



Response to Consultation & Consultation on Draft Decision

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

(Response to Consultation Document 07/03 and
Consultation on Draft Decision)

Document No:	07/83
Date:	17 October 2007

All responses to this draft decision should be clearly marked:-
“Reference: Submission re ComReg 07/83” as indicated above,
and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5.30pm,
Wednesday 14 November, 2007.

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Please note ComReg will publish all respondents’ submissions
with the Response to this Consultation, subject to the provisions
of ComReg’s guidelines on the treatment of confidential
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1 Executive Summary

Introduction

- 1.1 On 19 January 2007, ComReg issued a two-part national consultation on its review of the fixed interconnection markets. One paper dealt with wholesale call origination and transit services (“ComReg Document 07/02”)¹ while the second dealt with wholesale termination services (“ComReg Document 07/03”).² This document is a response to ComReg Document 07/03 on the call termination market.
- 1.2 ComReg received three responses to ComReg Document 07/03 from the following respondents:
 - BT Communications Ireland Ltd.,
 - Eircom Ltd., and
 - Vodafone Ltd.
- 1.3 ComReg thanks all respondents for their submissions. Having examined the views of all respondents, ComReg sets out in this document its conclusions on the review of the wholesale fixed call termination services markets.

Market Definition & Market Analysis

- 1.4 The services under examination in this review are those for the termination of voice calls on individual fixed networks. A terminating network is the network to which a customer who receives a call is directly connected. When a call is made to a fixed phone, whether from another fixed line or from a mobile, the call passes from the originating operator to the terminating operator. The terminating operator charges a fee for connecting the call to its customers which is known as a termination charge. The termination charge is paid by the originating operator and passed on to the caller in the retail price the caller pays for a call.
- 1.5 Having carried out a review of this market in accordance with its obligations under the Framework Regulations, ComReg is of the view that there are relevant product markets for wholesale call termination to end users located on individual fixed networks in the geographic market of the Republic of Ireland.
- 1.6 Each fixed network operator (“FNO”) has 100% market share in their relevant market. There are high and non-transitory barriers to entry that would prevent the emergence of potential competition over the period of this review, and there is insufficient countervailing buyer power to constrain an operator from acting to an appreciable extent independently of its customers.

¹ ComReg (2007) Market Review - Interconnection: Wholesale Call Origination and Transit Services, Document 07/02, January.

² ComReg (2007) Market Review - Interconnection: Wholesale Call Termination Services, Document 07/03, January.

Designation of Operators with Significant Market Power

- 1.7 Further to its analysis and consultation on this matter, ComReg’s conclusion is that the FNOs listed in Table 1.1 below have Significant Market Power (“SMP”) in the market for wholesale fixed call termination to end users on their individual fixed networks.

Table 1.1: FNOs designated with SMP in the market for wholesale voice call termination to end users on their individual fixed network

BT Ireland
Colt Telecom
Eircom
Magnet Communications
Ntl Ireland and Chorus ³
Smart Telecom
Verizon

Remedies

- 1.8 As ComReg’s analysis of the wholesale call termination markets indicated that the FNOs cited above should be designated with SMP, ComReg is obliged to impose at least one regulatory obligation on each FNO.⁴ ComReg is of the view that, in the absence of regulation, there is the potential for these operators to exercise their SMP by charging excessive prices for call termination services on their networks. As a means to address the potential competition problems that may arise, ComReg is of the view that the obligations imposed on the relevant operators should be based on the nature of the potential competition problem(s) identified and be proportionate and justified in light of the objectives contained in the Communications Regulation Act 2002. As such, they should recognise any potential differences in the competitive conditions faced by terminating operators in their respective markets.
- 1.9 On that basis, ComReg considers that the following obligations should apply to Eircom:

³ UPC is the new parent company of Ntl Communications (Ireland) Ltd and Chorus Communications Ltd. Chorus, the wholly owned subsidiary of UPC, acquired Ntl in 2005. UPC (Chorus) is in the process of merging these entities. The amalgamated entity is intended to be designated with SMP. References throughout this document to Ntl should be taken to refer to the amalgamated entity controlled by UPC (Chorus).

⁴ If an operator is designated as having SMP under Regulation 27 of the Framework Regulations (European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003), ComReg is obliged to impose on such an operator at least one of the obligations set out in Regulations 10 to 14 of the Access Regulations (European Communities (Electronic Communications) (Access) Regulations 2003) as ComReg considers appropriate.

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

1.10 The following obligations should apply to the OAOs listed in Table 1.1 above:

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

1.11 ComReg is of the view that the proposed remedies support ComReg's objectives as outlined in the Communications Regulation Act 2002. The proposed remedies aim to address identified market failures, to protect consumers against the exercise of market power and to promote competition in the markets involving these termination services.

Submissions

1.12 ComReg welcomes submissions from all interested parties on the text of the Draft Decision Instrument which is attached as Annex A.

1.13 All responses should be sent by fax, post, facsimile, email or on-line as indicated on the cover page of this document to arrive on or before 5.30pm Wednesday 14 November 2007.

2 Introduction

- 2.1 The new EU electronic communications regulatory framework requires that ComReg define relevant communications markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations.⁵ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.⁶
- 2.2 The Framework Regulations further require that the market analysis procedure under Regulation 27 be carried out as soon as possible after ComReg defines a relevant market, which takes place as soon as possible after the adoption, or subsequent revision, of the European Commission's Recommendation.⁷ In carrying out market definition and market analysis, ComReg must take the utmost account of the European Commission's Recommendation and the Commission's Guidelines on Market Analysis and the Assessment of Significant Market Power ("the SMP Guidelines").⁸
- 2.3 ComReg adopted the approach set out in the European Commission's Recommendation as its starting point for defining the relevant product market, such that the review was concerned with the market for call termination on individual fixed networks.
- 2.4 ComReg conducted an analysis of the relevant markets to decide whether or not they are effectively competitive. ComReg used a wide range of criteria including market share, potential competition, barriers to entry and expansion, countervailing buyer power and also conducted a prospective analysis of the relevant markets.
- 2.5 Where ComReg concludes that the relevant market is not effectively competitive (i.e. where there are one or more undertakings with significant market power ("SMP")), the Framework Regulations provide that it must identify the undertakings with SMP in that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.⁹ Alternatively, where it concludes that the relevant market is effectively competitive, the Framework Regulations oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market. If ComReg has previously imposed sector-specific SMP obligations on undertakings in a market, the maintenance of existing obligations or creation of new SMP obligations on undertakings without SMP is inconsistent with the regulatory framework. It must withdraw such obligations and may not impose new obligations on those undertaking(s).¹⁰

⁵ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

⁶ Regulation 27 of the Framework Regulations.

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

⁸ European Commission (2002) Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3.

⁹ Regulation 27(4) of the Framework Regulations.

¹⁰ Regulation 27(3) of the Framework Regulations.

- 2.6 This document also contains the draft decision instrument setting out the SMP obligations to be imposed on the aforementioned operators as a consequence of the SMP designation. The draft decision instrument is set out in Annex A.
- 2.7 This review is in line with ComReg’s objectives as set out in Section 12 of the Communications Regulation Act 2002, which are to promote competition, contribute to the development of the internal market and ensure that end-users derive the maximum benefit in terms of price, choice and quality.

Market Review Process

- 2.8 The review of the fixed call termination markets commenced with the publication of a national consultation on the Interconnection markets (“the initial consultation”) on 22 October 2004.¹¹ On 19 May 2005, ComReg notified the European Commission and published its response to consultation (“the initial response to consultation”).¹² The European Commission accepted the notified measures, in correspondence to the Chairperson of ComReg dated 17 June 2005. The initial consultation and the initial response to consultation are collectively referred to as the “initial review” throughout this document.
- 2.9 ComReg decided that, before issuing a final Decision Notice on these markets, it was appropriate to re-examine and update the market analyses contained in the initial review. This would allow ComReg to fully consider any change in the market from the time of the initial review. This process of updating the initial review is referred to throughout this document as the “current review”.
- 2.10 The current review involved collecting and updating data, and extending some elements of the initial review to take account of changing conditions. As part of the current review, ComReg issued specific Data Directions on the interconnection markets¹³ and conducted meetings and conference calls with a large number of operators.
- 2.11 In addition, ComReg reviewed the findings of the European Commission in its Draft Recommendation on Relevant Markets¹⁴ as well as the independent expert report advising the Commission on this new recommendation (“the Expert Report”) both of which were published in 2006.¹⁵ Both reports propose to include the market for wholesale call termination on individual networks in the revised Recommendation. However, the Commission’s Draft Recommendation on Relevant Markets notes that any finding of SMP will depend on the degree of countervailing buyer power and other factors potentially limiting market power. ComReg also reviewed the findings of other national regulatory authorities (“NRAs”) and the comments of the European

¹¹ ComReg (2004) Market Analysis - Interconnection Markets, Document 04/106a, October.

¹² ComReg (2005) Market Analysis - Interconnection Markets, Response to Consultation and Consultation on Draft Decisions, Document 05/37a, May.

¹³ Interconnection Data Direction sent to the fixed and mobile network operators – dated 09 June 2006.

¹⁴ European Commission (2006) Public Consultation on a Draft Commission Recommendation http://ec.europa.eu/information_society/policy/ecomms/doc/info_centre/public_consult/review/recommendation_final.pdf

¹⁵ Cave, Stumpf & Valletti (2006) A review of certain markets included in the Commission’s Recommendation on Relevant Markets subject to *ex ante* Regulation

http://ec.europa.eu/information_society/policy/ecomms/info_centre/documentation/studies_ext_consult/ind_ex_en.htm

Commission on these findings as a useful source of ancillary information on the market analysis process in relation to the interconnection markets.

- 2.12 As part of the current review, on 19 January 2007, ComReg issued a national consultation on the fixed call termination market (“ComReg Document 07/03”) and received three responses to the paper. All responses received will be published on ComReg’s website (with the exception of material supplied on a confidential basis).
- 2.13 Comments made by respondents which relate to specific issues in this market review are addressed in the relevant sections. Respondents were also asked for their general views on whether there were additional factors that required analysis by ComReg and, if so, to state clearly what additional analysis should be carried out.
- 2.14 One respondent agreed with the factors identified by ComReg as a basis for its analysis of these markets.
- 2.15 A second respondent expressed concern regarding ComReg’s failure to analyse the state of the markets in the absence of regulation and the resulting circularity of reasoning. This respondent added that ComReg should follow the European Commission’s “modified Greenfield approach” in this and other market reviews and in the imposition of proportional regulatory remedies.
- 2.16 ComReg notes that there is an inherent difficulty when examining markets that are currently subject to regulation as it means that it is not possible to present real life market data concerning the case absent such regulation. To attempt to manipulate the data to show the complexion of the market without regulation would involve the use of myriad assumptions, thereby leaving the analysis open to challenge. Nonetheless, it should be noted that even when examining the markets in the presence of regulation, there is strong evidence to indicate that a number of fixed network operators (“FNOs”) enjoy a position of SMP in their respective call termination markets. Further, ComReg has undertaken an analysis of the potential competitive problems in these markets.
- 2.17 Two of the respondents commented on the fact that the market analysis relied on historic market share data. One of these respondents called upon ComReg to conduct a truly prospective market review, taking into account trends from advanced markets and forecasts for Ireland for supply and demand-side market developments. The second respondent commented that ComReg should use the most recently available data in carrying out its market analysis.
- 2.18 ComReg is minded of the need to analyse the market on a forward-looking, prospective basis. In this regard, historic data is used as a guide to future developments in the market. This methodology is in keeping with the European Commission’s SMP Guidelines which note that “*NRAs should take past data into account in their analysis when such data are relevant to the developments in that market in the foreseeable future.*”¹⁶ Where available ComReg also considers data from other jurisdictions. ComReg is also cognisant of the need to consider the most up-to-date data in its analysis. As such, the pricing data has been updated to July 2007 in this document.
- 2.19 ComReg considered all respondents views in arriving at its conclusions in relation to market definition, market analysis and SMP obligations. ComReg considers that it

¹⁶ SMP Guidelines, paragraph 20.

has carried out a full and thorough analysis of the call termination markets on individual fixed networks and that it has examined all relevant factors. Having taken into consideration the views of respondents, this response to consultation and draft decision document now sets out ComReg’s final views on the market for wholesale fixed voice call termination to end users on individual networks.

Timeframe

2.20 The timeframe of this review is, at a minimum, two years from the date of publication of the Decision Notice.

Liaison with the Competition Authority

2.21 ComReg consulted with the Competition Authority in relation to its findings on the wholesale termination markets and provided the Competition Authority with a summary of these findings. The Competition Authority has considered these findings, discussed them with ComReg and concluded that they were appropriate.

Structure of this document

2.22 The remainder of this document is structured as follows:

- **Section 3** presents ComReg’s conclusions on the definition of the wholesale call termination markets. This section consists of a review of the market definition procedure and its scope in terms of product and geographic dimensions, as well as demand and supply-side assessments;
- **Section 4** presents ComReg’s market analysis of the call termination markets and presents ComReg’s view on whether the markets are effectively competitive with an analysis of market shares, existing competition, barriers to entry and countervailing buyer power;
- **Section 5** lists those undertakings that have been designated with SMP in the call termination markets;
- **Section 6** provides a discussion of potential competition problems, the general principles associated with remedies are outlined, a range of possible remedies are identified, and appropriate remedies set out;
- **Section 7** outlines the other services which are necessary for the provision of call termination services;
- **Section 8** presents the Regulatory Impact Assessment conducted for the wholesale call termination markets;
- **Annex A** sets out the Draft Decision Instruments;
- **Annex B** contains notification of the draft measures to the European Commission;
- **Annex C** sets out a glossary of terms used in this document;
- **Annex D** presents ComReg’s views on the methodology for a wholesale price cap;

- **Annex E** presents an overview of interconnection markets, in terms of call origination, transit and termination; and
- **Annex F** assesses the appropriate SMP criteria to be considered in the competition assessment in the termination markets.

3 Relevant Market Definition

Introduction

- 3.1 In carrying out market definition and market analysis, ComReg must take the utmost account of the European Commission’s Recommendation on Relevant Product and Service Markets (“Relevant Markets Recommendation”)¹⁷ and the Commission’s SMP Guidelines. In addition, ComReg considers the Commission’s Notice on the Definition of the Relevant Market (“Notice on Market Definition”)¹⁸ and any relevant competition case law or decisions.
- 3.2 As its starting point for defining the market, ComReg adopted the Commission’s approach in the Relevant Markets Recommendation in which the Commission recommends that national regulatory authorities (“NRAs”) should analyse the relevant wholesale national market for voice call termination on individual fixed networks.¹⁹
- 3.3 The definition of the relevant market is a dynamic task.²⁰ Thus the market definition and analysis considers both current market conditions and any potential developments that may take place on a prospective basis, i.e. over the next two years at a minimum.
- 3.4 The definition of the relevant market concentrates on identifying constraints on the price-setting and commercial behaviour of operators. These constraints comprise demand substitution and supply substitution. ComReg takes into account a range of measures, in assessing the effectiveness of demand and supply substitution for the purposes of defining the relevant market, including the SSNIP test where practicable.²¹ The market definition exercise is concerned with the likely competitive response of a body of customers, which is not necessarily the majority of customers,²² and the likely response of alternative suppliers.
- 3.5 The relevant market is defined in terms of both product and geographic dimensions. According to the European Court of Justice²³ a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in

¹⁷ European Commission (2003) Commission Recommendation on Relevant Product and Service Markets, in accordance with Directive 2002/21/EC, 8 May 2003, OJ C 114/45.

¹⁸ European Commission, Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5.

¹⁹ This market corresponds to that referred to in Annex 1(2) of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, (“the Framework Directive”), OJ 2002 L 108/33.

²⁰ In accordance with the SMP Guidelines ComReg must “conduct a forward looking, structural evaluation of the relevant market, based on existing market conditions”, paragraph 20.

²¹ The SSNIP test tries to ascertain whether customers purchasing a particular product or service would switch to readily available substitutes, or to suppliers located elsewhere, if a hypothetical monopoly supplier were to impose a small (in the range of 5% to 10%) but significant, non-transitory price increase above the competitive level. The test is concerned with identifying whether a sufficient degree of substitution would take place such as to render that small but significant price increase unprofitable. For additional guidance, see the Commission’s Notice on Market Definition, the SMP Guidelines and ComReg (2002) ComReg Information Notice on Market Analysis and Data Collection, Document 02/117, December.

²² See, for example, Case 85/76, Hoffman-La Roche & Co. A. G. v. Commission, [1979] ECR 461, as well as Case 66/ 86, Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs, [1989] ECR 803.

²³ See, for example, Case 322/81, Michelin v. Commission [1983] ECR 3461, as well as the Commission’s Notice on Market Definition and the SMP Guidelines.

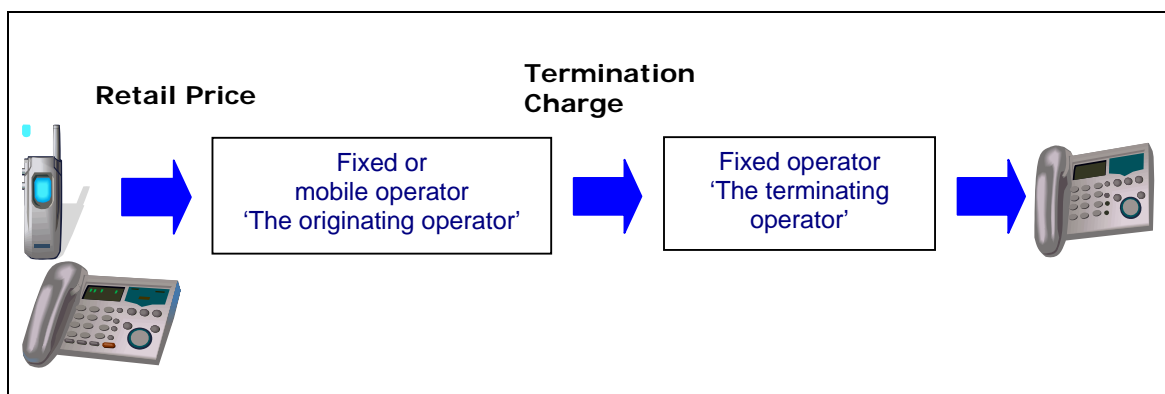
terms of their objective characteristics, their prices or their intended use but also in terms of the conditions of competition, common pricing constraints and/or the structure of supply and demand for the products in question.

- 3.6 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and distinguishable from neighbouring areas because the conditions of competition are appreciably different in those areas.²⁴
- 3.7 The initial review described the procedures which were followed by ComReg in undertaking the market definition and analysis and outlined the regulatory basis of the exercise. The current review has drawn on that approach and taken into account developments in the termination markets since the time of the initial review and further information provided by operators in response to recent data requests. All three respondents to ComReg Document 07/03 were in broad agreement with ComReg’s market definition.

Termination Services

- 3.8 The services under examination in this review are those for the termination of voice calls on individual fixed networks. A terminating network is the network to which a customer who receives a call is directly connected. When a call is made to a fixed phone, whether from another fixed line or from a mobile, the call passes from the originating operator to the terminating operator (this can be directly as in figure 3.1 below or indirectly via a transit operator).²⁵ The terminating operator charges a fee for connecting the call to its customers which is known as a termination charge. The termination charge is paid by the originating operator and passed on to the caller in the retail price it pays for a call. Call termination charges may include call set-up charges and may be separated into peak, off-peak and weekend rates.

