Commission for
Communications Regulation

Submissions to Consultation

Wholesale Call Origination and Wholesale Call Termination Markets

Response to Consultation Document No. 10/76 and decisions amending price control obligations and withdrawing and further specifying transparency obligations

Non-confidential submissions received from respondents

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<u>Response to ComReg Doc. 10/76</u>

Wholesale Call Origination and Wholesale Call Termination Markets

Proposed Amendments to the Price Control Obligations and Further Specifications of the Transparency Obligations

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OVERVIEW

- ComReg, in Consultation Doc. 10/76, proposes to regulate the price and the manner in which eircom offers services on the market for the provision of wholesale switchless voice ("SV") services. This market is a market downstream of the (regulated) interconnect markets and upstream of the (unregulated) market for calls. It is not included among the markets listed by the European Commission in its 2007 Recommendation. As such, this market for SV services can be regulated by ComReg only if ComReg demonstrates that the three criteria for ex ante regulation are met, Not only has ComReg not done so, but it is clear that, in the presence of regulated call origination and call termination markets, these criteria are not met. This is clearly evidenced by the presence of several OAOs in the market.
- ComReg's attempts to characterise eircom's notional elements of its SV service as new wholesale products falling within the scope of the regulated markets for call origination and call termination are misguided. As explained by ComReg itself, eircom, in providing its SV service, is "*reselling its own self-supply of voice to switchless operators*" (para. 2.5 of Doc. 10/76). There are no new wholesale products being offered in the markets for origination and termination, and the existing products for call origination and call termination offered to interconnected operators in the RIO discharge all relevant obligations of eircom in this regard.
- ComReg's proposals do not specify or amend existing obligations in the markets for call origination and call termination (which ComReg could not, in any event, do without conducting a new market analysis). Rather they would unlawfully regulate eircom in the market for SV services.
- eircom is of the view that the basis for the calculation of the minimum price that ComReg purports to impose on eircom in the SV market is entirely inappropriate and cannot be justified in any way. The appropriate standard to use is either the Equally Efficient or the Similarly Efficient Operator standard measured against the most interconnected operators. Any other choice will result in the unfair, unwarranted, unjustifiable and inefficient eviction of eircom from the market for SV, to the advantage of the most interconnected operator but to the detriment of competition on the market and ultimately to consumers. ComReg is not entitled to choose the interests of one operator over others.
- eircom is further of the view that ComReg's purported finding that its proposals will lead to further investment in infrastructure is not sound. It is questionable whether seeking to encourage investments in infrastructure where the total call volumes carried on the fixed TDM networks are declining, and there is already spare capacity, is appropriate. In any event, ComReg's analysis is flawed by ComReg's ignorance of the fact that switchless operators have the choice between several operators and not only eircom. The fact that eircom cannot make an offer which is competitive will not result in further investment; it will simply reduce the level of competition in the market for SV services.

RESPONSE TO CONSULTATION QUESTIONS

Q. 1. Do you agree or disagree with ComReg's preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and Call Termination? Please explain your response in detail.

eircom is fundamentally opposed to any amendment to the existing price control applying on the call origination and call termination markets.

First, eircom notes that ComReg is not lawfully entitled to amend the price control without first conducting a market analysis. eircom refers to Regulation 27 of the Framework Regulations which clearly allows an obligation to be imposed or amended only following a market analysis and a finding of SMP. The analysis of the call origination and call termination markets was conducted over three years ago and clearly cannot be relied upon by ComReg to address what ComReg appears to consider to be a significant change to the situation in the markets concerned.

Second, however, what, in fact, ComReg is seeking to do is not, contrary to what is said in Doc. 10/76, to amend the existing price control but rather to regulate the provision by eircom of services on a market downstream from the markets for call origination and call termination services. eircom notes the following:

- Contrary to what ComReg suggests at para. 3.4 of 10/76, eircom is not relying on "new" wholesale products which would fall within the scope of the call origination and call termination markets and would therefore be subject to existing regulation. As explained by eircom previously, these inputs are notional elements which eircom uses every time that it provides an end-to-end call on its network, including at the retail level. It is difficult to see what is new about them. These notional inputs which are being used by eircom are not sold in this form in the call origination and call termination markets because they cannot be availed of by operators in this form. The form in which these services can be availed of directly by OAOs is in the form of the products of origination and termination published by eircom in the RIO, as clearly shown in ComReg's graph on p. 6 of Doc. 10/76. eircom, in relation to these products, is subject to a range of obligations including of price control and transparency, with which it complies. Nor are these notional products being sold to switchless OAOs: they are part of eircom's self-provide for the purpose of end-to-end calls resold to OAOs in the form of the SV service.

  It is also contradictory for ComReg to state, in para. 1.2, that it is proposing a "*specific requirement not to cause a margin/price squeeze between the price of component parts of a Switchless Voice (SV) service and the pricing of the corresponding wholesale Call Origination and Call Termination products for interconnected Other Authorised Operators ("OAOs")*", and to find that it is entitled to intervene in this manner because those "component parts" fall within the scope of the regulated markets for call origination and call termination. A margin squeeze requires separate markets, upstream and downstream of each other and the margin squeeze test proposed by ComReg is, in fact, a margin test between the input markets for origination and termination and the downstream market for SV services.

- The obligation of cost-orientation for call origination and call termination services was found by ComReg to be appropriate to address the competition issues arising from eircom's SMP in the interconnect markets, including the issue of leveraging. eircom does not accept that its entry in the downstream market for SV is a sufficient pretext for ComReg to find, without conducting a market analysis, that a price control in the form of cost-orientation is no longer sufficient. eircom, in addition, believes that a price control which would take the form of an obligation of cost-orientation and an obligation not to margin squeeze including an obligation not to price below certain cost floors is unreasonable and disproportionate, and suggests that ComReg fails to appreciate the purpose of a price control obligation.

eircom submits, in this respect, that the purpose of a price obligation is to set the price for the products which fall within the scope of the regulated markets. While a regulator may choose different methodologies, among which are cost-orientation and retail-minus, it cannot lawfully impose several methods simultaneously. In the present instance, regulating the price for origination and termination services depending on whether eircom self-provides (or to adopt ComReg's (incorrect) positioning, (indirectly) provides to SV purchasers,) or provides to OAOs, would amount to imposing on eircom a double standard for compliance. eircom does not believe that such a distinction is justified and is of the view that this requirement, which would mean that eircom would have to treat its operation less favourably than those of OAOs, in addition to being disproportionate, is incompatible with Regulation 11 of the Access Regulations.

- It is apparent from the details of the price control proposed by ComReg that ComReg is, in fact, not proposing to regulate the price of these notional interconnect components but rather the price of the SV services provided by eircom on the market downstream from the call origination and call termination markets. Thus, tellingly, the costs which ComReg considers relevant to the margin squeeze test are not limited to the costs associated with the notional components being relied upon by eircom but include a range of costs faced by <u>OAOs</u> competing with eircom on the market for the provision of SV services. ComReg clearly is not concerned with the regulation of the interconnect markets but with the use of origination and termination inputs on the downstream market for SV. ComReg however is not entitled to intervene in this market in the manner it proposes.

  This is because the market for SV services, or end-to-end call services, is not a market which is included in the European Commission's 2007 Recommendation. This means that ComReg is not legally entitled to regulate this market unless it demonstrates that the three criteria for ex ante regulation are met, namely: (i) the market displays high and non-transitory barriers to entry, (ii) the market does not tend towards effective competition; <u>and</u> (iii) competition law would not be sufficient to address competition law issues arising.

  There is absolutely no doubt that, in the presence of regulation of the call origination and call termination markets, including a price control in the form of cost-orientation, that <u>none</u> of these criteria is met in so far as SV services are concerned. The obligation that eircom offers cost-oriented call origination and call termination services at the request of OAOs means that there are no high and non-transitory barriers to entry. Indeed, eircom was not the first entrant into this market which has been able to develop absent any regulatory intervention. Second, the market tends towards effective competition – in fact, it is already competitive. In particular, eircom does not believe that any operator in the market holds more than 40% and if there is, it is certainly not eircom. Finally, competition law, with the benefit of regulation at the upstream level, is entirely sufficient to apprehend any anti-competitive behaviour, including the potential margin squeeze of concern to ComReg, as set out para. 3.6, in particular.

For these reasons, eircom is of the view that the price control obligation proposed by ComReg is unlawful. eircom further believes that the price control obligation proposed by ComReg will <u>not</u> promote efficiency or assist in maximising consumer benefits. ComReg's analysis in this respect is flawed. In particular, ComReg's belief that "*the additional price control should promote sustainable competition as competitors offering voice services to their retail customers can either avail of the resale of wholesale voice services at an appropriate price or efficiently invest in interconnection to avail of cost oriented primary call origination and primary call termination"* fails to take into account that the SV market is driven by existing over-capacity in interconnection; that OAOs already providing SV services will continue to offer such services; and that end-users are most likely, as the outcome of the price control, to suffer higher, rather than lower, prices because OAOs providing SV services will be shielded from competition following eircom's forced exit from the market.

Q. 2. Do you agree or disagree with ComReg's preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets? Please explain your response in detail.

eircom fundamentally disagrees with ComReg's proposal.

First, it is not correct that ComReg's proposal does not "add to or amend" eircom's existing obligation of transparency. In fact, it is clear that ComReg's proposal amounts to imposing a new obligation of transparency in relation to eircom's provision of an unregulated service. As explained in response to Question 1, ComReg cannot amend an obligation without first conducting a market analysis and, in case of markets which have not been declared susceptible to ex ante regulation, demonstrating that the three criteria for intervention are met. ComReg has not done any of this and its proposal is accordingly unlawful.

Second, eircom finds it unconscionable that ComReg could find eircom in breach of its obligation of transparency and then seeks to specify that obligation without, at least, and simultaneously, withdrawing its finding of breach. It is against all recognised principles of natural and constitutional justice that an operator could be found in breach of an obligation which it did not have the means to comply with. In particular eircom could not anticipate that ComReg would expect eircom to publish its offer for a downstream product in discharge of an obligation on upstream markets. ComReg's approach to this matter is contrary to the requirements of fairness, transparency and legal certainty which ComReg must comply with in discharging its obligations.

Third, eircom does not accept that its obligation of transparency on the interconnect markets can be "specified" so as to require eircom to publish products which do not fall within the scope of the regulated markets. eircom notes that the supposedly regulated components which would be subject to the obligation of transparency cannot be purchased from OAOs, other than bundled together in the form of an end-to-end call, or separately in the form of the published interconnect products. In this regard, it is not the case, contrary to what ComReg appears to believe, that OAOs have the choice between purchasing interconnect products from eircom, purchasing SV services from OAOs or purchasing regulated SV components from eircom. Their choice is between purchasing interconnect products or purchasing SV from either eircom or OAOs. For SV operators, there is no material difference between purchasing a SV service from eircom or from OAOs, and such SV operators availing of eircom's White Label offers are not thereby provided with access to something that interconnected operators cannot have. Any such understanding of the market would be flawed and inaccurate. eircom notes that ComReg has not proposed that eircom publishes these notional products but rather the unregulated end-to-end product. As explained previously, and recognised by ComReg (see e.g., para 2.5 of ComReg 10/76), this product falls within the scope of a separate and unregulated market. The regulation applicable to certain products does not extend to all services for which they are used as inputs. This indeed would result in all possible telecoms markets being regulated.

Even if it was legally possible for ComReg to specify an obligation in the manner proposed by ComReg (clearly it is <u>not</u>), the very significant negative effects to expect from an obligation on eircom to publish its SV services in the manner proposed by ComReg clearly outweighs any benefits that could be gained. As such, the requirements on eircom proposed by ComReg are disproportionate and unlawful. eircom points to the following:

- The SV market already benefits from regulation on the upstream origination and termination markets including in terms of access, transparency, non-discrimination and price control and has been able to thrive including by relying on eircom's interconnect products as inputs to OAOs' SV services. This suite of wholesale remedies, just as much as it enables OAOs' SV services, constrains eircom's own offer. Requiring eircom to publish the terms of its SV offers will significantly disturb this balance by giving OAOs the possibility of systematically undercutting eircom's offers, thereby leading to eircom's exclusion from the market. Competition, and ultimately end-users, will not benefit from eircom's exclusion from the market. The published price floors will act as price ceilings for other operators, and market prices will increase. Higher prices for the consumer will follow. ComReg must recognise that eircom, in the SV market, is not providing a service which is indispensable to competitors and therefore capable of justifying an obligation of access and transparency.

