that, as evidenced from D.13 (in Appendix D), all MSPs offer such plans with varying amounts of any network minutes being included, as well as up to unlimited usage.

common off-net retail pricing approaches would limit a consumer's rationale for switching to making a mobile to fixed line call (instead of an off-net mobile to mobile call). ComReg would note that the MVCT Consultation did not definitively state that a common pricing approach would persist, absent regulation, in particular, stating that:

'if such common off-network pricing approaches were to persist absent regulation, then these would likely limit a consumer's rationale for switching to a fixed line call since the costs are the same irrespective of the identity of the called party's Service Provider." [EMPHASIS ADDED].

- 4.131 To the extent that those common pricing approaches were not to persist (absent regulation), ComReg acknowledges that this could impact consumer calling behaviour when deciding whether to make an off-net mobile call to another mobile subscriber or an off-net mobile call fixed line. However, when considered alongside the other factors set out in the MVCT Consultation¹⁵⁰ (the different characteristics of fixed and mobile telephony, including the ability to always contact a person on their mobile when outside the home/business coupled the desire for immediacy of contact, decline in fixed line ownership etc..) this does not lead ComReg to alter its view that an insufficient number of consumers, in response to an increase (SSNIP) in MTRs, would switch to make a M2F call instead of an off-net M2M call, such that the MTR increase would be unprofitable.

Defining the retail market and TMI's position within it

- 4.132 In paragraphs 4.110 to 4.113 we noted that TMI considered that ComReg had failed to conduct a substantive retail market analysis before defining the wholesale markets or had clearly articulated how the retail and wholesale markets are interrelated. TMI also indicated that it is subject to pressures at the retail level that can impact its wholesale behaviour and appeared to suggest that ComReg was seeking to regulate the retail market directly.
- 4.133 ComReg notes, that while TMI did not agree with ComReg's conclusions on the retail product and geographic market assessment, it did not materially comment on the analysis set out in the MVCT Consultation as to whether retail behaviours (through demand-side and supply-side substitution) are likely to indirectly constrain wholesale MTR setting behaviour. As much of TMI's response to Question 4 deals with matters which are more relevant to the subsequent definition of and assessment of competition within wholesale Relevant MVCT Markets and the imposition of remedies, ComReg only deals below with those issues raised in TMI's response which are of relevance to the retail market assessment (with the other aspects dealt with later in Sections 5, 6 and 8, as appropriate).
- 4.134 ComReg does not accept TMI's view that it failed to undertake an adequate analysis of the retail market or that its assessment of the retail markets is

¹⁵⁰ See paragraphs 4.131 to 4.138 of the MVCT Consultation.

somehow flawed or deficient. As noted in MVCT Consultation¹⁵¹, retail markets are considered to the extent that they inform the subsequent analysis of the MVCT Markets.

4.135 In this regard, ComReg maintains that, in line with the Explanatory Note to the 2007 Recommendation,

“The starting point is therefore a characterisation of retail markets, followed by a description and definition of related wholesale markets.”
[EMPHASIS ADDED]¹⁵²

4.136 As noted in the MVCT Consultation, while the objective of ComReg’s review is to define and analyse competition within the wholesale Relevant MVCT Markets, given wholesale demand for MVCT is largely derived from retail demand associated with the ability to make calls to mobile subscribers, it is necessary to consider the dynamics of the retail market and whether and how these dynamics impact at the wholesale level. ComReg has also examined the retail market to consider whether any competitive constraints arising at the retail level are sufficiently strong to effectively offset any potential market power at the wholesale level.

4.137 It is also worth noting that MVCT is purchased as a standalone wholesale input by Service Providers in order to provide a retail service to allow calls to be made to mobile subscribers. Given MVCT is part of the wholesale value chain of inputs used to provide retail services, consumers cannot themselves choose how to terminate calls to a mobile subscriber. MVCT is, therefore, an indirect input to the provision of a retail service that is not purchased directly by the consumer but, at the same time is necessary to fulfil their need to make an off-net call to a mobile subscriber or, in the case of the subscriber of the terminating MSP, the ability to receive incoming off-net calls originated at the retail level.

4.138 There is, therefore, no direct corresponding standalone retail market for MVCT (although it is accepted that the costs of termination may be factored into the retail prices charged by an originating Service Provider to its subscribers when making calls to mobiles and/or overall costs of service offerings). ComReg also considers that, in the presence of the CPP, competitive conditions differ between incoming off-net calls on the one hand and outgoing calls (potentially coupled with access) on the other.¹⁵³

4.139 Hence, in the MVCT Consultation ComReg carefully considered overall retail calling party and called party consumer behaviours to assess the extent to which they might influence behaviour and competitive outcomes in the wholesale Relevant MVCT Markets. In this regard, ComReg carefully analysed retail demand-side and supply-side behaviour and set out its views on the extent to

¹⁵¹ See paragraphs 4.2 to 4.7 of the MVCT Consultation.

¹⁵² See page 19 of the Explanatory Note.

¹⁵³ See paragraphs 5.56 to 5.61 of the MVCT Consultation and section 5 of this Decision.

which such behaviours might inform and impact the subsequent analysis of each of the Relevant MVCT Markets and competition within them. Based on competition law principles and having taken account of guidance issued by the European Commission¹⁵⁴ (including the Notice on Market Definition and SMP Guidelines which are all competition law based), ComReg set out its preliminary view in the MVCT Consultation that, having considered demand-side and supply-side substitutability at the retail level, indirect constraints from the retail markets were unlikely to be sufficiently strong or effective such that they would prevent a HM supplier of MVCT from profitably increasing its MTRs by a small but significant amount¹⁵⁵. In particular, and as noted earlier, this largely arises because of the CPP whereby the MSP of the called party sets the MTR and, given it is the calling party which pays for the entire call, the called party of the MSP is generally insulated from the impact of its MSPs MTR setting behaviour. Neither calling party nor called party sensitivities to a range of parameters were considered by ComReg to exercise an effective constraint on MTRs.

- 4.140 Overall, for the purposes of the relevant wholesale assessment of Relevant MVCT Markets, it is ComReg's position that it is not necessary, to conclude on the precise boundaries of the downstream retail *outgoing* calls market(s). What is relevant for the purposes of the MVCT market analysis is the need to ensure the successful completion of *incoming* calls from any Service Provider (FSP or MSP) to retail mobile subscribers. The retail market assessment is, therefore, carried out to the extent that it informs the definition and subsequent analysis of the wholesale services underpinning incoming call completion to mobile subscribers.
- 4.141 ComReg also does not accept TMI's view that it has mechanically followed the 2007 Recommendation. As is required by legislation¹⁵⁶, ComReg has taken utmost account of the 2007 Recommendation and, in so doing, has had regard to it in the context of its application to the particular circumstances of the Irish market and to particular MSPs operating within it. As noted above, it is ComReg's position that this has been demonstrated in the context of the specific analysis undertaken in the MVCT Consultation to date (and now subsequently in this Decision) whereby ComReg has carried out a considered and specific assessment of Irish retail markets, in particular, it identified and set out its views on the range of factors¹⁵⁷ which would affect the ability of retail consumers' behaviour to impact on the Relevant MVCT Markets and, in light of this,

¹⁵⁴ See paragraphs 1.10 to 1.11 above.

¹⁵⁵ ComReg would note that TMI response (see paragraph 20(f)) appears to suggest that it could not raise its MTRs above the existing levels by the normal benchmark used for assessing dominance. However, ComReg would respectfully point out that TMI's starting point is incorrect, in that, when defining the Relevant MVCT Market within which TMI operates, ComReg is seeking to ascertain whether TMI could raise its MTRs above the level that would exist in a competitive market, rather than from its existing MTR level (see Table 5 in section 6 which shows that TMI's MTRs have historically been and are currently significantly above the MTRs of other regulated MSPs).

¹⁵⁶ Regulation 26(1) of the Framework Regulations.

¹⁵⁷ See paragraphs 4.9 to 4.96 of the MVCT Consultation.

subsequently went on to assess the likely impact of retail consumer behaviour on the Relevant MVCT Markets¹⁵⁸.

- 4.142 ComReg considers that its approach to analysing the Relevant MVCT Markets is appropriate to national circumstances and is consistent with the approach envisaged in the Explanatory Note to the 2007 Recommendation, which states¹⁵⁹.

“The Recommendation should be considered in conjunction with the ‘Guidelines for market analysis and the assessment of significant market power’ referred to in Article 15(2) of the Framework Directive (hereinafter, “the Guidelines”). National regulatory authorities (“NRAs”) are required, taking utmost account of this Recommendation and the Guidelines, to define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law and to analyse those product and service markets, taking the utmost account of the Guidelines. On the basis of this market analysis, NRAs will determine whether or not these markets are effectively competitive and impose, amend, or withdraw regulatory obligations accordingly.

The regulatory framework is aimed at ensuring harmonisation across the single market and guaranteeing legal certainty. This Recommendation plays an important role in achieving both of these objectives, as it seeks to ensure that the same product and services markets will be subject to a market analysis in all Member States and that market players will be aware in advance of the markets to be analysed.”

- 4.143 Given the above, in accordance with the procedure for the identification and definition of markets ComReg is obliged, pursuant to Regulation 26 of the Framework Regulations, to take the “...utmost account..” of the 2007 Recommendation. ComReg is further obliged to carry out an analysis of the relevant markets, pursuant to Regulation 27 of the Framework Regulations taking account of the Recommendation. Accordingly, ComReg took as its starting point, the 2007 Recommendation, which identified *inter alia* “Voice call termination on individual mobile networks”, as a market which may warrant *ex ante* regulation. It remains ComReg’s analysis that there exist no compelling reasons, based on national circumstances, to deviate from the 2007 Recommendation in this instance.
- 4.144 TMI also suggested that, given its position in the retail market relative to other more established MSPs, it is subject to competitive pressures such as the ability of other Service Providers to exclude TMI calls from inclusive minutes offered to retail subscribers in bundled price plans. Rather than being an issue related to wholesale market definition, ComReg considers that the impact of such potential

¹⁵⁸ See paragraphs 4.9 to 4.96 and 5.67 of the MVCT Consultation.

¹⁵⁹ See page 4 of the Explanatory Note to the 2007 Recommendation.

action is more appropriately considered in the context of the analysis of CBP, in particular, in relation to the credibility of any threats by a MSP to purchase MVCT. Nevertheless, ComReg would note that while this is one possible course of action, ComReg has no evidence, nor did Respondents furnish it with any evidence, to suggest that any such actions have, in fact been taken by an MSP and, if to the extent they were to have done so, it does not appear to have had any material impact on TMI's ability to set its MTRs by a small but significant amount above the level that would pertain in a competitive market outcome¹⁶⁰. Indeed, in paragraph 6.74 we note that TMI's MTR differential with regulated MSPs' MTRs now currently ranges from 63% (above H3GI) to 232% (above Meteor, O2 and Vodafone). As noted in the MVCT Consultation¹⁶¹, ComReg is aware that certain Service Providers (principally FSPs but not MSPs) differentiate their retail prices for calls to TMI subscribers, however, ComReg considered that this is likely to be a direct consequence of TMI's MTR being significantly higher than those charged by most other currently regulated MSPs (which excludes Lycamobile).

- 4.145 With respect to TMI's comments that appeared to suggest that ComReg was seeking to directly regulate the retail market, as should be clearly evident from the MVCT Consultation Paper, ComReg is seeking only to regulate the wholesale Relevant MVCT Markets. Insofar as TMI's reference to ComReg's letter of 3 July 2012¹⁶² is concerned, the reference to the MVCT Consultation being 'primarily' related to wholesale MVCT markets simply relates to the fact that the consultation document as a whole also discussed retail markets (including fixed line markets) in the context of their potential to influence the wholesale Relevant MVCT Markets. Furthermore, ComReg is also required under statute to consider the impact on consumers and competition, the former of which are also indirectly consuming MVCT through their actions at the retail level. ComReg considers it has comprehensively and demonstrably analysed the Retail Market.

ComReg's Position on the Impact of Consumer Behaviour on the Relevant MVCT Markets

- 4.146 In paragraphs 4.114 to 4.145 above, ComReg has considered Respondents' comments on ComReg's assessment as to whether retail behaviours (through demand-side and supply-side substitution) are likely to indirectly and effectively

¹⁶⁰ As noted in paragraph 6.24 of the MVCT Consultation, TMI's MTRs ranged from 60% to 212% above those of MSPs currently designated with SMP. In paragraph 6.68 of this Decision it shows that TMI's current MTRs now range between 63% and 232% higher than other currently regulated MSPs MTRs.

¹⁶¹ See Appendix B of the MVCT Consultation.

¹⁶² This 3 July 2012 letter from ComReg responded to a TMI letter of 2 June 2012 and issues raised by TMI in a meeting with ComReg on 27 June 2012. This was followed by further correspondence from TMI to ComReg of 6 July 2012 seeking an extension to the MVCT Consultation response deadline and raising other issues. ComReg responded to this letter on 12 July 2012. There was further correspondence from TMI to ComReg of 7 August 2012, 1 and 15 November 2012 with ComReg responding on 14 August 2012, 7 and 16 November 2012 respectively.

constrain wholesale MTR setting behaviour. ComReg has also considered Respondents' views on its assessment as to the geographic scope of the retail market.

4.147 It should be noted that ComReg does not conclude definitively on a definition of the retail mobile market as, for the reasons previously outlined¹⁶³, it considered it unnecessary to do so, given it has assessed the dynamics of the retail mobile market (and other markets) to the extent that they inform the subsequent analysis of the wholesale Relevant MVCT Markets.

4.148 Having regard to the analysis set out in the MVCT Consultation¹⁶⁴ and the consideration of Respondents' views above, ComReg's position is set out below.

Retail Demand-Side Substitution

4.149 ComReg has previously identified those factors which it considered are most likely to affect the impact of retail consumer behaviour on the Relevant MVCT Markets. Having regard to such factors, ComReg then considered whether the characteristics, prices and intended use of potential substitute retail products are sufficiently interchangeable with those attributes associated with making off-net calls to a subscriber of an MSP.

4.150 In view of this, ComReg's position is that none of the following alternative forms of communication are currently, or within the medium term, likely to be an effective retail demand-side substitute for making an off-net call to a subscriber of a particular MSP:

- Make a mobile call to a fixed line;
- Make a fixed line call to a fixed line;
- Make an on-net mobile call;
- Make a VoIP call;
- Send an off-net SMS/Text;
- Send an email;
- Shorten calls or request a call back.

4.151 ComReg's position is that such demand-side substitution to the above alternative forms of communication, either individually or collectively, is unlikely to pose an effective indirect competitive constraint on the ability of a HM supplier of MVCT to profitably sustain a small but significant non-transitory increase in its MTRs.

¹⁶³ See paragraphs 4.134 to 4.139 above and paragraphs 4.3 to 4.7 and 4.97 of the MVCT Consultation.

¹⁶⁴ See paragraphs 4.97 to 4.216 of the MVCT Consultation.

Supply Side Substitution

- 4.152 ComReg has considered whether supply-side substitution is likely to effectively constrain the ability of a supplier of MVCT to profitably sustain a small but significant non-transitory increase in its MTRs.
- 4.153 It is technically infeasible for a Service Provider to have the ability to provide a voice call service to a mobile number which is not reliant on the provision of MVCT by the subscriber's MSP (and to do so in a timely manner, without incurring significant costs). Currently, it is the terminating MSP who controls the final routing and termination of calls to subscriber mobile numbers¹⁶⁵ and, as a consequence retail supply side substitution is not possible. ComReg is also unaware of any technologies in development or in existence that would, within the medium term, allow an originating Service Provider to bypass the called party's MSP to terminate a call to a subscriber's mobile number.
- 4.154 ComReg's position is that retail supply-side substitution is unlikely to pose an effective competitive constraint on the ability of a HM supplier of MVCT to profitably sustain a small but significant non-transitory increase in its MTRs.

Geographic Scope of the Retail Mobile Market

- 4.155 ComReg has considered the geographic scope of the retail mobile market to the extent that it informs the subsequent assessment of the geographic scope of the wholesale Relevant MVCT Markets.
- 4.156 In view of the nationally-driven pricing practices of the MSPs, their national coverage and the uniformity in retail mobile call product (functional and technical) characteristics offered across different geographic areas, ComReg's position is that the conditions of competition in the retail mobile market are sufficiently homogeneous to suggest the geographic market is national in scope.

¹⁶⁵ Either technically and/or contractually.

5 Definition of Wholesale Relevant MVCT Markets

- 5.1 In section 5 of the MVCT Consultation ComReg set out its preliminary view on the product and geographic scope of the Relevant MVCT Markets. ComReg briefly describes below the preliminary views set out in the MVCT Consultation and then goes on to consider Respondents' views before setting out its position on such matters.

Position set out in the MVCT Consultation

Wholesale Product Market Assessment

- 5.2 The MVCT Consultation, having assessed retail market behaviours and impacts, considered the definition of the Relevant MVCT Market from both a product and geographic perspective.
- 5.3 In defining the wholesale Relevant MVCT Markets, ComReg was quite clear, that whilst its starting point was the 2007 Recommendation, which identified *inter alia* "Voice call termination on individual mobile networks", for the avoidance of doubt ComReg examined whether it was appropriate in light of national circumstances and, in so doing, sought the views of interested parties. In this regard, ComReg then conducted its analysis by considering the narrow wholesale service involving the provision of a voice call termination service for the purpose of completing a call to a mobile subscriber. From there, ComReg then examined whether this narrow product market should be broadened to include other wholesale products or services, taking account of demand-side and supply-side substitutability considerations.
- 5.4 ComReg's assessment also started from the assumption that regulation is not present in the market under consideration, i.e. no regulation in the Relevant MVCT Markets (in accordance with the so-called 'modified greenfield approach'). However, SMP regulation present in other markets or regulation in place through the general regulatory framework is considered.
- 5.5 As noted above, before considering the detailed definition of the Relevant MVCT Markets, ComReg set out¹⁶⁶ to address some preliminary issues which could have a bearing on its approach to the wholesale market definition, in particular, the starting 'candidate MVCT product market' against which a substitutability analysis is carried out. In this regard, the MVCT Consultation set out ComReg's preliminary view that the starting point for the MVCT product market definition is such that the candidate product had the following characteristics:
- it involves interconnection between networks; and

¹⁶⁶ See paragraphs 5.5 to 5.17 of the MVCT Consultation.

- it involves call termination for the purpose of completing inbound voice calls to subscribers/mobile numbers that have been allocated (through a primary or secondary allocation) to an individual MSP; and
- the supplier of MVCT should have the ability to set/control the associated charges (MTRs) for the relevant wholesale service; and
- it should include the provision of mobile call termination to all subscribers of an individual MSP (rather than on an individual subscriber basis); and
- be defined on a technology neutral basis and should not differ by underlying technology and should include MVCT provided by a MSP through a national roaming agreement

5.6 It was ComReg's preliminary view that the candidate MVCT product market therefore consisted of:

“the provision by a mobile service provider of a wholesale service to other undertakings for the purpose of terminating incoming voice calls to mobile numbers¹⁶⁷ in respect of which that mobile service provider is able to set the MTR”

5.7 The MVCT Consultation then went on to consider whether the above market definition should be expanded in light of the availability of any effective wholesale demand-side and wholesale supply-side substitutes.

5.8 In terms of wholesale demand-side substitution, the MVCT Consultation noted¹⁶⁸ that given the nature of MVCT, a purchaser does not (in the medium term) have any viable alternatives for terminating a mobile voice call to a subscriber of an individual MSP, i.e. it is not possible for an originating (or transiting) Service Provider to terminate a call to any MSP's subscriber by purchasing termination on another MSP's network. ComReg's preliminary view was that there were currently no effective demand-side substitutes for MVCT and that this position was not likely to change within the timeframe of this market analysis.

5.9 Wholesale supply-side substitution was also considered¹⁶⁹ in the MVCT Consultation, including supply by an MSP other than the called party's MSP, supply from the entry of new MSPs into the market and supply through other technologies. It was ComReg's preliminary view that there were no effective supply-side substitutes for MVCT and that this position was not likely to change within the lifetime of the market analysis.

¹⁶⁷ The term “mobile number” includes a mobile which is the subject of a “primary allocation/reservation” and a mobile number which is the subject of a “secondary allocation/reservation”, within the meanings set out in the National Numbering Conventions, the current version of which is National Numbering Conventions, Version 7.0, [ComReg Document 11/17](#).

¹⁶⁸ See paragraphs 5.18 to 5.28 of the MVCT Consultation.

¹⁶⁹ See paragraphs 5.29 to 5.54 of the MVCT Consultation.

- 5.10 The MVCT Consultation also set out and analysed¹⁷⁰ a number of other considerations relevant to the definition of the MVCT product markets. In this regard, it was ComReg’s preliminary view that an MSP’s self-supply of mobile voice call termination does not fall within the MVCT product markets given that such self-supply is unlikely to constrain a HM MSP’s MTR setting behaviour in supplying MVCT to other Service Providers. ComReg’s preliminary view was also that the MVCT product markets were standalone markets and are not part of broader bundled service markets¹⁷¹.
- 5.11 Overall, it was ComReg’s preliminary view that there are not likely to be any effective demand-side or supply-side substitutes to the provision of MVCT by individual MSPs within the timeframe of the market analysis. ComReg also considered the strength of any indirect constraints from the retail market on the Relevant MVCT Markets and set out its preliminary view that these were insufficient to act an effective competitive constraint on the MTR setting behaviour if a HM supplier of MVCT.
- 5.12 It was, therefore, ComReg’s preliminary view that the wholesale MVCT product markets consisted of¹⁷²:
- “the provision by a mobile service provider of a wholesale service to other undertakings¹⁷³ for the purpose of terminating incoming voice calls to mobile numbers¹⁷⁴ in respect of which that mobile service provider is able to set the MTR”*
- 5.13 ComReg considered that the above definition was sufficiently flexible yet clear enough to identify the economic bottleneck in the Relevant MVCT Markets.
- 5.14 It was also noted that, to the extent that other wireless networks (or other similar technologies) could facilitate the offer, by a MSP, of a wholesale service for the termination of incoming calls to its own subscribers and, having regard to whether they utilise mobile numbers and their ability to determine their own MTRs, such MSPs are likely to face similar abilities and incentives to existing MSPs when setting their actual ‘MTRs’. As a consequence, it was ComReg’s preliminary view that mobile termination offered in these circumstances would likely fall within the wholesale MVCT product definition above.
- 5.15 Having regard to the above product market definition it was ComReg’s preliminary view that the following separate MVCT product markets (Relevant MVCT Markets’) exist:

¹⁷⁰ See paragraphs 5.55 to 5.61 of the MVCT Consultation.

¹⁷¹ See paragraphs 5.62 to 5.66 of the MVCT Consultation.

¹⁷² See paragraph 5.58 of the MVCT Consultation.

¹⁷³ For the avoidance of doubt, the MVCT Consultation noted in paragraph 5.77 that ‘other undertaking’ includes any undertaking, whether this be an undertaking located in the Republic of Ireland or in another jurisdiction.

¹⁷⁴ See footnote 167 above.

- Wholesale MVCT supplied by Hutchison 3G Ireland Limited;
 - Wholesale MVCT supplied by Lycamobile Ireland Limited;
 - Wholesale MVCT supplied by Meteor Mobile Communications Limited;
 - Wholesale MVCT supplied by Telefónica Ireland Limited (including Liffey Telecom Limited);
 - Wholesale MVCT supplied by Tesco Mobile Ireland Limited;
 - Wholesale MVCT supplied by Vodafone Ireland Limited;
- 5.16 Given the definition of the Relevant MVCT Markets, neither Postfone nor Blueface were considered by ComReg to fall within the scope of a Relevant MVCT Market, in particular, given they do not charge, nor do they currently have the ability to set, an MTR. However, ComReg noted that were they to do so (or have the ability to do so), then there is a strong case to be made that Postfone and Blueface would fall within the definition of the Relevant MVCT Market.
- 5.17 ComReg asked¹⁷⁵ the following questions with respect to the definition of the Relevant MVCT Markets from a product perspective.

Question 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.

Question 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.

Wholesale MVCT Geographic Market

- 5.18 Having set out its preliminary view on the Relevant MVCT Markets from a product perspective, ComReg went on in the MVCT Consultation to consider the geographic scope of such markets¹⁷⁶.
- 5.19 For similar reasons to the retail market, ComReg considered that, given a common pricing constraint and the homogeneity of conditions of competition in the supply of MVCT, the Relevant MVCT Markets are each national in geographic scope, the boundaries of which are defined by the geographic

¹⁷⁵ See Question 5 and 6 on page 104 of the MVCT Consultation.

¹⁷⁶ See paragraphs 5.71 to 5.75 of the MVCT Consultation.

coverage of each MSP's network. In this regard, the MVCT Consultation noted that MSPs:

- have national network/service coverage;
- do not differentiate MTRs based on the location of the mobile subscriber, i.e. MTRs are geographically uniform; and
- do not differentiate MTRs based on the underlying network standards deployed in particular geographic locations.

5.20 It was, therefore, ComReg's preliminary view that the geographic scope of the wholesale Relevant MVCT Markets is national and each was defined by the boundaries of geographic coverage of each of the MSPs networks in Republic of Ireland.

5.21 ComReg asked the following question with respect to its preliminary conclusions on the Relevant MVCT Markets from a geographic perspective.

Question 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.

Respondents' Views

5.22 Given the overlap of issues raised by Respondents with respect to Question 5, Question 6 and Question 7 above, ComReg has presented the main views of Respondents on these issues below.

5.23 **Seven Respondents expressed views** on ComReg's wholesale MVCT product market definition (Question 5 above). **Four Respondents agreed** (ALTO, Eircom Group, O2 and Vodafone) with ComReg's assessment, **one Respondent partially agreed** (Lycamobile), with the **two remaining Respondents disagreeing** (H3GI and TMI). In so doing, Respondents provided comments and additional analysis to that set out by ComReg in the MVCT Consultation, as well as raising other issues for consideration.

5.24 **Seven Respondents expressed views** on whether ComReg's proposed definition of the Relevant MVCT Markets¹⁷⁷ adequately identified the economic bottleneck represented by mobile voice call termination (Question 6 above). **Four Respondents agreed** (ALTO, Eircom Group, O2 and Vodafone), while **three Respondents disagreed** (H3GI, Lycamobile and TMI) with ComReg's analysis. In so doing, Respondents mostly referred back to their responses to Question 5, but, in some cases, provided additional comments and analysis to that set out by

¹⁷⁷ See paragraph 5.12 above.

ComReg in the MVCT Consultation, as well as raising other issues for consideration.

- 5.25 **Six Respondents expressed views** on ComReg's proposed geographic market definition (Question 7 above). **Three Respondents' agreed** (ALTO, Meteor, O2) with ComReg's preliminary conclusions on the wholesale MVCT geographic market assessment, while **three Respondents disagreed** (H3GI, Lycamobile and TMI). Vodafone did not express a view explicitly.
- 5.26 A brief overview of Respondents' views is set out below.
- 5.27 ALTO agreed, noting that there is no obvious substitute product for MVCT at this time or would there be for the foreseeable future. However, it suggested that barriers to entry in the market were low. It also agreed that ComReg's proposed definition of the Relevant MVCT Market adequately identified the economic bottleneck represented by MVCT and that the market was national in scope.
- 5.28 O2 expressed similar views to ALTO and indicated that its agreement was subject to its concerns highlighted in its responses to previous questions. It also agreed that the Relevant MVCT Markets were national in their geographic scope.
- 5.29 Eircom Group supported the definition of an MSP based on the criteria set out in the MVCT Consultation¹⁷⁸. It also concurred that the MVCT product market consists of interconnection of networks involving the termination of voice calls where the supplier has the ability to set the associated MTRs. Eircom Group also agreed with the definition of the market at a network rather than an individual subscriber level and on a technology neutral basis. It noted that beyond the time horizon of the current analysis, consideration may need to be given to the implications of higher data speeds on 4G networks with respect to the substitutability of services such as third party VoIP. Eircom also agreed with the exclusion of self-supply from the product market. It also agreed that ComReg's proposed definition of the Relevant MVCT Market adequately identified the economic bottleneck represented by MVCT and that the markets were national in their geographic scope.
- 5.30 Vodafone also agreed with the definition of an MSP based on the criteria set out in the MVCT Consultation. It also considered there were no completely effective demand-side or supply-side substitutes for MVCT supplied by an MSP, that self-supply should be excluded from the Relevant MVCT Markets and that ComReg's proposed definition adequately identified the economic bottleneck represented by MVCT. Vodafone did not comment specifically on the geographic scope of the Relevant MVCT Markets.
- 5.31 H3GI did not agree with ComReg's preliminary conclusions on the wholesale MVCT product market assessment or that the proposed market definition adequately identified the economic bottleneck represented by MVCT or that the

¹⁷⁸ See paragraph 5.6 of the MVCT Consultation which related to an MSP having 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

- geographic scope of the markets were national in scope. Its reasoning was based largely on its response to previous questions¹⁷⁹ (primarily related to the adequacy of the 2011 Market Research and ComReg's purported over-reliance upon this in the analysis). It also suggested that VoIP acts as an indirect constraint on MSPs when setting their MTRs.
- 5.32 Lycamobile partly agreed with ComReg's preliminary conclusions regarding ComReg's product market assessment, noting that it does not provide bundled services (presumably referring to its position as a SIM only service provider that does not supply its subscribers with handsets) and, as a consequence, expressed its view that its per-minute tariffs are more transparent than is the case for other MSPs who offer traditional bundles (that usually include a free or discounted mobile phone). It noted that other MSPs can easily cross subsidise one service for another (including wholesale MVCT) where traditional bundles are offered. Lycamobile also re-iterated the same opinion expressed in its response to previous questions¹⁸⁰ concerning the assessment of indirect constraints from the retail market and, in this regard, noted that the Lycamobile called party has 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, it stated that both the calling and called party are Lycamobile customers.
- 5.33 Lycamobile did not agree that ComReg's proposed wholesale market definition adequately identified the economic bottleneck represented by mobile voice call termination, as it considered that too much credence was given to the ability of a new unregulated MVNO entrant to set its own MTR. It also considered the geographic scope of the Relevant MVCT Markets to be global.
- 5.34 TMI did not agree with ComReg's preliminary views on the product and geographic assessment with respect to the Relevant MVCT Markets or that ComReg has properly identified the economic bottleneck represented by MVCT. As to its reasoning, it reiterated the same views expressed in its response to Question 4¹⁸¹, which largely related to its view that ComReg had failed to carry out an adequate analysis at both the retail and wholesale level and that ComReg had followed the non-binding 2007 Recommendation without taking due regard of Irish market conditions and the specifics of TMI.
- 5.35 Noting the above and additional matters raised, Respondents' views primarily focussed on issues which can be generally captured under the broad themes identified below.
- Whether there were low barriers to entry in the MVCT Market and the market definition's consistency with the 2007 Recommendation;

¹⁷⁹ See H3GI's response to Question 3 and Question 4 in paragraphs 4.37 and 4.98 above.

¹⁸⁰ See Lycamobile's response to Question 2 and Question 3 in paragraphs 4.19 and 4.34 above.

¹⁸¹ See paragraphs 4.110 to 4.113 above.

- Regulating MVNOs termination rates may reduce the level of competition in the retail market;
- Whether MVCT is purchased as a standalone service;
- Adequacy of the 2011 Market Research;
- Whether VoIP places an effective indirect constraint on the Relevant MVCT Markets;
- Suggested failure to define the wholesale MVCT market in light of TMI's specific position within the retail and wholesale markets;
- Whether a potential supply-side substitute exists through the purchase of termination via a Mobile Virtual Network Enabler (MVNE);
- Lycamobile's ability to set its MTR and the position of its subscribers;
- Whether the economic bottleneck has been properly identified; and
- Whether the Geographic Scope of the Relevant MVCT Markets is Global.

5.36 Respondents' views under the above themes are summarised below.

Whether there are low barriers to entry in the MVCT Market and the market definition's consistency with the 2007 Recommendation

5.37 ALTO and O2, while agreeing with the definition of the Relevant MVCT Markets, considered that, based on MVNO entry in recent years, barriers to entry were low. In view of this, O2 also expressed concern at what it considered to be a broadening of the market definition from that set out in the 2007 Recommendation, and that it did not meet the 3 criteria set out by the European Commission therein. In particular, O2 stated that the market defined by ComReg clearly has low barriers to entry which is evident from the retail market entry and exit by MVNOs in recent years.

Regulating MVNOs termination rates may reduce the level of competition in the retail market

5.38 O2, while agreeing with ComReg's analysis, suggested that the ability of new MVNOs to enter the market with regulated termination rates may reduce the level of competition in the retail mobile market and ComReg do not assess the impact of this on the retail mobile market.

Whether MVCT is purchased as a standalone service

5.39 Vodafone, while agreeing with ComReg's analysis, also commented on whether MVCT is part of a broader services market. In this regard, it suggested that it is not always the case that the purchase of MVCT by other undertakings is on a standalone basis, but is sometimes purchased as part of a bundle. One example cited by Vodafone related to the services purchased by MVNOs from their host network. For example, in launching its service, Vodafone noted that an MVNO will be required to purchase, call origination, call termination, SMS origination and

termination and possibly data and roaming services. Vodafone stated that how the services are purchased will be subject to commercial contract, but voice termination, for example, could therefore be purchased as part of a bundle which includes both originating and terminating calls.

Adequacy of the 2011 Market Research

5.40 As noted in paragraph 5.31 above, H3GI did not comment specifically on the wholesale MVCT product or geographic market assessment, but raised same issues in its response to previous questions, largely relating to the adequacy/robustness of the 2011 Market Research and ComReg's reliance upon it in conducting its analysis.

Whether VoIP places an effective indirect constraint on the Relevant MVCT Markets

5.41 In the context of the MVCT product market definition, H3GI considered that retail VoIP services placed an effective indirect constraint on the MTR setting behaviour of a HM supplier of MVCT.

Suggested failure to define the wholesale MVCT market in light of TMI's specific position within the retail and wholesale markets

5.42 TMI, while accepting that there is no alternative for a call to reach a customer on a particular mobile network other than through a route controlled by a mobile operator (i.e. there are no wholesale demand-side substitutes), considered that ComReg had failed to carry out an adequate analysis of the wholesale MVCT markets, having regard to TMI's specific position within it. In so doing, it reiterated the same points that were raised in its response to previous questions¹⁸², many of which were related to whether it had SMP and the proposed imposition of remedies upon it.

5.43 TMI considered that the retail markets and the Relevant MVCT within which TMI operates are inextricably linked and that the countervailing influences felt by TMI at the retail level should be taken into account in defining the wholesale market. It urged ComReg to carry out its analysis afresh and in a more thorough manner, and to propose a market definition that is specific to TMI rather than that which it considered was based on a broad overview of the sector.

5.44 TMI did not comment specifically on ComReg's assessment of the geographic scope of the Relevant MVCT Markets.

5.45 TMI also considered that ComReg had failed to provide adequate reasoning to support the preliminary views in the MVCT Consultation and because of this TMI could not adequately form a complete view of its position. In this regard TMI referred to the 'preliminary views' of ComReg and suggested that they were, therefore, incomplete.

¹⁸² See TMI response to questions 3 and 4 at paragraphs 4.28, 4.38, 4.100 and 4.110 to 4.113 above.

Whether a potential supply-side substitute exists through the purchase of termination via an MVNE

5.46 In the context of supply-side substitution, Vodafone believed that there are situations in the context of relationships between Mobile Virtual Network Enablers (MVNEs) and MVNOs where there may be a supply-side substitute for termination purchased from a MVNO, in particular, in the form of termination purchased directly from the MVNE. This, in Vodafone's view, may arise where, on the one hand, the MVNE has been allocated the mobile numbers used to give effect to MVCT but, on the other hand, it is the MVNO who offers MVCT to the market. In this regard, Vodafone cited the example of TMI who, as an MVNO, purchases wholesale network access from O2 via its (O2's) wholly owned subsidiary, Liffey Telecom (which is an MVNE)¹⁸³. Vodafone queried whether Liffey Telecom, in providing hosting and other services to TMI, was providing a potential supply-side substitute for MVCT supplied by TMI.

Lycamobile's ability to set its MTR

5.47 Lycamobile, in partially agreeing with ComReg's product market assessment, considered that too much credence has been given to a new unregulated MVNO entrant to set its own MTR. In this regard, Lycamobile indicated that the choice it faced was to either reduce its MTR or to face refusal or delay by other Service Providers in conditioning their networks for interconnection or to delay implementing number portability

Whether the economic bottleneck has been properly identified

5.48 In terms of the economic bottleneck represented by MVCT, Lycamobile expressed the view that

"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".

Whether the Geographic Scope of the Relevant MVCT Market is Global

5.49 Lycamobile did not agree that the wholesale MVCT geographic market is national in scope and considered it to be a global market based on its use of the international Global System for Mobile communications standard (the GSM standard). Lycamobile also noted that its customer base has a high propensity for making (as opposed to receiving) international calls, primarily to non-EU destinations and considered that it had no option but to purchase MVCT from such non-EU MSPs. It considered that reductions in the MTRs of EU MSPs, without a countervailing reduction in MTRs in a non-EU state, were effectively a

¹⁸³ See paragraphs 3.5 and 3.10 of the MVCT Consultation for the nature of the MVNO hosting arrangements between TMI and Liffey Telecom.

subsidy to the non-EU MSPs. Lycamobile also disagreed that retail products were homogenous, noting that this may be the case for the large mobile network operators' offerings, but not for niche MVNO's such as Lycamobile. Consequently, it considered that 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.

ComReg's Assessment of Respondents' Views

5.50 In paragraphs 5.22 to 5.49 above, ComReg has summarised the most relevant issues raised by Respondents concerning its definition of the Relevant MVCT Markets and its sets out below its consideration of the issues raised according to the themes identified in paragraph 5.35 above.

Whether there were low barriers to entry in the MVCT Market and the market definition's consistency with the 2007 Recommendation

5.51 In paragraph 5.37 it was noted that ALTO and O2 considered that, based on retail market entry by MVNOs, barriers to entry were low and, in view of this, O2 also expressed concern that the definition of the Relevant MVCT Markets may not meet one of the 3 Criteria¹⁸⁴ set out by the European Commission in its 2007 Recommendation.

5.52 ComReg does not agree that MVCT Market is characterised by low barriers to entry. ALTO and O2 may be confusing retail market entry with entry to the wholesale Relevant MVCT Markets. As noted in the MVCT Consultation¹⁸⁵, it was ComReg's preliminary view that there are no demand-side or supply-side substitutes in each Relevant MVCT Market and that this was likely to remain the case for the period under review. To the extent that there may be entry to the retail mobile market (including via an MVNO arrangement), that does not mean that a different MNO or MVNO can terminate a call to a subscriber of another MSP (i.e. retail market entry does not result in there being a demand-side or supply side substitute for mobile termination provided by another MSP).

5.53 Insofar as entry to the retail market is concerned, there is a requirement for a MSP to have spectrum and build a radio access network in order to offer services (involving considerable and partially sunk expenditure) and, as such, barriers to entry to the retail market are considered by ComReg to be high. However, ComReg also notes that there has been both entry and exit in the retail market by

¹⁸⁴ In order for a market to be susceptible to *ex ante* regulation by an NRA a market should have high barriers to entry (first criterion), not be likely tend towards effective competition (second criterion) competition law is insufficient to address the market failures that result from the first two criteria being met (third criterion). These criteria are set out in paragraph 2 of the 2007 Recommendation (the '3 Criteria').

¹⁸⁵ See section 5 of the MVCT Consultation.

MVNOs¹⁸⁶ over recent years, although this is highly dependent on the ability of MVNOs to commercially negotiate wholesale access network arrangements with MSPs who would also compete with MVNOs in the retail market.

- 5.54 ComReg notes O2's views suggesting the market definition has been broadened beyond the scope of that set out in the 2007 Recommendation. Rather than being broadened, it is ComReg's position that the market definition has been more precisely encapsulated in a technology neutral and forward looking manner and has been defined according to national circumstances (as is provided for in the 2007 Recommendation) in accordance with Regulation 16(1)(a) of the Framework Regulations.. ComReg would also note that the European Commission has, as a priori, determined that mobile termination markets are susceptible to *ex ante* regulation and that NRAs are required to apply the 3 Criteria when assessing markets other than those set out in the 2007 Recommendation. For example, the 2007 Recommendation notes¹⁸⁷ that:

"In defining relevant markets appropriate to national circumstances in accordance with Article 15(3) of Directive 2002/21/EC, national regulatory authorities should analyse the product and service markets identified in the Annex to this Recommendation.

When identifying markets other than those set out in the Annex, national regulatory authorities should ensure that the following three criteria are cumulatively met:" [EMPHASIS ADDED]

- 5.55 ComReg considers its market definition to be entirely consistent with Market 7 as identified in the 2007 Recommendation and to be appropriate in light of Irish circumstances. In this regard, ComReg notes that the European Commission Comments¹⁸⁸ have fully accepted ComReg's approach to defining the Relevant MVCT Markets and, therefore, it too considers ComReg's approach to be consistent with the definition of market 7 as set out in the 2007 Recommendation. Further, as evidenced from the MVCT Consultation and now in this Decision, ComReg would also note that:

- barriers to entry in each Relevant MVCT Market are considered to be high and non-transitory¹⁸⁹; and
- a tendency towards effective competition within each Relevant MVCT Market is not likely within the timeframe considered within the analysis¹⁹⁰; and

¹⁸⁶ TMI. Lycamobile, Postfone and Blueface operate in the retail market through MVNO arrangements. 'Just Mobile' entered the retail market but exited in August 2011 after less than a year of operation.

¹⁸⁷ See paragraphs 1 of the 2007 Recommendation.

¹⁸⁸ See Appendix C for a copy of the European Commission Comments.

¹⁸⁹ See paragraphs 5.29 to 5.54 of the MVCT Consultation.

¹⁹⁰ See section 6 of the MVCT Consultation.

- absent regulation, competition law is not likely to be sufficient to deal with the market failures identified¹⁹¹.

5.56 ComReg further notes that the Competition Authority's Opinion further concurs with ComReg's definition of the Relevant MVCT Markets and the European Commission Comments have fully agreed with the draft measures proposed to it and now set out in this Decision.

Regulating MVNOs termination rates may reduce the level of competition in the retail market

5.57 In paragraph 5.38 it was noted that O2 considered that the regulation of MVNOs' MTRs may reduce the level of competition in the retail mobile and that ComReg did not assess the impact of this.

5.58 The regulation of MTRs and its impact on the retail market is not, in ComReg's view, relevant to defining the Relevant MVCT Markets. Regulation of the MTRs of all MSPs (who it was proposed had SMP), including MVNOs, and its impact on competition and consumers was considered in the MVCT Consultation in the context of the competition problems that regulation was seeking to address and in the proposed remedies to assess these¹⁹². ComReg returns to the assessment of these issues later in this Decision¹⁹³.

5.59 However, and as noted in paragraph 4.56, to the extent that MVNO entry to the retail market is predicated on using wholesale MTR revenues in excess of efficiently incurred costs to cross-subsidise retail operations or customer acquisition, e.g., handset subsidies (with such wholesale revenues being derived from competitors or close competitors), then this suggests to ComReg that such entry may not be efficient.

Whether MVCT is purchased as a standalone service

5.60 In paragraph 5.39 Vodafone suggested that MVCT may not be a standalone service, in particular, for MVNOs, who it suggested purchase it as part of a bundle which includes both originating and terminating calls.

5.61 ComReg notes that MVNOs buy a range of wholesale access services in the context of their MVNO arrangement with their host MSP, including wholesale inputs (such as access to radio networks) which facilitate the MVNO in offering its own retail services. These are commercially negotiated and are not, therefore, generally relevant to the supply by an MVNO of MVCT services, although absent the hosting arrangement with an MNO, an MVNO would not be able to provide its retail or its MVCT services¹⁹⁴. MVCT is, however, purchased by Service Providers

¹⁹¹ See section 7 of the MVCT Consultation.

¹⁹² See sections 7, 8 and 9 of the MVCT Consultation.

¹⁹³ See section 7 and 8 of this Decision.

¹⁹⁴ If an MVNO did not have the hosting arrangement it would not have an ability to offer inbound calls to its subscribers.

from individual MSPs on a standalone basis whenever a subscriber of the Service Provider calls a subscriber of another MSP's network. ComReg does not consider that the price of MVCT (i.e. MTRs) is likely to be constrained by the bundle of wholesale services purchased by MVNOs to facilitate their retail offerings.

5.62 ComReg does not, therefore, agree with Vodafone's view, having regard to the above and for the reasons set out in the MVCT Consultation¹⁹⁵.

Adequacy of the 2011 Market Research

5.63 As stated in paragraph 5.40 above, H3GI disagreed with ComReg's preliminary view on the basis that it considered that ComReg had relied too significantly on the 2011 Market Research (and also in its response to Question 3 and Question 4).

5.64 ComReg notes that H3GI did not comment specifically on ComReg's analysis which set out that there were no demand-side or supply-side substitutes for MVCT. ComReg has previously addressed H3GI's comments regarding the 2011 Market Research¹⁹⁶ and, for the same reasons set out therein, ComReg does not accept H3GI's view.

Whether VoIP places an effective indirect constraint on the Relevant MVCT Markets

5.65 As noted in paragraph 5.41 above, H3GI considered that retail VoIP services placed an effective indirect constraint on the MTR setting behaviour of a HM supplier of MVCT.

5.66 ComReg previously considered this issue in the MVCT Consultation¹⁹⁷ and in paragraphs 4.117 to 4.120 of this Decision. For the reasons set out therein, ComReg's position is that VoIP use by retail subscribers is not likely to effectively constrain an MSP's MTR setting behaviour such that it would constrain it from profitably sustaining a small but significant increase in its MTRs (above the competitive level).

Suggested failure to define the wholesale MVCT market in light of TMI's specific position within the retail and wholesale markets

5.67 In paragraphs 5.42 and 5.43 above, we set out TMI's views whereby it considered that ComReg had failed to carry out an adequate analysis of the wholesale MVCT markets, having regard to TMI's specific position within it. TMI's reasoning was largely the same as that which it offered in response to previous questions¹⁹⁸.

¹⁹⁵ See paragraphs 5.62 to 5.66 of the MVCT Consultation.

¹⁹⁶ See paragraphs 4.58 and 4.59 above.

¹⁹⁷ See paragraphs 4.158 to 4.167 of the MVCT Consultation.

¹⁹⁸ See TMI's response as summarised in paragraphs 4.110 to 4.113 above.

- 5.68 ComReg notes that TMI also accepted that there were no wholesale demand-side substitutes for the provision of MVCT. TMI's response focuses on a number of suggested deficiencies in ComReg's analysis including that ComReg's analysis had failed to take account of TMI's position in the retail market.
- 5.69 Contrary to TMI's view, the Relevant MVCT Market within which TMI operates has been defined by ComReg having regard to TMI's particular circumstances within both the retail market and the wholesale Relevant MVCT Market within which TMI operates. ComReg has previously analysed the extent to which retail consumer behaviour (both called and calling parties) might impact upon all MSPs (including TMI's) position within the Relevant MVCT Markets and ComReg found that indirect constraints were unlikely to effectively constrain a HM supplier's ability to profitably sustain a small but substantial increase in MTRs above the competitive level. TMI also accepts that there are no effective demand side substitutes for MVCT offered by an individual MSP. As noted the MVCT Consultation¹⁹⁹, over the period within which it has been active in the wholesale market, TMI's MTRs ranged from 60% to 212% above those of MSPs currently designated with SMP. In paragraph 6.68 of this Decision it shows that TMI's current MTRs now range between 63% and 232% higher than other currently regulated MSPs MTRs. It, therefore, appears to ComReg that TMI has the ability to sustain and MTR increase well above the MTR levels of other currently regulated MSPs.
- 5.70 As noted in paragraphs 5.55 and 5.56 above, both the European Commission and the Competition Authority have concurred with ComReg's definition of the Relevant MVCT Markets.
- 5.71 As regards TMI's comments regarding ComReg's views being 'preliminary' in the MVCT Consultation, these simply reflect that fact that ComReg is consulting with stakeholders on its preliminary views prior to reaching a decision (having considered Respondents' Submissions) and finalising them. ComReg's views were thus "preliminary" in the sense that they do not pre-empt its final analysis and Decision. Accordingly, ComReg's views expressed in the MVCT Consultation were, by necessity, based on its consideration of market conditions at the time of writing, drawn from its analysis of information received from a number of sources, including Service Providers and other sources. Such views were, therefore, necessarily provisional and demonstrably so. ComReg set out reasons for its views including, for example factual information on which it relied in the MVCT Consultation, whilst also giving interested parties the opportunity to make submissions on these matters. In reaching its final decisions, ComReg takes full account of Respondent's views and has re-examined all issues in light of these.
- 5.72 TMI's response to Question 5 and Question 6 raised points that are the same as those set out in its response to previous questions (many of which were related to whether it had SMP and the proposed imposition of remedies upon it).

¹⁹⁹ See paragraph 6.24 of the MVCT Consultation.

ComReg has addressed these in paragraphs 4.132 to 4.145 above and, having regard to the reasons set out therein, ComReg maintains its view that its definition of the Relevant MVCT Markets is appropriate.

- 5.73 Given the above, ComReg does not find any material reasons set out within TMI's Submission, or otherwise (such as by reason of ComReg's own re-examination of the issues) to change its definition of the Relevant MVCT Market as it applies to TMI (or indeed another MSP).

Whether a potential supply-side substitute exists through the purchase of termination via an MVNE

- 5.74 In paragraph 5.46 we noted that Vodafone considered that there may be a supply-side substitute for termination purchased from a MVNO, in particular, in the form of termination purchased directly from the MVNE that provides wholesale services to the MVNO.

- 5.75 ComReg would note that its definition of the MVCT product concerns the supply by the MVNO of a call completion service enabling other Service Providers' subscribers to connect to the MVNO's subscribers (and not the subscribers of the MSP providing the network hosting arrangements to the MVNO). Additionally, it is the MNVO who has been allocated the mobile numbers (either through a primary or secondary allocation) and who has the ability to set the MTR. In the specific circumstance identified by Vodafone regarding the relationship between TMI and Liffey Telecom, ComReg notes that Liffey Telecom has no subscribers, TMI has a secondary allocation of mobile numbers (from Liffey Telecom) and it is TMI that sets the MTR and not Liffey Telecom. Therefore, ComReg does not consider that underlying wholesale access arrangements between these parties suggest that wholesale supply side substitution is possible.

Lycamobile's ability to set its MTR and the position of its subscribers

- 5.76 In paragraph 5.47 we noted that Lycamobile, in setting out views on the proposed market definition, considered that too much credence was given to a new unregulated MVNO entrant to set its own MTR.
- 5.77 ComReg would note that the wording of ComReg's proposed market definition²⁰⁰ focuses, amongst other things, on whether an MSP has the ability to set its MTR (which Lycamobile does). However, the extent to which it can do so independently of its competitors, customers and consumers is assessed in the context of whether an MSP has SMP. In this regard, Lycamobile indicated that the choice it faced was to either reduce its MTR or to face refusal or delay by other Service Providers in conditioning their networks for interconnection or to delay implementing number portability and these matters were²⁰¹ considered in

²⁰⁰ See paragraph 5.6 above.

²⁰¹ Insofar as Lycamobile was concerned, see paragraph 6.228 to 6.246 of the MVCT Consultation.

the MVCT Consultation in the context of the SMP assessment and are further considered in section 6 of this Decision²⁰².

- 5.78 It is also worth re-iterating that in the context of the definition of the Relevant MVCT Markets, that ComReg is seeking to ascertain the ability of a HM supplier of MVCT to profitably sustain a small but substantial increase (typically 5% to 10%) in MTRs above the competitive level. As noted the MVCT Consultation²⁰³, over the period within which it published its MTRs and offered MVCT services, Lycamobile's MTR have been substantially above those of MSPs currently designated with SMP (as well as being somewhat above unregulated MTRs of TMI). In Table 6 and paragraph 6.91 of this Decision it shows that Lycamobile's current MTRs now range between 13% and 275% higher than all other (regulated and non-regulated) MSPs' MTRs (excluding Vodafone which has negotiated an MTR from Lycamobile that is lower than that which is charged by Lycamobile to other Service providers – although it is still substantially above²⁰⁴ Vodafone's own MTR).
- 5.79 ComReg does not, therefore, accept Lycamobile's position that the wording of the definition of the Relevant MVCT Markets is inappropriate.

Whether the economic bottleneck has been properly identified

- 5.80 In paragraph 5.48 we noted that Lycamobile considered that the economic bottleneck in the Relevant MVCT Markets was the lack of effective regulation of wholesale access rates obtained by MVNOs from the host networks.
- 5.81 It stated that it is not uncommon for the wholesale access charges levied on the MVNO for the use of the MNO's network (those elements associated with the facilitation of the termination leg of the call) being equal to or exceeding the MTR received by the MVNO for terminating a call (presumably referring to a scenario where the rate charged by the host network to the MVNO under the MVNO arrangement for carrying the terminating leg of the call is greater than the MTR that the MVNO can levy on other Service Providers for the supply of MVCT).
- 5.82 As noted previously in paragraph 5.61, MVNO access arrangements between an MVNO and a host MNO are unregulated and are a matter for commercial negotiation. They are not, therefore, generally relevant to the supply, by an MVNO, of MVCT services. As also noted in paragraph 5.75 above, the underlying wholesale access arrangements between an MVNO providing MVCT and its host MNO/MVNE do not constitute a supply-side substitute for MVCT.
- 5.83 In any event, ComReg has also examined the wholesale contract between Lycamobile and O2 and ComReg would note that, contrary to Lycamobile's view,

²⁰² See, for example, paragraphs 6.86 to 6.92.

²⁰³ See paragraph 6.24 of the MVCT Consultation.

²⁰⁴ The TMI MTR charged to Vodafone ranges from [redacted] above the MTRs of other regulated MSPs.