Figure 3.1: How a fixed termination charge arises



²⁴ For additional guidance see the Commission’s Notice on Market Definition; SMP Guidelines; ComReg (2002) ComReg Information Notice on Market Analysis and Data Collection, Document 02/117, December; and United Brands v. Commission, [1978] ECR 207.

²⁵ See Annex E for further details on interconnection services.

- 3.9 Of particular importance in the context of the market definition for termination services is the Calling Party Pays (“CPP”) principle. The CPP principle means that the party making the call (the calling party), rather than the party receiving the call (the called party), pays the entire cost of the call at the retail level. The fixed call termination charge is included in the originating operator’s cost base and in the retail price charged by the originating operator to its subscribers. This leads to a separation as the calling party pays for the voice call, which typically includes the fixed voice termination charge, while the called party selects the terminating operator and therefore the level of the termination charge. That is, the calling party pays the termination rate, but it is the network operator chosen by the called party which determines the termination rate. Termination rates therefore do not directly raise costs to the customers of the operator that sets the termination rates, rather they tend to raise costs to those who place calls to that operator’s customers.

Relevant Product Market

- 3.10 As stated above, as its starting point for defining the market, ComReg adopted the European Commission’s Recommendation which recommends that NRAs should analyse the relevant wholesale market for call termination on individual public networks provided at a fixed location.²⁶
- 3.11 In ComReg Document 07/03, ComReg addressed the following issues in relation to delineating the relevant product market:
- a) Do termination services for calls to end users and calls to service providers fall within the same relevant product market;
 - b) Is the relevant product market for termination services for calls to end users a single network market;
 - c) Is fixed call termination part of a wider fixed services market;
 - d) Is self-supply included in the market for termination services for calls to end users; and,
 - e) Are termination services of Voice over Internet Protocol calls in the same product market as call termination services?
- 3.12 ComReg also considered the scope of the relevant geographic market.
- 3.13 These issues are discussed in more detail below. The views expressed in ComReg Document 07/03 are summarised, followed by any views expressed by respondents and a conclusion is subsequently drawn by ComReg.

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

- 3.14 In ComReg Document 07/03, ComReg proposed that the wholesale termination of calls to end users was not in the same relevant market as termination of calls to service providers (“SPs”).²⁷

²⁶ This market corresponds to that referred to in Annex I(2) of the Framework Directive.

²⁷ In the initial consultation (see ComReg Document 04/106a) ComReg suggested there were two separate relevant markets: one for wholesale termination of calls to end-users on each fixed network and one for

- 3.15 A consideration of demand for termination services suggested that termination services to end users and termination services to SPs were distinct products, and one could not act as an effective substitute for the other. This is because the calling party will typically call end users and SPs for distinct purposes which are not readily interchangeable. Thus, the need for the originating operator to direct a call to an end-user located on a specific network implies that re-directing that call to a SP located on another network would not act as an effective substitute.
- 3.16 On the supply side, it was considered that termination for calls to end users required geographic call termination.²⁸ In contrast, termination for calls to SPs required non-geographic termination²⁹ and thus could be provided without ubiquitous network coverage (e.g. in a concentrated area such as a business park). The economics of supplying access points for calls to SPs, which were likely to handle a lot of traffic in a defined geographic area, were different from those of supplying a nationwide network of low-traffic geographic termination points.
- 3.17 ComReg proposed that a provider of call termination services for end users could, theoretically, switch to providing termination services for calls to SPs, in response to a price increase of 5 to 10%, but the reverse was not the case. ComReg was of the view that the costs of rolling out a network to provide termination to end users were more significant than those of providing termination services to SPs. Hence, operators would be unlikely to be in a position to switch readily and without incurring significant cost to supplying termination of calls to end users in response to a 5 to 10 % increase in price. In any case, even if a provider of termination services to SPs could switch readily to providing call termination to end users, it would still not be able to offer an equivalent service as provided by existing suppliers of termination services to end users because technically the call can only be terminated on the specific end user's network to which it is destined.
- 3.18 Further, it was considered that different competitive conditions pertained to wholesale termination of calls to SPs and wholesale termination of calls to end users. This was due to the ability of SPs to negotiate with their terminating network operator and to switch to competing networks for hosting their service platform (e.g. internet dial-up or freephone calls) in response to price changes. This is distinct from the situation with wholesale termination of calls to end users where it is the called

wholesale termination of calls to SPs. This distinction was due primarily to the ability of SPs to negotiate with the relevant terminating operator suggesting they formed part of a separate multi-network market. Although the market for termination of calls to SPs was not included in the EU Commission's Recommendation on Relevant Markets, ComReg identified this market as one which was potentially susceptible to ex-ante regulation and its preliminary findings indicated that the market was not effectively competitive (see ComReg Document 05/37a). The Commission agreed that termination of calls to end users was not constrained by termination of calls to SPs and as such should not be included in the relevant market. However the Commission did not agree with ComReg's analysis that termination of calls to SPs was a separate market as there were low barriers to entry. Therefore ComReg withdrew its notification of the wholesale market for termination of calls to SPs (see ComReg Document 05/09) and indicated that it would continue to monitor developments in this market.

In addition, the Expert Report does not recommend making the market for termination of calls to SPs susceptible to ex ante regulation. NRAs may however examine whether there are particular national circumstances which create competition problems that may require intervention.

²⁸ Calls to end users are typically calls to geographic and mobile numbers and hence require geographic termination services. For further discussion see ComReg Document 04/106a, paragraphs 3.66 to 3.89.

²⁹ Calls to SPs are typically calls to non-geographic numbers (e.g. freephone numbers) and require non-geographic call termination services. For further discussion see ComReg Document 04/106a, paragraphs 3.66 to 3.89.

party that selects the terminating operator but, due to the CPP principle, they are less sensitive to the terminating charges set by their own network provider.

Views of Respondents

3.19 One respondent agreed that wholesale call termination to SPs was not in the same market as wholesale call termination to end users on a fixed network. The two other respondents made no comment in relation to this issue.

Conclusion

3.20 Given that no respondent made any negative comment on this issue, ComReg's position on this issue having considered the respondents' views remains unchanged. ComReg concludes that wholesale call termination to SPs is not in the same market as wholesale call termination to end users primarily because:

- On the demand side, call termination to SPs is not a substitute for call termination to end users – they are distinct products in the eyes of consumers and are not sufficiently interchangeable;
- On the supply side, call termination to end users requires geographic termination and therefore ubiquitous network coverage while call termination to SPs does not, therefore operators supplying termination to SPs would not be able to switch easily and costlessly to the provision of call termination to end users;
- There are different competitive conditions in the markets for wholesale termination of calls to end users and to SPs in that SPs are able to negotiate with their terminating provider and switch easily to competing networks, while the principle of CPP means that the consumer ultimately paying the termination rates is not in a position to negotiate or switch as the called party selects the network provider; and
- A different pricing policy applies to voice call termination for wholesale termination of calls to end users and call termination to SPs (revenue sharing).

b) Is the relevant market for termination services for calls to end users a single network market?

3.21 In ComReg Document 07/03, ComReg proposed that the relevant product markets for wholesale fixed termination services for calls to end users were for each individual fixed network operator (“FNO”), i.e. a single network market structure.

3.22 ComReg was of the view that it would not have been appropriate to have defined a very narrow product market based on each individual fixed number on a fixed network as fixed operators did not price discriminate between termination charges to different numbers on their networks. The proposed product market was more appropriate as it reflected the similar competitive conditions for all numbers on the network and the fact that a common pricing constraint applied to voice call termination for all subscribers to an individual fixed network.

3.23 It was also considered whether the market was an individual or multi-network market. In that regard, on the demand side an originating operator that wished to terminate a call to a fixed number on a specific network would not have had any available substitutes for the service. The operator could only have terminated the call

on the network to which that number was assigned irrespective of whether the call was delivered to the terminating network directly from the originating network or by an intermediate third party transit provider. The call would have been unsuccessful if an attempt were made to terminate it on another network.

- 3.24 The current need to direct traffic to a specific fixed geographic number ensures there is no effective demand-side substitute available at the wholesale level to operators that seek to terminate their traffic to an end-user located on a specific fixed network.
- 3.25 On the supply side, ComReg was of the view that over the timeframe of the review there were no technical alternatives by which a call could be successfully terminated without the co-operation of the terminating operator. It was considered that a number of significant technical changes would be required before a voice call could be terminated on a network other than the specific network to which the called party subscribes. Therefore, each operator's termination service was considered to fall within its own distinct market, and was not considered substitutable for the termination service provided by other operators over the review period. Accordingly, in the absence of viable technical alternatives emerging over the timeframe of this review it would be profitable for a hypothetical monopolist supplier of wholesale termination services to end users to increase its termination charges by a small but significant amount (e.g. 5 to 10%).

Views of Respondents

- 3.26 One respondent agreed that the relevant market for termination services for calls to end users was a single network market. The two other respondents made no comment in relation to this issue.

Conclusion

- 3.27 Given that no respondent made any negative comment on this issue, ComReg's position on this issue remains unchanged. ComReg concludes that wholesale call termination of calls to end users is a single network market because:
- There is a common pricing policy applied to voice call termination for all subscribers to an individual fixed network;
 - On the demand side, there are no available substitutes for an originating operator who wished to terminate a call on a particular network; and
 - On the supply side, there are no technical alternatives by which a call can be successfully terminated without the co-operation of the terminating operator.

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

- 3.28 In ComReg Document 07/03, ComReg examined the possibility that termination could have been part of a wider market incorporating all fixed services. This could have been the case if fixed operators had competed on the price of a bundle of fixed services offered and not on the price of each single service. Under that scenario, a fixed operator would not have been able to raise the price of termination without having reduced the price of other services in the bundle. This did not seem to be the case in practise. Eircom, for example, did not vary the retail price charged for making fixed calls to another operator. If it did so, consumers might have switched

to another operator in response to a rise in the price of the bundle of fixed services. ComReg was of the view that a wider market definition that encompassed all fixed services would only have been viable if fixed subscribers were sufficiently concerned about the cost of calls from fixed phones, which ComReg did not consider to be the case under CPP.

- 3.29 ComReg's evidence at the retail level did not suggest either significant price sensitivity to wholesale termination rates or consideration of the identity of the provider of termination services. Consumer research indicated that price was the most important factor for respondents when selecting a fixed line provider, at 66%, but this generally referred to the price for outgoing calls and subscribing to the service.³⁰ Thus in view of the CPP principle, subscribers were likely to be less concerned about the cost of incoming calls to their chosen network. In addition, there was little, if any, dissemination of information that would have made end users aware of termination charges. As a result, it was likely that most callers would be unaware of the identity of the fixed operator terminating the calls that they made or the charge differentials between terminating operators. This was particularly so given that Eircom did not charge different rates for making calls to other Eircom customers and making calls to any other fixed operator. In any case the lack of termination pricing awareness had the potential to limit the competitive significance of the identity of the terminating operator, even if callers were aware of the identity of the called network.
- 3.30 Retail price sensitivity could also have only imposed a competitive constraint on termination rates if the retail party paying for the service could have bypassed the terminating network. This would have been the case if there were demand-side substitutes at the retail level which constrained (or arguably might have constrained) the ability of a FNO to raise its termination charges. However, as noted above there are no technical alternatives to terminating a call on a specific end-user's network at present.
- 3.31 ComReg was of the view that FNOs did not compete for subscribers on the price of incoming calls to fixed phones but rather on the price of outgoing calls. This view was also consistent with the market definition exercise carried out as part of the initial review. In the context of its current review, ComReg emphasised that the provision of voice call termination at the wholesale level was a product that was, and could have been, purchased on an individual basis and thus the appropriate market definition was not that of a cluster of fixed services.
- 3.32 ComReg recognised that the regulation of wholesale voice call termination services could have affected other fixed services and proposed that it would take this into consideration where appropriate both in terms of its assessment of whether the relevant market was effectively competitive, and in terms of any remedies proposed. ComReg notes that it has recently been suggested by some commentators,³¹ primarily in the context of mobile markets, that the prices of outgoing calls are linked to the prices charged for call termination and, as such, if operators increased termination rates these gains would be competed away through reduced retail charges for subscription and outgoing calls and/or lower termination charges may result in higher

³⁰ ComReg (2006) ComReg Trends Report Q1 2006 prepared by Amarach Consulting, Document 06/22a, June, Slide 13.

³¹ For a discussion of this issue, see M. Armstrong and J. Wright (2007) Mobile Call Termination, September, <http://else.econ.ucl.ac.uk/papers/uploaded/255.pdf>

retail charges for subscribers, a phenomenon known as the “waterbed effect”. On that basis a cluster market definition for mobile services is appropriate.³² ComReg sees no evidence of this as a factor in fixed markets, particularly since the handset subsidy issue is not relevant.

Views of Respondents

3.33 One respondent agreed that wholesale call termination to end users on a fixed network was not part of a wider fixed services market. There was no comment on this issue from the other two respondents.

Conclusion

3.34 Arising from the above analysis, and the general agreement of respondents, ComReg concludes that fixed call termination is not part of a wider market for fixed services.

d) Is self-supply included in the market for termination services for calls to end users?

3.35 In ComReg Document 07/03, ComReg proposed that self-supply for termination of calls to end users should not be included in the relevant product market.³³

3.36 Termination services for calls to end users are usually self-supplied between the wholesale and retail arm of a network operator. Accordingly, a number of undertakings self-supply termination functionality while also supplying wholesale termination services to third parties. The question therefore arises as to whether those operators’ self-supply capacity exerts a strong enough competitive constraint to deter a hypothetical monopolist provider of call termination services on a particular network from implementing a small but significant (i.e. 5 to 10%) price increase above the competitive level.³⁴

3.37 As noted in previous sections, to complete a call to another operator’s network it is necessary to purchase wholesale call termination from that operator; no alternative wholesale inputs exist for completion of that call. Therefore, while alternative

³² This argument relies, however, on the assumption that competition and demand substitution at the retail level would be strong enough to compete away any excess profits deriving from call termination charges at the wholesale level. ComReg sees no persuasive evidence that there is a complete pass-through of wholesale termination profits to the retail level in the form of lower prices or handset subsidies, i.e., the magnitude of a waterbed effect, if any, is uncertain and is likely to be less relevant where penetration rates are high. Indeed, the purpose of the market definition and analysis process is to identify the ability of an undertaking to exert market power in the first instance. Issues regarding the appropriate distribution of any excess termination profits deriving from a position of SMP should arguably be considered at a later stage in terms of any proposed remedies.

³³ The initial review (see ComReg Document 04/106a and ComReg Document 05/37a) proposed that self-supply should be included in the relevant market based on possible substitution by customers from non-integrated terminating providers to integrated providers at the retail level. However, following further analysis it is unclear, in light of the CPP principle, whether such retail demand substitution is likely to be strong enough to warrant the inclusion of self-supply in the relevant market. In any case, the inclusion or exclusion of self-supply in the relevant market does not appear to have any material impact as the relevant terminating operators were considered to have 100% market share in both the initial and current reviews.

³⁴ The Expert Report (see infra note 15) sets out the following conditions for the inclusion of self-supply in the relevant market definition: “Only in the case where a rival firm has reached a network roll-out and geographical coverage comparable with the existing operator(s), where the necessary spare capacity is available, wholesale billing and account management systems exist, and where switching costs are low, supply substitution appears to impose a strong enough pricing constraint on the existing wholesale products. In this case the rival firm’s self provided inputs could be included in the same relevant wholesale market together with incumbent’s wholesale offerings.”

terminating operators may have relevant spare capacity and wholesale systems in place, it is not technically possible at this time to use such self-supplied or spare capacity for the purposes of terminating a call to an end user located on another terminating provider's network. The self-provided inputs of alternative terminating operators do not therefore act as a sufficient constraint on a wholesale operator supplying call termination to end users located on its individual fixed network and should not be included in the relevant market.

Views of Respondents

3.38 One respondent agreed that self-supply for termination of calls to end users on a fixed network should not be included in the relevant product market. There was no comment on this issue from the other two respondents.

Conclusion

3.39 ComReg concludes that, given the characteristics of the market for wholesale termination of calls to end users on individual fixed networks, it is not possible to use self-supplied capacity or inputs for the purposes of terminating calls to end users located on another terminating provider's network and therefore is not included in the relevant market.

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

3.40 In ComReg Document 07/03, ComReg did not consider that termination of Voice over Internet Protocol ("VoIP")³⁵ call services should be considered in the same product market as call termination services.

3.41 At the retail level, and indirectly at the wholesale level, it was considered conceivable that there could be an indirect constraint imposed on terminating operators from operators that provided VoIP services. VoIP calls include managed voice over broadband services ("VoB")³⁶ or unmanaged voice over internet services ("VoI").³⁷

3.42 In terms of functionality, a VoB call might be substitutable for a fixed call.³⁸ However, for a number of reasons this was unlikely to act as an effective enough constraint on wholesale call termination to be included in the same relevant market over the timeframe of this review.

³⁵ VoIP is an IP telephony term for a set of facilities used to manage the delivery of voice information over the Internet. VoIP involves sending voice information in digital form in discrete packets rather than by using the traditional circuit-committed protocols of the PSTN network.

³⁶ VoB is a sub-set of VoIP services. VoB is a service that allows you to make telephone calls over a high-speed Internet connection rather than through a regular telephone outlet without having to go through your computer. On the Internet, the call is carried in packets using VoIP.

³⁷ VoI services are accessible only through the installation of software on a computer and are available on a limited customer basis, that is, on a closed user group basis. Unlike VoB and traditional voice telephony services, VoI does not have a number range, ancillary services or service mediation. VoI calls are carried over the public internet and are not able to guarantee any quality of service.

³⁸ See conclusions on retail calls in ComReg (2006) Retail Calls Market Review – Call for Input on an Assessment of the Three Criteria, Document 06/51, September, where VoB services were considered substitutes in the non-residential market.

- 3.43 First, VoB uptake was dependent on users having a broadband connection. Currently, Ireland is experiencing relatively high growth rates in the take up of broadband by consumers.³⁹ However, this growth in broadband has not given rise to the significant use of VoB.⁴⁰ Experience in other countries shows that VoIP users remained a small proportion of broadband users, and VoB users represented a proportion of VoIP users.⁴¹
- 3.44 Second, customers would need an adaptor to switch to VoB. This was particularly pertinent given CPP where called parties may have been unlikely to have invested in alternative technologies to have minimised the cost of others calling them.
- 3.45 End users might prefer to keep their telephone line free to receive incoming calls and to use their broadband connection in a complementary way.⁴² In addition, it was considered that the potential for significant demand-side substitution was likely to be constrained by the need for customers to make two levels of investment to switch to VoB.
- 3.46 Perhaps more fundamentally, VoB would still not have obviated the need to pay a wholesale call termination charge if the originating operator was terminating the call on a geographic number associated with a specific end user on a particular fixed network.

Views of Respondents

- 3.47 One respondent agreed that VoIP services would not act as a constraint to a sufficient degree on wholesale call termination services. There was no comment on this issue from the other two respondents.

Conclusion

- 3.48 Having considered this issue further in view of market developments and the responses received on foot of ComReg Document 07/03, ComReg considers that wholesale termination of VoIP call services would not at present, nor over the timeframe of this review, act as a sufficient constraint in the market for wholesale call termination services on a fixed network. Termination of VoIP call services therefore is not considered by ComReg to be in the same product market as call termination services to end users on individual fixed networks within this review. This is primarily because ComReg sees no persuasive evidence at this stage that the CPP pricing principle applies in respect of termination of VoIP calls or that cable operators, such as, Ntl and Chorus are offering and/or charging for termination of VoIP calls. Nonetheless, ComReg will continue to monitor the development of VoIP services and may revisit its market definition should it prove necessary.