- In terms of the publication of the terms, conditions, SLAs, guarantee and other product related assurances, it is incorrect to pretend that eircom provides its SV customers with access to component parts which are subject to specific terms, conditions etc. To require eircom to publish these is either a requirement to publish its terms and conditions for SV service, or a requirement to publish eircom's internal reference offer for these products when used by eircom for the provision of downstream services. The first instance would amount to the imposition of an obligation on an unregulated market; the second instance supposes the existence of an obligation which however has not been imposed on the call origination and call termination markets and the benefit of which would be most doubtful. In both cases, ComReg's proposal is unlawful.
- It is accordingly extraordinary in these circumstances that ComReg is content to justify its proposal in terms of transparency by the fact that it "*will provide some assurance to interconnected OAOs"* that in effect, eircom is compliant with its obligations on the upstream markets for call origination and call termination. It is also a significant source of concern to eircom that ComReg is willing to exclude eircom from a market in circumstances where ComReg itself is not satisfied that end-users clearly will benefit as is apparent from ComReg's statement at para. 3.22 ("*ComReg believes that its proposals should not impact end users because it does not affect Eircom's freedom to price calls in retail markets. In fact ComReg believes there should be a longer term benefit from increased competition, or at least that competition provided at the retail level through the provision of SV services will not be adversely affected*"). This does not constitute sufficient justification. ComReg cannot lawfully seek to impose an obligation which will have the effect of excluding eircom from the market simply to reassure OAOs. Any obligation imposed under the framework must be proportionate and justified and appropriate to address the alleged competition problem that has been identified. ComReg has not identified any competition problem and its proposal is accordingly unjustified and unjust.
- Finally, ComReg's suggestion, in para. A12(vii), that "*ComReg may consider not requiring eircom to publish the minimum prices of its call origination and call termination components in the provision of SV services*" is difficult to understand, including in circumstances where ComReg issued a notification of breach: either eircom is subject to these obligations as part of its obligations on the call origination and call termination markets or it is not. The application of obligations cannot depend on compliance with other obligations as ComReg appears to believe. This would clearly contradict the requirements of fairness, objectivity and legal certainty. It appears to eircom that this demonstrates, if need be, that ComReg is seeking to impose on eircom a range of obligations on an unregulated market which ComReg is not entitled to regulate.

Q. 3. Do you agree or disagree with ComReg's preliminary views on the proposed structure of the price control margin (price) squeeze test – in particular that the margin (price) squeeze test: will be assessed based on a similarly efficient operator standard, will be assessed at a static point in time, will be assessed by time of day gradient (i.e. day, evening and weekend), and uses "LRAIC plus" as its cost standard? Please explain your response in detail.

Were the regulation of the market for SV services justified (for the avoidance of doubt, it is not so justified and for the reasons set out in response to Question 1, it is difficult to see how it could be justified), then and strictly without prejudice to the above, eircom agrees in general terms with the proposed structure of the price control, subject to the comments below:

- eircom previously proposed that the appropriate standard is that based on an "Equally Efficient Operator". However, in view of the fact that no operator in Ireland interconnects with eircom exclusively at the primary level only (thereby suggesting that it may not be efficient to do so), eircom is not opposed to a test based on a "Similarly Efficient Operator" standard, which recognises this. eircom however does not accept that the Similarly Efficient Operator standard can be reasonably interpreted to be set at the Lower Interconnect Level. It cannot be correct that efficient investment, in the view of ComReg, takes place at this level where no less that four other operators competing in the provision of SV services are significantly more interconnected with eircom. eircom agrees that, in circumstances where no operator is fully interconnected with eircom, a decision must be made as to what constitutes a level that is "similarly efficient" to eircom's. Clearly, however, there are only two choices, either a weighted average level or the "more interconnected level". eircom is of the view that the latter is the most appropriate.

  eircom notes further that the choice of the "Lower Interconnect Level" will force eircom out of the SV market to the detriment of competition and end-users. It will not "protect" lower interconnected OAOs, contrary to what ComReg argues. This is because such lower interconnected OAOs will, in any event, face competition from OAOs interconnected to a greater extent. In this regard, the choice of the Lower Interconnect Level results in granting the most interconnected operator ✂ a very significant advantage in the SV market over all other operators including eircom. eircom is of the view that this is not an option which is open to ComReg. It does not promote efficient competition: rather it provides one operator with an unfair advantage in the market. eircom believes that ComReg's purported justification by reference to the "*critical stage of development and roll out of LLU"* is entirely irrelevant to the question of the appropriate benchmark against which to measure efficiency in the provision of SV services. ComReg's proposed standard is accordingly indefensible and unreasonable.

- If such a test was justified (and it is not), eircom agrees that it should apply at a single point in time. This is the case because all the efficient competitors that will ever be in the market for SV services in Ireland are already offering services. Their input costs (and, in particular, their marginal costs) are determined by eircom published prices for Call Origination, Call Termination, and interconnect paths. The competitors have entered the market based on paying these charges and offer SV services that achieve the target contribution to the fixed costs of crossing their own networks and providing other supports to the switchless reseller. The only change to these inputs that will arise is changes to the prices published in the eircom reference offers. There is no other requirement for the test to apply over any particular period of time. There are no fixed or sunk costs exclusively associated with the SV service, as all the entrants already had all the necessary network and support infrastructures in place for other purposes before entering the SV market.

  As the eircom charges for call origination and call termination, that constitute the main incremental costs for the competitors in the SV market, have distinct charges for day, evening and weekend, the test should apply separately at each of those times of day. To apply the test only on a 24-hour basis would run the risk of implementing a control that would distort the level of competition between the providers of SV services to mainly business (daytime) end users, as opposed to providers of SV services to mainly residential (evening and weekend) end users.

- With respect to the use of a cost standard, eircom believes regulatory consistency should be pursued when choosing costing methodologies, which impact on vertically integrated services.

  In the particular case of SV services, we note that the main network component inputs used in the provision of SV services are, in effect, price regulated using a "LRAIC plus" cost standard. In this sense, eircom is of the opinion that the cost standard for the network components of SV services should also not deviate from this basis. However, as noted in this response, given the incremental nature of SV as a service to the existing baseline portfolio, any absorption of joint and common costs at the wholesale layer needs to be considered in this context.

Q. 4. Do you agree or disagree with ComReg's preliminary views on the costs to be included in the margin (price) squeeze test? Please explain your response in detail.

If a margin squeeze test on the SV market was justified (which it is not), then the costs listed by ComReg, including call origination, Interconnect paths, call termination and the OAOs' costs for using their network and support facilities, would be relevant to the assessment of eircom's price for SV services. The list of costs considered to be relevant by ComReg in setting a minimum price clearly shows however that the price control proposed by ComReg is not concerned with the price charged by eircom for the "regulated components" for call origination and termination but with the price for the SV service. eircom refers to its response to Question 1 in this regard.

Q. 5. Do you agree or disagree with ComReg's preliminary view in relation to the structure of the minimum prices/price floors for the margin (price) squeeze test? Please explain your response in detail.

eircom disagrees fundamentally with the indicative minimum prices published by ComReg as Option 1. These prices reflect ComReg's incomprehensible choice of the Lower Interconnected Level in deciding the relevant mix of interconnect inputs. As explained by eircom above, this very unfortunate choice would result in excluding eircom from the market for SV, protect inefficient competitors already in the market for SV and encourage further inefficient entry.

Q. 6. Are there any issues in relation to the amendment of the price control obligations and further specification of the transparency obligations in the markets of Call Origination and Call Termination that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

Please refer to eircom's responses to Questions 1-5 above.

ComReg does not explain why, in the presence of regulation of the upstream level and having regard to competition law rules, eircom has an incentive to cause a margin squeeze and does not seek to understand and explain how it can be that if this is the case, eircom was not the first to enter the market and that it is not the dominant provider in the market. ComReg gives no regard to potentially competing objectives of eircom as a retail and wholesale operator. Nor does ComReg give any regard to factors such as the weight of eircom's interconnect business in its SV strategy, or to the existence of interconnect over-capacity. These are all essential aspects of the SV market dynamics which ComReg must consider.

Q. 7. Do you agree or disagree with the preliminary views expressed by ComReg? If not, please explain which preliminary view(s) you disagree with and detail what specific amendments you believe are required.

eircom disagrees fundamentally with the approach taken by ComReg to the market for SV. Even a cursory analysis of the actual market conditions in this market would indicate that the three preconditions for ex ante regulation are not met. The presence of four competitors prior to eircom's entry shows that the barriers to entry are low and that the market is prospectively, and already, competitive. Competition law is clearly sufficient to address any competition law issue arising and indeed has constrained eircom's pricing behaviour in the market. ComReg's proposals amount to an unjustified regulation of a market which ComReg cannot lawfully regulate.

In addition to the legal shortcomings of ComReg's approach, highlighted throughout this response, ComReg's justification for intervention is, in any event, significantly lacking. ComReg points to "eircom's ability and incentives to cause a margin/price squeeze" and that "it is not demonstrably clear what precisely the nature of the regulated component products included by eircom in its provision of SV service are and that they are clearly provided on a non-discriminatory basis in terms of quality".

These are entirely unacceptable bases for intervention.

First, as highlighted in response to Question 6, ComReg gives no explanation why eircom should have an incentive to cause a "margin squeeze" in the market for SV services. If anything, recent experience demonstrates that eircom has no such incentive and/or has faced sufficient constraints in preventing this.

Second, ComReg is not entitled to assume non-compliance by eircom with its obligation to justify the imposition of further obligations. eircom complies with its obligation of non-discrimination, and the call origination and call termination services provided to its downstream operations for the purpose of retail calls or SV services are of the same quality as those provided to interconnected operators. ComReg, without giving any evidence whatsoever of the contrary, cannot assume that this is not the case. eircom further strongly opposes any suggestion at para. 2.26 that eircom is not complying with its obligations under the Access Regulations.

Q. 8. Do respondents believe that the draft text of the proposed decision instruments are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please elaborate on your response.

eircom does not agree that ComReg Decisions D04/07 and D06/07 can be used as the basis for imposing on eircom the obligations proposed by ComReg. Not only do the market analyses that led to these decisions include no findings that can justify these obligations but they concern markets other than the market that ComReg purports to regulate. In these circumstances, Regulations 9, 10, 14 and 17 of the Access Regulations cannot be relied upon by ComReg.

Without prejudice to this, eircom notes the following:

(Wholesale Call Origination)

- Section 3.1. is unnecessary
- It is not sufficient to set a mandatory test by reference to a consultation document. In the interest of legal certainty and clarity the test should be set out in the decision instrument itself.

- Section 5.1.1.1 and section 5.1.1.2 do not reflect the obligations which ComReg has, in fact, proposed in the consultation document. The prices which ComReg proposes eircom should publish exceed the Call Origination “component part” of eircom’s SV service. Call origination should accordingly be appropriately defined so that the manner in which eircom can discharge these obligations are clear. Similarly, eircom cannot publish the terms, conditions, SLAs, guarantees and other product related assurances of the Call Origination part of an SV service because this “part” is not being offered on a separate basis.

These observations apply mutatis mutandis to the Draft Decision for Wholesale Call Termination.

Q. 9. Do you have any views on this Regulatory Impact Assessment and are there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Appendix A in ComReg’s document 10/76 is entitled “Regulatory Impact Assessment” (RIA). At section A4 ComReg suggests that a RIA was “*not mandatory for ComReg to do*”. ComReg’s proposals would broaden the scope of regulation to encompass the SV product. Therefore ComReg’s contention that this does not amount to regulatory change is incorrect. As ComReg is proposing new regulations in relation to the SV product, ComReg is obliged to conduct a full RIA of all the available feasible options. This ComReg has manifestly failed to do. However, eircom does not believe that the analysis conducted by ComReg provides the basis for a true Regulatory Impact Assessment. ComReg’s assessment is tainted by one very significant omission, namely the assessment of the proposed measures on eircom in terms of eircom’s ability to maintain a presence on the market for SV and in terms of the financial impact on eircom. ✂ ComReg has also failed to take into account the impact of these measures on eircom’s existing White Label customers. Instead ComReg has chosen to focus on the difficulty or otherwise of the implementation of the option by eircom. This is entirely inadequate an assessment.

In addition, no effort is made by ComReg in its RIA to quantify the predicted effect on stakeholder welfare of the various options identified. As a general point, ComReg should apply objective cost-benefit analysis principles in its RIAs. There is also no discussion of the appropriate weight that should be attached to the various costs and benefits experienced by each of the relevant stakeholders. (e.g. How is a negative impact on eircom balanced against a positive impact on an OAO, or vice versa? How is a negative impact on a highly interconnected OAO balanced against a positive impact on an OAO who might be interconnected at the higher levels of the eircom network? etc.).

<u>ComReg’s “Preferred” Option</u>

The analysis of the impacts also appears, in some instances, to be selective. In many instances, the RIA appears to have been approached with the aim of justifying a conclusion already reached, to the detriment of an appraisal of the options open to ComReg.