Lycamobile's MTRs [REDACTED]

Whether the Geographic Scope of the Relevant MVCT Markets is Global

- 5.84 In paragraph 5.49 we noted that Lycamobile did not agree that the wholesale MVCT geographic market is national in scope, but considered it to be global, based on its use of the GSM standard; based on it having to purchase MVCT from both EU and non-EU MSPs given the propensity of its subscribers to mostly make outbound international calls; and its position that retail mobile product offerings were not homogeneous.
- 5.85 ComReg does not agree that such reasons justify the broadening of the scope of the geographic market beyond national boundaries. ComReg has previously addressed the relevance, to wholesale MVCT market definition, of Lycamobile's subscribers' international outbound calling preferences²⁰⁶. For the reasons set out therein, ComReg does not consider this to be materially relevant to the definition of the geographic scope of the Relevant MVCT Markets which, by definition, relates to "inbound" calls which are coming in to Lycamobile's Irish registered subscribers in Ireland (such reasons included the geographic area in which Lycamobile provides wholesale MVCT to other undertakings for the purpose of completing inbound calls to its Irish mobile subscribers is in Ireland, its MTRs do not differ based on underlying technology used to supply MVCT or based on geographic considerations).
- 5.86 While Lycamobile uses the GSM standard in a number of countries, as noted in the MVCT Consultation²⁰⁷, insofar as the supply of MVCT by any Irish MSP operating within a Relevant MVCT Market is concerned, MTRs in Ireland are not differentiated according to the underlying technology employed (notwithstanding that many such MSPs employ several technologies in providing retail and wholesale MVCT services).
- 5.87 ComReg has also previously addressed Lycamobile's comments regarding the uniformity of mobile call product offerings when considering Lycamobile's response to Question 4²⁰⁸. In the context of the wholesale Relevant MVCT Markets, each MSP operating within them offers the same MVCT product (from a functional perspective) to all other undertakings and does not differentiate their MTRs based on the location of the called party or by technology employed. This

²⁰⁵ [REDACTED]

²⁰⁶ See ComReg's response to Questions 4 to Question 6 regarding Lycamobile's views, in particular at paragraphs 4.62 to 4.66m 4.121 to 4.124 and 5.76 to 5.79 of this Decision.

²⁰⁷ See 5.73 of the MVCT Consultation.

²⁰⁸ See paragraphs 4.62 to 4.66 of this Decision.

strongly suggests to ComReg that there are homogeneity of conditions of competition and common pricing constraints within each Relevant MVCT Market.

- 5.88 Having regard to the above, ComReg does not consider that the issues raised by Lycamobile on this issue would lead it change its view that the geographic scope of the Relevant MVCT Markets are national.

ComReg’s Position on the Definition of the Relevant MVCT Markets

- 5.89 In paragraphs 5.50 to 5.88 above, ComReg has considered Respondents’ Submissions on ComReg’s analysis of the definition of the MVCT product and geographic markets. Having regard to the analysis set out in the MVCT Consultation²⁰⁹ and the consideration of Respondents’ views above, ComReg’s position is set out below.
- 5.90 ComReg’s position is that there are currently no effective demand-side and supply-side substitutes for MVCT and this position is not likely to change within the lifetime of this market analysis. ComReg’s position is also that the strength of any indirect constraints from retail markets are insufficient to act as an effective competitive constraint on the Relevant MVCT Markets.

Definition of the MVCT Product Market

- 5.91 ComReg’s position is that each of the wholesale MVCT product markets are defined as follows:

“The MVCT product markets consist of the provision by a mobile service provider of a wholesale service to other undertakings²¹⁰ for the purpose of terminating incoming voice calls to mobile numbers²¹¹ in respect of which that mobile service provider is able to set the MTR”

- 5.92 To the extent that other wireless networks (or other similar technologies) could facilitate the offer, by a MSP, of a wholesale service for the termination of incoming calls to its own subscribers and, having regard to whether they utilise mobile numbers and their ability to determine their own MTRs, such MSPs are likely to face similar abilities and incentives to existing MSPs when setting their actual ‘MTRs’. As a consequence, it is ComReg’s position that mobile termination offered in these circumstances would fall within the wholesale MVCT product definition above.

²⁰⁹ See paragraphs 5.1 to 5.75 of the MVCT Consultation.

²¹⁰ For the avoidance of doubt, the MVCT Consultation noted in paragraph 5.77 that ‘other undertaking’ includes any undertaking, whether this be an undertaking located in the Republic of Ireland or in another jurisdiction.

²¹¹ See footnote 167 above.

Definition of the MVCT Geographic Market

5.93 It is ComReg's position that the geographic scope of each of the Relevant MVCT Markets is the Republic of Ireland, in particular,

"The geographic scope of the Relevant MVCT Markets corresponds to the geographic coverage of each individual mobile service provider's network."

Identification of Relevant MVCT Markets

5.94 Having regard to the above product and geographic market definitions, it is ComReg's position that the following separate Relevant MVCT Markets exist:

- Wholesale MVCT supplied by Hutchison 3G Ireland Limited;
- Wholesale MVCT supplied by Lycamobile Ireland Limited;
- Wholesale MVCT supplied by Meteor Mobile Communications Limited;
- Wholesale MVCT supplied by Telefónica Ireland Limited (including Liffey Telecom Limited);
- Wholesale MVCT supplied by Tesco Mobile Ireland Limited;
- Wholesale MVCT supplied by Vodafone Ireland Limited;

5.95 Given the definition of the Relevant MVCT Markets, neither Postfone nor Blueface are considered by ComReg to fall within the scope of a Relevant MVCT Market, in particular, given they do not charge, nor do they currently have the ability to set, an MTR. However, ComReg notes that were they to do so (or have the ability to do so), then Postfone and Blueface would likely fall within the definition of the Relevant MVCT Market.

6 Competition Analysis and Assessment of Significant Market Power

- 6.1 In section 6 of the MVCT Consultation, ComReg set out its preliminary view on whether each of the Relevant MVCT Markets is effectively competitive and whether any MSPs operating within such markets should be designated as having Significant Market Power (SMP).
- 6.2 ComReg briefly describes below the preliminary views set out in the MVCT Consultation and then goes on to consider Respondents' views before setting out its position on such matters.

Position set out in the MVCT Consultation

Overview

- 6.3 The MVCT Consultation noted that Article 14(2) of the Framework Directive²¹² states that:

“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”.

- 6.4 Arising from this definition, ComReg assessed whether SMP exists in accordance with the framework established by the European Commission. In this regard, it was highlighted²¹³ that the European Commission's SMP Guidelines, of which ComReg is required to take utmost account²¹⁴, refer to a range of criteria²¹⁵ that may be considered by National Regulatory Authorities (NRAs) when seeking to establish whether an undertaking(s) has SMP in a relevant market. For the purposes of the analysis of the Relevant MVCT Markets, ComReg considered all of the criteria set out in the SMP Guidelines and considered that the criteria of most relevance to the assessment of SMP in the Relevant MVCT Markets are:

- Market shares;
- Control of infrastructure not easily duplicated;
- Absence of potential competition; and

²¹² Article 14 (2) of the Framework Directive is transposed by Regulation 25 (1) of the Framework Regulations.

²¹³ See paragraphs 6.6 to 6.8 of the MVCT Consultation.

²¹⁴ In accordance with Regulation 25 (2) of the Framework Regulations ComReg is required to take utmost account of the SMP Guidelines.

²¹⁵ See paragraphs 75 and 78 of the SMP Guidelines

- Absence of or low countervailing buying power.
- 6.5 ComReg also considered that factors such as historical and likely pricing behaviour are relevant considerations. Other factors identified in the SMP Guidelines which could be used to indicate the potential market power of an undertaking were also examined in the MVCT Consultation²¹⁶ but, for the reasons set out therein, were considered of no or less relevance for the purposes of the SMP assessment in the Relevant MVCT Markets.
- 6.6 ComReg also noted²¹⁷ that in markets subject to *ex ante* SMP regulation, an authorised undertaking's behaviour may also be restricted by way of existing SMP regulatory controls. In this regard, it was necessary to consider the potential ability of the undertaking to exert market power in the absence of *ex ante* SMP regulation²¹⁸ in the market concerned.
- 6.7 ComReg's SMP assessment occurred under the following three broad headings within which the relevant criteria identified above were encapsulated:
- **Existing competition in the Relevant MVCT Markets** – an assessment of factors such as market shares, relative strength of existing competitors and pricing behaviour.
 - **Potential competition in the Relevant MVCT Markets** - an assessment of factors such as control of infrastructure not easily duplicated, barriers to entry in the Relevant MVCT Markets, as well as considering the overall strength of potential competitors.
 - **Strength of any countervailing buyer power (CBP)** – an assessment of the impact posed by any strong buyers of MVCT on the competitive behaviour of the MVCT sellers.

Existing Competition in the Relevant MVCT Markets

- 6.8 In the MVCT Consultation, ComReg considered²¹⁹ factors such as market shares, pricing, and the relative strength of existing competitors.
- **Existing Competition:** as the Relevant MVCT Markets were defined such that each MSP identified is the sole supplier of mobile voice call termination to its subscribers, it was ComReg's preliminary view that each of the MSPs operating within them do not face existing competition. The strength of any indirect constraints coming from the retail market were also not considered likely to be sufficient to result in the development of effective competition in

²¹⁶ See Appendix C of the MVCT Consultation.

²¹⁷ See paragraph 6.13 of the MVCT Consultation.

²¹⁸ However, as noted in paragraph 5.4 of the MVCT Consultation, while discounting SMP regulation in the market concerned, other obligations (such as, for example, relevant SMP remedies existing in other markets, or obligations relating to general consumer protection or interconnection) are considered.

²¹⁹ See paragraphs 6.16 to 6.35 of the MVCT Consultation.

each of the Relevant MVCT Markets. ComReg also considered that these conditions are likely to remain broadly the same over the medium term (i.e. within the lifetime of the market analysis).

- **Market Shares:** Given the definition of the Relevant MVCT Markets, it was noted by ComReg that each of the 6 individual MSPs operating within them (identified in paragraphs 5.15) had 100% market share, irrespective of whether this is measured by call termination volumes or call termination revenues. These high market shares were considered by ComReg to have been maintained over time²²⁰. It was noted that there were currently no competitors in the each of Relevant MVCT Markets, and that this position was likely to be maintained over at least the medium term.
- **Pricing Behaviour:** The MVCT Consultation noted that development and extent of competition in a market over time may be observed by reference to pricing behaviour. In an SMP assessment context, the ability of a MSP to behave, to an appreciable extent, independently of the pricing behaviour of its competitors may be suggestive (but not determinative in itself) of SMP when considered alongside other factors. In view of this, ComReg examined the trends in the MTR pricing behaviour of MSPs over a four and a half year period²²¹, noting, where appropriate, that certain MSPs pricing behaviour had operated in the presence of SMP price related obligations. The analysis showed that there have been wide variations between the MTRs charged by each of the MSPs. Non-regulated MSPs had charged substantially higher MTRs than regulated MSPs, with the differences between MTRs increasing over time as regulated MSPs have reduced their MTRs in light of regulatory pressures. It was also noted that there have been differences between the MTRs charged by regulated MSPs, however, this has eroded over time to some degree (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 was 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), supported, in ComReg's view, a strong presumption of SMP in the Relevant MVCT Markets.

6.9 ComReg's preliminary view was that the high market shares, existing competition and historic MTR pricing behaviour trends were strongly suggestive that,

²²⁰ At that time, Lycamobile had not yet commenced provision of wholesale MVCT, however, it had published its MTRs and in light of the advanced stage of its wholesale arrangements mean that it was likely to offer MVCT (within the timeframe of this market analysis). Lycamobile was considered likely to hold a 100% market share which would be maintained over time.

²²¹ See Table 11 of the MVCT Consultation.

individually, Vodafone, O2, Meteor, H3GI, TMI and Lycamobile, were likely to have SMP in the Relevant MVCT Markets within which they operate. However, ComReg then considered other relevant factors which might diminish or undermine this presumptive SMP position.

Potential Competition in the Relevant MVCT Markets

6.10 In the MVCT Consultation ComReg considered²²² potential competition in the Relevant MVCT Markets, in particular, whether entry was likely over the medium term to such an extent that it would constrain an MSP's ability to act, to an appreciable extent, independently of its competitors, customers or consumers. In this regard it was noted that the threat of market entry, where it is credible, probable and timely, can be a disciplining factor which might impact the behaviour of each of the MSPs operating within the Relevant MVCT Markets. ComReg was of the preliminary view that given the significant high and non-transitory barriers to entry in each of the Relevant MVCT Markets, the emergence of potential competition within a medium term was unlikely and, therefore, was not likely to provide an effective competitive constraint on MSPs. Consequently, ComReg considered that the likely absence of potential competition did not undermine the strong indication that, individually, Vodafone, O2, Meteor, H3GI, TMI and Lycamobile had the power to behave, to an appreciable extent, independently of each other, customers and consumers.

Countervailing Buyer Power

6.11 In the MVCT Consultation ComReg considered²²³ whether bargaining power on the buyer side of each the Relevant MVCT Markets is likely to impose a sufficient competitive constraint on the MTR setting behaviour of an MSP supplying MVCT, such that it would credibly offset their power to behave, to an appreciable extent, independently of competitors²²⁴, customers and ultimately consumers. In so doing, ComReg examined whether sufficient²²⁵ countervailing buyer power (CBP) exists such that it results in MSPs supplying MVCT not being able to sustain MTRs that are above the level that would pertain in a competitive market outcome, i.e. the effective exercise of CBP is one which results in MTRs being constrained to the level that would be achieved in a competitive market outcome.

6.12 ComReg expressed the view that effective CBP is that which results from customers being of sufficient size or importance to the seller and having the ability to credibly switch to alternative sources of supply such that it deters the seller from profitably increasing its prices. It also noted that effective CBP is that

²²² See paragraphs 6.36 to 6.40 of the MVCT Consultation.

²²³ See paragraphs 6.41 to 6.248 of the MVCT Consultation.

²²⁴ As noted above, there are no actual or potential competitor suppliers of MVCT in each Relevant MVCT Market.

²²⁵ The existence of some level of CBP would not, in itself, be sufficient. Rather, it must be sufficiently strong such that it results in an MTR being prevented from rising above a level that would pertain in a competitive market outcome.

which has a broader market impact and not just that which only results in a limited segment of customers benefiting from better terms and conditions.

6.13 ComReg also outlined the framework²²⁶ under which ComReg considered CBP including:

- the economic framework for CBP assessment;
- the regulatory context for CBP assessment, in particular, ComReg's approach to the treatment of existing SMP regulation in the Relevant MVCT Markets, being the markets within which prospective SMP is now being assessed; existing SMP regulation in markets other than the Relevant MVCT Markets; and other non-SMP regulation and the role of dispute resolution; and
- other criteria relevant to the CBP assessment, including the degree to which a purchaser of MVCT represents an important outlet for the seller; the degree to which a purchaser of MVCT is a well informed and price sensitive buyer; and evidence of CBP through analysing actual negotiations.

6.14 To support its CBP analysis, ComReg relied on information requested²²⁷ from purchasers and sellers of MVCT to examine the history and extent of any negotiations regarding MTRs and to review any strategy employed by the relevant parties during such negotiations.

6.15 The above factors were subsequently discussed in detail in the context of individual CBP assessments in each of the specific Relevant MVCT Markets within which MSPs operate. While noting that in some cases a degree of CBP had been exercised, in particular, with respect to a degree of CBP experienced by TMI and Lycamobile, ComReg's preliminary view was that the level of any CBP exercised by MVCT purchasers is unlikely to be sufficiently effective such that it would, absent regulation, prevent the individual abilities of Vodafone, O2, Meteor, H3GI, TMI and Lycamobile to set their MTRs above the level which would occur in a competitive market outcome (and act independently of competitors, customers and consumers).

SMP Designation

6.16 Having considered a wide range of factors to identify whether any undertaking enjoys a position of SMP in each of the Relevant MVCT Markets, ComReg's preliminary view was that each of the Relevant MVCT Markets is not effectively competitive and the individual MSPs operating within each Relevant MVCT Markets, as identified below, should be designated as having SMP:

- Wholesale MVCT supplied by Vodafone Ireland Limited;

²²⁶ See paragraphs 6.47 to 6.83 of the MVCT Consultation.

²²⁷ ComReg requested information through a series of Statutory Information requests in November 2010, July 2011 and October 2011. Such information included details of interconnection arrangements and any evidence of negotiations concerning the level of MTRs.

- Wholesale MVCT supplied by Telefónica Ireland Limited (including Liffey Telecom Limited);
 - Wholesale MVCT supplied by Meteor Mobile Communications Limited;
 - Wholesale MVCT supplied by Hutchison 3G Ireland Limited;
 - Wholesale MVCT supplied by Tesco Mobile Ireland Limited; and
 - Wholesale MVCT supplied by Lycamobile Ireland Limited.
- 6.17 ComReg asked the following question²²⁸ with respect to its preliminary conclusions on the assessment of SMP.

Question 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.

Respondents’ Views

Assessment of SMP

- 6.18 **7 Respondents commented on this question. Two Respondents agreed** (ALTO and Eircom Group) with ComReg’s assessment of SMP and the associated proposed SMP designations. **Three Respondents partially agreed** (Lycamobile, O2 and Vodafone), while **two Respondents did not agree** (H3GI and TMI) with ComReg’s assessment of SMP and the associated proposed SMP designations as they related to them.
- 6.19 ALTO agreed with the SMP assessment noting the lack of incentive for the MSPs to negotiate reduced MTRs with the wider industry and the issues with Countervailing Buyer Power, in particular, that it is not possible for a Service Provider to purchase MVCT from anyone other than the terminating MSP. ALTO considered that *ex-ante* regulation is required. ALTO also noted that relying on *ex-post* competition law takes too long and, by the time issues were resolved, the retail market and competitors within that market could be seriously damaged.
- 6.20 Eircom Group agreed with the SMP assessment and the proposed designations, as well as the proposal not to designate Postfone and Blueface with SMP given they are currently unable to set their own MTRs. Eircom Group noted, in line with the preliminary view expressed by ComReg²²⁹ that, were Postfone and Blueface to have the ability to set their own MTRs, they would likely fall within the definition of a Relevant MVCT Market. It urged ComReg to initiate an immediate market analysis were Postfone and Blueface to have the ability to set their own MTRs,

²²⁸ See question 8 on page 176 of the MVCT Consultation.

²²⁹ See paragraph 5.79 of the MVCT Consultation and paragraphs 5.16 and 5.95 of this Decision.

noting that TMI's MTRs had, so far, remained unregulated for a period of five years.

- 6.21 O2 agreed with the SMP assessment (subject to its comments on the definition of the Relevant MVCT Market²³⁰) with respect to its own position in the Relevant MVCT Market within which it operates, but disagreed with respect to TMI and Lycamobile, largely on the basis that it viewed the CBP analysis with respect to these MSPs as being unconvincing. O2 also noted that there were some errors in Table 12 within the MVCT Consultation which set out the percentage reductions in MTRs to date.
- 6.22 Lycamobile agreed with ComReg's approach to assessing SMP but disagreed with the conclusions drawn by ComReg with respect to Lycamobile. In this regard, it considered that it had experienced CBP with respect to its MTR negotiations with Vodafone and that CBP also exists with respect to O2 by virtue of the direct interconnection arrangements with the company in light of the MVNO hosting arrangement. Lycamobile acknowledged that, as it increased its customer base and the amount of MVCT purchased from it increased, this would weaken the effects of CBP. Lycamobile also disagreed with ComReg's assessment of Lycamobile's pricing behaviour and its ability to set its MTRs independently.
- 6.23 Vodafone agreed with ComReg's preliminary conclusions regarding its assessment of existing wholesale market shares and that neither wholesale competition nor retail constraints were likely to provide effective competitive constraint on the supply of MVCT. It also agreed with ComReg's assessment of CBP and considered that any CBP 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%. It noted that this was particularly the case where other Service Providers had a material number of subscribers. With regard to possible countervailing buyer power at the retail level, in the context of the use of the CPP 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 existed to a limited extent, but was likely to be insufficient to render unprofitable a SSNIP of 5%-10% in MVCT charges by the HM supplier of MVCT. However, Vodafone did not agree that MSPs will continue to have the power to set MTRs independently of each other for a number of reasons, including that an MSP's ability to set its MTRs would be conditioned by a combination of general legislative requirements to negotiate interconnection²³¹ and conditions in the Numbering Conventions²³² requiring Service Providers to open up numbers on their networks where technically and economically feasible.

²³⁰ See paragraph 5.36 above.

²³¹ Such requirements arise under Regulation 5(2) of the Access Regulations 2011.

²³² See footnote 41 in this Decision.

- 6.24 According to H3GI, ComReg has failed to properly apply a ‘modified greenfield’ approach in assessing pricing behaviour. In this regard, H3GI considered that, rather than considering how MVCT may have been priced absent SMP regulatory controls, ComReg’s analysis of pricing behaviour had drawn conclusions from pricing in the presence of regulation. H3GI also disagreed with ComReg’s approach of disregarding the role of dispute resolution when assessing CBP. It also noted there were errors in Table 11 of the MVCT Consultation concerning some of its MTRs in the period H2 2010 to H1 2011.
- 6.25 TMI disagreed largely on the basis of its view that it had, or would experience, effective CBP given its subscriber base size/retail market share relative to other MSPs and the impact this would have on its ability to set its MTRs independently of competitors, customers and consumers. TMI also considered that it was not engaging in any distortion of competition. It considered that ComReg’s analysis was deficient and, in its view, ComReg had not appropriately considered the SMP criteria. It cited a number of reasons why it did not have SMP as well as raising a number of issues in relation to the proportionality of ComReg’s approach to imposing regulatory obligations, arguing that there are clear and objectively justifiable reasons why TMI ought to be treated differently to the established MSPs with respect to the imposition of price control obligations concerning its MTRs.
- 6.26 Eircom Group, Lycamobile, O2, TMI and Vodafone also raised a number of other issues in their Submissions and these along with the matters highlighted above are further summarised below. In this regard, ComReg considers that Respondents’ views can be generally categorised into the following themes.
- Assessment of potential competition;
 - Suggested failure to adequately consider the SMP Criteria and adequacy of CBP analysis with respect to TMI;
 - Adequacy of the analysis of Countervailing Buyer Power with respect to Lycamobile;
 - Whether a MSP’s ability to set its MTRs independently is constrained by other non-SMP obligations and other incentives faced by MSPs;
 - Approach to assessing MTR pricing behaviour;
 - Whether the impact of dispute resolution should be discounted in the SMP analysis; and
 - Other additional issues.
- 6.27 Respondents’ views under the above themes are summarised below.

Assessment of potential competition

- 6.28 O2 also commented on its earlier concern that, given the narrow market definition, there has been little comment in the market review on potential competition. According to O2, ComReg assert that there are high and non-transitory barriers to entry in this market. However, it stated that the market had

seen five new entrants in the past 4 years, one of which had exited. O2 indicated that there would appear to be significant potential for new entrants and noted that it is difficult to assess the impact that 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. O2 states that an 'automatic' SMP designation imposes price controls, which would act as a disincentive to MSPs entering the market and thereby impact upon competitive activity in retail mobile markets.

Suggested failure to adequately consider the SMP Criteria and adequacy of CBP analysis with respect to TMI

- 6.29 TMI's view was that ComReg's reasoning in the MVCT Consultation in relation to the assessment as to whether TMI has SMP was of a summary nature, was mechanical, lacked justification and adequate reasoning and was, therefore, inadequate. In this regard, it considered that ComReg had failed to adequately consider the criteria in the SMP Guidelines and adequately justify why, in TMI's specific case, each criteria is or is not relevant to the assessment of SMP. TMI suggested that ComReg had assumed that TMI has SMP by virtue of other MSPs having SMP. TMI requested that ComReg, as a matter of urgency, should set out in detail the rationale for such a finding of SMP and to give TMI adequate time to respond or, better still, recognise that it would be inappropriate to find that TMI has SMP. It considered that the current consultation should be stopped with the necessary market definition and other remedial work undertaken so as to ensure a robust and sustainable consultation process.
- 6.30 Furthermore, TMI considered that ComReg's assessment of SMP with respect to TMI was flawed given it only considered a situation where TMI's MTRs were static and did not consider what would have happened had TMI not followed the market's approach in setting its MTRs. TMI stated that it was not in a position to increase its MTRs (by the normal benchmark used for assessing dominance) and did not have the ability to act, to an appreciable extent, independently of its competitors or consumers. It considered that it was subject to CBP and that if it did increase its MTRs, other Service Providers would refuse to pay or take other actions such as terminate interconnection arrangements or exclude calls to TMI subscribers from their retail bundles. In support of its position as to why TMI considered it did not have SMP, it set out the following reasoning:²³³
- TMI stated that it faced difficulties establishing interconnection agreements with all the incumbents and, that if TMI did have SMP with regard to call termination on its network, then it presumed the other Service Providers would have needed to conclude interconnection agreements with TMI. TMI states that the factual evidence demonstrates otherwise;
 - TMI stated that it faced particular difficulties with H3GI which necessitated the involvement of ComReg. It also noted that for a period of approximately

²³³ See paragraph 20 of TMI's response.

18 months, TMI could not effectively launch in Ireland as its customers were not able to call all numbers, which negatively affected TMI and its ability to compete in the market, as well as delaying the introduction of lower prices for consumers. This, in TMI's view, showed that it had not got SMP. (TMI also noted that a new entrant today could decide to ignore TMI and proceed with its launch but it could not do the same with more established operators such as Vodafone and O2 also, in TMI's view, demonstrating that it does not have SMP);

- TMI stated that it had to rely on ComReg (for whose assistance TMI was very grateful) to help it operate in the Irish market place and it suggested that it is counterintuitive that a new and small entrant which needs the assistance of the regulator would be said to have SMP or that it could in any way affect or distort competition.
- If TMI has SMP, which it stated is consistent with the ability to raise prices, then it questioned why would it have reduced its MTRs (in January 2010, February 2012 and subsequently in August 2012).
- TMI stated it was [REDACTED] ²³⁴ thereby demonstrating that TMI had little CBP/negotiating power/SMP.
- TMI made a number of other comments, most of which relate to ComReg's approach to imposing regulatory obligations, in particular, those relating to price control. In this regard it is TMI's view that, given the size and scale of its operations it is not comparable to other larger more established MSPs and it has less freedom to act independently. As a consequence, ComReg should take this into consideration in terms of the proportionality of its approach. TMI suggested that there are clear and objectively justifiable reasons why TMI ought to be treated differently to the established MSPs with respect to the regulation of mobile termination rates. TMI noted an 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.
- TMI indicated that a finding of SMP was not contemplated by TMI nor was the proposed imposition of price control within the timeframe contemplated. TMI acknowledged that 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

²³⁴ See paragraph 20© of TMI's submission

contemplated by TMI, particularly when, in its view, the majority of other MNOs and MVNOs across Europe have had far longer to prepare. TMI considered that ComReg's approach to implementation had been left so late that the procedures/analysis followed were not fair or thorough and deprived TMI of the same opportunity to prepare for regulatory change as had been afforded to others in the past.

- TMI also requested that the consultation be stalled and a new consultation is initiated, with more detailed and accurate analysis of the relevant markets and greater investigation into the impact (or lack thereof) of ComReg's proposals on competition at a wholesale and retail level.
- TMI considered that 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. TMI expressed the view that larger incumbent MSPs are not as concerned with MTRs as smaller MVNOs as such MSPs can net off the MTR payments against each other to a greater extent.

6.31 TMI also raised a number of issues in its response²³⁵ to Question 8, many of which do not relate to the SMP assessment itself, but to the purported consequences on TMI arising from the imposition of regulatory obligations.

6.32 O2, while agreeing with ComReg's SMP assessment as it applied to O2, suggested that the degree of dominance and potential abuse of dominance differs across those MSPs it is proposed to designate with SMP and that this should be recognised in the assessments of market power and specifically in relation to Countervailing Buyer Power. In this regard, O2 believed that ComReg's analysis with respect to CBP exercised upon TMI was not convincing and suggested that TMI's voluntary reductions in its MTRs were evidence of the exercise of CBP on its pricing behaviour and that ComReg does not offer any reasoning why a profit maximising firm, with ability to abuse its dominant position through high MTRs, would voluntarily reduce its MTRs. O2 noted that ComReg has suggested that some exercise of CBP is evident in TMI's case and questioned how ComReg can then argue that TMI can set its MTRs, to an appreciable extent, independently of competitors.

Adequacy of the analysis of Countervailing Buyer Power with respect to Lycamobile

6.33 Two Respondents expressed views on the analysis of CBP with respect to Lycamobile, in most cases having regard to the analysis as to whether it had or would experience CBP such that it would constrain Lycamobile's ability to set its MTRs independently of competitors, customers for MVCT (i.e., other Service Providers) or retail consumers.

²³⁵ See paragraphs 36 to 41 of the TMI Submission.

6.34 Lycamobile, given it is a new entrant and by virtue of its size, considered that it had experienced CBP as evidenced from its dealings with Vodafone and TMI with respect to the level of its MTRs. Lycamobile also considered that O2 has CBP by virtue of the direct interconnection between the companies which was necessary for the effective operation of its MVNO arrangement with O2. It suggested that ComReg's 'presumption' that the existence of the MVNO arrangement undermines any exercise of CBP by O2 is not correct and that the opposite is true. Lycamobile also suggested that the MVNO arrangement creates Countervailing Buyer Power in favour of O2 since O2 can cease the provision of wholesale services and transit. Lycamobile noted that although alternatives exist for some such services (i.e., direct interconnection), the timeframe to implement them makes these alternatives commercially unviable. Lycamobile also stated that, looking forward, as Lycamobile's customer base increases, and as the amount of Lycamobile termination purchased by the other network operators increases, Lycamobile considered that the effect of CBP will decrease, particularly if the volume of traffic it terminates justifies a direct interconnection. Lycamobile also disagreed with ComReg's assessment of its pricing behaviour and its ability to set its MTRs independently. In this regard it considered that it had set its MTRs at a

*"...competitive rate, being the average MTR at the prevailing time for the MVNO Tesco Mobile."*²³⁶

6.35 O2 also considered that ComReg's CBP analysis with respect to Lycamobile was inadequate, raising some similar issues to those raised regarding the analysis of CBP for TMI in paragraph 6.32 above.

Whether an MSP's ability to set its MTRs independently is constrained by other non-SMP obligations and other incentives faced by MSPs

6.36 Vodafone agreed with ComReg's preliminary conclusion 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. It argued that this was because of the following.

- (a) General obligations to negotiate interconnection under Regulation 5(2) of Access Regulations²³⁷ and provisions in section 3.2.2.4 of the Numbering Conventions²³⁸ which require numbers to be opened 'where technically and economically feasible' mean that operators are constrained from denying access.
- (b) MSPs of a certain size face incentives to set symmetrical MTRs given they are both a revenue and a cost. It also acknowledged that MTRs also impact

²³⁶ See Lycamobile Submission, in particular, its response to Question 8.

²³⁷ This is derived from Article 4.1 of the Access Directive.

²³⁸ This is derived from Article 28.1 of the Universal Service Directive (as amended).

the level and structure of mobile tariffs and, given competition in the retail market, such MSPs faced incentives to set low MTRs, in order to attract retail subscribers and prevent switching to other subscribers. This, in Vodafone's view, acted as an indirect constraint on MSPs in setting their MTRs.

Approach to assessing MTR pricing behaviour

6.37 According to H3GI, ComReg had failed to properly apply a 'modified greenfield' approach. In H3GI's opinion, rather than considering "*how MVCT may have been priced absent SMP regulatory controls*", ComReg was drawing conclusions from pricing in the presence of regulation.

6.38 Vodafone also commented on ComReg's analysis of MTR setting behaviour and questioned the rationale for ComReg's preliminary view that the levels of MTR reductions by SMP MSPs to date, would not have been achieved without ComReg oversight of the voluntary agreements (which led to reductions in MTRs)²³⁹. Vodafone went on to question ComReg's preliminary view in the MVCT Consultation, namely,

"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".²⁴⁰

6.39 Vodafone also stated that the reference above '*...to other factors already considered ...*' were not identified in the MVCT Consultation.

6.40 Vodafone noted that ComReg facilitated the negotiation of these agreements and, if it was ComReg's belief that voluntary agreements were insufficient for MNOs to discharge their regulatory obligations in relation to cost-oriented rates, then it was incumbent on ComReg to intervene. It noted that there has been no intervention in relation to the voluntary agreement since 2010 making it a reasonable assumption (in its view) that ComReg believed there were no material competition issues justifying such intervention. It considered that ComReg could have reasonably conducted a full market review from 2008 onwards, but chose not to do so. It stated that it was 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.

²³⁹ For details relating to the implementation of such voluntary agreements, see paragraph 6.22 of the MVCT Consultation.

²⁴⁰ See paragraph 6.28 of the MVCT Consultation.

- 6.41 Vodafone also raised a number of issues in relation to competition problems and price control remedies (which were not directly relevant to the SMP assessment).

Whether the impact of dispute resolution should be discounted in the SMP analysis

- 6.42 H3GI disagreed with ComReg's assertion that dispute resolution was not a factor for consideration in terms of its actual or potential impact on the bargaining dynamic between parties and ultimately CBP. According to H3GI, the existence of ComReg's dispute resolution function and resulting powers was a relevant factor to be examined in each case. Although, it did not state why this is the case.

Other Additional Issues

- 6.43 A number of Respondents raised a number of issues regarding the assessment of SMP, general matters and/or other perceived difficulties related to matters set out in the MVCT Consultation.

Change in Traffic Flows in context of CBP Assessment for Meteor

- 6.44 Eircom Group, while agreeing with the CBP assessment, noted that during the time period analysed in the MVCT Consultation²⁴¹, ComReg identified²⁴² an asymmetry in interconnect traffic flows between Meteor and each of Vodafone and O2 respectively that operated in favour of Meteor, with fewer minutes of MVCT being purchased by Meteor from each of these other MSPs than vice versa. Eircom Group noted that this situation has changed in the intervening period, to the extent that Meteor now sees a sustained asymmetry in the other direction that operates to the detriment of Meteor. According to 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 other MSPs in the retail market, notably O2 and Vodafone.

Difficulties in expressing views given the redaction of text

- 6.45 ALTO and O2 both commented on ComReg's practice of redacting commercially sensitive/confidential information in the MVCT Consultation. While appreciating the need to do so, they noted that this made it difficult to comment on such text and, therefore, impacted their ability to respond fully to the issues raised. O2 urged ComReg to protect commercially sensitive information while at the same time giving a comprehensive account of the issues being discussed.

Suggested legal deficiencies in the consultation with respect to the SMP assessment

- 6.46 TMI suggested that ComReg had not set out the position fully as to why and how TMI could have SMP. It suggested that the explanation does not contain sufficient detail or reasoning so as to enable TMI to appreciate its position or vindicate its rights. TMI requested that ComReg, as a matter of urgency, should

²⁴¹ This period covered H2 2007 to H1 2011.

²⁴² See paragraph 6.167 of the MVCT Consultation.

- 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 as to lay the path for a robust and sustainable consultation process. TMI also requested that the consultation is stalled and a new consultation initiated, with a 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.
- 6.47 TMI also repeated a number of its views raised in response to previous questions, including those relating to whether ComReg is required to follow the 2007 Recommendation, indicating that were ComReg to apply it in Ireland inappropriately, that this would be a breach of EU law.
- 6.48 TMI also considered that a finding that TMI had SMP (and subject to various obligations) would be contrary to the "*Principle of Good Administration*" having regard to the timeframe for implementation of the eventual decision arising from the MVCT Consultation and the consequential impact on TMI. It stated that ComReg's consultation period²⁴³ was inadequate, noted that ComReg would have 4 months to reach its decision in November 2012²⁴⁴ while TMI would then have to comply with it by 1 January 2013. It also drew attention to paragraph 8.73 of the MVCT Consultation which indicated that a Separate Pricing Consultation would issue in relation to the detailed specification of any cost-orientation obligation to be imposed on MSPs designated as having SMP. TMI considered that it had not, therefore, been provided with the "*complete picture*" in order to allow it to respond adequately.
- 6.49 TMI also considered that a finding that TMI had SMP (and subject to various obligations) would be contrary to the "*Principle of Legal Certainty*". It re-iterated comments concerning the implementation timeframes noted in paragraph 6.48 above, noting that the decision would result in TMI being subject to an entirely different legal and regulatory regime in terms of price control within a matter of weeks. TMI considered that this would undermine its business model and, as such, would [redacted]. TMI considered, like operators in other jurisdictions and other operators in the Irish market, that it would need adequate time to take account of any determinations in terms of SMP and price regulation. In this respect, TMI considered that that an MTR glide path (whereby MTRs reduce over time) should be put in place to facilitate TMI in adapting to a new regulatory regime.

Errors in Tables in the MVCT Consultation

- 6.50 As noted in paragraphs 6.21 and 6.24, O2 and H3GI pointed to factual errors in Table 11 and Table 12 in the MVCT Consultation.

²⁴³ The MVCT Consultation ran from 23 May 2012 to 17 July 2012, having been extended twice.

²⁴⁴ This timeframe was set out in the MVCT Consultation as the likely timeframe within which ComReg is expected to issue its decision.

ComReg's Assessment of Respondents' Views

6.51 Prior to considering Respondents' views above, ComReg has set out below an update of some of the information that was set out in the MVCT Consultation and that is of relevance to the assessment of SMP.

Update of Information Relevant to SMP Assessment

6.52 Having regard to the passage of time, ComReg has updated below a range of information that was originally presented in the MVCT Consultation. This information largely related to pricing information and information concerning interconnection and termination traffic exchanges between MSPs and other Service Providers.

Update on MTR Pricing Information

6.53 In paragraphs 6.19 to 6.35 of the MVCT Consultation, ComReg presented information concerning the movements in MSPs' MTRs over the period H2 2007 to May 2012. This information is now updated to take account of any changes that have occurred since then. It should be noted that the MTRs shown in all tables below are those which were in place at the beginning of each half year period listed. e.g., the period H1 shows the MTRs that were in place at 1 January etc.

6.54 Table 1²⁴⁵ below presents an update of the movement in individual MSPs' MTRs over the period since H2 2007 to the present, along with the blended weighted average MTRs²⁴⁶ for each period. The data is based on information provided by MSPs in response to statutory information requests and data published in the Eircom²⁴⁷ Switched Transit and Routing Price List (STRPL).

²⁴⁵ This table updates information that was originally presented in Table 11 of the MVCT Consultation (on page 112)

²⁴⁶ A blended MTR is a weighted average price of peak, off-peak and weekend MTRs. Weighting is based on the ratio of voice call termination minutes on the MSP's network between peak, off-peak and weekend time periods. Given Lycamobile is a new entrant a traffic profile is not yet available. However, given its MTRs are symmetric across all times of day the blended weighted average MTR is not relevant. It should be noted in this regard that Lycamobile published its MTRs in July 2011.

²⁴⁷ Available at www.eircomwholesale.ie.

	MSPs' MTR Movents											
Vodafone	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
Peak	12.26	11.89	11.89	12.75	12.75	9.55	9.55	6.94	6.04	5.22	4.77	4.77
Off-peak	8.15	7.78	7.78	4.83	4.83	4.83	4.83	3.51	3.06	2.64	2.41	2.41
Weekend	5.00	4.87	4.87	4.83	4.83	4.83	4.83	3.51	3.05	2.64	2.41	2.41
<i>Weighted average</i>	<i>9.59</i>	<i>9.30</i>	<i>9.30</i>	<i>9.00</i>	<i>9.00</i>	<i>9.00</i>	<i>7.38</i>	<i>5.36</i>	<i>4.52</i>	<i>4.02</i>	<i>3.68</i>	<i>3.68</i>
O2	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
Peak	11.25	11.23	11.23	10.93	10.93	8.80	8.88	6.83	5.98	5.68	5.18	5.18
Off-peak	7.99	9.49	9.49	8.80	8.80	7.15	7.15	3.93	2.80	2.09	1.92	1.92
Weekend	7.99	4.75	4.75	4.75	4.75	3.86	3.86	3.40	2.86	2.14	1.96	1.96
<i>Weighted average</i>	<i>9.79</i>	<i>9.40</i>	<i>9.40</i>	<i>9.00</i>	<i>9.00</i>	<i>9.00</i>	<i>7.38</i>	<i>5.36</i>	<i>4.52</i>	<i>4.02</i>	<i>3.68</i>	<i>3.68</i>
Meteor	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
Peak	15.90	15.60	15.60	15.60	15.60	10.43	10.43	10.43	8.70	7.38	6.59	6.59
Off-peak	10.71	9.79	9.79	9.79	9.79	9.79	8.38	1.85	1.11	1.00	1.00	1.00
Weekend	8.32	7.60	7.60	5.21	5.21	5.21	4.46	1.85	1.10	1.00	1.00	1.00
<i>Weighted average</i>	<i>12.88</i>	<i>11.70</i>	<i>11.70</i>	<i>11.00</i>	<i>11.00</i>	<i>11.00</i>	<i>8.98</i>	<i>5.86</i>	<i>4.52</i>	<i>4.02</i>	<i>3.68</i>	<i>3.68</i>
H3GI	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
Peak	17.78	17.78	17.78	17.78	17.78	17.78	13.88	13.88	14.08	13.88	11.38	11.30
Off-peak	11.43	11.43	11.43	11.43	11.43	6.90	2.00	2.00	2.11	1.00	6.00	6.00
Weekend	8.89	8.89	8.89	8.89	8.89	8.89	8.89	3.91	4.01	2.00	0.50	0.50
<i>Weighted average</i>	<i>14.14</i>	<i>13.50</i>	<i>13.50</i>	<i>13.50</i>	<i>13.50</i>	<i>12.43</i>	<i>12.43</i>	<i>9.26</i>	<i>8.42</i>	<i>7.82</i>	<i>7.48</i>	<i>7.48</i>
TMI	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
Peak	17.80	17.80	17.80	17.80	17.80	17.12	17.12	17.12	17.12	15.41	15.41	15.41
Off-peak	12.50	12.50	12.50	12.50	12.50	12.02	12.02	12.02	12.02	10.82	10.82	10.82
Weekend	10.20	10.20	10.20	10.20	10.20	9.81	9.81	9.81	9.81	8.83	8.83	8.83
<i>Weighted average</i>	<i>14.30</i>	<i>14.30</i>	<i>14.30</i>	<i>14.30</i>	<i>14.30</i>	<i>13.80</i>	<i>13.80</i>	<i>13.80</i>	<i>13.80</i>	<i>11.54</i>	<i>12.55</i>	<i>12.20</i>
Lycamobile	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
OPeak	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	13.79	13.79	13.79	13.79
Off-peak	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	13.79	13.79	13.79	13.79
Weekend	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	13.79	13.79	13.79	13.79
<i>Weighted average</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>	<i>N/A</i>	<i>13.79</i>	<i>13.79</i>	<i>13.79</i>	<i>13.79</i>

Table 1: MTR Pricing H2 2007 to present (expressed in cent)

²⁴⁸ The current MTRs are the same as those which were in place at the beginning of H2'12.

6.55 Table 2²⁴⁹ below presents an update on the relative movement in each individual MSP's MTRs over the period since H2 '07 to the present.

MSP	% Reduction in Weighted Average MTRs H2 07 to May 2012	% Reduction in Weighted Average H2 07 to present
Vodafone	-58.0%	-61.6%
O2	-58.9%	-62.4%
Meteor	-68.7%	-71.4%
H3GI	-44.7%	-47.1%
TMI	-12.2%	-14.7%
Lycamobile	N/A ²⁵⁰	0%

Table 2: % Reduction in Weighted Average MTRs between H2 '07 to Present

6.56 ComReg has set out below the differences between individual MSPs' weighted average MTRs in terms of how they compare relative to each other over the period H2'07 to the current date. Given Vodafone's and O2's MTRs have been almost identical²⁵¹ over this period, we do not show differences between such MSPs' MTRs below.

	Meteor Weighted Average MTR Differences											
	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
% above Vodafone	34%	26%	26%	22%	22%	22%	22%	9%	0%	0%	0%	0%
% above O2	32%	24%	24%	22%	22%	22%	22%	9%	0%	0%	0%	0%

Table 3: Difference in Meteor's MTRs in comparison to other MSPs' MTRs

	H3GI – Weighted Average MTR Differences											
	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
% above Vodafone	47%	45%	45%	50%	50%	38%	68%	73%	86%	95%	103%	103%
% above O2	44%	44%	44%	50%	50%	38%	68%	73%	86%	95%	103%	103%
% above Meteor	10%	15%	15%	23%	23%	13%	38%	58%	86%	95%	103%	103%

Table 4: Difference in H3GI's MTRs in comparison to other MSPs' MTRs

	TMI – Weighted Average MTR Differences											
	H2'07	H1'08	H2'08	H1'09	H2'09	H1'10	H2'10	H1'11	H2'11	H1'12	H2'12	Current
% above Vodafone	49%	54%	54%	59%	59%	53%	87%	157%	205%	243%	241%	232%
% above O2	46%	52%	52%	59%	59%	53%	87%	157%	205%	243%	241%	232%
% above Meteor	11%	22%	22%	30%	30%	25%	54%	135%	205%	243%	241%	232%
% above H3GI	1%	6%	6%	6%	6%	11%	11%	49%	64%	76%	68%	63%

Table 5: Difference in TMI's MTRs in comparison to other MSPs' MTRs

²⁴⁹ This table updates information that was originally presented in Table 12 of the MVCT Consultation (on page 112).

²⁵⁰ Lycamobile only commenced offering MVCT services in May 2012.

²⁵¹ In H2 '07, O2's blended average MTR was 2% above that of Vodafone. This difference declined up to H1 '09 at which point respective blended average MTRs were symmetric.

Lycamobile – Blended Average MTR Differences				
	H2'12 Vodafone ²⁵²	H2'12 Other Undertakings	Current -Vodafone	Current - Other Undertakings
% above Vodafone	[X] %	275%	[X] %	275%
% above O2	[X] %	275%	[X] %	275%
% above Meteor	[X] %	275%	[X] %	275%
% above H3GI	[X] %	84%	[X] %	84%
% above TMI	[X] %	10%	[X] %	13%

Table 6: Difference in Lycamobile's MTRs in comparison to other MSPs' MTRs

6.57 As noted in the MVCT Consultation²⁵³, Vodafone, O2 and Meteor have been subject to SMP price controls in the periods examined above, whereas H3GI only became subject to SMP price controls in December 2008. Neither TMI nor Lycamobile have been subject to SMP price regulation to date.

Interconnection and termination traffic exchanges

6.58 In the MVCT Consultation²⁵⁴, in particular in the context of the individual assessments as to whether MSPs had faced effective CBP²⁵⁵, ComReg examined

- which were the largest purchasers of MVCT from individual MSPs (since these were considered to be most likely to seek to exert CBP having regard to their relative importance to the MVCT seller); and
- the relative exchanges of terminating traffic between each of these large buyers and the MSP (as part of the assessment as to whether buyers would be price sensitive).

6.59 ComReg has updated the above information (the 'Updated Interconnection and Termination Traffic Information') which is now presented in Appendix F.

6.60 While there have been some movements in interconnection and termination positions in the intervening period, the trends are broadly supportive of the analysis set out in the MVCT Consultation.

ComReg's Assessment of Respondents' Views

6.61 In paragraphs 6.18 to 6.50 above, ComReg has summarised the key issues raised by Respondents concerning its assessment of SMP and proposed SMP designations. Having updated above the information of most relevance to the SMP assessment, ComReg sets out below its consideration of the key issues

²⁵² Vodafone has negotiated lower MTRs with Lycamobile - see further discussion in paragraph 6.231 to 6.245 of the MVCT Consultation.

²⁵³ See paragraphs 6.22 to 6.33 of the MVCT Consultation.

²⁵⁴ See paragraphs 6.84 to 6.246 of the MVCT Consultation.

²⁵⁵ See paragraphs 6.84 to 6.248 of the MVCT Consultation.

raised by Respondents according to the themes identified in paragraph 6.26 above

Assessment of potential competition

- 6.62 As noted in paragraph 6.28 above, O2 stated that there has been little comment in the MVCT Consultation on potential competition, citing the number of new retail entrants in recent years and suggesting that this could impact on the ability of any one MSP to behave, to an appreciable extent, independently of other competitors, customers and consumers. O2 also made other comments which are also addressed below.
- 6.63 ComReg would note that, in this instance, O2 appears to be confusing entry in the retail market as evidence that there is the potential for competition to emerge in the wholesale Relevant MVCT Markets. In the MVCT Consultation, ComReg identified²⁵⁶ that there were no actual competitors in each Relevant MVCT Market and that there was no likelihood of the emergence of potential competition within the timeframe considered as part of the market analysis²⁵⁷. ComReg also identified that retail constraints were not likely to indirectly constrain wholesale behaviour in the Relevant MVCT Markets. i.e. in response to a SSNIP in MTRs any resultant change in behaviour by retail customers is not likely to effectively constrain MTRs. . Having regard to the definition of the Relevant MVCT Markets, notwithstanding the retail market of entry of certain MVNOs (including TMI and Lycamobile), each MSP is the sole supplier of MVCT for the purpose of terminating calls to its subscribers. No Respondent has identified any effective demand-side or supply-side substitutes for the provision of MVCT.
- 6.64 With regard to O2's comments that 'automatic' SMP designation imposes price controls which may deter entry into the retail market, ComReg would note that its SMP designations are not 'automatic' but are based on a detailed analysis based on the competition law principles set out in the SMP Guidelines. Furthermore, price control (and other) obligations are imposed in light of identified competition problems and not just on the basis of an SMP designation. Furthermore, an appropriate cost oriented price control obligation should not deter retail market entry *per se*, but may deter inefficient retail market entry where such entry is based on a presumption being able to use wholesale revenues earned from above efficient cost MTRs to subsidise aspects of the retail business such as access charges, call prices or subsidise handsets. In particular, where MSPs have SMP in the wholesale aspect of their business (in which they face no competition), this should not cross subsidise the retail business which is subject to some degree of competition.

²⁵⁶ See paragraphs 6.17 and 6.36 to 6.39 of the MVCT Consultation.

²⁵⁷ See paragraphs 5.29 to 5.44, 6.17 and 6.36 to 6.40 of the MVCT Consultation.

Suggested failure to adequately consider the SMP Criteria and CBP with respect to TMI

- 6.65 As noted in paragraphs 6.29, 6.30 and 6.32, TMI (and O2²⁵⁸) raised a number of issues concerning the adequacy of ComReg's SMP assessment with respect to TMI and cited a number of reasons as to why, in its view, it did not have SMP.
- 6.66 ComReg does not agree with TMI's view that ComReg's SMP assessment with respect to it was deficient or lacked justification. ComReg set out a detailed SMP analysis in the MVCT Consultation²⁵⁹ with respect to TMI's specific circumstances in the Relevant MVCT Market (and other MSPs). In this regard, ComReg considered whether TMI (and other MSPs) has the power to behave, to an appreciable extent, independently of competitors, customers and ultimately consumers. In assessing whether this was the case, ComReg considered whether TMI's behaviour was effectively constrained by:
- **Existing Competition:** this included an examination of market shares (TMI has 100% market share in the Relevant MVCT Market), the strength of existing competitors (there are no competitors in the Relevant MVCT Market within which TMI operates), and an examination of TMI's pricing behaviour with respect to its MTRs. TMI's MTRs have not been subject to SMP regulation and, it was noted in the MVCT Consultation that, while having reduced somewhat between H2 2007 and May 2012²⁶⁰ that they remained significantly above the MTRs of every other MSP²⁶¹, save for Lycamobile.
 - **Potential Competition:** ComReg's view in the MVCT Consultation²⁶² was that the threat of market entry in each of the Relevant MVCT Markets (and not the retail market), including that within which TMI operates, remained highly unlikely within the timeframe of the review ComReg has also considered this point in paragraph 6.62 to 6.64 above²⁶³.
 - **CBP:** The MVCT Consultation set out a CBP assessment²⁶⁴ specific to TMI's circumstances, including its actual contractual negotiations, which concluded that any CBP exercised to date had not been effective, nor would it likely be in the period covered by the market analysis. To the extent that TMI had to

²⁵⁸ See paragraph 6.21 above.

²⁵⁹ See section 6 of the MVCT Consultation, including paragraphs 6.16 to 6.40 and 6.176 to 6.214.

²⁶⁰ Table 11 at paragraph 6.20 of the MVCT Consultation showed that TMI's weighted average MTR had reduced from 14.43 cent in H2 07 to 12.55 cent in May 2012, representing a then reduction of some 12.2%.

²⁶¹ Table 14 at paragraph 6.24 of the MVCT Consultation showed that at May 2012, TMI's MTRs ranged from 60% to 212% above the MTRs of other regulated MSPs.

²⁶² See paragraphs 6.36 to 6.40 of the MVCT Consultation.

²⁶³ These paragraphs deal with comments from O2 concerning potential competition and are equally relevant in the context of addressing TMI's points on the same issue.

²⁶⁴ See paragraphs 6.176 to 6.214 of the MVCT Consultation.

negotiate particular terms in a contract that it did not like and sign a standard interconnect contract does not suggest in itself that the other MSPs have exercised CBP.

- 6.67 Having regard to the above and, contrary to TMI's view, there is, therefore, no question of ComReg simply assuming that TMI has SMP on the basis that other MSPs have SMP. A detailed rationale for ComReg's preliminary findings was clearly set out in the MVCT Consultation and ComReg would note that TMI, in its Submission, did not offer material views on ComReg's assessment of existing or potential competition within the Relevant MVCT Markets, including with respect to TMI's position.
- 6.68 As noted above, the MVCT Consultation²⁶⁵ analysed TMI's (and other MSPs') historic pricing behaviour. The MVCT Consultation acknowledged that TMI had reduced its MTRs (at that time by 13.4% in the period since 2007). The MVCT Consultation set out ComReg's view, in light of the available evidence, on the then MTR reductions, including the view that TMI had reduced its MTRs in light of the perception of the threat of potential regulatory pressure from ComReg rather than resulting from pressure from MVCT purchasers. ComReg has further considered the evolution of TMI's (and other MSPs') MTRs in the intervening period. Insofar as TMI is concerned, as noted in Table 1 above, it further reduced its weighted average MTRs by 0.35 cent²⁶⁶ (less than half a cent) in August 2012²⁶⁷ to 12.2 cent per minute. This represents a 14.7% reduction since 2007. However, as noted in Table 5 above, TMI's MTRs have been and remain substantially and appreciably above the MTRs of other currently regulated MSPs, with this differential now currently ranging from 63% (above H3GI) to 232% (above Meteor, O2 and Vodafone)²⁶⁸. Notwithstanding the recent 0.35 cent MTR reduction by TMI, these differentials have increased beyond the levels previously set out in the MVCT Consultation²⁶⁹. Contrary to TMI's view, ComReg does not, therefore, consider that TMI has, in fact, followed the market in setting the level of

²⁶⁵ See paragraphs 6.19 to 6.33, as well as paragraphs 6.191 to 6.213 (dealing with the assessment of evidence with respect to negotiations with TMI on its MTRs) of the MVCT Consultation.

²⁶⁶ TMI reduced each of its peak, off-peak and weekend MTRs by 0.4c. However, having regard to traffic volumes in these periods, this translates into a weighted average MTR reduction of 0.35cent

²⁶⁷ Having regard to the documentation provided by TMI in response to the August 2012 Statutory Information request, ComReg has considered the basis upon which TMI chose this reduction. TMI considered two options, however, TMI chose the option that gave the lowest absolute level of MTR reduction. The options examined by TMI were to [REDACTED]

²⁶⁸ Over the entire period from 2007 to date (November 2012), between TMI's weighted average MTRs were, on average (being the average of the differences calculated at each half yearly period) between 29.2% to 121.7% above the weighted average MTRs of other regulated MSPs ranged.