³⁹ The latest available data shows that in terms of broadband penetration growth, Ireland achieved the fifth highest growth rate in the OECD (5.8%), fifteen places above the OECD average (3.4%) at the end of December 2006. In terms of broadband penetration (on a per capita basis) Ireland is five places below the OECD average (with a rate of 12.5% compared to the OECD average of 16.9%); ComReg (2007) Irish Communications Market: Quarterly Key Data - June 2007, Document 07/34, June, pages 24-25.

⁴⁰ ComReg's latest market research shows that only a small proportion of broadband users (10% at the end of 2006) actually use VOIP services and only a subset of those use VOB. See ComReg (2007) ComReg Trends Survey Series Q4 2006. Presentation of Results, prepared by Amarach Consulting, Document 07/13, March.

⁴¹ *ibid.*

⁴² Expert Report.

Operators Included in the Relevant Product Market

3.49 There are currently seven FNOs providing wholesale call termination services in Ireland, as listed in Table 3.1 below. These operators are therefore considered relevant operators for the purpose of this market review.

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

BT Ireland
Colt Telecom
Eircom
Magnet Communications
Ntl Ireland and Chorus
Smart Telecom
Verizon

3.50 In the initial review, ComReg also identified a number of other operators as potentially active in the markets for wholesale call termination to end users located on individual fixed networks.⁴³ These operators were Blueface, Budget Telecom, Energis (Cable & Wireless), Finarea, Imagine Group Telecom, Opera Telecom, Swiftcall and Talk Telecom. However, on further analysis of these operators, ComReg considered that they should not be considered as part of the relevant markets as they had no directly connected end users and were not actually active in the relevant market. This is discussed in more detail below.⁴⁴

3.51 Although these operators had termination rates published in Eircom’s switched transit and routing price list (“STRPL”), they had not received wholesale traffic for the purposes of termination to end users because:

- a) They did not have directly connected end users; and/or
- b) A geographic termination rate was a prerequisite to entering into any interconnection agreement with Eircom.

3.52 Most of the operators listed in Table 3.2 below had not received any revenue to date from termination to end users and in most cases did not intend to provide this service within the timeframe of this review.

⁴³ See ComReg Document 04/106a, Annex C.

⁴⁴ See ComReg Document 07/03, paragraphs 3.47 to 3.52.

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

Blueface
Budget Telecom
Energis (Cable & Wireless)
Finarea
Imagine Group Telecom
Opera Telecom
Swiftcall
Talk Telecom

- 3.53 Two of the operators listed in Table 3.2 did have an allocation of geographic numbers and the evidence to date suggested that one had received termination revenue payments from Eircom. However, as these operators had no directly connected end customers these calls/revenues were not for termination of calls to end users, instead, these were calls destined for a geographic number for onward routing to a calling card platform. The calling card platform then determined the destination of the call. Where the destination was international it was routed back to the operator's switch for international transit. Thus, the geographic numbers were used for re-routing services and not for terminating calls to end users on those numbers, so the operators in question did not control access to any end users.
- 3.54 ComReg was of the view that operators with an allocation of geographic numbers would not have constituted a relevant market for an SMP analysis. From the information provided by the operators listed in Table 3.2, the services provided by them were similar to the provision of calls to non-geographic numbers, so that the wholesale customers involved (e.g. calling card platforms) could have chosen to switch to another indirect access provider to route their calls if the price of 'termination' were to have increased.
- 3.55 ComReg therefore was of the view that the operators listed in Table 3.2 should not be included in the market analysis as they had no directly connected end users and were not active in the relevant market. However, ComReg proposed to monitor the position of the operators in this group and, in the event that market entry occurred, to review this finding.

Views of Respondents

- 3.56 One respondent agreed with ComReg's analysis that the operators listed in Table 3.2 above should be excluded from the market definition, while another respondent raised no concerns regarding this matter.
- 3.57 The third respondent had reservations about ComReg's proposal not to include in the relevant market those operators that use geographic number ranges for re-routing services and not terminating calls to end users. The respondent recognised that, in

line with ComReg’s analysis, this use of geographic numbers equated to neither call termination to end users nor call termination to SPs. It also believed that as a result it neither fits the market definition for call termination to end users nor does it offer the opportunity for market forces to regulate wholesale prices as would be the case with non geographic numbers.

- 3.58 The respondent argued that ComReg had implied market failure could not arise in relation to this use of geographic numbers based on the suggestion that the wholesale customers involved (e.g. calling card platforms) could choose to switch to another indirect access provider if the price of termination were to rise. The respondent asserted that this logic was flawed as it implied that the commercial relationships for geographic numbers that were used in this way were similar to those of non-geographic numbers. In this instance, the respondent noted that the calling card platform was generally provided by the hosting operator and in any case it was the originating operator and not any wholesale customer that would be burdened with any price increase. Moreover, the originating operator would be prevented from passing on the additional cost to the calling customer due to restrictions that apply under the national numbering conventions. The respondent suggested that the market for call termination to users in a fixed location should be defined in accordance with the *ability* of an undertaking to terminate calls to end users whether or not they are currently offering such services.
- 3.59 This respondent went on to argue that arising from their concerns regarding the market definition exercise, that the operators listed in Table 3.2 above should also be designated with SMP. However, in the absence of any wholesale regulation for these operators, the respondent called for a review of the numbering conventions to remove the anomaly whereby the retail price is regulated whereas the wholesale interconnect rates are not.

Conclusion

- 3.60 As noted in paragraph 3.10 above, the starting point for this market definition exercise was the Commission’s Recommendation on Relevant Markets which recommends the relevant wholesale market for call termination on individual public networks provided at a fixed location as susceptible to *ex ante* regulation. The analysis then considered whether, from a demand and supply perspective, the market should be expanded to include additional substitutes.
- 3.61 The respondent’s starting point, however, appears to be the difficulties which may arise should remedies not be applied to the sub-set of operators listed in Table 3.2 above. This, however, cannot lead to the automatic presumption that the market should be defined in a particular way independently of demand and supply side considerations. In paragraph 3.20 above ComReg sets out its clear reasons as to why wholesale call termination to SPs is not in the same market as wholesale call termination to end users. While some of the operators listed in Table 3.2 did have some allocation of geographic numbers, critically, as acknowledged by the respondent, they do not currently offer wholesale call termination to end users. Rather a PBX (or self supply at a particular business location) may be the only geographic number active.
- 3.62 In addition, it is ComRegs’ understanding that the sub-set of operators are unlikely to provide wholesale call termination to end users within the timeframe of the review. While the respondent suggests that the market should be defined in accordance with an *ability* to terminate calls to end users, it does not demonstrate that these operators

will actually switch from using their limited allocation of geographic numbers for re-routing or self-supply purposes to supplying termination services to end users and thus actually be in a position to exert market power over the provision of such services over the timeframe of this review. In that regard, ComReg notes the SMP Guidelines which state that operators must be able to replicate services within one year to be included in the relevant market. The operators listed in Table 3.2 would be unlikely to be in a position to switch readily and without incurring significant cost to supplying termination of calls to end users in response to a 5 to 10 % increase in price.

- 3.63 ComReg concludes therefore that it would not be justified to include within the market definition undertakings that are not currently terminating calls to end users, as suggested by the respondent. As such, these operators are not considered for the purposes of the SMP analysis for these relevant markets set out in section 4. Nonetheless, ComReg will monitor the position of the operators in this group and, in the event that any of these operators becoming active in the relevant market, may revisit the market definition.

Relevant Geographic Market

- 3.64 In ComReg Document 07/03, it was noted that the terms on which termination services were offered to and by all operators in Ireland did not change by geographic area and each individual fixed network was deemed a relevant product market according to the market definition. While the customers of a FNO may not have been located nationwide, if, for example, retail services were provided predominantly to customers in the Dublin area, termination to a particular end user was made available on a nationwide basis and the national wholesale termination rate pricing was not differentiated. It was considered unlikely that retail customers would have been satisfied with a service that only allowed for the termination of calls (and hence the receipt of calls) in a specific local area. ComReg was of the view therefore that the relevant geographic market for the supply of wholesale call termination services to end users corresponded to a national market.

Views of Respondents

- 3.65 One respondent agreed that there was a national market for wholesale call termination services to end users on individual fixed networks. There was no comment on the geographic market from the other two respondents.

Conclusion

- 3.66 Arising from the above analysis, and noting the general agreement of respondents, ComReg concludes that the geographic market for wholesale call termination services to end users on a fixed network is national in scope.

Conclusion on Market Definition

- 3.67 The market definition analysis which has been carried out indicates that the relevant market is that for wholesale fixed termination to end users located on individual fixed networks having considered the following:
- Wholesale call termination to service providers is not in the same market as wholesale call termination to end users on a fixed network;

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

3.68 ComReg concludes that the relevant markets are the national markets for wholesale call termination to end users located on individual fixed networks and comprises the operators set out in Table 3.1 above. All of the respondents expressed broad agreement with the findings of the market definition exercise. The only reservation raised by one respondent was the issue of which operators fall within the scope of the relevant market definition. ComReg concludes that the operators listed in Table 3.2 above do not fall within the boundaries of the relevant market as they do not currently offer call termination services to end users. ComReg may, however, revisit the applicable operators in the event of any of these operators becoming active in the relevant market within the timeframe of the review.

4 Relevant Market Analysis

Introduction

- 4.1 In the initial review, ComReg presented a detailed analysis of the relevant markets and assessed the state of competition and developments on those relevant markets in accordance with the Framework Regulations. ComReg Document 07/03 built on the initial market analysis and reasoning conducted by ComReg in relation to call termination, focusing on any changes in these markets since the time of the initial review and updating the underlying data and market analysis, where appropriate.
- 4.2 Having provisionally identified the relevant market as single network markets for the provision of wholesale call termination to end users at a fixed location, ComReg’s analysis focussed on the issue of whether the relevant fixed network operators (“FNOs”) had sufficient market power to profitably raise the price above the efficient level in relation to their respective terminating networks. If such market power existed, then there may be a case for regulatory intervention to prevent any negative effects of such market power on consumers and ultimately end users.
- 4.3 On the basis of the market analysis conducted in ComReg Document 07/03, ComReg provisionally determined that the markets for wholesale call termination on individual networks are not effectively competitive. Accordingly, ComReg was of the preliminary view that Eircom and relevant OAOs have significant market power (“SMP”) in these identified markets.
- 4.4 ComReg solicited respondents’ views on the relevant SMP criteria underlying the competition assessment, the updated SMP analysis and on the proposals and views contained therein.⁴⁵ As stated earlier, ComReg received three industry responses from BT Ireland, Vodafone and Eircom. ComReg notes that the respondents did not comment directly on the relevant individual criteria used to assess SMP in the market with the exception of one respondent who commented on Countervailing Buyer Power (“CBP”). The views of this respondent are addressed below in the subsection on CBP. ComReg has considered all responses received to ComReg Document 07/03 in arriving at its conclusions in relation to market analysis and SMP as set out below.
- 4.5 In the following sections, ComReg considers the issue of SMP in the individual markets for wholesale call termination to end users at a fixed location. In each case, a summary of ComReg’s preliminary views are presented, followed by respondents’ views received on foot of ComReg Document 07/03, ComReg’s responses to these views and ComReg’s final position.

Overview of SMP Analysis for Call Termination Markets

- 4.6 ComReg Document 07/03 outlined the preliminary view that the markets for call termination to end users at a fixed location on individual networks are not effectively competitive. It also presented ComReg’s preliminary view as to those undertakings with SMP in the call termination markets, namely Eircom, BT Ireland, Verizon, Ntl Ireland, Colt Telecom, Smart Telecom and Magnet Communications Ltd.

⁴⁵ See ComReg Consultation Document 07/03, consultation questions 3 and 4.

- 4.7 ComReg considered in detail the most pertinent criteria for the analysis of competition in the market in question which included the following;⁴⁶
- a) Market Share;
 - b) Existing Competition;
 - c) Barriers to Entry and Potential Competition; and
 - d) Countervailing Buyer Power (“CBP”).
- 4.8 Having examined in detail each of these four SMP criteria, with particular focus on the issue of CBP, ComReg was of the preliminary view that each FNO in the relevant market had 100% market share. Given the particular characteristics of termination markets, there are high and non transitory barriers to entry that would prevent the emergence of potential competition over the period of the review i.e, two years from the publication date of the decision. ComReg was also of the preliminary view that there is insufficient CBP to constrain relevant FNOs from acting to an appreciable extent independently from customers, competitors or consumers in the provision of wholesale call termination services.
- 4.9 Respondents were asked whether they agreed with ComReg’s preliminary conclusions on SMP.

Views of Respondents

- 4.10 In general, the three respondents broadly agreed with ComReg’s preliminary conclusions on SMP in the wholesale market for call termination at a fixed location. As noted above, however, one respondent expressed reservation about ComReg’s proposal to remove from the relevant markets those operators that use geographic number ranges for services which are in their view similar to those on non-geographic numbers. This respondent believes that these operators listed in Table 3.2 above should also be designated with SMP or, in the alternative, that ComReg should address this issue through a review of the numbering conventions. As discussed in sections 3.50 to 3.63 above ComReg has set out its clear reasons as to why the sub set of operators in Table 3.2 are excluded from the relevant market and therefore the following SMP analysis. Another respondent expressed some reservation that Eircom cannot exert CBP and exert pressure in relation to the termination rates of its competitors.

ComReg’s Position and Conclusions

- 4.11 After further consideration, ComReg’s final position remains unchanged from that which was expressed in ComReg Document 07/03. Having completed the review of competition and developments in these relevant markets ComReg considers that it is appropriate to designate Eircom and the following OAOs, BT, Colt, Magnet, Ntl, Smart and Verizon, with SMP for call termination on their respective networks. In coming to its final views on SMP in the market in question, ComReg has considered a number of different factors in its assessment of the level of competition within fixed wholesale call termination markets. Detailed below are the most pertinent criteria for the analysis of competition in the market in question. In each case

⁴⁶ Annex F contains a summary of the other SMP criteria contained in the SMP Guidelines and an explanation for why ComReg considered them less relevant in the context of this market review.

ComReg’s preliminary views on these SMP criteria are summarised, followed by the views, if any, expressed by respondents on ComReg’s preliminary analysis together with ComReg’s final position.

a) Market Shares

- 4.12 Having provisionally identified single network markets for the provision of wholesale call termination to end users, ComReg’s preliminary view was that each operator has 100% market share and that this situation is not expected to change over the timeframe of the review. It was not possible for any operator other than the operator controlling the network terminating point to a particular end user and geographic number to terminate calls to that end user, as discussed in section 3 as part of the market definition exercise. Therefore, ComReg considered each FNO had a 100% market share of wholesale termination to end users on its network.
- 4.13 Respondents were asked whether they agreed with ComReg’s preliminary analysis of this SMP criteria and whether this criteria had been sufficiently examined.

Views of Respondents

- 4.14 None of the respondents referred directly to ComReg’s assessment of the market share criteria in their submissions. Nevertheless, one respondent submitted that it understood ComReg’s reasoning that each FNO has a 100% market share in termination on their network and that this is unlikely to change over the timeframe of the review. Another respondent who agreed with the market definition was of the view that it follows almost automatically on the basis of the market definition that each FNO must have SMP in the wholesale market for call termination on their respective networks.

ComReg’s Position and Conclusions

- 4.15 In the SMP Guidelines, it is clear that although a high market share alone is not sufficient to establish the possession of SMP, it is unlikely that a firm will be dominant without a large market share. The SMP Guidelines further note that, according to established case law,

“...very large market shares - in excess of 50% - are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position...An undertaking with a large market share may be presumed to have SMP, that is, to be in a dominant position, if its market share has remained stable over time.”⁴⁷

- 4.16 The SMP Guidelines also state that

“.....the existence of a dominant position cannot be established solely on the basis of large market shares, and that NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of SMP.”⁴⁸

- 4.17 ComReg recognises that large market shares are not in themselves sufficient to form the basis of a finding of SMP and that other factors that can contribute to SMP (and

⁴⁷ SMP Guidelines, paragraph 75.

⁴⁸ SMP Guidelines, paragraph 78.

indeed offset it) must also be taken in to account. Noting the views of one respondent that it follows almost automatically on the basis of the market definition that each FNO must have SMP, ComReg does not view the existence of large market shares as determinative of the question of whether or not SMP existed in the relevant market. It is apparent, however, that all operators have 100% market share of termination on their own networks and that each operator's 100% market share is a sustainable and non-transient position in light of the high barriers to entry, and also because potential competition is unlikely to occur over the lifetime of the review.

- 4.18 The relevant markets exhibit market shares that, by reference to established case law, remain consistent with a finding of SMP. Discussed below, ComReg considers other factors which may qualify an operator's potential dominance on its own network.

b) Existing Competition

- 4.19 It was ComReg's preliminary view that there is a lack of existing competition in the individual network markets for call termination. On the basis of the preliminary conclusions of the market definition exercise contained in ComReg Document 07/03,⁴⁹ ComReg believed that existing competition would not provide an effective constraint on the relevant wholesale market for call termination on individual fixed networks. This analysis showed that there are no feasible supply or demand-side substitutes for the provision of wholesale call termination services to end users at a fixed location over the timeframe of the review. Technically, it is not possible to terminate a call to an end user without the co-operation of the operator to which the end user is subscribed. Any attempt to terminate the call on any network other than that which the called party subscribed to would result in the call being unsuccessful. As such, there are high and non-transitory barriers to entry into each individual network market during the period of the review.
- 4.20 Respondents were asked whether they agreed with ComReg's preliminary analysis of this SMP criteria and whether this criteria had been sufficiently examined.

Views of Respondents

- 4.21 None of the respondents referred directly to ComReg's assessment of existing competition in their submissions. However, ComReg noted the respondents' broad agreement with the preliminary conclusions of the market definition exercise.

ComReg's Position and Conclusions

- 4.22 In view of the market definition analysis and noting the fact that respondents did not comment on this issue directly, ComReg concludes that there is a lack of existing competition in the individual markets for wholesale call termination to end users on individual fixed networks and that this situation is not expected to change over the timeframe of the review. An assessment of existing competition would indicate that, to a sufficient extent, FNOs are in a position to act independently of their competitors and customers. Discussed below, ComReg considers other factors which may qualify an operator's potential dominance on its own network.

⁴⁹ See ComReg Document 07/03, paragraphs 3.45 to 3.46.

c) Barriers to Entry and Potential Competition

- 4.23 ComReg Document 07/03 set out ComReg’s preliminary conclusion that there are high and non transitory barriers to entry and no threat of potential competition in the relevant markets. As detailed in the section 3 of this document on market definition and in ComReg Document 07/03, the characteristics of the call termination market (where call termination to a particular end user was not replicable *per* definition and no other operator could have terminated the call) meant that many of the structural barriers to entry/expansion which had been examined in the market analysis of the call origination and transit markets were not relevant for the termination market.⁵⁰ Therefore, FNOs were not significantly threatened by potential competition in the supply of their termination services given the absence of alternative means and/or technologies for terminating calls over their respective networks. Each FNO had control over infrastructure not easily replicated as it was not possible to replicate access for termination of a call to a specific end user associated with a specific number. It was not envisaged that this situation would change significantly over the period of this review.
- 4.24 Respondents were asked whether they agreed with ComReg’s preliminary analysis of this SMP criteria and whether this criteria had been sufficiently examined.

Views of Respondents

- 4.25 None of the respondents referred to ComReg’s assessment of barriers to entry and potential competition in their submissions. However, ComReg noted the respondents’ board agreement to the preliminary conclusions to the market definition exercise.