It is difficult to understand in this regard how in examining the “impact on OAOs” of the proposals ComReg can consider all OAOs as a unitary homogenous body, all of whom have identical attitudes to eircom’s SV product. ComReg appears to assume that all OAOs are hostile to eircom’s presence in the market and limits the analysis to the impact of the proposals on an OAO who competes with eircom in the SV space. This approach is in no way reflective of reality and completely ignores the significant divergence of views among the OAO community. In fact, the effect of a particular option on one OAO may be diametrically opposite to the effect of the same option on another OAO, e.g. depending on the level of infrastructure investment, levels of interconnection, etc..

It is similarly difficult to understand why ComReg would choose to give more weight in its deliberations to <u>potential</u> effects than to <u>much more certain</u> effects. ComReg's purported assessment of the effects of the proposed price control, which ignores the highly likely exit of the market by eircom but emphasises hypothetical risks (i.e. "*could be at risk of margin (price) squeeze*", OAOs "*may be squeezed by Eircom*", and similarly consumers ""*may be squeezed by Eircom*") is a case in point.

<u>Six Core Principles</u>

eircom notes the six core principles listed by ComReg in sections A4 and A18, on which it claims to base its assessment of the various options (i.e. necessity, effectiveness, proportionality, transparency, accountability and consistency). eircom concurs with these general principles for the conduct of the assessment. However, we do not believe that ComReg has met these principles in its RIA.

In particular, eircom does not accept that ComReg's purported intervention is by any standard necessary. Nor can it be considered consistent, having regard to the outstanding Breach Notice issued by ComReg in July 2008. ComReg appears to be both of the opinion that the obligation concerned is so clear that it can potentially be enforced in the High Court and simultaneously that it is so unclear that it requires to be "specified". Nor does ComReg's "all or nothing" approach to the RIA allow it to arrive at a level of regulation that is effective and proportionate. For instance, ComReg has only considered the binary positions of "publish" and "don't publish". However, there are other options, including that eircom might be obliged to publish terms and conditions, but not minimum price floors. This option merits absolutely no mention in the ComReg RIA.

<u>Listed Options</u>

We will now consider some of the options listed by ComReg in more detail, in particular ComReg's impact assessment under some of the headings. This is done for demonstration purposes, and should not be considered to be an exhaustive list of the limitations that eircom sees with ComReg's assessment of the various (limited and incomplete) options put forward by ComReg.

1. **Option – Price control is not amended**

<u>Impact on OAOs</u> – OAOs who have not invested heavily in interconnect infrastructure, and who currently purchase, or may in the future purchase, SV from eircom will be disadvantaged and face higher charges if ComReg's proposals are finalised. This impact is ignored by ComReg in its RIA.

2. **Option – Price control to include obligation not to margin (price) squeeze**

<u>Impact on eircom</u> – We have pointed above that the effect of this measure would be to terminate eircom's involvement in this marketplace, and that this effect has been completely ignored by ComReg in its RIA.

<u>Impact on consumer</u> – With the knowledge that the imposition of this test would mean eircom exiting this "market", it is disconcerting that ComReg can list the only impact on consumers here as being that "*test should ensure that competition is maintained to the benefit of consumers*". In fact, the actual consequence will be the polar opposite of what ComReg predicts.

3. **Option – That the margin (price) squeeze test is based on a Similarly Efficient Operator – the SEO is based on lower level of interconnection than average**

<u>Impact on eircom</u> – ComReg fails to assess the true impact on eircom. The over-riding impact on eircom is that it will not be able to compete ✂, to the obvious detriment to the competitive position in SV.

General – ComReg failed to assess the impacts of other related options here including the choice of an Equally Efficient Operator or a Reasonably Efficient Operator.

4. **Option – That the margin (price) squeeze test is conducted on a product by product basis**

Impact on eircom – ComReg fails to assess the true impact on eircom.

Impact on OAOs – ComReg's approach is defective because it is incomplete and ignores the various situations of different OAOs.

Impact on consumer – There is no attempt to assess the impact on consumers.

5. **Option – That the test uses "LRAIC plus" as the appropriate measure of cost**

General – No consideration is given to the possible use of "Average Variable Cost" (AVC), "Average Avoidable Cost" (AAC), "Average Total Cost" (ATC), etc.

Impact on eircom – By proposing "LRAIC plus" ComReg is proposing the inclusion of an element of fixed and common costs in the cost floor for eircom. This will therefore result in a higher cost floor than if ComReg had proposed either AAC or AVC. Not only does ComReg fail to consider either of these two viable options (AAC or AVC), but ComReg also fails to predict what the effect might be on eircom having to go to the market with a price which was inflated by the loading of portions of fixed and common costs. eircom will therefore be put in an impossible competitive position by ComReg, since eircom's competitors will be pricing on a marginal costing basis, in order to maximise contribution. Again, as outlined previously, the obvious consequence is that eircom will be unable to compete and will be forced to exit the "market".

Impact on OAOs/consumer – eircom disagrees with ComReg's premise that an OAO will calculate on including "*an appropriate amounts of fixed and common costs*" when deciding whether or not to enter or expand in a market. On the contrary, a basic principle of decision making in business is that the threshold that a product must overcome before it is viable is if it covers the level of the associated variable costs. In other words, the OAO will base their decision on marginal costing principles, and anything above the variable cost will be a contribution which makes the product or service viable.

6. **Option – That transparency obligation is amended to exempt Eircom from publishing minimum prices, terms, conditions associated with call origination and call termination when provided in SV services**

This option appears to be totally at odds with the proposals put forward by ComReg in document 10/76. ComReg clearly proposes that eircom should be obliged to publish the minimum prices and the terms of the SV product. Nowhere does the RIA consider the option proposed by ComReg (of eircom being compelled to publish the minimum prices and the terms). This is a very serious omission.

END

2 BT Communications Ireland Limited

BT Communications Ireland Ltd ("BT")
Response to the ComReg Consultation and draft decision on:

Price Controls and Transparency Measures for Wholesale Call Origination and Termination.

ComReg Reference Document No. 10/76

Issue 1 – 23nd November 2010

1 Introduction

This is a welcome and timely consultation addressing a significant development in the Irish market which is the introduction of what is commonly known as eircom 'White label' wholesale products. We note that this consultation is focused on Switchless Voice (SV) services, however, the white label products from eircom supports both SV and Wholesale Broadband Access services. Hence in this response we use the term white label to include both SV and WBA services.

We are an alternative operator in Ireland and consume the eircom Wholesale Interconnect regulated product set in conjunction with our own network facilities to provide downstream reseller SV products. The introduction of the eircom's White label product set and eircom's vertical integrations means that eircom is now our main supplier and our direct competitor for sales to SV re-sellers.

For some time we have been concerned as to the components and the pricing of the eircom White Label products as there is sparse information of what is being offered and we have been particularly concerned whether some fees have been waived when an operator moves to the eircom product, and whether the costs of the additional components in the White Label Product, whatever they might be, are being fully recovered.

We note that eircom are mandated in Ireland as has having SMP in the Call Origination and Call termination Markets and agree that it's appropriate to add the margin (price) squeeze test and additional regulatory remedies to prevent exAnti such behaviours.

Before we address the questions in detail we feel we must address the statement that ComReg makes in clause 2.26. We are shocked but not surprised to read that "…eircom operates a limited form of separation between Retail and Wholesale operations, …". This is not acceptable and we seek ComReg to undertake a detailed investigation into the 'Chinese walls' within eircom and how they are operating to ensure they are fit to protect the industry. Its little surprise that the industry perception is that eircom favours its downstream businesses over Wholesale. We also support Comreg's intention to investigate the lack of controls between eircom Interconnect products and their SV product.

Within our detailed response the following themes emerge:

a. **Ensure economic space for Interconnect providers and stimulate investment.**

   We fully agree with ComReg's intention to ensure that there is an economic space for other providers to exist in Ireland and such will enable investment and benefit the consumer through competition and greater choice of retail product.

   We are very concerned that eircom, if unhindered, will set prices where it is simply not viable for operators to build their own networks and seek interconnect, and ultimately all operators will be forced to purchase the eircom SV product. The consultation already suggests to us that such is already starting to happen with eircom passing the SB-WLR 14% price control discount straight through to its SV customers whilst also providing additional facilities such as call records.

   We support the ladder of investment concept in Ireland and welcome this initiative by ComReg to protect investment in Ireland and the customer and job benefits that flow from this.

b. Following from above its essential the transparency should include the public publication of the following to the whole industry:

i. Product description
ii. A full price list including all facilities and service wrap
iii. Published Reference Offer
iv. SLAs (we expect these to be contractual within the reference offer)
v. Process documentation

c. Apply these proposals to the eircom Retail Sales Channel

As discussed in our response to question 7 ComReg came to the conclusion in the dispute between COLT and eircom (ComReg Doc 09/30) that eircom Retail is a Sales Channel which means it is a switchless reseller and eircom are self supplying Call Origination and Call Termination.

For reasons of non-discrimination we therefore consider that eircom Retail should also be subject to purchasing the Call Origination and Termination packages with the same obligations as proposed in this consultation. If this is not correct then the Final Determination in the COLT vs. dispute must have been wrong.

d. eircom pass through of SB-WLR 'Line Rental' discount

The ComReg consultation appears limited to the price floors for calls, however the SB-WLR Retail Minus price control of 14% also needs to be re-evaluated given eircom pass this straight through to its SV re-sellers. I.e. the eircom SV product can make no margin from the SB-WLR line rental package.

We don't have specific evidence but there is considerable speculation circulating in the industry that additional facilities are also be offered as part of the eircom white label package supporting SB-WLR and it's essential that transparency is brought in these matters so that Interconnected operators can choose whether they require the same. For example:

- Call records are being provided – not available in SB-WLR.
- Waiving or no transfer fees to move to the White label package – which also includes DSL products. Transfers using the basic interconnect and basic DSL package are not free.
- Work done by eircom Customer Service Reps is not available in the basic SB-WLR/DSL product.

We are not aware of eircom applying a service charge for these additional facilities hence we believe if re-sellers on the SV are being offered a 14% discount on the retail package and taking benefit from additional associated features, then the regulated Retail Minus control for OAOs interconnecting should be adjusted to Retail Minus 16% or 18% or 20%. A similar adjustment should be made for the DSL price control. If a service charge is being applied for these services then these should be published and available to all carriers.

In conclusion the SB-WLR Retail minus price controls need to be reviewed to increase the discount for interconnected providers that do not avail of the additional associated service features being provided in the eircom SV product. The same should apply to the DSL Price Control.

e. Correctly evaluating the call charge benefits.

The figures offered in the consultation (Ref. table below clause 4.37) appear to only consider the simple call scenarios and not the more complex scenarios. It is also not clear whether eircom treat Meteor and eMobile as on net or off net and what benefits if any are being packaged into their White Label package. We have provided further detail in our response to question 4.

f. Unreasonable Bundle/Wholesale package test

We believe that an unreasonable bundles/package test should be added to the proposed Call Origination and Call Termination Decisions as we believe eircom have the motive and ability to repeat the unreasonable bundle retail non-compliance that ComReg stopped in 2009.

2. Detailed Response

Q. 1. Do you agree or disagree with ComReg's preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and Call Termination? Please explain your response in detail.

A.1 We agree with ComReg's preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and call termination for the following reasons:

a. We fully agree with ComReg's intention to ensure that there is an economic space for other providers to exist in Ireland and such will enable investment and benefit the consumer through competition and greater choice of retail product.

   We are very concerned that eircom, if unhindered, will set prices where it is simply not viable for operators to build their own networks and seek interconnect, and ultimately all operators will be forced to purchase the eircom SV product. The consultation already suggests to us that such is already starting to happen with eircom passing the SB-WLR 14% price control discount straight through to its SV customers whilst also providing additional facilities such as call records.

   We support the ladder of investment concept in Ireland and welcome this initiative by ComReg to protect investment in Ireland and the customer and job benefits that flow from this. We note that the Regulatory Impact Assessment concludes that there is no onerous work on eircom to implement the margin test and this adds further to the need to implement this new regulatory remedy.

b. We consider that eircom through its vertical integration has both the ability and the motive to margin squeeze OAOs supplying calls products to Switchless Resellers.

c. We have learned from this consultation that eircom are passing the SB-WLR regulated 14% Price Control saving from retail services straight through to their SV re-sellers; hence it's not clear how the costs of additional services and facilities provided are being recovered. This raises the concern that a squeeze could already exist.

   eircom are the only carrier in the switchless reseller market as we understand with the ability to pass on the 14% price control. In order to compete all other reseller providers would have to sell their product at cost yet would have considerable cost to absorb.

   This means that for BT to compete with eircom we would have to sell this product (WLR) at a loss when all costs are taken into account.

d. There is no transparency from eircom as to their prices, the product features or the quality of service; hence anti-competitive practices will only be discovered exPost when re-sellers move to eircom at which time the market is foreclosed.

e. As ComReg address in later questions, OAOs cannot achieve the same cost floor as eircom due to the economies of scale and scope and the externalities of eircom's incumbency, so we believe a price control will provide a fairer trading environment for sustainable competition and a better outcome for consumers.

f. The OAOs in Ireland have, and are demonstrating, that they will invest where competition is fair so this price control is good for the Irish economy, investment, jobs and the customer.