²⁶⁹ See paragraph 5.69 above where it is noted that at the time of the publication of the MVCT Consultation, TMI's MTRs ranged from 60% to 212% above those of MSPs currently designated with SMP.

its MTRs or that the reductions to date suggest it does not have SMP. Furthermore, ComReg would also note that TMI has previously confirmed to ComReg that:

“Tesco Mobile confirms that our MVCT is set independently of its competitors.”²⁷⁰

- 6.69 As also noted in the MVCT Consultation²⁷¹, TMI received requests from both Eircom (in January 2011) and Vodafone (in June 2011) to lower its MTRs, with TMI responding in July 2011 effectively refusing to lower its MTRs. This, in ComReg’s view, is strongly suggestive that TMI does not face effective CBP, as it continues to sell MVCT service to these two MSPs at MTR levels which are likely to be above cost efficient competitive market outcome levels. As noted earlier, all Service Providers that want to enable their subscribers to call TMI subscribers must purchase MVCT from TMI in order to complete these calls.
- 6.70 ComReg has also considered further information obtained from TMI in response to the August 2012 Statutory Information Request (including copies of presentations given to the TMI Board and internal emails), and ComReg, having considered the latest position, maintains its view that TMI’s MTR reductions, including those which took effect in August 2012, have been driven by the threat of potential regulatory intervention by ComReg (either on foot of the market analysis process or through disputes being raised by other Service Providers) and the desire to be seen to be reducing MTRs in the face of this²⁷². It remains ComReg’s view that such reductions have also been implemented to minimise the increasing differential between TMI’s MTRs and other regulated MSPs MTRs (which have also been reducing and to minimise the above mentioned threat of regulatory intervention – either through a dispute based on existing obligations or intervention by ComReg through the imposition of SMP obligations)²⁷³.
- 6.71 Having regard to the fact that there are no actual competitors in the Relevant MVCT Market within which TMI operates (or in ComReg’s view is their likely to be), TMI’s historical pricing behaviour (which is somewhat informative of its potential future actions) is strongly suggestive to ComReg (but not determinative in itself) that TMI can set its MTRs independently of competitors, customers and consumers.
- 6.72 ComReg also does not accept TMI’s view that its analysis in the MVCT Consultation of the SMP criteria (set out in the SMP Guidelines) was deficient.

²⁷⁰ TMI’s response of 14 February 2011 to ComReg’s November 2010 Statutory Information Request. Agreed note of a conference call with TMI held on 22 July 2012.

²⁷¹ See paragraphs 6.201 and 6.202 of the MVCT Consultation.

²⁷² For example, based on information in presentations given to TMI Board on 16 December 2011, 25 April 2012 and 26 July 2012.

²⁷³ Such reasons are, for example, evident from the details contained in a TMI internal paper dated 16 December 2011 which was presented to the TMI Board.

ComReg carefully set out in the MVCT Consultation²⁷⁴ why its considered certain criteria were or were not relevant or were of less relevance in the context of the analysis of each of the Relevant MVCT Markets and, having done so, then assessed each of relevant the SMP criteria. ComReg would again note that TMI, in is Submission, has not offered any specific reasoning to counter the views expressed by ComReg in the MVCT Consultation on such matters. ComReg would also note that, pursuant to the requirements under Article 7 of the Framework Directive, it has consulted with the European Commission concerning the draft measures it intended to take arising from it analysis of the Relevant MVCT Markets, including with respect to its SMP assessment. The European Commission considered ComReg proposed approach with respect to its SMP assessments (amongst other things), and the European Commission Comments²⁷⁵ have concurred with ComReg's analysis that TMI (and other MSPs identified) should be designated as having SMP. In the absence of specific views from TMI as to why it disagreed with the assessment of the SMP criteria, and having regard to the European Commission Comments and the Competition Authority Opinion²⁷⁶, ComReg sees no reason to alter its views as set out the MVCT Consultation regarding its approach to assessing the SMP criteria, and the assessment of such is now finalised in Appendix F of this Decision.

- 6.73 O2 questioned why, other than in response to CBP being exercised, TMI would reduce its MTRs and, in this regard, ComReg would refer O2 to ComReg's views in paragraph 6.69 to 6.71 above. In the MVCT Consultation, ComReg also considered whether TMI experienced effective CBP and, in reaching the preliminary view in the MVCT Consultation that TMI's MTR setting behaviour had not been effectively constrained by CBP, ComReg had regard to a range of factors²⁷⁷, including the relative bargaining positions of TMI and its MVCT purchasers in light of their respective subscriber bases and relative exchanges of interconnection traffic²⁷⁸. While ComReg accepts that the bargaining strength of the parties can differ, having regard to the above analysis, ComReg maintains its views (for the reasons set out in this Section 6) that CBP has not been effective in constraining TMI's ability to set its MTRs independently of competitors, customers and consumers.
- 6.74 With respect to TMI's comments that ComReg's MTR analysis is static or that TMI could not increase its MTRs above the current level (by '*the normal*

²⁷⁴ See paragraphs 6.7 to 6 .12 and Appendix C of the MVCT Consultation. Each of the SMP criteria considered relevant were subsequently explained and assessed in the assessment of SMP in Section 6 of the MVCT Consultation.

²⁷⁵ See Appendix C of this Decision.

²⁷⁶ See Appendix B of this Decision.

²⁷⁷ See paragraphs 6.178 to 6.184 of the MVCT Consultation.

²⁷⁸ See Appendix F, paragraphs F.35 to F.41. For example, it is noted that there is a significant asymmetry of traffic between TMI and Eircom, with TMI terminating [X] %] less minutes on Eircom's network than vice versa.

benchmark used for assessing dominance) or that TMI's MTR reductions to date are not consistent with its ability to raise its MTRs, ComReg would respectfully point out that in assessing SMP, ComReg is seeking to ascertain whether TMI, in setting its MTRs, has the ability to act, to an appreciable extent, independently of its competitors (there are none), customers (MVCT purchasers have only one source of supply) and consumers (ComReg's considers indirect constraints to be ineffective), rather than the ability to raise them from its existing MTR level, which, as noted in paragraph 6.68 above, ComReg considers to be already substantially above other regulated MSPs' MTRs and also above an efficient competitive level based MTR. In this regard, TMI's MTR differential with regulated MSPs' MTRs now currently ranges from 63% (above H3GI) to 232% (above Meteor, O2 and Vodafone) ComReg considers the evolution of TMI's MTRs to be evidence which supports (but is not in itself solely determinative of) ComReg's view that TMI has SMP.

- 6.75 With respect to TMI's view that Service Providers could exclude calls to TMI subscribers from their retail bundles if TMI sought to increase its MTR, ComReg would note that while this is one possible course of action, ComReg has no evidence to suggest that any such actions have, in fact been taken to date, notwithstanding the fact that TMI's MTRs have been and remain substantially above those of other regulated MSPs. Even to the extent that such actions may have been taken, it is ComReg's view that they have not, to an appreciable extent, impacted upon TMI's independence in its MTR setting behaviour. ComReg would also note that, to the extent that other Service Providers were to include/exclude calls to TMI subscribers from their retail bundles, this is likely to be as a consequence of high and is a way of managing a pricing risk for a Service Provider that its subscribers make too many calls to TMI subscribers, and that the cost of the wholesale MTR charges it pays to TMI would not be recovered through the retail subscription price.
- 6.76 As noted in the MVCT Consultation²⁷⁹, ComReg is aware that certain FSPs differentiate their retail prices for calls to TMI subscribers, however, ComReg considered that this likely to be a direct consequence of TMI's MTR being significantly higher than that charged by other MSPs (save for Lycamobile). Nevertheless, having regard to TMI's responses to the Statutory Information Requests and having considered TMI's Submission, ComReg has no evidence to suggest that this had been a material factor which has somehow factored into or constrained TMI's past or current MTR setting behaviour in a material manner.
- 6.77 TMI has stated that the difficulties it had during its launch period in establishing interconnection agreements is evidence that it does not have SMP, as if it did, Service Providers would have needed to interconnect with TMI. ComReg is aware that, following TMI's December 2006 announcement that it intended to enter the retail market, there were some difficulties in establishing Mobile Number Portability (MNP) arrangements. Delays in establishing MNP were

²⁷⁹ See Appendix B of the MVCT Consultation.

investigated²⁸⁰ at that time and ultimately ComReg decided that no regulatory enforcement was required, largely given that MNP was implemented prior to launch. However, ComReg has no evidence to suggest that these MNP delays resulted in some material level of constraint having been placed on the ability of TMI to set its MTRs, to an appreciable extent, independently of competitors customers and consumers. Indeed, as noted in paragraphs 6.68 to 6.71 above, notwithstanding that there are no competitors in the Relevant MVCT Market within which TMI operates, its MTRs have, for a considerable period remained substantially above those MTR of other regulated MSPs. Furthermore, ComReg would note that as part of the Statutory Information Request issued to TMI in November 2010, it specifically sought details from TMI regarding evidence of any negotiations with other Service Providers regarding TMI's MTRs²⁸¹ in the period since 2007. The information provided by TMI in response to this request related mainly to the MTR reductions made by TMI arising from ComReg's TMI Dispute Determination²⁸². ComReg had regard to this in the MVCT Consultation²⁸³ in assessing whether TMI had SMP. ComReg further acknowledged in the MVCT Consultation²⁸⁴ that the bargaining dynamic between TMI and other Service Providers with whom it wished to interconnect may have been somewhat imbalanced at TMI's launch. ComReg also noted that TMI has long since established direct interconnect arrangements²⁸⁵ with O2, Eircom and BT and that TMI has not sought to directly interconnect with other Service Providers, instead relying on wholesale transit arrangements to facilitate its wholesale traffic handover with other networks (both inbound and outbound). On a forward looking basis, and as set out in the MVCT Consultation, it was and remains ComReg's view that any CBP that TMI considers it may have experienced during its launch period would likely have diminished given the subsequent establishment of direct interconnection arrangements (since in the context of a bargaining scenario, a purchaser could no longer credibly rely on delay in or refusals to physically interconnect to strengthen its bargaining position). Furthermore, as TMI's subscriber base has continued to grow²⁸⁶, Service Providers will consider it more important (than when TMI launched) to interconnect with TMI owing to the fact that their subscribers expect to be able to call subscribers on other networks. And, were they not able to do so, this could have negative effects for the Service Provider concerned having regard to the intensity of retail competition (say

²⁸⁰ See Closure of Compliance Investigation into the market entry of Tesco Mobile Ireland and the Implementation of Mobile Number Portability, ComReg Document 07/102, December 2007.

²⁸¹ Annex 2, Questions 4 of Statutory Information Request issued to TMI dated 23 November 2010.

²⁸² See paragraphs 6.22, 6.29 and 6.65 of the MVCT Consultation.

²⁸³ See CBP assessment at paragraphs 6.192 to 6.200 of the MVCT Consultation.

²⁸⁴ See paragraph 6.183 of the MVCT Consultation.

²⁸⁵ ComReg would note that TMI has also signed an agreement for direct interconnection with Vodafone, however, this has never been technically implemented.

²⁸⁶ TMI's market share of total mobile subscribers (excluding mobile broadband) stood at 3.5% in Q2 2012 Source: Irish Communications Market: Key Data Report – Q2 2012, ComReg Document 12/101.

- increased complaints from its subscribers and the consequential reputation/brand damage, with subscribers potentially switching to competitors).
- 6.78 ComReg has considered TMI's MTR setting behaviour above and does not accept that its analysis is flawed or indeed, that TMI followed the market in setting its MTRs. It is difficult for ComReg to predict with certainty, on a forward looking basis, as to what actions other Service Providers might take having regard to how TMI might set its MTRs in the future. However, the MTR position adopted by TMI to date shows that its MTRs, notwithstanding the reductions to date, remain substantially above those of other MSPs. It is quite possible that a Service Provider could, absent regulation, seek to refuse to pay or to terminate interconnection arrangements. Indeed, Service Providers' awareness of ComReg's intention to carry out an analysis of the MVCT market and their subsequent sight of its preliminary views as set out in the MVCT Consultation (to designate TMI with SMP and impose a cost orientation obligation upon it) may well have temporarily put off such potential actions. However, ComReg considers outright refusal to pay or to interconnect, while possible, to be less credible, in particular given the size of TMI's subscriber base and, as noted above, the potential damage to a Service Provider's own reputation and competitive position (arising from complaints from its subscribers – which expect to be able to make calls to and receive calls from subscribers of other Service Providers) in the event such actions are taken.
- 6.79 However, were such actions attempted, as was the case back in 2009 with the TMI Dispute, it would likely involve an escalation to ComReg, perhaps in the form of a dispute resolution request. As noted in the MVCT Consultation²⁸⁷ (and later in paragraphs 6.114 to 6.116 of this Decision), it is ComReg's view that in such circumstances ComReg would be acting in a regulatory capacity and, for the reasons set out therein, its actions in this regard fall to be disregarded in assessing SMP.
- 6.80 TMI, either in response to the MVCT Consultation or indeed previous Statutory Information Requests, has not provided any material information to ComReg to support its claims that it was required to accept [REDACTED]. Even to the extent it was, it is ComReg's position that this has not materially impacted upon TMI's ability to set its MTRs, to an appreciable extent' independently of its competitors, customers and consumers, thereby mitigating its market power in the Relevant MVCT Market within which it operates. This is particularly so when, as noted previously, TMI's MTRs have and continue to remain substantially above the MTRs charged by other regulated MSPs, [REDACTED].
- 6.81 However, ComReg would also note the following points regarding TMI's interconnection arrangements. Firstly, TMI has signed 4 interconnect agreements with other Service Providers for the supply of MVCT to them, namely Eircom, O2,

²⁸⁷ See paragraphs 6.57 to 6.66 of the MVCT Consultation.

BT and Vodafone. However, despite TMI having an interconnect agreement with Vodafone [redacted]²⁸⁸. Secondly, TMI has previously confirmed to ComReg²⁸⁹ that, prior to launch, it proposed the same MTRs to all Service Providers and the only evidence adduced by TMI in terms of any negative operator feedback on these initial MTRs was that which came from H3GI (which subsequently led to the TMI Dispute). As part of the MVCT Consultation²⁹⁰ ComReg considered the evidence of bargaining power from actual interconnection negotiations between TMI and Service Providers, including the TMI Dispute and correspondence from each of Vodafone and Eircom to TMI seeking reductions in its MTRs. ComReg's preliminary conclusions were that there was insufficient evidence to suggest, based on actual MTR negotiations, that TMI had experienced or would experience sufficient CBP such that it would constrain TMI's ability to set its MTRs above the competitive level. ComReg has not been presented with material evidence which would lead it to change its view on this issue.

- 6.82 ComReg also notes that some of TMI's comments with respect to ComReg's SMP assessment related to the proportionality of ComReg's approach with respect to the imposition of remedies, in particular, a price control obligation, and TMI's view that such an obligation is not justified or proportionate and, even if it were, TMI should be afforded the opportunity of a gradual reduction in its MTRs. Such comments are not, in ComReg's view, materially relevant to the assessment of SMP. Furthermore, insofar as remedies are concerned ComReg would note that the MVCT Consultation and this Decision deal with the imposition of a price control obligation of cost orientation in principle, with the detailed specification of the specific costing methodology to be employed by ComReg in light of this cost orientation obligation having been the subject of the Separate Price Control Consultation to which TMI has also responded. Therefore, TMI's comments on price control remedies and the appropriateness and proportionality of them in TMI's circumstances are considered in this Decision in the context of the imposition of a cost orientation obligation only. In this regard, ComReg notes TMI's reference to the imposition of specific price control obligation in Spain²⁹¹ and how it was applied to a particular MSP in that market. ComReg would note that those circumstances concerned the detailed nature and implementation of price control obligations which, as outlined above, are not the subject of this Decision. However, ComReg would note that such Spanish MSPs, which were a mix of MNOs and MVNOs, were found by the Spanish NRA to have SMP. Furthermore, all SMP MNOs had cost-orientation obligations imposed upon them, with SMP MVNOs being required to set reasonable prices whereby their

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²⁸⁹ Correspondence from TMI to ComReg of 16 May 2011 clarifying certain aspect of its response to ComReg's November 2010 Statutory Information Request.

²⁹⁰ See paragraphs 6.219 to 6.213 of the MVCT Consultation.

²⁹¹ See European Commission comments on Case ES/2012/1314, 30 April 2012.

- MTRs would be equal to the MTR of their host MNOs (i.e. effectively a cost-orientation obligation). ComReg would also note that the highest MTRs amongst such MNOs ranged, at that time, from 3.42 cent to 4.07 cent, whereas in TMI's case its weighted average MTR is currently 12.2 cent.
- 6.83 As regard TMI's comments that a finding of SMP was not contemplated by it and that it should be afforded an opportunity to prepare for regulatory change, in particular, having regard to proportionality considerations, ComReg considered and further considers this in the context of the imposition of regulatory obligations in Section 8. In this regard, where appropriate, ComReg has provided an implementation period for certain remedies. However, as noted previously, insofar as price control obligations are concerned, the MVCT Consultation and this Decision seeks only to impose a price control obligation of cost-orientation, with the detailed nature of this being specified in the Separate Price Control Consultation.
- 6.84 ComReg would also note that it has been engaged in communication with TMI since at least November 2010 in relation to its analysis of the MVCT market. Such communication has included Statutory Information Requests, meetings²⁹², as well as email correspondence. TMI, as itself acknowledges, is present in other European Markets, and is or ought to be familiar with the EU (and associated national) regulatory framework in relation to mobile termination markets. In this regard, ComReg would also note that Tesco Mobile (Group) made a submission²⁹³ to the European Commission in 2008 when the 2009 Termination Rate Recommendation was being formulated and consulted upon. As also noted in the MVCT Consultation²⁹⁴, TMI is a 50:50 joint venture with O2 Ireland who itself is a long established MSP with significant experience in and knowledge of the regulation of MVCT Markets. While ComReg appreciates that TMI could not know with certainty that it could be designated as having SMP, having regard to the history of its communications with ComReg regarding its analysis of the MVCT markets, TMI's presence in other markets, its ownership structure and evidence from TMI's internal documentation²⁹⁵ that suggests its was alive to the possibility of regulation, ComReg finds it difficult to conceive that TMI did not know (and/or did not reasonably expect) that there was the possibility that it could, arising from the analysis of the MVCT markets, be designated as having SMP (and have obligations imposed upon it).

²⁹² For example, Meetings with TMI on 5 November 2010 and 11 January 2012 (as well as more recent meetings).

²⁹³ See http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/termination_rates/tesco.pdf.

²⁹⁴ See footnote 39 of the MVCT Consultation.

²⁹⁵ Internal communications obtained by ComReg from TMI in response to various Statutory Information Requests.

6.85 Furthermore, contrary to TMI's view, ComReg also considers its analysis and consultation process to be robust and fair. ComReg's proposed approach as set out in the MVCT Consultation and now finalised in this Decision has been carried out in line with its statutory obligations and duties, with an appropriate and detailed level of consideration and analysis having been given to all relevant matters. ComReg has been vested with the statutory functions and powers to consider whether electronic communications markets should be subject to SMP-type regulation. In this regard, ComReg would note that it has defined the Relevant MVCT Markets assessed competition within them, identified competition problems and set out proportionate and non-discriminatory remedies which are designed to mitigate such problems, ultimately to the benefit of competition and consumers. ComReg has also carried out its national and EU consultations in accordance with its statutory obligations and published consultation procedures²⁹⁶ and does not accept that its consultation procedure has somehow been flawed or unfair. ComReg further considers its consultation procedures (characterized by a transparent and public consultation process) have been entirely sufficient and, as part of the consultation process, ComReg has remained open to changing its view as a consequence of the responses received to consultation process (and otherwise).

Adequacy of the analysis of Countervailing Buyer Power with respect to Lycamobile

6.86 As noted in paragraphs 6.33 to 6.44 Lycamobile and O2 raised a number of issues concerning ComReg's assessment of CBP.

6.87 Lycamobile considered it has experienced CBP with respect to its dealings with Vodafone and O2 and, furthermore, that it had set its MTRs at a competitive level. ComReg does not agree with Lycamobile's view that Vodafone, TMI and O2 have exercised effective CBP upon its MTR setting behaviour. The points raised by Lycamobile in this regard were considered by ComReg in the MVCT Consultation²⁹⁷ and for the reasons set out therein and below ComReg maintains its position. In this regard, the MVCT Consultation recognised that, in the initial launch period, given Lycamobile's new entrant status (it has few subscribers) relative to Eircom and Vodafone, that this could be a distinguishing factor which could influence the bargaining dynamic between the parties in their MTR negotiations. ComReg reviewed whether there was actual evidence of CBP being exercised upon Lycamobile by other undertakings and having regard to information obtained from the parties through Statutory Information Requests (including to Vodafone, O2 and Lycamobile), ComReg recognised that Vodafone has exercised some degree of CBP. However ComReg did not consider this CBP to be effective, including for reasons that the level of the MTR reduction was achieved by Vodafone only (which in ComReg's view is likely to still be above an

²⁹⁶ Information Notice on ComReg's Consultation Procedures, May 2011, [ComReg Document 11/34a](#).

²⁹⁷ See paragraphs 6.215 to 6.246 of the MVCT Consultation.

- MTR set in a competitive market outcome) and that no MTR reduction had been applied by Lycamobile to any other Service Providers.
- 6.88 ComReg has further considered the position in light of Lycamobile's comments and, as part of the August 2012 Statutory Information Requests, ComReg sought further information from Lycamobile with respect to its MTR negotiations in the period July 2011 to August 2012 (ComReg had already obtained information to cover the period prior to this). This included information with respect to its negotiations with O2 regarding transit arrangements to support the Lycamobile MVNO arrangement, particularly in the run up to Lycamobile's retail launch (where pressures to reach agreement might have been greatest) and whether there was actual evidence these transit negotiations had any impact on the MTRs to be levied by Lycamobile on O2. ComReg has reviewed the information provided and, while there do appear to have been some delays by both parties in concluding a contract for the supply of transit services by O2 to Lycamobile, ComReg has not found material evidence to suggest that such delays were related to Lycamobile's MTR or to an O2 strategy to get Lycamobile to reduce them. Furthermore, it is apparent from the negotiations that, while a transit contractual agreement had not been signed, Lycamobile were aware that agreement had been reached with O2 such that the transit services would still be provided, notwithstanding the absence of a signed transit contractual agreement. This would likely have reduced any pressure perceived by Lycamobile to agree to lower MTRs on the basis of the potential from delays in signing transit agreement contracts. Additionally, ComReg would also note that even to the extent that Lycamobile considered it was being subject to contractual pressures, this did not result in Lycamobile lowering the MTRs it charges to O2 (with the MTRs being the same as at Lycamobile's initial launch).
- 6.89 On a similar point, Lycamobile also suggest that the MVNO arrangement with O2 also creates CBP in favour of O2, stating that O2 can cease the provision of wholesale services and transit. ComReg has no evidence to suggest, based on Lycamobile's response to the August 2012 Statutory Information Request, that the MVNO commercial arrangements have been a relevant factor in any negotiations between O2 and Lycamobile concerning Lycamobile's MTR. While it is possible that O2 could refuse to provide transit services to Lycamobile (even though it has not, notwithstanding the absence of a signed transit contractual agreement), ComReg maintains its view in the MVCT Consultation that alternative suppliers of transit services are available to Lycamobile. While this would involve some switching costs for Lycamobile, in the event of a refusal by O2 to supply such services, Lycamobile would be in a position to procure transit

services from another provider (or indeed interconnect directly) in reasonable timeframe²⁹⁸.

- 6.90 Contrary to Lycamobile's view, ComReg also would note, that the point made in the MVCT Consultation²⁹⁹ was that the MVNO arrangement³⁰⁰ was likely to create incentives for both parties to interconnect, particularly where such services were part of the contractually agreed MVNO arrangement which has no contractual relationship with the level of MTR to be charged by Lycamobile to O2.
- 6.91 With regard to Lycamobile's comments on existing competition³⁰¹ and its setting of its MTRs by reference to TMI's MTRs, ComReg does not accept that this suggests that there is existing competition in the Relevant MVCT Market within which Lycamobile operates. Lycamobile is the sole supplier of MVCT in this market and there are, therefore, no competitors or are their likely to be in the timeframe covered by this market analysis. Lycamobile has not suggested that there is any viable and effective alternative means for a Service Provider to complete a call to a Lycamobile subscriber other than through the purchase of MVCT from Lycamobile. Furthermore, even to the extent that Lycamobile set its MTR by reference to TMI's MTR, this also does not suggest, in itself, that Lycamobile's rate is competitive or that there is competition in the Relevant MVCT Market within Lycamobile operates. It is ComReg's view, based on the information provided in response to Statutory Information Requests, that Lycamobile set its rate by reference to TMI's MTR having considered what it thought would be acceptable to purchasers of MVCT. Additionally, ComReg considers it highly likely that Lycamobile's (and TMI's) MTRs are set at a level above that which would apply in a competitive market outcome. Indeed, in the MVCT Consultation³⁰² it was noted that, excluding the MTR being levied by Lycamobile on Vodafone, Lycamobile's MTRs ranged from 10% to 243% above regulated and unregulated MSPs' MTRs. In the intervening period, as noted in Table 1 above, Lycamobile's MTRs have remained static and, given regulated MSPs have reduced their MTRs further in the meantime (albeit in the presence of regulation) and TMI has reduced its MTRs (absent regulation), the gap between

²⁹⁸ ComReg has reviewed the MVNO Agreement between O2 and Lycamobile. While the MVNO Agreement provides for the ability for either party to terminate the arrangement in specific circumstances (clause 16), it appears to ComReg that such circumstances would not involve unilateral action by O2 to cease services based on the level of MTR being charged by Lycamobile to O2. Furthermore, where the MVNO Agreement was to be lawfully terminated, there are contractual provisions (clause 17) governing post termination arrangements.

²⁹⁹ See paragraph 6.218 of the MVCT Consultation.

³⁰⁰ ComReg assumes that one reason for O2 to agree MVNO arrangements was that it had spare capacity on its network, and wanted to get more usage out of it. It, therefore, is considered likely to have an incentive to agree to interconnect, and pay MTRs so that their own customers can terminate calls on Lycamobile network.

³⁰¹ ComReg considers Lycamobile's comments on existing competition in this section on CBP given they related to Lycamobile's response to Question 8 on CBP.

³⁰² See Table 16 in the MVCT Consultation.

Lycamobile's MTRs and other MSPs' MTRs has widened further and, as noted in Table 6 above, now range from 13% to 275% above other MSPs' MTRs.

- 6.92 O2 also considered that ComReg's CBP analysis with respect to Lycamobile was inadequate although it did not raise specific reasons why, other than Lycamobile had yet to launch. While ComReg recognises that Lycamobile has only recently started supplying MVCT, overall, having regard to the analysis in the MVCT Consultation, having considered Respondents' views above, ComReg does not consider that Lycamobile has experienced effective CBP.

Whether an MSP's ability to set its MTRs independently is constrained by other non-SMP obligations and other incentives faces by MSPs

- 6.93 As noted in paragraph 6.36 Vodafone did not agree that MSPs would continue to have the power to set MTRs independently of each other having regard to a combination of general non-SMP type obligations to negotiate interconnection under Regulation 5(2) of Access Regulations³⁰³ and provisions in section 3.2.2.4 of the Numbering Conventions³⁰⁴ which require numbers to be opened 'where technically and economically feasible' mean that operators are constrained from denying access.
- 6.94 Vodafone's argument appears to be based on the premise that the requirement for Service Providers to open up a mobile numbers on their networks (in order to allow their subscribers to contact mobile subscribers) is conditioned by economic feasibility (and by requirements to negotiate interconnection), and that this would condition the level of a MSP's MTRs such that they would be set at the level that would occur in a competitive market outcome. For example, an MVCT purchaser could refuse to open up Vodafone's mobile numbers on its network (thereby preventing its subscribers from making calls to Vodafone's subscribers and vice versa) on the basis that it considered Vodafone's MTR not to be economically feasible and that this commercial pressure would condition Vodafone to set its MTR at an efficient cost based competitive level (thereby suggesting that Vodafone cannot act independently in setting its MTRs).
- 6.95 ComReg does not agree that such non-SMP obligations have been or would likely be effective in preventing a MSP from acting independently in setting its MTRs. Firstly, both obligations apply independent of whether or not any Service Provider has SMP. Secondly, both obligations apply in their own right as stand-alone obligations which create legal duties and, while mutually supportive of general network interoperability, they operate independently of each other. i.e., a right to negotiate interconnection is not linked to the requirements of the numbering conventions and vice versa. Thirdly, an obligation to negotiate interconnection is not tantamount to a requirement to actually interconnect.
- 6.96 In the case of obligations to negotiate interconnection arising under 5(2) of the Access Regulations, ComReg notes that an operator is required to 'negotiate'

³⁰³ This is derived from Article 4.1 of the Access Directive.

³⁰⁴ This is derived from Article 28.1 of the Universal Service Directive (as amended)

interconnection, which is not tantamount to a requirement to have to actually interconnect. If such negotiations were to break down, including on the basis of the charges to be levied for the interconnection service, either party to then could seek to have the matter resolved by ComReg through the dispute resolution framework provided for under Regulation 31 of the Framework Regulations³⁰⁵. As noted in the MVCT Consultation (and in paragraphs 6.114 to 6.115 below), ComReg considers that the role of dispute resolution is to be disregarded in the context of an SMP assessment. Furthermore, even to the extent that ComReg was to intervene in an interconnection dispute between two non-SMP parties and to set or impose an appropriate charge for interconnection, this is something that would apply only to the parties concerned and not have a broader market application. As noted in the MVCT Consultation³⁰⁶ in the context of the CBP analysis (and in the preceding paragraphs above), in ComReg's view, constraints on MSPs' ability to price, to an appreciable extent, independently of competitors, customers and consumers were considered to be effective when, amongst other things, they have a broad market application (and do not apply solely between two individual parties).

- 6.97 Insofar as section 3.2.2.4 of the Numbering Conventions is concerned, this relates to a requirement on Service Providers to open up access to numbers '*...where technically and economically feasible*'. Economic feasibility arises, therefore, in the context of opening numbers and is not, in ComReg's view meant to govern the level of interconnection charges for an interconnection service such as MVCT.
- 6.98 Even if ComReg were to accept that the level of an MTR is something which is a relevant factor to be considered in the context of the economic feasibility of opening up a number on a network (in the context of the Numbering Conventions), any constraint posed by the Numbering Conventions, coupled with the requirement to negotiate interconnection, would have to imply that the interpretative context for economic feasibility under the Numbering Conventions is that it equates to a competitive outcome based MTR. ComReg does not accept that such an interpretation is contemplated under the European regulatory framework³⁰⁷. If it were, it would equally suggest that ComReg could, require Vodafone to comply with condition 3.2.2.4 of the Numbering Conventions by lowering its MTR to the level that would occur in a competitive market outcome

³⁰⁵ As noted in paragraph 6.60 of the MVCT Consultation.

³⁰⁶ See paragraph 6.46 of the MVCT Consultation.

³⁰⁷ As noted in paragraph 6.59 of the MVCT Consultation, ComReg can impose SMP type obligations (including with respect to access and pricing) on a non-SMP Service Provider to the extent that it is necessary to ensure end-to-end connectivity in accordance with Regulation 6 (2) of the Access Regulations, potentially on foot of the exercise of its dispute resolution functions. As further noted in paragraph 8.22 of the MVCT Consultation, the European Commission has made comments under Article 7/7a of the Framework Directive on the need for NRAs to ensure the imposition of effective SMP remedies to address SMP type competition problems (rather than relying on non-SMP type measures imposed through dispute resolution).

- based on it being an economically feasible rate. This, in ComReg's view would more likely be tantamount to SMP type regulation and would more appropriately be addressed in the context of the outcome of a market analysis and the specification of SMP remedies (as appropriate).
- 6.99 ComReg would also note that Vodafone, in seeking to obtain lower MTRs from those originally offered by Lycamobile, also raised an issue as to whether it would be economically viable for them to purchase MVCT from Lycamobile at the originally offered MTR. Notwithstanding Vodafone exercising some degree of CBP upon Lycamobile and obtained a lower MTR, as noted in paragraph 5.78 and in Table 6, Lycamobile's current MTRs now range between 13% and 275% higher than all other (regulated and non-regulated) MSPs' MTRs (excluding Vodafone which has negotiated an MTR from Lycamobile that is lower than that which is charged by Lycamobile to other Service providers – although it is still substantially above³⁰⁸ Vodafone's own MTR). In practice, therefore, non-SMP type obligations have not been effective in constraining pricing behaviour (or potential effective denial of access through pricing MVCT significantly above efficiently incurred cost).
- 6.100 Vodafone also suggested that MSPs of a certain size face incentives to set symmetrical MTRs given they are both a revenue and a cost and given competition in the retail market and the desire to attract/maintain subscribers.
- 6.101 As noted in the MVCT Consultation³⁰⁹, both regulated and non-regulated MSPs have historically set their MTRs at asymmetric levels, although such asymmetry has been eliminated in more recent times for some MSPs (notably Vodafone, O2 and Meteor, all of whom are regulated). Furthermore, such regulated MSPs have, by virtue of their non-discrimination obligations charged the same MTR to all Service Providers purchasing MVCT. It is also worth noting that in the periods prior to such MSPs being regulated via SMP price control obligations, their MTRs were also set at asymmetric levels³¹⁰.
- 6.102 While it may be the case that MSPs purchasing similar levels of termination may face some incentives to set symmetrical MTRs, this does not necessarily mean that MTRs would be set at the level that would, as a consequence, occur in a competitive outcome. For example, above efficient cost MTRs will be revenue/cost neutral for MSPs that exchange similar levels of termination traffic, but such above cost MTRs could still be levied on MSPs (and FSPs) with asymmetric traffic levels (such a strategy could, for example, amount to a type of collusive and/or exploitative behaviour whereby the two MSPs also set symmetrical rate for themselves but charge rivals or close competitors higher

³⁰⁸ The Lycamobile MTR charged to Vodafone ranges from [redacted] above the MTRs of other regulated MSPs.

³⁰⁹ See paragraph 6.20 to 6.33 of the MVCT Consultation.

³¹⁰ ComReg would also note that in April 1999 Vodafone unregulated MTRs ranged from 19.78 cent (peak) to 13.21 cent (off-peak and weekend). In October 2000 Vodafone unregulated MTRs ranged from 18.41 cent (peak) to 12.06 cent (off-peak) and 9.52 cent (weekend).

rates). Furthermore, insofar as traffic levels were to be symmetric with an FSP, incentives are not likely to be aligned given differences in the level of MTRs and FTRs (including in circumstances where the FSPs' FTRs are regulated). Additionally, even if two MSPs were to purchase similar levels of termination from each other, incentives to set similar levels of MTRs for each other, or indeed with respect to other Service Providers, may also be affected by the percentage of traffic which is on-net versus off-net. For example, if two MSP exchange similar levels of terminating traffic, but one MSP has a higher percentage of off-net traffic (of its total traffic), this will likely affect their overall cost base relative to the other MSP. As noted in Figure E of the Updated Retail Trends Analysis in Appendix D, there remain differences between each of the individual MSPs' percentage of traffic which is on-net and off-net traffic, with such differences being substantial in many cases, particularly between more established MSPs (such as Vodafone and O2) and smaller MSPs.

- 6.103 In the MVCT Consultation³¹¹ ComReg considered the degree of symmetry of termination traffic exchanges between MSPs and MVCT purchasers, in particular, in relation to the two largest purchasers of MVCT from each individual MSP. In all cases there were asymmetric exchanges of termination traffic, although the level of asymmetry differed. Having regard to the information provided by Service Providers' in response to the August 2012 Statutory Information Requests, ComReg would also note³¹² that, in the intervening period, such levels of asymmetry have remained and, in some cases have increased.
- 6.104 Even if two MSPs were to face incentives to set symmetrical MTRs, as noted in paragraph 6.96, this is something that would apply only to the parties concerned and not have a broader market application and would not, in ComReg's view, be an effective constraint on an MSPs' ability to price independently of competitors, customers and consumers.
- 6.105 Having regard to the above, an MSP's ability to price independently of competitors, customers and consumers is not likely to be constrained effectively by either non-SMP type obligations or by any incentives that certain MSPs may face to set symmetric MTRs.

Approach to assessing MTR pricing behaviour

- 6.106 As noted in paragraphs 6.37 to 6.40 H3GI and Vodafone raised a number of issues concerning ComReg's approach to assessing MTR pricing behaviour, in essence, questioning the appropriateness of drawing conclusion on pricing which was subject to regulation and the basis for ComReg's view that MSPs have the ability to price independently.

³¹¹ See individual CBP assessments (in particular, those relating to the price sensitivity of buyers) in section 6 of the MVCT Consultation.

³¹² See Appendix F which sets out and updates relative termination traffic exchanges between individual MSPs and their largest purchasers.

- 6.107 According to H3GI, ComReg has failed to properly apply a ‘modified greenfield’ approach. In H3GI’s opinion, rather than considering “how MVCT may have been priced absent SMP regulatory controls”, ComReg is drawing conclusions from pricing in the presence of regulation. It also suggests that ComReg ‘*determined*’ that the MTRs charged by H3GI under its voluntary glide path arrangement were ‘*appropriate*’ and that ‘*ComReg cannot now penalise operators for charging in accordance with what it agreed.*’
- 6.108 ComReg does not agree with the views expressed by H3GI in relation to its application of the ‘modified greenfield approach’. The MVCT Consultation provided a considered analysis³¹³ of the MTR pricing trends for all MSPs (both those with and without SMP related pricing obligations and how the position changed over time). In so doing, the MVCT consultation noted³¹⁴ that pricing trends are informative, but not necessarily determinative and need to be considered alongside other relevant factors. ComReg clearly set out, with respect to each individual MSP, the basis upon which it considered trends in MTR pricing and recognised the varying circumstances as they pertained to individual MSPs with and without SMP price control obligations. Insofar as H3GI is concerned, the analysis of its MTR pricing behaviour was considered³¹⁵ in the context that that H3GI only became subject to SMP price control obligations in 2008. Its pricing behaviour prior to this occurred, therefore, absent regulation. Even when subject to regulation, ComReg took and remains of the view that H3GI has set its MTRs consistently above those of other existing SMP MSPs, notwithstanding it at all times having the ability to set its MTRs at levels lower than in its voluntary commitments to ComReg. Indeed, as noted in the MVCT Consultation³¹⁶, even in the presence of regulation, ComReg has had to take enforcement action against H3GI in order to require it to comply with its then existing price control obligations. Furthermore, H3GI has changed its peak, off-peak and weekend MTRs within the overall cap of its maximum MTR (agreed under the voluntary arrangement) in order to maximise its termination revenues in light of the incoming termination traffic volumes during these periods. Again, demonstrating that H3GI has, even within the context of the voluntary arrangement, had the ability to set its MTRs somewhat independently.
- 6.109 ComReg does not accept H3GI’s characterisation of ComReg’s role with respect to the voluntary glide path arrangements entered into by H3GI (and indeed other SMP MSPs). While it is ComReg’s view that, absent the direct regulatory pressure from ComReg, such voluntary arrangements would not likely have been entered into by MSPs, during the implementation of such voluntary arrangements

³¹³ See paragraphs 6.19 to 6.33 of the MVCT Consultation as well as in the assessment of CBP with respect to individual MSPs in paragraphs

³¹⁴ See paragraphs 6.19 and 6.23 of the MVCT Consultation.

³¹⁵ See paragraph 6.22(b), Table 14 in paragraph 6.24 and paragraph 6.26 and 6.27 of the MVCT Consultation.

³¹⁶ See paragraph 6.22(b) of the MVCT Consultation.

- it was made clear to H3GI³¹⁷ (and other MSPs) that this was acceptable in the context of it being a transitional measure to full cost orientation³¹⁸, with the aim of establishing a more definitive level of cost oriented prices at a later date. It was also made clear by ComReg to H3GI (and other SMP MSPs) that any party to this arrangement was not precluded from reducing termination charges below the maximum MTR levels at any time over the period of the voluntary arrangement.
- 6.110 Vodafone has also questioned the rationale for ComReg's preliminary view in the MVCT Consultation that the levels of MTR reductions by SMP MSPs to date, would not have been achieved without ComReg oversight of the voluntary agreements. ComReg would refer Vodafone to its view in paragraphs 6.108 and 6.109 above. ComReg would note that its analysis of the historic position in respect of MTRs MTR setting behaviour was not solely determinative of its preliminary view that each of MSPs with SMP has the ability and incentive to act independently from competitors, customers and consumers. ComReg has analysed the historic position to inform what might happen (absent regulation) and has also had regard to a number of other factors which have been identified including an absence of existing and potential competition, insufficient indirect constraints³¹⁹ and effective CBP).
- 6.111 Insofar as Vodafone is concerned, the trends in its pricing were considered noting that Vodafone has been subject to SMP price controls since 2005. Vodafone's pricing behaviour prior to this occurred, therefore, absent regulation and ComReg would note that its MTRs were their highest ever during this unregulated period. Even when subject to regulation, ComReg notes that Vodafone has set its MTRs consistently at the level of its voluntary commitments to ComReg, notwithstanding it at all times having the ability to set MTRs below these.
- 6.112 In paragraph 6.109 above, ComReg has set out its role with respect to the voluntary arrangements for reducing MTRs. ComReg facilitated the negotiation of these agreements and, as would be clear from correspondence with Vodafone (and other MSPs), such arrangements were never considered by ComReg to be a substitute for effective regulation, including ensuring that MTRs were cost-oriented. These were accepted by ComReg as a transitional measure towards cost-orientation and, in this regard, were put in place pending the then completion of a future analysis of mobile termination markets (now the subject of this Decision). ComReg does not, therefore, accept Vodafone's view that, absent intervention by ComReg, it a reasonable assumption that ComReg believed there were no material competition issues justifying such intervention. Indeed, as noted in the MVCT Consultation³²⁰, there have been three revisions to the voluntary

³¹⁷ Email correspondence from ComReg to H3GI (and other SMP MSPs) of 26 August 2010.

³¹⁸ Subject to a finding that an MSP has SMP and that a price control obligation is appropriate.

³¹⁹ When ComReg referred to "*....along with other factors already considered...*" in paragraph 6.28 of the MVCT Consultation, it was referring to the aforementioned factors.

³²⁰ See paragraph 6.22(a) of the MVCT Consultation.

agreements, all of which have been heavily facilitated by ComReg, thus showing that ComReg did not find various commitments that were entered into to be acceptable.

- 6.113 Overall, ComReg considers that the conclusions it has drawn in the MVCT Consultation and this Decision from the analysis of H3GI's and Vodafone's (and other MSPs') pricing behaviour to be reasonable and appropriate.

Whether the impact of dispute resolution should be discounted in the SMP analysis

- 6.114 As noted in paragraph 6.42 H3GI disagrees with ComReg's view that 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, although it does not state why this is the case.

- 6.115 ComReg considers that dispute resolution and the exercise, by ComReg's of such a role, to be a complimentary but separate form of regulation. ComReg also accepts that disputes can be brought on matters which do or do not relate to SMP obligations. ComReg also recognises that the threat of disputes and ComReg's associated intervention can also condition Service Providers actual or potential actions. However, ComReg clearly set out its reasoning and position on this issue in the MVCT Consultation³²¹ and, for the reasons set out therein, remains of the view that its approach is an appropriate one. ComReg, therefore, does not accept H3GI's views on this issue.

- 6.116 Furthermore, having regard to Service Providers' responses to the Statutory Information Requests ComReg has no evidence to suggest that the threat of or actual dispute resolution was a material factor which resulted in an MSP being effectively constrained in its ability to set its MTRs independently of its competitors, customers or consumers.

Other additional issues

Change in Traffic Flows in context of CBP Assessment for Meteor

- 6.117 As noted in paragraph 6.44, Eircom Group, while agreeing with the CBP assessment, noted in the context of the CBP analysis for Meteor, that in recent periods it now was buying more minutes of termination from Vodafone and O2 than vice versa.

- 6.118 ComReg engaged with Meteor to assess this issue and based on the information provided by Meteor, there appears to be a change in the asymmetry of MVCT purchases in very recent months³²², it is too early to say yet whether this trend will be a permanent one. However, even based on the latest data supplied by Meteor, over the period 2007 to August 2012, Meteor has purchased fewer minutes of MVCT from each of Vodafone and O2 than vice versa.

³²¹ See paragraphs 6.57 to 6.66 of the MVCT Consultation.

³²² See Appendix F of this Decision.

6.119 Nevertheless, ComReg does not consider the recent change to be material such that it would lead ComReg to change its view in the MVCT Consultation that Meteor has not experienced effective CBP (ComReg notes that Meteor agreed with its CBP assessment). ComReg considers that Vodafone and O2 will, be price sensitive buyers of Meteor supplied MVCT (and vice versa).

Difficulties in expressing views given the redaction of text

6.120 As noted in paragraph 6.45, ALTO and O2 both commented on ComReg's practice of redacting commercially sensitivity/confidential information in the MVCT Consultation.

6.121 ComReg recognises there is a balance to be struck between protecting confidential and/or commercially sensitive information and the need to provide sufficient reasoning to both support its analysis and to allow interested parties to make meaningful comment. ComReg would note that no financial modelling information was contained in the analysis set out in the MVCT Consultation. Information was redacted on the basis that it was provided to ComReg by Service Providers either in confidence or on the basis of it being commercially sensitive and ComReg is obliged to treat this information as such. ComReg notes that the MVCT Consultation provided³²³ the ability for individual Service Providers to have visibility of their own redacted information, and this was availed of in a number of cases.

Suggested deficiencies in the consultation with respect to the SMP assessment

6.122 In paragraphs 6.46 to 6.49, TMI raised a number of other suggested deficiencies with the MVCT Consultation.

6.123 TMI considered that insufficient rationale had been provided for the proposed designation of TMI with SMP. ComReg set out in detail in the MVCT Consultation³²⁴, and in section 6 of this Decision³²⁵, the reasons why TMI should be designated with SMP. ComReg does not, therefore, accept TMI's views on this matter.

6.124 TMI considered it had not had adequate time to respond to the MVCT Consultation. ComReg does not accept TMI's views. As noted in paragraph 6.85 above, ComReg has consulted in line with its statutory obligations and duties and its published consultation procedures. TMI (and other parties) were afforded a period of almost 8 weeks to prepare its response to the MVCT Consultation. At TMI's request, ComReg also met with TMI on a number of occasions, at which TMI has shared its views with ComReg. Insofar as the Separate Pricing

³²³ See paragraph 1.27 of the MVCT Consultation.

³²⁴ See section 6 of the MVCT Consultation.

³²⁵ Including paragraphs 6.65 to 6.85 above.

Consultation is concerned, ComReg would also note that TMI were afforded a period of just over 9 weeks to prepare its response on those matters³²⁶.

- 6.125 TMI also considered that ComReg is mechanically following the 2007 Recommendation and is inappropriately applying it in Ireland, contrary to EU law. ComReg does not accept TMI's views on this issue. As noted in paragraph 4.141 and as should be evident from both the MVCT Consultation and this Decision, ComReg has taken utmost account of the 2007 Recommendation and, in so doing, has had regard to it in the context of its application to the particular circumstances of the Irish market and to particular MSPs operating within it, including TMI.
- 6.126 TMI considered that it is being afforded inadequate time to prepare for the implementation of decisions proposed and, because of the approach to consulting separately on the detail of the cost-orientation obligation through the Separate Price Control Consultation, TMI has not been provided with the "*complete picture*" in order to allow it to respond adequately. ComReg does not accept TMI's views on this matter and, as noted in paragraph 6.124 above, TMI has had adequate time to respond to both the MVCT Consultation and the Separate Pricing Consultation. Furthermore, in ComReg's view, the issues raised by TMI are not directly relevant to a finding of SMP per se but are more relevant in the context of the imposition of regulatory obligations (which are discussed in Section 8. ComReg would also note that in the MVCT Consultation and subsequently in this Decision, ComReg has carefully considered the impact of the imposition of regulatory obligations, including on proportionality grounds and having regard to its statutory objectives and functions. Where appropriate, ComReg has allowed an implementation period for certain obligations³²⁷. To the extent that TMI's comments relate to the time to prepare for the implementation of a price control remedy arising in the context of the detailed specification of the cost-orientation obligation, these matters were the subject of the Separate Pricing Consultation and, as noted in paragraph 6.82 above, are considered in that context (i.e. the Separate Pricing Decision) and not in this Decision.
- 6.127 TMI also considered that a finding that TMI has SMP (and subject to various obligations) would be contrary to the "*Principle of Legal Certainty*", stating that the decision would result in TMI being subject to an entirely different legal and regulatory regime in terms of price control within a matter of weeks such that it would undermine its business model. While ComReg would note that TMI will be subject to SMP and various obligations, as stated in paragraph 6.126 above, this Decision deals with the imposition of cost-orientation in principle, with the detailed specification of such having been considered in the Separate Pricing Consultation. TMI's comments on the imposition of a detailed price control

³²⁶ ComReg would note that the MVCT Consultation issued on 23 May and closed on 19 July 2012. The Separate Pricing Consultation commenced on 28 June 2012 and closed on 4 September 2012.

³²⁷ For example, as noted in Section 8 of the MVCT Consultation and later in this Decision, a RIO is to be published within 3 months following the effective date of ComReg's decision.

obligation are therefore considered in ComReg's Separate Pricing Decision. Furthermore, as noted in paragraph 6.83 and 6.84, ComReg finds it difficult to conceive that TMI did not know that there was the possibility that it could, arising from the analysis of the MVCT markets, be designated as having SMP (and have obligations imposed upon it). In section 8 of the MVCT Consultation and this Decision, ComReg has also considered the proportionality of imposing certain obligations, having regard to identified competition problems.

Errors in Tables in the MVCT Consultation

6.128 As noted in paragraphs 6.21 and 6.24, O2 and H3GI pointed to factual errors in Table 11 and Table 12 in the MVCT Consultation. These errors have been corrected in Table 1 and Table 2 above, and the positions taken by ComReg in this Decision have been made on the basis of the information contained in these (and other) updated tables.

ComReg's Position on SMP Assessments

6.129 In paragraphs 6.62 to 6.128 above, ComReg has considered Respondents' Submissions on ComReg's assessment of SMP and proposed SMP designations. Having regard to the analysis set out in the MVCT Consultation³²⁸ and the consideration of Respondents views above, ComReg's position is set out below.

SMP Assessment

6.130 ComReg has considered a wide range of factors to identify whether any undertaking enjoys a position of SMP in each of the Relevant MVCT Markets identified. These factors were those set out in the SMP Guidelines (including those set out in Appendix F) as well as other relevant matters that have been identified. ComReg's position is as follows.

Existing Competition in the Relevant MVCT Markets

6.131 ComReg has considered existing competition in each of the Relevant MVCT Markets under the following headings.

- **Existing Competition:** Each MSP operating within its Relevant MVCT Market is the sole supplier of mobile voice call termination and, therefore, it is ComReg's position that each such MSP does not face existing competition in the sale of MVCT. It is ComReg's position that the strength of any indirect constraints coming from the retail market are not considered likely to be sufficient to result in the development of effective competition in each of the Relevant MVCT Markets. It is ComReg's position that these conditions are likely to remain broadly the same over the medium term (i.e. within the lifetime of the market analysis).
- **Market Shares:** It is ComReg's position that each MSP operating within its Relevant MVCT Market has 100% market share, irrespective of whether this

³²⁸ See section 6 of the MVCT Consultation.

is measured by call termination volumes or call termination revenues. It is ComReg's position that these high market shares have been maintained over time and, given there are no competitors in the each of Relevant MVCT Markets, this position is likely to be maintained over at least the medium term.

- **Pricing Behaviour:** It is ComReg's position that absent SMP regulation, it is more likely than not the case that each of H3GI, Lycamobile, Meteor, O2, TMI and Vodafone, individually have the power to set their MTRs, to an appreciable extent, independently of competitors, customers and consumers.

6.132 ComReg's position is that the absence of existing competition, high market shares and historic MTR pricing behaviour trends are strongly suggestive that, individually, H3GI, Lycamobile, Meteor, O2, TMI and Vodafone, have SMP in each of the Relevant MVCT Markets within which they operate.

Potential Competition in the Relevant MVCT Markets

6.133 ComReg's position is that the emergence of potential competition within each of the Relevant MVCT Markets over the medium term is unlikely and, therefore, is not likely to provide an effective competitive constraint on each of the MSPs' individual abilities to behave, to an appreciate extent, independently of competitors, customers and consumers.

Countervailing Buyer Power

6.134 While noting that in some cases a degree of CBP had been exercised in particular, with respect to a degree of CBP experienced by TMI and Lycamobile, ComReg's position is that the level of any CBP exercised by MVCT purchasers upon each of the MSPs operating within a Relevant MVCT Market is unlikely to be sufficiently effective such that it would, absent regulation, prevent the individual abilities of Vodafone, O2, Meteor, H3GI, TMI and Lycamobile to behave, to an appreciate extent, independently of each competitors, customers and consumers.

SMP Designations

6.135 Having regard to Regulation 25 of the Framework Regulations, ComReg has determined, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that each of the Relevant MVCT Markets identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive.

6.136 In accordance with Regulation 27(4) of the Framework Regulations, ComReg hereby designates each of the following MSPs as individually having SMP within the Relevant MVCT Market within which they operate:

- Hutchison 3G Ireland Limited;
- Lycamobile Ireland Limited.
- Meteor Mobile Communications Limited;

- Telefónica Ireland Limited (including Liffey Telecom Limited);
- Tesco Mobile Ireland Limited; and
- Vodafone Ireland Limited;

6.137 Having established this, ComReg now goes on to consider competition problems in the Relevant MVCT Markets.

7 Competition Problems and Impacts on Competition and Consumers

- 7.1 In section 7 of the MVCT Consultation, ComReg set out its preliminary view on those competition problems which, absent regulation, could potentially arise in each of the Relevant MVCT Markets by virtue of an MSP having the ability and incentive to engage in a range of ant-competitive behaviours in light of its SMP position. ComReg further noted that the purpose of *ex ante* regulation is to prevent an undertaking with SMP from behaving in a manner which would inhibit the development of effective competition to the detriment of consumers.
- 7.2 ComReg briefly describes below the preliminary views set out in the MVCT Consultation and then goes on to consider Respondents' views before setting out its final position on such matters.