ComReg’s Position and Conclusions

- 4.26 ComReg Document 07/03 noted that while high market shares are suggestive of market power, it was important that an overall analysis was carried out in order to determine whether FNOs can act independently of its competitors and consumers in the single network markets for termination. ComReg has carried out a thorough and careful analysis of competition and market developments in the relevant markets. Having considered this analysis, the underlying market definition analysis in particular, and the respondents’ views, ComReg sees no persuasive evidence to alter its views already expressed in ComReg Document 07/03 that there are high and non transitory barriers to entry and no threat of potential competition.
- 4.27 ComReg concludes that there are currently no feasible substitutes to wholesale call termination to end users at a fixed location. Given the absolute barriers to entry to terminating calls on an end-user’s individual fixed network, it is not possible for another operator to enter an individual network market and compete for the provision of termination services to a specific operator’s directly connected end users. Each FNO enjoys, at this time, a monopoly over the supply of call termination to end users on its network and it is not envisaged that this situation will change significantly over the timeframe of this review. In view of the above, ComReg concludes that the high and non-transitory barriers to entry arising from the FNOs’ control of infrastructure not easily replicated, as discussed earlier in section 2, means that potential

⁵⁰ See ComReg Document 07/02, paragraphs 4.22 to 4.32 (call origination) and paragraphs 4.66 to 4.96 (transit).

competition will not provide an effective competitive constraint in the setting of termination charges over the timeframe of this review.

d) Countervailing Buyer Power

- 4.28 Given the particular characteristics of the termination market and in the absence of existing or potential competition, the only remaining possible constraint on a FNO when setting its termination rate for the provision of wholesale call termination on its respective network is the bargaining strength of buyers. Following the ECAP Decision⁵¹ and in accordance with the SMP Guidelines, ComReg recognised that a key factor to be examined in its assessment of SMP in the termination markets is countervailing buyer power (“CBP”). This refers to the relative bargaining strength of the buyer of termination services in its negotiations with the prospective seller of such services.
- 4.29 As highlighted above, all operators have a 100% market share of termination on their own networks, and there is currently and prospectively no likely demand or supply side substitution. However, CBP is a factor which may qualify an undertaking’s potential dominance. ComReg’s assessment of CBP considered the likelihood of and/or existence of CBP in the markets for wholesale call termination on individual fixed markets and tried to identify the circumstances under which this could be exerted. In examining whether an undertaking has SMP, it is not sufficient for the buyer to have some CBP, but rather it is necessary that the buyer can exert sufficient CBP such that the seller is unable to act to an appreciable extent independently of competitors, customers and consumers.
- 4.30 ComReg’s analysis of CBP in fixed termination markets draws on the methodological approach and analysis used in the H3GI mobile termination market review.⁵² ComReg noted the ECAP decision which confirmed the importance of examining the application of relevant economic theory such as bargaining theory when considering CBP.⁵³ ComReg also noted the EU Commission’s Expert Report on Relevant Markets and the factors which it highlights as potentially influencing the respective bargaining positions of operators, that is, the potential for buyers to refuse to interconnect; the potential for buyers to refuse to buy termination services (while continuing to supply call termination); or the potential for buyers to impose a reciprocal increase in the termination rate.
- 4.31 Taking into account the relevant economic theories as background to the analysis, ComReg assessed the issue of CBP under the following headings in ComReg Document 07/03:

⁵¹ ECAP (2005) Hutchison 3G Ireland Limited v ComReg, Decision Number 07/05, September. <http://www.ecap.ie/NR/rdonlyres/D2F9E016-A14F-41D8-875F-7291F8B7F1F7/O/ECAPDecisionNo0705.pdf>
The relative importance of CBP in the assessment of competition in termination markets was re-confirmed by this ECAP decision.

⁵² See ComReg Document 07/01.

⁵³ Subsequent to the 2005 ECAP decision, ComReg carried out a new review of wholesale mobile voice termination on H3GI’s network which examined in detail the issue of CBP and the application of bargaining theory (See ComReg Document 07/01). In the model advanced by Binmore & Harbord regarding the bargaining dynamic between Eircom and H3GI such factors that could affect the bargaining position of operators included the effect of being a new entrant, risk aversion, the potential for using delay as a strategic tool, the threat of regulatory intervention, etc. The reader is referred to ComReg Document 07/01 and 07/03 for a detailed discussion of the literature on CBP in call termination markets.

- CBP analysis Eircom – relative bargaining strengths of Operators. In this section, ComReg considered the degree of CBP facing Eircom as the seller of termination services (i.e. whether the other FNOs had sufficient CBP to constrain the pricing behaviour of Eircom); and
 - CBP analysis OAOs - evidence from the negotiations and relative bargaining strengths of Operators. In this section, ComReg considered the degree of CBP facing OAOs selling termination services (i.e. whether Eircom had sufficient CBP to constrain the pricing behaviour of other FNOs).
- 4.32 Based on the analytical framework and the evidence from negotiations between operators, ComReg was of the preliminary view that CBP was unlikely to pose a sufficient competitive constraint on any FNO in their respective terminating markets over the timeframe of this review. The case for Eircom having SMP was seen as strong as there is no credibly large buyer sufficient to constrain Eircom from acting to an appreciable extent independently. In the case of the OAOs, ComReg was of the preliminary view that, on balance, there was insufficient CBP in the markets for wholesale voice call termination on the individual fixed networks of BT, Verizon, Ntl, Colt, Smart and, on a forward looking basis, Magnet.
- 4.33 Respondents were asked whether they agreed with ComReg’s preliminary analysis of this SMP criteria and whether this criteria had been sufficiently examined.

Views of Respondents

- 4.34 ComReg notes that no respondent raised any concerns in relation to the economic framework which was used to analyse CBP as applied in both the ComReg Document 07/03 on fixed termination and in the mobile market review.⁵⁴
- 4.35 While the respondents in general agreed with ComReg’s preliminary conclusions on SMP in the wholesale markets for call termination, only one respondent directly commented on ComReg’s assessment of CBP. This respondent did not necessarily agree that Eircom could not exert CBP and exert pressure on the termination rates of OAOs. This is discussed in more detail below.

i) Insufficiency of Bargaining Strength of OAOs (BT, Colt, Magnet, Ntl, Smart and Verizon) over Eircom

- 4.36 In ComReg Document 07/03, ComReg examined whether there would be sufficient CBP from the OAOs to prevent Eircom from acting to an appreciable extent independently of its customers, competitors and consumers in the market for wholesale call termination to end users on its own network.
- 4.37 As Eircom’s termination rates have been subjected to the Reference Interconnect Offer (“RIO”) provisions since 1999, an examination of Eircom’s rate setting behaviour therefore would not have yielded useful information on the potential for OAOs to exert CBP over Eircom. Nevertheless, in view of the EU Commission’s Expert Report on relevant markets and the underlying economic framework, ComReg considered the credibility of a number of ways by which the OAOs could potentially exercise CBP over Eircom:

⁵⁴ ComReg Document 07/01.

- By threatening not to purchase or to delay the purchase of termination services from Eircom (in the case of a new entrant);
 - Refusal to interconnect with Eircom; or
 - To cease interconnection with Eircom altogether.
- 4.38 ComReg also considered whether any of the OAOs was a particularly important buyer of Eircom’s termination services such that Eircom would have been concerned if an OAO has pursued one of more of the above strategies.
- 4.39 ComReg considered whether the OAOs (BT, Verizon, Ntl, Colt, Smart or Magnet) exerted sufficient CBP or pressure on Eircom in the negotiating process to prevent Eircom from exercising market power in the provision of wholesale termination services.
- 4.40 ComReg Document 07/03 proposed that no operator would have the effect of exercising a constraint on Eircom in the setting of its termination rates. ComReg was of the preliminary view, that in the absence of Eircom’s regulated termination rates, no one OAO would have been in a strong enough position to exercise a sufficient constraint on Eircom’s market power because:
- Each OAO had a strong commercial incentive to interconnect with Eircom to enable them to provide a full service to their customers, particularly in light of Eircom’s large customer base which resulted in most calls made by an OAO’s customers terminating on Eircom’s network, and the fact that no alternative to termination on Eircom’s network existed for an OAO who wanted to offer a full service to their customers;
 - A refusal or a delay to interconnect would result in disturbances to its own customers (for outgoing and incoming calls) given the size of Eircom’s customer base; and,
 - Given Eircom’s size in comparison to each of the OAOs,⁵⁵ and where multiple networks co-exist, it is unlikely that any one OAO would have been of sufficient importance as a buyer of Eircom’s termination services to exercise sufficient CBP over Eircom in the setting of its fixed termination rates.
- 4.41 In addition, if an OAO had threatened to pursue one of these courses of action, the threat would not have been credible to Eircom because there is a general regulatory requirement on all operators (irrespective of SMP status) to interconnect with Eircom in order to ensure end-to-end interconnectivity and interoperability of service for their customers.
- 4.42 Respondents were asked whether they agreed with ComReg’s preliminary analysis of this SMP criteria and whether this criteria had been sufficiently examined.

Views of Respondents

- 4.43 No respondent commented on ComReg’s analysis on the insufficiency of the bargaining strength of BT, Colt, Magnet, Ntl, Smart and Verizon over Eircom.

⁵⁵ Eircom can be distinguished from other FNOs because it is the largest buyer of termination across all fixed networks, it is the main buyer of termination on behalf of other networks and it is the largest provider of fixed end to end connectivity.

ComReg's Position and Conclusions

4.44 Having reviewed all evidence and responses to the preliminary analysis, ComReg sees no persuasive reason at this stage to alter its views as expressed in ComReg Document 07/03 with respect to whether OAOs (BT, Verizon, Ntl, Colt, Smart or Magnet) exerted sufficient CBP or pressure on Eircom when setting its termination rates, in the absence of regulation of Eircom's rates. ComReg considers that clear reasons as to why OAOs would have insufficient scope to constrain Eircom's SMP are set out in ComReg Document 07/03, sections 4.23 to 4.30. ComReg notes that no respondent commented on its analysis on the insufficiency of the bargaining strength of BT, Colt, Magnet, Ntl, Smart and Verizon over Eircom. In light of the foregoing, ComReg concludes that there would be insufficient CBP from OAOs to constrain Eircom in its ability to act to an appreciable extent independently of its customers, competitors and consumers.

ii) Insufficiency of Bargaining Strength of Eircom over OAOs (BT, Colt, Magnet, Ntl, Smart and Verizon)

4.45 As noted above, having first considered whether other FNOs had sufficient CBP to constrain the pricing behaviour of Eircom, ComReg then considered the degree of CBP facing OAOs selling their termination services. This section sets out ComReg's position and conclusions in light of respondents' views on whether Eircom had sufficient CBP to constrain the pricing behaviour of other FNOs.

4.46 In ComReg Document 07/03, ComReg was of the preliminary view that Eircom would not be in a position to exert sufficient CBP on OAOs (BT, Colt, Magnet⁵⁶, Ntl, Smart or Verizon) to constrain their ability to act to an appreciable extent independently of their customers, competitors and consumers in the market for wholesale call termination to end users on their individual networks.

4.47 ComReg examined the market dynamic including the commercial incentives for interconnection, to further assess whether there is evidence OAOs are in a strong bargaining position with respect of setting their termination rates. In that regard, ComReg conducted a detailed analysis of the historical evidence of negotiations between Eircom and OAOs in respect of termination rates.⁵⁷

4.48 ComReg examined whether Eircom had a sufficient degree of bargaining strength in negotiations with FNOs (BT, Colt, Magnet, Ntl, Smart or Verizon) such that Eircom could credibly threaten to refuse to buy termination services; to delay purchasing termination services; or to cut off interconnection altogether with any of these operators and thereby prevent these operators from exercising market power.

4.49 ComReg recognised that Eircom is likely to be an important buyer of termination services from an OAO and given its large subscriber base could operate more easily without interconnection of OAOs. Nevertheless a number of factors, in particular the commercial incentives together with Eircom's regulatory obligations, led ComReg to the preliminary view that Eircom has insufficient CBP to offset the ability of the OAOs to price independently.

⁵⁶ In the case of Magnet, ComReg concludes that on a forward looking basis, there is insufficient CBP to constrain Magnet from acting to an appreciable extent independently of its customers, competitors and consumers.

⁵⁷ ComReg Document 07/03, paragraphs 4.33 to 4.56.

- 4.50 In terms of Eircom's regulatory obligations, ComReg Document 07/03 noted that Eircom was prohibited from refusing to buy termination services – it was obliged to engage in negotiations to ensure end-to-end interconnectivity and interoperability of service for its customers.
- 4.51 In addition to the regulatory requirements to interconnect, there are commercial incentives for Eircom to interconnect with each of the OAOs to provide a full service/ end-to-end connectivity to its own subscribers by enabling them to contact end users on all other fixed networks. This is likely to be a stronger incentive as OAOs subscriber base grows.
- 4.52 There were also a number of additional factors which ComReg considered were important in coming to the preliminary view that Eircom had limited bargaining strength in negotiations with each of the FNOs in respect of their termination rates:
- As Eircom's own termination rates were regulated, if any FNO increased their termination rates, or refused to lower their termination rates when negotiating with Eircom, the FNO's knew that Eircom was unable to retaliate by increasing its own rates;
 - There was no evidence to suggest that Eircom could use the prospect of dispute resolution by ComReg in its favour to achieve lower termination rates from the OAOs; and
 - The evidence presented by OAOs did not suggest that Eircom at anytime refused to purchase termination services from OAOs or is likely to sever those business relations given the interconnection agreements it has in place with OAOs.
- 4.53 In addition, ComReg was of the preliminary view that the empirical evidence showed that OAOs can price, to an appreciable extent, independently in the absence of regulation. All OAOs had termination rates which were above Eircom's regulated rates.
- 4.54 For these reasons, ComReg came to the preliminary conclusion that the commercial incentives and the regulatory obligations to engage in interconnect negotiations, as well as other factors, limit any CBP that Eircom might have and this is likely to be a stronger trend as an OAO's subscriber base grows.
- 4.55 Respondents were asked whether they agreed with ComReg's preliminary analysis of this SMP criteria and whether this criteria had been sufficiently examined.

Views of Respondents

- 4.56 As noted above, only one respondent directly commented on ComReg's assessment of CBP. This respondent while agreeing somewhat with the preliminary analysis of the relevant individual SMP criteria did not necessarily agree that Eircom could not exert CBP and exert pressure on the termination rates of OAOs. In that regard, this respondent made a number of additional comments:
- The respondent concurs that in general the OAO termination rates are higher than those of Eircom's, but argued that this is because the cost base of OAOs is likely to be different to that of Eircom's. According to the respondent, OAOs set termination rates to account for their respective reasonable cost bases and if

OAOs were to truly cover their reasonable costs their termination rates may increase substantially;

- The respondent argues that the fact that OAOs termination rates were set around the same level as Eircom's in 1998 does nothing to inform the relative negotiating powers of the parties. Rather OAOs were forced to set termination rates around the same level as Eircom in 1998 in order that interconnection agreements were signed and products launched;
- The respondent agrees that Eircom pursued it for a change in its termination rate in the past, something that was affected in May 2005. However, it disagrees with ComReg's preliminary analysis that there was no evidence to suggest that the prospect of dispute resolution had been a factor in BT reducing its termination rates. The respondent submits that it was cognisant of this and that indeed Eircom used this as a bargaining tool;
- The respondent argues that Eircom, as the SMP operator and gate keeper of all RIO services, has significant CBP and can exert pressure in relation to the termination rates of its' competitors; and
- The respondent does not agree with ComReg's preliminary assessment that it was "bargaining power" that had enabled OAOs to maintain their rates above Eircom's regulated rates, rather it was more a matter of the history of development of the interconnection contracts in the Irish market.

ComReg's Position and Conclusions

- 4.57 ComReg notes the respondents' views and underlines that the critical issue is whether sufficient CBP exists on the part of Eircom to offset the ability of relevant OAOs to act independently of its competitors, customers and consumers.
- 4.58 Based on the evidence to date from the negotiations between OAOs and Eircom and, in taking in to account the respondents' views, ComReg remains of the position that Eircom is not in a position to exert sufficient CBP on any of the following operators, BT, Colt, Magnet, Ntl, Smart or Verizon.
- 4.59 In any negotiation over termination rates with an OAO, Eircom has insufficient bargaining strength to prevent them from pricing, to an appreciable extent, independently because:
- If an OAO threatens, or actually does, to increase their own termination rates, Eircom cannot apply a reciprocal price increase in its own termination rates as its interconnection and termination rates are at present regulated at cost oriented levels. Given the non discriminatory obligation in the provision of interconnection services, Eircom is not in a position to offer more advantageous rates to one OAO over another. Such factors remove a significant source of bargaining strength for Eircom;
 - As noted above, Eircom would be unlikely to threaten not to purchase termination services from any of these operators, to cease interconnection with any of them or to delay purchasing termination services from them over the timeframe of this review. This conclusion is supported by experience in the market to date - Eircom has many interconnection agreements and there is no

evidence to suggest a refusal to purchase termination services on the part of Eircom or severance of existing agreements with OAOs is likely to occur;

- The evolution of termination rates in the market supports the conclusion that operators have the ability to charge termination rates above Eircom's. ComReg notes that the respondent is in agreement that in general OAO termination rates are higher than those of Eircom's, yet this respondent believes that OAOs' termination rates are representative of their higher costs. It is of note that no cost data was provided by the respondent to support its view that if OAOs were to truly cover their "reasonable" costs their termination rates may increase substantially. ComReg is not aware of any network efficiencies that would demonstrate a justification for differences in the costs of termination at a fixed location. In any case, even if costs for an OAO were higher than those of, say, Eircom, that would not of itself allow the OAO to be able to demand termination rates above Eircom's rate. If Eircom was exercising sufficient CBP, it would presumably be able to demand rates at roughly its own rates, regardless of what the costs of the OAO were. Yet this is generally not the case, as OAOs have been able to obtain higher termination rates than Eircom;
- From the evidence to date, it does not appear that Eircom, being an important interconnection partner, has prevented OAOs from pricing, to an appreciable extent, independently in the setting of their termination rates.
- The evidence to date suggests that the prospect of dispute resolution has not been a factor used by Eircom in its favour. Rather the prospect of a dispute in 2002 over BTs termination rates did not exert downward pressure on the BT termination rates at that time.⁵⁸ ComReg notes the agreement of the respondent that Eircom pursued it for a termination rate change in the past, something that was affected in May 2005. Having maintained its termination rate significantly above that of Eircom despite Eircom's requests for a rate reduction, BT's decision to lower its termination rates in May 2005, again, appears to have been largely in anticipation of an SMP designation by ComReg;⁵⁹
- ComReg remains of the view that Eircom did not have sufficient CBP to prevent OAOs from acting independently of their competitors and customers, to an appreciable extent, as demonstrated by the fact that Eircom has been unable to negotiate termination rates with OAOs which are at the same level or lower than its own regulated rates. The evidence of OAOs termination rates shows that they have managed to sustain their termination rates above Eircom's cost orientated termination rates despite the continuous fall in Eircom's own termination and interconnection rates generally. This ability to sustain higher rates, despite falling rates from Eircom, is clearly indicative of an ability to exercise market power.

4.60 For these reasons, ComReg concludes that Eircom would have insufficient scope to constrain OAO's SMP in the market for termination on their respective networks.

⁵⁸ ComReg was of the preliminary view that it is not appropriate to consider dispute resolution procedures as having a mitigating effect on the market power of the terminating operator, or to regard such procedures as being a surrogate for SMP obligations.

⁵⁹ This rate reduction was BT's first in almost five years and came into effect in May 2005, the same month as ComReg's notification to the European Commission that BT enjoyed a position of dominance in this market. See ComReg Document 05/37a. This was accepted by the EU Commission in June 2005.