Q. 2. Do you agree or disagree with ComReg's preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets? Please explain your response in detail.

A.2. We agree with ComReg's preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets for the following reasons:

a. We strongly welcome ComReg's initiative to increase the transparency remedy in Ireland as evidence from other jurisdictions shows that this is the catalyst to make the non-discrimination remedy effective. The problem for industry is that it does not, and cannot know what eircom is offering due to contractual confidentiality and secrecy, hence proving non-discrimination is incredibly difficult. The transparency remedy removes the confidentiality and secrecy veil and exposes whether anti-competitive behaviour exists for some key elements of the product.

b. Following from above its essential the transparency should includes the public publication of the following to the whole industry:
    i. Product description
    ii. A full price list including all facilities.
    iii. Published Reference Offer
    iv. SLAs (we expect these to be contractual within the reference offer)
    v. Process documentation

Q. 3. Do you agree or disagree with ComReg's preliminary views on the proposed structure of the price control margin (price) squeeze test – in

particular that the margin (price) squeeze test: will be assessed based on a similarly efficient operator standard, will be assessed at a static point in time, will be assessed by time of day gradient (i.e. day, evening and weekend), and uses „LRAIC plus‟ as its cost standard? Please explain your response in detail.

A.3. We agree with ComReg's preliminary view on the proposed structure of the price control margin (price squeeze test) and the use of the Similarly Efficient Operator Standard and the time of day gradient (i.e. day, evening and weekend). We would like to offer the following reasons and comments as follows:

a. We agree to the SEO model for the reasons highlighted by ComReg and would add ComReg continue to have the powers to request information from all operators to inform and confirm as necessary their data from eircom.

b. LRAICplus – We agree this model for the Call Origination and Call Termination markets. We believe that it's possible that in some markets eircom will have the incentive to load the regulated product with common costs, however we believe the incentive here is to minimise such, hence we trust ComReg will take account of what they are seeing as common costs in other markets and ensure such are included here.

c. We consider it more effective if the test were taken as now; one year out; and three years out as this will show immediate compliance and pick up any trend issues that may squeeze the product going forward. The market needs regulatory certainty and it is of little use passing a margin test today in the knowledge that product estimates show a failure in the short to medium term as such will act to foreclose the market over a longer period.

d. We agree that the time of day approach is preferable; however, we assume the impact of volumes on the prices will be picked up in the overall pricing model and test. For example high volumes at one price will have a greater impact of the test than low volumes at another price. I.e. each price should pass the margin test in its own right as well as combined test of all.

Q. 4. Do you agree or disagree with ComReg's preliminary views on the costs to be included in the margin (price) squeeze test? Please explain your response in detail.

A.4 We broadly agree with ComReg's preliminary on the costs to be included in the margin (price) squeeze test however we have some concerns and suggest adding the following:

Infrastructure clarification

a. We are aware from data requests that ComReg should have a view of the different types of interconnects, such as Customer Sited, In Span etc and we trust the eircom published prices of these various products have been factored into the model.

   However it's not clear to us that the cost of running OAO fibre to the eircom exchanges; provision of street footway boxes; the provision of switch ports on the OAOs equipment etc has been considered in the ComReg Model.

   We trust that the proxy interconnect costs assumed in the model will also include the capacity at the connection and rentals <u>at the granularity eircom supply to the OAOs.</u> Typically voice interconnect is carried out at the primary or 2Mbit/s circuit size, hence the costs should reflect the provision of these and not just an STM-1 or STM-4 rate proxy. I.e. Operators have to pay eircom on a per circuit basis and this should apply to how eircom to eircom costs are constructed rather than a value for capacity.

b. The model should include an adequate provision for spare capacity on interconnect paths to cover spikes of traffic and in case of one route going faulty. BT believes that some operators in Ireland maintain 30% to 60% of their eircom interconnect paths for such reasons and this is a significant cost to OAOs which should be captured.

c. Often forgotten is voice interconnect is dependent on the Signalling System Number 7 (SS7) signalling links which can be extremely expensive from some switch vendors. These are often duplicated for resilience as traditional interconnect does not work without SS7 signalling.

d. Interconnect has two ends and we are concerned that only the eircom end is considered in detail. We consider that the industry should also be invited to discuss the operation of the model and the aspects where there input costs are required.

e. In relation to international traffic we believe that eircom's price should be the call origination amounts as set out in this document plus the maximum price they charge for international prices as set out in the RIO.
As a switchless reseller customer will not have the ability to route traffic on a route by route basis they would not have the ability to negotiate the best rates from their suppliers, or pick off the cheapest route. An alternative approach would be to build into the cost model the cost of buying and maintaining in a Least Cost Routing (LCR) tool, which is a costly element.

f. We feel blind in not having sight of the model and this limits our ability to comreg is a high level of detail.

Call components

g. We believe that the IN dip charges that eircom apply to the OAOs is missing from the ComReg figures and these should be included.

h. We are also unclear as to how the charges work for lo call, revenue share call, premium rate calls etc and assume the service should be entered into the model for completeness and the STRPL for transparency.

i. We assume that ComReg would maintain the SMP status on the SV product Call termination pricing.

j. We would propose that the pricing structure offered by Eircom on SV should replicate 100% the pricing structure offered to switched interconnect customers, otherwise Eircom's SV customers will be at an advantage to switched interconnect customers. This is due to the fact that switched interconnect customers currently have to manage:
 - call duration (as a result of 2 part charging)
 - mix of call termination carriers (more traffic going to Imagine/UPC etc).

   Hence we propose that the Switched Transit Routing Price List (STRPL) forms the structure of the eircom SV with the call origination amount added, and with the service fees (e.g. for CDRs etc.).

k. Mobile Termination – we ask Comreg to clarify our understanding of what is proposed here. Our view is that the price proposed by Comreg is that the eircom SV customer would pay the following charging elements:
 - call origination
 - MTR
 - eircom Transit Rate (to get the minute to the mobile operator)
 - Look up and re-route charges (where the number has been ported).

   For illustration we have a scenario below on termination to Vodafone (Peak):

PEAK PRICING	Vodafone	O2 Ported to VF	Meteor Ported to VF
Proposed Call Origination Rate	0.01350	0.01350	0.01350
Termination Rate - Peak	0.09549	0.09549	0.09549
Transit Charge - Per Call	0.00621	0.00621	0.00621
Transit Charge - Per Minute	0.00204	0.00204	0.00204
Look Up and re-route charge - Per Call	0.00000	0.00000	0.00663
Look Up and re-route charge - Per Minute	0.00000	0.00500	0.00212
Total Per Call Charge	0.00621	0.00621	0.01284
Total Per Minute Charge	0.11103	0.11603	0.11315

l. We would like to understand how the proposed €0.01352 Peak rate (for illustration) will change after the new call origination rates are introduced in January 2011. We believe that a further squeeze is taking place as the Double Tandem and tandem rates are being reduced at a much higher rate than the primary rates.

m. We are seeking clarity and transparency as to whether eircom treat Meteor and eMobile as on net or off net and what benefits, if any, are being packaged into their SV package.

Q. 5. Do you agree or disagree with ComReg's preliminary view in relation to the structure of the minimum prices/price floors for the margin (price) squeeze test? Please explain your response in detail.

A.5 We agree with ComReg's preliminary view for option 1 as it reflects the market that has emerged absent the proposed price controls and the exAnte control will prevent anti-competitive going forward.

Our view is that indicative prices in table below clause 4.37 are too low for the floor and do not appear to reflect costs such as the IN dip charge and a wider range of off-net call types as discussed in our earlier answers.

Q. 6. Are there any issues in relation to the amendment of the price control obligations and further specification of the transparency obligations in the markets of Call Origination and Call Termination that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

A.7 We genuinely welcome this consultation given our concerns with the relatively secretive approach that eircom has taken towards the transparency of their offering and their entrenched dominant market share of the wholesale Call Origination and Call Termination markets in Ireland.

The offering of this service leverages eircom's dominant position in the provision of regulatory products into a new sub-market which is the provision of wholesale solutions for re-sellers and includes SV and DSL re-sale.

We would like to offer the following additional issues:

a. **Applicability to eircom Retail -** ComReg found in the Final Determination dated 8th April 2009, ComReg Doc 09/301

[1] *Determination in the dispute between Colt Telecom Ireland and Eircom in relation to alleged failure by Eircom to provide Wholesale Terminating Segments of Leased Line based on Uncontended Ethernet Access.*

A key reason why ComReg would not accept COLT's request for Co-location for Ethernet services was because eircom Retail is only a Sales Channel to eircom. An extract from the Final Determination is provided below:

Extract of ComReg Doc 09/30

> 160. In this particular instance Colt in its original SOR submitted to Eircom requested co-location at the same rates, terms and conditions as Eircom offers to Eircom Retail. Eircom Retail is a sales channel within Eircom and as such Eircom does not offer a co-location product to Eircom Retail for exchange or network based equipment.

End of Extract

The Final Determination was not challenged and so must stand as the accurate record of the truth. This therefore means eircom Retail is officially defined as a Sales Channel, i.e. a SV Reseller.

We therefore conclude for eircom Retail to avoid non-discrimination they should receive the same terms and conditions as the OAO re-sellers.

b. **Unreasonable bundles /packages –** we consider that eircom could attempt to circumvent the margin test and transparency obligations by offering associates or other facilities bundled in a wholesale package. This would be similar to the eircom Retail bundles stopped by ComReg in 2009. We therefore consider that an unreasonable bundles / unreasonable wholesale package test and regulation should apply.

c. **Transparency of the Model -** We appreciate the development of financial models forms a significant part of ComReg's work to evaluate the situation and to inform ComReg's opinion. We believe that greater transparency of the model with dummy numbers to protect confidentiality would be beneficial to the industry and enable us to provide more informed comments. The perception remains in industry that eircom view the model or at least its working during the submission of their data and this provides them with a benefit.

d. **OAO Costs -** As indicated in Answer 4 it's not clear to us that the true OAO costs to establish an interconnect are being considered; the perception is the eircom half of the interconnect is considered but not the costs of the fibres, digging ducts, the signalling systems, switch ports etc on the OAO side of the interconnect.

e. **Call Costs -** Also from Answer 4 it's not clear to us that the modelling has included all the call costs, such as the IN Dip and the costs of the various off-net call types.

Q. 7. Do you agree or disagree with the preliminary views expressed by ComReg? If not, please explain which preliminary view(s) you disagree with and detail what specific amendments you believe are required.

A.7. We broadly agree with preliminary views expressed by ComReg and have highlighted our comments and suggestions within our answers. However, we consider that the unreasonable bundles test should apply as the motive and ability exists for eircom to introduce other elements into the wholesale solution which make the solution anti-competitive.

Q. 8. Do respondents believe that the draft text of the proposed decision instruments are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please elaborate on your response.

a. We believe that an unreasonable bundles / unreasonable wholesale package test should be added to the proposed decisions as we believe eircom have the motive and ability to repeat the unreasonable bundle retail issue that ComReg stopped in 2009.
b. Ref - Decision Instrument for Call Origination clause 5: it needs to be made clear that the Reference Offer should be published and in the public domain.
c. Ref – Decision Instrument for Call Termination clause 5: same comment as for Call Origination above.

Q. 9. Do you have any views on this Regulatory Impact Assessment and are there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

A.9. We agree with the Regulatory Impact Assessment.

End

3 ALTO

alto

alternative operators in the communications market

Response to Consultation on Wholesale Call Origination and Wholesale Call Termination Markets Ref: 10/76

Submission By ALTO

Date: November 23rd 2010

ALTO is pleased to respond to the Consultation on ComReg's Wholesale Call Origination and Wholesale Call Termination Markets in Ireland.

ALTO welcomes the opportunity to comment on these comprehensive and significant proposals from ComReg relating to price control, promotion of efficiency, and promotion of sustainable competition in both markets.

ALTO is generally supportive of ComReg's Draft Decision Instrument to be found at Appendix A of the consultation paper. In particular, we highlight that Ireland has been lacking in the areas outlined in the paper. We support ComReg's focus in addressing this area now, although we have some concerns in relation to the appropriate form of cost models which should be employed in Ireland and specifically when considering the EU Commission's position in relation to these particular markets. ALTO would urge ComReg to adopt a pure LRIC model for all ongoing/future reviews where it is deemed necessary to impose a charge control to constrain dominance and promote competition and consumer choice. This would ensure compliance with EC recommendations and results in better outcomes for consumers.