Position set out in the MVCT Consultation

- 7.3 Given ComReg's preliminary view in the MVCT Consultation that none of the Relevant MVCT Markets is effectively competitive and that six MSPs should be individually designated as having Significant Market Power (SMP), ComReg's preliminary view was that, absent regulation, there is the potential and incentive for an SMP MSP in the Relevant MVCT Market to engage in exploitative and exclusionary behaviours which would impact negatively upon competition and customers.
- 7.4 The MVCT Consultation identified a range of competition problems falling within the above types of exploitative and exclusionary conduct, including:
- **Excessive pricing**³²⁹ resulting in raised input costs to other rival MSPs and Fixed Service Providers (FSPs), and could ultimately result in raised prices to consumers for making calls to mobiles and potentially restricting FSPs' sales of F2M calls to subscribers of the terminating MSP. Such excessive pricing (giving rise to wholesale revenues in excess of costs) would thus, not only exploit consumers making calls to mobiles, but might also harm or distort competition where the above efficient cost MVCT input distorts competition in related downstream markets, e.g. in retail markets where MSPs or FSPs rely on the upstream MVCT input. It was also noted that excessive pricing may also reduce the incentive for productive efficiencies or to innovate (or hinder innovation).
 - **Vertical le veraging**³³⁰ whereby, a vertically integrated operator that has dominance (i.e. SMP) at one level in the production or distribution chain (e.g. the Relevant MVCT Market) can potentially transfer this market power into downstream (and potentially competitive) market(s) where it is also active (or

³²⁹ See paragraphs 7.9 to 7.16 of the MVCT Consultation.

³³⁰ See paragraphs 7.17 to 7.22 of the MVCT Consultation.

in closely related markets) and engage in exclusionary or other conduct which aims to reduce or distort competition in such markets. Cited examples of such exclusionary conduct included refusal or constructive refusal to supply; the discriminatory use of or withholding of information as well as discrimination on quality and pricing parameters; and margin squeeze.

- 7.5 The MVCT Consultation also highlighted³³¹ the impact of the above issues on competition and consumers, including that excessive MTRs would likely result in off-net calls to mobiles being priced inefficiently high, with the terminating MSP using wholesale revenues in excess of costs earned from above cost MTRs to cross subsidise and selectively lower the price of some of their own retail services (such as access, handset or on-net retail prices). ComReg also highlighted competitive and distributional impacts for FSPs and smaller MSPs (with larger traffic outflows than other more established MSPs) and the effects that above cost MTRs can have in distorting competition amongst MSPs and between MSPs and FSPs. It was also noted that excessive MTRs can reduce MSPs' incentives to innovate and increase efficiency, as inefficient MTRs are paid for by competitors and, in turn consumers.
- 7.6 ComReg's overall preliminary view was that, absent regulation, there is the ability and incentive for an SMP MSP to engage in the above summarised exploitative and exclusionary behaviours which could impact upon competition and consumers. In view of this, appropriate *ex ante* regulatory obligations were considered justified and necessary.
- 7.7 ComReg asked³³² the following question on the competition problems identified, along with the associated impact of these on competition and consumers.

Question 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.

Respondents' Views

- 7.8 **Seven Respondents expressed views** on Question 9 above. In general, **two Respondents agreed** (ALTO and Eircom Group) with ComReg's assessment that the competition problems and the associated impacts on competition and consumers identified are those which could potentially arise in the Relevant MVCT Markets. **One Respondent partially agreed** (O2) with ComReg's assessment **while four Respondents disagreed** (H3GI, Lycamobile, TMI and Vodafone) with it.

³³¹ See paragraphs 7.23 to 7.31 of the MVCT Consultation.

³³² See Question 9 on page 184 of the MVCT Consultation.

- 7.9 ALTO noted the standard for the European Commission to highlight markets for *ex ante* regulation was high, and the measures proposed by ComReg align with best practice. It also agreed that SMP MSPs had the ability to charge excessive prices for call termination services in the relevant MVCT Market, as countervailing buyer power was low.
- 7.10 Eircom Group agreed with much of ComReg’s assessment of the competition problems and the associated impacts on competition and consumers. It noted that some of the key effects of MTRs set above the efficient cost level echoed its concerns highlighted in its response to previous questions. In particular, Eircom Group referred to the distributional impacts for FSPs and smaller MSPs and the limitations that this imposes on retail pricing flexibility.
- 7.11 O2, in partially agreeing with ComReg’s assessment, commented that ComReg had detailed the theoretical competition problems which exist in the Relevant MVCT Markets. However, O2 disagreed that vertical integration is an issue as it is difficult to see the risk of MSPs exercising market power in other related markets where, in its view, they clearly have no such leveraged market power.
- 7.12 According to H3GI, ComReg has not demonstrated that H3GI has the ability and incentive to engage in excessive pricing. It also referred to paragraph 7.10 of the MVCT Consultation which 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.”³³³*
- 7.13 H3GI suggested 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*” and, as a result, ComReg cannot make a determination in respect of the risk of excessive pricing.
- 7.14 Lycamobile considered that it did not have the ability and incentive to engage in exploitative and exclusionary behaviours given its low retail market share. It also suggested that the competition problems most affecting Lycamobile (in terms of its purchase of MVCT from other MSPs) related to access³³⁴. Lycamobile also reiterated comments it had raised in its response to Question 7 (dealing with the wholesale MVCT geographic market assessment)³³⁵, noting that its customer base has a high propensity for making (as opposed to receiving) international calls, primarily to non-EU destinations and considered that it had no option but to purchase MVCT from such non-EU MSPs. It considered that reductions in the

³³³ Case C 27/76 United Brands v. Commission [1978] ECR 207, [1978] 1 CMLR 429, para. 250. In United Brands the Court of Justice of the European Union held that: “...charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be... an abuse”.

³³⁴ As discussed in paragraphs 8.25 to 8.28 of the MVCT Consultation.

³³⁵ See paragraph 5.49 above.

MTRs of EU MSPs, without a countervailing reduction in MTRs in a non-EU state, were effectively a subsidy to the non-EU MSP.

- 7.15 In TMI's opinion, no remedies were necessary because there are no actual or potential competition problems in the case of TMI's position in the market. TMI stated that the competition problems identified by ComReg are unrealistic in relation to TMI's case, in particular, it considered that it could not deny access to MVCT or charge excessive MTRs as it cannot act independently of other Service Providers across its operations. However, it indicated that it is willing to engage with ComReg to reach a situation where TMI is legally bound to avoid any breach without the need to impose SMP. Much of TMI's response³³⁶ on Question 9, rather than focusing on the competition problems and consequential consumer and competitive impacts identified by ComReg in the MVCT Consultation, mainly focussed on TMI's suggested deficiencies in ComReg's SMP assessment³³⁷ and on the proportionality and fairness of ComReg's proposed imposition of regulatory obligations on TMI. TMI also raised a number of suggested deficiencies in ComReg's analysis such as that it was not in a position to vindicate its position given, its view that the MVCT Consultation had provided inadequate justification regarding the competition problems in TMI's specific circumstances and the timeframe within which TMI had to respond to the MVCT Consultation (and the Separate Pricing Consultation).
- 7.16 Vodafone did not agree (although its Submission appeared to agree with certain aspects of ComReg's analysis) and raised a number of issues. In commenting on exploitative practices it disagreed that SMP MSPs could exercise their market power by reducing output, engage in excessive pricing, or would have incentives to reduce innovation. It also questioned whether SMP MSPs would have incentives to deliberately impair the quality of service provided to MVCT purchasers. In relation to vertical leveraging, it considered that the problems described by ComReg were theoretically possible but that ComReg was unable to provide real life examples of such problems. Vodafone also made a number of comments regarding ComReg's analysis of the impact of competition problems on consumers and competition.
- 7.17 TMI and Vodafone also raised a number of other issues in their Submissions and these, along with the matters highlighted above, are further summarised below.

³³⁶ See sections H and J of the TMI Submission.

³³⁷ For example, it considered, *inter alia*, that it would be wrong to designate TMI with SMP in the Relevant MVCT Market if it would result in effects on TMI's position in other markets; TMI has a small retail presence and as a consequence the obligations to be imposed on TMI should be less onerous than those imposed on large MSPs; that treating all MSPs the same in remedies terms would be discriminatory and disproportionate; given TMI's position in the market and its role in bringing competition, any SMP designation should be delayed and be consistent with a reasonable path towards cost oriented levels; obligations should only be justified in light of the nature of problems identified, be proportionate and justified in light of ComReg's statutory objectives and only be imposed following consultation in line with statutory requirements.

In this regard, ComReg considers that Respondents' views on Question 9 can be generally categorised into the following themes.

- Whether MSPs could engage in exploitative practises;
- Whether MSPs could engage in excessive pricing;
- Whether SMP MSPs could engage in behaviours relating to vertical leveraging;
- Impact of competition problems on consumers and competition.

7.18 Respondents' views under the above themes are set out below.

Whether MSPs would engage in exploitative practises

7.19 A number of Respondents expressed views on whether SMP MSPs would engage in exploitative practices such as reducing output and/or excessive pricing. These are discussed below.

Whether MSPs would reduce output

7.20 While noting that the theory suggests that firms with market power could reduce output, Vodafone did not consider this to be realistic in Relevant MVCT Markets. Vodafone referred to paragraph 7.9³³⁸ of the MVCT Consultation and stated that SMP MSPs would not have a commercial incentive to do so given they face incentives to terminate the largest possible volume of calls on their network in order to maximise calls/revenues. It also noted that reductions in output (whether in terms of switching or transmission capacity) are unlikely as it would be as harmful to its customers as it would be to MVCT purchasers' customers (noting its view that one of the European Commission's rationales for moving to Pure LRIC based pricing was the high value placed on inbound calls by the called party).

Whether SMP MSPs would engage in excessive pricing

7.21 We have already noted H3GI's (paragraphs 7.12 and 7.13), Lycamobile's (paragraph 7.14) and TMI's (paragraphs 7.15) views on excessive pricing issues above.

7.22 TMI also noted that SMP or dominance is consistent with having the ability to raise prices and in line with TMI's response to previous questions, it noted that, its MTR prices are falling, and cited the example of its MTR reductions in January 2010 and again on 1 February 2012. In TMI's opinion, this is not consistent with having the power to sustain or raise prices.

³³⁸ Paragraph 7.9 it was stated that "Economic theory suggests that where a firm possesses market power it is in a position to increase prices above and/or reduce output below competitive levels, thereby allowing higher than normal profits to be earned. These higher profits effectively create a wealth transfer from the consumer to the firm with market power. It is ComReg's preliminary view that an MSP having SMP in the Relevant MVCT Market(s) would have the ability and incentives to engage in exploitative practices, such as excessive pricing".

- 7.23 We have also noted Vodafone's views in paragraph 7.16 above. In support of its position, Vodafone considered that excessive pricing for larger MSPs was likely to be counter productive and indicated what matters most to MSPs is the relativity of MTRs between them and their competitors. It noted that an MSP with a higher relative MTR can use the excess revenue to cross subsidise retail services and thereby attract customers from its competitors. In this regard it cited the example of H3GI who has had MTRs which were then (at the time of the Vodafone Submission) 95% above the MTRs of other regulated MSPs.
- 7.24 Furthermore, in the opinion of Vodafone, 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. Vodafone suggested that this can clearly be seen in the case of the higher MTRs now in situ for H3GI, TMI and Lycamobile, whereby no existing Irish MSP differentiates its off-net mobile retail prices on the basis of the higher cost for terminating calls on these three MSPs.

Whether SMP MSPs can engage in behaviours relating to vertical leveraging

- 7.25 As noted in paragraph 7.11 above, O2 disagreed that vertical integration is an issue in this market. According to O2, it was difficult to see the risk of MSPs exercising market power in other related markets where, in its view, they clearly have no such leveraged market power. It also considered that a significant amount of interconnection and access issues are regulatory obligations which pre-exist irrespective of any SMP obligations being imposed on MSPs in the Relevant MVCT Markets. In its view, the likelihood of competition problems from vertical leveraging was very low.
- 7.26 As noted in paragraph 7.16, Vodafone considered that the problems described by ComReg were theoretically possible but that ComReg was unable to provide real life examples of such problems.
- 7.27 As noted in paragraphs 7.14 and 7.15, both TMI and Lycamobile considered that they would be unable to deny access to MVCT given their size relative to the size of other larger MSPs. In contrast, Lycamobile considered that the competition problem that had most affected it was that which related to access.

Impact of competition problems on consumers and competition

- 7.28 TMI and Vodafone expressed views on the impact of competition problems on competition and consumers. Such views are identified under the headings below.

Risk of recent entrants leaving the market

- 7.29 TMI considered that it would be wrong to designate TMI with SMP in the Relevant MVCT Market if it would result in effects on TMI's position in other markets. It considered that MTRs favour those MSPs with the highest differential between inbound and outbound calls and, in view of this, treating all MSPs equally (with respect to the imposition of regulatory obligations) would risk recent entrants being forced out of the market.

Balance of Interconnection traffic and payments

- 7.30 Vodafone noted that a smaller operator sending more traffic to a larger operator than it receives in turn will clearly be at a disadvantage where terminating rates are reciprocal. It also noted that where a smaller MSP has a higher MTR, there is a cutover point at which the disadvantage arising from the traffic imbalance is outweighed by the additional revenues it receives from its higher MTR. It, therefore considered that it was not a given in all markets (and ‘...*certainly not in Ireland...*’)³³⁹ that smaller MSPs are disadvantaged by current termination rates and/or by any traffic imbalance in traffic flows or that imposing large MTR reductions on all MSPs will ultimately benefit smaller MSPs in the Irish market.
- 7.31 Vodafone did welcome the planned reduction in MTR asymmetries and the ending of competitive distortions caused by very large differences in the levels of MVCT/MTR between different MSPs. It cited the example of H3GI’s asymmetric MTRs and set out the financial impact of this on Vodafone over a number of years.

MTR Levels and competition in mobile markets

- 7.32 Vodafone, in commenting on paragraphs 7.26 to 7.28 of the MVCT Consultation, suggested that was ComReg’s contention that a reduction of MTRs in line with the European Commission’s 2009 Termination Rates Recommendation will benefit competition and will, in particular, benefit smaller MSPs. It noted that one of the motivations advanced by ComReg (and other regulators), has been that MTRs above “*incremental costs*”³⁴⁰ 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), Vodafone noted that 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.
- 7.33 Vodafone suggested that ComReg argues that by reducing MTRs to “*incremental cost*”³⁴¹, competition amongst MSPs can be enhanced. Vodafone considered that, 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, its is not aware of any studies that consider widely the extent to which these theoretical models accord with real life practice. Due to what Vodafone considered to be a lack of real life evidence, it referred to commissioned research³⁴² to identify whether actual evidence from a range of

³³⁹ See section 5.3.1 of the Vodafone Submission.

³⁴⁰ See section 5.3.2 of the Vodafone Submission.

³⁴¹ *Ibid.*

³⁴² “*The impact of mobile termination charges on competition between mobile providers – Frontier Economics, December 2011.*”

jurisdictions supports the implicit hypotheses used by ComReg and other regulators. Vodafone considered that its research, based on quantitative analysis from a number of mobile markets including Ireland), shows:

“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.

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.”³⁴³

- 7.34 Vodafone goes on to suggest that ComReg has 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 to support the development of competition. Vodafone disagreed with these ground, indicated that its commissioned research showed there was no evidence that such differentials would affect “*competition for customers*”³⁴⁴ and stated that regulators should not use these grounds to reduce MTRs without clear evidence to support their positions. Vodafone also reserved its position with respect to its intention to provide a response to the Separate Pricing Consultation.

Effects of current regime on fixed to mobile call traffic

- 7.35 In line with its views in paragraphs 7.32 to 7.34 above, Vodafone considered that there was no evidence to support the suggested contention that MTRs above incremental costs have detrimental impacts on competition. In particular, Vodafone disagreed with ComReg’s view in paragraph 7.26 of the MVCT Consultation that:

“In particular, consumer choices would be distorted between mobile and fixed calling services due to differences in the relative retail prices of

³⁴³ See paragraph 5.3.2 of Vodafone’s Submission.

³⁴⁴ *Ibid.*

fixed to mobile and mobile to mobile call services that do not reflect the underlying costs involved in providing MVCT. Consumers that make large amounts of on-net mobile to mobile calls are, in effect, subsidised by consumers who make off-net calls (whether originating from other MSPs or FSPs).³⁴⁵

- 7.36 Vodafone cited its own analysis of Eircom's retail charges for fixed to mobile calls (on particular Eircom price plans) and noted that these retail charges are significantly in excess of the underlying MTRs charged to Eircom at the wholesale level. It believed, based on its own calculations, that the cost of mobile termination typically represents less than 20% of the total cost to an Eircom fixed line subscriber of a call to a mobile. It noted its intention to provide a further analysis in its response to the Separate Pricing Consultation.

Inefficiencies paid for by excess MTRs

- 7.37 Vodafone disagreed with ComReg view in the MVCT Consultation³⁴⁶ 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. Vodafone states that ComReg offers no evidence to support such a contention in the case of the Irish or any other market.

- 7.38 Vodafone also made comments which related to ComReg's views as set out in the Separate Pricing Consultation and stated that it was incumbent upon ComReg to show how the difference between a LRIC+ MTR and a pure LRIC MTR would reduce the risk of inefficiencies and enhance innovation. Similarly, in the context of a potential move to Pure LRIC MTRs, it considered that ComReg does not explain why the revenue impacts of MTR reductions to date would not be sufficient to stimulate cost efficiencies and innovation on mobile networks.

Asymmetries dampening investment

- 7.39 Vodafone agreed with ComReg's preliminary view³⁴⁷ that MTR asymmetries - not objectively justified – could create cross-subsidies and could dampen investment incentives. However, it considered that the revenue transfers arising from asymmetries were relatively small when compared to the revenue reductions arising from regulated MTR reductions. Vodafone considered that such revenue reductions are likely to have more of an impact on investment incentives than MTR asymmetries and considered that this issue was not adequately addressed by ComReg.

³⁴⁵ There is economic literature which indicates that a regulatory policy focused on waterbed effects may be damaging to competition and may reduce welfare. This is due to the fact that above-cost termination rates and on-net/off-net price differentials may create so called tariff-mediated network externalities making large mobile networks more attractive to consumers than smaller mobile networks and also fixed networks. See David Harbord, Marco Pagnozzi, *Università di Napoli Federico, January 2008, On-Net/Off-Net Price Discrimination and 'Bill-and-Keep vs. 'Cost-Based Regulation of Mobile Termination Rates'*.

³⁴⁶ See paragraphs 7.13 and 7.29 of the MVCT Consultation.

³⁴⁷ See paragraph 7.30 of the MVCT Consultation.

MTR levels and competition in mobile markets

7.40 Vodafone refers to ComReg's preliminary view in the MVCT Consultation³⁴⁸ that:

“Excessive MTRs may also somewhat³⁴⁹ reduce the flexibility for retail pricing innovations to occur (such as, in the offering of more inclusive any network minute bundles or unlimited call offerings). This may be particularly so depending on, for example, differences between MTRs and Fixed Termination Rates (FTRs), or indeed the level of asymmetries between MTRs.”

7.41 Vodafone stated that 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. It considered that one indicator of the 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, noting that this is despite TMI's average MTR being 12.55 cent per minute. It considered that 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.

ComReg's Assessment of Respondents' Views

7.42 In paragraphs 7.8 to 7.41 above, ComReg has summarised the key issues raised by Respondents concerning ComReg's assessment of competition problems (and their associated impact on competition and consumers) which, absent regulation, could potentially arise in the Relevant MVCT Markets from an MSP having SMP. Prior to setting out its final position, ComReg considers Respondents' views according to the themes identified in paragraph 7.17 above.

Whether MSPs could engage in exploitative practices

7.43 In paragraphs 7.20 to 7.24 we noted Respondents' views on whether SMP MSPs would engage in exploitative practices. These are considered below.

Whether MSPs could reduce output

7.44 As noted in the MVCT Consultation, price-related exploitative behaviour was identified as a primary competition concern. For the purposes of this market review, and in the context of the Relevant MVCT Markets, ComReg is of the view that, in the absence of *ex ante* regulation, MSPs have the ability and incentive to set excessive MTRs. Absent regulation, this would result in a structure of prices in retail and wholesale markets that would be less efficient, distort customer choice, restrict or distort competition and generate adverse distributional impacts.

³⁴⁸ See paragraph 7.31 of the MVCT Consultation.

³⁴⁹ Retail pricing flexibility is not solely determined by MTRs, but would also be impacted by retail costs and other network costs associated with the provision of the services (such as call origination etc.).

7.45 As inputs to the overall cost of making a call, off-net MTRs create a floor to off-net retail pricing. Higher MTRs make it difficult for Service Providers to offer flat-rate calling plans due to the uncertainty regarding the likely level of customer take-up of such plans. As noted by Marcus (2004), in the presence of a higher cost base

“[a] flat rate plan would have to address many business risks, including the prospect that the plan might attract large numbers of self-selected customers who had significantly above-average usage patterns.”³⁵⁰

7.46 High per-minute termination costs will likely be passed through to customers in the form of higher retail rates (either for a bundle of calls or on a per call basis for off-net calls) than would otherwise be the case if MTRs were set according to efficient cost. High retail prices can ultimately be expected to dampen retail customer demand for making calls (in particular off-net calls) and lead to a lower overall consumption of call minutes. As noted by the European Commission in its Staff Working Document accompanying the 2009 Termination Rate Recommendation,

“...it may be expected that higher wholesale prices would ultimately result in higher retail prices for originating calls for certain customer groups.... Higher prices at the retail level tend to depress call origination due to the price elasticity of demand. High and diverging MTRs thus have the potential to dampen consumer demand and usage of mobile phone services”³⁵¹.

7.47 Vodafone’s Submission notes that reductions in output might be as harmful to the terminating MSP’s own customers as to the MVCT purchaser’s customers, presumably due to the presence of the benefits of receiving a call (i.e. call externalities). However, as noted by recent economics literature³⁵², the presence of call externalities can also provide strategic incentives to SMP MSPs to reduce the number of calls that subscribers on rival networks receive, reducing the attractiveness of rival networks and, hence, their ability to compete (by indirectly encouraging subscribers to join the network where most of their calling circle are

³⁵⁰ See J Scott Marcus, July 2004, “Call Termination Fees: The U.S. in global perspective”, presented at the 4th ZEW Conference on the Economics of Information and Communication Technologies, Mannheim, Germany. See also Patrick DeGraba, December 2000, “Bill and Keep at the Central Office As the Efficient Interconnection Regime”, OPP Working Paper no. 33, “... because carriers will view traffic-sensitive interconnection charges as raising their marginal costs, they will tend to raise their traffic-sensitive retail prices, even though the underlying cost structure of the networks may be nontraffic-sensitive”.

³⁵¹ European Commission Staff Working Document Accompanying the Commission Recommendation on the Regulatory treatment of Fixed and Mobile Termination Rates in the EU, Implications for Industry, Competition and Consumers, available from: http://ec.europa.eu/information_society/policy/ecomm/doc/implementation_enforcement/eu_consultation_procedures/working_doc.pdf, page 10.

³⁵² Harbord and Pagnozzi, Network-based price discrimination and ‘bill and keep’ vs ‘cost based’ regulation of mobile termination rates, Review of Network Economics, 2010.

already subscribers). The economics literature notes that MTRs above cost can lead to permanent net payments by smaller networks because traffic between networks will not be in balance³⁵³ and this effect is reinforced by call externalities since off-net prices set above costs imply that smaller networks receive relatively fewer calls relative to their larger rivals which tend to have a larger volume of calls on-net. Off-net MTRs which are above the efficient costs of termination can accentuate the ability for larger networks to apply on-net/off-net retail tariff differentials resulting in strategically-induced network effects (tariff-mediated network externalities) which may be detrimental to smaller networks. Vodafone's views thus, fail to take into account the strategic effects that a dampening of consumption of off-net calls on rival networks can have in terms of gaining competitive advantages over retail rivals and the mechanism through which MTRs above efficient cost can facilitate such strategic effects.

Whether MSPs could engage in excessive pricing

7.48 As noted in the MVCT Consultation, the role of *ex ante* regulation is to analyse relevant markets which exhibit certain structural characteristics which render them susceptible to *ex ante* regulation and to identify whether there are persistent market failures which present a significant risk of competition problems materialising, such that it is appropriate to impose certain preventative measures in advance. As noted in paragraph 7.5 of the MVCT Consultation:

“ComReg would note that it is neither necessary to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuse. Rather, ComReg notes that the purpose of ex ante regulation is to prevent the possibility of abuses given that MSPs have been identified on a preliminary basis with SMP in the Relevant MVCT Markets, and thus have both the ability and incentives to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users”.

7.49 ComReg has conducted a thorough analysis of the structural and behavioural characteristics of the Relevant MVCT Markets and has identified that each MSP operating within its Relevant MVCT Market is the sole supplier of MVCT and there are no effective competitive constraints on MSPs that would prevent them from increasing their MTRs above a competitive level in their own Relevant MVCT Market. Each MSP operates in a distinct product market with 100% market share, an absence of existing competition, an absolute barrier to entry by virtue of the MSPs' control over their own subscribers' mobile numbers which are key to routing the final leg of an inbound call, as well as insufficient CBP. It is also ComReg's position that the strength of any indirect constraints coming from the retail market are not considered sufficient to result in the development of effective competition in each of the Relevant MVCT Markets over the relevant review

³⁵³ See Figure **Error! Main Document Only.** in Appendix D showing individual MSPs on-net/off-net traffic percentages and Appendix F showing the relative termination exchanges between individual MSPs and the largest purchasers of MVCT from them.

- timeframe. It has therefore been identified in the MVCT Consultation³⁵⁴ and this Decision³⁵⁵ that each SMP MSP does not face existing or potential competition on in its own Relevant MVCT Market within the lifetime of the current market review.
- 7.50 The nature of the problem identified in the Relevant MVCT Markets is thus one of persistent market failure. Contrary to H3GI's views, paragraphs 5.29 to 5.54 and 6.36 to 6.40 of the MVCT Consultation demonstrated how SMP MSPs are protected by high and non-transitory entry barriers associated with control over resources (i.e. mobile numbers) not easily replicated which would provide them with the *ability* to raise MTRs to excessively high levels. These paragraphs furthermore demonstrated how SMP MSPs would have the *incentives* to set MTRs at excessively high levels since, by virtue of the CPP principle, it is the end users of rival Service Providers who would ultimately have to pay the higher cost of contacting the terminating MSPs' customers, and not the terminating MSPs' own customers who would foot the bill. In addition, as demonstrated by paragraphs 6.41 to 6.248 of the MVCT Consultation and in section 6 of this Decision, CBP does not act as a sufficiently effective constraint on the ability of the SMP MSPs to raise MTRs above an efficient cost based competitive level.
- 7.51 ComReg considers that the clear ability and incentives of SMP MSPs to engage in exploitative termination pricing practices justifies the imposition of pre-emptive measures in the Relevant MVCT Markets. Allowing exploitative pricing problems to arise and tackling them after they have already happened through *ex post* competition law can allow negative distortions of retail competition and consumer behaviour to materialise which can be difficult to remedy/reverse after the event. Imposing obligations on an *ex ante* basis ensures there are timely and proportionate preventative measures in place in wholesale Relevant MVCT Markets where the persistent and enduring nature of competitive bottleneck, and the strategic relationship with downstream retail markets, implies a clear and imminent risk of excessive wholesale pricing practices.
- 7.52 Contrary to comments made by H3GI, Lycamobile and TMI, historic MTR pricing trends are also consistent with ComReg's position that, absent *ex ante* regulation, Vodafone, O2, Meteor, H3GI, TMI and Lycamobile individually have the ability to act, to an appreciable extent, independently of competitors, customers and end users in each of the Relevant MVCT Markets within which they operate.
- 7.53 The MVCT Consultation³⁵⁶ and this Decision³⁵⁷ have provided a detailed analysis of the MTR pricing trends for all MSPs (both those with and without existing SMP-related pricing obligations and how the position changed over time). In so

³⁵⁴ See sections 5 and 6 of the MVCT Consultation.

³⁵⁵ See sections 5 and 6 of this Decision.

³⁵⁶ See paragraphs 6.19 to 6.33 of the MVCT Consultation as well as in the assessment of CBP with respect to individual MSPs in paragraphs 6.84 to 6.248.

³⁵⁷ See section 6 of this Decision.

doing, the MVCT Consultation noted³⁵⁸ that pricing trends are informative, but not necessarily determinative and need to be considered alongside other relevant factors. ComReg clearly set out the basis upon which it considered MTR pricing trends and recognised the varying circumstances pertaining to individual MSPs with and without existing SMP price control obligations.

- 7.54 Insofar as H3GI is concerned, the analysis of its MTR pricing behaviour was considered³⁵⁹ in the context that H3GI's pricing only became subject to SMP price control obligations in 2008. Even when subject to pricing regulation from 2008 onwards, ComReg remains of the view that H3GI has set its MTRs consistently above those of other existing SMP MSPs (as noted by Table 4 above, in H2 2012 H3GI's weighted average MTR was 103% higher than the other three regulated MSPs). This divergence has arisen, notwithstanding H3GI at all times having the ability to set its MTRs at levels lower than in its voluntary commitments to ComReg. Indeed, as noted in the MVCT Consultation³⁶⁰, even in the presence of regulation, ComReg has had to take enforcement action against H3GI in order to require it to comply with its then existing price control obligations.
- 7.55 As regards Lycamobile's claim that it does not have the ability to engage in exploitative and exclusionary pricing behaviour in light of its low retail market share, ComReg recalls that Lycamobile is the sole MVCT supplier in its own Relevant MVCT Market. There are, therefore, no competitors nor are there likely to be in the Relevant MVCT Market in the timeframe covered by this market analysis. Furthermore, ComReg considers it highly likely that Lycamobile's (and TMI's) MTRs are set at a level above a hypothetical competitive market outcome. As noted in Table 1 in section 6 above, Lycamobile's MTRs have remained static since its entry to the Irish mobile market and, given regulated MSPs have reduced their MTRs further in the meantime (albeit in the presence of regulation), and TMI has absent regulation reduced its MTRs (albeit to a level still notably in excess of the other regulated MSPs' MTRs), the gap between Lycamobile's average MTR and other MSPs' average MTRs has widened further. As noted in Table 6 in section 6 above, Lycamobile's average MTR now exceeds the other MSPs' average MTRs by 13% to 275% (excluding the MTR charged by Lycamobile to Vodafone).
- 7.56 In addition, regarding Lycamobile's claim that its customer base has a high propensity for making international calls to non-EU destinations, ComReg has already addressed this issue in paragraph 4.123 above. Indeed, ComReg has no jurisdiction over the MTRs set in other EU and non-EU countries. At the same time, ComReg notes that EU NRAs have analysed their relevant MVCT markets taking account of the EU regulatory framework and, according to national circumstances, have imposed price control obligations on SMP MSPs as

³⁵⁸ See paragraphs 6.19 and 6.23 of the MVCT Consultation.

³⁵⁹ See paragraph 6.22(b), Table 14 in paragraph 6.24 and paragraph 6.26 and 6.27 of the MVCT Consultation and section 6 of this Decision.

³⁶⁰ See paragraph 6.22(b) of the MVCT Consultation.

appropriate. When imposing, maintaining or amending *ex ante* obligations in a national context, ComReg must consider the regulatory options which best meets its statutory objectives for the relevant market review period. Thus, while taking the international context into account, ComReg is ultimately required to consider which price control mechanism is most appropriate for the particular market circumstances, taking into account ComReg's statutory objectives to promote competition, the internal market and the interests of users within the Community³⁶¹.

- 7.57 ComReg has also considered TMI's MTR-setting behaviour in the MVCT Consultation and does not accept that the competition problems identified by ComReg are unrealistic in relation to TMI's case. As recalled in paragraph 7.50 above, the absence of existing competition, the high and non-transitory entry barriers, insufficient CBP as well as the application of the CPP principle, clearly provide TMI with the *ability* and *incentives* to set MTRs and other commercial terms and conditions independently of competitors, customers and consumers in its Relevant MVCT Market. The MTR position adopted by TMI to date furthermore shows that its MTRs, notwithstanding the slight reductions to date, remain substantially above those of other MSPs. As highlighted in Table 5 in section 6 above, TMI's weighted average MTR is currently between 63% and 232% higher than the MTRs of the other three regulated MSPs.
- 7.58 In relation to TMI's proposal that it is willing to engage with ComReg to reach a situation whereby TMI is legally bound to avoid any breach rather than imposing SMP obligations, ComReg notes that this recourse is not open to ComReg in light of the presence of SMP and the specific competition problems which have been identified. Pursuant to Article 16(4) of the Framework Directive, where an NRA designates SMP in a relevant market it shall impose "*appropriate specific regulatory obligations*" on that relevant market. However, as noted previously, ComReg has not made any decision in this paper concerning the appropriateness timing of particular forms of cost-orientation, including glide paths and the timeframes within which they are to apply.
- 7.59 As regards Vodafone's comments that excessive pricing would be counter-productive for larger MSPs and that increases in MTRs are difficult to pass on to end users in the form of higher retail prices due to the competitive nature of the market, ComReg has shown in paragraphs 7.49 and 7.50 (and section 6) above that, absent regulation, all MSPs have the *ability* and *incentive* to set excessive MTRs in their Relevant MVCT Markets. As noted in paragraph 7.50 above, the structural characteristics of each Relevant MVCT Market are such that there is

³⁶¹ Pursuant to Section 12 of the Communications Regulation Acts 2002 to 2011, ComReg's statutory objectives are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community. As regards price control obligations, Article 13(2) of the Access Directive requires that "...any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits". Recital 20 of the Access Directive explains further that "[t]he method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits".

insufficient pressure to constrain an MSP from behaving, to an appreciable extent, independently of its competitors and customers in its MVCT pricing behaviour over the lifetime of the current market review. Therefore, in the absence of regulation, each SMP MSP would have an ability to charge MTRs above a hypothetical cost based competitive market outcome in its own Relevant MVCT Market. Indeed, ComReg considers that the larger MSPs have particularly strong abilities and incentives to raise downstream rivals' costs through excessive upstream MTRs. One MSP's MTR is another Service Provider's expense. So, an MSP has incentives to raise its MTR because it puts its competitors at a disadvantage by raising their costs, such that the other Service Provider's has to try to recover those higher costs through some combination of higher retail prices, lower handset subsidies etc. In essence, above cost MTRs result in the calling party subsidising the called parties MSP's operations. Any consequential competition/exclusionary impacts associated with raising downstream rivals' inputs *via* excessive MTRs are likely to be more pronounced where such excessive MTRs are implemented by the larger MSPs³⁶².

- 7.60 Vodafone's contention that the fact that MSPs do not differentiate their off-net mobile retail prices according to the higher off-net MTRs charged by specific MSPs does not provide sufficient evidence of an absence of consumer harm resulting from MTRs set above a competitive level. Indeed, as noted in paragraph 7.45 above, as inputs to the overall cost of making a call, off-net MTRs create a floor to off-net retail pricing. Hence, while MSPs may not differentiate their retail off-net tariffs according to the specific terminating MSP being called, off-net termination rates set above a competitive level can still lead to a higher overall cost base and thus higher retail prices for off-net calls than would otherwise be the case if MTRs had approximated a hypothetical competitive outcome. It is also likely that each MSP, in not differentiating off-net call charges by MSP called, will, in deciding to do so, make some estimate of the proportion of outgoing calls to each network to estimate the cost of a fixed price bundle with "any network" free minutes or, in the case of a pay-as-you go plan, on a per call basis. By including MSPs with higher MTRs in this estimate, MSPs take a risk that they have a higher proportion of outgoing calls to the high MTR MSPs compared to the estimated levels. It also means that the below average MTR MSPs have to include above average MTRs in their calculations, while the above cost MTR MSPs are able to offer lower off-net call prices since all the MTRs they would pay would be lower.
- 7.61 Furthermore, as noted in paragraph 7.47 above, high off-net termination rates can further facilitate distortions of retail competition through reinforcing the ability of MSPs to apply on-net/off-net retail tariff differentials in their retail pricing

³⁶² The 'vertical arithmetic' approach provides a framework for assessing incentives to foreclose (upstream or downstream). This effectively involves looking at the trade-offs in a strategy of foreclosure between the cost of any lost wholesale profits due to the foreclosure of downstream rivals against the benefit of higher downstream profits due to rivals' customers now purchasing from the SMP operator, possibly at a higher price.

structure which can further entrench the attractiveness of larger networks with a high proportion of on-net calls (known as tariff-mediated network externalities).

Whether SMP MSPs could engage in behaviour relating to vertical leveraging

- 7.62 In paragraphs 7.25 to 7.27 we noted Respondents' views on whether SMP MSPs can engage in behaviours relating to vertical leveraging. With regard to the comments raised by O2, TMI and Lycamobile concerning the credibility of leveraging behaviour from the Relevant MVCT Markets, ComReg would make the following observations.
- 7.63 In view of the close relationship between the upstream Relevant MVCT Markets and downstream retail calls markets it was ComReg's contention in the MVCT Consultation that a vertically integrated MSP that has SMP in the Relevant MVCT Market may have the incentive to use this market power to affect the competitive conditions in related retail calls markets where competitors rely on this MVCT input in order to provide an end-to-end retail calls offering to their subscribers (by using the incoming above cost MTR revenues as a way of subsidising their retail operations in which there is competition).
- 7.64 ComReg recognises that the risks of any such behaviour having an exclusionary effect on, or materially distorting the structure of, downstream retail markets is more credible where the terminating MSPs already have a significant presence on downstream retail markets. The impact of asymmetric networks (in subscriber/traffic terms) means that a larger MSP will likely have more incoming calls on which to charge an above cost MTR, so it either gets the above cost MTR revenue or, because of on-net/off-net price differentials, encourages a subscriber to switch to its network. However, even where smaller or new-entrant MSPs have greater incentives to interconnect with the more established networks, such new entrant MSPs may still have incentives to engage in discriminatory tactics as a means of extracting an excessive termination tariff as part of those negotiations. As noted in the CBP analysis in section 6 above, by virtue of the MSPs' control over access to their subscribers' mobile numbers, non-regulated MSPs have charged (often substantially) higher MTRs than the regulated MSPs. It is conceivable that SMP MSPs might invoke delaying tactics such as protracted negotiations in respect of the provision/renewal of access to MVCT or associated facilities with a view to extracting an MTR which is above level that would otherwise arise in a hypothetical competitive market outcome.
- 7.65 While it is recognised that a new entrant or smaller MSP would likely want to maximise returns by offering its subscribers comprehensive end-to-end connectivity with other established Service Providers, the risk remains that delayed or ineffective access by any of the SMP MSPs could still raise rivals' costs and also contribute to enhanced barriers to entry in the retail market for new entrants with fewer subscribers. Any raising of rivals' costs and related distortion of, or reduction in, competition in these retail markets could result in harm to consumers, potentially in the form of higher prices, lower output/sales,

and reduced quality or consumer choice. In addition, while there may be less incentive for new entrant or smaller MSPs to deny access in relation to the more established Service Providers with a larger customer base, there could still be an incentive for smaller MSPs to deny access to other small-scale Service Providers. SMP MSPs might also potentially have the ability and incentives to discriminate/refuse the supply of MVCT to Service Providers of a comparable size and/or potential new entrants in the downstream markets. Thus, all SMP MSPs have the ability and incentives to impede downstream competitors through price (e.g. excessive and/or discriminatory pricing) and/or non-price means (e.g. delaying negotiations or by not facilitating calls from the customers of rival Service Providers which may be relatively new entrants in the calls markets).

- 7.66 As to Vodafone's comment regarding real life examples of abuse, ComReg reiterates its position in paragraph 7.5 of the MVCT Consultation that in an *ex ante* regulatory context:

"it is neither necessary to catalogue examples of actual abuse, nor to provide exhaustive examples of potential abuse. Rather, ComReg notes that the purpose of ex ante regulation is to prevent the possibility of abuses given that MSPs have been identified on a preliminary basis with SMP in the Relevant MVCT Markets, and thus have both the ability and incentives to engage in exploitative and exclusionary behaviour to the detriment of competition and end-users".

- 7.67 While It is not a precondition for *ex ante* regulation to demonstrate actual evidence of past anti-competitive behaviour, it is evident from the assessment of MTR pricing behaviour to date³⁶³ that, absent regulation, SMP MSPs have the ability and incentive to set MTRs above that which would pertain under a hypothetical competitive market outcome and thus to raise their downstream rivals' costs accordingly.
- 7.68 Furthermore, as regards O2's suggestion that non-SMP interconnection and access obligations are sufficient to prevent against the likelihood of vertical leveraging problems, ComReg has already provided a detailed assessment (in paragraphs 6.57 to 6.66 of the MVCT Consultation) of the relevance of other non-SMP obligations and the role of dispute resolution in potentially constraining the exercise of SMP in the Relevant MVCT Markets. ComReg has also set out its view in this Decision³⁶⁴ on Vodafone's comments regarding potential constraints from non-SMP obligations. ComReg has come to the clear view that non-SMP regulatory intervention through dispute resolution in relation to the level of MTRs, while appropriate in certain scenarios as a short term measure, is no substitute for the conduct of a market analysis and, where appropriate, the imposition of permanent price control remedies which would facilitate maximum regulatory certainty, predictability and transparency for existing and potential market

³⁶³ See section 6 of this Decision.

³⁶⁴ See paragraphs 6.93 to 6.99 above.

participants. In view of the clear *ability* and *incentives* for SMP MSPs to engage in a range of exploitative and exclusionary behaviour in the Relevant MVCT Markets, robust and predictable obligations of access, transparency, non-discrimination, and price control are justified and appropriate to address these persistent competition risks.

Impact of competition problems on consumers and competition

7.69 In paragraphs 7.28 to 7.41 we noted that Respondents had expressed views on ComReg's analysis of the impact of competition problems on consumers and competition. These are considered below.

Risk of recent entrants leaving the market

7.70 As regards TMI's claims that MTRs favour those MSPs with the highest differential between inbound and outbound calls, ComReg acknowledges that inbound/outbound call ratios will vary across Service Providers. However, to the extent that MTRs set above a hypothetical competitive level result in certain entrants being incentivised to attract customers with a higher inbound to outbound calling ratio, this clearly shows how MTRs can affect the structure and direction of retail competition and to constrain the range of commercial strategies available to smaller Service Providers.

7.71 MTRs set above a hypothetical competitive level implies that there is a greater risk that smaller networks would be put at a disadvantage in competing for a group of customers that make more outbound calls than they receive as inbound calls. This restricts the competitive opportunities of the smaller networks since such customer groups are likely to be important to MSPs in terms of market share, as such customer segments are frequently heavy users of voice and other services.

7.72 It is ComReg's position that setting MTRs on the basis of cost orientation means that MSPs would compete on the basis of retail commercial strategies, rather than using above cost MTR revenue to subsidise retail operations, which in turn enables smaller MSPs to target customers which generate larger outflows of (off-net) call traffic. As noted above, ComReg's position is that an obligation of cost-orientation is a justified, appropriate and proportionate approach to address the ability and incentive of SMP MSPs to engage in excessive pricing. In this Decision, ComReg has not specified what form of cost-orientation is appropriate, with such matters having been the subject of the Separate Pricing Consultation and now the Separate Pricing Decision. Insofar as the specific form of cost-orientation is concerned, ComReg would refer TMI to its Separate Pricing Decision, in which ComReg has clearly outlined that it is concerned with protecting the integrity of the competitive process and consumers as a whole, rather than protecting or furthering the interests of particular Service Providers (pursuing particular commercial strategies).

7.73 Furthermore, in relation to TMI's claims that not all MSPs should be treated equally with respect to the imposition of regulatory obligations, ComReg would re-iterate its comments in paragraph 7.74 above and would refer TMI to the

Separate Pricing Decision within which ComReg indicates how asymmetric MTRs significantly risk facilitating a range of other retail distortions, including:

- Rewarding a MSP for its smaller size can give inappropriate investment signals and risks promoting inefficient entry. This risks the inappropriate recovery of inefficiently incurred costs or costs related to network investments which do not affect the delivery of voice call termination services;
- Setting a higher price floor for off-net calls risks a restriction of retail pricing flexibility for off-net calls (including limiting the development of innovative tariffs involving off-net call minutes and restricting commercial opportunities for Service Providers who want to attract a more mixed user base such as users with higher outbound call volumes); and/or
- Asymmetric MTRs can help larger Service Providers to justify higher off-net retail tariffs reinforcing the ability of larger Service Providers to implement on-net/off-net retail tariff differentials thereby exploiting tariff-mediated network effects which can further impede entry and growth of smaller Service Providers.

Balance of Interconnection traffic and payments

- 7.74 ComReg notes a certain lack of clarity in Vodafone's comments on this issue. On the one hand, Vodafone notes that certain smaller MSPs may not be disadvantaged by current asymmetric MTRs where any disadvantage arising from their traffic imbalance is outweighed by additional revenues received from the higher MTRs. On the other hand, Vodafone welcomes the planned reduction in MTR asymmetries and the ending of competitive distortions caused by differences in the levels of MTRs between different MSPs.
- 7.75 As regards the impacts of a move to symmetric MTRs, ComReg has not, within this Decision, specified what form of cost-orientation is appropriate, including matters in relation to symmetry of MTR. ComReg would refer Vodafone to its Separate Pricing Decision in which ComReg has taken into account the direct and immediate financial impact of MTR reductions on all Service Providers. However, as noted in the Separate Pricing Decision, asymmetric MTRs charged in excess of efficient cost significantly risk facilitating a range of other retail distortions (see paragraph 7.73 above).
- 7.76 While high asymmetric MTRs subsidise one particular group of MSPs, this subsidy comes at the expense of another group of Service Providers (e.g. other FSPs or MSPs). ComReg's ultimate position thus draws on an inclusive assessment considering the net impact on the (fixed and mobile) sector and consumers as a whole. In the Separate Pricing Decision, ComReg notes that, while it has assessed the (static) financial impacts of its proposal on all relevant stakeholders, ComReg also has to balance this against dynamic impacts and the need to ensure its decisions protect the integrity of the competitive process as a whole, rather than protecting or furthering the interests of particular Service Providers only.

MTR Levels and competition in mobile markets

7.77 Vodafone has submitted that there is no evidence of a link between on-net/off-net price differentials or the level of MTRs with the market position of smaller players. It refers to analysis undertaken by Frontier Economics which *inter alia* analyses the relationships between:

- a higher incidence of on-net/off-net price differentials and the market share and average prices of smaller MSPs in a selection of countries; and
- the level of MTRs and the market shares of Service Providers in a selection of countries.

7.78 It is important to first clarify that the above research was undertaken only for a relatively limited set of countries and thus comprises a relatively narrow set of data points. ComReg also notes that there are a number of factors likely to influence entry and expansion, such that it is difficult to isolate the actual impact of on-net/off-net price differentials on the respective market position of different players.

7.79 Frontier Economics itself notes that there are a myriad of factors which can affect the ability of MSPs to compete in retail mobile markets. Frontier Economics notes the limitations of its report where it recognises, apart from on-net/off-net price differentials, the range of other factors which are also capable of impacting on the competitive position of MSPs in retail markets:

“For example, these are likely to include the maturity of the market at the time of entry, customer switching costs, the sales and distribution channels of each operator and each operator’s commercial and marketing strategy. Isolating the effect of price differentials would therefore require detailed econometric analysis to determine the relationship between the ability of an operator to gain market share and all these factors. Such analysis is beyond the data set available for this report”.

7.80 There is also recent empirical evidence on tariff-mediated network effects which, contrary to the Vodafone and Frontier Economics’ views expressed above, supports the theory that strategically-induced network effects (through on-net/off-net price differentials) can be a profitable strategy for attracting and maintaining market share and for pre-empting entry or delaying the growth of smaller Service Providers. As noted by Dotecon (2011)³⁶⁵, the literature has begun to look at decisions made by customers as part of a social network, i.e. decisions that such groups of customers might make in a coordinated manner. For example, Birke and Swann (2010)³⁶⁶ have estimated the importance of tariff-mediated network

³⁶⁵ See Tasneem Azad, Dotecon Perspectives, The day of the discounts, Spring 2011, available from: <http://www.dotecon.com/assets/images/perspec6.pdf>.

³⁶⁶ See Birke, D and G. Swann (2010) “Network effects, network structure and consumer interaction in mobile telecommunications in Europe and Asia”, *Journal of Economic Behaviour & Organization*, 153-167.

effects and the impact of a consumer's social network on their choice of MSP. The authors examined data from surveys of students in several European and Asian countries, and found that the respondents strongly coordinated their choice of MSP, but only if the provider induced the network effects in the first place.

- 7.81 The economics literature has also begun to consider the effects that may arise as a result of customer beliefs about the strength of certain market players or the speed with which different networks are expected to grow. Dube and Chintagunta (2010)³⁶⁷ find that strengthening indirect network effects can lead to a strong, economically significant increase in market concentration, highlighting the important role of customer beliefs. The authors consider that consumers will tend to pick the firm that they expect to have the larger network, irrespective of the actual behaviour of the firm, or its size. Dotecon (2011) thus observes that the changing nature of customer behaviour within mobile markets suggests that even small retail price differentials can have non-trivial competition effects in terms of potentially "tipping" retail markets in favour of larger incumbent MSPs.

Effects of current regime on fixed-to-mobile call traffic

- 7.82 The issues raised by Vodafone regarding the relationship between the retail charges for fixed-to-mobile calls and the underlying MTRs charged to Eircom at the wholesale level are addressed in further detail in the Separate Pricing Consultation and Separate Pricing Decision. Since it is assumed that, in the presence of *ex ante* regulation, the retail fixed voice calls market is competitive, one would expect cost savings from MTR reductions based on cost orientation to be passed through to fixed voice calls subscribers. As noted by Analysys Mason, such reductions may take place through lower subscription charges, or reduced charges for certain types of call (e.g. fixed-to-mobile, fixed-to-fixed, or international calls), rather than being retained by the FSPs entirely as profit. In addition, as noted in the Separate Pricing Decision, any reduction of the fixed-to-mobile cross-subsidy on the basis of cost orientation should generate positive benefits for fixed users by freeing up funds that can potentially be usefully directed towards fixed services and investments.

Inefficiencies paid for by excess MTRs

- 7.83 Competition provides a strong impetus for dynamic efficiency. MTRs above efficient cost can give rise to a number of potential barriers to entry and growth in retail markets which can reduce the overall intensity of retail competition and thus provide weaker incentives for dynamic efficiency than under a situation of cost-oriented MTRs. For example:
- MTRs set above efficient cost have the potential to **raise barriers to entry and growth** by generating significant financial transfers from smaller Service Providers (or net termination payers) to their larger rivals (or net termination recipients) which have stronger incentives (and are more able) to offer on-net

³⁶⁷ See Dube, J-P and P. Chintagunta (2010) "Tipping and Market Concentration with Indirect Market Effects", *Marketing science* 2010, 216-249.

discounts. The further termination charges depart from efficient cost, the further they may contribute to raising the growth barriers for a new entrant network (by discouraging customers from joining that network), network, where the majority of originated calls are to another network, or “Off-Net”.

- Above-cost MTRs **effectively create a floor to retail (off-net) pricing** behaviour and can thus influence the ability and incentives of smaller Service Providers to pursue customers with significant off-net calling volumes. Termination rates can therefore have a material bearing on the retail commercial strategies pursued by smaller Service Providers. They may prevent tariff innovation, such as Service Providers (large or small) from being able to include off-net calls in tariff bundles, without taking an unacceptable risk of high off-net termination payments.
- 7.84 In addition, the further MTRs are set above the efficient cost of wholesale call termination, the further they can **accentuate the ability of Service Providers to employ retail on-net/off-net price discrimination strategies** which, through reinforcing network effects, can enhance the attractiveness of the larger networks further ‘tipping’ the retail market in their favour. Such strategies may raise switching costs for customers within calling circles (such as families or groups of friends) as all must switch network together to maintain access to on-net discounts and thereby mute retail competition.
- 7.85 Setting MTRs on the basis of cost orientation can thus help alleviate the potential for these important wholesale charges to contribute to impediments to retail competition. Cost-oriented MTRs also help minimise the risk of an inappropriate recovery of inefficiently incurred costs from the Calling Party or costs related to network investments which do not affect the delivery of voice call termination services. Thus cost-oriented MTRs provide much stronger potential for appropriate and sustainable dynamic efficiency incentives in downstream retail markets.
- 7.86 The specific issues raised by Vodafone regarding the comparative performance of a LRIC+ MTR and a pure LRIC-based MTR in respect of productive and dynamic efficiency incentives are not relevant to this Decision but are addressed in section 6 of the Separate Pricing Consultation and section 6 of the Separate Pricing Decision.

Asymmetries dampening investment incentives

- 7.87 As noted in paragraph 7.74 above, ComReg notes a certain lack of clarity in Vodafone’s comments on the issue of asymmetry. On the one hand, Vodafone notes that revenue transfers arising from asymmetries are relatively small when compared against the potential impact of reductions in asymmetric MTRs on investment incentives. On the other hand, Vodafone welcomes the planned reduction in MTR asymmetries and the ending of competitive distortions caused by differences in the levels of MTRs between different MSPs.
- 7.88 Paragraphs 7.75 to 7.73 above set out ComReg’s position regarding the need to take a comprehensive view of the impact of asymmetric MTRs on the sector as a

whole including the risk that asymmetric MTRs charged in excess of efficient cost facilitate a range of other retail distortions, including promoting inefficient entry, impeding retail pricing flexibility for off-net calls (whether as part of a bundle or otherwise) and/or reinforcing the ability of larger Service Providers to generate tariff-mediated network externalities which can further impede entry and growth of smaller Service Providers.

MTR levels and competition in mobile markets

7.89 Vodafone's comments regarding retail competition off-setting the effects of higher MTRs through a single retail off-net tariff being applied, irrespective of the terminating MSP, have already been addressed by ComReg in paragraph 7.60 above.

ComReg's Position on Competition Problems and Impacts on Competition and Consumers

7.90 In section 7 of the MVCT Consultation and in paragraphs 7.42 to 7.89 above, ComReg has set out its assessment of competition problems (and their associated impact on competition and consumers) which, absent regulation, could potentially arise in the Relevant MVCT Markets arising from an MSP having SMP. Having regard to the analysis set out in the MVCT Consultation³⁶⁸ and the detailed consideration of Respondents' views above, ComReg's final position is now set out below.

7.91 In view of the structure of the Relevant MVCT Markets and their close relationship with downstream retail (calls) markets, it is ComReg's position that an SMP MSP would have the *ability* and *incentive* to engage in a range of **exploitative** and/or **exclusionary** conduct, including:

- exploiting customers or consumers by virtue of its SMP position in the Relevant MVCT Market (e.g. through setting prices above those which would pertain under a hypothetical competitive market outcome); and/or
- using its control over upstream MVCT inputs to engage in price and non-price practices aimed at raising rivals' costs in related downstream markets.

³⁶⁸ See section 7 of the MVCT Consultation.