Overall Conclusion on Market Analysis

- 4.61 ComReg has considered a number of different factors in its assessment of the level of competition within fixed call termination markets. ComReg has concluded that each of the following FNO's, namely Eircom, BT, Colt, Magnet, Ntl, Smart and Verizon, have SMP. Each operator has 100% market share of termination on its own network, there is currently no demand or supply-side alternatives and this is not expected to change over the lifetime of this review. Their respective 100% market shares was considered to be a sustainable and non-transient position in light of the high barriers to entry and also because potential competition was unlikely to occur over the lifetime of the review. In addition, following a detailed analysis, it was concluded that no operator(s) has sufficient CBP to prevent any of these FNO's from acting to an appreciable extent independently of its customers, in the absence of regulation.
- 4.62 ComReg considers that it has carried out a robust and thorough analysis of the relevant SMP criteria in order to make well reasoned conclusions on the undertakings that hold a position of SMP on the national markets for wholesale call termination to end users located on their respective individual fixed networks.

5 Designation of Undertakings with Significant Market Power

5.1 Having regard to the sections above, particularly sections 3 and 4, ComReg is of the view that, in accordance with the Framework Regulations, the following FNOs should be designated as having SMP in the market for wholesale call termination on their own networks:

- BT Ireland Ltd.;
- Colt Telecom Ltd.;
- Eircom Ltd.
- Magnet Ltd.;
- Ntl Ltd and Chorus;⁶⁰
- Smart Telecom Ltd.; and
- Verizon Ltd.

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

⁶⁰ UPC is the new parent company of Ntl Communications (Ireland) Ltd and Chorus. Chorus, the wholly owned subsidiary of UPC, acquired Ntl in 2005. UPC (Chorus) is in the process of merging these entities. The amalgamated entity is intended to be designated with SMP. References throughout this document to Ntl should be taken to refer to the amalgamated entity controlled by UPC (Chorus).

6 Market Remedies

Introduction

- 6.1 Where ComReg determines, as a result of a market analysis carried out by it in accordance with Regulation 27 of the Framework Regulations, that a given market identified in accordance with Regulation 26 of the Framework Regulations is not effectively competitive, ComReg is obliged, under Regulation 9(1) of the Access Regulations,⁶¹ where an operator is designated as having SMP to impose on such an operator some of the obligations set out in Regulations 10 to 14 of the Access Regulations as ComReg considers appropriate.
- 6.2 In the initial review, ComReg noted that additional obligations from those set out in the Access Regulations could be proposed, for example to ensure end-to-end connectivity. These non-SMP obligations would be applied with the permission of the European Commission per Regulation 6 of the Access Regulations.
- 6.3 In this review ComReg has revisited its analysis of fixed wholesale call termination markets, and has taken in to account any changes in the market since the time of the initial review. In this section, ComReg first outlines the potential competition problems which it considers could possibly arise in these relevant markets, in the absence of regulation. In light of this assessment and having considered respondents' views, ComReg then sets out the detailed remedies that it will impose on respective SMP operators to address the potential competition problems and market failures identified. ComReg has selected remedies that it considers appropriate at this time and in view of the prevailing market conditions.

Potential Competition Problems in the Wholesale Call Termination Markets

- 6.4 In ComReg Document 07/03, ComReg outlined potential competition problems that could arise in the call termination markets. Following the recommendations of the SMP Guidelines, the approach taken to the assessment of the wholesale call termination markets and the scope for potential competition problems to arise was forward-looking. In line with the Modified Greenfield Approach,⁶² ComReg must carry out the assessment of competition problems in the absence of regulation. While evidence of past market behaviour can contribute to this analysis, it is important to note that in any discussion of possible competition problems and of the scope for an operator to exert SMP, it is not necessary for ComReg to point to examples of actual abuse that may have occurred. While such examples if clearly identified could be corroborative of a finding of SMP, the nature of *ex ante* regulation is that it is concerned with guarding against such potential abuses in advance.
- 6.5 Therefore, ComReg considers that the justification for considering *ex ante* remedies must be broader than if solely based on demonstrable acts of past behaviour. ComReg instead has to identify the potential for a particular competition problem to arise in the relevant markets because of the *ability* and *incentives* of an SMP undertaking to engage in such behaviour, which in turn will be based on the findings of the market analysis (see section 4). ComReg suggests that this is a key difference

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

⁶² As outlined in the Expert Report.

in approach between *ex ante* and *ex post* analysis and ComReg notes that its approach is similar to that of other NRAs, as is evident from their notifications to the European Commission.

6.6 According to settled case law

*“dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”*⁶³

- 6.7 An undertaking which has SMP has the potential ability to influence a range of competition parameters including prices, innovation, output and the variety or quality of goods and services. Absent regulation, a dominant firm would rationally have the incentive to raise prices, as there would be insufficient competitive pressure to prevent this. In addition, a firm which is dominant in an upstream market could use its market power to leverage into a downstream market. A firm with dominance in one market could also attempt to leverage power horizontally into a related market, i.e. a market at the same level in the production or distribution chain.
- 6.8 Generally, the types of competition problems likely to arise in the call termination markets are associated with possible exploitative behaviour, such as excessive pricing, and possible exclusionary behaviour, in particular vertical leveraging. In each case, ComReg set out a detailed discussion of the issues.

a) Excessive Pricing

- 6.9 The most important potential competition problem associated with termination markets is excessive pricing, which is a type of exploitative behaviour. Concerns about pricing arise where, absent SMP regulation, price levels are likely to be persistently high with no effective pressure (e.g., from new entry/expansion or from strong buyers) to bring them down to competitive levels over the period of the review.
- 6.10 As discussed in section 4, the wholesale call termination markets are characterised by 100% market share, an absence of existing competition, high and non-transitory barriers to entry associated with control over infrastructure not easily replicated, limited scope for potential competition and insufficient CBP. Thus, there is insufficient pressure to constrain the fixed terminating operators to an appreciable extent in their pricing behaviour over the period of the review. Therefore, in the absence of regulation, each SMP operator has the *ability* to charge excessive prices for their termination services in their own respective fixed termination markets. This derives from the fact that such high prices would not be undermined by significant new entry or expansion or by pressure from strong buyers over the period of this review.
- 6.11 The *incentives* for the FNOs to charge excessive prices derive largely from their ability to make excessive profits by virtue of the high and non-transient barriers to entry and the absence of significant competitive pressure and insufficient CBP over the timeframe of the review. Thus, possible exploitative behaviour by way of

⁶³ DG Competition (2005) Discussion paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels, December, page 9.

excessive pricing is a key potential concern for each of the termination markets identified above.

- 6.12 Further incentives to charge excessive prices would also derive from the fact that the terminating operators' wholesale customers are also frequently their downstream competitors. Thus, charging high prices for wholesale call termination could also have the effect of restricting competition/raising rivals' costs in downstream calls markets thereby enabling the terminating operators' retail arms to gain market share and profits at the expense of their rivals. This possibility is considered in the section dealing with constructive or outright refusal to deal below.

b) Vertical Leveraging

- 6.13 Another potential competition problem associated with termination markets is vertical leveraging, which is a type of exclusionary behaviour. Vertical leveraging, in general, can be described as any behaviour by which a vertically-integrated undertaking with SMP on one market transfers its market power to another, potentially competitive market. As leveraging is an attempt to drive rivals out of the potentially competitive market, to limit their sales or profits, or to prevent them from entering the market, it can be regarded as a form of foreclosure.
- 6.14 In the context of call termination markets, vertical leveraging may arise when a vertically-integrated firm with SMP in the upstream wholesale market for call termination controls an important input that is necessary to operate in a downstream market which is potentially competitive and may therefore be able to affect the competitive conditions in the downstream retail markets. This could occur via such practices as refusal to deal (whether outright refusal or constructive refusal through delay, etc) or supplying access on discriminatory or unreasonable terms.
- 6.15 A vertically-integrated operator with SMP at the wholesale level is likely to have incentives to impede competition in downstream retail markets where it is also active as such behaviour could increase its retail market share and profits.
- 6.16 As is clear from section 4, originating operators require effective access to call termination services in order to enable their retail customers to contact end users on all other fixed networks thereby providing them with a full service offering. In addition, as noted in section 4, there is currently no effective alternative to terminating on the specific fixed network on which the called party is located. Therefore, a terminating FNO controls an important input for downstream retail markets giving it significant scope and *ability* to influence competitive conditions on those downstream markets. Furthermore, given the substantial entry barriers, limited scope for potential competition and insufficient CBP it is not considered that this situation will change significantly over the review timeframe.
- 6.17 In addition, terminating FNOs also compete with their wholesale customers in downstream retail markets. Thus, in the absence of regulation, they would have *incentives* to raise rivals' costs or impede competition on those downstream markets to increase their own retail profits.
- 6.18 The main type of vertical leveraging that may arise in the call termination markets includes a refusal to deal/denial of access or supply on unreasonable terms. Such a refusal to deal may be effected by either pricing or non-pricing means and may be an outright denial of access or a constructive refusal of access, for example, by way of offering access on unreasonable terms. This problem may arise in the call

termination markets as terminating FNOs have control of important wholesale inputs for downstream competitors to offer retail calls services.

- 6.19 As the majority of calls terminate on Eircom's network, its main wholesale customers are its downstream competitors, and it historically has a relatively strong position on downstream retail calls markets, Eircom could have considerable *ability* to influence competitive conditions significantly on those markets via the terms and conditions it sets for its wholesale call termination service. This ability may be considered greater for Eircom than for the OAOs given the significant volumes of calls that terminate on Eircom's network in comparison to other terminating operators' networks. The *incentives* for Eircom to engage in denial of access derive from the fact that such behaviour could have the effect of impeding the development of competition in the downstream calls markets thereby enabling Eircom Retail to gain market share at the expense of its competitors. Furthermore, the incentives to engage in such behaviour may be greater for Eircom than for the OAOs because, in view of its larger subscriber base and established position in the retail calls markets, it may have less to lose by not facilitating calls from the customers of other operators than other terminating FNOs who may be relatively recent entrants in the calls markets.
- 6.20 Therefore while ComReg is of the view that operators would generally have incentives to interconnect with each other, and they are also obliged to do so, it is possible that the ability and incentives remain, for example, to offer access to termination services on unreasonable terms (for example, via the potential discriminatory use of, or withholding of information, delay tactics, and the application of undue requirements in interconnect contracts), and as such, obligations are appropriate. This possibility is considered more pertinent in the case of Eircom given that it terminates the majority of calls and therefore has considerable ability to affect the competitive conditions on markets involving those services. Given the imbalance in termination traffic flows, ComReg is of the view that vertical leveraging would be more likely to have a detrimental effect on competition in the overall fixed market if carried out by Eircom. As such, it is considered appropriate to impose remedies on Eircom to address this potential access problem.
- 6.21 In addition, given that a key concern for all of the termination markets is the potential for exploitative behaviour by way of excessive pricing, each of the terminating FNOs could potentially reinforce their ability to extract excessive prices from their wholesale customers via their terms and conditions of access. For example, the terminating FNOs may supplement their bargaining power by employing some of the tactics identified in paragraph 4.30 above by, for example, the application of undue requirements in interconnect contracts so as to extract higher rates from their customers. Thus, obligations relating to non-discrimination may be necessary to supplement any obligations addressing the potential pricing problems identified above.

Principles to be Applied When Selecting Obligations/Remedies

- 6.22 As discussed in section 4, there are seven FNOs that have been designated with SMP for termination of calls to end users on their networks.
- 6.23 The SMP Guidelines state that where an NRA finds an operator with SMP, it is obliged, to impose one or more regulatory obligations, as outlined in the Access Directive, which are proportionate to the nature of the potential competition

problems identified and other factors outlined in the Access Directive.⁶⁴ Thus, ComReg is under an obligation to impose appropriate SMP obligations on all operators designated as having SMP in the markets for call termination.

- 6.24 In choosing remedies, ComReg has taken account of the nature of the potential problem identified. Each remedy is considered to be proportionate and justified in light of the objectives set out in section 12 of the Communications Regulation Act 2002.
- 6.25 ComReg will apply remedies in a similar manner where appropriate, however when ComReg examines the detailed nature of these obligations it needs to be proportionate. Some obligations or some detail of the obligations imposed on Eircom may be too burdensome to impose on the other FNOs (that in general have smaller market shares of the total fixed market) and so would not be appropriate.
- 6.26 Where possible, consideration has been given to a range of remedies so that the least burdensome but effective remedy can be selected, thus conforming to the principle of proportionality. In the initial consultation, ComReg presented alternative regulatory options to address identified potential competition problems. This included a discussion of less onerous alternatives and why these would not achieve ComReg's objectives, and a discussion of more onerous alternatives and why they would be disproportionate or overly burdensome. In the initial response to consultation, ComReg adopted a preferred option. The current review focuses upon this preferred option and assesses whether market conditions justify an amendment to these proposals.
- 6.27 In choosing remedies, ComReg has also taken account of their potential effects on related markets. As part of the process of selecting appropriate remedies, ComReg has conducted, *inter alia*, Regulatory Impact Assessments ("RIAs") (see section eight) in line with the Ministerial Direction (issued by the Minister for Communications, Marine & Natural Resources in accordance with Section 13 of the Communications Regulation Act 2002) published on 21 February 2003 and 26 March 2004.
- 6.28 The remedies chosen by ComReg are also incentive compatible. The remedies have been selected and designed in a manner which ensures that compliance with regulation should outweigh the benefits of evasion.
- 6.29 Respondents were asked whether they agreed with the principles ComReg proposed to adopt when selecting obligations in this market.

Views of Respondents

- 6.30 Two of the respondents agreed with the principles that ComReg proposed to adopt when selecting obligations in this market. The third respondent however, expressed some concerns in relation to the approach to choosing the appropriate remedies. In that regard, this respondent refers to ComReg Document 06/69⁶⁵ where ComReg expressed the view that a RIA need not be conducted in cases where it is proposed by ComReg that existing regulatory measures should be kept in place. In response to the aforementioned consultation, this respondent highlighted risks in failing to fully review existing regulation in light of market changes over time. It further believed that it is not appropriate to assume that the relative costs and benefits of the proposed

⁶⁴ See SMP Guidelines, paragraphs 21 and 114.

⁶⁵ ComReg (2006) ComReg's Approach to Regulatory Impact Assessment, Document 06/69, December.

regulation have not changed in the period since the draft decision was issued. This respondent is of the view that ComReg needs to review each of the options available, through a comprehensive RIA in order to assess whether the proposed remedies continue to be justified, necessary and proportionate relative to the alternative regulatory options.

ComReg's Position and Conclusion

- 6.31 ComReg wishes to underline that it has identified a number of potential competition problems in the markets for call termination on individual fixed networks, as discussed above, and that it has selected remedies based on the nature of the potential competition problems identified. Further, ComReg's evaluation of each remedy as discussed below ensures that each remedy is proportionate, justified and that it represents the least onerous means to resolve the competition problem it is intended to address. These principles are also applied in the RIA in relation to ComReg's evaluation of the regulatory options open to it (see Section 8 for further details of the respondents' views regarding the RIA and ComReg's response).
- 6.32 ComReg would note, however, that in line with the SMP Guidelines ComReg must ensure that each obligation is proportionate to the problem to be remedied. Thus, it has approached the setting of remedies by ensuring the means used attains a given end/addresses a potential problem and is no more than what is appropriate and necessary to achieve that particular objective.
- 6.33 ComReg considers that these principles are appropriate in order for ComReg to identify remedies which need to be put in place in the relevant market in order to address the potential competition problems identified.

Remedies to Address Potential Competition Problems

- 6.34 On the basis of the SMP designation in the market for wholesale call termination at a fixed location, ComReg will impose a number of obligations on the respective SMP operators as set out in Section 5.
- 6.35 The market analysis carried out in the current review revealed that all relevant FNOs have SMP for termination of calls to end users on their networks. ComReg will apply remedies in a similar manner where appropriate, however when ComReg examines the detailed nature of these obligations it needs to be proportionate. Some obligations or some detail of the obligations imposed on Eircom may be too burdensome to impose on the OAOs (that, in general, have a smaller market share of the total fixed market) and so would not be appropriate. As discussed in the previous section, in determining the appropriateness, proportionality and justification of SMP obligations, ComReg is guided by the objectives set out in Section 12 of the Communications Regulation Act 2002 and the principles set out in Regulation 6 and 9 of the Access Regulations.
- 6.36 Having completed the market assessment and having considered the respondents' views;
- Sub-section A sets out in detail the SMP obligations that ComReg believes are appropriate to impose on BT, Colt, Magnet, Ntl, Smart and Verizon (referred to as "OAOs"); and
 - Sub-section B sets out the obligations proposed for Eircom.

6.37 These obligations are being imposed to address the potential competition problems arising in these relevant markets and as discussed in paragraphs 6.4 to 6.21 above.

A: Remedies on OAOs in the wholesale call termination market

6.38 Given the finding of SMP on the individual OAO networks in the call termination markets, ComReg is obliged to impose obligations which ensure that operators can interconnect appropriately to each others network.

6.39 Following the market analysis in section 4, a number of OAOs (BT, Colt, Magnet, Ntl, Smart and Verizon) have been identified with SMP for call termination services to end users on their own network. In order to address the competition problems identified in paragraphs 6.4 to 6.21 above, ComReg has the following remedy options available in considering the appropriate remedies to impose on OAOs in the terminating market:

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

6.40 As set out in the ComReg Document 07/03, ComReg was of the preliminary view that OAOs should have the following obligations imposed on them in relation to their respective network markets:

- a) Transparency;
- b) Non-discrimination; and
- c) Price Control.

6.41 For a discussion of the obligations that ComReg believe should not be imposed on the OAOs (i.e. access, cost accounting and accounting separation) on the grounds of proportionality and not being overly burdensome on the OAO, see the RIA in section 8 below.

a) Transparency

6.42 ComReg was of the view that the following OAOs, BT, Colt, Magnet, Ntl, Smart and Verizon, be required, in accordance with Regulation 10 of the Access Regulations, to make public, in detail, the termination rates they apply to all other operators in the termination market. This would take the form of requiring the publication of their rates on a publicly accessible website. The Access Directive states that transparency may be used in relation to *“interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices”*.

6.43 Transparency is not regarded as an onerous burden because for many of the OAOs the imposition of this obligation would result in them being required to publish the termination charges that they levy on Eircom only, as traffic is mainly terminated from the Eircom network. In some cases, an OAO might be required to publish other termination rates when it is directly interconnected with an operator other than Eircom and the termination rates are different. However, in the absence of a

transparency obligation ComReg would have no guarantee that this would continue and ComReg would have no means of remedying any deficiencies in the information provided as a result.

- 6.44 Having transparent prices in the market would make it easier for customers to make informed choices. Furthermore, the disclosure of termination rates would also enable ComReg to monitor more easily the state of competition in the call termination market. Transparency is the least burdensome obligation that can be imposed on SMP operators.
- 6.45 The publication of prices and advance notice of proposed changes to those prices can assist purchasers of wholesale termination services, who may need to restructure their retail prices in response to tariff changes at the wholesale level.
- 6.46 ComReg was of the view that the imposition of a transparency obligation would enable negotiations between operators to be undertaken more speedily and reduce potential complaints.
- 6.47 ComReg’s further view was that the benefits of a transparency remedy far outweigh the costs. Indeed, by only requiring the OAOs to publish their prices on their websites the cost is minimised. ComReg was of the view that a transparency obligation on SMP operators is appropriate for this market.
- 6.48 Respondents were asked whether a transparency obligation as outlined above was appropriate to impose on OAOs in this market and if so, whether transparency in these relevant markets would be met by publication of termination rates on their respective websites and notification of any changes to termination rates in advance.