General Observations:

ALTO welcomes the depth of the study as this has shed further light on ComReg's thinking and provided ALTO members with the opportunity to comment on the initial proposals. In particular, we would also like to highlight the following areas:

1. ALTO supports the concept of LRIC rather than the proposals for 'LRAIC plus'. 'LRAIC plus' needs to be qualified as to how common costs are allocated to the 'plus' element so that only valid costs and valid valuations of those common costs are applied. We are concerned that a lack of rigor in

cost allocations and valuations could undermine ComReg's modelling. A review timetable will also be required by industry.

2. Price control period – we have sympathy with ComReg's view to set the price control period for one year, however such a short period is problematic as most customer contracts will be longer than a year and changing the pricing too often exposes the OAOs to absorbing additional costs unless the price review is downwards. A more reasonable duration might be a two-year cycle.
   However, given the short duration of the price control period, ALTO would urge ComReg to commit to conducting another market review at such a time as to ensure the control determined by this review does not extend beyond the proposed two year period.

3. We consider that it's not possible for an OAO in Ireland to replicate eircom's cost base given eircom enjoy benefits of scale, scope and externalities. We consider that the appropriate model to use is the Similarly Efficient Operator – SEO, model, as this will compensate for the gap between an efficient OAO and eircom.

Alternative operators in Ireland utilize the eircom Wholesale regulated product set in conjunction with their own (generally leased) network facilities to provide downstream reseller Switchless products. The introduction of eircom's White label product set and eircom's vertical integrations means that eircom is now the main supplier and the direct competitor for sales to switchless re-sellers.

For some time we have been concerned as to the components and the pricing of the eircom product as there is sparse information of what is being offered and we have been particularly concerned whether some fees have been waived when an operator moves to the eircom product, and whether the costs of the additional components in the White Label Product, whatever they might be, are being fully recovered.

Within our detailed response the following main concerns emerge:

Application of these proposals to the eircom Retail Sales Channel

As discussed in our response to question 2 ComReg came to the conclusion in the dispute between COLT and eircom (ComReg Doc 09/30) that eircom Retail is a Sales Channel which means it is a switchless reseller and consumes Call Origination and Call Termination from a supply business in eircom.

For reasons of non-discrimination we therefore consider that eircom retail should also be subject to purchasing the Call Origination and Termination packages with the same obligations as proposed in this consultation. If this is not correct then the Final Determination in the COLT vs. eircom dispute must have been wrong.

eircom pass through of SB-WLR 'Line Rental' discount

The ComReg consultation appears limited to the price floors for calls, however the SB-WLR Retail Minus discount of 14% also needs to be re-evaluated given eircom pass this straight through to its Switchless Re-sellers. i.e. the eircom 'white label' product can make no margin from the SB-WLR line rental package.

We don't have specific evidence but there is considerable speculation in the industry that additional facilities are also being offered as part of the eircom white label package supporting SB-WLR, whilst the charging mechanism is transparent. For example:

- Call records are being provided – not available in SB-WLR.
- Waiving or no transfer fees to move to the White label package – which also includes DSL products. Transfers using the basic interconnect and basic DSL package are not free.

- Work done by eircom Customer Service Reps is not available in the basic SB-WLR/DSL product.

We are not aware of eircom applying a service charge for these additional facilities hence we believe if re-sellers on the White label are being offered a 14% discount on the retail package and benefit from additional associated features, then the regulated Retail Minus control for OAOs interconnecting should be adjusted to Retail Minus 16% or 18% or 20% for Interconnected operators. A similar adjustment should be made for DSL services.

In conclusion, the SB-WLR Retail Minus price controls need to be reviewed to increase the discount for interconnected providers that do not avail themselves of the additional associated service features being provided in the eircom White label product. The same should apply to DSL Price Control.

Correctly evaluating the call charge benefits.

There are a considerable number of call scenarios and the figures offered in the consultation appear to only consider the simple scenarios. It is also not clear whether eircom treat Meteor and eMobile as on-net or off-net and what benefits, if any, are being packaged into their White Label package.

Unreasonable Bundle/Wholesale package test

We believe that an unreasonable bundles/package test should be added to the proposed Call Origination and Call Termination Decisions as we believe eircom have the motive and ability to repeat the unreasonable bundle retail non-compliance that ComReg stopped in 2009.

Response to Consultation Questions:

Section titles from the Consultation have been used to help keep the questions and answers in context.

Section 3 Proposals

Q. 1. Do you agree or disagree with ComReg's preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and Call Termination? Please explain your response in detail.

A. 1. ALTO strongly agrees with ComReg's preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and call termination for the following reasons:

a. We consider that eircom through its vertical integration has both the ability and the motive to margin squeeze OAOs supplying calls products to Switchless Resellers.

b. We have learned from this consultation that eircom are passing the regulated 14% Price Control saving from retail services straight through to their re-sellers; hence it's not clear how the costs of additional services and facilities are being recovered. This raises the perception that a squeeze could already exist.

c. There is no transparency from eircom as to their prices, the actual product being supplied or the quality of service; hence anti-competitive practices will only be discovered after the event, or *ex post* when re-sellers move to eircom at which time the market is foreclosed.

d. As ComReg address in later questions, OAOs cannot achieve the same cost floor as eircom due to the economies of scale and scope and the externalities of their incumbency, so we believe a price control will provide a fairer trading environment for sustainable competition.

e. The OAOs in Ireland have and are demonstrating that they will invest where competition is fair so this price control is good for the Irish economy, investment, jobs and the customer.

Q. 2. Do you agree or disagree with ComReg's preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets? Please explain your response in detail.

A. 2. We agree with ComReg's preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets.

We strongly welcome ComReg's initiative to increase the transparency remedy in

Ireland as evidence from other jurisdictions shows that this is the catalyst to make the non-discrimination remedy effective. The problem for industry is that it does not, and cannot know what eircom is doing due to contractual confidentiality and secrecy, hence proving non-discrimination is incredibly difficult. The transparency remedy removes the confidentiality and secrecy veil and exposes some key aspects of anti-competitive behaviour.

Section 4: Price Control: proposed margin (price) squeeze test

Q. 3. Do you agree or disagree with ComReg's preliminary views on the proposed structure of the price control margin (price) squeeze test – in particular that the margin (price) squeeze test: will be assessed based on a similarly efficient operator standard, will be assessed at a static point in time, will be assessed by time of day gradient (i.e. day, evening and weekend), and uses "LRAIC plus" as its cost standard? Please explain your response in detail.

A. 3. We agree with ComReg's preliminary view on the proposed structure of the price control margin (price squeeze test) and the use of the Similarly Efficient Operator Standard and the time of day gradient (i.e., day, evening and weekend). We would like to offer the following reasons and comments as follows:

a. We agree to the SEO model for the reasons highlighted by ComReg and would also add that ComReg continue to have the powers to request information from all operators to inform and confirm as necessary their data from eircom.

b. LRAIC Plus – We accept, with reservations, this model for the Call Origination and Call Termination markets but only on a temporary basis. It is out of synchronisation with EU Commission recommendations relating to LRIC as the most appropriate model and therefore seek regular and formal reviews in terms of its overall use. We believe that it's possible that in some markets eircom will have the incentive to load the regulated product with common costs, which is contrary to the intention, which is to minimise such activity. Accordingly, we trust ComReg will take account of what they are seeing as common costs in other markets and ensure such are included here.

c. With respect as to the time period to conduct the test, we think a combined test will be more effective. Our concern is that a test today only shows the compliance at the time of the test. It would appear more effective if the test were taken as now; one year out; and three years out as this will show immediate compliance and pick up any trend issues that may squeeze the product going forward.

d. We agree that the time of day approach is preferable; however, we assume the impact of volumes on the prices will be picked up in the overall pricing model and test.

Q. 4. Do you agree or disagree with ComReg‟s preliminary views on the costs to be included in the margin (price) squeeze test? Please explain your response in detail.

A. 4. We broadly agree with ComReg's preliminary views on the costs to be included in the margin (price) squeeze test however we have some concerns that not all the costs have been included as below:

Infrastructure clarification

a. We are aware from data requests that ComReg should have a view of the different types of interconnects, such as Customer Sited – CSI, In Span – ISI, etc., and we trust the eircom published prices of these various products have been factored into the model.

However it's not clear to us that the cost of running OAO fibre to the eircom exchanges; provision of street footway boxes; the provision of switch ports on the OAOs equipment etc has been considered in the ComReg Model.

b. We trust that the proxy interconnect costs assumed in the model will also include the capacity at the connection and rentals at the granularity eircom supply to the OAOs. Typically voice interconnect is carried out at the primary or 2Mbit/s circuit size, hence the costs should reflect the provision of these and not just an STM-1 or STM-4 rate. i.e., Operators have to pay eircom on a per circuit basis and this should apply to how eircom to eircom costs are constructed rather than a value for capacity.

c. Often overlooked is that voice interconnect is dependent on Signalling System Number 7 signalling links, which can be extremely expensive from some switch vendors. These are often duplicated for resilience as traditional interconnect does not work without SS7 signalling.

d. Interconnect has two ends and we are concerned that only the eircom end is considered in detail. We consider that the industry should also be invited to discuss the operation of the model and the aspects where there input costs are required.

e. We feel constrained in not having sight of the model and this limits our ability to comment to ComReg at a detailed level.

Call components

f. We believe that the IN dip charges that eircom apply to the OAOs could be missing from the ComReg figures and these should be included. The IN dip charges were something of an issue in early 2000 with the onset of fixed and non-geographic porting. The IN dip charges are a component of the current interconnection rates and need to be recognised as such.

g. We are also unclear as to how the charges work for lo call, revenue share call, premium rate calls etc and assume the service should be entered into the model for completeness and the Switched Routing and Transit Price List – STRPL, for transparency.

h. We assume that ComReg would maintain the SMP status on the White label for the for the Call termination pricing.

Q. 5. Do you agree or disagree with ComReg's preliminary view in relation to the structure of the minimum prices/price floors for the margin (price) squeeze test? Please explain your response in detail.

A. 5. We agree with ComReg's preliminary view for option 1 as it tends to more closely reflect the market that has emerged absent the proposed price controls; the *ex ante* control will provide benefit going forward by preventing anti-competitive behaviour. However, our view is that indicative prices in the table below clause 4.37 are too low for the floor and do not appear to reflect costs such as the IN dip charge and a wider range of off-net call types.

Section 5: Conclusion

Q. 6. Are there any issues in relation to the amendment of the price control obligations and further specification of the transparency obligations in the markets of Call Origination and Call Termination that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

A. 6. We genuinely welcome this consultation given our concerns with the relatively secretive approach that eircom has taken towards the transparency of their offering and their entrenched dominant market share of the wholesale Call Origination and Call Termination markets in Ireland.

The offering of this service leverages eircom's dominant position in the provision of regulatory products into a new market, that is, the provision of wholesale solutions for re-sellers.

The following is a list of issues that are important in relation to this consultation and should be considered during the decision processes:

a. **Applicability to eircom Retail**

ComReg found in the Final Determination dated 8th April 2009, ComReg Document: 09/30 that:

> *"Determination in the dispute between Colt Telecom Ireland and Eircom in relation to alleged failure by Eircom to provide Wholesale Terminating*

Segments of Leased Line based on Uncontended Ethernet Access."

A key reason why ComReg would not accept COLT's request for Co-location for Ethernet services was because eircom Retail is only a Sales Channel to eircom. An extract from the Final Determination is provided below:

Extract of ComReg Doc 09/30

160. In this particular instance Colt in its original SOR submitted to Eircom requested co-location at the same rates, terms and conditions as Eircom offers to Eircom Retail. Eircom Retail is a sales channel within Eircom and as such Eircom does not offer a co-location product to Eircom Retail for exchange or network based equipment.

End of Extract

The Final Determination was not challenged and so must stand as the accurate record of the position. This therefore means eircom Retail is officially defined as a Sales Channel, i.e., a Switchless Reseller.

ALTO therefore conclude for eircom retail to avoid non-discrimination they should receive the same terms and conditions as the OAO re-sellers.

b. **Unreasonable bundles / packages** – we consider that eircom could attempt to circumvent the margin test and transparency obligations by offering associates or other facilities bundled in a wholesale package. This would be similar to the eircom Retail bundles stopped by ComReg in 2009. We therefore consider that an unreasonable bundles / unreasonable wholesale package test should also apply.

c. **Transparency of the Model** - We appreciate the development of financial models forms a significant part of ComReg's work to evaluate the situation and to inform ComReg's opinion. We believe that greater transparency of the model with dummy numbers to protect confidentiality would be beneficial to the industry and enable us to provide more informed comments. The perception remains in industry that eircom view the model or at least it's working during the submission of their data and this provides them with a benefit.

d. **OAO Costs** - As indicated in Answer 4 it's not clear the true OAO costs to establish an interconnect are being considered; the perception is the eircom half of the interconnect is considered but not the costs of the fibres, digging ducts, the signalling systems, switch ports etc on the OAO side of the interconnect.

e. **Call Costs** - Also from Answer 4 it's not clear that the modelling has included all the call costs, such as the IN Dip and the costs of the various off-net call types.