8 Remedies

Overview of Approach to Remedies in the MVCT Consultation

- 8.1 In section 8 of the MVCT Consultation, ComReg set out its preliminary view on the imposition of appropriate and proportionate remedies to mitigate the competition problems identified in section 7 of the MVCT Consultation.
- 8.2 It was noted that, in accordance with Regulation 8(1) of the Access Regulations, where an operator is designated as having a SMP on a relevant market, ComReg is required to impose on such an operator such of the obligations set out in Regulations 9 to 13 as ComReg considers appropriate. In this regard, the obligations that may be imposed by ComReg on SMP undertakings are those relating to:
- (a) Access;
 - (b) Transparency;
 - (c) Non-Discrimination;
 - (d) Price Control and Cost Accounting; and
 - (e) Accounting Separation.
- 8.3 In addition, it was noted that Regulation 8(6) of the Access Regulations provides that any of the above obligations imposed must:
- (a) be based on the nature of the problem identified;
 - (b) be proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Acts 2002 to 2011 and Regulation 16 of the Framework Regulations³⁶⁹;
 - (c) only be imposed following public consultation and notification of the draft measures to the European Commission, BEREC and other NRAs in accordance with Regulation 12 of the Framework Regulations.
- 8.4 It was also noted that Regulations 12(1) and 12(4) of the Access Regulations also provide statutory criteria that ComReg must take into account before imposing access obligations on an SMP undertaking. These criteria include, *inter alia*, examining the technical and economic viability of using or installing competing facilities; the feasibility of providing access; the initial outlay of investment by the undertaking; and the need to safeguard competition in the long term.

³⁶⁹ Pursuant to section 12 of the Communications Regulation Acts 2002 to 2011, ComReg's relevant objectives in relation to the provision of electronic communications networks and services are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community.

- 8.5 A number of other considerations³⁷⁰ were taken into account, as appropriate, when assessing whether and what form of obligation to impose, with such considerations, along with those highlighted above, also discussed in further detail in the context of the Regulatory Impact Assessment in section 9 of the MVCT Consultation.
- 8.6 The MVCT Consultation then went on to consider the proposed approach to Regulation by considering each possible obligation and justifying why or why not it was required in the Relevant MVCT Markets.
- 8.7 It was further noted that Vodafone, O2, Meteor and H3GI have been subject to SMP regulation in the wholesale mobile voice call termination markets to date and, as a consequence, have been subject to resultant specific regulatory obligations. Neither TMI nor Lycamobile have, to date, been subject to SMP regulation and are not currently subject to SMP remedies
- 8.8 As a first step ComReg considered³⁷¹ whether the option of de-regulation/regulatory forbearance was appropriate in the Relevant MVCT Markets and set out its preliminary view that it was not given none of the Relevant MVCT markets were considered to be effectively competitive (or likely to become effectively competitive within the timeframe covered by this review) and having regard to the identified a range of competition problems that could occur in these markets, absent regulation. ComReg's preliminary view was that relevant issue to be considered related to what form of regulation was appropriate, in particular, which specific remedies were appropriate having regard to the particular circumstances of the Relevant MVCT Markets and the associated competition problems. ComReg set out its preliminary views on these issues in the MVCT Consultation³⁷² and, in doing so took account of the relevant statutory requirements to which ComReg must have regard when seeking to impose regulatory obligations. The approach proposed in the MVCT Consultation regarding remedies is summarised below.

Imposition of Access Remedies

Position set out in the MVCT Consultation

- 8.9 The MVCT Consultation provided³⁷³ a regulatory context within which the imposition of access obligations is considered. In this regard it was noted that Regulation 12(1) of the Access Regulations provides that ComReg may, in accordance with Regulation 8 of the Access Regulations, impose on an operator obligations to meet reasonable requests for access to, and use of, specific

³⁷⁰ See paragraphs 8.6 of the MVCT Consultation.

³⁷¹ See paragraphs 8.8 to 8.11 of the MVCT Consultation.

³⁷² See paragraphs 8.18 to 8.98 of the MVCT Consultation.

³⁷³ See paragraphs 8.19 to 8.24 of the MVCT Consultation.

network elements and associated facilities where ComReg considers that the denial of such access, or the imposition by operators of unreasonable terms and conditions having a similar effect, would:

- hinder the emergence of a sustainable competitive retail market,
- would not be in the interests of end-users and
- would otherwise hinder the objectives set out in section 12 of the Communications Regulation Acts 2002 to 2011.

8.10 It was noted that regulation 12(2)(a) to 12(2)(j) and Regulation 12(3) of the Access Regulations provided that ComReg can impose additional access obligations.

8.11 In assessing whether access obligations would be proportionate to the objectives set out in section 12 of the Communications Regulation Acts 2002 to 2011, ComReg also identified that, pursuant to Regulation 12(4) of the Access Regulations, it had to take a number of factors into account³⁷⁴.

8.12 ComReg noted existing SMP access obligations³⁷⁵ and, having regard to its statutory obligations and functions, then proposed and justified a range of access obligations that it intended to impose on all SMP MSPs in order to address competition problems identified in section 7 of the MVCT Consultation. These included:

- **A requirement on each SMP MSP to provide access to MVCT and Associated Facilities**³⁷⁶: ComReg proposed that SMP MSPs should be required to meet all reasonable requests from other undertakings for the provision of access and, in so doing, shall provide, access to MVCT (being interconnection) and access to associated facilities. Associated Facilities included access to the Mobile Number Porting Centralised Database (the 'MNPCD')³⁷⁷ which is under the collective control of MSPs, and was considered necessary to allow other undertakings to have efficient and effective read only³⁷⁸ access to information which is necessary to facilitate the accurate and efficient routing of voice calls to ported mobile numbers and,

³⁷⁴ See paragraph 8.16 of the MVCT Consultation

³⁷⁵ Each of Vodafone, O2 and Meteor has had a range of access obligations currently imposed upon them by virtue of their existing designations with SMP. H3GI has not, to date, had an obligation to provide access, imposed upon it. Neither TMI nor Lycamobile has been designated with SMP to date and, consequently neither TMI nor Lycamobile has had access (or other) SMP related obligations imposed upon it.

³⁷⁶ See paragraphs 8.25 to 8.28 of the MVCT Consultation.

³⁷⁷ This is a database over which MSPs have (effective or contractual) control, which facilitates mobile number portability and contains the list of ported mobile numbers and associated details, including voice call and other routing details. It provides undertakings, including MSPs, with access to the information necessary for accurately routing voice calls to ported mobile numbers.

³⁷⁸ By 'read only', ComReg means the ability to view but not amend details contained on the MNPCD.

therefore, MVCT. ComReg considered this measure to be justified and proportionate given the identified competition problem that SMP MSPs have the ability and incentive to expressly or constructively refuse to provide MVCT to an undertaking requesting access, with consequential impacts on down stream competition and consumers.

- **A requirement to negotiate in good faith³⁷⁹:** ComReg proposed to impose an obligation on all SMP MSPs to negotiate in good faith with undertakings requesting access to MVCT and access to associated facilities in the Relevant MVCT Markets. ComReg considered this measure to be proportionate and justified in order to ensure that genuine bona fide negotiations take place between SMP MSPs and other undertakings in relation to access, particularly given the identified competition problem that SMP MSPs have the ability and incentive to expressly or constructively refuse to provide MVCT to an undertaking requesting access, with consequential impacts on down stream competition and consumers. ComReg, also, proposed that, should an access request be refused, the objective criteria for refusing same should be provided by the SMP MSP to the requesting undertaking at the time of refusal.
- **A requirement not to withdraw access to facilities already granted³⁸⁰:** ComReg proposed impose an obligation on all SMP MSPs not, without the prior approval of ComReg, to withdraw access to facilities already granted. ComReg noted that an SMP MSP could have the incentive and ability to refuse/delay access to MVCT associated facilities resulting in restrictions in or distortions to competition to the detriment of consumers. ComReg considered that this requirement would promote regulatory certainty for all parties without unduly restricting investment incentives.
- **A requirement to grant open access to technical interfaces, protocols and other key technologies³⁸¹:** ComReg proposed impose an obligation on all SMP MSPs access to technical interfaces, protocols and other key technologies that are indispensable to the use of MVCT and associated facilities. ComReg considered that this remedy was both justified and proportionate in order to ensure that, in the context of the provision of access to MVCT and access to associated facilities, interoperability of networks and services is ensured. In so doing, ComReg also considered that this remedy would contribute to the development of effective downstream competition to the ultimate benefit of consumers.
- **Requirements governing fairness, reasonableness and timeliness of access³⁸²:** ComReg proposed to impose an obligation on all SMP MSPs that

³⁷⁹ See paragraphs 8.29 to 8.32 of the MVCT Consultation.

³⁸⁰ See paragraphs 8.33 to 8.34 of the MVCT Consultation.

³⁸¹ See paragraphs 8.25 to 8.36 of the MVCT Consultation.

³⁸² See paragraphs 8.37 to 8.40 of the MVCT Consultation.

access to MVCT and access to associated facilities should be provided in a fair, reasonable and timely manner and that, where a request for access from an undertaking is refused or only partially met, the objective reasons for such should be provided in detail to the undertaking which has made the request, and to do so in a timely fashion (having regard to the nature of the request). These remedies were intended to address competition problems associated with the denial (actual or constructive) of access to MVCT, as well as to minimise the scope for discriminatory treatment of undertakings by ensuring a consistency in the treatment of requests for access. ComReg also considered that this remedy would contribute to the development of effective downstream competition, to the ultimate benefit of consumers.

- 8.13 ComReg asked the following question³⁸³ with respect to its preliminary conclusions on the imposition of access obligations on SMP MSPs.

Question 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.

Respondents’ Views

- 8.14 Of **six responses received** on this question³⁸⁴, **two Respondents agreed** (ALTO and O2) with ComReg’s approach to imposing access remedies, **two Respondents partially agreed** (Eircom Group, Lycamobile), while **two Respondents disagreed** (H3GI and Vodafone). Additional comments provided by Respondents’ are briefly summarised below.
- 8.15 ALTO agreed, noting that ComReg’s approach aligns with international best practice and that, without access remedies, the Relevant MVCT Markets could be restricted or foreclosed to other Service Providers through a direct or constructive refusal to supply MVCT. ALTO also agreed that access to the MNPCD was necessary, noting that it enabled other Service Providers, including those providing transit, to efficiently route calls to MSPs.
- 8.16 Eircom Group partially agreed but expressed concerns that the definition of access proposed was overly broad. According to the Eircom Group, it was not clear from the MVCT Consultation what forms of access other than access to MVCT and associated facilities could be imposed. Furthermore, Eircom Group did not accept that there were any forms of access other than access to MVCT and associated facilities that could be imposed by ComReg as a result of the

³⁸³ See question 10 on page 194 of the MVCT Consultation.

³⁸⁴ TMI did not address this question in its Submission but indicated that this should not be taken as acceptance or agreement with ComReg’s assessment or preliminary conclusions.

market analysis set out in the MVCT Consultation. In this context it questioned the reference to the following underlined wording:

*“...for the avoidance of doubt, Access shall include (but shall not be limited to) [EMPHASIS ADDED] Access to MVCT and Associated Facilities...”*³⁸⁵

- 8.17 Lycamobile considered that 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. It stated that MSPs could make strategic requests for direct interconnection in order to drive up smaller/new entrant MSPs costs and, therefore, safeguards should be put in place to prevent any abuse of the access obligation.
- 8.18 H3GI indicated that it did not agree with ComReg’s approach to imposing access remedies “as it relates to H3GI”. It considered that access to the MNPCD should not be mandated as an SMP obligation, noting its view that this was provided already under Regulation 25 of the Universal Service Regulations³⁸⁶
- 8.19 Vodafone did not agree that access obligations were necessary, repeating its views in response to a previous question³⁸⁷ whereby it considered that as access is already effectively required through a combination of non-SMP general obligations coming from the Access Regulations and Numbering Conventions, SMP MSPs could not deny access to MVCT and associated facilities.
- 8.20 ComReg considers that Respondents’ views on Question 10 can be generally categorised into the following themes (we do not elaborate on Respondents’ views under these themes as they are substantially captured above).
- Clarity regarding the scope of the definition of the access obligation;
 - Whether safeguards are necessary to prevent strategic abuse of the access obligation;
 - Whether access remedies are necessary given other general non-SMP type obligations; and
 - Whether access to the MNPCD is necessary.

ComReg’s Assessment of Respondents’ views

- 8.21 In paragraphs 8.14 to 8.20 above, ComReg has summarised Respondents’ views concerning ComReg’s proposed approach regarding the imposition of access obligations. Prior to setting out its final position, ComReg considers Respondents’ views according to the themes identified in above.

³⁸⁵ This refers to the definition of “Access” in section 2.1 of the Decision Instrument in Appendix D of the MVCT Consultation.

³⁸⁶ See footnote 108 above.

³⁸⁷ See Vodafone response to Question 8 at paragraphs 6.23 to 6.36 of this Decision.

Clarity regarding the scope of the definition of the access obligation

- 8.22 ComReg has noted Eircom Group's comments at paragraph 8.16 above regarding the scope of the access obligation. While ComReg agrees that it is, in general, difficult to envisage what specific forms of access, other than access to MVCT and associated facilities are necessary in the Relevant MVCT Markets, ComReg would note that such access is also governed by, amongst other things, non-discrimination and transparency obligations. The reference to '*...amongst other things...*' refers to the possibility that other forms of access may also be reasonable and, having regard to any developments in each Relevant MVCT Market over the lifetime of the market analysis, ComReg does not wish to preclude other forms of access that may be reasonably requested by another Service Provider or which may arise by virtue of the SMP MSP self-providing new forms of access. For example, in the intervening period since previous reviews of the mobile termination markets, ComReg has considered it necessary to mandate access to the MNPCD. ComReg has also acknowledged in the MVCT Consultation that new forms of interconnection such as IP interconnection, could emerge over the next 2-3 years, particularly with the development of 4G networks, and ComReg considered that where new forms of interconnection or information in relation to this are provided by an SMP MSP to one undertaking, that the SMP MSP should treat other undertakings in a similar manner.³⁸⁸
- 8.23 In this regard, ComReg would note that apart from requiring that an SMP MSP provides access to MVCT and associated facilities, ComReg has also sought to impose an obligation requiring all SMP MSPs to, *inter alia*,:
- "... meet all 'meet all reasonable requests from other Undertakings for the provision of Access."³⁸⁹*
- and that where any requests for access are refused or partially granted to
- "...provide in detail to the Undertaking each of the objective reasons for such....."³⁹⁰*
- 8.24 Hence, the rationale for including "*...included by not limited to...*" in the definition of access was to explicitly recognise that access to MVCT and associated facilities may not be the only form of access but, when considered alongside other obligations to be imposed, it is clear that such alternative forms of access must be reasonable having regard to the nature of the services and facilities associated with the supply of MVCT.
- 8.25 ComReg does not, therefore, propose to amend the definition of access but trusts that the clarity provided above allays Eircom Group's concerns and provides certainty as to ComReg's approach.

³⁸⁸ See paragraph 8.48 of the MVCT Consultation.

³⁸⁹ See obligation 8.1 of the Decision Instrument in Appendix D of the MVCT Consultation.

³⁹⁰ See obligation 9.2 of the Decision Instrument in Appendix D of the MVCT Consultation.

Whether safeguards are necessary to prevent strategic abuse of the access obligation

- 8.26 ComReg has noted Lycamobile's comments at paragraph 8.17 above regarding the need for safeguards to be put in place to prevent any abuse of the access obligation by, for example, larger MSPs making strategic requests for interconnection in order to drive up costs. ComReg has no evidence to date of such behaviour having happened in the markets nor does it considered it likely to happen. A decision by any Service Provider to directly or indirectly (via a third party transit arrangement) interconnect with an MSP will likely be based on a number of factors including
- (a) the cost to the Service Provider of interconnecting (the cost associated with the installation and ongoing operation of the physical interconnect link);
 - (b) the volume of traffic to be handed over to the terminating MSP (below a certain point, the volume of traffic will not likely justify the use of direct interconnection having regard to the costs of (a) above (with MVCT purchasers relying on indirect connection through transit arrangements).
- 8.27 Furthermore, the terminating service provider will also be in a position to recover its relevant efficiently incurred costs in providing physical interconnection (for example, the rental/use of a physical port on an MSP's switch/point of interconnect), with any such charges to be set out in advance by the SMP MSP in its reference interconnect offer price list³⁹¹.
- 8.28 Furthermore, as noted in paragraphs 8.23 and 8.25 above, to the extent that an SMP MSP receives a request for access other than access to MVCT and associate facilities, it would also need to consider whether it is reasonable and respond accordingly.
- 8.29 In view of the above, ComReg does not consider it necessary to provide further safeguards with respect to the access obligations. However, the matter will be kept under reviews and, if warranted, ComReg may further specify such access obligations having regard to their ongoing operation.

Whether access remedies are necessary given other general non-SMP type obligations

- 8.30 ComReg has noted Vodafone's views in paragraph 8.19 above that access obligations are unnecessary given a Service Provider is already effectively required to provide access through a combination of non-SMP general obligations. ComReg has already set out its views on such matters in paragraphs 6.93 to 6.99 of this Decision and, for the reasons set out therein, maintains its view such non-SMP type obligations are not sufficient to address competition problems relating to effective or constructive denial of access by SMP MSPs.

³⁹¹ See discussion of transparency obligations in paragraphs 8.57 to 8.64 of the MVCT Consultation.

Whether access to the MNPCD is necessary

- 8.31 ComReg notes H3GI's comments in paragraph 8.19 above that it does not agree with the imposition of access obligations and that access to the MNPCD should not be mandated as an SMP obligation as this is provided already under Regulation 25 of the Universal Service Regulations.
- 8.32 Given H3GI's reasons for not agreeing with access obligations relate to the "...reasons set out above..." (namely, its response to previous questions), ComReg would refer H3GI to its response to these questions.
- 8.33 Insofar as mandating access to the MNPCD is concerned, ComReg is not seeking to mandate access to facilitate porting of mobile numbers (which is as H3GI point out covered by Regulation 25 of the Universal Service Regulations). As noted in the MVCT Consultation³⁹², access to the MVCT is being mandated as an associated facility to support the use of MVCT, in particular, given that the MNPCD (which is operated collectively by MSPs) contains the call routing details for the carriage of calls to subscribers who have ported their mobile number from one MSP to another. Absent a Service Provider having such read only access to these details, it is not in a position itself to effectively and efficiently route its subscribers' traffic to the correct MSP.
- 8.34 ComReg trusts that this clarifies the scope of the obligation on which it maintains its position.

ComReg's Position

- 8.35 In paragraphs 8.9 to 8.34 above, ComReg has considered Respondents' views regarding its approach to imposing access obligations in each Relevant MVCT Market.
- 8.36 Having regard to the analysis set out in the MVCT Consultation³⁹³ (including the consideration of the requirements of Regulation 12(2) of the Access Regulations³⁹⁴), the discussion on competition problems in section 7 of this Decision and the consideration of Respondents' views above, ComReg intends to maintain its position with respect to the imposition of access obligations, with each SMP MSP having the obligations below imposed upon them.
- A requirement to meet reasonable requests for access;
 - A requirement to provide access to MVCT and associated facilities;
 - A requirement to negotiate in good faith
 - A requirement not to withdraw access to facilities already granted;

³⁹² See paragraph 8.26 of the MVCT Consultation.

³⁹³ See section 7 and paragraphs 8.14 to 8.40 of the MVCT Consultation.

³⁹⁴ See paragraph 8.27 and 8.28 of the MVCT Consultation.

- A requirement to grant open access to technical interfaces, protocols and other key technologies; and
- Requirements governing fairness, reasonableness and timeliness of access.

8.37 The above requirements are more properly described and prescribed in the Final Decision Instrument³⁹⁵ in Appendix I of this Decision, having regard to ComReg's position on Respondents' views on other obligations elsewhere in this Decision.

Imposition of Non-Discrimination Remedies

Position set out in the MVCT Consultation

8.38 In the MVCT Consultation, ComReg noted that Regulation 10 of the Access Regulations provides that ComReg can impose non-discrimination obligations on an SMP undertaking in relation to access or interconnection. It was also noted that the Access Directive³⁹⁶ provided that the principle of non-discrimination is designed to ensure that undertakings with market power do not distort competition, in particular, where they are vertically integrated undertakings that supply services to undertakings with whom they compete on downstream markets. It was noted that non-discrimination obligations can be standalone, but can also support other obligations such those relating to access, transparency and price control.

8.39 ComReg described existing SMP non-discrimination obligations³⁹⁷ and, having regard to its statutory obligations and functions, then proposed and justified a range of non-discrimination obligations that it considered should be imposed on all SMP MSPs in order to address competition problems identified in section 7 of the MVCT Consultation. ComReg proposed to require that all SMP MSPs:

- apply equivalent conditions, including in respect of MTRs or other charges, in equivalent circumstances to other undertakings requesting or being provided with access (including access to MVCT and associated facilities); and
- ensure that access (including access to MVCT and associated facilities) and information are provided to all other undertakings under the same conditions and of the same quality as the SMP MSP provides to itself or to its subsidiaries, affiliates or partners.

8.40 ComReg indicated that the non-discrimination obligations above were to apply irrespective of whether or not a specific request for services or information has been made by an undertaking to the relevant SMP MSP.

³⁹⁵ See sections 8 and 9 of the Final Decision Instrument.

³⁹⁶ Recital 17 of the Access Directive.

³⁹⁷ Each of Vodafone, O2, Meteor and H3GI has, by virtue of their existing SMP designation, had a range of non-discrimination obligations imposed upon them. Neither TMI nor Lycamobile has been designated with SMP to date and, consequently have not had non-discrimination obligations imposed upon them.

- 8.41 ComReg also 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 was ComReg's preliminary 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 problems³⁹⁸ 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.
- 8.42 ComReg also considered whether non-discrimination obligations alone would be sufficient to address the competition problems identified in section 7 of the MVCT Consultation and this Decision and did not consider this to be the case. For example, excessive pricing, constructive denial of access problems or poor service quality issues could still remain in the presence of a non-discrimination obligation.
- 8.43 ComReg considered that the imposition of the above non-discrimination obligations to be both proportionate and justified having regard to the competition problems identified. It was noted that all currently designated SMP MSPs have some form of non-discrimination obligations imposed upon them, and ComReg did not consider it to be objectively justified to adopt an alternate approach for those MSPs it was proposed to designate for the first time with SMP, namely Lycamobile and TMI.
- 8.44 ComReg asked the following question³⁹⁹ with respect to its preliminary conclusions on the imposition of non-discrimination obligations on SMP MSPs.

Question 11. Do you agree with ComReg's approach to impose 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.

Respondents' Views

- 8.45 Of the **six Respondents expressed views** on this question⁴⁰⁰, **four Respondents' agreed** (ALTO, Eircom Group, O2 and Vodafone) with ComReg's

³⁹⁸ Such as margin squeeze or predation and the impact in terms of restrictions or distortions of downstream competition.

³⁹⁹ See question 11 on page 197 of the MVCT Consultation.

approach to imposing non-discrimination remedies, while **two Respondents disagreed** (H3GI and Lycamobile).

- 8.46 In the main, those Respondents that agreed simply noted ComReg's proposed approach. ALTO noted that ComReg's approach to imposing non-discrimination remedies aligned with international best practice. It also referred to paragraph 8.49⁴⁰¹ of the MVCT Consultation which it interpreted as ComReg stating that a cost-orientation obligation would apply to both on-net and off-net calls removing the potential for non-discrimination.
- 8.47 H3GI indicated that that it did not agree with ComReg's approach to imposing non-discrimination remedies "...as it relates to H3GI...". It also referred to paragraph 8.49 of the MVCT Consultation stating that it reserved its rights on this matter pending the outcome of ComReg's separate, but near parallel, Separate Pricing Consultation.
- 8.48 Lycamobile raised concerns that under the non-discrimination obligations, the MNO providing the hosting arrangements to the MVNO and the MVNO itself would need to apply identical conditions (including MTR) to all other MSPs, and this would adversely affect the ability of the MNO host network and the MVNO to freely negotiate a national roaming agreement on commercial terms, and would restrict the pricing options potentially available.
- 8.49 ComReg considers that Respondents' views on Question 11 can be generally categorised into the following themes (we do not elaborate on Respondents' views under these themes as they are substantially captured above).
- The application of non-discrimination obligations to self-supply of MVCT; and
 - Impact of non-discrimination obligations on MVNO hosting arrangements;

ComReg's Assessment of Respondents' views

- 8.50 In paragraphs 8.45 to 8.49 above, ComReg has summarised Respondents' views concerning ComReg's proposed approach regarding the imposition of non-discrimination obligations. Prior to setting out its final position, ComReg considers Respondents' views according to the themes identified above

⁴⁰⁰ TMI did not address this question in its Submission but indicated that this should not be taken as acceptance or agreement with ComReg's assessment or preliminary conclusions.

⁴⁰¹ In paragraph 8.49 ComReg stated that "*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.*"

The application of non-discrimination obligations to self-supply of MVCT

- 8.51 We have noted ALTO's views in paragraph 8.46 above, which seem to suggest that it considered that ComReg was applying the non-discrimination obligation to on-net (self-supplied) MVCT. This is not the case. In paragraph 8.49 ComReg indicated that in the context of the specific circumstances of the Relevant MVCT Markets, it was 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. ComReg has set out its approach regarding the detailed nature of cost-orientation obligations to be applied in the Separate Pricing Decision and, having regard to this approach, it is ComReg's view that *ex ante* the non-discrimination obligations should apply to on-net MVCT. However, ComReg may revisit this issue having regard to the appropriate implementation of matters contained in the Separate Pricing Decision.
- 8.52 ComReg also noted that, in paragraph 8.47 H3GI did not offer specific comments on why it disagreed with ComReg's approach to imposing non-discrimination obligations but reserved its position with respect to paragraph 8.49 of the MVCT Consultation. In the absence of an explanation of H3GI's position ComReg does not comment further.

Impact of non-discrimination obligations on MVNO hosting arrangements

- 8.53 ComReg notes Lycamobile's view in paragraph 8.48 that the non-discrimination obligations would affect the ability of the MNO host network and the MVNO to freely negotiate a national roaming agreement on commercial terms.
- 8.54 ComReg does not agree with Lycamobile's' views. As noted previously in this Decision⁴⁰², MVNO hosting arrangements are not subject to regulation. ComReg also noted that MVCT is separate to MVNO hosting arrangements but does rely on services provided by the host network⁴⁰³. One possibility whereby there could be concerns would be as follows. If the same network inputs supplied by the host MNO to the MVNO to support the commercial relationship are the same network inputs used to support the MNO's or MVNO's supply of MVCT, then to the extent there are no objective differences between the MVNO hosting inputs and the MVCT services then issues of potential price discrimination in the supply of MVCT could arise if MVNO charges levied by the host network were to be lower

⁴⁰² See paragraph 5.61 above.

⁴⁰³ If an MVNO did not have the hosting arrangement it would not have an ability to offer inbound calls to its subscribers.

than its (the host network's) MTRs. For example, if a host MNO was charging say, a commercial rate of 1 cent to the MVNO for the 'terminating leg' of the call, and these network elements were the same (and represented the entirety of) those network elements employed by the MNO in supplying MVCT to other undertakings, it would be difficult to justify (absent cost differences and differences in network elements used) MTRs being higher than 1 cent. However, the converse is not true, i.e. MVNO hosting charges could be higher than MTRs since such arrangements are not regulated and are subject to commercial negotiation between the parties.

- 8.55 However, as noted in paragraphs 8.51 and 8.52 above, an appropriately specified cost-orientation obligation with transparent MTRs should provide regulatory certainty and prevent such a problem occurring.

ComReg's Position

- 8.56 In paragraphs 8.38 to 8.55 above, ComReg has considered Respondents' views regarding its approach to imposing non-discrimination obligations in each Relevant MVCT Market.
- 8.57 Having regard to the analysis set out in the MVCT Consultation⁴⁰⁴, the discussion on competition problems in section 7 of this Decision and the consideration of Respondents' views above, ComReg intends to maintain its position with respect to the imposition of non-discrimination obligations, with each SMP MSP having the obligations below imposed upon them.
- (a) a requirement to apply equivalent conditions, including in respect of MTRs or other charges, in equivalent circumstances to other Service Providers requesting or being provided with access (including access to MVCT and associated facilities) or requesting or being provided with information in relation to such access;
 - (b) a requirement to provide access (including access to MVCT and associated facilities) and information to all other Service Providers under the same conditions and of the same quality as the SMP Mobile Service Provider provides to itself or to its subsidiaries, affiliates or partners.
- 8.58 The above obligations apply irrespective of whether or not a specific request for services or information has been made by a Service Providers to the relevant SMP Mobile Service Provider.
- 8.59 The above requirements are more properly described and prescribed in the Final Decision Instrument⁴⁰⁵ in Appendix I of this Decision, having regard to ComReg's position on Respondents' views on other obligations elsewhere in this Decision.

⁴⁰⁴ See section 7, paragraphs 8.41 to 8.51 and section 9 of the MVCT Consultation.

⁴⁰⁵ See section 10 of the Final Decision Instrument.

Imposition of Transparency Remedies

Position set out in the MVCT Consultation

- 8.60 In the MVCT Consultation⁴⁰⁶, ComReg noted that Regulation 9 of the Access Regulations provide that ComReg may, *inter alia*, specify obligations to ensure transparency in relation to access or interconnection requiring an SMP undertaking to make public specified information such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any conditions limiting access to or use of services and applications where such conditions are permitted by law. It was also noted that transparency obligations can be standalone but can also support other obligations being imposed and, as evidenced from the above, usually relate to requirements to make specified information publicly available
- 8.61 ComReg described existing SMP transparency obligations⁴⁰⁷ and, having regard to its statutory obligations and functions, then proposed and justified a range of transparency obligations that it considered should be imposed on all SMP MSPs in order to address competition problems identified in section 7 of the MVCT Consultation. ComReg proposed to require that all SMP MSPs should be required to:
- (a) to make publicly available and keep updated on its website a Reference Interconnect Offer (the "RIO") which is the standard offer of contract for access to MVCT and associated facilities.
 - (b) to ensure that the RIO is sufficiently unbundled in order that Service providers availing of access are not required to pay for services or facilities which are not necessary for the access requested.
 - (c) to make MTRs publicly available and publish such MTRs in an easily accessible manner on its publicly available website. In so doing, it shall publish a notice of its intention to amend its MTRs not less than 35 calendar days in advance of the date on which any such amendment comes into effect. Such notice shall at least include a statement of the existing MTRs, a description of the proposed new MTRs and the date on which such new MTRs are proposed to come into effect.
 - (d) to provide directly to undertakings with which it has entered into a contract in respect of access to MVCT and access to associated facilities, written notification of its intention to amend its MTRs. Such written notification is to be provided not less than 35 calendar days in advance of the date on which any such MTR amendment comes into effect. Such notice is also to at least

⁴⁰⁶ See paragraphs 8.52 to 8.64 of the MVCT Consultation.

⁴⁰⁷ Each of Vodafone, O2, Meteor and H3GI has, by virtue of their existing SMP designation, had a range of transparency obligations imposed upon them (although H3GI's were more limited than those which applied to the others). Neither TMI nor Lycamobile has been designated with SMP to date and, consequently have not had non-discrimination obligations imposed upon them.

include a statement of the existing MTRs, a description of the proposed new MTRs and the date on which such new MTRs are proposed to come into effect.

- 8.62 ComReg considered that the 35 calendar day timeframe for advance notification of MTR changes above should achieve an appropriate balance between the need for MSPs to be able to make changes speedily, while also recognising the requirements for MVCT purchasers to factor such changes into retail and wholesale pricing decisions and any related billing system changes/developments. In particular, ComReg noted that given many MVCT purchasers do so via indirect interconnection through third party wholesale transit or carriage arrangements⁴⁰⁸, the wholesale billing systems of such third party's will require amendment to give effect to MTR changes. This may also involve such third parties providing notification to their wholesale customers.
- 8.63 ComReg also proposed the removal of existing requirements on Meteor, O2 and Vodafone to file a copy of all signed interconnection agreements with ComReg.
- 8.64 ComReg also considered whether transparency obligations alone would be sufficient to address the competition problems identified in section 7 of the MVCT Consultation and did not consider this to be the case. For example, excessive pricing, discriminatory behaviour (on price or non-price grounds) or denial of access problems would not be capable of being adequately addressed through transparency obligations alone.
- 8.65 ComReg asked the following question⁴⁰⁹ with respect to its preliminary conclusions on the imposition of transparency obligations on SMP MSPs.

Question 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.

Respondents' Views

- 8.66 Of the **six responses received**⁴¹⁰, **one Respondent is in complete agreement** (ALTO) with ComReg's approach to imposing transparency remedies, **three Respondents partially agreed** (Eircom Group, O2 and Vodafone) while **two Respondents' disagreed** (H3GI and Lycamobile).

⁴⁰⁸ For example, Eircom through its SMP obligations to offer CPS, SB-WLR and transit services provides MVCT purchasers with indirect access to MVCT services.

⁴⁰⁹ See question 12 on page 200 of the MVCT Consultation.

⁴¹⁰ TMI did not address this question in its Submission but indicated that this should not be taken as acceptance or agreement with ComReg's assessment or preliminary conclusions.

- 8.67 ALTO welcomed the publication of a RIO as the basis for a standard interconnect contract for access to MVCT and associated facilities.
- 8.68 All three Respondents that partially agreed either noted or questioned the proposed 35 day notice period for MTR changes, given that normal commercial practice is one month.
- 8.69 H3GI indicated that it does not agree with ComReg's approach to imposing transparency remedies "...as it relates to H3GI..." and referred to its response to previous questions.
- 8.70 Lycamobile suggests that the publishing of a Reference Interconnect Offer or MTRs on an operator's public website is of no benefit to and is highly likely to confuse the consumer. It considered the remedies (in particular the requirement to ensure a RIO is sufficiently unbundled) to be inappropriate and disproportionate for an MVNO, only serving to drive up costs which ultimately must be borne by the consumer. In addition, Lycamobile commented that ensuring the RIO is sufficiently "unbundled" is likewise an inappropriate obligation for an MVNO and is disproportionate, only serving to drive up costs which ultimately must be borne by the consumer. It also questioned the proposed 35 day notice period for MTR changes, suggesting 30 days was sufficient.
- 8.71 ComReg considers that Respondents' views on Question 12 can be generally categorised into the following themes (we do not elaborate on Respondents' views under these themes as they are substantially captured above).
- 35 day advance notice period for changes to MTRs;
 - the need for a RIO that is sufficiently unbundled; and
 - publication of the RIO and MTRs on SMP MSP's websites.

ComReg's Assessment of Respondents' views

- 8.72 In paragraphs 8.66 to 8.71 above, ComReg has summarised Respondents' views concerning ComReg's proposed approach regarding the imposition of transparency obligations. Prior to setting out its final position, ComReg considers Respondents' views according to the themes identified above.

Publication of the RIO and MTRs on SMP MSP's websites and the need for a RIO that is sufficiently unbundled

- 8.73 In paragraph 8.70 above. We noted that Lycamobile had questioned the benefit to consumers of publishing MTRs and a RIO on its website. ComReg would note that such publication is primarily designed to be of direct benefit to MVCT purchasers, although this allows such purchasers to, for example, have visibility of wholesale changes which may affect their retail offers (such as prices for calls to subscribers of MSPs) and is, therefore, of indirect benefit to consumers. MVCT purchasers, by having direct visibility of terms and conditions of supply, including prices, have regulatory certainty and it is also a means to ensure effective operation of non-discrimination obligations.

- 8.74 The reason why a sufficiently unbundled RIO is required is to ensure that MVCT purchasers do not pay for services which are unnecessary for the services requested (and to prevent undue tying or bundling of services) which can drive up purchasers costs.
- 8.75 As noted in the MVCT Consultation⁴¹¹, ComReg does not consider the above obligations to provide an undue or disproportionate burden on SMP MSPs, in particular, they would, absent regulation, still require a contract for the supply of MVCT. However, in recognition that certain SMP MSPs will have to develop a RIO for the first time, ComReg has provided a 3 month implementation period (from the effective date) for this obligation.
- 8.76 As note in paragraph 8.69 H3GI did not offer specific comments on why it disagreed with ComReg's approach to imposing transparency obligations but referred to its response to precious questions. ComReg has addressed such questions earlier in this Decision.

35 day advance notice period for changes to MTRs

- 8.77 In paragraphs 8.68 to 8.70 above ComReg has noted Respondents' views regarding the 35 day advance notification period for changes to MTRs. The rational and justification for this period was set out in the MVCT Consultation⁴¹² and summarised at paragraph 8.62 above, in particular, that those purchasing (directly and indirectly) MVCT need to change wholesale and retail billing systems, including notification by wholesale transit providers to their wholesale customers. ComReg notes that many MSPs and Eircom Group (the largest transit provider in the State) have indicated that 30 days is a sufficient notice period. In view of this ComReg intends to reduce the 35 day notice period to 30 days across all affected transparency obligations.

ComReg's Position

- 8.78 In paragraphs 8.72 to 8.77 above, ComReg has considered Respondents' views regarding its approach to imposing transparency obligations in each Relevant MVCT Market.
- 8.79 Having regard to the analysis set out in the MVCT Consultation⁴¹³, the discussion on competition problems in section 7 of this Decision and the consideration of Respondents' views above, save for the amendments highlighted in paragraph 8.77 above, ComReg intends to maintain its position with respect to the imposition of transparency obligations, with each SMP MSP having the obligations below imposed upon them:

⁴¹¹ See paragraph 8.62 of the MVCT Consultation.

⁴¹² See paragraph 8.60 of the MVCT Consultation.

⁴¹³ See section 7, paragraphs 8.52 to 8.64 and section 9 of the MVCT Consultation.

- (a) to make publicly available and keep updated on its website a Reference Interconnect Offer (the “RIO”) which is the standard offer of contract for access to MVCT and associated facilities.
- (b) to ensure that the RIO is sufficiently unbundled in order that Service providers availing of access are not required to pay for services or facilities which are not necessary for the access requested.
- (c) to make MTRs publicly available and publish such MTRs in an easily accessible manner on its publicly available website. In so doing, it shall publish a notice of its intention to amend its MTRs not less than 30 calendar days in advance of the date on which any such amendment comes into effect. Such notice shall at least include a statement of the existing MTRs, a description of the proposed new MTRs and the date on which such new MTRs are proposed to come into effect.
- (d) to provide directly to undertakings with which it has entered into a contract in respect of access to MVCT and access to associated facilities, written notification of its intention to amend its MTRs. Such written notification is to be provided not less than 30 calendar days in advance of the date on which any such MTR amendment comes into effect. Such notice is also to at least include a statement of the existing MTRs, a description of the proposed new MTRs and the date on which such new MTRs are proposed to come into effect.

8.80 The above requirements are more properly described and prescribed in the Final Decision Instrument⁴¹⁴ in Appendix I of this Decision, having regard to ComReg’s position on Respondents’ views on other obligations elsewhere in this Decision.

Imposition of Price Control and Cost Accounting Remedies

Position set out in the MVCT Consultation

8.81 In the MVCT Consultation⁴¹⁵ it was noted that Regulation 13 of the Access Regulations provides that ComReg may, *inter alia*, impose on an operator obligations relating to cost recovery and price controls. These include obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of access or interconnection in situations where a market analysis indicates that a lack of effective competition means that the operator concerned may sustain prices at an excessively high level or may apply a price squeeze to the detriment of end-users⁴¹⁶.

⁴¹⁴ See section 11 of the Final Decision Instrument.

⁴¹⁵ See paragraphs 8.64 to 8.89 of the MVCT Consultation.

⁴¹⁶ Pursuant to Regulation 13(1) of the Access Regulations.

- 8.82 In imposing any such obligations, it was also noted that ComReg is required to take into account a number of factors including the investment made by the SMP operator⁴¹⁷ and the need to ensure that any cost recovery mechanism or pricing methodology that ComReg imposes serves to promote efficiency and sustainable competition and maximise consumer benefits⁴¹⁸.
- 8.83 Based on the above, it was noted that the purpose of price control and cost accounting obligations are to ensure that prices charged are not excessive (or cause a margin squeeze) and promote efficiency and sustainable retail competition while maximising consumer benefits.
- 8.84 ComReg described existing SMP price control and cost accounting obligations⁴¹⁹ and, having regard to its statutory obligations and functions, then proposed and justified a price control obligation that it considered should be imposed on all SMP MSPs in order to address price-related competition problems identified in section 7 of the MVCT Consultation. ComReg also proposed not to impose cost accounting obligations and also set out the justification for this.

Price control obligations

- 8.85 ComReg considered that the imposition of price control obligations⁴²⁰, in particular a cost-orientation obligation, was justified and proportionate having identified in section 6 and 7 of the MVCT Consultation that SMP MSPs have the ability an incentive to set their prices associated with access to MVCT and associated facilities at an excessive level thereby impacting upon downstream competition to the detriment of consumers. ComReg noted that it intended 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 (subsequently in the Separate Pricing Consultation). ComReg also noted that, in accordance with Regulation 13(4) of the Access Regulations, in the presence of the proposed obligation of cost orientation, the burden of proof that charges (including MTRs) are derived from costs, including a reasonable rate of return on investment would rest with the MSP concerned.

Cost accounting obligations

- 8.86 Insofar as cost accounting obligations are concerned⁴²¹, ComReg noted in the MVCT Consultation that, if specific price control obligations were to be

⁴¹⁷ Pursuant to Regulation 13(2) of the Access Regulations.

⁴¹⁸ Pursuant to Regulation 13(3) of the Access Regulations.

⁴¹⁹ Each of Vodafone, O2, Meteor and H3GI has, by virtue of their existing SMP designation, been subject to a price control obligation of cost orientation to date. Only Vodafone and O2 have been subject to a cost accounting obligation. However, having regard to the voluntary glide path approach to reducing MTRs that has been in place to date, this obligation has not been specified in detail. Neither TMI nor Lycamobile have been subject to a price control or cost accounting obligation given the absence of any SMP designation upon them to date.

⁴²⁰ See paragraphs 8.75 to 8.81 of the MVCT Consultation.

⁴²¹ See paragraphs 8.82 to 8.89 of the MVCT Consultation

meaningful, it may be necessary to have a clear and comprehensive understanding of the costs associated with an SMP MSP's provision of MVCT. Having regard to the detailed nature of the price control obligation that is ultimately specified in the Separate Pricing Consultation, to support the effectiveness of such obligations, ComReg did not, at that time, consider it necessary and justified to impose a cost accounting obligation, again noting that ultimately, the burden of proof that charges (including MTRs) are derived from costs, including a reasonable rate of return on investment would rest with the MSP concerned.

- 8.87 ComReg asked the following question⁴²² with respect to its preliminary conclusions on the imposition of price control and cost accounting obligations on SMP MSPs.

Question 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.

Respondents' Views

- 8.88 ComReg sets out Respondents' views on its proposed approach to price control and cost accounting obligations below.

Price control obligations

- 8.89 Of the **five responses**⁴²³ **received** in relation to the proposed price control obligations, **three Respondents expressed support in principle** for ComReg's approach (ALTO, Meteor and O2), while **two Respondents disagreed** (Lycamobile and H3GI) with ComReg's approach.
- 8.90 ALTO agreed in principle with ComReg's approach, noting that it aligned with the advice of the European Commission and that it should remove the potential for on-net versus off-net price discrimination.
- 8.91 Meteor noted its belief that "...*there is a clearly justified need for MTRs to be set at truly cost oriented levels.*" Indicating that it intended to respond on the detailed nature of the cost-orientation obligation in its response to the Separate pricing Consultation.

⁴²² See question 13 on page 204 of the MVCT Consultation.

⁴²³ TMI did not express any views in response to the price control aspects of Question 13 above, however, there were general comments elsewhere in its Submission suggesting it considered price control was not appropriate and, even if it were, it should be afforded a glide path. Vodafone did not comment specifically on the proposed cost orientation obligation but indicated that it intended to respond on this remedy in its response to the Separate Pricing Consultation.

- 8.92 O2 also agreed in principle with ComReg's approach but noted that the existing arrangement of voluntary reductions have been effective in terms of the cost of implementation of the existing price control obligations. O2 also reserved its rights in relation to the detailed nature of the cost-orientation obligation having regard to the matters under consultation in the Separate pricing Consultation.
- 8.93 H3GI indicated that it does not agree with ComReg's approach to imposing transparency remedies "...as it relates to H3GI..." and referred to its response to previous questions.
- 8.94 Lycamobile stated that it did not agree with ComReg's approach to imposing a price control remedy of cost orientation and indicated that "...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."

Cost Accounting Obligations

- 8.95 Of the **three responses received**⁴²⁴ in relation to ComReg's approach on cost accounting obligations, all **three Respondents' agreed** (H3GI, Lycamobile and Vodafone) with ComReg's preliminary view that a cost accounting obligation was unnecessary, having regard to the outcome of the Separate Pricing Consultation.
- 8.96 The above Respondents' did not elaborate further on their views on this matter.
- 8.97 ComReg considers that Respondents' views on Question 13 can be generally categorised into the following themes all of which concern the price control obligation (we do not elaborate on Respondents' views under these themes as they are substantially captured above).
- The justification for and proportionality of a price control obligation of cost-orientation.
 - The requirement for a cost accounting obligation

ComReg's Assessment of Respondents' views

- 8.98 In paragraphs 8.89 to 8.96 above, ComReg has summarised Respondents' views concerning ComReg's proposed approach regarding the imposition of a price control obligation of cost-orientation and the non-imposition of a cost accounting obligation. Prior to setting out its final position, ComReg considers Respondents' views according to the themes identified above.

The justification for and proportionality of a price control obligation of cost-orientation

- 8.99 As noted in paragraphs 8.93 and 8.94 above, both H3GI and Lycamobile did not agree with ComReg's proposal to impose a cost-orientation obligation. We also

⁴²⁴ ALTO, Eircom Group, O2, TMI and Vodafone did not express views in relation to the cost accounting aspects of Question 13 above.

- noted⁴²⁵ that TMI did not express any views in response to the price control aspects of Question 13 above, however, there were general comments elsewhere in its Submission suggesting it considered price control was not appropriate and, even if it were, it should be afforded a glide path.
- 8.100 The justification for price control obligations was set out in the MVCT Consultation and had regard to the competition problems identified in section 7 (competition problems) and the analysis of MSPs pricing behaviour in section 6 (dealing with SMP). ComReg has further updated its analysis on these matters in section 6 and 7 of this Decision and, for the reasons set out therein, and in the MVCT Consultation ComReg maintains its view that SMP MSPs have the ability and incentive to engage in excessive pricing behaviours to the detriment of downstream competition and consumers.
- 8.101 In Table 1 to Table 6 of this Decision⁴²⁶ and previously in the MVCT Consultation⁴²⁷ ComReg has set out its views on the ability of MSPs to set their MTRs independently of their competitors, customers and consumers. We noted that both TMI and Lycamobile, both of who have not been subject to regulation to date have set their MTRs substantially and appreciably above those of other regulated SMP MSPs to date. In this regard, since the MVCT Consultation, the gap between Lycamobile's MTRs and other MSPs' MTRs has widened further and, as noted in Table 6, now range from 13% to 275% above other MSPs MTRs⁴²⁸. As noted in Table 5 above, TMI's MTRs have been and remain substantially above the MTRs of other currently regulated MSPs, with this differential⁴²⁹ now currently ranging from 63% (above H3GI) to 232% (above Meteor, O2 and Vodafone)⁴³⁰.
- 8.102 Insofar as H3GI's comments are concerned, given it did not offer specific comments on why it disagreed with ComReg's approach other than to refer to its response to previous questions, ComReg would refer H3GI to its response on such matters earlier in this Decision.
- 8.103 With respect to Lycamobile's comments that the detailed nature of the cost orientation obligation could be disproportionate for MVNOs having regard to the substantial investment in cost accounting systems or financial expects that may be required, ComReg would note that such matters are more appropriately considered in the context of the detailed specification of the cost-orientation obligation. However, in this Decision ComReg does not intend (see paragraph

⁴²⁵ See footnote 423 above.

⁴²⁶ See pages 98 to 100 of this Decision

⁴²⁷ See paragraphs 6.19 to 6.33 of the MVCT Consultation.

⁴²⁸ See detailed discussion at paragraph 6.91 of this Decision.

⁴²⁹ See detailed discussion at paragraph 6.68 of this Decision.

⁴³⁰ Over the entire period from 2007 to date (November 2012), between TMI's weighted average MTRs were, on average (being the average of the differences calculated at each half yearly period) between 29.2% to 121.7% above the weighted average MTRs of other regulated MSPs ranged.

8.112 below) to impose cost accounting obligations on SMP MSPs. ComReg would also note that, to the extent that the burden of proof in demonstrating that MTRs and prices are cost-oriented would rest with the MSP concerned, given the nature of MVNO operations, they do not have a mobile network and, therefore, ComReg considers that any accounting systems burden that may arise as a consequence of an MVNO seeking to demonstrate its MTRs and charges are cost-orientated should not be disproportionately onerous.

8.104 While TMI did not comment on Question 13 concerning price control obligations, it did comment on such matters elsewhere in its Submission, particularly, for example:

- suggesting that there was no such competition problem of TMI engaging in excessive pricing given, in its view, it did not have the ability to set its MTRs independently of its competitors;⁴³¹
- stating that the imposition of a price control obligation on TMI would be unreasonable, unnecessary and inappropriate⁴³²;
- stating that more time is needed for TMI to adjust to the imposition of price control obligations and that other options such as a gradual glidepath should be considered, particularly by reference approaches taken by NRAs elsewhere in the EU.⁴³³
- suggesting that ComReg's approach to price control was discriminatory vis-à-vis other MSPs in the Irish market;

8.105 With respect to the above points, ComReg considers that its analysis in the MVCT Consultation⁴³⁴ and this Decision clearly shows that TMI has the ability and incentive to engage in excessive pricing behaviour with respect to its supply of MVCT (see, for example, paragraph 8.101 above and section 7). TMI's MTRs have been and remain substantially above those of all other Regulated SMP MSPs and, in section 7 ComReg has determined that TMI (and other SMP MSPs) has the ability and incentive to engage in excessive pricing behaviour. In the Regulatory Impact Assessment in section 9 of this Decision, ComReg has also considered the impact of price control obligations on individual SMP MSPs, competition and consumers.

8.106 Given the risk of price-related identified competition problems deriving from an SMP position in the Relevant MVCT Markets, ComReg considers that each SMP MSP should be subject to a cost-orientation obligation with respect to access to MVCT and associated facilities. A consistent approach to price control in the form of cost orientation for SMP MSPs, all of which provide national coverage, will

⁴³¹ See paragraph 20(e) and 21 of TMI's Submission.

⁴³² See paragraph 2.3, 5 of TMI's Submission.

⁴³³ See paragraph 12, 25, 26, 28a, 28b and 28g of TMI's Submission.

⁴³⁴ See section 6 and 7 of the MVCT Consultation.

ensure efficient price and investment signals are provided to all market players and, in ComReg's view, does not represent an undue burden in light of the identified problem of excessive pricing and its detrimental impact on retail competition and consumers.

- 8.107 ComReg also considers that imposing a cost-orientation obligation on all SMP MSPs provides regulatory certainty to each party, as well as to buyers of MVCT who purchase this service from several MSPs. In doing so, it will minimise the scope for disputes/investigations and potentially inefficient case-by-case regulation through dispute resolution or other activities. A consistent and harmonised approach will also promote the provision of pan European services (given Service Providers in other EU jurisdictions also purchase MVCT from Irish MSPs) and minimise the regulatory burden on MSPs, the significant majority of which have operations in other European countries. It should also promote the internal market by removing or minimising distortions that may arise as a consequence of the different regulatory treatment by NRAs of MSPs found to have SMP in other EU jurisdictions.
- 8.108 A cost-orientation obligation, once specified in detail, will also reduce the magnitude of the effects of any undue on-net/off-net price discrimination through excessive MTRs, while at the same time continuing to allow retail pricing flexibility.
- 8.109 As previously noted in the MVCT Consultation and this Decision, this Decision solely concerns the imposition of cost-orientation price control, with the detailed specification of this being the subject of the Separate Pricing Consultation (and now the Separate Pricing Decision). ComReg has not, therefore, made any decision in this paper concerning the appropriateness timing of particular forms of cost-orientation, including glide paths and the timeframes within which they are to apply.
- 8.110 Finally, ComReg would note that the imposition of cost-orientation obligations on MSPs found to have SMP by NRAs in other jurisdictions is now largely the accepted common practice amongst NRAs and as approved by the European Commission (including in the case of Ireland). In paragraph 6.62 we also noted the situation with respect to the regulation of MTRs in Spain whereby SMP MVNOs there have been required to set their MTRs at the same level of their host network. ComReg also notes that Tesco Mobile (TM) UK (which is also an MVNO) has not been found to operate within a UK mobile termination market and has not been designated with SMP or had price control obligations upon it. As ComReg understands it, this is due to the nature of the contractual relationship TMUK has with its host MNO (Telefonica UK), such that TMUK does not have the ability to set or charge an MTR. In this regard, where an inbound call goes to a TMUK subscriber, it is terminated by Telefonica UK who itself sets and collects its MTR, i.e. the MNO provides MVCT and collects the termination rate. TMUK, therefore, appears to operate its retail business in the UK in the presence of this commercial relationship with its host MNO. In contrast, as noted in section 5, TMI does have the ability to set its own MTR.

8.111 ComReg would also note that the European Commission Comments have accepted ComReg's approach to symmetric regulation (insofar as it relates to this Decision) of SMP MSPs in the Irish Relevant MVCT Markets, having regard to the detailed analysis and justifications provided in the MVCT Consultation and subsequently notified to the European Commission in accordance with Article 7 of the Framework Directive.

The requirement for a cost accounting obligation

8.112 As there was universal agreement amongst those that expressed views on ComReg's proposed approach to cost accounting, there are, therefore, no comments for ComReg to address on this subject. ComReg, therefore intends to maintain its position as set out in the MVCT Consultation.

8.113 However, while not commenting on this question, ComReg notes that TMI in its Submission states⁴³⁵ that:

"...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."

8.114 This is a reference to the executive summary of the MVCT Consultation and ComReg would note that cost accounting obligations (and accounting separation obligations) are an example of other potential obligations considered but ruled out by ComReg.

ComReg's Position

8.115 In paragraphs 8.98 to 8.114 above, ComReg has considered Respondents' views regarding its approach to imposing price control and cost accounting obligations in each Relevant MVCT Market.

8.116 Having regard to the analysis set out in the MVCT Consultation⁴³⁶, the discussion on competition problems in section 7 of this Decision and the consideration of Respondents' views above, ComReg intends to maintain its position with respect to the imposition of price control obligations (and non-imposition of cost accounting obligations), with each SMP MSP having the obligations below imposed upon them:

- (a) Each SMP MSP shall be subject to a cost orientation obligation as regards MTRs and prices charged by that SMP MSP to any other undertaking for access to or use of those products, services or facilities referred to in the access obligations.

8.117 The above requirements are more properly described and prescribed in the Final Decision Instrument⁴³⁷ in Appendix I of this Decision, having regard to ComReg's

⁴³⁵ See paragraph 29(d) of the TMI Submission.

⁴³⁶ See section 7, paragraphs 8.65 to 8.89 and section 9 of the MVCT Consultation.