Views of Respondents

- 6.49 All respondents agreed that transparency was desirable and proportionate and therefore an appropriate obligation to impose on OAOs in this relevant market. In general all of the respondents agreed the transparency obligation would be met by OAO’s publishing their termination rates on their respective websites and where advance notification was given in relation to any changes to termination rates.
- 6.50 However, one respondent submitted that the OAO termination rates applicable to Eircom should be the only termination rates relevant for publication and that these were already published by Eircom on their website in the Switched Transit Routing Price List (“STRPL”) document. This respondent believed that extending the scope of the obligation of transparency beyond this would create an administrative burden on OAOs and ComReg when monitoring compliance with the obligation in question. Another respondent noted that Eircom’s STRPL is currently the main means of publishing termination rates applicable across various operators. Nonetheless, the respondent believes that it would be appropriate that each OAO publishes its termination rates on its website in the interest of consistency and transparency.
- 6.51 This respondent also commented that the obligation of transparency is necessary where a non-discrimination obligation is imposed in order to verify that the SMP operator is not engaging in discriminatory practices.
- 6.52 All respondents are in broad agreement that advance notice of a termination rate change should be provided. One of these respondents commented that the notice period should be governed by Eircom’s notice period (one month) due to the fact that if an OAO rate changed the transit charge would change. The other two respondents believed, in addition to publication of termination rates, that each OAO

should provide advance notice and a level of detail consistent with that provided in the STRPL. These respondents believe that this would be a sufficient requirement for operators publishing rates on their websites.

ComReg's Position and Conclusion

- 6.53 After further consideration of the issue of transparency provisions and taking into consideration the views expressed by respondents, ComReg remains of the view that an obligation of transparency which requires that SMP OAOs to publish charges for supply and use of voice call termination services, including any proposed changes to those charges 21 calendar days in advance is appropriate, proportionate and justified, as outlined in ComReg Document 07/03.
- 6.54 ComReg acknowledges that there is some transparency in the fixed market at present as the fixed termination charges of the FNOs are publicly available on Eircom's website. However, ComReg considers that the obligation of transparency is appropriate to apply to all of the SMP OAOs as it will give greater visibility to the terms and conditions on which other organisations can purchase termination services. This will in turn enable negotiations to be undertaken more speedily and reduce potential complaints. Furthermore, the obligation to provide a minimum of 21 calendar days notice of changes to termination charges will allow organisations to react to any price changes in a timely manner.
- 6.55 In the interests of consistency and transparency, ComReg believes that OAOs should publish on their website the fixed termination rate(s) which apply to all other operators and should continue to have termination rates published in Eircom's STRPL. This is not deemed to be a costly or burdensome exercise for OAOs.
- 6.56 An obligation of transparency is necessary to help ComReg monitor SMP operators and thereby ensure that SMP OAOs are not behaving in discriminatory way with respect to termination on their individual networks (see further discussion on the non-discrimination obligation below). Information used to measure compliance with obligations of price control and non-discrimination would not otherwise be available without an obligation of transparency. This can help deter potential anti-competitive behaviour by SMP operators.
- 6.57 ComReg also believes that it is important a price control is associated with a degree of transparency for interconnecting operators, consumers and other interested parties.
- 6.58 For these reasons, ComReg concludes that OAOs with SMP on their individual termination networks be required to make public the fixed termination rates they apply to all other operators in the termination market as part of their transparency obligation. In addition the OAOs should give a minimum of 21 calendar days notice of a change in their termination rate to other operators.

b) Non-Discrimination

- 6.59 As discussed in ComReg Document 07/03, ComReg was of the opinion that an OAO designated with SMP in the market for call termination on their individual fixed network should be required, in accordance with Regulation 11 of the Access Regulations, to apply similar terms and conditions on interconnecting operators where they avail of call termination services having equivalent characteristics. Without this obligation ComReg would not have the ability to require that SMP operators behave in a non-discriminatory manner.

- 6.60 Respondents were asked whether OAOs designated with SMP should be required to apply similar terms and conditions to all interconnection operators.

Views of Respondents

- 6.61 Two respondents agreed that OAOs should be subject to an obligation to offer similar terms and conditions to all interconnecting operators. The third respondent did not agree on the basis that such an approach would limit the opportunity for commercial negotiations and stifles innovative deals between entities (where there is equal bargaining power between entities). This respondent also added that Eircom is still overwhelmingly the dominant fixed operator with over 75% market share in the fixed market and is the provider of all RIO products and services. The respondent goes on to state that Eircom's bargaining power is significantly greater than any other fixed operator, thus allowing them to easily affect a particular outcome through behavioural practices. This respondent however believed that if two entities have similar market power and thus bargaining power, commercial negotiations and ingenuity can flourish and this should not be impinged by a non discrimination obligation.

ComReg's Position and Conclusion

- 6.62 Given the SMP findings and having taken into account the views of all respondents, ComReg remains of the view that all OAO's designated with SMP in the call termination market should be required to apply similar terms and conditions on interconnecting operators in equivalent circumstances. A key reason for this is that each operator has 100% market share on its own network, with no immediate prospect of competition and there is insufficient countervailing buyer power to act as a competitive constraint in the relevant markets. All of the obligations imposed on SMP OAOs are under *ex ante* regulation.
- 6.63 ComReg concludes that an obligation of non discrimination is required in addition to the price control obligation, discussed below, to prevent and monitor potential competitive distortions brought about by termination charges. Such an obligation is necessary as opportunities exist for OAOs with SMP to discriminate in a manner that would disadvantage another provider by applying different charges where differences are not justified by reference to objective considerations. Thus, regardless of the size of a FNO in the overall fixed-line sector, as referred to by one respondent, each individual FNO has the ability to discriminate against particular operators, with an accompanying negative effect on competition. ComReg does not agree that an obligation of non-discrimination will mean that commercial negotiations cannot flourish.
- 6.64 ComReg is of the view that that a non-discrimination obligation is necessary and appropriate for this markets and all OAO's designated with SMP in the call termination market should be required to apply similar terms and conditions on interconnecting operators where they avail of call termination services having equivalent characteristics.

c) Price control

- 6.65 In ComReg Document 07/03, ComReg examined whether a cost orientation obligation in relation to termination charges should be applied across the industry to include OAOs where SMP is found on individual OAO networks.

- 6.66 ComReg also examined the setting of termination rates for OAOs, and the fact that a solution was proposed by Eircom whereby OAOs should be allowed to charge the current Eircom Single Tandem call termination rates for an interim period.
- 6.67 A common position⁶⁶ in the setting of termination rates for alternative operators is to allow new entrants to charge higher than the regulated termination rates of the incumbent initially and to apply a price cap system or a glide path to achieve a competitive level over a reasonable period of years. The period of the glide path must be strictly limited in time to that appropriate to the particular market conditions. The aim of a glide path is to allow new entrants to set higher than competitive charges on market entry in order to recover the level of initial investment and potential inability to achieve economies of scope and scale. The glide path is a mechanism for bringing all termination rates in the market into line, over a certain period.
- 6.68 According to the market definition and market analysis there are six SMP OAOs each with their own terminating rates in the fixed market. The termination rates can vary considerably from operator to operator and in some instances the differences do not necessarily reflect underlying causes such as economies of scale and scope etc. As such ComReg was of the view that the appropriate competitive termination rate is the current regulated rate of the incumbent and that all operators should achieve this level of charging following the glide path period decided upon. Therefore, at the end of the glide path period, the current regulated rate of the incumbent should be used by all operators, including both the incumbent and OAOs.
- 6.69 An alternative solution to reciprocal rates would involve OAOs setting their termination rates at an equivalent level to the Eircom Single Tandem call termination rate over the glide path period decided on.
- 6.70 Respondents were asked whether OAOs designated with SMP in respect of their individual network should be required to charge equivalent termination rates to the regulated termination rates of Eircom. In respect of the application of any price control, respondents were asked, in the event that a glide path approach was adopted, what might be an appropriate period for this provision. Respondents were also asked whether OAOs should achieve the same termination rates as the regulated termination rates of Eircom at the end of a glide path period. Finally, respondents were asked whether an alternative solution – setting termination rates at the current Eircom single tandem rate for an interim period – is appropriate.

Views of Respondents

- 6.71 In relation to the appropriateness of a price control for OAOs in respect of their termination rates and the manner in which such a remedy should be applied the views of the respondents were mixed.
- 6.72 Two of the respondents agreed that it is appropriate to impose a price control on the respective OAOs who are found to have SMP on their individual terminating networks. Of these respondents, one believes that OAOs should be obliged to charge equivalent termination rates to the regulated termination rates of the incumbent, the other believes that OAOs should be obliged to charge prices that are cost orientated with Eircom costs as the basis of those prices. This respondent believes that to allow new entrants to recover network costs at a higher rate than the LRIC recovered by

⁶⁶ ERG (2006) Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, May 2006.

Eircom from call termination prices is to encourage inefficient entry. The respondent added that this does not necessarily mean that OAOs must charge the same price as Eircom as OAOs generally offer only one level of interconnect price where Eircom offers three.

- 6.73 A third respondent did not agree with the imposition of price control on OAOs as Eircom continues to:
- Enjoy market dominance in the entire fixed market with over 75% market share;
 - Offer non fit-for-purpose products, services and non-equivalent access to OSS which means that OAOs cost bases are high, but must be reasonably recoverable; and
 - Place obstacles in the way of innovation and market entry by placing barriers such as not allowing operators to migrate customers between platforms (bitstream to LLU) and thus prevent operators from reasonably gaining market share.
- 6.74 Each of the respondents had different views on whether the OAOs should achieve the same termination rates as the regulated termination rates of the incumbent at the end of the glide path period. One respondent agreed that the target rate for OAOs should be the regulated termination rates of the incumbent.
- 6.75 A second respondent proposed that the cost per network element derived from the LRIC model of Eircom's core network be used to set prices based on routing factors that reflect the structure of the OAO network. Using this approach the respondent believed that each OAO could charge a separate single call termination price that will allow efficient cost recovery at the same level of unit cost per network element as is recovered from Eircom call termination prices. Again according to this respondent, OAOs rates will not necessarily be the same as the incumbent rates rather they will reflect the geographic reach and structure of the network built by the OAO to serve Irish end users. The third respondent did not agree with achieving equivalence with the incumbent's termination rates at the end of the glide path. For the reasons set out above, this respondent believed that OAOs should be able to recover reasonable costs when setting termination rates and no further impositions should be placed on OAOs until the wider market issues referred to above are resolved.
- 6.76 Again, all respondents had different views with regard to a reasonable time period for a glide path approach. One respondent believed that a glide path approach in order to reach a target efficient level over time would be appropriate and proportionate and that a glide path over four years would be most appropriate. Another respondent does not believe that a glide path approach is appropriate and that an immediate step change is required as OAOs are recovering a level of costs substantially above the efficient level. This respondent was of the view that given the time necessary to develop a cost-oriented rate for each OAO network and then to implement them, it would propose that Eircom's cost-oriented termination rates should be used as inputs to set a ceiling for the OAOs' rates for a period of two years. As noted above, one respondent was opposed to the proposition of equivalence with Eircom's termination rate yet believes that if price control for OAOs in respect of their termination rates was introduced a long term approach to the glide path would be the most appropriate given the prevailing market conditions.
- 6.77 On the appropriateness of the alternative solution of setting termination rates at the current Eircom single tandem rate for an interim period, the respondents had the

following mixed views. As discussed above one respondent believes that OAOs should be able to recover reasonable costs when setting termination rates and that no further impositions should be imposed on OAOs until wider market issues are resolved. Another respondent supports the alternative interim measure on the basis that it believes the impact on OAOs would be marginal and would not threaten the commercial viability of these operators in the short term. A final respondent does not believe this is a solution as it will lead to over compensation for some OAOs while an under recovery for others depending on network reach.

ComReg's Position and Conclusion

- 6.78 Based on the analysis of competition and market developments presented above and, following a detailed consideration of respondents' views and of approaches adopted in other markets⁶⁷ and/or jurisdictions, ComReg concludes that it is appropriate and justified to impose a price control on the respective OAOs given that each operator enjoys dominance on their fixed termination market.
- 6.79 ComReg recognises that the price control remedy to be imposed under the Access Regulations must be based on the nature of the problem identified, proportionate, and justified. In view of the structure of the market OAOs dominance on their respective terminating network will persist over the timeframe of this review. There is no alternative to call termination on a particular operator's network. The current termination markets do not provide sufficient pricing constraints to ensure that prices reflect efficient costs and are not excessive. This impedes competition as other operators may then have to raise their retail rates in order to recover the cost of termination. A price control is an effective way to remedy the competition problem identified in these markets, that is, the lack of effective constraints on OAOs to ensure that their call termination rates are set at an efficient level. ComReg considers that the price control obligation will support ComReg's objectives of promoting competition whilst protecting the interests of consumers.
- 6.80 ComReg believes that a price control regime, if appropriately designed, can be a proportionate response where competitive forces and other regulation are insufficient to constrain fixed termination charges to efficient levels. Following detailed analysis by ComReg of the various price control options available and having taken into account the disparity of the respondents' views, ComReg concludes that the most appropriate and proportionate form of price control to impose on respective OAOs is a glide path towards the efficient rate when an OAO (designated with SMP) reaches a market share threshold of 5% of total direct access paths or, in the event that an OAO with SMP does not reach such a threshold, 5 years from the effective date of any final decision in relation to this market review, whichever of these thresholds is reached soonest.
- 6.81 Currently there is no OAO with 5% or greater share of total direct access paths. Direct access paths will include access paths connected to an operators own network, or using LLU as a form of direct access.⁶⁸ As a means of monitoring the threshold level, ComReg will review the direct access path information obtained as part of the quarterly reports and may also request information direct from the operators to assess whether any OAO has reached the 5% market share threshold of direct access paths. Once an OAO reaches this level ComReg will inform the OAO at which

⁶⁷ For example, call termination on mobile networks.

⁶⁸ The data on direct access paths is readily available in the quarterly reports submitted by the operators to ComReg.

point ComReg will then consult on the specifics of the glide path period and the level of the regulated rate to be achieved by the OAO.

- 6.82 There is currently no evidence to suggest when an OAO/OAO's might reach the 5% threshold, as such it is considered premature to set a specific glide path period at this stage. ComReg plans to consult on an appropriate glide path period once an OAO reaches the threshold. The consultation will also include an assessment of an appropriate level of a regulated rate to be achieved by the OAO or OAO's in question, on the basis that OAOs have different network topologies compared to the incumbent. Using the actual interconnect rate of the incumbent may not be appropriate. ComReg believes that in principle the target rate for OAOs should be the regulated termination rates of the incumbent at the end of a glide path period. However, ComReg recognises that setting OAOs termination rates does not necessarily mean that they must charge the same price as Eircom for the provision of termination services. An approach to developing termination rates for OAOs may be to reflect the geographic reach and structure of the network built by the OAO to serve end users. ComReg expects that a decision therefore will be made on an appropriate glide path period and the level of the regulated rate following a consultation once a respective OAOs reaches the of 5% threshold or 5 years has passed since the effective date of this decision, whichever is soonest.
- 6.83 Nevertheless, ComReg believes price control should be imposed on all operators identified with SMP and the manner in which price control is implemented should be broadly consistent across all operators in the market. On that basis, when a particular SMP OAO reaches a market share of 5%, it would then be proportionate for that operator to start on a glide path to the appropriate target efficient level. A price control based on a glide path approach in order to reach a target efficient level over time is appropriate and proportionate as to have a disruptive one off adjustment to OAO termination rates to the efficient level may be burdensome on the OAO in question. ComReg is of the view that on the grounds of proportionality an unduly burdensome or needlessly costly obligation should be avoided.
- 6.84 ComReg is also of the view that this remedy is proportionate in its application, as the competitive harm associated with higher termination rates on the part of OAOs is likely to be less when their overall market share is low. As a price control would generally be seen as representing a higher level of intervention than most other remedies, it seems appropriate not to overburden small OAOs in a manner that might not be commensurate with the benefit gained from lessening the competitive harm. However, small OAOs should not be permitted to retain high termination rates indefinitely. Without the price control remedy SMP OAOs would have no incentive to set call termination charges at a competitive level. If OAOs with SMP have not reached the threshold (a market share of 5%) within 5 years of making a final decision on this market, then they should in any event commence a glide path at that point, in a similar manner as discussed in 6.73 above. ComReg would note that OAOs have the opportunity to move their rates from the current position to an efficient level in the interim period. ComReg would also note that it is possible that a later glide path, if any, is likely to be steeper than one initiated at an earlier time, which would give OAOs a further incentive not to try to deliberately limit their market share. Although ComReg would point out that an OAO would be highly unlikely to act in this way in any case. More discussion of this issue is contained in the RIA. For these reasons, ComReg considers that this approach should not limit the remedy's contribution to consumer welfare or the enhancement of competition in these relevant markets.

6.85 A price control obligation will be imposed on respective OAOs and will be implemented once the OAO reaches a 5% market share of total direct access paths, or within 5 years of the date of this decision, whichever occurs soonest. Once the OAO/OAOs reach the 5% market share ComReg will inform the OAO at which point ComReg will then consult on the specifics of the glide path period and the level of the regulated rate to be achieved by the OAO. It should be noted that the price control obligation as outlined above would be reviewed in line with any future assessment of SMP in these markets. In the event that any future assessment of competitive conditions in these relevant markets results in SMP designations of operators and, should ComReg ultimately decide that a price control remedy is appropriate at a later stage, nevertheless the 5 year timeframe from the effective date of this decision will be used in the setting of a revised price control if deemed necessary.

B: Remedies on Eircom in the wholesale call termination market

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

6.87 ComReg’s examination of appropriate remedies in this market is discussed below in terms of :

- a) Access to and use of specific network facilities;
- b) Transparency;
- c) Non-discrimination;
- d) Price Control and Cost Accounting; and
- e) Accounting Separation.

a) Access to and use of specific network facilities

i. Access obligation

6.88 In ComReg Document 07/03, ComReg expressed the view that an access obligation for call termination services should continue to be imposed on Eircom. Obligations can be imposed on operators “*to meet reasonable requests for access to, and use of, specific network elements and associated facilities*”.⁶⁹ That is, *inter alia* in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end user’s interest.

6.89 ComReg’s analysis of the competition problems suggested that wholesale access obligations were necessary to promote more effective competition in retail markets. Absent regulation it was possible that Eircom would have incentives not to offer

⁶⁹ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

sufficient wholesale products on reasonable terms through commercial negotiations with OAOs. ComReg was of the view that without appropriate access obligations Eircom could have an incentive to apply unreasonable contractual terms on other operators, and exercise non-price forms of discrimination that would likely delay the offering of access to other operators.

- 6.90 The transparency and non-discrimination obligations are necessary but insufficient on their own for dealing with the competition problems in this market. A key competition concern in the Eircom wholesale end user call termination market relates to the denial of access for facilities or the application of excessive pricing by Eircom.
- 6.91 In the absence of regulation, ComReg was concerned that there may be a risk that Eircom could leverage its market power from the wholesale market into the potentially competitive retail calls market.
- 6.92 ComReg has considered the effect of imposing an obligation of non-discrimination, but not imposing an access obligation on Eircom. It was of the view that this could mean that ComReg would not be in a position to require Eircom to negotiate in good faith with requesting undertakings, or to require Eircom to continue to provide existing services on existing terms and conditions in accordance with Regulation 13 of the Access Regulations. Furthermore, it would mean that ComReg would not be able to impose a requirement on Eircom, in accordance with Regulations 13 of the Access Regulations, to provide call termination services on terms and conditions which are fair, reasonable and timely.
- 6.93 Respondents were asked if they agreed that an access obligation for call termination services should be imposed on Eircom pursuant to Regulation 13.