Q. 7. Do you agree or disagree with the preliminary views expressed by ComReg? If not, please explain which preliminary view(s) you disagree with and detail what specific amendments you believe are required.

A. 7. We broadly agree with preliminary views expressed by ComReg and have highlighted our comments and suggestions within our answers. However, we consider that the unreasonable bundles test should apply as the motive and ability exists for eircom to introduce other elements into the wholesale solution that make the solution anti-competitive.

Section 7: Draft Decisions

Q. 8. Do respondents believe that the draft text of the proposed decision instruments are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please elaborate on your response.

A. 8. See three points listed below:

a. We believe that an unreasonable bundles / unreasonable wholesale package test should be added to the proposed decisions as we believe eircom have the motive and ability to repeat the unreasonable bundle retail issue that ComReg stopped in 2009.

b. Ref - Decision Instrument for Call Origination clause 5: it needs to be made clear that the Reference Offer should be published and in the public domain.

c. Ref – Decision Instrument for Call Termination clause 5: same comment as for Call Origination above.

Appendix A: Regulatory Impact Assessment

Q. 9. Do you have any views on this Regulatory Impact Assessment and are there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

A. 9. We agree with the Regulatory Impact Assessment.

ALTO

23rd November 2010

4 Telefonica Ireland Limited

Non confidential version

Wholesale Call Origination and
Wholesale Call Termination Markets

Response to Document 10/76

O2 welcomes the opportunity to respond to ComReg's consultation on "Wholesale Call Origination and Wholesale Call Termination". From the outset we wish to state that O2 is extremely concerned about ComReg's proposals and believe that if implemented the viability of O2 Ireland's fixed line business and our contingent ICT business strategy are severely jeopardised, O2's strategy in these areas is outlined below. We believe that the principles underlying ComReg's general approach are flawed and out of step with the converged business models being adopted in the Irish market.

Before addressing the questions specifically raised in the consultation document O2 would make a number of preliminary remarks.

O2 has developed in recent years a suite of products which has offered a wider choice of mobile and fixed services to its business customers. O2 has invested in developing its capability to offer converged services which are in response to demands from our customer base for products covering our traditional mobile services and fixed and broadband services. O2's offerings in the market have been part of increasing cross platform competition in the Irish market as the communications market becomes increasingly competitive.

Today it is not unusual for mobile and cable operators to offer fixed and broadband services and the Irish telecoms market is not large enough to support a competitive landscape where all main players try to rollout their own competing fixed infrastructure and therefore through wholesale partnership and/or acquisition the Irish communications market now offers competitive converged services to businesses and consumers.

O2 disagrees with ComReg's view that it is required to intervene on this issue as not to would conflict with the regulatory goal of infrastructure competition. Unfortunately ComReg fail to explain how this proposed intervention will be balanced with the goal to protect competition. ComReg are adopting an outdated concept of infrastructure investment which assumes that operators seeking wholesale fixed services must in the first instance invest in fixed network assets and in fact be encouraged to do so on the basis of a ladder of investment. Pursing this approach in the fixed market would narrow competition to those operators with fixed competences and networks only to the exclusion of other platform operators, for example mobile operators, who wish to offer converged products to its customer base.

ComReg are also failing to understand what is driving competition in retail fixed and broadband markets. ComReg are through this proposed price increase damaging the extent and depth of competition for fixed services to retail customers. With an effectively competitive retail market these increases in wholesale prices cannot be passed on and the business case for some operators will disappear. ComReg in their regulatory impact assessment appear to ignore this as the only option open to OAO's is to take call origination and call termination components at prices reflective 'of their own investment in interconnection infrastructure'. What is the impact on those operators who for commercial reasons choose to outsource the fixed wholesale components required to offer fixed voice and data services to its retail customers? Such a scenario needs to be assessed by ComReg.

ComReg's proposed price change is intended to realign regulated prices to ensure there are incentives to invest in fixed infrastructure. O2 appreciates the regulatory objectives ComReg is trying to achieve in this regard, however the consequence of this proposal is to introduce a bias in favour of platform based infrastructure led competitive strategies instead of embracing alternative competitive strategies which O2 believes will lead to more retail offerings and competition in the market place.

O2 also believes that ComReg's proposals will have the effect of reducing not only retail competition but also wholesale competition. Access seekers such as O2 require a competitive wholesale market for fixed inputs. Increasing the input costs for Switchless voice products in the market will only lead to higher input costs for wholesale access seekers, not more choice in switchless voice products. O2 believes that this approach by ComReg is contrary to its obligation to protect competition and protect consumers.

O2 would also ask ComReg to assess the impact this decision will have on the level of retail competition in the fixed markets. In order to assist in this review below we outline O2's general fixed and ICT market strategy, which we are happy to further detail in bilateral discussions.

O2's Fixed / ICT Strategy (SECTION REMOVED);

Q. 1. Do you agree or disagree with ComReg"s preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and Call Termination? Please explain your response in detail.

O2 does not agree with ComReg"s preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and Call Termination. At this point in time all operators including interconnected operators are free to choose the SV product or not. As to which is the more efficient route for any particular operator at a point in time will depend on their longer term strategic goals and financial constraints. It is not necessary or appropriate that ComReg favour one approach at the expense of all others, especially on this issue where ComReg makes the assertion that "the important regulatory goal of infrastructure investment" is preferable and in the best interests of consumers, but has produced little or no empirical evidence to support the basis for this assertion in the current economic climate or in to the future telecoms landscape.

Having outlined our strategy in this area above, O2 would also question whether ComReg's infrastructure bias in the fixed sector will in the long term bring lower telecoms prices to Irish consumers and business, which will be essential to enabling the Irish economy to remain competitive. In a small country like Ireland economies of scale are difficult to realise, LLU for the most part essentially destroys economies of scale by dividing up network foot prints amongst competing operators and O2 believes that it is highly questionable in the current economic climate as to whether it produces an economically efficient result especially given the success of UPC in urban Ireland over recent years.

O2 also believes that ComReg's bias for infrastructure competition which has informed its current proposals will also significantly increase the digital divide in Ireland. The economics of unbundling exchanges outside of the major urban centres was always questionable and non infrastructure based approaches to increasing competition in rural Ireland were always the only way forward in the fixed sector. ComReg's proposals as they stand will have two impacts;

1. Drive current SV OAO's out of the market, or
2. Force surviving SV providers to raise their prices considerably.

Both of these outcomes will be bad for competition in the fixed sector in Ireland and will be particularly damaging to rural Ireland.

Addressing the requirements of the Access regulations as detailed by ComReg, O2 believes the proposed change to the access obligations does not lead to efficiency in the sense that the regulations were intended to achieve. ComReg are favouring one business model (i.e. fixed infrastructure investment) and efficiency measured on this basis. ComReg have to assess whether the measures proposed will lead to a more efficient SMP operator and ComReg have not addressed this issue.

O2 would also question whether this proposal will lead to sustainable competition. In fact it will lead to raising barriers of entry for service providers wishing to enter the fixed market and may lead to market exit. ComReg have offered no empirical evidence or market assessment to make the claim that the proposed price changes will result in promoting consumer choice in terms of product range, quality and affordability.

O2 would recommend that ComReg consider margin squeeze issues with reference to retail prices as opposed to the regulated costs of call origination and call termination. It may be appropriate to set SV product prices on the basis of retail minus as opposed to cost plus. O2 would refer ComReg to the most recent edition of Telecommunications Policy and the article by Briglauer, Gotz and Schwarz, 'Can margin squeeze indicate the need for deregulation? The case of fixed network voice telephony markets'. The authors argue that in the presence of inter-modal competition in retail markets, regulators need to be careful applying margin squeeze tests.

Q. 2. Do you agree or disagree with ComReg"s preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets? Please explain your response in detail

O2 does not agree with ComReg"s preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets. O2 believes that ComReg should respect the confidentiality of commercially agreed contracts. ComReg's transparency proposals would remove all OAO's ability to negotiate favourable contract terms on a bilateral basis thus ultimately reducing the current levels of competition in the retail space.

Q. 3. Do you agree or disagree with ComReg"s preliminary views on the proposed structure of the price control margin (price) squeeze test – in particular that the margin (price) squeeze test: will be assessed based on a similarly efficient operator standard, will be assessed at a static point in time, will be assessed by time of day gradient (i.e. day, evening and weekend), and uses „LRAIC plus" as its cost standard? Please explain your response in detail.

O2 does not agree with ComReg"s preliminary views on the proposed structure of the price control margin (price) squeeze test and in particular the way all the key levers are in ComReg's preliminary view to be set at a level that maximises the bias towards interconnected OAO's i.e. Lowest level of interconnect and also choosing a static test that doesn't allow for network development. More importantly, O2 wishes to point out that we completely disagree with the assertion made by ComReg in this section to support the proposed margin squeeze test, namely (emphasis added);

"3.22 ComReg believes that its proposals should not impact end users because it does not affect Eircom"s freedom to price calls in retail markets. In fact ComReg believes there should be a longer term benefit from increased competition, or at least that *competition provided at the retail level through the provision of SV services will not be adversely affected*".

SECTION REMOVED

Q. 4. Do you agree or disagree with ComReg"s preliminary views on the costs to be included in the margin (price) squeeze test? Please explain your response in detail.

O2 does not agree with ComReg"s preliminary views on the costs to be included in the margin (price) squeeze test. ComReg has focused entirely on the costs that interconnected OAO's have incurred. ComReg has not carried out any assessment of the investment that SV operators have incurred. In the case of O2 Ireland the capex costs incurred in development, integration, testing and deployment of our SV proposition provided by eircom

SECTION REMOVED

Q. 5. Do you agree or disagree with ComReg"s preliminary view in relation to the structure of the minimum prices/price floors for the margin (price) squeeze test? Please explain your response in detail.

No comment.

Q. 6. Are there any issues in relation to the amendment of the price control obligations and further specification of the transparency obligations in the markets of Call Origination and Call Termination that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

No comment.

Q. 7. Do you agree or disagree with the preliminary views expressed by ComReg? If not, please explain which preliminary view(s) you disagree with and detail what specific amendments you believe are required.

No comment.

Q. 8. Do respondents believe that the draft text of the proposed decision instruments are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please elaborate on your response.

No Comment

Q. 9. Do you have any views on this Regulatory Impact Assessment and are there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

O2 believes it is important that ComReg present an empirical assessment of the scale of what ComReg calls “the appropriate economic space for the build or buy options” we also believe it is critical that ComReg properly consider the impact on OAO’s currently offering SV product if ComReg’s proposals go through as currently drafted.

O2 also believes a more effective regulatory impact assessment in this instance would be a new market review. The market review underpinning this proposed decision was published in 2007 but is based on data from 2005 and a market assessment from 2006. The retail market has changed significantly since that review. The continuing convergence of mobile and fixed product offerings have changed the demands of access seekers in the fixed market. O2 believe decisions taken on the basis of market reviews which are out of date risk causing significant damage to the Irish telecoms market and being challenged legally. O2 would remind ComReg that the Commission’s revised list of recommended markets was published in 2007 and in that list Call Transit was removed as a market susceptible to ex-ante intervention. Call Transit forms part of the Interconnection market review. Under the Framework regulations ComReg are obliged to review markets as soon as possible after the adoption of the revised list of recommended markets. O2 would also refer to the new telecoms package and the statutory time limits which form part of the new legislative package. ComReg are obliged under those provisions to conduct a market review at least every three years. It is likely these provisions will be in place in early 2011 and as a matter of prudence ComReg should conduct a new market review for the markets referred to in this proposed decision.

5 Vodafone Ireland Limited

Vodafone Response to the Consultation 10/76 on Wholesale Call Origination and Wholesale Call Termination Markets and draft decisions in relation to proposed amendments to the price control obligations and further specifications of the transparency obligations

Ref. ComReg Document

Response Date:

Introduction

Vodafone welcomes the opportunity to respond to this consultation and draft decision in which ComReg proposes to add additional obligations on eircom ‘white label’ or switchless voice (’SV’) wholesale product. As a buyer of competing SV services, Vodafone has an interest in ComReg’s proposed regulation of this product particularly since Vodafone is not experiencing any pressing problems in respect of this product market. Therefore, we believe ComReg must have clear evidence of market failure and a robust basis for action before considering the imposition of further obligations on eircom.

While the ‘ladder of investment’ may be a laudable regulatory goal, ComReg must be sure that the very entities that ComReg wishes to protect or encourage to make network investments are not the same entities who will find very difficult to compete in the short to medium term as a result of regulatory intervention.