⁴³⁷ See section 12 of the Final Decision Instrument.

position regarding Respondents' views on other obligations elsewhere in this Decision and ComReg's relevant statutory objectives as set out in section 12 of the Communications Regulation Acts 2002 to 2011, Regulation 16 of the Framework Regulations and in Regulation 6 of the Access Regulations, Regulation 8(6) of the Access Regulations, Regulation 12 of the Access Regulations and Regulation 13 of the Access Regulations⁴³⁸.

Imposition of Accounting Separation Remedies

Position set out in the MVCT Consultation

- 8.118 In the MVCT Consultation⁴³⁹, ComReg noted that, in accordance with Regulation 11 of the Access Regulations, ComReg can, *inter alia*, require an operator which is vertically integrated to make transparent its wholesale prices and its internal transfer prices, among other things, to ensure compliance with any non-discrimination obligation imposed or, where necessary, to prevent unfair cross-subsidy. It was also noted that an accounting separation obligation can also reinforce cost accounting and transparency obligations as it can help to ensure that costs are neither over nor under recovered and help disclose such possible competition problems by making visible the wholesale prices and internal transfer prices of an SMP operator's services.
- 8.119 ComReg described existing SMP accounting separation obligations⁴⁴⁰ and, having regard to its statutory obligations and functions, then proposed and justified reasons why it considered it unnecessary to impose an accounting separation on any SMP MSPs. In particular, having regard to the implementation of an appropriately specified cost-orientation obligation (through the Separate Pricing Consultation), ComReg considered that it would be burdensome and costly for SMP MSPs to comply with an accounting separation obligation and, therefore, be disproportionate.
- 8.120 ComReg indicated that the matter will be kept under review having regard to the specification and implementation of the detailed price control.

⁴³⁸ Pursuant to section 12 of the Communications Regulation Acts 2002 to 2011, ComReg's relevant objectives in relation to the provision of electronic communications networks and services are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community. ComReg is also mindful to ensure a consistent regulatory approach and to ensure no discrimination in the treatment of undertakings providing electronic communications networks and services, pursuant to Regulation 16 of the Framework Regulations. ComReg also took account, in acting in the pursuit of its objectives as set out in Section 12 of the Act and Regulation 16 of the Framework Regulations, the importance of promoting efficiency, sustaining competition, promoting efficient investment and innovation whilst giving the maximum benefit to end-users, as more particularly set out at Regulation 6 of the Access Regulations.

⁴³⁹ See paragraphs 8.90 to 8.96 of the MVCT Consultation.

⁴⁴⁰ Only Vodafone and O2 have had accounting separation obligations imposed upon them in relation to accounting separation. Such obligations were only specified in principle, with detailed requirements never having been ultimately specified. Neither Meteor nor H3GI were subject to accounting separation obligations, largely on grounds of proportionality.

8.121 ComReg asked the following question⁴⁴¹ with respect to its preliminary view that an accounting separation obligation did not need to be imposed SMP MSPs at this time.

Question 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.

Respondents' Views

8.122 Of the **six responses received**⁴⁴² on this question, **all Respondents were in agreement** (ALTO, H3GI, Lycamobile, Eircom Group, O2 and Vodafone) with ComReg's approach and, in most cases did not offer further views.

8.123 Lycamobile agreed, noting that any accounting separation obligation will require substantial investment in cost accounting systems and, due to the nature and scale of the operations of MVNOs, the obligation would not be proportionate.

8.124 Eircom Group's agreed, noting that the application of such obligations can impose high administrative costs on MSPs that would likely outweigh any resulting benefits and considered that a Bottom-Up (BU) cost model for determining MTRs can be achieved without the complexity of accounting separation.

8.125 Vodafone agreed that subject to the implementation of any appropriate price control, there is no current requirement to introduce an accounting separation remedy.

ComReg's Assessment of Respondents' Views

8.126 Given Respondents' were universally in agreement with ComReg's preliminary views and, in so responding, did not raise any material issues, ComReg intends to maintain its position as set out in the MVCT Consultation. While ComReg notes Eircom Group's comments regarding the inappropriateness of accounting separation obligations in the presence of BU models, such matters will need to be determined on a case-by-case basis.

ComReg's Position

8.127 In paragraphs 8.22 to 8.25 above, ComReg has considered Respondents' views regarding its approach not to impose accounting separation obligations in each

⁴⁴¹ See question 14 on page 206 of the MVCT Consultation.

⁴⁴² TMI did not address this question in its Submission but indicated that this should not be taken as acceptance or agreement with ComReg's assessment or preliminary conclusions.

Relevant MVCT Market. ComReg's position is that accounting separation obligations are not warranted at this time.

Overall Conclusions on Remedies in the Relevant MVCT Markets

Position set out in the MVCT Consultation

- 8.128 Having regard to the competition problems identified in section 7 and the discussion in paragraphs 8.1 to 8.95 of the MVCT Consultation ComReg proposed to impose a range of access, non-discrimination, transparency and price control remedies on all SMP MSPs.
- 8.129 ComReg set out these remedies in the form of a Draft Decision Instrument which was attached at Appendix D of the MVCT Consultation and invited interested parties to comment on it. In so doing, ComReg asked the following questions⁴⁴³ with respect to its Draft Decision Instrument.

Question 15. Do respondents agree with ComReg's draft Decision Instrument set out in Appendix H? 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.

Respondents' Views

- 8.130 ComReg asked two identical questions on the Draft Decision Instrument (see footnote 443 below) and in this section we set out Respondents' views on these questions.
- 8.131 Of the **seven responses received** to this question, **four Respondents agreed** (ALTO, O2, Meteor and Vodafone) with the Draft Decision Instrument, albeit subject to previous comments on the other questions asked in relation to remedies. **Three Respondents did not agree** (H3GI, Lycamobile and TMI), also on the basis of previous comments.

ComReg's Assessment of Respondents' Views

- 8.132 ComReg has already addressed Respondents' views with respect to questions 10 to 14 above dealing with remedies and, as and where appropriate has amended the Draft Decision Instrument in light of this.

ComReg's Position

- 8.133 The regulatory obligations to be imposed in light of ComReg's position set out in this Section 8 are more properly described and prescribed in the Final Decision Instrument⁴⁴⁴ in Appendix I of this Decision. The impact of these obligations on

⁴⁴³ See question 15 and question 17 on page 206 and 246 respectively of the MVCT Consultation.

⁴⁴⁴ See sections 8 to 12 of the Final Decision Instrument.

SMP MSPs, other Service Providers and competition is further considered in section 9 of this Decision.

9 Regulatory Impact Assessment

Position set out in the MVCT Consultation

Overview

- 9.1 In section 9 of the MVCT Consultation, ComReg set out its preliminary Regulatory Impact Assessment (RIA). In so doing, ComReg noted that the purpose of a RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. ComReg set out its approach to conducting the RIA and then conducted its RIA having regard to its proposed approach to imposing (or not) regulatory remedies in section 8 of the MVCT Consultation, along with a consideration of other options.
- 9.2 It was noted that the RIA, in conjunction with the rest of the analysis and discussion set out elsewhere in the MVCT Consultation represented a RIA which set out its preliminary assessment of the potential impact of the imposition of the proposed regulatory obligations in the Relevant MVCT Markets. The RIA was set out under the headings below.

The principles adopted by ComReg in selecting remedies⁴⁴⁵

- 9.3 The MVCT Consultation referred to the legislative basis upon which ComReg must consider the imposition of Remedies, including under Regulation 8(6) of the Access Regulations and Section 12(1)(a) of the Communications Regulations Acts 2002 to 2011.

Description of the policy issue at hand and identified the objectives⁴⁴⁶

- 9.4 The MVCT Consultation referred to the foregoing analysis which set out ComReg's preliminary view that each of the Relevant MVCT Markets was not effectively competitive and that each of the MSP operating in them should be designated as having SMP. It was noted that ComReg was required to impose on an operator with SMP, such of the obligations (remedies) identified below.
- (a) Access;
 - (b) Transparency;
 - (c) Non-Discrimination;
 - (d) Price Control and Cost Accounting; and
 - (e) Accounting Separation.
- 9.5 It was noted that ComReg's objectives are to enhance the development of effective competition in downstream markets within which MSPs and FSPs,

⁴⁴⁵ See paragraphs 3.11 and 9.12 of the MVCT Consultation.

⁴⁴⁶ See paragraphs 9.13 to 9.19.

which rely on the upstream MVCT input, operate. In so doing, having regard to the competition problems identified in the MVCT Consultation, ComReg indicated it was seeking to prevent restrictions or distortions in competition amongst Service Providers, thereby promoting the development of effective competition, to the ultimate benefit of consumers. It was also noted that ComReg is also seeking to provide regulatory certainty/predictability to all Service Providers through the development of an effective and efficient forward looking regulatory regime that serves to promote competition amongst MSPs and, to a certain extent, between MSPs and FSPs. These objectives were also considered to further the development of the internal market given Service Providers operate in other European jurisdictions and given MVCT is also an input to calls originating abroad but destined for Irish mobile subscribers.

- 9.6 In pursuing these objectives, ComReg thereby aimed to influence the behaviour of SMP MSPs in order to mitigate the potential harmful effects that can arise as a consequence of the exercise of SMP. In this regard, ComReg considered that the regulatory measures that it proposed in section 8 of the MVCT Consultation, and further considered in the RIA, should address in a proportionate way the relevant competition problems and the consequential impacts on competition and consumers.
- 9.7 ComReg then went on to identify and consider the regulatory options open to it.

Identify and describe the potential regulatory obligations⁴⁴⁷

- 9.8 In the MVCT Consultation, ComReg recognised that regulatory measures should be kept to the minimum necessary to address the identified market failure in an effective, efficient and proportionate manner. A range of potential incremental regulatory options were available to ComReg to address the competition problems in the Relevant MVCT Markets and the question of regulatory forbearance and the incremental imposition of one or more of the obligations identified in paragraph 9.4 above were considered.
- 9.9 ComReg set out its preliminary view as to why regulatory forbearance was not appropriate and then, following an incremental assessment (starting from the lightest of remedies to the most intrusive) of the appropriateness of other individual remedies, considered that transparency, non-discrimination, access and price control remedies, were appropriate. ComReg's preliminary views were that cost accounting and accounting separation obligations were not appropriate.
- 9.10 ComReg went on to then determine the impact of its proposed regulatory approach on stakeholders.

⁴⁴⁷ See paragraphs 9.20 to 9.38.

Determine the Impact on Stakeholders⁴⁴⁸

9.11 In determining the impact on stakeholders ComReg grouped its proposed remedies into three options, namely:

- (a) **Option A:** Impose Transparency, Non-discrimination and Access obligations.
- (b) **Option B:** Impose Transparency, Non-discrimination, Access and Price Control obligations⁴⁴⁹.
- (c) **Option C:** Impose a full suite of obligations including Cost Accounting and Accounting Separation obligations.

9.12 In assessing each of the options, ComReg considered the impact on SMP MSPs, other Service Providers and consumers, before then going on to consider the impact on competition.

Determine the Impact on Competition⁴⁵⁰

9.13 ComReg's preliminary view in the MVCT Consultation was that, absent regulation, there is the potential and incentive for an SMP operator in its Relevant MVCT Market to engage in exploitative and exclusionary behaviours which would impact on competition and consumers. Having regard to its then analysis of competition problems, the impact of these on competition and consumers⁴⁵¹ and its statutory objectives the imposition of appropriate *ex ante* remedies to address such competition problems were considered justified.

9.14 It was noted that each of the specific remedies proposed was designed to promote the development of effective competition. This was considered so, given remedies were to be applied consistently across all MSPs, address the identified impacts of competition problems associated with MSPs having SMP in the Relevant MVCT Markets and, ultimately would be to the benefit of Service Providers by allowing them to compete fairly at the retail level, to the benefit of consumers

Assess the likely impacts and choose the best option⁴⁵²

9.15 Having considered its obligations under Regulation 8(6) of the Access Regulations and Section 12(1)(a) of the Communications Regulations Acts 2002 to 2011 and, having considered the impacts on stakeholders and competition,

⁴⁴⁸ See paragraphs 9.39 to 9.40 of the MVCT Consultation.

⁴⁴⁹ In considering Price Control, the impact on stakeholders of a cost orientation obligation is considered. As noted previously, the detailed specification of the cost orientation was considered in the Separate Pricing Consultation, within which the regulatory impact on SMP MS Ps and other stakeholders will be further considered.

⁴⁵⁰ See paragraphs 9.41 to 9.42 of the MVCT Consultation.

⁴⁵¹ See section 7 of the MVCT Consultation.

⁴⁵² See paragraphs 9.43 to 9.48 of the MVCT Consultation.

including the impact on the development of competition within the internal market, it was ComReg's preliminary view that **Option B** represented the most justified, reasonable and proportionate of the approaches to regulation within the Relevant MVCT Markets. i.e., impose Transparency, Non-discrimination, Access and Price Control obligations.

- 9.16 ComReg noted that overall, the regulatory obligations chosen do not unduly discriminate against any one particular MSP in that they are imposed symmetrically and this should provide regulatory certainty and ensure fairer and more balanced retail competition amongst MSPs and Service Providers purchasing MVCT.
- 9.17 ComReg asked the following question⁴⁵³ with respect to its preliminary conclusions on the Regulatory Impact Assessment.

Question 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.

Respondents' Views

- 9.18 **Six Respondents expressed views** on ComReg's RIA. In general, **three Respondents broadly agreed** (ALTO, Meteor and Vodafone) with ComReg's RIA, while **three Respondents disagreed** (H3GI, Lycamobile and TMI).
- 9.19 ALTO indicated that the RIA was "...clear and logical...".
- 9.20 Eircom Group, whilst not disagreeing with the conclusions reached in the RIA, considered that the approach to the RIA in general was wrong given it was a qualitative discussion and lacked a quantified assessment of the efficiency or cost of ComReg's proposals.
- 9.21 Vodafone agreed that, of the three options considered by ComReg in the RIA, option B represented the most reasonable, balanced and proportionate approach. However, while agreeing that a cost orientation obligation is appropriate for all designated MSPs, Vodafone did not agree that a move to pure LRIC pricing is either proportionate or justified and expressed views to justify its position. Vodafone suggest that the driver for a move from the current form of regulation (i.e. voluntary glidepaths tending towards a removal of asymmetries) is clearly the 2009 Termination Rates Recommendation. In Vodafone's opinion, 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 (CRF). 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

⁴⁵³ See question 16 on page 219 of the MVCT Consultation.

of a particular cost methodology, in Vodafone's view, ComReg must be satisfied that its proposed course of action in relation to the imposition of remedies is compatible with these primary duties.

- 9.22 H3GI disagreed with the RIA as it related to H3GI "...for the reasons set out above..." in essence referring to its responses to previous questions.
- 9.23 Lycamobile did not agree with the RIA, referring to its response to previous questions⁴⁵⁴. It suggested that ComReg had underestimated the impact on consumers and the impact on SMP MSPs, reiterating previous comments⁴⁵⁵ that it offers a pre-paid SIM only retail proposition and that its typical customer seeks to make outbound international calls and messages and that reductions in its MTRs, without a corresponding reduction on non-EU MTRs would lead to a corresponding increase in the retail tariff. According to Lycamobile, 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 later defined) are such that, in Lycamobile's opinion, new entrants will not enter into the Irish market.
- 9.24 In its response, TMI indicates that it does not agree with ComReg's preliminary conclusions in the RIA and refers to its response on previous questions⁴⁵⁶, much of which related to issues concerning the definition of the Relevant MVCT Markets, ComReg's assessment of competition within them and the proposed SMP designations. TMI's overall view is that regulation of its operations, including the proportionality of the regulation of its MTRs, would be damaging to competition and to consumers, as well as to TMI's position in the retail market. It notes, for example, 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."*⁴⁵⁷

*"A finding of SMP was not contemplated by TMI [redacted] nor was the proposed imposition of price control within the radically short timeframe contemplated."*⁴⁵⁸

⁴⁵⁴ Lycamobile referred to its response to questions 1 to 14 in the MVCT Consultation.

⁴⁵⁵ See, for example, Lycamobile's response to Question 2 (paragraph 4.19 above), Question 3 (paragraph 4.34 above), Question 4 (paragraphs 4.105), Question 6 (paragraph 5.81 above) and Question 7 (paragraph 5.49 above).

⁴⁵⁶ See sections E, F, G and H of the TMI Submission which related to TMI's response, either partially or entirely, Questions 4 to 9 in the MVCT Consultation.

⁴⁵⁷ See paragraph 24 of TMI's Submission.

⁴⁵⁸ See paragraph 25 of TMI's Submission.

- 9.25 Respondents' views highlighted above can be generally categorised into the following themes.
- Impact on SMP MSPs, Consumers and Competition;
 - Insufficient quantitative analysis in the RIA;
 - Other matters
- 9.26 As Respondents' views are substantively explained above, ComReg does not further summarise the views expressed. ComReg now goes on to consider Respondents' views according to the above themes.

ComReg's Assessment or Respondents' Views

- 9.27 In paragraphs 9.18 to 9.26 above, ComReg has summarised the key issues raised by Respondents concerning ComReg's RIA. Prior to setting out its final position, ComReg considers Respondents' views according to the themes identified in paragraph 9.25 above.
- 9.28 Pursuant to section 12 of the Communications Regulation Acts 2002 to 2011, ComReg's relevant objectives in relation to the provision of electronic communications networks and services are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community. ComReg is also mindful to ensure a consistent regulatory approach; to ensure no discrimination in the treatment of undertakings providing electronic communications networks and services and to impose ex-ante regulatory obligations only where there is no effective and sustainable competition, pursuant to Regulation 16 of the Framework Regulations. ComReg also took account, in acting in the pursuit of its objectives as set out in Section 12 of the Act and Regulation 16 of the Framework Regulations, the importance of promoting efficiency, sustaining competition, promoting efficient investment and innovation whilst giving the maximum benefit to end-users, as more particularly set out at Regulation 6 of the Access Regulations. Regulation 6(1) of the Access Regulations states that ComReg shall encourage and, where appropriate, ensure, in accordance with the Access Regulations, adequate access, interconnection and the interoperability of services in such a way as to: (a) promote efficiency, (b) promote sustainable competition, (c) promote efficient investment and innovation, and (d) give the maximum benefit to end-users. Pursuant to Regulation 6 (3) ComReg has ensured that obligations imposed are objective, transparent, proportionate and non-discriminatory and are applied in accordance with Regulations 12, 13 and 14 of the Framework Regulations.

Impact on SMP MSPs, Consumers and Competition

- 9.29 ComReg has noted Lycamobile's and TMI's views above in paragraphs 9.23 and 9.24 respectively, which mainly concerned the assessment in the RIA of the impact on these SMP MSPs' individual positions (arising from the imposition of regulatory obligations) and the impact on competition and consumers.

- 9.30 Insofar as Lycamobile's comments are concerned, as noted above the issues raised were also the subject of Lycamobile responses to previous questions and ComReg has already responded⁴⁵⁹ to them in this context. With respect to the RIA, when imposing, maintaining or amending *ex ante* obligations in a national context, ComReg must consider the regulatory options which best meets its statutory objectives for the relevant market review period. Thus, while taking the international context into account, ComReg is ultimately required to consider which *ex ante* obligations are most appropriate to the particular market circumstances in a national context, taking into account the potential competition problems and ComReg's statutory objectives⁴⁶⁰. In this regard, ComReg has identified the ability and incentive for all SMP MSPs to engage in a range of potentially exploitative and exclusionary practices in the Relevant MVCT Markets.
- 9.31 In view of the market failures identified, forbearance from imposing *ex ante* regulatory obligations as a consequence of the customer calling patterns of specific MSPs would not be in line with ComReg's statutory objectives or its role in promoting regulatory certainty and predictability for all current and potential market participants. Indeed, regulatory forbearance for specific MSPs in Ireland could lead to the circular and perverse outcome of disadvantaging callers in other countries when making calls to Irish subscribers where, for example, the callers' domestic Service Providers are subject to price control obligations but the Irish recipients' MSPs are not.
- 9.32 Similarly, insofar as TMI's comments are concerned, as noted above, the issues raised by TMI were also the subject of TMI's responses to previous questions and ComReg has already responded⁴⁶¹ to them in this context. With respect to the RIA, ComReg notes that there are no clear objective reasons to forbear from the imposition of certain *ex ante* obligations on specific SMP MSPs.
- 9.33 ComReg has conducted a thorough analysis of the structural and behavioural characteristics of the Relevant MVCT Markets and has identified that there are

⁴⁵⁹ See ComReg's consideration of Lycamobile's views in Sections 3 to 8 of this Decision.

⁴⁶⁰ Pursuant to Section 12 of the Communications Regulation Acts 2002 to 2011, ComReg's statutory objectives are: (i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community. As regards price control obligations, Article 13(2) of the Access Directive requires that "... any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits". Recital 20 of the Access Directive explains further that "[t]he method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits". ComReg was also mindful to ensure a consistent regulatory approach and to ensure no discrimination in the treatment of undertakings providing electronic communications networks and services (pursuant to Regulation 16 of the Framework Regulations). ComReg confirms, it also took account, in acting in the pursuit of its objectives as set out in Section 12 of the Act and Regulation 16 of the Framework Regulations, the importance of promoting efficiency, sustaining competition, promoting efficient investment and innovation whilst giving the maximum benefit to end-users, as more particularly set out at Regulation 6 of the Access Regulations.

⁴⁶¹ See ComReg's consideration of TMI's views in Sections 3 to 8 of this Decision.

no existing or potential effective constraints on MSPs when setting their MTRs or other wholesale terms and conditions of supply. The nature of the problem identified is thus one of persistent market failure with a clear and imminent risk of exploitative and/or exclusionary competition problems. Thus, ComReg is required to impose remedies appropriate to the competition problems identified in all of the Relevant MVCT Markets. It is ComReg's view that the similar characteristics and competition problems identified in all of the Relevant MVCT Markets justify a similar regulatory treatment. Furthermore, in addition to potentially not providing sufficient protection against the competition problems identified in section 7 above, asymmetric regulatory treatment risks facilitating a range of other possible distortions in retail markets. Such distortions include promoting inefficient entry, impeding retail pricing flexibility, and/or reinforcing the ability of larger MSP to implement certain retail pricing strategies which can further impede entry and growth of smaller Service Providers.

- 9.34 Regarding TMI's comments that neither a finding of SMP nor a price control obligation was contemplated by it, ComReg has already addressed this issue in section 6 above. In this regard, ComReg notes TMI's presence in other European Markets, and that TMI is, or ought to be, familiar with the EU (and associated national) regulatory framework in relation to MVCT markets. In this regard, ComReg would also note that Tesco Mobile made a submission⁴⁶² to the European Commission in 2008 when the 2009 Termination Rate Recommendation was being formulated. It is clearly recommended by the European Commission that any forbearance of regulation on grounds of new entry or small market share should be time-limited in view of the other possible distortions that such asymmetric regulation can generate. As also noted in the MVCT Consultation⁴⁶³ and section 6 of this Decision, TMI is a 50:50 joint venture with O2 Ireland who itself is a long established MSP with significant experience in and knowledge of the regulation of MVCT markets. While ComReg appreciates that TMI could not know with certainty that it could be designated as having SMP (until such a decision had been taken), based on the history of communications with ComReg⁴⁶⁴, TMI's presence in other markets, its ownership structure and evidence from TMI's internal documentation⁴⁶⁵, it certainly could not have discounted the possibility of *ex ante* regulation and/or reasonably expected *ex ante* regulation was not possible. ComReg finds it difficult to conceive that TMI did not know that there was the possibility that it could, arising from the analysis

⁴⁶² See

http://ec.europa.eu/information_society/policy/ecomms/doc/library/public_consult/termination_rates/t esco.pdf.

⁴⁶³ See footnote 39 of the MVCT Consultation.

⁴⁶⁴ For example, TMI would have been aware as far back as November 2010 (when ComReg first contacted it) that ComReg was engaging in analysis of the mobile termination markets.

⁴⁶⁵ Internal communications obtained by ComReg from TMI in response to various Statutory Information Requests.

of the MVCT markets, be designated as having SMP (and have *ex ante* obligations imposed upon it).

Insufficient quantitative analysis in the RIA

- 9.35 We noted Eircom Group's views in paragraph 9.20 above that, while agreeing with the overall RIA conducted, the RIA lacked a quantified assessment of the efficiency or cost of ComReg's proposals.
- 9.36 ComReg notes that the MVCT Consultation and this Decision both explore, in detail, the suitability of different regulatory approaches for the Relevant MVCT Markets. As such, the overall analysis (and in particular sections 7 and 8 of the MVCT Consultation and of this Decision) considers the likely and potential impacts of various regulatory options taking account of the specific characteristics of the Relevant MVCT Markets. Therefore, this RIA forms part of a broader regulatory impact assessment which extends throughout a number of sections in the MVCT Consultation and this Decision.
- 9.37 In particular, ComReg's assessment of Competition Problems and Impacts on Competition and Consumers (section 7 of the MVCT Consultation and of this Decision) considers the ability and incentives for exploitative behaviour and/or exclusionary strategies to arise as a consequence of having SMP positions in the Relevant MVCT Markets. In particular, price-related competition problems have been identified as a primary concern. ComReg has demonstrated that, in the absence of appropriate *ex ante* regulation, SMP MSPs would have the ability and incentives to set MTRs above the level that would pertain under a hypothetical competitive outcome. Section 7 of the MVCT Consultation and this Decision demonstrates how such behaviour would potentially result in a structure of prices in retail and wholesale markets that would be less efficient, restrict or distort competition, distort customer choice, and generate adverse distributional impacts. Furthermore, SMP MSPs would have the ability and incentives to obstruct effective MVCT access with a view to extracting excessive MTRs and/or raising rivals' costs/impeding competition in downstream retail markets.
- 9.38 In ComReg's remedies assessment (section 8 of the MVCT Consultation and of this Decision), ComReg has further undertaken a detailed assessment of a range of possible regulatory options for addressing the competition problems identified. In this regard, ComReg took a balanced and incremental approach to its assessment of regulatory options by first considering the lightest potential form of remedial action and the likely resulting impacts on competition and consumers. ComReg then incrementally considered additional remedial action with a view to revealing the appropriate mix of regulatory obligations to address the specific market failures and consequential competition and distributional impacts identified.
- 9.39 The MVCT Consultation and this Decision thus incorporate a full and objective assessment of the various regulatory options available for the Relevant MVCT Markets in an Irish context. As part of that assessment, ComReg has undertaken detailed analysis of the specific structure and characteristics of the Relevant

MVCT Markets and a graduated impact assessment of potential regulatory options for addressing each of the specific problems identified (however a formal cost benefit analysis is not necessary). This RIA should, therefore, be read in conjunction with the MVCT Consultation and this Decision as a whole.

Other matters

- 9.40 We noted in paragraph 9.21 that Vodafone raised a number of issues concerning the potential move to Pure LRIC pricing and the need for ComReg to consider such a course of action is compatible with its statutory obligations and duties. However, as noted previously, insofar as price control obligations are concerned, the MVCT Consultation and this Decision seeks only to impose a price control obligation of cost-orientation, with the detailed nature of this to be specified arising from the outcome of the Separate Price Control Consultation as now reflected in the Separate Price Control Decision. As such, Vodafone's comments on pure LRIC are not relevant to this Decision, as ComReg has made no finding herein in relation to the detailed specification of the cost-orientation obligation to be imposed on all SMP MSPs. These issues are addressed in detail in the Separate Price Control Decision.
- 9.41 We also noted in paragraph 9.22 that H3GI did not agree, although it did not outline its reasoning other than to refer to its response to previous questions. In the absence of specific comments from H3GI on the RIA, ComReg would note that it has addressed H3GI's responses to its previous questions elsewhere in this Decision.

ComReg's Position

- 9.42 For the purposes of the analysis of the Relevant MVCT Markets, ComReg has considered Respondents' views in paragraphs 9.27 to 9.41 above. ComReg has updated its RIA, where appropriate in light of Respondents' views and its final RIA is now set out in Appendix H of this Decision (the 'Final RIA'). The Final RIA should be read in conjunction with MVCT Consultation and the analysis and discussion set out in this section 9 and elsewhere in this Decision.
- 9.43 Having considered the impacts on stakeholders and competition, including the impact on the development of competition within the internal market and ultimately the impact on end users, it is ComReg's position that regulatory forbearance is not appropriate and that Option B represents the most justified, reasonable and proportionate of the available regulatory approaches. Thus, ComReg's reasoned final position is to impose the Access, Transparency, Non-discrimination, and Price Control obligations as set out in section 8 of this Decision.⁴⁶⁶

⁴⁶⁶ In considering Price Control, the impact on stakeholders of a cost orientation obligation is considered. As noted previously, the detailed specification of the cost orientation was considered in the Separate Pricing Consultation and now the Separate Pricing Decision within which the regulatory impact on SMP MSPs and other stakeholders has been further considered.

10 Next Steps

- 10.1 ComReg has set out its position in the preceding sections regarding its analysis of the Relevant MVCT Markets and has today published its Decision on its publicly available website www.comreg.ie.
- 10.2 Each of the following MSPs are hereby notified of this Decision:
- Hutchison 3G Ireland Limited;
 - Lycamobile Ireland Limited;
 - Meteor Mobile Communications Limited;
 - Telefónica Ireland Limited (including Liffey Telecom Limited);
 - Tesco Mobile Ireland Limited;
 - Vodafone Ireland Limited;

Appendix A Legal and Regulatory Background

- A.1 This market review is being undertaken by ComReg in accordance with the obligation under the **Framework Directive**¹ that NRAs should analyse and define the Relevant MVCT Markets taking the utmost account of the **2007 Recommendation**² (including the **Explanatory Note to the 2007 Recommendation**³) and the **SMP Guidelines**⁴.
- A.2 Regulation 26 of the Framework Regulations⁵ requires that ComReg, taking the utmost account of the 2007 Recommendation and of the SMP Guidelines, defines relevant markets appropriate to national circumstances, in accordance with the principles of competition law.
- A.3 The European Commission refers in the 2007 Recommendation to the wholesale Relevant MVCT Markets as follows:
- “Voice call termination on individual mobile networks.”*⁶
- A.4 Having regard to Regulation 25 of the Framework Regulations, where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged under Regulation 27(4) of the Framework Regulations to designate an undertaking(s) with SMP in that market and impose on such undertaking(s) such specific obligations as it considers appropriate, or maintain or amend such obligations where they already exist.
- A.5 Where an operator is designated as having SMP in a relevant market, ComReg is obliged, under Regulation 8(1) of the **Access Regulations**⁷,

¹ Articles 15 and 16 of 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**').

² 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**').

³ European Commission Staff Working Document, Explanatory Note accompanying the 2007 Recommendation (the '**Explanatory Note to the 2007 Recommendation**'), (C(2007) 5406).

⁴ 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**').

⁵ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) (the '**Framework Regulations**'). The Framework Regulations transpose the Framework Directive.

⁶ Annex to the 2007 Recommendation, point 7.

to impose on such an operator such of the obligations set out in Regulations 9 to 13 of the Access Regulations as it considers appropriate. Obligations imposed must:

- (a) be based on the nature of the problem identified;
- (b) be proportionate and justified in the light of the objectives laid down in section 12 of the **Communications Regulation Acts 2002 to 2011**⁸, and Regulation 16 of the **Framework Regulations** and Regulation 6 of the **Access Regulations**; and
- (c) only be imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.

A.6 Section 12(1)(a) of the Communications Regulation Acts 2002 to 2011 sets out the objectives of ComReg in exercising its functions in relation to the provision of electronic communications networks, electronic communications services and associated facilities, namely:

- (a) to promote competition;
- (b) to contribute to the development of the internal market; and
- (c) to promote the interests of users within the European Union.

A.7 Overall, in preparing this Decision, ComReg has taken account of its functions and objectives under the Communications Regulation Acts 2002 to 2011, in addition to requirements under the Framework Regulations and the Access Regulations. ComReg has taken the utmost account of the 2007 Recommendation and the Explanatory Note to the 2007 Recommendation, the SMP Guidelines, the European Commission's **2009 Termination Rate Recommendation**⁹ and its **2005 Accounting Separation and Cost Accounting Recommendation**¹⁰. ComReg has further taken account of the European Commission's

⁷ European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011) (the '**Access Regulations**'). The SMP Guidelines also state at paragraph 17 that "NRAs must impose at least one regulatory obligation on an undertaking that has been designated as having SMP".

⁸ Communications Regulation Act 2002 (No. 20 of 2002), as amended by Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011) (the '**Communications Regulation Acts 2002 to 2011**').

⁹ 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**').

¹⁰ 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**').

Notice on Market Definition¹¹ and any relevant common positions adopted by **BEREC**¹².

- A.8 ComReg has also had regard to relevant European Commission comments made, pursuant to Article 7 of the Framework Directive, with respect to other National Regulatory Authorities' (NRAs') market analyses.

¹¹ 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.

¹² Body of European Regulators for Electronic Communications (**BEREC**) as established by Regulation (EC) No 12 11/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office.

Appendix B Consultation with the Competition Authority

- B.1 The following (see pages below) is a copy of the opinion of the Competition Authority setting out its agreement with ComReg's definition of the Relevant MVCT Market(s) and the assessment of competition within such markets.



Alex Chisholm
Chairperson
Commission for Communications Regulation
Abbey Court
Irish Life Centre
Lower Abbey Street
Dublin 1

4th October 2012

Re: Commission for Communications Regulation ("ComReg") Market Review - Voice Call Termination on Individual Mobile Networks

Dear Alex,

Pursuant to Regulation 27(1) of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011) ComReg has consulted the Competition Authority with respect to ComReg's proposed draft measures arising from its analysis of the Mobile Voice Call Termination ("MVCT") markets.

On the basis of the facts and analysis presented by ComReg, the Competition Authority is satisfied that there are no grounds for altering the market definitions proposed by ComReg.

On the basis of the facts and analysis presented by ComReg, the Competition Authority is satisfied that there are no grounds to disagree with ComReg's conclusion that each of the identified Mobile Service Providers should be designated as having significant market power in each of the identified relevant MVCT markets.

Yours sincerely

Isolde Goggin
Chairperson
Competition Authority

Tel: 01 804 5400
E-mail: ig@tca.ie

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Appendix C European Commission Comments

- C.1 The following (see below) is a copy of correspondence from the European Commission setting out its comments pursuant to Article 7 of the Framework Directive.
- C.2 Insofar as the definition of the Relevant MVCT Markets, SMP assessments, SMP designations and the imposition of remedies arising from this Decision are concerned, the European Commission has fully accepted ComReg's position without comment.
- C.3 To the extent that the European Commission has provided comments these relate to matters which are entirely the subject of the detail of the price control obligations as set out in the Separate Pricing Consultation and now subsequently in the Separate Pricing Decision.



Brussels, 12.11.2012
C(2012) 8381 final

Commission for Communications
(COMREG)

Block DEF — Abbey Court — Irish
Life Centre, Lower Abbey St.
Dublin 1
Ireland

Mr Alex Chisholm
Chairperson of the Commission

Fax: +35318788193

Dear Mr Chisholm,

Subject: Commission Decision concerning: Case IE/2012/1371 — Voice call termination on individual mobile networks in Ireland; Case IE/2012/1372 — Call termination on individual public telephone networks provided at a fixed location in Ireland — Remedies; and Case IE/2012/1373 — Voice call termination on individual mobile networks in Ireland — Remedies.

Comments pursuant to Article 7(3) of Directive 2002/21/EC

I. PROCEDURE

On 11 and 12 October 2012, the Commission registered notifications from the Irish national regulatory authority, Commission for Communications (ComReg),¹ concerning (i) the review of the market for voice call termination on individual mobile networks in Ireland, including remedies,² and (ii) remedies related to the market for call termination on individual public telephone networks provided at a fixed location³ in Ireland.

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Corresponding to market 7 in Commission Recommendation 2007/879/EC 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

³ Corresponding to market 3 in Commission Recommendation 2007/879/EC 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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË — Tel. +322991111

The national consultation⁴ on the first issue ran from 23 May 2012 to 19 July 2012, and on the second issue from 28 June 2012 to 10 August 2012.

On 19 October 2012, a request for information⁵ (RFI) was sent to ComReg and a response was received on 24 October 2012. The deadline for the EU consultation under Article 7 of the Framework Directive is 12 November 2012.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

II.1. Background

Fixed termination

The market for call termination on individual public telephone networks provided at a fixed location in Ireland was previously notified to and assessed by the Commission under cases IE/2005/0191,⁶ IE/2007/0701,⁷ IE/2009/0917⁸ and IE/2011/1220.⁹

In the previous market review, ComReg defined seven relevant markets and stated that all fixed telecommunication operators providing call termination services had significant market power (SMP) in their networks. ComReg proposed to impose on Eircom the obligations of access, transparency, non-discrimination, accounting separation, cost orientation and cost accounting. Alternative network operators (ANOs) were made subject to transparency, non-discrimination and price control obligations. The specific obligation imposed on Eircom was to ensure that FTRs were calculated using a forward-looking, long-run incremental costs (FL-LRIC) model. ANOs designated with SMP were exempt from cost orientation until they reached a 5% share of total direct access paths. If the ANO did not reach the 5% share of the market within five years, ComReg would impose a price control regulation. ComReg has not yet decided whether any FSP has reached this 5% threshold and, accordingly, the FTRs charged by ANOs have not to date been subject to any price control obligations.¹⁰

In its comments on the 2007 market reviews, the Commission considered ComReg's approach to alternative operators as inconsistent with EU practice and invited ComReg to revisit its market analysis. The Commission then invited ComReg to align its forthcoming review with the Commission's Termination Rates Recommendation and set FTRs for all SMP operators at the level of costs incurred by an efficient operator to

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 (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ SG-Greffe (2005)D/202695.

⁷ SG-Greffe (2007) D/207013.

⁸ C(2009)4570.

⁹ C(2011)4377.

¹⁰ In Case IE/2011/1220, ComReg intended to revise the current FL-LRIC cost-accounting model in 2012.

achieve symmetric price control remedies on the relevant market. The Commission also underlined the need for a coherent European approach regarding the cost accounting method.

Mobile termination

The market for voice call termination on individual mobile networks in Ireland was previously notified to and assessed by the Commission under cases IE/2008/0746, IE/2005/0216 and IE/2004/0073.¹¹ Furthermore, ComReg specifies in the response to the RFI that some recent MTR reductions (not notified to the Commission) were made in Ireland on the basis of a voluntary glide path approach. According to ComReg, these reductions were not the result of a draft measure under Article 7(3) of the Framework Directive and, accordingly, would not require notification to the Commission under the Article 7 consultation procedure.

In its 2008 Decision, the Commission underlined the need for a coherent European approach regarding the cost accounting method.

II.2. Market definition

Regarding mobile call termination, ComReg concludes that the product market consists of the provision by a mobile service provider¹² of a wholesale service to other undertakings for the purpose of terminating incoming voice calls to mobile numbers in respect of which the MSP is able to set MTRs.

ComReg defines six separate wholesale markets on the networks of Hutchison 3G Ireland Limited (H3G), Lycamobile Ireland Limited (Lycamobile), Meteor Mobile Communications Limited (Meteor), Telefónica Ireland Limited (O2), Tesco Mobile Ireland Limited (TMI), and Vodafone Ireland Limited (Vodafone).

As regards fixed call termination, a new market review is currently on-going and expected to be notified in Q1 2013. The currently imposed remedies relate to the previous market review.

II.3. Finding of significant market power

ComReg proposes to designate all six MSPs as having SMP in their respective markets. The main criteria considered by ComReg are (i) market share, relative strength of existing competitors and pricing behaviour, (ii) control of infrastructure not easily duplicated, (iii) barriers to entry and potential competition and (iv) countervailing buying power.

ComReg considers that the two MVNOs, TMI and Lycamobile, are the only virtual operators able to set their own MTRs.¹³

¹¹ SG-Greffe(2008) D/200677, SG-Greffe(2005)D/204274 and SG-Greffe(2004) D/203078.

¹² Mobile service providers are either mobile network operators (MNOs) or mobile virtual network operators (MVNOs). While the level of network access provided under MVNO arrangements can vary, MVNOs in Ireland are similar in that they have neither an allocation of spectrum nor any radio access network (mast, antennae, etc.) infrastructure.

¹³ Two other MVNOs, Postfone and Blueface, were not deemed to fall within the scope of the relevant market given they do not charge, nor do they currently have the ability to set, an MTR. However, if they (or any other new entrant) begin to do so, ComReg intends to carry out a market analysis according to the EU consultation procedure.

II.4. Regulatory remedies

ComReg intends to impose the following obligations on SMP operators in both fixed and mobile termination markets: (i) access, (ii) non-discrimination, (iii) transparency, and (iv) price control.

ComReg considers that the long-run, incremental costs methodology is the most appropriate approach for calculating FTRs and MTRs. However, while FTRs will be based on a bottom-up long-run incremental cost (BU-LRIC) model, MTRs will be based on a BU-LRIC benchmark approach.

ComReg is of the view that there should be the same implementation dates in both markets in order to minimise distortions and to ensure consistent application. Consequently, implementation of the FTRs and MTRs resulting from the proposed methodologies is planned for 1 July 2013.

Fixed Termination

ComReg explains that, for the current FTRs in place from 1 July 2012, the industry expects that reduced FTRs will remain in place for at least 12 months, i.e. up to 30 June 2013. ComReg considers that an implementation date of 1 July 2013 will give providers sufficient time to adjust their forecasts and other relevant data.

ComReg proposes that all SMP operators be made subject to the cost-orientation obligation. Eircom's costs would no longer be calculated according to a FL-LRIC model but be based on a pure BU-LRIC methodology. For the other SMP operators, the current price control imposed on them (such as explained in II.1) will be amended to cost-orientation, also based on a pure BU-LRIC methodology.

The proposed BU-LRIC-based FTRs are set out in the table below:

BU-LRIC FTR		
Start date	Cent per minute (blended rate¹⁴)	Efficient network technology¹⁵
1 July 2013	0.098	TDM
1 July 2014	0.085	TDM/NGN
1 July 2015	0.072	NGN

Eircom's national termination rates include primary, tandem and double tandem termination rates. The majority of traffic is exchanged between the other SMP operators and Eircom at the primary level. ComReg specifies that, for the purposes of the current draft measure, only the primary FTR is relevant.¹⁶

¹⁴ Blended rate per minute of the cost per minute and the cost per call, where the average call duration is 2.66 minutes.

¹⁵ Taking into account the Commission's guidance that the cost model should be based on the most efficient technologies, subject to their availability in the timeframe considered by the model, ComReg's model for FTRs is based on a mix of PSTN and NGN as the incumbent and ANOs have confirmed that they have not yet procured an NGN voice solution for 2013 and will gradually introduce the upgrade, possibly from 2014. At this stage, ComReg therefore believes that the most efficient means of terminating fixed calls for 2013 and 2014, in the absence of a fit-for-purpose NGN solution, is the current network in place, i.e. TDM equipment, albeit with a transition to a NGN solution envisaged in 2014. However, given the incumbent has made it known that it is procuring a NGN voice solution, ComReg has modelled a full NGN voice network in the pure BU-LRIC cost model for 2015.

¹⁶ The tandem and double-tandem termination rates are defined as 'transit' and currently subject to the regulatory regime applicable to the wholesale market for call transit services. Tandem and double-

Mobile Termination

Maximum MTRs will be based on a benchmark approach, following a glide path¹⁷ reduction towards a target MTR of € 1.02/min to be achieved as of 1 July 2013.

MTRs changes towards benchmarked rate	
<u>Start date</u>	<u>Cent per minute</u>
1 July 2012	4.15
1 January 2013	2.58
1 July 2013	1.02

All six MSPs will be subject to a symmetric MTR as of 1 January 2013 and will, as of 1 July 2013,¹⁸ charge rates that are not higher than the benchmarked pure BU-LRIC MTR.

The maximum target MTR of € 1.02/min was calculated using a benchmark based on the countries that have notified pure BU-LRIC models for MTRs to the European Commission, i.e. UK, Belgium, Portugal, Spain, France, Denmark and Italy.¹⁹ The benchmark will therefore be visible to ComReg and industry on the Commission website and in the updated BEREC snapshot reports published bi-annually.

ComReg stresses that, due to *inter alia* limited resources, it is not at this stage in a position to develop a pure BU-LRIC model. Therefore the benchmark approach for setting MTRs will apply until a pure BU-LRIC model for MTRs is available in Ireland. ComReg intends to make this model available for review as soon as possible, but no later than July 2014, i.e. the maximum timeframe allowed for in the Recommendation for using an alternative approach. However, ComReg intends to conduct a market review on a six-monthly basis after 1 July 2013 in order to ensure that the MTRs in Ireland reflect the current average of all notified MTRs. ComReg further stresses that the review may lead to a revision of the benchmark MTR and consequently of the maximum permitted MTR in Ireland. In that case, i.e. if a change to the rate of 1.02 cent per minute is considered necessary prior to the completion of the BU-LRIC model, ComReg would act

tandem termination rates will be considered in further detail in ComReg's upcoming consultations as part of the review of the wholesale call origination, wholesale call transit, and wholesale call termination markets.

¹⁷ The starting point of the glide path is the weighted average of the current MSP rates in Ireland (such as published in the most recent BEREC snapshot). MTRs are generally differentiated by peak, off-peak and weekend usage.

¹⁸ The current voluntary glide path in place for the four MSPs in Ireland previously designated with SMP runs until the end of 2012. As a result of the proposal to implement the benchmark approach from 1 July 2013, ComReg also considers it necessary to extend the current glide path approach from 1 January 2013 to 30 June 2013 by making a step change to the existing MTRs. It is proposed that this step change would be a straight line cut from the MTR on 1 January 2013 to reach the compliant pure LRIC MTR by 1 July 2013. As regards the two additional MSPs that ComReg proposes to designate with SMP for the first time (i.e. TMI and Lycamobile), ComReg proposes that they would be subject to the same MTR as those applicable to the four other SMP MSPs as of 1 January 2013.

¹⁹ Initially, ComReg considered basing its benchmark on all those countries where final and binding BU-LRIC decisions were in place. However, given that at the date of publication of ComReg's consultation, France was the only Member State where this decision was not challenged by operators, ComReg amended its approach and based its MTR benchmark on those countries (except the Netherlands) which had notified their models to the Commission.

in accordance with the consultation requirements set out in Articles 6 and 7 of the Framework Directive.

III. COMMENTS

The Commission has examined the notification and the additional information provided by ComReg and has the following comments.²⁰

Need for a consistent European approach for termination rates

Implementation date

ComReg proposes to implement termination rates consistent with the outcome of a pure BU-LRIC model only as of 1 July 2013. This is not in line with the Commission's Termination Rates Recommendation,²¹ according to which, NRAs should ensure that termination rates are implemented at a cost-efficient (BU-LRIC) level by 31 December 2012.

As regards mobile termination, for the period from 1 July 2013 until the adoption of a pure BU-LRIC model (expected by 1 July 2014 at the latest), ComReg proposes to set MTRs in Ireland on the basis of a benchmarking method. Recital 22 and of Recommend 12 of the Termination Rates Recommendation exceptionally allow NRAs, in the event of limited resources, to apply cost-efficient termination rates consistent with the Recommendation using an alternative approach. However, even in those circumstances, NRAs must comply with the deadline of 31 December 2012 set out in Recommend 11 of the Termination Rates Recommendation.

Regarding fixed termination, ComReg argues that a delayed introduction of cost-efficient FTRs by 1 July 2013 would better match business expectations. The Commission would like to stress that the Recommendation was issued in 2009 and that therefore market players are aware of the implementation dates. The timeframe set out in the Recommendation aims not only to ensure the sustainability of the sector but also to maximise consumer benefits as soon as possible. In its 2007 decision on the market review,²² the Commission invited ComReg to revisit its analysis as soon as a common costing approach for fixed termination is established at EU level. This would have allowed ComReg to ensure a more gradual transition towards BU-LRIC-based rates and to meet the implementation date set in the Recommendation.

Against this background, the Commission considers that ComReg should review its proposed glide paths for both fixed and mobile termination rates. The Commission proposes to call upon ComReg to implement the target MTR and FTR levels (€ 1.02/min and € 0.098/min respectively) by 31 December 2012, thus aligning the implementation dates with the deadline set in the Termination Rates Recommendation.

However, the Commission acknowledges that bringing in cost-efficient MTRs as of 1 January 2013 would result in a steep reduction over a very short time period.

²⁰ In accordance with Article 7(3) of the Framework Directive.

²¹ Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (Termination Rates Recommendation), 2009/396/EC, OJ L 124, 20.5.2009.

²² SG-Greffe (2007) D/207013.

The notified draft measure also proposes to impose cost-efficient FTRs on alternative operators that were not previously subject to cost-orientation. ComReg is of the view that there should be the same implementation dates in both markets in order to minimise distortions and ensure consistent application. Against this background, the Commission considers that a short delay in implementing the cost-oriented fixed and mobile termination rates, which in no circumstances should last beyond 1 July 2013, may exceptionally be acceptable in this case.

Benchmarking approach

According to ComReg, its benchmark is based on rates in the Member States that have *notified* pure BU-LRIC models to the Commission (with the exception of the Netherlands).

On this point, the Commission would like to underline that, for the purpose of benchmarking, an average of termination rates set by the NRAs by way of final decisions in the Member States should be applied.²³ This is without prejudice to an appeal pending against a final decision, as far as the rates adopted therein are implemented, i.e. in force.

The Commission acknowledges that in this particular case, the proposed MTR (€ 1.02/min) appears to be consistent with the EU simple average of the Member States that have implemented a pure BU-LRIC model by a way of a final decision, and that therefore the outcome of ComReg's benchmarking is in line with the Commission's recommended approach. The following table, also cited by ComReg in its notification,²⁴ lists all the Member States that have *adopted* the pure BU-LRIC model by a way of a *final decision* and a simple arithmetic average of the adopted rates in those countries yields € 1.02/min:

Country (Case number)	Target rate €/min)	Deadline
BE (BE/2010/1086)	1.08	01/01/2013
FR (FR/2011/1200)	0.80	01/01/2013
PT (PT/2012/1312)	1.27	01/01/2013
IT (IT/2011/1219)	0.98	01/07/2013
ES (ES/2012/1291)	1.09	01/07/2013
DK (DK/2012/1342)	1.07*	01/01/2013
UK (UK/2010/1068)	0.86**	01/04/2013

* DKK 0.08/min — corresponds to the exchange rate on 20 June 2012.
 ** Adjusted rate by Ofcom following the Competition Appeal Tribunal's judgment, according to which the MTRs glide-path would target 0.67ppm (2008/09 prices) on 1 April 2013. This corresponds to the exchange rate on 24 July 2012.

In view of future reviews of the benchmark rate, the Commission would therefore like to invite ComReg to clarify in its final decision that it includes in its benchmarking exercise all pure BU-LRIC MTRs notified to the Commission, at the target level, and as specified in the *final decisions taken* by the NRA.

²³ See Commission comments in cases EL/ 2012/1343 and LV/2012/1356.

²⁴ With one difference, the UK rate of 0.083 €/min was used as it corresponds to the exchange rate of 9 October 2012.

Pursuant to Article 7(7) of the Framework Directive, ComReg shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁵ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²⁶ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.²⁷ You should give reasons for any such request.

Yours sincerely,
For the Commission,
Robert Madelin
Director-General

²⁵ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of 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 301, 12.11.2008, p. 23.

²⁶ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2298 87 82.

²⁷ The Commission may inform the public of the result of its assessment before the end of this three-day period.

Appendix D Updated Retail Trends Analysis

- D.1 This Appendix D provides an updated analysis, as of June 2012, of the retail mobile market trends as discussed in section 3 of the MVCT Consultation and further considered in section 3 of this Decision.
- D.2 Generally, it has not been possible to report on figures for Lycamobile given the entered the retail market (and wholesale market) in July.

Growth in mobile phone subscriptions

- D.3 As shown in Figure A below, in the six months to June 2012, mobile subscriptions (excluding mobile broadband subscriptions) have remained broadly flat, growing by less than 1%. Overall, in the period Q1 2008 to Q2 2012 mobile subscriptions have declined by 0.2% and stood at 4,920,327 subscribers at Q2 2012.

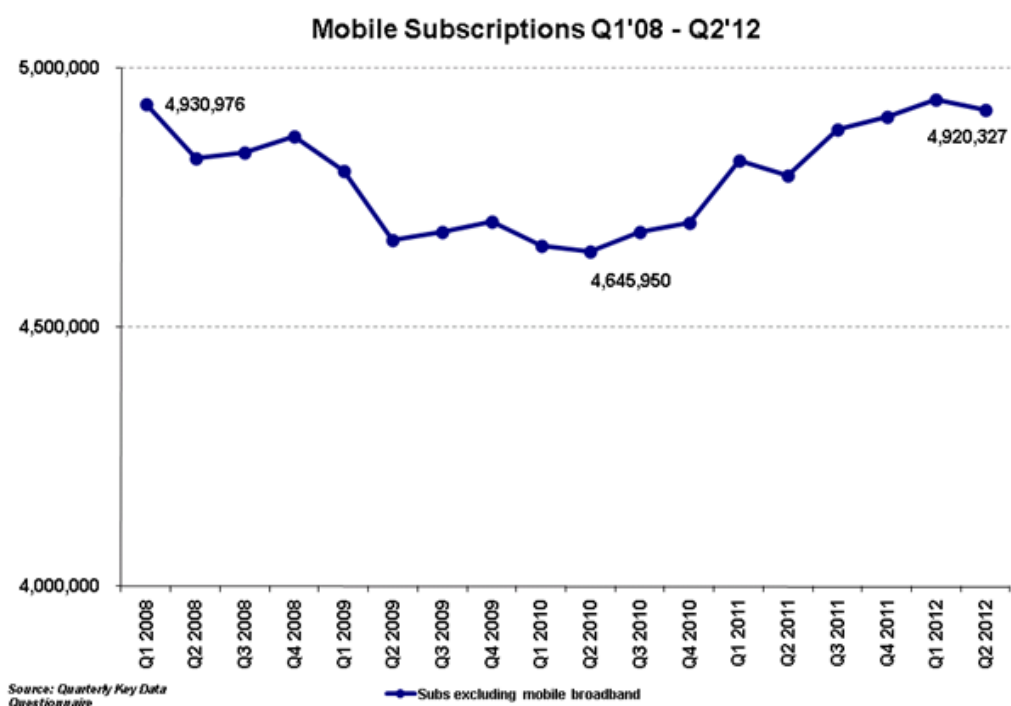


Figure A: Growth in Mobile Phone Subscriptions, Q1'08 – Q2'12

Decline in fixed line ownership

- D.4 As illustrated in Figure B below, the number of fixed line access paths¹ has fallen (with the exception of a slight pick-up in the six months to June 2012) continuously since December 2007. Overall, in the period Q1 2008 to Q2 2012 fixed line ownership (as measured by fixed line access paths) has fallen by 15.7%. However, it should be noted that

¹ PSTN and ISDN access paths

these figures exclude UPC’s telephony subscribers (provided over their cable network) which, as Q2 2012 amounted to 205,800 subscribers².