Views of Respondents

- 6.94 Two operators agreed that an access obligation for call termination services should be imposed on Eircom. Another operator believed that the obligation of access should be applied symmetrically. It believed that not to do so called into question ComReg's basis for applying this remedy to Eircom and on each of the mobile operators' respective markets for call termination. The respondent commented that ComReg did not provide sufficient justification for not applying the same logic in the case of OAOs designated with SMP. It then explains that it concurs with ComReg's view that an OAO would be unlikely to deny access to Eircom, but ComReg did not consider the possibility of an OAO denying access to other OAOs.

ComReg's Position and Conclusion

- 6.95 In relation to the issue of whether an access obligation for call termination services should continue to be imposed on Eircom, given the SMP finding by ComReg on the relevant market and having considered the issue in light of the respondents' views, ComReg concludes that the position should remain unchanged as to that expressed in ComReg Document 07/03.
- 6.96 ComReg believes that an obligation of access that requires Eircom to negotiate in good faith with requesting undertakings, or to require Eircom to continue to provide existing services on existing terms and conditions for the purpose of voice call termination is a necessary condition for the interoperability of services and therefore is appropriate for this market. It also provides greater certainty in the market. As highlighted in section 4 above, Eircom's large customer base resulted in most calls

made by an OAO's customer terminating on Eircom's network. Eircom is the largest buyer of termination across all fixed networks, it is the main buyer of termination on behalf of other networks and it is the largest provider of fixed end to end connectivity. ComReg agrees with one respondents' view that the availability of all levels of call termination (primary, tandem and double tandem) from Eircom are likely to be necessary to ensure competition in even parts of the call termination market. In the absence of such an obligation Eircom may have the ability and incentive to refuse or delay interconnection for the delivery of voice call termination with other operators. A denial of access or delayed access would result in significant disturbances to OAOs customers (for outgoing and incoming calls) thereby undermining the sustainability of competition at the retail level.

6.97 ComReg is also of the view that it would be dis-proportionate to impose this requirement on the OAOs. This is primarily because:

- It is not in the commercial interests of the OAOs not to interconnect with Eircom or indeed with other OAO;
- The asymmetric geographic reach and structure of the network built by the OAO to serve end users. As noted above, the OAO offers termination services that are different from those offered by Eircom, generally offering only one level of interconnection where Eircom offers three levels of interconnect.
- Eircom's overall depth of interconnection in comparison to each of the OAOs and currently there is no OAO with 5% or greater share of total direct access paths. ComReg notes the respondents' view that the nature of the call termination on end users service is such that the incumbent will have an enduring bottleneck control over the primary call termination on all end users connected to the Eircom network and may have bottleneck control over tandem and double tandem call termination; and
- Under the regulatory framework for electronic communications, there is provision under Regulation 6 of the Access Regulations to ensure that there is adequate access and interconnection such that additional access obligations on OAOs may be unnecessary and overly burdensome at this time.

6.98 Obligations should be imposed only when there is a need for them, thus while Eircom could well have an incentive not to interconnect with smaller operators, the reverse is highly unlikely to be true. This would suggest that no access obligation in addition to the provisions of Regulation 6 of the Access Regulations is needed for OAOs at this time. While an access obligation may be unnecessary and overly burdensome on the OAO, the provisions of Regulation 6 of the Access Regulations go some way towards lessening ComReg's concern that OAOs could unreasonably deny access. Should this situation change and an issue relating to denial of interconnection by OAOs arise, ComReg will of course re-consider this issue, and whether it would be necessary to impose access obligations on OAOs with SMP.

6.99 For these reasons, an access obligation for call termination services should continue to be imposed on Eircom.

ii. Obligation to interconnect networks/network facilities

6.100 ComReg believed that Eircom should be required to continue, pursuant to Regulation 13(2)(i) of the Access Regulations, to interconnect networks or network facilities where necessary. ComReg was of the view that the imposition of this

obligation is necessary to maintain Eircom's obligation to interconnect with existing and new OAOs. Eircom may suggest that it would have an incentive to interconnect and in that case, this obligation should impose no significant burden on Eircom, while ensuring, *ex ante*, that any possible harmful exercise of dominance is prevented.

- 6.101 Respondents were asked if they agreed with the proposal to require Eircom to interconnect networks or network facilities.

Views of Respondents

- 6.102 All three respondents agreed that Eircom be required to interconnect networks or network facilities. One respondent also added that this access requirement should apply in a similar way to all undertakings designated with SMP in this market.

ComReg's Position and Conclusion

- 6.103 ComReg sets out clear reasons in sections 6.95 to 6.99 above as to why an access obligation for call termination services should be imposed on Eircom pursuant to Regulation 13. Having considered this issue taking account of the respondents' views, similar reasons apply as to why network access should continue to be provided together with a requirement to interconnect networks or network facilities. Given the ubiquity of the Eircom network all of the key interconnection facilities are likely to be provided by Eircom and required for the correct functioning of the market in general and even in parts of the call termination market.
- 6.104 Again, for the reasons set out above in relation to an access obligation on OAOs, ComReg is of the view that it would be dis-proportionate to impose a requirement on the OAOs to interconnect networks and network facilities. The impact of a ubiquitous network such as Eircom's not continuing to interconnect networks or network facilities would be fundamentally different to OAOs not offering interconnection and would be detrimental to the correct functioning of the markets. This is primarily because OAOs at this stage do not have a depth of interconnection comparative to Eircom. Nevertheless, under Regulation 6 of the Access Regulations OAOs are required to ensure that there is adequate access and interconnection and ComReg will closely monitor this issue going forward.
- 6.105 For the reasons set out above, Eircom should continue to interconnect networks or network facilities as part of its Access obligation.

iii. Withdrawal of access

- 6.106 ComReg was of the view that Eircom should continue to have an obligation pursuant to Regulation 13(2)(c), not to withdraw access to facilities already granted, unless this has been approved by ComReg. If the withdrawal has a significant impact on the market ComReg may then decide that a public consultation is necessary as a means of approval for withdrawal of the facility.
- 6.107 ComReg was of the view that this obligation is necessary to ensure that OAOs have the certainty to provide retail services to the marketplace and so compete with Eircom.
- 6.108 In addition, ComReg noted that the gradual migration to next generation network ('NGN') technology might well give rise to an increase in possible cases where Eircom might wish to withdraw access to existing facilities. ComReg has examined

the issue with regard to withdrawal of access where an operator may be required to retain facilities already in place in a time when it is re-designing its network architecture and redeploying network infrastructure and where, access facilities, if not withdrawn, could impede development.

- 6.109 ComReg's view was that Eircom should continue to seek ComReg approval before withdrawing access to existing facilities, and that ComReg's decision would be proportionate and justifiable and would take into account the potential impact on the market.
- 6.110 Respondents were asked if they agreed that Eircom should be required not to withdraw access to facilities already granted, save without prior ComReg approval.

Views of Respondents

- 6.111 One of the respondents believed that if it becomes clear that certain facilities have become redundant across the industry then it would be considered adequate that Eircom should be required to provide sufficient notice to the industry and ComReg in relation to its plans of withdrawal. If no objections were raised by any party the withdrawal of the facility should proceed without a need for a public consultation. A second respondent believed that it should be absolutely mandatory that Eircom should not withdraw access to facilities already granted, save without prior ComReg approval. A third respondent believed that the current regime whereby Eircom withdrew products after a period of notice to wholesale customers should be allowed to continue. It added that Eircom has always provided a reasonable notice period to all its customers where it intends to withdraw a product and current industry agreed dispute process allows for issues to be referred to ComReg in the event that one party disagrees with the proposed withdrawal of a particular product. It then commented that the proposed remedies represented a new obligation without justification and, were unnecessary, disproportionate and damaging to the interest of industry and/or consumers. It also believed that in an evolving market the wholesale services for which there was a 'reasonable request' and, demand at one time may no longer be demanded or 'reasonable' at a future date. In some cases the cost of maintaining these services would outweigh their value and Eircom should therefore be allowed to withdraw these types of services. The respondent suggested that if ComReg imposed the proposed obligation it could fetter its future policy-making discretion.

ComReg's Position and Conclusion

- 6.112 Under Regulation 13(2) (c), Eircom is obliged not to withdraw access to facilities already granted, ComReg proposes to supplement this obligation by instituting an approval mechanism. This would mean that Eircom would be required to obtain prior approval from ComReg in relation to withdrawal of a facility. It should be noted that ComReg does not consider this requirement to be an additional SMP obligation as such, but a mechanism in support of the existing SMP obligation, which would permit ComReg to more effectively implement and monitor that obligation. In light of the current uncertainty with regard to roll out of NGNs and indeed the concerns of industry expressed to ComReg, ComReg is of the view that it is justifiable to impose such an obligation on Eircom to the effect that Eircom should not withdraw access to facilities without ComReg's prior approval. Where Eircom considers withdrawing access to a facility then it should, within a reasonable timeframe depending on the nature of the facility, inform ComReg. ComReg will then consider the impact of the request to withdraw the product/service and if it is deemed that there would be a significant impact on industry then a consultation process will be initiated by

ComReg. The consultation would include such issues as the notification necessary for industry and whether compensation might be necessary, or appropriate regarding stranded assets of OAOs etc. ComReg will be proportionate in this regard and is of the view that this should not create any additional or unreasonable burden to Eircom.

- 6.113 Eircom should continue to have an obligation not to withdraw access to facilities already granted, as part of its Access obligation. Withdrawal should not occur without ComReg’s prior approval by ComReg for the withdrawal of such access. ComReg will consult further on the detail of how the withdrawal of significant facilities should take place.

iv. Specified information

- 6.114 ComReg believed that Eircom should be required, pursuant to Regulation 13(2)(c) and 13(3) of the Access Regulations, to continue to provide specified information which supports existing call termination services. Specified information should include such information as technical specifications, network characteristics, terms and conditions for supply and use, and prices which are necessary for the provision of existing end user call termination services.
- 6.115 ComReg was of the view that this obligation would be met by the continued offering of the relevant facilities in accordance with following the terms, conditions and specifications. These are contained in the Main body clauses, Annex A definitions, Billings and Payments annex, located in the recent version of Eircom Core RIO document on the Eircom wholesale website. In addition, the billing forms, Network Plan, Technical Manual, Calling Line Identification Code of Practice (CLI CoP), Call Origination and Termination Routing Scheme, Non Disclosure Agreement as published as stand alone documents on Eircom’s wholesale website and prices contained in the most recent version of Eircom RIO Price List also on the Eircom wholesale website.
- 6.116 ComReg noted that the RIO is an evolving document and that the specific information required to support call termination services will change over time.
- 6.117 Respondents were asked if they agreed with ComReg’s proposal to require Eircom to provide specified information which supports call termination services.

Views of Respondents

- 6.118 All three respondents agreed that Eircom should be required to provide specified information which supports call termination services.

ComReg’s Position and Conclusion

- 6.119 Eircom should continue to provide specified information which supports existing call termination services as part of its Access obligation.

v. Obligation to meet reasonable request for access

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

- 6.121 ComReg was of the view that access seekers may need to avail of other products which are included within the definition of the relevant wholesale market that will allow them to develop retail offerings to compete in the retail market. An access remedy is the only remedy which allows OAOs to make reasonable requests for products according to their specifications pursuant to Regulation 13 (2) (a) or (f) of the Access Regulations. In cases where commercial negotiations are not successful any such requests will be reviewed in the context of Regulation 13(4) of the Access Regulations.
- 6.122 ComReg was of the view that an SMP operator should not have to meet requests that are unreasonable, or are not technically feasible. In assessing whether requests are reasonable, ComReg noted that such requests should not constitute an undue burden on the SMP operator. This means that a request which is technically feasible should allow the SMP operator to receive a reasonable rate of return on any necessary investments made to supply a product at a price the requesting operator is willing to pay. If an issue arises between either party in this regard the option is available for it to be brought to the attention of ComReg.
- 6.123 Respondents were asked if they agreed that Eircom should have an obligation to meet reasonable requests for access.

Views of Respondents

- 6.124 Two respondents agreed that Eircom should have an obligation to meet reasonable requests for access. However one of these respondents also believed that this obligation should also be applied equally to OAOs designated with SMP in the fixed termination market. The third respondent questioned the term ‘reasonableness’ and referred to Article 13 of Access Regulations 2003 for guidance. It further commented on the fact that Article 13 goes on to state that when assessing whether such obligations would be proportionate a number of points shall be taken into account. Arising from this the respondent called upon ComReg to consider the development of a reasonable demand or proportionality test in terms of the conditions and price at which a newly-requested wholesale service were to be offered. The following are the points they considered should be included in respect of the proportionality test:
- The expected reasonable demand should be substantiated;
 - Commercial approaches should be given preference over heavy handed regulatory solutions;
 - The price for a particular wholesale service should include the development costs spread over the reasonably expected demand; and
 - The price should also include the ‘option value’ created for OAOs and for the fact that Eircom sinks the investment and takes the risk; those who choose to hire its capacity on a short-term basis gain the benefits of not having to take that risk – but have to pay higher short-run access prices as a consequence.
- 6.125 This respondent requested ComReg to also consider obligations to supply wholesale products as something of a last resort that should be used when other approaches proved ineffective or impractical. Only if there was a commercial case with reasonable demand for the product/service should it proceed. In essence the respondent summarised that the ‘proportionality test’ should always apply in deciding whether to require an SMP operator to offer a regulated wholesale service so as to determine whether the net benefits to the market of requiring such a product outweighed the costs of delivering it.

ComReg's Position and Conclusion

- 6.126 In view of the SMP access obligation to be imposed on Eircom together with the requirement to interconnect networks and network facilities, ComReg is of the view that Eircom should continue to meet reasonable access requests to facilitate competition to the benefit of end users. Network access should be provided together with any services, facilities or arrangements which are necessary for the provision of communication services over that interconnection. The provision of access should occur as reasonably practicable and should be on fair and reasonable terms and conditions.
- 6.127 With regard to the issue of what constitutes 'reasonableness', ComReg believes that a more appropriate approach perhaps is to assess each access complaint received, if any, on a case by case basis. In relation to one respondent's suggestion that ComReg should employ a formalised test, ComReg considers that this is not a practical approach on the basis that there are a significant number of interacting variables which must also be considered. ComReg is of the view that a common sense approach to what is a reasonable request for access and what an unreasonable request is, is more appropriate through a proper analysis where necessary of actual situations as they present themselves, on a case by case basis. Currently, there are no such issues noted around access to call termination services. However, should such issues arise by the movement to IP technology then ComReg will ensure that any regulatory obligations are adhered to in full.
- 6.128 Imposing the obligation of a reasonable request for access on all OAOs designated with SMP in the fixed termination market at this stage would be unnecessary and overly burdensome on OAOs in view of the position already expressed above by ComReg (paragraphs 6.95 to 6.99 and 6.103 to 6.105) in relation to the nature of access to and use of specific network facilities. ComReg is of the view that it would be dis-proportionate to impose this requirement on the OAOs. This is primarily because the current size of the OAO network and therefore it is not in the commercial interests of the OAOs not to interconnect with Eircom or indeed with other OAOs. Therefore, each SMP OAO should in principle provide network access for the provision of voice call termination services to all operators who reasonable request access. In addition, the provisions of Regulation 6 of the Access Regulations go some way towards lessening ComReg's concern that OAOs could unreasonably deny access.
- 6.129 ComReg concludes for the reasons set out above, the obligation to meet reasonable access requests as part of its Access obligation should continue to be imposed on Eircom.

vi. Service Level Agreement

- 6.130 ComReg proposed that, pursuant to Regulation 13 (3) of the Access Regulations, Eircom's call termination services should be provided on terms and conditions which are fair, reasonable and timely. In this regard ComReg was also of the view that the terms and conditions should be supported by the Service Level Agreement ("SLA"). SLAs should ensure that Eircom have an incentive to provide products and services which are fit for purpose and treat OAOs the same as its own retail arm. ComReg noted that it may consult with industry at a later stage on the need for more prescriptive SLAs. ComReg's view was that the SLA was an important instrument in order to allow OAOs to approach Eircom and ensure that their

requests for new or amended products are treated promptly and appropriately. In addition, pursuant to Regulation 13(2)(b) of the Access Regulations ComReg was of the view that Eircom should have the obligation to negotiate in good faith with the undertakings requesting access.

- 6.131 Respondents were asked if they agreed that Eircom should be required to provide call termination services on terms which are fair, reasonable and timely, and that these terms should be supported with SLAs and that ComReg should consult with industry on the terms and conditions of the SLA.

Views of Respondents

- 6.132 Two of the respondents agreed that Eircom must provide termination services on terms which were fair, reasonable and timely. One respondent commented that there needs to be a level of transparency that will allow OAOs to trust that they are enjoying at least the equivalent level of service that Eircom Retail enjoys. A third respondent commented that to date it had not found it necessary nor had OAOs requested SLAs for Eircom's provision of wholesale call termination. It added that Eircom had a statement in its RIO that guaranteed call routing on a non-discriminatory basis and it believed that this was sufficient and that any imposition of an SLA would represent unwarranted regulatory intervention.

- 6.133 Further, two of the three respondents agreed that ComReg should consult with industry on the terms and conditions of the SLA. One of the two operators suggested that operators should try to agree SLAs as far as possible with facilitation by ComReg on those issues that could not be resolved. Further to this the respondent also noted that it should be able to negotiate the level of service credits associated with SLAs as ultimately these formed part of a legal contract between the two parties. A third respondent stated that there was no necessity for a SLA and therefore no need for consultation with industry on this issue.

ComReg's Position and Conclusion

- 6.134 ComReg is of the view that SLAs are an important condition of any contract to ensure the provision of access services to operators are on an equivalent basis to those provided to the downstream arm of the SMP operator. Currently ComReg has not been alerted to any significant abuses in relation to call termination services. In light of the changing environment of NGNs however, it may be necessary to ensure that SLAs are developed, with terms and conditions for alternative interconnection networks.

- 6.135 ComReg believes that the following obligations should be imposed with regard to SLAs:

- Eircom must conclude a legally binding and fit-for purpose industry SLA with OAOs in respect of wholesale products;
- The SLA must contain provision for service credits arising from a breach of the SLA;
- Eircom must negotiate in good faith in relation to these matters;
- The SLA must be updated as required and such updates may be required by ComReg to be so updated;

- The industry SLA shall be published on Eircom’s wholesale website;
- The detailed operation of the SLA is to be subject of further review with industry and Eircom and consultation by ComReg. Where appropriate and reasonable, the SLA may be amended and/or supplemented, following further engagement with industry and following consultation.

6.136 Eircom must continue to provide call termination services on terms and conditions which are fair, reasonable and timely. These terms and conditions should be supported and reflected by SLAs, as part of its Access obligation. ComReg intends to consult further on the proper implementation of SLAs, to ensure compliance with regulatory obligations.

vii. Provision of services on an unbundled basis

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

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

6.139 Respondents were asked if they agreed that Eircom should be required to provide unbundled call termination services as part of its access obligation.