ComReg must give serious consideration to the actual commercial realities on the ground and be clear where the long term retail competition to eircom is actually occurring and desist from intervention if this competition is likely to be damaged. Imposing wholesale obligations is only justified if ComReg can demonstrate that this is the correct course of action required to protect actual competition and not just a theoretical regulatory outcome. In particular Vodafone notes that the proposed intervention seeks to protect some form of intermediate merchant market and not the retail market.

If there is not retail market issues and there is no wholesale market issue in the individual markets it is not clear that there is a justification for intervention to protect a putative intermediate market.

Response to Consultation Questions

Q. 1. Do you agree or disagree with ComReg‟s preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and Call Termination? Please explain your response in detail.

As margin squeeze tests are a standard regulatory tool to ensure a ‘level playing field’ for operators competing against incumbents (usually at a retail level), it is difficult to object to its imposition in this case if it can be demonstrated that this is likely to lead to an increase in consumer welfare. However, Vodafone does not believe that this is necessarily the case in this instance or that ComReg has demonstrated that its proposed action will achieve this outcome.

ComReg states that the purpose of the proposed obligation is ‘*to protect interconnected OAOs from any possible margin (price) squeeze in the markets of Call Origination and Call Termination where Eircom re-sells wholesale voice to switchless operators’*. ComReg believes that this ‘*will encourage efficient infrastructure investment and promote competition and innovation amongst operators’*. ComReg further believes that this ‘*will ensure that retail consumers derive benefits in terms of price, choice and quality*.

Vodafone believes that these are all worthy objectives and desired outcomes but remain to be convinced as to the extent of market failure that exists with SV or the likelihood of achieving ComReg's desired outcome in relation to increased network investment.

Vodafone notes that a number of Operators have already "climbed" the ladder of investment and have invested in infrastructure to allow them to purchase regulated Call Origination Call Termination and Call transit from eircom. A subset of these operators leverage their interconnection to offer SV services to switchless providers. These SV providers compete with eircom and each other. To Vodafone's knowledge, they offer services which vary in price, quality and level of resilience and can serve different segments of the switchless re-seller market.

It is not clear that eircom's current SV price is currently at a level which prevents other operators competing in this market. Indeed, it may not be eircom's SV price which is the biggest barrier to a less well connected operator moving up the value chain or increasing market share but may in fact be the best connected operator's.

ComReg has not advanced any empirical evidence that a margin squeeze test of the type proposed, which only constrains eircom's SV pricing, will have any effect on the current competitive dynamic in the market.

The pricing level at which eircom would have to operate to materially alter the current competitive constrains in respect of SV products are in Vodafone's view likely to be amenable to Competition Law remedies. On this basis it would appear that ComReg's proposed intervention is not justified or reasonable as it in effect regulates a downstream market in a manner which is likely to constrain competition raise wholesale prices and prevent market forces bringing benefits to end users.

This aspect of the market had developed prior to eircom's offering of a SV product. During this period Vodafone believes that operator investment stabilised and that there has been limited further investment in switching or interconnection infrastructure. This atrophy developed absent any influence by eircom.

In this scenario those operators who had a less extensive interconnect managed to build a business model which did not seem to be limited by their better connected (and prospectively cheaper) competitors.

It is not ComReg's function to limit the operation of the market so that a potential competitor, in eircom, is excluded from exerting any competitive pressure as opposed to abusing a dominant position.

Constructing a price control where eircom is constrained to offer prices at or above the pricing of existing market players does precisely that.

Q. 2. Do you agree or disagree with ComReg‟s preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets? Please explain your response in detail.

Vodafone does not agree with ComReg in relation to further specifications of the transparency obligations. SV is a wholesale service and purchasers of SV have a commercial interest in maintaining the maximum level of competition between competing providers. If eircom's SV price is totally transparent at all times, it is logical that a competing wholesale provider bidding against eircom would only bid marginally below the eircom price in an effort to win new business. Absent this level of eircom transparency, competing wholesale providers may well bid lower prices which are more in line with their own cost of provision. It is difficult to see how imposing greater transparency for eircom's SV price helps the purchasers of these services and by extension, enhances the welfare of significant numbers of retail customers.

Q. 3. Do you agree or disagree with ComReg‟s preliminary views on the proposed structure of the price control margin (price) squeeze test – in particular that the margin (price) squeeze test: will be assessed based on a similarly efficient operator standard, will be assessed at a static point in time, will be assessed by time of day gradient (i.e. day, evening and weekend), and uses "LRAIC plus‟ as its cost standard? Please explain your response in detail.

Notwithstanding our views on the necessity for a margin squeeze test for SV provision, it is our view that when assessing the cost standard to be used ComReg has failed to take into account the extent to which OAOs enter the SV market as an ancillary or marginal adjunct to their primary business. It is Vodafone's view that SV providers' investments in switches and interconnection are driven by selling into the retail market and that the SV business is run on a marginal cost basis. In this context the cost model to use when imputing a cost to eircom and which appropriately protects OAOs from the impact of eircom's pricing is unlikely to be LRAIC plus. ComReg has failed to justify why LRAIC plus yields the appropriate comparator costs.

Notwithstanding this view, Vodafone agrees that if the margin squeeze test is implemented as proposed 'SEO' is the correct standard for Comreg to use.

Vodafone is strongly of the view that the traffic weighting to be applied should be that of a "More Interconnected Level". Absent eircom's presence in the market this is the level of interconnection that provides the cost constraint against which SV operators must compete. There is no basis for requiring that eircom's margin squeeze cost stack includes costs higher than those which already apply in the market absent its presence. To constrain eircom in this way distorts competition by conferring an advantage on the most interconnected operator by sheltering it from competition.

Q. 4. Do you agree or disagree with ComReg‟s preliminary views on the costs to be included in the margin (price) squeeze test? Please explain your response in detail.

Vodafone does not agree that it is appropriate to include the OAO Network Costs in the Call Origination cost stack as shown in Figure 3 of ComReg's document. Such costs lie clearly within the Transit market. ComReg has offered no justification why such costs are reckonable in the Call Origination Market when calls are sold in conjunction with Call Termination but are not reckonable when Call Origination is sold separately. It would be more appropriate and less distortive for these costs to be addressed as part of a review of the Local Calls Disadvantage issue.

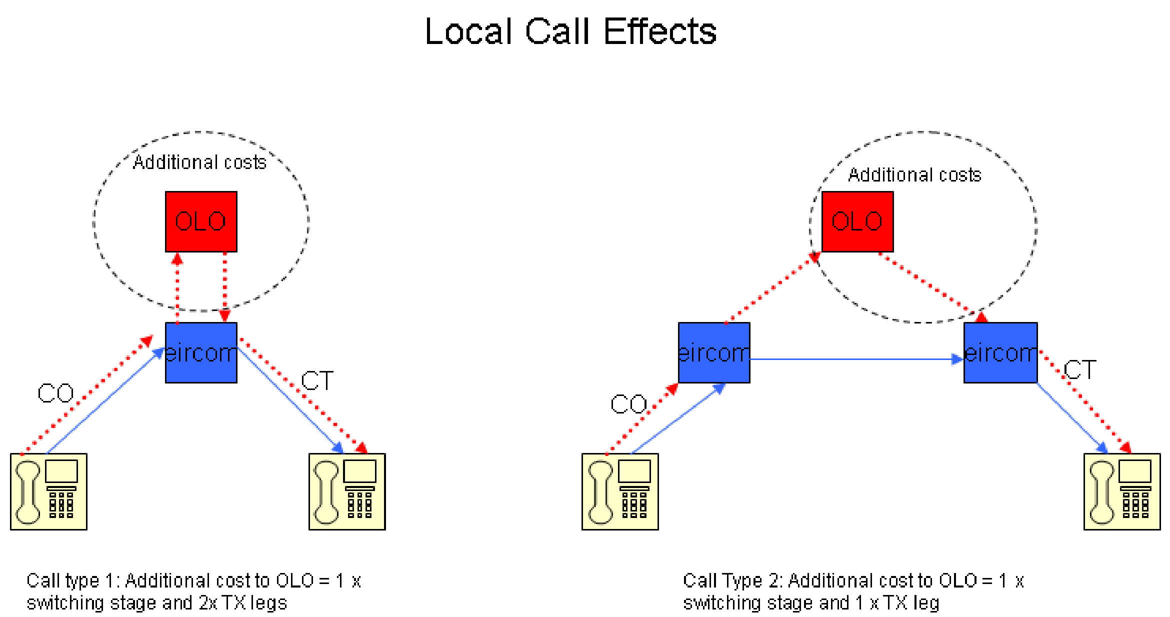
Vodafone does not agree with the use of the 'Lower Interconnected Level' as the relevant adjustment to eircom's efficiently incurred cost when evaluating the 'SEO'. As set out above we believe the 'Most Interconnected Level' level which reflects the realities in the market place in more relevant and supportable.

ComReg proposes to use its Bottom Up LRAIC model in assessing costs however in common with other proposed price controls OAOs have had no visibility of this model and have not had the opportunity to examine the appropriateness or otherwise of its detailed assumptions, cost allocation methodology or general fitness for purpose. On this basis it is meaningless for ComReg to purport to "consult" on this issue

Q. 5. Do you agree or disagree with ComReg‟s preliminary view in relation to the structure of the minimum prices/price floors for the margin (price) squeeze test? Please explain your response in detail.

Comment: Comreg has identified the 'local call disadvantage' effect as an area where eircom enjoys significant cost advantages over its wholesale and retail competitors. This effect arises from eircom's ability to route certain call types (typically calls originating and terminating within the same or adjacent primary exchanges) at a lower cost than that available to its competitors (see Fig. 1).

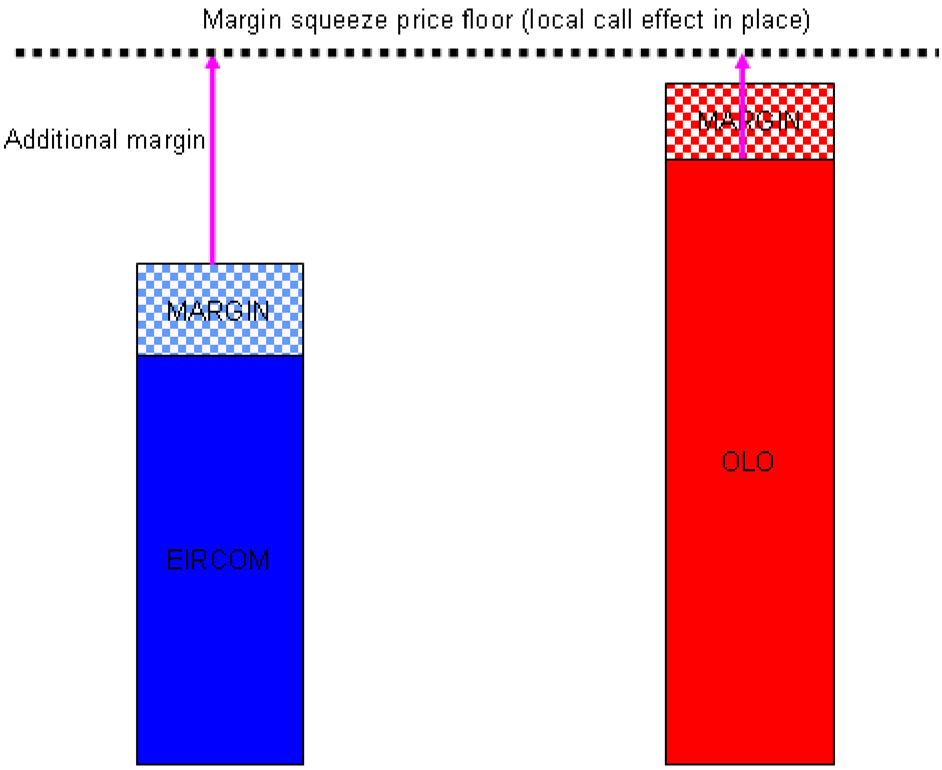
FIG. 1



In call type 1, eircom has lower costs since to originate the same type of call (CO and CT off the same primary exchange), the OLO must incur the cost of an additional switching exchange plus 2 additional transmission legs. In call type 2 (CO and CT in adjacent primary exchanges), the OLO must incur the additional cost on a switching stage and one transmission leg. To remove this competitive barrier, ComReg could oblige eircom to provide a wholesale input\product which effectively eliminates the additional costs to OLOs in the routing cases shown in Figure 1. (The actual routing may remain the same but with an adjustment in pricing to allow for the additional OLO costs). This reform alone would contribute greatly to both retail and wholesale competition and might be sufficient in itself to address many of the drivers for the intervention proposed in this Consultation.