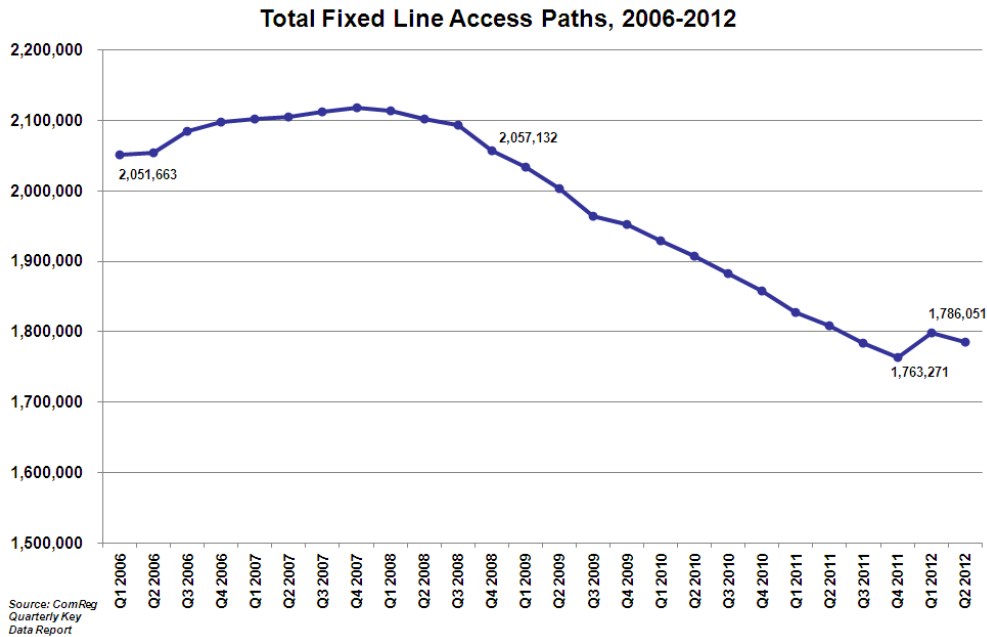


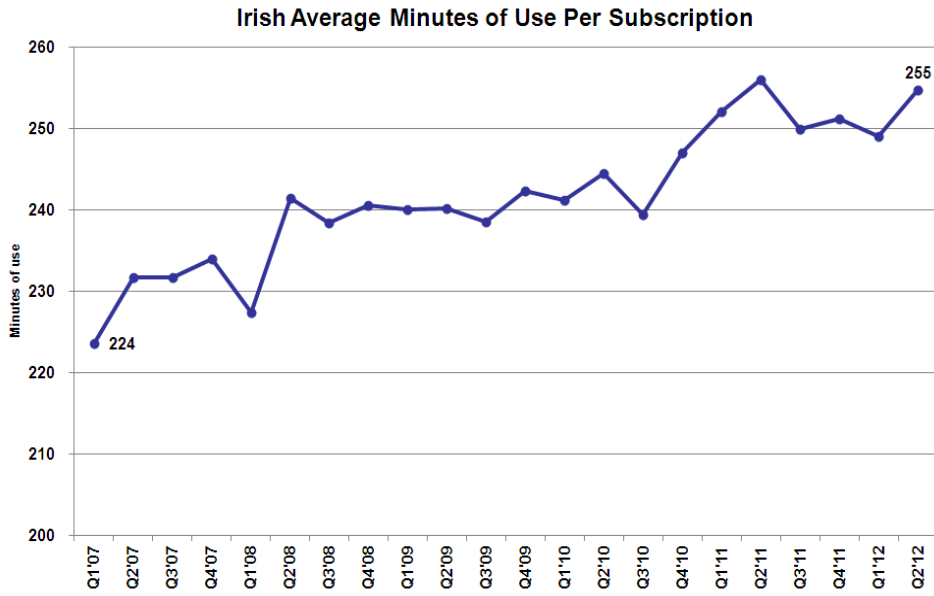
Figure B : Decline in Fixed Line Ownership, Q1’06 – Q2’12

Growth in use of mobile voice services

D.5 As noted in Figure C below, in the six months to June 2012, the average number of minutes of use³ (‘MoU’) by Irish mobile subscribers had grown by 1.4%. In the period Q1 2007 to Q2 2012, MoU by Irish mobile phone customers grew by 13.9%, and, at Q2 2012 stood at 255 minutes of usage per month. Over the period, the average quarterly growth rate for MoU is 1%.

² See page 13 of Liberty Global press release setting out results for Q2 2012 at <http://www.lgi.com/PDF/press-release/UPC-Holding-Press-Release-Q2-2012-FINAL.pdf>

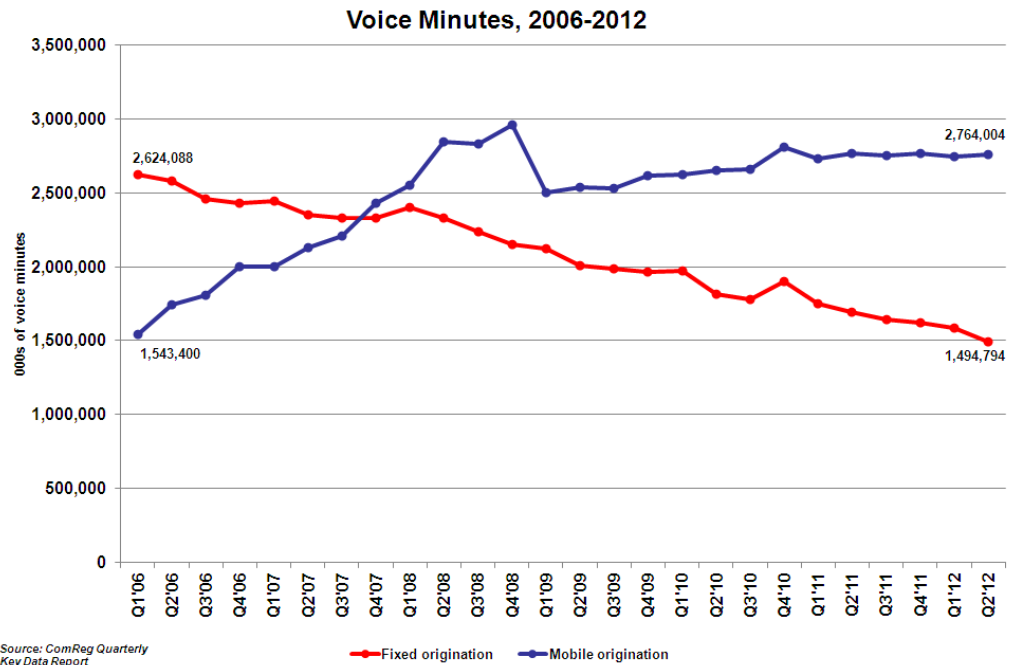
³ In its Quarterly Key Data Report, ComReg defines Minutes of Use as: “Minutes of Use per month per average user is calculated by dividing total voice minutes of use on the operator’s network by the average subscriber base during the quarter by 3 to calculate a monthly usage figure. It is measured in minutes and should exclude traffic related to Mobile Data Services. Both incoming and outgoing minutes should be included to both fixed networks and mobile networks (off-net and on-net) and roaming minutes should exclude incoming roaming minutes, i.e. calls made by foreign roamers on Irish mobile networks.”



Source: ComReg Quarterly Key Data Report

Figure C: Irish average monthly minutes of mobile use, Q1'07 – Q2'12

D.6 Figure D below illustrates the growth of mobile voice traffic over the period Q1 2006 to Q2 2012 and the decline of fixed voice traffic in the same period. Overall, mobile voice traffic has grown by approximately 3% in the same period. Overall, mobile voice traffic has grown by approximately 79% in the period, with an average quarterly growth rate of less than 1%. However, in the period Q4 2008 to Q2 2012, mobile voice traffic has actually declined by 7%. In contrast, fixed voice traffic has fallen by 43% in the period Q1 2006 to Q2 2012.



Source: ComReg Quarterly Key Data Report

Figure D: Irish voice minutes, Q1 2006 – Q2 2012

Mobile on-net and off-net traffic trends

D.7 As illustrated in Figure E below, with the exception of O2 (which showed a minor decline) MSPs generally experienced either continued growth or stability in the percentage of their overall retail on-net traffic in the six months to June 2012. Notably, H3GI and TMI have, since the periods reported upon in the MVCT Consultation (H2 2011), experienced the greatest growth in on-net traffic.

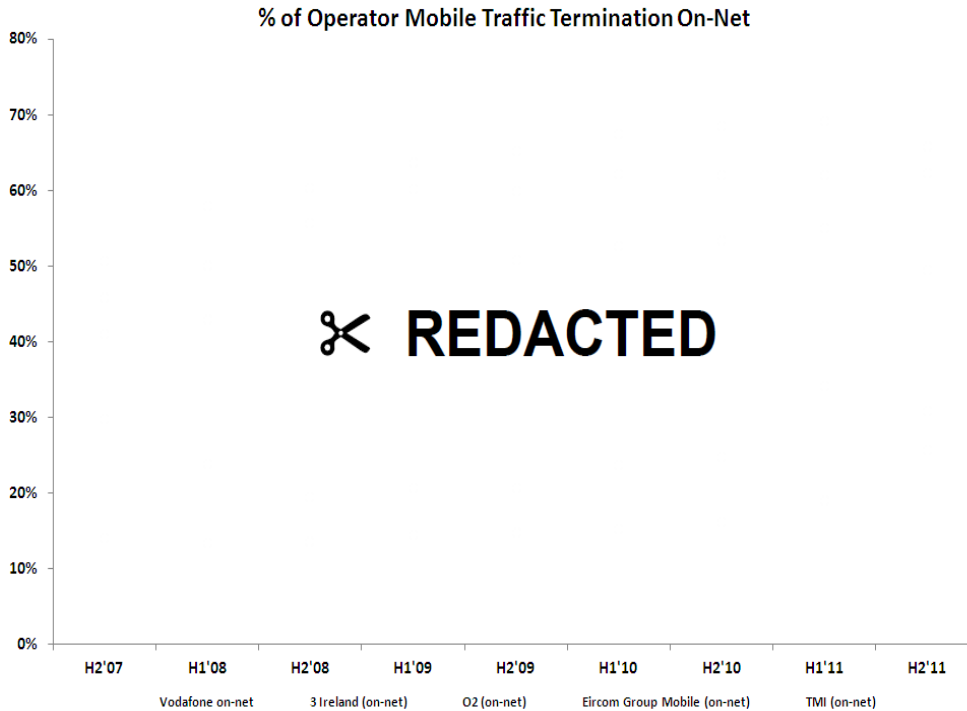


Figure E: MSPs’ on-net termination, 2007-2012

D.8 Figure F below shows the weighted average⁴ off-net (termination on another MSP or FSP) and on-net (self-supplied) termination of retail traffic for the 5 main MSPs⁵ in the period H2⁶ 2007 to H1 2012. As at H1 2012, off-net termination counted for 39.9% having fallen from 54.3% in H2 2007. Similarly, on-net termination grew from 45.7% in H2 2007 to 60.1% in H1 2012.

⁴ Given the varied on-net/off-net traffic profiles that each MSP has experienced over time, ComReg has, in the relevant period, weighted all individual MSPs’ traffic profiles by their individual market shares (as measured by subscriptions). These are then aggregated for the relevant time period.

⁵ H3GI, Meteor, O2, TMI and Vodafone (Lycamobile figures are too small to report).

⁶ Throughout this Consultation Paper, ‘H’ refers to half year. For example, H1 refers to the half year ending 30 June, whereas H2 refers to the half year ending 31 December.

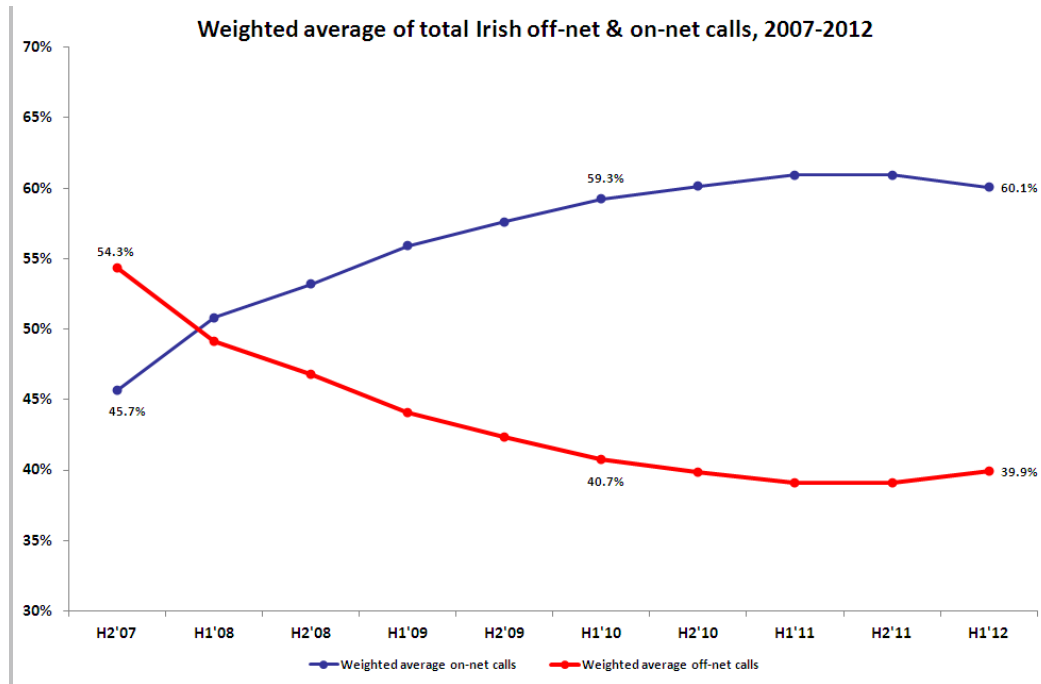


Figure F: Weighted Average of Off-Net and On-Net Termination across Main MSPs, 2007-2012

Switching Trends

- D.9 Figure G below highlights the continued growth in Mobile Number Portability (MNP) in Ireland. Almost three million numbers have been ported since MNP was introduced in 2003 and is somewhat indicative of the level of switching in the retail mobile market. In the four years to June 2012, approximately 96,000 numbers have, on average, been ported every quarter. Over the most recent 12 month period, approximately 419,000 numbers were ported, equating to 8.5% of the total mobile subscription base.
- D.10 Building on the switching behaviour captured by the 2011 Market Research⁷, a ComReg consumer survey⁸ conducted by Accent (a market research company) in November 2011 indicated that of the 969 mobile users surveyed, 16% had switched MSP in the previous 12 months. The 2011 Market Research showed that 14% of respondents had switched price plan/package (without switching operator) during the previous 12 months. 33% of respondents at that time indicated that they had at some stage switched their operator, while only 6% had switched during the previous 12 months.

⁷ See paragraph 3.35 and 3.36 of the MVCT Consultation.

⁸ ICT usage among residential consumers: November 2011, Accent, [ComReg Document 11/96a](#).

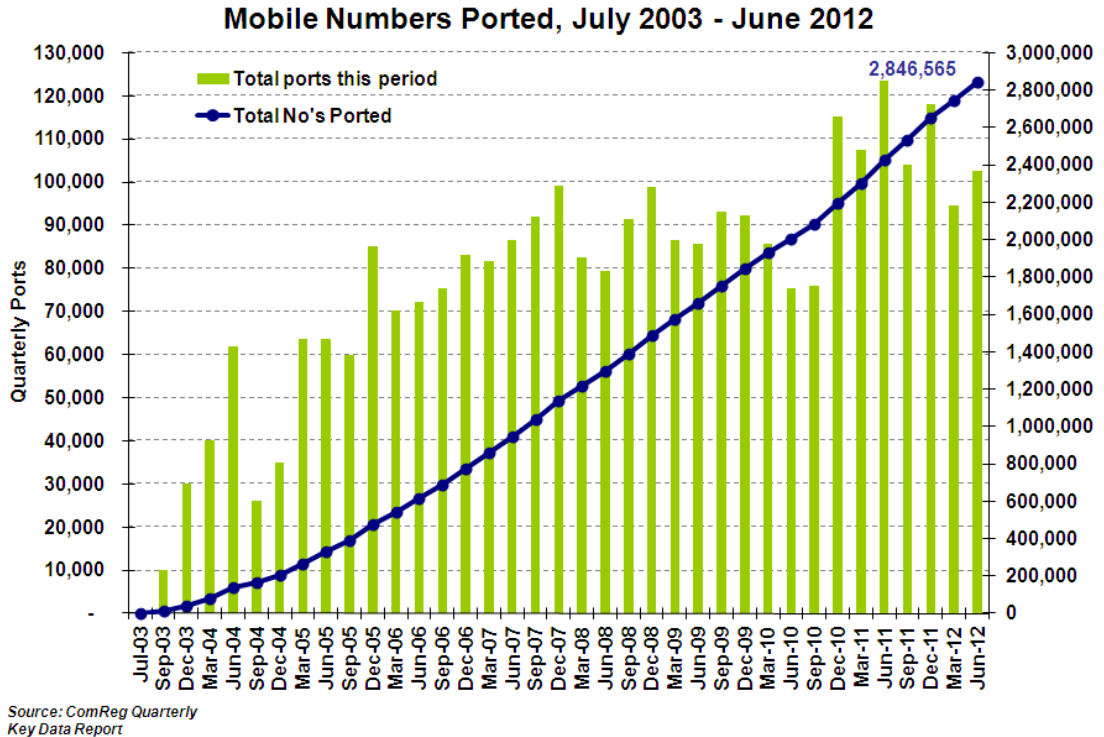


Figure G: Mobile numbers ported in Ireland

Retail Price Plans

- D.11 The MVCT Consultation noted that the structure of retail mobile price plans had changed somewhat since the last reviews of the MVCT markets with the key trends including features such as billpay plans' inclusive minutes capable of being used for calls to any network; the cost of off-net calls within prepay and billpay plans tending not to vary by network called; and the prevalence of free on-net calls amongst prepay and billpay plans. Features of fixed to mobile price plans were also noted and included differential pricing for calls to fixed and mobile networks; differential pricing depending on which mobile network was being called; and evidence of some inclusion within fixed line call bundles of inclusive (but low in number) minutes for calls to mobiles;
- D.12 ComReg has further reviewed the structure of retail mobile price plans, the output of which is set out in D.13 of this Decision. In general, the above trends, as also noted in the MVCT Consultation⁹, remain the same, although the following is highlighted.
- Since the publication of the MVCT Consultation, a number of new plans have been offered and price plans have been ceased (and are legacy plans);
 - Postfone price plans are now included;
 - UPC now offers two packages which include free minutes to mobile;

⁹ See paragraphs 3.38 to 3.41 of the MVCT Consultation.

- Blueface has extended its product offerings to include additional price plans and mobile add-ons.

Other Developments

- D.13 The MVCT Consultation noted a number of other developments including growth in mobile phone usage and the decline in fixed line usage. An update on these issues has been previously discussed in this Appendix D.
- D.14 The MVCT Consultation also considered the emergence of smartphone technology and growth in usage over the period Q1 2007 to Q4 2011. Building on the smartphone usage information identified in the 2011 Market Research¹⁰, the ComReg consumer survey conducted by Accent in November 2011¹¹ indicated that of the 1,000 consumers surveyed, 54% responded that they owned a smartphone, a figure which is up from the 44% that said they owned a smartphone in the 2011 Market Research. The MVCT Consultation also noted that, according to ComReg's Quarterly Report, as of Q4 2011 there was approximately 2.1m active, non-dongle 3G SIMs used in mobile phones¹². This figure has slightly increased over the period to Q2 2012 but remains broadly the same.
- D.15 The MVCT Consultation also discussed the future assignment of spectrum rights of use in the 800MHz, 900MHz and 1800MHz spectrum bands. ComReg announced on 25 May 2012 the commencement of the multi-band spectrum award process¹³. Since then, the auction process concerning the spectrum rights of use has been completed, with the results having been set out by ComReg in its Spectrum Auction Results Information Notice¹⁴. All current MNOs obtained spectrum in this auction. This award process is a vital step in allowing for the next generation of advanced mobile services to be made available for Irish consumers and businesses in the years ahead.

¹⁰ See paragraph 3.35 and 3.36 of the MVCT Consultation.

¹¹ ICT usage among residential consumers: November 2011, Accent, [ComReg Document 11/96a](#).

¹² This is based on the aggregate of all operators' submissions to ComReg's Quarterly Key Data Report. Active 3G Users–Total Number of Dedicated Mobile Broadband Subscriptions (Dongle/modem only). For the purposes of this analysis this figure is used as the total number of smartphones.

¹³ See ComReg 12/53: <http://www.comreg.ie/fileupload/publications/ComReg1253.pdf>

¹⁴ See Results of the Multi-Band Spectrum Award - Information Notice, [ComReg Document 12/123](#), 15 November 2012 (the 'Spectrum Auction Results Information Notice').

Appendix E Retail Mobile Pricing Structures¹

Plan Name	Vodafone Price Plans ⁱ			
	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day ²	Off-Net Plan Pricing Differs by Service Provider Called ³	On-Net Pricing Differs to Off-Net Pricing ⁴
Vodafone Advantage	P	x	✓ FSP DR	✓ DR
Vodafone Lifestyle	P	✓ AC	x	x
My Way: Plus, Complete, Complete Plus (12, 18, 24 month commitment)	B	x	x	✓ F ⁱⁱ
Vodafone Simply 100, 200 and 400 Plans (SIM only)	B	x	x	✓ F
Vodafone Perfect Choice 50 and 100 Plans	B	x	x	✓ F Weekend Only
Perfect Choice 200, 400 and 600 Plans (with FREE anytime calls and texts to Vodafone)	B	x	x	✓ F ⁱⁱⁱ
Perfect Choice Access Plus 150, 500 and 700 Plans (with FREE anytime calls and texts to Vodafone)	B	x	x	✓ F
Perfect Choice Access 150, 300, 500 and 700 Plans (with FREE anytime calls and texts to Vodafone)	B	x	x	✓ F

¹ Legacy price plans highlighted in grey and new price plans or price plans not included in the MVCT Consultation are highlighted in yellow.

² This column (throughout Appendix D) captures whether price of making calls differs according to when call is made during peak, off-peak or weekend. ✓=Yes and x=No. If Yes, then it is also indicated if the difference applies to All Calls (Mobile and Fixed) (AC), Mobile Only (M), Fixed Only (F) or to calls to the Same Network (SN) only.

³ This column (throughout Appendix D) captures whether there is a difference in the price of making 'off-net' calls to subscribers of other mobile service providers (MSPs) or fixed service providers (FSPs) (together 'Service Providers') differs. ✓=Yes and x=No. If Yes, then it is also indicated if this difference applies to one or more Specific Mobile Service Providers (SMSPs) on the one hand, or to FSPs on the other and whether the price is at a Discounted Rate (DR) or is Free (F).

⁴ This column (throughout Appendix D) captures whether the cost of making a call to a subscriber of the same MSP, on the one hand, is different to the cost of calling a subscriber of a different MSP or FSP. ✓=Yes and x=No. If Yes, then it is also indicated whether the on-net call price is at a Discounted Rate (DR) or is Free (F).

Plan Name	O2 Price Plans ^{iv}			
	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
O2 Experience	P	x	✓ FSP DR	✓ DR
O2 Experience Plus	P	x	x	✓ F
O2 Experience More	P	x	x	x
O2 Choices 300, 500, 800, 1200, 2000 6, 12, 18, 24 month contracts	B	x	✓ FSP DR / F	✓ ^v
O2 Choices 300, 500, 800, 1200, 2000 Billpay 30 days, Billpay 12 months (SIM Only)	B	x	✓ FSP DR / F	✓ ^{vi}
O2 Clear 50, 175	B	x	x	x
O2 Clear 350 with free O2 to O2 calls / free text extra / free anytime unlimited evening and weekend calls / free anytime landline extra	B	✓AC Weekend only	✓ FSP DR / F	✓ ^{vii}
O2 Clear 600 with free unlimited anytime O2 to O2 calls / free any network text extra / free unlimited any network evening and weekend calls / free anytime landline extra	B	x	x	✓ F
O2 Clear Unlimited O2 to O2 calls and texts and landline calls	B	x	✓ FSP F	✓ F
O2 Clear 50, 175, 350, 600 (SIM only)	B	x	x	x
O2 Clear Unlimited O2 to O2 and landline, O2 calls and texts (SIM only)	B	x	✓ FSP F	✓ F
O2 Simplicity 100, 150	B	x	x	✓ F
O2 Advance 150, 350, 550, 700 with free unlimited anytime O2 to O2 calls extra, free unlimited evening and weekend calls extra, free unlimited anytime landline calls	B	x	x	✓
O2 Advance 150, 350, 550, 700 (SIM only)	B	✓FO	x	x
O2 Advance 350, 550, 700 (Microsim for iPhone 4)	B	✓FO	x	x

'48' (O2 trading name) Price Plans^{viii}				
Plan Name	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
48's Monthly €10 Membership^{ix} and €20 VIP Membership	P	x	x	x

Postfone Price Plans*				
Plan Name	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
Postfone Control Price Plan	P	x	x	x

Meteor Price Plans ^{xi}				
Plan Name	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
Anytime Online €5, €10, €20	P	x	x	✓ DR & F ^{xii}
Anytime All In €10, €20, €30	P	x	x	✓ DR & F ^{xiii}
Anytime Choice includes free Meteor Any Network, Internet & Meteor texts	P	x	x	✓ DR & F ^{xiv}
Rolling 30 SIM only (Light users / Small / Medium / Shockproof)	B	x	x	✓ F
Bill Pay Lite; €10, €30 SIM only	B	x	x	✓ F
Bill Pay Smart Lite; €30, €50 SIM only	B	x	x	✓ F
Bill Pay Connect 200, 500, 700	B	x	x	✓ F
Bill Pay Max	B	x	✓ FSP	✓ F
Bill Pay Smart 200, 400, Unlimited	B	x	x	✓ F

eMobile (Trading name of Eircom/Meteor) Mobile Price Plans ^{xv}				
Plan Name	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
Standard Seven Day	P	x	✓ FSP	x
[Weekly Prepay] Seven 5; Seven 10; Seven 15	P	x	✓ FSP	x
[Monthly Prepay] Thirty 20 Free Any Network Texts	P	x	✓ FSP	x
[Monthly Prepay] Thirty 20 eMobile to eMobile Talk and Text	P	x	✓ FSP	x
[Monthly Prepay] Thirty 30 eMobile to eMobile Talk and Text	P	x	✓ FSP	x
Select 100, 200, 300, 400, 500	B	x	✓ FSP	x
Select Unlimited; Talk and Text	B	x	✓ FSP	x

Plan Name	3 Ireland Price Plans ^{xvi}			
	Prepay (P) or Billpay (B) Plan (Note 1)	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
3Pay €5 top ups, €10 top ups, €20 top ups or higher	P	✓ AC Weekend only	x	✓ F
Bill Pay Flex (Flexi Max plans)	B	x	x	✓ F
Flexi Fix Regular Talk and Text	B	x	x	✓ F
Flexi Fix Capped Talk and Text	B	x	x	x
Mini, Classic, Super, Mega Flex	B	x	x	✓ F
Classic, Super, Mega, Ultimate Flex Max	B	x	x	✓ F
Mini, Classic, Super, Mega Flex (SIM Only)	B	x	x	✓ F
Classic, Super, Mega, Ultimate Flex Max (SIM Only)	B	x	x	✓ F
Flexiflix 15, 25, 45	B	x	x	✓ F
Flexiflix 15, 25, 45 (SIM Only)	B	x	x	✓ F

Plan Name	Tesco Mobile Price Plans ^{xvii}			
	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
Anyone Anytime	P	x	x	✓ F
Anyone Anytime Free €10 Top Up	P	x	x	✓ F
Anyone Anytime Free €20 Top Up	P	x	x	✓ F
Anyone Anytime Free €30 Top Up	P	x	x	✓ F
Free calls, texts, and picture messages (on-net)	P	x	x	✓ F
SIM Only (12, 16, 20, 25, 30, 40, 50, 70 Euro Plans) €70 plan now €35: 10,000 Calls, 10,000 Texts, 15GB Data	B	x	x	✓ F
Flexible credit capped plan (30, 60, 90 Euro)	B	x	x	✓ F
12 – 18 months contract plans	B	x	x	✓ F

Plan Name	Blueface Mobile Price Plans ^{xviii}			
	Prepay (P) or Billpay (B) Plan	Plan Pricing Differs by Time of Day	Off-Net Plan Pricing Differs by Service Provider Called	On-Net Pricing Differs to Off-Net Pricing
Business Pay as you go	P	x	✓FSP	x
Home Landline Pay as you go	P	x	✓M	✓M
(Business) Unlimited UK & Ireland Business Plan	B	x	x	✓F
(Residential) Freedom Basic	B	x	✓M	✓M
(Residential) Freedom World	B	x	✓M	✓M
Freedom Plus+	B	x	✓M	✓M
Mobile Add-on	B/P	x	✓M	✓M

Eircom Pricing – Calls to Mobile Elements ^{xix}			
Plan Name	Prepay (P) or Billpay (B) Plan	Plan Pricing for Mobile Differs by Time of Day	Off-Net Plan Pricing Differs by Mobile Service Provider Called
Eircom Talk Anytime	B	✓	✓DR
Eircom Talk Off-peak	B	✓	✓DR
Eircom Talk Weekend	B	✓	✓DR
Eircom Talk add-ons: Mobile Light 60 Mobile Extra 150 eMobile/Meteor 200	B	x	✓DR
Eircom €55 Broadband Mobile & Home Phone Bundle ^{xx}	B	✓	x
Eircom €65 Broadband Mobile & Home Phone Bundle ^{xxi}	B	✓	x
Eircom €79 Broadband Mobile & Home Phone Bundle ^{xxii}	B	✓	x

UPC Pricing – Calls to Mobile Elements ^{xxiii}			
Plan Name	Prepay (P) or Billpay (B) Plan	Plan Pricing for Mobile Differs by Time of Day	Off-Net Pricing Differs by Mobile Network Called
Anytime World	B	✓	✗
Freetime World	B	✓	✗
Home Phone	B	✓	✗
Anywhere 100 (includes 100 free minutes to mobile/landline)	B	✗	✗
Anywhere 200 (includes 200 free minutes to mobile/landline)	B	✗	✗

ⁱ Vodafone: Details correct as of 19 November 2012, as per data sourced from <http://www.vodafone.ie/phones-plans/?ts=1335349194770> and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp.

ⁱⁱ Vodafone: Customer chooses amount of minutes, texts and data to be included in the plan, with an additional payment for extra minutes/texts used each month.

ⁱⁱⁱ Vodafone: As an alternative to free anytime on-net Vodafone to Vodafone calls and texts, a subscriber can also select free any network calls and texts to 5 any network numbers.

^{iv} O2: Details correct as of 19 November 2012, as per data sourced from <http://www.o2online.ie/o2/shop/plans/> and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp

^v O2: Some variants of these plans offer on-net O2 to O2 calls at reduced or free rates, but the majority of the variants on the plans have the same rate for both on-net and off-net calls.

^{vi} O2: Some variants of these plans offer on-net O2 to O2 calls at reduced or free rates, but the majority of the variants on the plans have the same rate for both on-net and off-net calls.

^{vii} O2: Some variants of these plans offer on-net O2 to O2 calls at reduced or free rates, but the majority of the variants on the plans have the same rate for both on-net and off-net calls.

^{viii} 48: Details correct as of 19 November 2012, as per data sourced from <http://48months.ie/> and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp

^{ix} 48: Unlimited calls and texts to any mobile network, along with a set 20 minutes (cannot purchase excess minutes beyond this) to subscribers of FSPs.

^x Postfone: Details correct as of 19 November 2012, as per data sourced from <http://www.postfone.ie/> and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp

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- ^{xi} Meteor: Details correct as of 19 November 2012, as per data sourced from <http://www.meteor.ie/> and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp
- ^{xii} Meteor: Depends on top-up amount.
- ^{xiii} Meteor: Depends on top-up amount.
- ^{xiv} Meteor: Depends on top-up amount.
- ^{xv} eMobile: Details correct as of 19 November 2012, as per data sourced from <http://www.meteor.ie/>, <http://www.emobile.ie/> and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp
- ^{xvi} H3GI: Details correct as of 19 November 2012, as per data sourced from http://www.three.ie/products_services/index.html and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp
- ^{xvii} TMI: Details correct as of 19 November 2012, as per data sourced from <http://shop.tescomobile.ie/our-price-plans.aspx> and http://www.callcosts.ie/mobile_phones/Mobile_Calculator.123.LE.asp
- ^{xviii} Blueface: Details correct as of 19 November 2012, as per data sourced from Blueface.
- ^{xix} Eircom: Details correct as of 19 November 2012, as per data sourced from <http://www.eircom.net/productsServices/pstn/> and http://www.callcosts.ie/home_phones/Home_Phones_Calculator.178.LE.asp
- ^{xx} Eircom: Fixed to mobile element considered – Eircom Talk Off-peak. Fixed element includes unlimited off-peak landline calls and 30 minutes off-peak to any mobile operator. Details correct as of 19 November 2012, as per data sourced from <https://secure.eircom.net/bundles/>
- ^{xxi} Eircom: Fixed to mobile element considered – Eircom Talk Off-peak. Fixed element includes unlimited off-peak Local and National landline calls and 30 minutes off-peak to any mobile operator. Details correct as of 19 November 2012, as per data sourced from <https://secure.eircom.net/bundles/>
- ^{xxii} Eircom: Fixed to mobile element considered – Eircom Talk Off-peak. Fixed element includes unlimited off-peak Local and National landline calls and 30 minutes off-peak to any mobile operator. Details correct as of 19 November 2012, as per data sourced from <https://secure.eircom.net/bundles/>
- ^{xxiii} UPC: Details correct as of 19 November 2012, as per data sourced from <http://www.upc.ie/phone/> and http://www.callcosts.ie/home_phones/Home_Phones_Calculator.178.LE.asp.

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Appendix F Updated Interconnection and Termination Traffic Information

- F.1 In Section 6¹ it was noted that in the MVCT Consultation, in particular in the context of the individual assessments as to whether MSPs had faced effective CBP², ComReg examined
- which were the largest purchasers of MVCT from individual MSPs (since these were considered to be most likely to seek to exert CBP having regard to their relative importance to the MVCT seller); and
 - the relative exchanges of terminating traffic between each of these large buyers and the MSP (as part of the assessment as to whether buyers would be price sensitive).
- F.2 ComReg has updated the above information (the 'Updated Interconnection and Termination Traffic Information') which is now presented below.

H3GI Position

- F.3 In the MVCT Consultation we noted that H3GI had some [redacted] direct MVCT supply agreements with other undertakings, with the two largest³ buyers of MVCT from H3GI being Eircom and Vodafone. H3GI also had direct interconnection agreements with [redacted] FSPs for the purchase of fixed termination and other services. This position has not changed⁴ in the intervening period.
- F.4 In the MVCT Consultation we noted that Vodafone and Eircom accounted for the largest shares of MVCT purchased from H3GI in the MVCT Consultation. This position remains the same, although ComReg would note that in recent quarters O2 has become one of the two largest purchasers of MVCT from H3GI. It is, however, too early to say whether this trend for O2 will continue.
- F.5 There have also been some movements in the overall shares of MVCT sold by H3GI to both Vodafone and Eircom.
- F.6 As the end of H1 2012, Vodafone accounted for some [redacted] %⁵ of the total share of H3GI provided MVCT, having fallen from [redacted] %

¹ See paragraphs 6.58 and 6.59 of this Decision.

² See paragraphs 6.84 to 6.248 of the MVCY Consultation.

³ The size of buyer is measured here and elsewhere by reference to the volume of MVCT minutes purchased.

⁴ ComReg notes that H3GI has indicated to ComReg in its response to the August 2012 Statutory Information Request that it had entered into MVCT interconnection arrangements with non-domestic Service Providers, in particular, [redacted]. In the context of CBP, given domestic Service Providers are likely to be the main purchasers of MVCT we have excluded interconnection agreements with non-domestic Service Providers.

⁵ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, Vodafone accounted for approximately [redacted] % of the total share of MVCT purchased from H3GI.

in H2 2009. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated Relevant Time Period'), the volume of Vodafone's purchases of MVCT from H3GI have also increased by some [X]%, a figure which has increased significantly on that reported in the period set out in the MVCT Consultation⁶.

- F.7 As the end of H1 2012, Eircom accounted for some [X]%⁷ of the total share of H3GI provided MVCT, having fallen from [X]% in H2 2009. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated Relevant Time Period'), the volume of Eircom's purchases of MVCT from H3GI have also declined by some [X]%, having declined further from the figure reported in the MVCT Consultation⁸.
- F.8 It has been observed that, between H2 2007 and H1 2012, H3GI's absolute level of termination purchased from Vodafone has increased by [X]%, up significantly from [X]% at the end of 2011. Over the same period, H3GI's absolute level of termination purchased from Eircom declined by some [X].
- F.9 Over the Updated Relevant Time Period, ComReg has observed that there was an asymmetry of traffic flows with H3GI terminating [X]%⁹ more minutes on Vodafone's network than vice versa.
- F.10 ComReg has also observed that, over the Updated Relevant Time Period there were asymmetric traffic flows, with Eircom terminating more than [X]%¹⁰ more minutes on H3GI's network than vice versa.
- F.11 Having regard to the above, while there have been some movements in certain figures, the trends are broadly supportive of the analysis set out in the MVCT Consultation.

Vodafone Position

- F.12 In the MVCT Consultation we noted that Vodafone had some [X] direct MVCT supply agreements with other undertakings, with the two largest buyers of MVCT from Vodafone being Eircom and O2. Vodafone also had direct interconnection agreements with [X] FSPs for the purchase of fixed termination and other services. This position has changed in the intervening period with Vodafone having entered into another

⁶ In the MVCT Consultation it was noted that the volume of MVCT purchased by Vodafone from H3GI had grown by [X] in the period between H2 2007 to H1 2011.

⁷ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, Eircom accounted for approximately [X] of the total share of MVCT purchased from H3GI.

⁸ In the MVCT Consultation it was noted that the volume of MVCT purchased by Eircom from H3GI had declined by [X] in the period between H2 2007 to H1 2011.

⁹ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by Vodafone on H3GI and the total volume of minutes terminated by H3GI on Vodafone. In the MVCT Consultation it was noted that this figure was [X].

¹⁰ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by Eircom on H3GI and the total volume of minutes terminated by H3GI on Eircom. In the MVCT Consultation it was noted that this figure was [X].

interconnect agreement with another undertaking¹¹ for the supply of MVCT.

- F.13 In the MVCT Consultation we noted that Eircom and O2 accounted for the largest shares of MVCT purchased from Vodafone in the MVCT Consultation. This position remains the same, although, there have also been some movements in the overall shares of MVCT sold by Vodafone to both these Service Providers.
- F.14 As the end of H1 2012, Eircom accounted for some [redacted] %¹² of the total share of Vodafone provided MVCT, having fallen from [redacted] % in H2 2007. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated Relevant Time Period'), the volume of Eircom's purchases of MVCT from Vodafone have also declined by some [redacted] %, with the level of decline further increasing significantly beyond that reported upon in the MVCT Consultation¹³.
- F.15 As the end of H1 2012, O2 accounted for some [redacted] %¹⁴ of the total share of Vodafone provided MVCT, broadly the same as the figure of [redacted] % in H2 2009. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated Relevant Time Period'), the volume of O2's purchases of MVCT from Vodafone have also declined by [redacted] %, with the level of decline increasing beyond that reported upon in the MVCT Consultation¹⁵.
- F.16 Over the Updated Relevant Time Period, ComReg has also observed that there was an asymmetry of traffic flows with Eircom terminating [redacted] %¹⁶ more minutes on Vodafone's network than vice versa, a figure which has increased significantly since the period reported upon in the MVCT Consultation.
- F.17 ComReg has also observed that, over the Updated Relevant Time Period there were asymmetric traffic flows, with O2 terminating [redacted] %¹⁷ more minutes on Vodafone's network than vice versa, a

¹¹ This undertaking is [redacted].

¹² In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, Eircom accounted for a approximately [redacted] % of the total share of MVCT purchased from Vodafone.

¹³ In the MVCT Consultation it was noted that the volume of MVCT purchased by Eircom from Vodafone had declined by [redacted] % in the period between H2 2007 to H1 2011.

¹⁴ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, O2 accounted for approximately [redacted] % of the total share of MVCT purchased from Vodafone.

¹⁵ In the MVCT Consultation it was noted that the volume of MVCT purchased by O2 from Vodafone had declined by [redacted] % in the period between H2 2007 to H2 2011.

¹⁶ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by Eircom on Vodafone and the total volume of minutes terminated by Vodafone on Eircom. In the MVCT Consultation it was noted that this figure was [redacted] %.

¹⁷ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by O2 on Vodafone and the total volume of minutes terminated by Vodafone on O2. In the MVCT Consultation it was noted that this figure was [redacted] %.

figure which has increased significantly since the period reported upon in the MVCT Consultation.

O2 Position

- F.18 In the MVCT Consultation we noted that O2 had some [redacted] direct MVCT supply agreements with other undertakings, with the two largest¹⁸ buyers of MVCT from O2 being Eircom and Vodafone. O2 also had direct interconnection agreements with [redacted] FSPs for the purchase of fixed termination and other services. O2 indicated to ComReg in its response to a July 2012 13D Request that O2 had some [redacted] direct MVCT supply agreements with other undertakings. The situation remains the same in terms of the two largest buyers of MVCT from O2 and O2's position has not changed in terms of direct interconnection agreements for the purchase of fixed termination and other services.
- F.19 In the MVCT Consultation we noted that Eircom and Vodafone accounted for the largest shares of MVCT purchased from O2 in the MVCT Consultation. This position remains the same.
- F.20 There have also been some movements in the overall shares of MVCT sold by O2 to both Eircom and Vodafone.
- F.21 As the end of H1 2012, Vodafone accounted for some [redacted%]¹⁹ of the total share of O2 provided MVCT, having fallen from [redacted%] in H2 2009. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated Relevant Time Period'), the volume of Vodafone's purchases of MVCT from O2 have decreased by some [redacted%], a figure which has decreased further on that reported in the period set out in the MVCT Consultation²⁰.
- F.22 As the end of H1 2012, Eircom accounted for some [redacted%]²¹ of the total share of O2 provided MVCT, having fallen from [redacted%] in H2 2009. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated Relevant Time Period'), the volume of Eircom's purchases of MVCT from O2 have also declined by some [redacted%], having declined further from the figure reported in the MVCT Consultation²².
- F.23 It has been observed that, between H2 2007 and H1 2012, O2's absolute level of termination purchased from Vodafone has decreased

¹⁸ The size of buyer is measured here and elsewhere by reference to the volume of MVCT minutes purchased.

¹⁹ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, Vodafone accounted for approximately [redacted%] of the total share of MVCT purchased from O2.

²⁰ In the MVCT Consultation it was noted that the volume of MVCT purchased by Vodafone from O2 had declined by [redacted%] in the period between H2 2007 to H1 2011.

²¹ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, Eircom accounted for approximately [redacted%] of the total share of MVCT purchased from O2.

²² In the MVCT Consultation it was noted that the volume of MVCT purchased by Eircom from O2 had declined by [redacted%] in the period between H2 2007 to H1 2011.

by [redacted]%, down further from [redacted] at the end of 2011. Over the same period, O2's absolute level of termination purchased from Eircom declined by some [redacted]%.²³

F.24 Over the Updated Relevant Time Period, ComReg has observed that there was an asymmetry of traffic flows with O2 terminating [redacted] more minutes on Vodafone's network than vice versa.

F.25 ComReg has also observed that, over the Updated Relevant Time Period there were asymmetric traffic flows, with Eircom terminating [redacted] more minutes on O2's network than vice versa.

F.26 Having regard to the above, while there have been some movements in certain figures, the trends are broadly supportive of the analysis set out in the MVCT Consultation.

Meteor Position

F.27 In the MVCT Consultation we noted that Meteor had some [redacted] direct MVCT supply agreements with other undertakings, with the two largest buyers of MVCT from Meteor being O2 and Vodafone. Meteor also had direct interconnection agreements with [redacted] FSP for the purchase of fixed termination and other services. This position has not changed in the intervening period.

F.28 In the MVCT Consultation we noted that O2 and Vodafone accounted for the largest shares of MVCT purchased from Meteor in the MVCT Consultation. This position has not changed in the intervening period, although there have been some movements in the overall shares of MVCT sold by Meteor to both O2 and Vodafone.

F.29 As the end of H1 2012, O2 accounted for some [redacted] of the total share of Meteor provided MVCT, having increased slightly from [redacted] in H2 2009. In absolute terms, over the period H2 2007 to H1 2012, the volume of O2's purchases of MVCT from Meteor have also increased by some [redacted], a figure which has decreased significantly on that reported in the period set out in the MVCT Consultation²⁶.

²³ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by Vodafone on O2 and the total volume of minutes terminated by O2 on Vodafone. In the MVCT Consultation it was noted that this figure was [redacted]%.²³

²⁴ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by Eircom on O2 and the total volume of minutes terminated by O2 on Eircom. In the MVCT Consultation it was noted that this figure was [redacted]%.²⁴

²⁵ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, O2 accounted for approximately [redacted] of the total share of MVCT purchased from Meteor.

²⁶ In the MVCT Consultation it was noted that the volume of MVCT purchased by O2 from Meteor had grown by [redacted] in the period between H2 2007 to H1 2011.

- F.30 As the end of H1 2012, Vodafone accounted for some [X] %²⁷ of the total share of Meteor provided MVCT, having grown from [X] % in H2 2009. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated Relevant Time Period'), the volume of Vodafone's purchases of MVCT from Meteor have also increased by some [X] %, having declined from the figure reported in the MVCT Consultation²⁸.
- F.31 It has been observed that, between H2 2007 and H1 2012, Meteor's absolute level of termination purchased from O2 has decreased by [X] %. Comparatively, in the period between H2 2007 and H1 2012, Meteor's absolute level of termination purchased from O2 declined by [X] 7.65%. Between H2 2007 and H1 2012, Meteor's absolute level of termination purchased from Vodafone grew by some [X] %, while in the period between H2 2007 and H1 2012, Meteor's absolute level of termination purchased from Vodafone grew by [X] %.
- F.32 Over the Updated Relevant Time Period, ComReg has observed that there was a significant narrowing of the asymmetry of traffic flows, with Meteor now terminating [X] %²⁹ less minutes on Vodafone's network than vice versa.
- F.33 ComReg has also observed that, over the Updated Relevant Time Period there were asymmetric traffic flows, with O2 terminating [X] %³⁰ more minutes on Meteor's network than vice versa.
- F.34 Having regard to the above, while there have been some movements in certain figures, the trends are broadly supportive of the analysis set out in the MVCT Consultation.

TMI Position

- F.35 In the MVCT Consultation we noted that TMI had some [X] direct MVCT supply agreements with other undertakings, with the two largest buyers of MVCT from TMI being Eircom and O2. TMI also had direct interconnection agreements with [X] FSPs for the purchase of fixed termination and other services. This position has not changed in the intervening period.
- F.36 In the MVCT Consultation we noted that Eircom and O2 accounted for the largest shares of MVCT purchased from TMI in the MVCT Consultation. ComReg notes that although in H1 2012 Vodafone was

²⁷ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, Vodafone accounted for approximately [X] % of the total share of MVCT purchased from Meteor.

²⁸ In the MVCT Consultation it was noted that the volume of MVCT purchased by Vodafone from Meteor had increased by [X] % in the period between H2 2007 to H1 2011.

²⁹ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by Vodafone on Meteor and the total volume of minutes terminated by Meteor on Vodafone. In the MVCT Consultation it was noted that this figure was [X] %.

³⁰ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by O2 on Meteor and the total volume of minutes terminated by Meteor on O2. In the MVCT Consultation it was noted that this figure was [X] %.

one of the two largest purchasers of MVCT from TMI, over the Updated Relevant Time Period, O2 and Eircom still remained the top two purchasers of TMI provided MVCT, despite there being some movements in the overall shares of MVCT sold by TMI to both Eircom and O2. As at the end of H1 2012, Eircom accounted for some [redacted]³¹ of the total share of TMI provided MVCT, having fallen substantially from [redacted] in H2 2009. In absolute terms, over the period H2 2009 to H1 2012, the volume of Eircom's purchases of MVCT from TMI have also increased by some [redacted]³², a figure which has increased significantly on that reported in the period set out in the MVCT Consultation.

- F.37 As at the end of H1 2012, O2 accounted for some [redacted]³³ of the total share of TMI provided MVCT, having fallen from [redacted] in H2 2009. In absolute terms, over the period H2 2007 to H1 2012 (the 'Updated TMI Relevant Time Period'), the volume of O2's purchases of MVCT from TMI have also increased by some [redacted], having declined from the growth figure reported in the MVCT Consultation³⁴.
- F.38 It has been observed that, between H2 2007 and H1 2012, TMI's absolute level of termination purchased from O2 has increased by [redacted], up significantly from [redacted] at the end of 2011.
- F.39 Over the Updated Relevant Time Period, ComReg has observed that there was a reduced but still significant asymmetry of traffic flows between TMI and Eircom, with TMI terminating [redacted]³⁵ less minutes on Eircom's network than vice versa.
- F.40 ComReg has also observed that, over the Updated Relevant Time Period there were slightly reduced but low asymmetric traffic flows between TMI and O2, with TMI terminating [redacted]³⁶ more minutes on O2's network than vice versa.
- F.41 Having regard to the above, while there have been some movements in certain figures, the trends are broadly supportive of the analysis set out in the MVCT Consultation.

³¹ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, Eircom accounted for approximately [redacted] of the total share of MVCT purchased from TMI.

³² In the MVCT Consultation it was noted that the volume of MVCT purchased by Eircom from TMI had grown by [redacted] in the period between H1 2009 to H1 2011.

³³ In the MVCT Consultation it was noted that, in the period between H2 2007 to H2 2011, O2 accounted for approximately [redacted] of the total share of MVCT purchased from TMI.

³⁴ In the MVCT Consultation it was noted that the volume of MVCT purchased by O2 from TMI had increased by [redacted] in the period between H2 2007 to H1 2011.

³⁵ Figure based on the total volume, over the Updated Relevant Time Period, of minutes terminated by TMI on Eircom and the total volume of minutes terminated by Eircom on TMI. In the MVCT Consultation it was noted that this figure was [redacted].

³⁶ Figure based on the total volume, over the Updated TMI Relevant Time Period, of minutes terminated by TMI on O2 and the total volume of minutes terminated by O2 on TMI. In the MVCT Consultation it was noted that this figure was [redacted].

Lycamobile Position

- F.42 In the MVCT Consultation we noted that Lycamobile was directly interconnected with O2 only (which hosts Lycamobile's MVNO arrangement). We also noted that O2 also provides transit services to Lycamobile to facilitate the routing of outbound traffic from Lycamobile to other Service Providers and inbound traffic from other Service Providers to Lycamobile. This position has not changed in the intervening period. We also noted in the MVCT Consultation that as Lycamobile was not yet operational, ComReg did not yet have any reliable MVCT volume figures upon which to base an assessment of the largest buyers of Lycamobile MVCT or an assessment of the largest sellers of termination to Lycamobile. Lycamobile indicated that once its traffic volumes justify it, it intends to interconnect with other Service Providers directly.
- F.43 Lycamobile provided ComReg with one partial half-year period of MVCT volume information (given it only entered the market in May 2012) upon which to base an assessment of the largest buyers of Lycamobile MVCT and an assessment of the largest sellers of termination to Lycamobile. However, given the scale of termination volumes involved, it is too early to say yet whether this position is likely to remain in the medium to long term. Nevertheless, this is the only information available to ComReg. ComReg has, therefore, considered the share of MVCT purchased by a number of Service Providers directly and indirectly interconnected with Lycamobile.
- F.44 As at H1 2012, O2 accounted for [redacted] % of the share of Lycamobile-provided MVCT, while [redacted] % of Lycamobile's total purchased termination was on O2's network.
- F.45 In the same period, Eircom accounted for [redacted] % of the total share of Lycamobile-provided MVCT, and Meteor accounted for an additional [redacted] % of the total share of Lycamobile-provided MVCT. Combined, 29.3% of Lycamobile's total purchased termination was across the Meteor and Eircom networks.
- F.46 In H1 2012, Vodafone accounted for [redacted] % of the total share of Lycamobile-provided MVCT, while [redacted] % of Lycamobile's total purchased termination was on the Vodafone network.
- F.47 The volume of termination purchased by Lycamobile from other Service Providers (including MSPs) is sufficiently low that it is not possible to draw any definitive conclusions from this. However, ComReg considers that given Lycamobile's subscriber base it will consider it to be important to secure interconnection with other Service Providers (in order that its subscribers can make calls to subscribers on other networks – absent the ability to do so Lycamobile would not likely attract subscribers to its network)
- F.48 Having regard to the above, it is reasonable to assume the O2, Eircom group and Vodafone likely constitute the largest purchasers of MVCT from Lycamobile which is representative of ComReg's preliminary view

in the MVCT Consultation and are broadly supportive of the views set out therein.

Appendix G Other SMP Criteria Considered

- G.1 As noted in paragraph 6.5, other factors which could be used to indicate the potential market power of an undertaking have been considered but, for the reasons set out below, are considered of little or no relevance for the purposes of the SMP assessment in the Relevant MVCT Markets.

Overall size of the undertaking

- G.2 This criterion refers to the potential advantages, and the sustainability of those advantages, that may arise by virtue of the size of the undertaking relative to its competitors or customers. Having regard to the definition of the Relevant MVCT Markets, there is only one supplier in each Relevant MVCT Market and, therefore, there are no actual or potential competitors (given significant entry barriers). ComReg does, however, consider this factor to be somewhat relevant in considering the strength and impact of any countervailing buyer power on SMP. This criterion is, therefore, considered of less relevance.

Technological advantages or superiority

- G.3 Technological advances or superiority can represent a barrier to entry as well as conferring the ability for an undertaking to achieve cost or production advantages/efficiencies over its competitors. Having regard to the definition of the Relevant MVCT Markets, there is only one supplier in each Relevant MVCT Market (given significant entry barriers) and, therefore, there are no actual or potential competitors. Comparisons amongst competitor technologies have little or no bearing on the assessment of SMP in the Relevant MVCT Markets. This criterion is, therefore, considered of less relevance.

Easy or privileged access to capital markets/financial resources

- G.4 Easy or privileged access to capital markets may act as a barrier to entry, however, for the same reasons identified in paragraph G.3 there are absolute barriers to entry and no actual or potential competitors on each Relevant MVCT Market. Capital/financial advantages vis-à-vis competitors do not arise in the Relevant MVCT Markets and this criterion is, therefore, considered of little or no relevance.