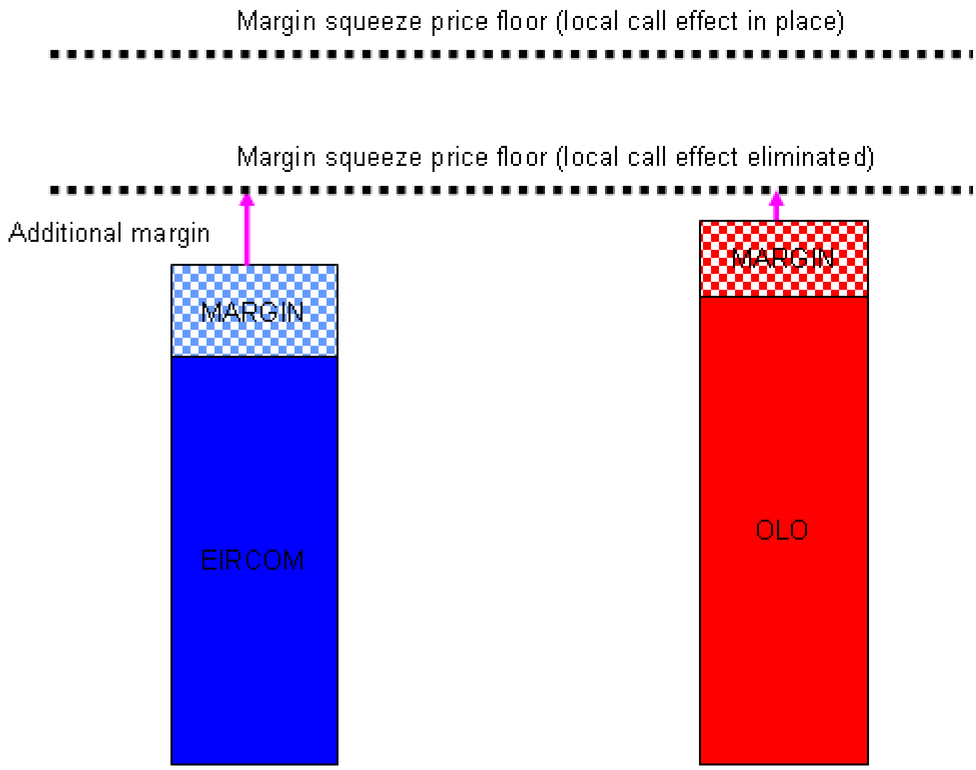
It is clear from figure 1, that the cost stack for OLOs routing these call types is higher that that for eircom for similar calls. This becomes a significant issue when ComReg includes such costs in its calculation of the total 'notional cost' to an OLO for an end-end call and which then forms part of the margin squeeze test. Since eircom does not incur these costs in reality, setting the price floor based on a 'notional' OLO cost stack means that eircom pass the test with a significantly understated margin. (FIG. 2)

Fig. 2



In Figure 3, we can see that once the local call effect is eliminated or reduced, the price floor can be set lower since the cost stack for the OLO is more closely matched to that of eircom. Setting the price floor at this level reduces the overall margin to eircom while leaving that of the OLO largely unchanged. The lower price floor will feed through to as a lower cost to re-sellers and eventually benefit consumers.

FIG. 3



Q. 6. Are there any issues in relation to the amendment of the price control obligations and further specification of the transparency obligations in the markets of Call Origination and Call Termination that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

Vodafone believes that the proposed intervention is premature and excessive. ComReg is proposing a margin squeeze test in the intermediate space between regulated wholesale and competitive retail markets prior to dealing with structural pricing issues such as Local Calls Disadvantage. To do so risks two possible outcomes. The first is that eircom is successful in competing in this intermediate space because it can pass the test while retailing a margin while OAOs cannot operate at this level. This arises because it appears that eircom actual internal costs are lower than the cost imputed for the test which map to the actual costs of an OAO which are in large measure. This issue arises if the cost recovery methodology gives rise to structural anomalies where costs are skewed away from eircom's self supply. One expect that the lowest priced regulated product would be equivalent in level to eircom's internal self supply costs if the cost model properly recovered common elements. This would appear not to be the case here.

Q. 7. Do you agree or disagree with the preliminary views expressed by ComReg? If not, please explain which preliminary view(s) you disagree with and detail what specific amendments you believe are required.

Vodafone believe that the proposed market intervention by ComReg is not justified, proportionate or reasonable. ComReg has failed to demonstrate evidence of any market requirement. It has not demonstrated that other forms of regulatory intervention such as dealing with structural pricing anomalies (e.g. Local Calls Disadvantage) would not yield better regulatory outcomes. ComReg has failed to consider the possible anti-competitive impacts of effectively precluding eircom from competing at a competitive level in supplying SV. Until these general issues together with the specific issues outlined in the detailed response are addressed, it is Vodafone's view that ComReg's preliminary views are not sufficiently well grounded to from the basis of the imposition of ex ante obligations.

Q. 8. Do respondents believe that the draft text of the proposed decision instruments are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please elaborate on your response.

As stated above, Vodafone believes that Comreg has not shown the legal basis for regulating the SV product - which contains elements of three separate markets (i.e. CO, transit and CT) – when ComReg intends to impose obligation on only two elements of the product, namely CO and CT.

In relation to the Decision Instrument and specifically relating to Price Control of Call Origination and Call Termination, Vodafone does not believe there is a requirement to insert the proposed sections in either s.10.7 of the Decision Instrument (Wholesale Call origination) of Appendix A of D4/07 nor following s.10.2 of Decision Instrument at Appendix A 0f D06/07.

Vodafone believe that the transparency obligation in relation to both Call Origination and Call Termination components should be amended to include only a requirement to satisfy ComReg that eircom's proposed SV pricing will have no detrimental effect on competition.

Q. 9. Do you have any views on this Regulatory Impact Assessment and are there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Comments on the regulatory options and specific obligations proposed by ComReg

i. ComReg's preliminary view is that eircom has the incentive to reinforce its market power in the upstream wholesale call market thorough the use of its SV product which in turn has the effect of delaying/impeding entry and competition in the CO and CT markets. While Vodafone accepts that ComReg is obliged to take a precautionary and forward-looking view of markets, we do not believe that ComReg has demonstrated to the required level that there is an existing or potential market failure in relation to SV services. While the promotion of infrastructure is a legitimate regulatory goal, regulatory intervention is wholesale markets should only be pursued where the outcome is eventual outcome is reasonably predictable and there is no obvious risk of unintended consequences. Vodafone does not believe that this is the case here. There seems little point in taking regulator action at the wholesale level with a view to increasing retail competition sometime into the future when the same action damages that very competition at a real level in the present. Indeed, ComReg's proposals in relation to SV price floors has the very real potential of damaging existing competitors to eircom to such an extent that they may not be in the market in the future to avail of ComReg's hoped for long term benefits. Vodafone believe that ComReg should serious reconsider its proposed regulation in relation to eircom's SV service.

ii. If ComReg had reasonably demonstrated existing or potential market failure in the provision of SV services, then an obligation of non-discrimination would have been appropriate. Vodafone does not believe that this has been the case.

iii. In the event that ComReg imposes further obligations on eircom in relation to SV, then a margin squeeze test based on SEO is appropriate.

iv. Vodafone does not believe that the use of the lower level of interconnect sends the right investment signals in relation to the efficient provision of SV services. The high level of interconnect is in Vodafone opinion a more appropriate level to use.

v. In the event that ComReg imposes further obligations on eircom in relation to SV, the six-price floors proposed by ComReg are appropriate.

vi. In the event that ComReg imposes further obligations on eircom in relation to SV, LRAIC plus is appropriate.

vii. In relation to transparency, Vodafone believes there is no reasonable case to support the publication of eircom's SV price. In the event that ComReg imposes further obligations on eircom in relation to SV, ComReg should impose reporting obligation that show to ComReg's satisfaction that competition is protected. However, ComReg also has a duty to assess the reality as it currently exists in the market and to protect those areas and entities that are already providing robust competition

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Magnet Networks welcomes the publication of this consultation. Magnet Networks also appreciates the writer's clear and concise style. We hope the outcome of this consultation will provide light and clarity to the pricing mechanisms utilised by eircom in the whitelabel market.

Q. 1. Do you agree or disagree with ComReg's preliminary view to amend the price control to add an obligation not to margin (price) squeeze in the markets of Call Origination and Call Termination? Please explain your response in detail.

Magnet Networks agree with ComReg's preliminary view to amend the price control obligations to include one not to price squeeze in the outlined markets. Magnet Networks agree to this for numerous reasons. Firstly, the current situation allows eircom to leverage pricing in a switchless voice product. The second reason is to provide transparency; the lack of transparency allows the leveraging of the pricing by eircom. The next reason is to prevent a market foreclosure. As OAO's do not have a view of the pricing that eircom charge they are unable to see if there is an equivalence of input i.e. is eircom charging the same prices for the same service to non-switchless providers. Without the obligation not to margin squeeze it is impossible for OAO's to prove a margin squeeze but yet the market may be foreclosed by the provision of these services. The lack of a price control stymies operators and prevents them from climbing the ladder of investment as they are unsure that if they invest eircom won't find some way to undercut their proposed pricing and thus that investor will not gain a return on that investment.

Q. 2. Do you agree or disagree with ComReg's preliminary view in relation to the further specifications of the transparency obligations in the Call Origination and Call Termination markets? Please explain your response in detail.

As per question 1 transparency is an imperative in Magnet Networks view to ensure that there is no margin squeeze and no foreclosure of the market. Transparency ensures that an alternative operator can truly assess the market and see if it is worth moving up the ladder of investment and purchasing interconnections.

Q. 3. Do you agree or disagree with ComReg's preliminary views on the proposed structure of the price control margin (price) squeeze test – in particular that the margin (price) squeeze test: will be assessed based on a similarly efficient operator standard, will be assessed at a static point in time, will be assessed by time of day gradient (i.e. day, evening and weekend), and uses "LRAIC plus" as its cost standard? Please explain your response in detail.

Overall, Magnet Networks agree with the preliminary views outlined relating to the price control margin squeeze. Though Magnet Networks would argue that a REO is the more appropriate test, Magnet Networks understands that there is not sufficient amount of information available from OAO's to adequately provide a costing input to the REO costing model. Magnet Networks feel that the SEO test is adequate once economies of scale are taken into account. This will provide a more accurate view of costs as opposed to the EEO model.

Magnet Networks agrees with assessing the costs from a static point in time. This is the more timely and efficient manner. Though the dynamic cost may be more accurate the benefits are not so significant to merit the extra cost and workload. Magnet Networks agree with the gradient currently. Though having 6 different prices floors is a little confusing however, it is the best option currently.
Magnet Networks agree that a LRIC model is the most appropriate costing model and feel that the plus model allows for efficiencies. However, it must be stated that the allocation of common costs must be rigorously checked to ensure that these costs have not been allocated elsewhere and that there is no over recovery of costs.
Magnet Networks has a caveat that these methodology should be examined within 2 years to ensure that they are consistent with the on going offers and to see if there has been an increase in the number of interconnections.

Q. 4. Do you agree or disagree with ComReg's preliminary views on the costs to be included in the margin (price) squeeze test? Please explain your response in detail.

Magnet Networks agree with utilising the SEO costing model is the most appropriate currently. However, Magnet Networks feel a bottom up input rather than eircom's top down is more appropriate. Magnet Networks believe utilising BU-LRAIC is more consistent with ComReg's previous consultations.

Q. 5. Do you agree or disagree with ComReg's preliminary view in relation to the structure of the minimum prices/price floors for the margin (price) squeeze test? Please explain your response in detail.

Magnet Networks agree with the preliminary views regarding a price floor. The indicative pricing is easy to understand and is comprehensive.

Q. 6. Are there any issues in relation to the amendment of the price control obligations and further specification of the transparency obligations in the markets of Call Origination and Call Termination that ComReg has not considered in this consultation? If so, please document and explain those issues fully and provide examples where appropriate.

Magnet Networks has no other issues regarding the outlined obligations.

Q. 7. Do you agree or disagree with the preliminary views expressed by ComReg? If not, please explain which preliminary view(s) you disagree with and detail what specific amendments you believe are required.

Magnet Networks agree with the majority of the preliminary views outlined by ComReg in this consultation. If Magnet Networks disagrees with ComReg it has outlined its opinion above.

Q. 8. Do respondents believe that the draft text of the proposed decision instruments are from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please elaborate on your response.

Magnet Networks believe that the draft text is clear from a legal, technical and practical perspective but would like to point out at point 3.2 of both draft decisions, there is reference to Eircom Ltd, this is unnecessary as eircom is already defined in the ‘Definitions’ section.

Q. 9. Do you have any views on this Regulatory Impact Assessment and are there other factors (if any) ComReg should consider in completing its Regulatory Impact Assessment? Please explain your response and provide details of any factors that should be considered by ComReg.

Magnet Networks has no view on the Regulatory Impact Assessment and feel that ComReg has adequately considered each factor in their assessment.