A highly developed distribution and sales network

- G.5 The need to establish distribution systems might delay short to medium term market entry given the costs involved and can, therefore, act as a barrier to entry. Given MVCT is a wholesale service and is purchased by a relatively small number of authorised undertakings (often through an intermediary transit provider) the nature of the SMP MSP's distribution and sales network is not particularly complex. This criterion is, therefore, not considered of relevant to the assessment of SMP in the Relevant MVCT Markets.

Product or services diversification

G.6 While there is often a positive correlation between product/service differentiation and market power (due to the impact of differentiation on brand loyalty and a customer's willingness to switch supplier), MVCT is purchased on a standalone rather than a bundled basis. This criterion is, therefore, considered of less relevance to the assessment of SMP in the Relevant MVCT Markets.

Economies of scale and scope

G.7 Economies of scale refer to reductions in average costs due to an increase in output/production. Economies of scale can act as a barrier to entry given new entrants may not achieve the same cost advantages as an existing producer whose output is at operating at a higher level, i.e. it may result in new entrants only being able to operate below the minimum efficient scale.

G.8 Economies of scope exist when a product's average costs are reduced by virtue of the firm producing the product jointly with other products, i.e. where the firm achieves lower costs of production as it produces product jointly rather than separately. Economies of scope can act as a barrier to entry given they can confer cost advantages on a firm over its competitors (who may not produce other products etc.).

G.9 For the same reasons identified in paragraph G.3 there are significant barriers to entry in the Relevant MVCT Markets, no actual or potential competitors and, as a consequence cost advantages via scale or scope economies do not arise in the context of an SMP assessment. These criteria are, therefore, not considered relevant to the assessment of SMP in the Relevant MVCT Markets.

Barriers to expansion

G.10 Competition in a market may be more vigorous where entry barriers are lower. For the same reasons identified in paragraph G.3 there are significant barriers to entry in the Relevant MVCT Markets, no actual or potential competitors and, as a consequence, competition is not likely to extend beyond the MSP supplying MVCT. This criterion is, therefore, not considered of relevance to the assessment of SMP in the Relevant MVCT Markets.

Sunk costs

G.11 Sunk costs are costs that once incurred cannot be recovered on exit from the market and can represent an absolute barrier to entry. For the same reasons identified in paragraph G.3 there are significant barriers to entry in the Relevant MVCT Markets, no actual or potential competitors and, as a consequence, this criterion is, therefore, not considered of relevance to the assessment of SMP in the Relevant MVCT Markets.

Appendix H Final Regulatory Impact Assessment

- H.1 In section 9 of this Decision ComReg considered Respondents' views on the RIA originally set out in its MVCT Consultation. This Appendix H sets out ComReg's Final RIA.
- H.2 The Regulatory Impact Assessment (RIA) is an analysis of the likely effect of proposed new regulation or regulatory change. The purpose of a RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. It is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders. Appropriate use of the RIA should ensure that the most effective approach to regulation is adopted.
- H.3 ComReg's approach to RIA follows the RIA Guidelines¹ published by ComReg in August 2007 and takes into account the "Better Regulation" programme² and international best practice (for example, considering developments about RIA published by the European Commission and the OECD).
- H.4 Section 13(1) of the Communications Regulation Acts 2002 to 2011 requires ComReg to comply with Ministerial Policy Directions. In this regard, Ministerial Policy Direction 6 of February 2003³ requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and international best practice and otherwise in accordance with measures that may be adopted under the "Better Regulation" programme.
- H.5 In conducting the RIA, ComReg has regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation may be different to regulation exclusively by way of enacting primary or secondary legislation. Our ultimate aim in conducting a RIA is to ensure that all measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach has been taken towards a RIA.
- H.6 ComReg's approach to RIA follows five steps:

¹ ComReg, "Guidelines on ComReg's Approach to Regulatory Impact Assessment", [ComReg Document 07/56a](#), 10 August 2007 (the 'RIA Guidelines').

² Department of the Taoiseach, "Regulating Better", January 2004. See also "Revised RIA Guidelines: How to conduct a Regulatory Impact Analysis", June 2009, http://www.taoiseach.gov.ie/eng/Publications/Publications_2011/Revised_RIA_Guidelines_June_2009.pdf.

³ Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

Step 1: Describe the policy issue and identify the objectives.

Step 2: Identify and describe the regulatory options.

Step 3: Determine the impacts on stakeholders.

Step 4: Determine the impacts on competition.

Step 5: Assess the impacts and choose the best option.

H.7 The purpose of carrying out a RIA is to aid decision-making through identifying regulatory options and analysing the impact of those options in a structured manner. The Department of the Taoiseach's Revised RIA Guidelines state that

*"RIA should be conducted at an early stage and before a decision to regulate has been taken."*⁴

H.8 The European Commission, in reviewing its own use of impact assessments, also notes that:

*"Impact assessments need to be conducted earlier in the policy development process so that alternative courses of action can be thoroughly examined before a proposal is tabled."*⁵

H.9 In determining the impacts of the various regulatory options, current best practice appears to recognise that full cost benefit analysis would only arise where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Such comprehensive review may be undertaken by ComReg when necessary and appropriate.

H.10 Having regard to the various sets of guidelines, it is clear that the RIA should be introduced as early as possible in the assessment of potential regulatory options, where appropriate and feasible and ComReg has done so in the MVCT consultation. The consideration of regulatory impact provides a discussion of options, and the RIA should therefore be integrated within the overall preliminary analysis. This is the approach which ComReg has followed in this market review. The RIA is now being finalised in this Decision, having taken into account Respondents' views and any comments from the European Commission and the Competition Authority.

H.11 ComReg now conducts its final RIA (the '**Final RIA**') having regard to its final position to imposing (or not) regulatory remedies in section 8, along with a consideration of other options which have been now discounted. The following sections, in conjunction with the rest of the analysis and discussion set out elsewhere in this Decision and in the MVCT Consultation represent the Final RIA. It sets out a final assessment of

⁴ See paragraph 2.1 of the [Revised RIA Guidelines](#).

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Second strategic review of Better Regulation in the European Union", COM(2008) 32 final 30.01.2008, p. 6.

the potential impact of the imposition of the regulatory obligations on MSPs that have been designated⁶ with SMP in each of the Relevant MVCT Markets (as defined in section 5 of this Decision).

Principles in selecting remedies

H.12 In paragraphs 8.2 to 8.4 of the MVCT Consultation and section 8 and 9 of this Decision, we previously set out the legislative basis upon which ComReg must consider the imposition of remedies. In choosing remedies ComReg is obliged, pursuant to Regulation 8(6) of the Access Regulations, to ensure that they are:

- Based on the nature of the problem identified
- Proportionate and justified in the light of the objectives laid down in section 12 of the Communications Regulation Acts 2002 to 2011, and Regulation 16 of the Framework Regulations and Regulation 6 of the Access Regulations; and
- Only imposed following consultation in accordance with Regulations 12 and 13 of the Framework Regulations.

H.13 Section 12(1)(a) of the Communications Regulation Acts 2002 to 2011⁷ sets out the objectives of ComReg in exercising its functions in relation to the provision of electronic communications networks, electronic communications services and associated facilities, namely:

- To promote competition;
- To contribute to the development of the internal market; and
- To promote the interests of users within the European Union.

Describe the policy issue and identify the objectives

H.14 In general, the European Commission acknowledges the need for the imposition of *ex ante* SMP related regulatory obligations in order to mitigate the exercise of SMP by undertakings and to ensure the development of effective competition within and across communications markets. We have noted previously that the European Commission has established that the wholesale MVCT market is susceptible to *ex ante* regulation and, on this basis, ComReg has carried out the analysis in the MVCT Consultation and this Decision.

H.15 In sections 5 and 6 of this Decision respectively, ComReg set out its position on the definition of the individual Relevant MVCT Markets, followed by a competition analysis within each of these markets⁸.

⁶ See section 6 of this Decision.

⁷ Other relevant statutory objectives which ComReg took into account include those set out at Regulation 16 of the Framework Regulations and Regulation 6 of the Access Regulations.

⁸ ComReg set out its preliminary views on such matters in section 5 and 6 of the MVCT Consultation.

ComReg has designated six MSPs with SMP in each of the separate Relevant MVCT Markets within which they operate. In section 7, ComReg then considered, on the basis of the SMP findings, the potential for competition problems to arise in the Relevant MVCT Markets over the review period in question⁹. To address these identified competition problems and competition/consumer impacts, ComReg set out and justified in section 8 proportionate regulatory remedies that it is imposing on MSPs with SMP¹⁰. In section 9 of this Decision, ComReg has considered Respondents' views on the RIA was set out in the MVCT Consultation.

- H.16 As noted above, on the basis of its assessment, ComReg's position is that each of the Relevant MVCT Markets is not effectively competitive and the MSP operating in each Relevant MVCT Market (as identified in paragraph 6.136) should be designated as having SMP. As noted in paragraph 8.2 of the MVCT Consultation and section 8 of this Decision, in order to address identified competition problems, ComReg is required to impose on an operator with SMP such of the obligations (or remedies) set out below:
- (a) Access;
 - (b) Transparency;
 - (c) Non-Discrimination;
 - (d) Price Control and Cost Accounting; and
 - (e) Accounting Separation.
- H.17 We also noted in paragraph 8.8 of the MVCT Consultation and section 8 and 9 of this Decision, that ComReg is compelled to impose at least one obligation on an SMP MSP where it is designated as having SMP.
- H.18 With specific regard to the definition of the Relevant MVCT Markets, the assessment of competition within them and, having regard to the competition problems identified in section 7 of the MVCT Consultation and this Decision, ComReg's objectives are to enhance the development of effective competition in downstream markets within which MSPs and FSPs, that rely on the upstream MVCT input, operate. In so doing, ComReg is seeking to prevent restrictions or distortions in competition amongst Service Providers, thereby promoting the development of effective competition, to the ultimate benefit of consumers. ComReg is also seeking to provide regulatory certainty/predictability to all Service Providers through the development of an effective and efficient forward looking regulatory regime that serve to promote competition amongst MSPs and, to a certain extent, between MSPs and FSPs. These objectives also serve to further the development of the internal market given Service Providers operate in

⁹ ComReg set out its preliminary views on such matters in section 7 of the MVCT Consultation.

¹⁰ ComReg set out its preliminary views on such matters in section 8 of the MVCT Consultation.

other European jurisdictions and given MVCT is also an input to calls originating abroad but destined for Irish mobile subscribers.

- H.19 In pursuing these objectives, ComReg aims to influence the behaviour of SMP MSPs in order to mitigate the potential harmful effects that can arise as a consequence of the exercise of SMP. In this regard, ComReg considers that the regulatory measures that it has imposed in section 8 of this Decision, (and further considered in section 9), should address, in a proportionate way, the relevant competition problems and the consequential impacts on competition and consumers.
- H.20 In section 8 of this Decision, ComReg has considered the impact of the specific nature of regulation considered necessary in the Relevant MVCT Markets and, is of the view that the remedies specified are both appropriate and justified in light of the market analysis and the identified competition problems. The regulatory options are further considered below.

Identify and describe the potential regulatory options

- H.21 ComReg recognises that regulatory measures should be kept to the minimum necessary to address the identified market failure in an effective, efficient and proportionate manner. There are a range of potential regulatory options available to ComReg to address the competition problems in the Relevant MVCT Markets.
- H.22 In this regard, regulation can be considered to be incremental, such that only obligations are imposed which are necessary and proportionate to the competition problems which have been identified. The lightest measure that can be imposed is the obligation of transparency.¹¹ Should this be insufficient to address competition problems on its own, ComReg may apply a non-discrimination obligation.¹² If this is still not sufficient, ComReg may next consider the imposition of an access obligation,¹³ or accounting separation obligations.¹⁴ The final measure to be considered is the imposition of a price control and cost accounting remedy.¹⁵
- H.23 The questions of regulatory forbearance and the incremental imposition of one or more of the above obligations are considered below.

Forbearance

- H.24 In the case of the current analysis of the Relevant MVCT Markets, ComReg is required¹⁶ to impose at least some level of regulation on undertakings designated as having SMP. In section 6 of this Decision, ComReg set out its position that none of the Relevant MVCT Markets is

¹¹ Regulation 9 of the Access Regulations.

¹² Regulation 10 of the Access Regulations.

¹³ Regulation 12 of the Access Regulations.

¹⁴ Regulation 11 of the Access Regulations.

¹⁵ Regulation 13 of the Access Regulations.

¹⁶ Per Regulation 8(1) of the Access Regulations.

effectively competitive (or likely to become effectively competitive within the timeframe covered by this review).

- H.25 In view of this, absent the imposition of any remedies within the Relevant MVCT Markets, it is ComReg's position that such markets would not likely function effectively. As highlighted in section 8 of the MVCT Consultation and this Decision and paragraph 9.43 of this Decision, it is ComReg's position that the option of regulatory forbearance in each of the Relevant MVCT Markets is not, therefore, appropriate or justified.

Transparency Obligations

- H.26 ComReg's position in section 8 of the MVCT Consultation¹⁷ and section 8¹⁸ of this Decision is that a transparency obligation was necessary and would facilitate the development of effective downstream competition. In summary, ComReg has specified transparency remedies involving requirements to publish a Reference Interconnect Offer setting out the contractual terms and conditions and technical basis upon which Service Providers can obtain access to MVCT and associated facilities; and requirements to publish MTRs and provide advanced notice of changes to them.
- H.27 ComReg considers that each of the SMP MSPs should be required to comply with transparency obligations in order to minimise information asymmetries and, therefore, facilitate timely and efficient access to MVCT and associated facilities and to promote effective competition in downstream markets.
- H.28 However, transparency obligations on their own are not considered by ComReg to be sufficient, as while they allow monitoring and observation of actions, they do not directly affect the actions/ behaviour of SMP MSPs themselves.

Non-Discrimination Obligations

- H.29 Following our review of competition problems in section 7 of the MVCT Consultation and Section 7 of this Decision, we also subsequently considered in section 8¹⁹ of the MVCT Consultation and section 8 of this Decision²⁰ that a non-discrimination obligation was necessary. In summary, ComReg has specified non-discrimination remedies relating to requirements that SMP MSPs ensure that other Service Providers being provided with MVCT are not treated differently, or that such Service Providers are provided with information or service in a manner different to which the SMP MSP provides to itself.
- H.30 Such non-discrimination obligations essentially drive a form of behaviour in the Relevant MVCT Market, by requiring equivalent or

¹⁷ See paragraphs 8.52 to 8.64 of the MVCT Consultation.

¹⁸ See paragraphs 8.78 to 8.80 of this Decision.

¹⁹ See paragraphs 8.41 to 8.51 of the MVCT Consultation.

²⁰ See paragraphs 8.56 to 8.59 of this Decision.

treatment of Service Providers (with the transparency obligation providing the means of observing that discrimination is not occurring). In view of potential issues of discriminatory treatment (on price or non-price terms), transparency obligations alone would not address such issues. Furthermore, a non-discrimination obligation itself (or coupled with transparency) does not specifically address what type of product or service should be offered, or how it should be offered. Additionally, recourse to a non-discrimination obligation tends to be on an *ex post* basis, so that a Service Provider alleges a breach after the event.

- H.31 Thus, the operation of the non-discrimination and transparency obligations alone are considered by ComReg not to be adequate in providing a means of ensuring *ex ante* that SMP MSPs provide access to MVCT and associated facilities, including request for different types of access or providing it in a fair, reasonable and timely manner.

Access Obligations

- H.32 In our review of competition problems in section 7 of the MVCT Consultation and section 7 of this Decision and our review of remedies in section 8²¹, of the MVCT Consultation and section 8 of this Decision²², we identified issues related to the actual denial of or effective refusal to provide access to MVCT and associated facilities. While a non-discrimination obligation would be a necessary supporting obligation to address these issues, it is ComReg's position that it would not on its own, or coupled with transparency obligations, be sufficient.
- H.33 An access obligation gives operators the right to request access to MVCT and associated facilities and establishes the principles on which the relevant products and services should be made available. In summary, ComReg has specified access remedies relating to the requirement to provide access to MVCT and associated facilities, and to do so in a fair, reasonable and timely manner (and to provide objective reasons where requests for access are refused); the requirement to negotiate in good faith with Service Providers requesting access to MVCT; the requirement not to withdraw access to facilities already granted; and the requirement to grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services
- H.34 It is ComReg's position that, such access obligations are a fundamental requirement in the Relevant MVCT Markets and, taking account of the provisions of Regulation 12(1) of the Access Regulations, the absence of such obligations would hinder the development of effectively competitive retail markets by creating restrictions or distortions in competition amongst Service Providers, to the detriment of consumers.

²¹ See paragraphs 8.17 to 8.40 of the MVCT Consultation.

²² See paragraphs 8.35 to 8.37 of this Decision.

H.35 Such access obligations are therefore considered necessary and appropriate in achieving the objectives of section 12²³ of the Communications Regulation Acts 2002 to 2011 and Regulation 16 of the Framework Regulations and Regulation 6 of the Access Regulations, namely the promotion of competition, contributing to the development of the internal market and protecting the interests of end-users.

Price Control and Cost Accounting Obligations

H.36 In our review of competition problems in section 7 of the MVCT Consultation and section 7 of this Decision, and following our consideration of remedies in section 8²⁴ of the MVCT Consultation and Section 8²⁵ of this Decision, we considered it necessary to ensure that wholesale charges for access to MVCT and associated facilities should be subject to price control and cost accounting obligations. In summary, ComReg has decided to impose requirements that access to MVCT and associated facilities are cost oriented, with the detailed nature of the specific costing methodology to be adopted in light of the cost orientation obligation to be subject to a separate pricing consultation which is expected to be published shortly.

H.37 Given our position that the MSP operating in each Relevant MVCT Market (as identified in paragraph 6.136) has SMP, there is limited constraint offered by actual competition, potential competition and countervailing buyer power and, as a consequence, an SMP MSP's wholesale prices are not likely to be appreciably constrained in the absence of regulation. In view of this, transparency, non-discrimination and access obligations combined are not considered by ComReg to be sufficient and a cost-orientation obligation is considered necessary to address the issue of excessive pricing. In addition, a benefit of setting MTRs or other charges *ex ante* would be to provide advance certainty for Service Providers when setting their retail prices, particularly given MTRs are a cost input to call (or other) charges.

H.38 Insofar as cost accounting obligations are concerned, ComReg's position was that such a remedy would not be necessary, subject to an appropriately specified and implemented cost-orientation obligation, along with the onus being on SMP MSPs to demonstrate their charges are reflective of efficient costs. In view of this, the burden of such a cost accounting obligation was considered to be disproportionate.

Accounting Separation Obligations

H.39 In section our review of competition problems in section 7 of the MVCT Consultation and section 7 of this Decision and, following the consideration of accounting separation remedies in section 8 of the

²³ See paragraph 8.2 to 8.4 of this Decision.

²⁴ See paragraphs 8.65 to 8.89 of the MVCT Consultation.

²⁵ See paragraphs 8.115 to 8.117 of this Decision.

MVCT Consultation²⁶ and section 8 of this Decision²⁷, it is ComReg’s position that the imposition of such remedies at this stage may be excessively burdensome and costly for SMP MSPs to comply with and may therefore represent a disproportionate approach to resolving issues such as excessive pricing (and their impacts on downstream markets) particularly, in light of the alternative proposed obligations identified in section 8.

Determine the impacts on stakeholders

- H.40 Given that ComReg has designated six MSPs with SMP, as outlined above²⁸, it is ComReg’s position that the option of regulatory forbearance is unwarranted and can be discounted when considering the impact on stakeholders.
- H.41 Having regard to the discussion in paragraphs H.26 to H.39 above and the review of competition problems and remedies in sections 7 and 8 of this Decision respectively (and in the MVCT Consultation), ComReg has, on an incremental basis, identified why a range of appropriate remedies are necessary, proportionate and justified, while at the same time discounting other remedies. Having regard to the analysis and assessment of the Relevant MVCT Markets, ComReg has now grouped remedies into three options below for the purpose of considering the incremental impact of each option on stakeholders.
- (a) Option A: Impose Transparency, Non-discrimination and Access obligations.
 - (b) Option B: Impose Transparency, Non-discrimination, Access and Price Control obligations²⁹.
 - (c) Option C: Impose a full suite of obligations including Cost Accounting and Accounting Separation obligations.

Option A: Impose Transparency, Non-discrimination and Access obligations

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
Overall, a symmetric approach to the imposition of obligations should be positive for all	Overall, symmetric approach to imposition of obligations on SMP MSPs should be	By ensuring access to MVCT Service Providers will be able to ensure their

²⁶ See paragraphs 8.89 to 8.90 of the MVCT Consultation.

²⁷ See paragraph 8.127 of this Decision.

²⁸ See discussion in paragraphs H.24 to H.25.

²⁹ In considering Price Control, the impact on stakeholders of a cost orientation obligation is considered. As noted previously, the detailed specification of the cost orientation was considered in the Separate Pricing Consultation, within which the regulatory impact on SMP MSPs and other stakeholders has been further considered in the Separate Pricing Decision.

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
<p>MSPs given all are treated in a non-discriminatory fashion and it therefore promotes regulatory certainty/predictability.</p> <p>Meteor, O2, Vodafone and H3GI all currently have existing obligations regarding transparency and non-discrimination, with the first three MSPs also having access obligations. The incremental burden of the proposed obligations on all such MSPs is not likely to be significant.</p> <p>H3GI, TMI and Lycamobile do not have access obligations, although each of such MSPs currently provides access to MVCT (as well associated facilities) on a commercial basis. The cost of meeting the obligation to provide access to MVCT and associated facilities is not likely to be significant or disproportionate.</p> <p>Similarly, TMI and Lycamobile do not currently have transparency or non-discrimination obligations. However, both such MSPs would, in normal commercial circumstances, be expected to put in place commercial contracts, terms and conditions and</p>	<p>positive for all Service Providers by ensuring access is provided to them in a timely fashion, and in a manner which is transparent and consistent, thereby promoting regulatory certainty.</p> <p>Absent a cost orientation obligation, significant risk that Service Providers (including MSPs) would face high MTRs, with potential for retail price flexibility and innovation reduced (such as flat rate or bundles pricing). High MTRs may also result in an effective denial of access to MVCT. Regulatory certainty is reduced given wholesale pricing uncertainty.</p>	<p>subscribers can make calls to MSPs subscribers.</p> <p>Consumers, in particular, those with fixed line phones making F2M calls, likely to face high prices (whether through call or other charges). Consumers making off-net M2M calls may also face higher prices. This can dampen consumers' demand for F2M calls and/or drive consumer calling patterns to make more M2M calls than would otherwise be necessary.</p> <p>As high MTRs reduce the ability for Service Providers to innovate on retail pricing (say through bundled plans) it may limit the availability of such plans to consumers.</p>

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
<p>notify MVCT buyers of these, including MTRs and changes to them.</p> <p>Absent obligations regarding price control (cost orientation) SMP MSPs would have flexibility to charge MTRs at a level of their choice, with excess profits earned potentially feeding into the level and structure of MSPs own retail pricing. Excessive MTRs could also result in an effective denial of access to other Service Providers.</p> <p>MSPs incentives to innovate and increase efficiency or provide alternative forms of access in the Relevant MVCT Markets may be somewhat reduced as excessive MTRs are paid for by competitors and, in turn, by their customers.</p> <p>Withdrawal of existing obligations of cost accounting and accounting separation from Vodafone and O2 are likely to be positive for such MSPs as it reduces regulatory burden upon them. Similarly, the non-imposition of these obligations on H3GI, Lycamobile and TMI would also be positive.</p>		

Option B: Impose Transparency, Non-discrimination, Access and Price Control (cost orientation) obligations

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
<p>Meteor, O2, Vodafone and H3GI all currently have existing obligations of cost orientation. The incremental burden on such MSPs is, therefore, not likely to be insignificant.</p> <p>As neither TMI nor Lycamobile have, to date been subject to a cost orientation obligation, this will lead to an increased regulatory burden on them. Having regard to the existing level of their MTRs this will likely result in a reduction of such MTRs and a corresponding reduction in wholesale revenues where they are net receivers of termination traffic (although this would be offset having regard to the level of MTRs paid to other MSPs).</p> <p>Having regard to the above, on a static basis, some smaller MSPs would see lower MTR revenues as a result of the proposed decision. At the same time, such smaller MSPs MTR expenses (i.e., the amount that they must pay other MSPs for out-going off-</p>	<p>Increased transparency and certainty over wholesale pricing which addresses negative effects set out in Option A above. By reducing the impact of inter-operator termination transfers (from above efficient cost MTRs) and providing Service Providers with greater scope for offering innovative packages with larger numbers of inclusive (off-net) call minutes, or converged services (e.g., fixed and mobile bundles), increased competition from FSPs and late-entrant or smaller MSPs, cost-orientation should promote innovation and additional investment incentives for all Service Providers in the long-run. In this regard it will provide for a stable, predictable and effective regulatory environment for future investments and establish a level playing field and enhanced competition between different MSPs and between MSPs and FSPs. It should also minimise the regulatory burden of Service Providers that are active on a cross border basis (as many of the Irish MSPs are) and reduce</p>	<p>Negative effects on consumers identified in Option A are likely to be addressed, having regard to Service Provider's behaviour on retail pricing (where reductions in MTRs are not passed through to the retail level, consumers may not receive full benefits).</p> <p>While some retail pricing structural adjustments may occur, cost oriented MTRs can be expected to ultimately translate into lower retail prices for fixed and mobile calls, thereby also making them more affordable for fixed and mobile consumers.</p> <p>Enhanced competition will facilitate the development of innovative services for consumers such flat rate/unlimited/bundled offers and encourage the development of converged fixed-mobile services and bundles. While there is no guarantee of a full pass-through by FSPs of reduced MTRs in the price of calls to mobile numbers, given the commercial objectives of the FSPs to maintain subscriber numbers, and fixed traffic volumes, FSPs are likely to be use MTR reductions in fixed</p>

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
<p>net calls) will also decrease. The net impact of the change in MTR revenues and expenses will depend on relative magnitude of off-net incoming and outgoing calls. At the same time, the dynamic impact of lower MTRs should enable smaller MSPs to offer lower off-net calling prices for its subscribers. This in turn should enable smaller MSPs, to overcome the barrier to expansion arising from the desire of mobile subscribers to join larger networks where their friends and family are already subscribers. The ability to attract customers from larger networks (through offering bundles with a larger number of call minutes, including off-net calls) should enhance the competitive position of smaller MSPs, and provide opportunities for increased revenues in the long-run.</p> <p>As noted above, MSPs may need to change retail pricing structures having regard to any reductions in MTRs. As the precise detail of the cost orientation obligation was subject to consideration within the Separate Pricing</p>	<p>cross-country distortions to investment and competition, thereby consolidating the internal market for electronic communications services.</p> <p>Cost-oriented MTRs should deter inefficient entry based on revenues from MTRs that are above efficient cost, thereby allowing all Service Providers to compete on a level playing field. Efficient entry and exist into and out of the mobile market will be based on the ability to compete at the retail level, rather than based on above efficient cost MTR based cross-subsidies between MSPs and FSPs and amongst MSPs.</p> <p>More consistent and balanced regulatory approach between MSPs and FSPs and amongst MSPs, thereby providing certainty/predictability to market participants, including with respect to investment decisions.</p> <p>As cost orientation is consistently applied by other NRAs across Europe on SMP MSPs in those jurisdictions, imposition in Irish market is likely to contribute to the development of the internal market by being</p>	<p>to mobile cross-subsidy to attract new or maintain existing subscribers.</p>

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
<p>Consultation, the impacts on SMP MSPs and other stakeholders have been further within the Separate Pricing Decision</p>	<p>consistent and removing competitive distortions across EU jurisdictions.</p> <p>Inefficient cross-subsidies arising from excessive MTRs (between MSPs and between MSPs and FSPs) are likely to be reduced.</p> <p>While there is no guarantee of a full pass-through by FSPs of reduced MTRs in the price of calls to mobile numbers, given the commercial objectives of the FSPs to maintain subscriber numbers, and fixed traffic volumes, FSPs are likely to be use MTR reductions in fixed to mobile cross-subsidy to attract new or maintain existing subscribers.</p>	

Scenario C: Impose full suite of remedies including Cost Accounting and Accounting Separation obligations

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
<p>Maintenance of existing obligations of cost accounting and accounting separation on Vodafone and O2 likely to involve some burden.</p> <p>Burden likely to be higher for other MSPs who do not currently have such obligations, in particular, for smaller MSPs such as TMI and Lycamobile.</p>		

Impact on SMP MSPs	Impact on Service Providers	Impact on Consumers
Likely be more disproportionate for the latter MSPs.		

Determine the impacts on competition

- H.42 ComReg’s position is that, absent regulation, there is the potential and incentive for an SMP operator in each Relevant MVCT Market to engage in exploitative and exclusionary behaviours which would impact on competition and consumers. In section 7 of this Decision (and the MVCT Consultation), ComReg provided examples of potential competition problems and the impact of these on competition and consumers. ComReg has also highlighted its objectives in regulating the Relevant MVCT Markets in paragraph H.18 above, in particular, preventing restriction in or distortions of competition in affected retail markets.
- H.43 Having considered Respondents’ views, the imposition of appropriate *ex ante* remedies to address such competition problems was discussed and considered justified in section 8 of this Decision, and each of the specific remedies is designed to, amongst other things, promote the development of effective competition. This is so, given remedies are to be applied consistently across all MSPs, address the identified impacts of competition problems associated with MSPs having SMP in their Relevant MVCT Markets and, ultimately will be to the benefit of Service Providers by allowing them to compete fairly at the retail level and to consumers.

Assess the likely impacts and choose the best option

- H.44 In the discussion on its proposed approach on remedies throughout the MVCT Consultation and this Decision, ComReg has taken full account of its obligations under Regulation 8(6) of the Access Regulations (including that any proposed remedies are to be based on the nature of the problem identified), as well as its relevant objectives as set out under section 12 of the Communications Regulation Acts 2002 to 2011, Regulation 16 of the Framework Regulations and Regulation 6 of the Access Regulations.
- H.45 ComReg has imposed a range of specific regulatory obligations on SMP MSPs operating within in the Relevant MVCT Markets and, in so doing, has assessed the impact on stakeholders and competition not only in this section 9, but throughout the MVCT Consultation and this Decision.
- H.46 Having considered the impacts on stakeholders and competition, including the impact on the development of competition within the internal market, it is ComReg’s position that Option B represents the

most justified, reasonable and proportionate of the approaches to regulation within the Relevant MVCT Markets.

- H.47 Overall, the regulatory obligations chosen do not unduly discriminate against any one particular MSP in that they are imposed symmetrically and this should provide regulatory certainty and ensure fairer and more balanced retail competition amongst MSPs and Service Providers purchasing MVCT.
- H.48 ComReg considers that it has met the requirement to be transparent in its approach by setting out proposed remedies, by, providing the justification for such proposed remedies, and by issuing a detailed and reasoned public consultation on these matters.
- H.49 ComReg has given consideration throughout the MVCT Consultation and this Decision to other potential regulatory remedies (such as cost accounting and accounting separation) and considers that such remedies are not, at this time, warranted, largely having regard to proportionality grounds and given that other proposed remedies, if applied appropriately, would appropriately address the relevant competition and other concerns.

Appendix I Final Decision Instrument

1. STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument (“Decision Instrument”) is made by the Commission for Communications Regulation (“ComReg”) and relates to the market for voice call termination on individual mobile networks as identified by the European Commission in its Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation¹ (“the 2007 Recommendation”) and as analysed by ComReg in the document entitled *Market Review: Voice Call Termination on Individual Mobile Networks, Response to Consultation and Decision, ComReg Document 12/124, Decision Number. D 11/12.*

1.2 This Decision Instrument is made:

- i. Pursuant to and having regard to the functions and objectives of ComReg as set out in Sections 10 and 12 of the Communications Regulation Acts 2002 to 2011² and in Regulation 16 of the Framework Regulations; and
- ii. Having taken account of its functions under Regulation 6(1) of the Access Regulations; and
- iii. Having taken the utmost account of the 2007 Recommendation and the European Commission’s Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (“the SMP Guidelines”)³; and
- iv. Having, where appropriate, pursuant to Section 13 of the Communications Regulation Acts 2002 to 2011 complied with the policy directions made by the Minister for Communications, Marine and Natural Resources⁴; and
- v. Having taken the utmost account of the European Commission’s Recommendation of 7 May 2009 on the Regulatory Treatment of

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, 28.12.2007, p. 65) (“the 2007 Recommendation”).

² Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

³ European Commission guidelines of 11 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C165/03) (OJ C 165/6).

⁴ Policy Directions made by Dermot Ahern TD, then Minister for Communications, Marine and Natural Resources, dated 21 February 2003 and 26 March 2004.

- Fixed and Mobile Termination Rates in the EU (“the Termination Rates Recommendation”)⁵; and
- vi. Having had regard to the market definition, market analysis and reasoning set out in Consultation Paper and Draft Decision, Market Analysis: Voice Call Termination on Individual Mobile Networks, ComReg Document No. 12/46; and
 - vii. Having taken account of the submissions received from interested parties in relation to ComReg Document No. 12/46 following a public consultation pursuant to Regulation 12 of the Framework Regulations; and
 - viii. Having consulted with the Competition Authority further to Regulation 27 of the Framework Regulations; and
 - ix. Having notified the draft measure and the reasoning on which same is based to the European Commission, BEREC and the national regulatory authorities in other EU Member States in accordance with Regulation 13 of the Framework Regulations and having taken the utmost account pursuant to Regulation 13(6) of the Framework Regulations of any comments made by the European Commission, BEREC and any national regulatory authority in another EU Member State in accordance with Article 7(3) of the Framework Directive⁶; and
 - x. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations and Regulations 8, 9, 10, 11 and 13 of the Access Regulations.
- 1.3 The provisions of ComReg Document No. 12/46 and ComReg Document No. 12/124 (Decision No. D11/12) shall, where appropriate, be construed with this Decision Instrument.

PART I - GENERAL PROVISIONS (SECTIONS 2 TO 5 OF THE DECISION INSTRUMENT)

2. DEFINITIONS AND INTERPRETATION

2.1 In this Decision Instrument:

“**Access**” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time; for the avoidance of doubt, Access shall include (but shall not be limited to) Access to MVCT and Associated Facilities;

⁵ 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).

⁶ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), as may be amended from time to time;

“Associated Facilities” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time, but shall also include, for the avoidance of doubt, the Mobile Number Porting Centralised Database;

“Authorisation Regulations” means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), as may be amended from time to time;

“BEREC” means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

“ComReg” means the Commission for Communications Regulation, established under the Communications Regulation Acts 2002 to 2011;

“Effective Date” means the date set out in Section 16 of this Decision Instrument;

“Electronic Communications Network” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Electronic Communications Service” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“End-User” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Framework Regulations” means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011), as may be amended from time to time;

“H3GI” means Hutchison 3G Ireland Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls it, and its successors, affiliates and assigns;

“Interconnection” shall have the same meaning as under Regulation 2 of the Access Regulations, as may be amended from time to time;

“Liffey Telecom” means Liffey Telecom Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls it, and its successors, affiliates and assigns;

“Lycamobile” means Lycamobile Ireland Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls it, and its successors, affiliates and assigns;

“Meteor” means Meteor Mobile Communications Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls it, and its successors, affiliates and assigns;

“Mobile Network” means a digital wireless cellular network using radio frequency spectrum in any of the 900 MHz, 1800 MHz and/or 2100 MHz Bands or other radio frequency spectrum bands as assigned by ComReg to an Undertaking from time to time;

“Mobile Number(s)” shall have the same meaning as set out in the National Numbering Conventions, as may be amended from time to time. The current meaning of a Mobile Number is a number from the Irish national numbering scheme commencing with the network code 08X, where X can represent any digital character 0-9, except 1. For the avoidance of doubt, Mobile Number shall include both a Mobile Number which is the subject of a Primary Allocation/Reservation and a Mobile Number which is the subject of a Secondary Allocation/Reservation;

“Mobile Number Porting Centralised Database” is a database over which Mobile Service Providers have (effective or contractual) control, which facilitates Mobile Number portability and contains the list of ported Mobile Numbers and associated details, including voice call and other routing details. It provides Undertakings, including Mobile Service Providers, with access to the information necessary for accurately and efficiently routing voice calls to ported Mobile Numbers;

“Mobile Service Provider (MSP)” means an Undertaking providing End-Users with land based/terrestrial publicly available mobile voice telephony services using a Mobile Network;

“Mobile Termination Rate(s) (MTR(s))” means the wholesale charge(s) levied by a Mobile Service Provider for the supply of MVCT;

“Mobile Virtual Network Service(s)” means wholesale voice traffic conveyance and associated services provided by one Mobile Service Provider (‘MSP A’) to another Mobile Service Provider (‘MSP B’) which allow Subscribers of MSP B to make and receive mobile voice calls on the Mobile Network of MSP A.

“Mobile Voice Call Termination (MVCT)” means the provision by a Mobile Service Provider of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to Mobile Numbers in respect of which that Mobile Service Provider is able to set the MTR. For the avoidance of doubt, the provision of MVCT involves the provision of an Interconnection service;

“MVNO Host Network Provider” means the Mobile Service Provider providing the Mobile Virtual Network Service;

“National Numbering Conventions” means the set of rules under which the Irish national numbering scheme is managed and administered as set out in the document entitled *National Numbering Conventions, Version 7.0, ComReg Document No. 11/17*, as may be amended by ComReg from time to time;

“Numbering Plan Management” shall have the same meaning as under the National Numbering Conventions, as may be amended from time to time. The current meaning of Numbering Plan Management is the function within ComReg which carries out management of the Irish national numbering scheme;

“Primary Allocation/Reservation” shall have the same meaning as under the National Numbering Conventions, as may be amended from time to time. The current meaning of Primary Allocation/Reservation is the direct allocation or reservation of numbers by the Numbering Plan Management to individual network operators, service providers or users;

“Reference Interconnect Offer (RIO)” means the offer of contract by a Mobile Service Provider to another Undertaking in respect of MVCT (and Associated Facilities). To the extent that there is any conflict between the RIO and the obligations now set out herein, the latter shall prevail;

“Relevant Market” means, in the context of a particular SMP Mobile Service Provider, the specific market relating to that SMP Mobile Service Provider as identified in Sections 4.2.1 to 4.2.6 below;

“Relevant Markets” means all of the markets defined in Section 4.2 below;

“Secondary Allocation/Reservation” shall have the same meaning as under the National Numbering Conventions, as may be amended from time to time. The current meaning of Secondary Allocation/Reservation is the allocation or reservation of numbers to a downstream Undertaking or to an End-User, by an Undertaking to whom a Primary Allocation/Reservation has already been made. For the avoidance of doubt, a downstream Undertaking in this context includes any Undertaking other than the Undertaking to whom the Primary Allocation/Reservation was made;

“Significant Market Power (SMP) Mobile Service Provider” refers to a Mobile Service Provider designated with SMP in Section 5 below;

“Significant Market Power (SMP) Obligations” are those obligations as more particularly described in Part II below;

“Subscriber” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Telefónica” means Telefónica Ireland Limited, and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls it, and its successors, affiliates and assigns,

including Liffey Telecom, but excluding, for the purposes of this Decision Instrument, Tesco Mobile;

“Tesco Mobile” means Tesco Mobile Ireland Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls it, and its successors, affiliates and assigns, but excluding for, the purposes of this Decision Instrument, Telefónica;

“Undertaking” shall have the same meaning as under Regulation 2 of the Framework Regulations, as may be amended from time to time;

“Vodafone” means Vodafone Ireland Limited and its subsidiaries, and any undertaking which it owns or controls and any undertaking which owns or controls it, and its successors, affiliates and assigns;

“900 MHz Band” means the 880 to 915 MHz band of radio frequency spectrum paired with the 925 to 960 MHz band of radio frequency spectrum;

“1800 MHz Band” means the 1710 to 1785 MHz band of radio frequency spectrum paired with the 1805 to 1880 MHz band of radio frequency spectrum;

“2100 MHz Band” means the 1900 to 1920 MHz band of radio frequency spectrum, and the 1920 to 1980 MHz band of radio frequency spectrum paired with the 2110 to 2170 MHz band of radio frequency spectrum.

3. SCOPE AND APPLICATION

- 3.1 This Decision Instrument applies to H3GI, Lycamobile, Meteor, Telefónica, Tesco Mobile and Vodafone in respect of activities falling within the scope of the Relevant Markets defined in Section 4 of this Decision Instrument.
- 3.2 This Decision Instrument is binding upon H3GI, Lycamobile, Meteor, Telefónica, Tesco Mobile and Vodafone in the manner now set out below and each such Undertaking shall comply with this Decision Instrument to the extent that it applies to that Undertaking.

4. MARKET DEFINITION

- 4.1 This Decision Instrument relates to the market for voice call termination on individual mobile networks, as identified in the 2007 Recommendation and as analysed by ComReg in the document entitled *Market Review: Voice Call Termination on Individual Mobile Networks, Response to Consultation and Decision, ComReg Document 12/124, Decision Number. D 11/12*. For the purposes of this Decision Instrument, ComReg identifies six separate markets as defined in Section 4.2 below (referred to in this Decision Instrument as the Relevant Market(s)).

- 4.2 Pursuant to Regulation 26 of the Framework Regulations and in accordance with the 2007 Recommendation and the Explanatory Note⁷, taking the utmost account of the SMP Guidelines and in accordance with the principles of competition law, the six separate Relevant Markets defined in this Decision Instrument are the markets for the provision, by each of those Mobile Service Providers below, of voice call termination services in Ireland to other Undertakings for the purpose of terminating incoming voice calls, as more particularly described in Sections 4.2.1 to 4.2.6 below:
- 4.2.1 the provision by H3GI of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to Mobile Numbers (which are the subject of a Primary Allocation/Reservation and/or a Secondary Allocation/Reservation) in respect of which H3GI is able to set the MTR; and
 - 4.2.2 the provision by Lycamobile of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to Mobile Numbers (which are the subject of a Primary Allocation/Reservation and/or a Secondary Allocation/Reservation) in respect of which Lycamobile is able to set the MTR; and
 - 4.2.3 the provision by Meteor of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to Mobile Numbers (which are the subject of a Primary Allocation/Reservation and/or a Secondary Allocation/Reservation) in respect of which Meteor is able to set the MTR; and
 - 4.2.4 the provision by Telefónica of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to Mobile Numbers (which are the subject of a Primary Allocation/Reservation and/or a Secondary Allocation/Reservation) in respect of which Telefónica is able to set the MTR; and
 - 4.2.5 the provision by Tesco Mobile of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to Mobile Numbers (which are the subject of a Primary Allocation/Reservation and/or a Secondary Allocation/Reservation) in respect of which Tesco Mobile is able to set the MTR; and
 - 4.2.6 the provision by Vodafone of a wholesale service to other Undertakings for the purpose of terminating incoming voice calls to Mobile Numbers (which are the subject of a Primary Allocation/Reservation and/or a Secondary Allocation/Reservation) in respect of which Vodafone is able to set the MTR.
- 4.3 The Relevant Markets are more particularly described in Section 5 of the document entitled *Market Review: Voice Call Termination on Individual Mobile Networks, Response to Consultation and Decision, ComReg Document 12/124, Decision Number. D 11/12.*

⁷ European Commission Explanatory Note accompanying the 2007 Recommendation, SEC(2007) 1483/2, C(2007) 5406 ("the Explanatory Note").

5. DESIGNATION OF MOBILE SERVICE PROVIDERS WITH SIGNIFICANT MARKET POWER (“SMP”)

5.1 Pursuant to Regulation 25 and Regulation 27 of the Framework Regulations and taking the utmost account of the SMP Guidelines, having determined that the Relevant Markets are not effectively competitive, each of the following Mobile Service Providers is individually (and not collectively) designated as having SMP in relation to the Relevant Market on which that Mobile Service Provider operates:

- (i) H3G;
- (ii) Lycamobile;
- (iii) Meteor;
- (iv) Telefónica;
- (v) Tesco Mobile; and
- (vi) Vodafone.

PART II - SMP OBLIGATIONS IN RELATION TO SMP MOBILE SERVICE PROVIDERS (SECTIONS 6 TO 12 OF THE DECISION INSTRUMENT)

6. GENERAL PROVISIONS REGARDING SMP OBLIGATIONS

- 6.1 For the purposes of Part II of this Decision Instrument, the Mobile Service Providers identified at Sections 5.1(i) to 5.1(vi) above are referred to individually as the “SMP Mobile Service Provider” and collectively as the “SMP Mobile Service Providers”.
- 6.2 For the purposes of this Decision Instrument, an SMP Obligation applies to an SMP Mobile Service Provider only insofar as and to the extent that such SMP Mobile Service Provider is operating on its Relevant Market.

7. SMP OBLIGATIONS IN RELATION TO MVCT

- 7.1 ComReg is imposing certain SMP Obligations on SMP Mobile Service Providers in accordance with and pursuant to Regulations 8, 9, 10, 12, and 13 of the Access Regulations, as detailed further in Sections 8 to 12 below.

8. OBLIGATIONS TO PROVIDE ACCESS

- 8.1 Pursuant to Regulation 12(1) of the Access Regulations, each SMP Mobile Service Provider shall meet all reasonable requests from other Undertakings for the provision of Access.
- 8.2 Without prejudice to the generality of Section 8.1 and pursuant to Regulation 12(2) of the Access Regulations, each SMP Mobile Service Provider shall provide and grant Access to Undertakings to the following particular services and facilities:
- (i) MVCT;
 - (ii) Associated Facilities (including the Mobile Number Porting Centralised Database).

- 8.3 Without prejudice to the generality of Sections 8.1 and 8.2, each SMP Mobile Service Provider shall:
- (i) Pursuant to Regulation 12(2)(b) of the Access Regulations, negotiate in good faith with Undertakings requesting Access (including Access to MVCT and Associated Facilities); and
 - (ii) Pursuant to Regulation 12(2)(c) of the Access Regulations, not without the prior approval of ComReg withdraw Access (including Access to MVCT and Associated Facilities) already granted; and
 - (iii) Pursuant to Regulation 12(2)(e) of the Access Regulations, grant open access to technical interfaces, protocols and other key technologies that are indispensable for the interoperability of services or virtual network services (including Access to MVCT and Associated Facilities).

9. CONDITIONS ATTACHED TO THE ACCESS OBLIGATIONS

- 9.1 Pursuant to Regulation 12(3) of the Access Regulations, each SMP Mobile Service Provider shall, in relation to the obligations set out under Section 8 above, grant Undertakings Access (including Access to MVCT and Associated Facilities) in a fair, reasonable and timely manner.
- 9.2 Where a request by an Undertaking for provision of Access (including Access to MVCT and Associated Facilities), or a request by an Undertaking for the provision of information in relation to such Access is refused or granted only in part by an SMP Mobile Service Provider, the SMP Mobile Service Provider shall, at the time of the refusal or partial grant, provide in detail to the Undertaking each of the objective reasons for such refusal or partial grant.

10. OBLIGATION OF NON-DISCRIMINATION

- 10.1 Each SMP Mobile Service Provider shall have an obligation of non-discrimination as provided for by Regulation 10 of the Access Regulations in respect of Access (including Access to MVCT and Associated Facilities).
- 10.2 Without prejudice to the generality of Section 10.1, each SMP Mobile Service Provider shall:
- (i) Apply equivalent conditions, including in respect of MTRs or other charges, in equivalent circumstances to other Undertakings requesting or being provided with Access (including Access to MVCT and Associated Facilities) or requesting or being provided with information in relation to such Access; and
 - (ii) Provide Access (including Access to MVCT and Associated Facilities) and information to all other Undertakings under the same conditions and of the same quality as the SMP Mobile Service Provider provides to itself or to its subsidiaries, affiliates or partners.

10.3 For the avoidance of any doubt, the obligations set out in this Section 10 apply irrespective of whether or not a specific request for services or information has been made by an Undertaking to the relevant SMP Mobile Service Provider.

11. OBLIGATION OF TRANSPARENCY

11.1 Each SMP Mobile Service Provider shall have an obligation of transparency as provided for by Regulation 9 of the Access Regulations in relation to Access (including Access to MVCT and Associated Facilities).

11.2 Without prejudice to the generality of the obligation in Section 11.1, pursuant to Regulation 9(2) of the Access Regulations, each SMP Mobile Service Provider shall make publicly available, and keep updated on its website, a RIO. The RIO shall be sufficiently unbundled so as to ensure that Undertakings availing of Access (including Access to MVCT and Associated Facilities) are not required to pay for services or facilities which are not necessary for the Access requested.

11.3 The RIO shall include:

- (i) A description of the offer of contract for Access (including Access to MVCT and Associated Facilities) broken down into components according to market needs; and
- (ii) A description of any associated contractual or other terms and conditions for Access (including Access to MVCT and Associated Facilities) including MTRs and other charges; and
- (iii) A description of the technical specifications and network characteristics of the Access (including Access to MVCT and Associated Facilities) being offered.

11.4 Each SMP Mobile Service Provider shall publish its RIO within three (3) months of the Effective Date.

11.5 Without prejudice to the generality of the obligations in Section 11.1 to 11.4, pursuant to Regulation 9(1) and 9(4) of the Access Regulations, each SMP Mobile Service Provider shall make its MTRs publicly available and shall publish such MTRs in an easily accessible manner on its publicly available website. Each SMP Mobile Service Provider shall, unless otherwise agreed with ComReg:

11.5.1 publish a notice of its intention to amend its MTR(s) not less than 30 calendar days in advance of the date on which any such amendment comes into effect. Such notice shall at least include a statement of the existing MTR(s), a description of the proposed new MTR(s) and the date on which such new MTR(s) are proposed to come into effect; and

11.5.2 provide Undertakings with which it has entered into a contract in respect of Access, written notification of its intention to amend its MTR(s) not less than 30 calendar days in advance of the date on which any such amendment comes into effect. Such notification

shall at least include a statement of the existing MTR(s), a description of the proposed new MTR(s) and the date on which such new MTR(s) are proposed to come into effect.

- 11.6 Pursuant to Regulation 9(3) of the Access Regulations, ComReg may issue directions requiring an SMP Mobile Service Provider to make changes to the RIO to give effect to obligations imposed in this Decision Instrument and to publish the RIO with such changes. In accordance with Regulation 18 of the Access Regulations, ComReg may issue directions to an SMP Mobile Service Provider from time to time requiring it to publish specified information, such as accounting information, technical specifications, network characteristics, prices, and terms and conditions for supply and use, including any conditions limiting access to or use of services and applications where such conditions are permitted by law.

12. OBLIGATION RELATING TO PRICE CONTROL

- 12.1 Pursuant to Regulation 13(1) of the Access Regulations, each SMP Mobile Service Provider is subject to a cost orientation obligation as regards MTRs and prices charged by that SMP Mobile Service Provider to any other Undertaking for Access to or use of those products, services or facilities referred to in Section 8.
- 12.2 Without prejudice to the generality of the obligation in section 12.1, the cost orientation obligation referred to in Section 12.1 shall be subject to the requirements further specified by ComReg in the document entitled Mobile and Fixed Voice Termination Rates in Ireland, Response to Consultation and Decision, ComReg Document 12/125, Decision Number D12/12.

PART III - OBLIGATIONS AND EFFECTIVE DATE (SECTIONS 13 TO 16 OF THE DECISION INSTRUMENT)

13. STATUTORY POWERS NOT AFFECTED

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

14. WITHDRAWAL OF OBLIGATIONS

- 14.1 The Decisions set out in ComReg Document No. 04/82 (ComReg Decision D09/04⁸), ComReg Document No. 05/78 (ComReg Decision D11/05⁹) and ComReg Document No. 08/92 (ComReg Decision D05/08¹⁰) are hereby withdrawn when this Decision Instrument shall take effect.

⁸ Market Analysis – Wholesale Voice Call Termination on Individual Mobile Networks, ComReg Document No. 04/82, Decision D09/04, 24 July 2004.

⁹ Market Analysis – Mobile Voice Call Termination on Individual Mobile Networks, Imposition of SMP Obligations, ComReg Document 05/78, Decision D11/05, 13 October 2005.

15. MAINTENANCE OF OBLIGATIONS

- 15.1 Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements contained in Decision Notices and Directions made by ComReg applying to each SMP Mobile Service Provider and in force immediately prior to the Effective Date of this Decision Instrument, are continued in force by this Decision Instrument and each SMP Mobile Service Provider shall comply with same.
- 15.2 If any section, clause or provision or portion thereof contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

16. EFFECTIVE DATE

- 16.1 The effective date of this Decision Instrument shall be the date of its notification to each SMP Mobile Service Provider and it shall remain in force until further notice by ComReg.

**KEVIN O'BRIEN
COMMISSIONER
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 21 DAY OF NOVEMBER 2012**

¹⁰ Market Analysis - Voice Call Termination on Hutchison 3G Ireland's Mobile Network, ComReg Document No. 08/92, Decision D05/08, 1 December 2008.

Appendix J Glossary of Frequently Used Terms

Acronym	Full Title
BEREC	Body of European Regulators for Electronic Communications
CBP	Countervailing Buyer Power
CP	Calling Party
CPP	Calling Party Pays
ERG	European Regulators Group
EU	European Union
F2F	Fixed to Fixed call
F2M	Fixed to Mobile call
FSP	Fixed Service Provider
FTRs	Fixed Termination Rates
FWALA	Fixed Wireless Access Local Area
H3GI	Hutchison 3G Ireland Limited
HM(T)	Hypothetical Monopolist (Test)
ISDN	Integrated Services Digital Network
M2F	Mobile to Fixed (call)
M2M	Mobile to Mobile (call)
MHz	Megahertz
MNAC	Mobile Network Access Code
MNP	Mobile Number Portability
MNPCD	Mobile Number Porting Centralised Database
MNO	Mobile Network Operator
MoU	Minutes of Use
MSP	Mobile Service Provider
MTR	Mobile Termination Rate
MVCT	Mobile Voice Call Termination
MVNE	Mobile Virtual Network Enabler
MVNO	Mobile Virtual Network Operator
NRA	National Regulatory Authority
O2	Telefónica Ireland Limited

OSP	Originating Service Provider
PSTN	Public Switched Telephone Network
RIO	Reference Interconnect Offer
RNA	Retail Narrowband Access
RP	Receiving Party
SIM	Subscriber Identity Module
SME	Small-to-Medium-size Enterprise
SMP	Significant Market Power
SMS	Short Message Service
SSNIP	Small but Significant Non-transitory Increase in Price
STRPL	Switched Transit and Routing Price List
TMI	Tesco Mobile Ireland Limited
UPC	United Pan-Europe Communications
VoIP	Voice over Internet Protocol
WDMDS	Wideband Digital Mobile Data Service
WPNIA	Wholesale Physical Network Infrastructure Access