Views of Respondents

6.140 One of the respondents agreed that Eircom should be required to provide unbundled call termination services as part of its access obligations. It added that this needed to be transparent to allow OAOs to have confidence that they are experiencing equivalence to Eircom’s downstream retail arm and that they are not buying unnecessary elements thus adding to their cost base in an inappropriate manner. A second respondent believed that this obligation should be equally applicable to OAOs as it would be to Eircom. The third respondent believed that the reference to unbundled termination services with regard to Eircom’s retail arm was inappropriate. It added that as fixed call termination was not provided to Eircom’s retail arm and it was therefore difficult to understand the intent of this proposal.

ComReg’s Position and Conclusion

6.141 As noted above, given the ubiquity of the Eircom network all of the key interconnection facilities are more likely to be provided by Eircom and required for the correct functioning of the market in general and even in parts of the call termination market. Without appropriate access obligations Eircom could have an incentive to apply unreasonable contractual terms on other operators, and exercise non-price forms of discrimination, such as, unreasonably bundling. In that regard, there may be a risk that Eircom could leverage its SMP from the wholesale market into the potentially competitive retail calls market.

6.142 In view of the SMP finding by ComReg and having considered the issue taking account of the respondents’ views, ComReg’s view remains that expressed in the last consultation i.e., wholesale access obligations are necessary to promote more effective competition in wholesale and retail calls markets. It would mean that

ComReg would be able to impose a requirement on Eircom, in accordance with Regulations 13 of the Access Regulations, to provide call termination services on terms and conditions which are fair, reasonable and timely. A part of the access obligation, ComReg considers that it is reasonable to require Eircom to provide termination services on an unbundled basis in order to ensure that OAOs are not required to buy additional products to those directly required for their services. As already clarified in the consultation document *‘the basis for this provision is to ensure that OAOs are not required to buy products that they do not need for their services, as this may have the effect of reducing their efficiency and ability to compete’*.

- 6.143 On the basis that an access obligation is not proposed for OAOs the requirement to provide termination services on an unbundled basis should also not apply to these respective operators.
- 6.144 ComReg concludes that as part of the access obligation Eircom should continue to provide call termination services on an unbundled basis as part of its Access obligation.

viii. Equivalency

- 6.145 ComReg proposed that Eircom should continue to be required to provide access and information necessary for the provision of call termination services to competitors at an equivalent standard and at an equivalent time as that provided to its own retail arm.
- 6.146 In the current review, ComReg emphasised that OAOs should be given the same notice/information in relation to the provision of wholesale call termination services as Eircom provide to its retail arm. In addition to this ComReg, as well as OAOs, should be given reasonable pre notification of plans which the incumbent may have with regards restructuring of their network where interconnection services will be affected.
- 6.147 Respondents were asked if they agreed that Eircom should provide access and information necessary for call termination services to competitors at equivalent times and standards as it provides to its retail arm. Respondents were also asked if they agreed that where there will be a direct impact on OAOs, that both OAOs and ComReg should be notified of plans which Eircom may have with regard to restructuring of their network.

Views of Respondents

- 6.148 One of the respondents believed that this obligation should be applied generally to all undertakings designated with SMP in the termination market. In addition the SMP operator should not be mandated to provide information to the level that would equate to technical advice or support. A second respondent agreed that Eircom should provide access and information necessary for call termination services to competitors at equivalent times and standards as it provides to its retail arm. This respondent believed that this obligation should be addressed by transparency to ensure that there is a satisfactory level of trust that this equivalency is being achieved. One of the respondents fundamentally disagreed with ComReg’s attempts to present Eircom’s retail arm as an OAO. It further outlined that it considered Eircom’s retail arm was not in the same position as an OAO, terminating fixed calls on Eircom’s network. This same respondent believed that it was important that

ComReg bore this in mind when devising remedies designed to ensure that wholesale services provided by Eircom to OAOs allow them to compete effectively with Eircom on retail markets. This respondent is also concerned that this is not obliged to provide information to another provider making a request for new network access unless and until we have sufficient understanding of the nature of the request to judge that it is genuine and reasonable.

6.149 Further, one of the respondents agreed that where OAOs were directly impacted in terms of interconnection services by plans to restructure the network, both ComReg and OAOs should be pre-notified. Another respondent commented that it was Eircom's current practice to inform interconnecting OAOs in a transparent and timely fashion of changes in the network architecture. This respondent added that Eircom would inform OAOs of any network restructuring or transition to a NGN that would impact on interconnection or interoperability with Eircom's network(s) or OAOs' use of Eircom's fixed call termination services. The principles proposed by this respondent regarding interconnection migration included in its response were as follows:

- Once legacy products were no longer absolutely necessary in relevant markets (i.e. SMP requirements no longer valid), their provision should no longer be subject to regulatory intervention;
- Equitable but affordable commercial agreement would be needed for new interconnection services;
- Eircom could not indemnify OAOs for investment risk due to obsolescence, which should be considered a normal commercial uncertainty;
- There should be recognition by ComReg and all industry players that the transition to an NGN core network would be done gradually over several years; and
- There should be recognition that the EU Regulatory Framework had an objective of encouraging infrastructure build.

6.150 The third respondent agreed that OAOs and ComReg should be notified of plans which Eircom have with regard to restructuring of their network. It believed that this should take the form of a formal consultation process managed by ComReg. In addition reasonable notice periods, as deemed by ComReg, should be provided and appropriate and reasonable compensation should also be granted to OAOs.

ComReg's Position and Conclusion

6.151 ComReg is of the view that Eircom should continue to be required to provide access to and information necessary for call termination services to competitors at an equivalent standard and an equivalent time as is provided to Eircom's retail arm as part of its Access obligation.

6.152 In relation to the point made by one respondent who suggested that ComReg attempted to present Eircom's retail arm as an OAO, ComReg believes that this misrepresents its views. It is obvious that Eircom's retail arm is not in fact an OAO, but to state this is confusing and misses the point. The issue being examined is the position of Eircom's retail arm, versus an OAO's retail arm. In some cases, both of these may be in the same position and in other cases they are not. The object of non-discrimination obligation is to oblige Eircom's wholesale arm to give equality of treatment to Eircom Retail on the one hand and OAOs on the other, so that the latter

is not placed unduly at a disadvantage relative to Eircom Retail. The ERG Remedies document for example, states that: *‘In general non-discrimination requires that the SMP undertaking ‘applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provide services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners’. This shows that the scope of the non-discrimination obligation clearly covers a firm’s internal processes. The general non-discrimination obligation requires that third party access seekers are treated no less favourably than the operator’s internal divisions.’*⁷⁰

- 6.153 With regard to Eircom’s notification of network plans, ComReg believes that Eircom should notify ComReg of significant network plans once these have been approved in Eircom. In addition, Eircom should notify OAOs where these plans are likely to have a direct significant financial impact on an OAO(s). With regard to the points made on Interconnection migration, ComReg agree with some of these points in principle, but believe that these issues should be addressed through commercial negotiations. ComReg may however be required to intervene where a dispute arises. As previously discussed in the section on withdrawal of access, Eircom would be required to obtain prior approval from ComReg in relation to withdrawal of a facility. ComReg would then consider the impact of the request to withdraw the product/service and if it is decided that there would be a significant impact on industry, a consultation process would be initiated by ComReg. The consultation would include such issues as the notification necessary for industry, whether compensation might be necessary or appropriate (regarding stranded assets of OAOs, etc).
- 6.154 As to whether a similar obligation as outlined above should apply to all SMP OAOs ComReg is of the view that at this stage and in the absence of Access obligation on respective OAOs such an obligation would not be appropriate, proportionate or justified. The basis for the access obligation on Eircom and its supporting provisions are clearly set out above. ComReg concludes that Eircom should continue to provide access and information necessary for call termination services to competitors at an equivalent standard and equivalent time as that provided to its own retail arm as part of its Access obligation.

ix. Open access

- 6.155 ComReg proposed that, pursuant to Regulation 13(2)(e), Eircom should continue to be required to grant open access to technical interfaces, protocols, or other key technologies and systems and should also be required to provide access to such Operational Support Systems (“OSS”) or similar software necessary to ensure fair competition in the provision of services.
- 6.156 Unless the provision of services by Eircom of certain products is mandated, ComReg’s view is that there may be an incentive for Eircom to limit access or make access more difficult. It is obviously necessary for OAOs to have open access to technical interfaces, protocols, and OSS such as is necessary for them to take up the mandated product and allow them to compete with Eircom at the retail level.
- 6.157 Respondents were asked if they agreed that Eircom should be required to grant open access to technical interfaces, or other key technologies and should also be required to provide access to such OSS or similar software necessary to ensure fair competition in the provision of services.

⁷⁰ ERG Common Position on the approach to appropriate remedies in the new regulatory framework.

Views of Respondents

6.158 Two of the respondents disagreed with ComReg’s proposal as set out above. One of these respondents argued that its concern was to ensure that Eircom was not obliged to provide open access as outlined above to an OAO making a request for new network access unless and until it had sufficient understanding of the nature of the request to judge that it was ‘genuine and reasonable’. The second respondent claimed that the information that was required from the SMP operator should be defined at the point of interconnection. This respondent believed that information about those technical interfaces and protocols that were essential to support access to wholesale call termination services should be provided, however information about technologies, systems and software that may be specific to Eircom’s retail activities and replicated by OAOs should not be subject to open access requirements. The third respondent firmly believed that Eircom should be required to grant open access to technical interfaces, protocols, or other key technologies and also be required to provide access to such OSS or similar software necessary to ensure fair competition in the provision of services. This respondent further added that the level of access should be sufficiently transparent to ensure that there is a level of trust in the OAO community that the level of access is equivalent to that provided by Eircom to its downstream retail arm, i.e. it must be demonstrably equivalent.

ComReg’s Position and Conclusion

- 6.159 With regard to the views expressed by respondents, ComReg notes that where an operator is refused open access on the grounds that the request is not ‘genuine and reasonable’ that operator can submit a dispute to ComReg, which will be assessed by ComReg, on a case by case basis. The OAO submitting the dispute might ultimately have to demonstrate to ComReg that its request is in fact ‘genuine and reasonable’. It would not be appropriate for ComReg to define at this time what exactly ‘genuine and reasonable’ means for all cases in advance - this would be considered on a case by case basis.
- 6.160 With regard to the suggestion by one respondent on the ‘Equivalence of Input’ (EoI) ComReg propose to revisit this at a later stage and may decide to consult with industry in this regard.
- 6.161 It should also be noted that OAOs should be allowed access to the data available through OSS which OAOs require for the efficient provision of services and allow competitors to compete effectively. ComReg considers that the imposition of an obligation to provide access to OSS, in conjunction with the supporting remedies for non-discrimination and transparency is appropriate to ensure a level playing field in the context of product/service development. ComReg considers that, an obligation to ‘negotiate in good faith’ in relation to requests for access is also appropriate. ComReg would like to highlight that it will consult separately on the requirement for a separate remedy of negotiation in good faith.
- 6.162 Eircom should continue to be required to grant open access to technical interfaces, protocols, or other key technologies and systems and should also be required to provide access to such OSS or similar software necessary to ensure fair competition in the provision of services in foot of its Access obligation. Where access to updated facilities of the incumbent requires an update of the facilities on the part of the OAO to benefit from these upgrades, sufficient notice must be given to this OAO(s) by Eircom.

b) Transparency

- 6.163 ComReg proposed that a transparency obligation should continue to be imposed on the SMP operator, Eircom. It is stated as part of the Access Directive⁷¹ that transparency may be used in relation to ‘interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices’.
- 6.164 Transparency is a necessary means of ensuring that ComReg and OAOs can observe price and non-price terms and conditions for Eircom’s wholesale call termination products. A transparency obligation is required to support any accounting separation obligations, as this would allow the calculation of costs and prices (i.e. internal price transfers) to be rendered visible. This would also allow ComReg to monitor compliance with any non-discrimination obligations, and address competition problems relating to cross subsidisation, price discrimination and the application of price squeezes.
- 6.165 ComReg has considered the existing level of publication of data per the Reference Interconnect Offer (“RIO”). Eircom currently publishes a full suite of reference documentation in relation to interconnect products, including call termination services. However, ComReg was of the view that, in the absence of an enforceable obligation, there would be no guarantee that Eircom would continue to publish a RIO and ComReg would have no means of remedying any deficiencies in the RIO as a result.
- 6.166 Respondents were asked if they agreed if transparency, and in particular the requirement to make public interconnection terms and conditions, is a necessary remedy to address problems in this market.

Views of Respondents

- 6.167 All three respondents agreed that the obligation of transparency was a necessary and appropriate obligation to impose on a SMP operator. One of these respondents commented that unless Eircom are specifically required to follow a particular process in relation to its terms and conditions Eircom do not voluntarily provide it. Another respondent agreed that transparency was a necessary remedy however the respondent claimed that the existing level of publication by Eircom satisfied the obligation for transparency. It further added that there was no evidence to suggest that there was currently a lack of transparency and it was therefore unnecessary to impose these remedies.

ComReg’s Position and Conclusion

- 6.168 ComReg considers that Eircom should notify ComReg of significant network plans, once these have been approved in Eircom. In addition, Eircom should notify OAOs where these plans are likely to have a direct significant financial impact on an OAO. This will allow the efficient upgrade of OAO systems which may be required in order to facilitate such obligations as access to new services. In response to the point raised by one respondent regarding transparency (that the existing level of publication by Eircom satisfied the obligation for transparency) ComReg is of the view that in the absence of an enforceable obligation, there would be no guarantee

⁷¹ Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, Article 9.

that Eircom would continue to publish a RIO and ComReg would have no means of remedying any deficiencies in the RIO as a result.

6.169 A transparency obligation should continue to be imposed on Eircom.

i. Publication of a Reference Interconnect Offer ('RIO')

6.170 In considering the implementation of the transparency obligation, ComReg proposed that Eircom should continue to publish a Reference Offer for call termination services on its wholesale website pursuant to Regulation 10(3) of the Access Regulations.

6.171 Respondents were asked if they agreed that Eircom should publish a Reference Offer for Call Termination services on its wholesale website.

Views of Respondents

6.172 All three respondents agreed that Eircom should publish a reference offer for call termination services on its wholesale website. All comments made in relation to the question above were also relevant in relation to this question. One respondent added that such transparency is the only way that the industry can be assured that the non-discrimination obligation is measurable to any extent.

Conclusion

6.173 Eircom should continue to publish a Reference Offer for call termination services on its wholesale website as part of its Transparency obligation.

ii. Publication of a specified information

6.174 In considering the imposition of an access obligation, ComReg noted that Eircom should be required to continue to provide information necessary to support call termination services. It is believed that a transparency obligation would continue Eircom's obligation to publish the set of specified information as described above, and would make provision for the evolution of the RIO documentation, as published on the Eircom wholesale website⁷², and for the introduction of new products and services.

6.175 Respondents were asked if they agreed that Eircom should publish specified information which supports call termination services.

Views of Respondents

6.176 All three respondents agreed that Eircom should publish specified information which supports call termination services. The points made above by respondents were also relevant to this question. One respondent advised against any obligation to provide information that equates to advice or consultancy.

Conclusion

6.177 Eircom should continue to publish specified information which supports call termination services.

⁷² www.Eircomwholesale.ie/regulatory/

iii. Publication of manuals and documentation

- 6.178 ComReg proposed that Eircom should continue to publish appropriate manuals and supporting documentation for new and existing call termination services. This would include manuals, order forms and processes for new and existing services, the detail to be determined on a case by case basis.
- 6.179 Respondents were asked if they agreed that Eircom should be required to publish appropriate manuals and documentation for new and existing call termination services.

Views of Respondents

- 6.180 All three respondents agreed that Eircom should be required to publish appropriate manuals and documentation for new and existing call termination services. One respondent again highlighted that the existing level of publication by Eircom satisfies the obligation for transparency and there is no evidence presented that there is currently a lack of transparency and that it is therefore unnecessary to impose these remedies. Another respondent again commented that industry requires this level of transparency to underpin the non-discrimination obligation. A third respondent added that the format for such publications and the level of detail provided should be consistent with that currently provided for existing services. Documentation in relation to new services should be provided only in so far as those new services are clearly identified as wholesale interconnect services that are proper to the RIO. Furthermore, this publication obligation should only be to the extent that the effort and overhead involved is balanced against the number of interconnected parties, the overall complexity of the Eircom interconnect offering and the rate at which changes are made to the document set.
- 6.181 With regard to any additional information which Eircom should provide to ComReg and industry or both to support products and services in the RIO one respondent suggested the following:
- A formal process for OAOs to propose textual amendments to the RIO or associated documents. Eircom follow a formalised process under ‘the RIO text change process’ whereby industry comments/negotiates proposals put forward by Eircom, however the decision mandating this process fell short of mandating that OAOs could propose textual changes which would then go through a similar process of industry comment and negotiation with ComReg having the ultimate veto on what was to be included in the RIO.
 - The new services process requires an overhaul to improve speed and robustness of process.
 - A requirement to detail the equivalence of products/processes and interfaces with that provided to Eircom’s downstream retail arm.

ComReg’s Position and Conclusion

- 6.182 ComReg has addressed in the sections above, the issue raised by one of the respondent regarding the existing level of publication and how it already satisfies the transparency obligation. ComReg will revisit at a later stage the suggestion made by one respondent in relation to publication of information of Eircom Retail. This may involve a consultation process in order to seek the views of industry.

- 6.183 ComReg is of the view that currently the publications satisfy the obligation. However, this will be kept under review and updated as soon as possible where conditions change. Any amendments and updates will require ComReg approval prior to publication.
- 6.184 With regard to the suggestion of a formal process for OAOs to propose textual changes to the RIO or associated documents, ComReg believe that if an OAO requires a change to the RIO then it should send the proposed change to Eircom in the first instance. If Eircom objects to the change or do not give an acceptable response then the OAO can revert to ComReg. ComReg will assess the reasonableness of the request and if it believes that the request is indeed reasonable then it will proceed to direct Eircom to make the proposed change. If the change is deemed to be unreasonable then ComReg will discuss this with the operator.
- 6.185 Eircom should be required to continue to publish appropriate manuals and documentation for new and existing call termination services as part of its Transparency obligation.

iv. RIO Price & Textual Changes

- 6.186 As provided for by Regulation 10 (2) of the Access Regulations, the RIO shall be sufficiently unbundled so as to ensure that other undertakings availing of such facilities are not required to pay for facilities which are not necessary for the service requested and such offer shall include:
- A description of the relevant offerings broken down into components according to market needs; and
 - A description of the associated terms and conditions, including prices.
- 6.187 Eircom shall publish any proposed textual changes to the RIO text on its website for the purpose of notifying all interested parties of such changes. Comments on the proposed changes by OAOs should be submitted to ComReg within 21 (twenty one) calendar days of any such notice and ComReg will either approve or amend the proposed changes within a further 3 (three) weeks. Eircom shall amend and re-publish its RIO in accordance with the obligations set out in this section. As provided for by Regulation 10 (5) of the Access Regulations, ComReg may issue directions requiring Eircom to make changes to the RIO to give effect to obligations imposed in the Draft Decision Instrument (see Annex A) pursuant to the Access Regulations and to publish the RIO with such changes.
- 6.188 With regard to pricing, under the current process for updating the RIO, Eircom advises ComReg 7 days in advance of its intentions to publish an updated RIO price list. The updated RIO price list is circulated to OAOs 21 calendar days before the changes come into effect⁷³.
- 6.189 The RIO Price List is published on the Eircom wholesale website, and consists of the following documents –
- RIO Change Matrix;

⁷³ International Access Rates are the exception to this.

- RIO Price List marked version; and
 - RIO Price List unmarked version.
- 6.190 ComReg is of the view that these obligations should be maintained as it is necessary to provide OAOs with sufficient notice of any changes to the Eircom RIO, and it is useful for ComReg to be notified in advance. It is proposed that this process should apply to all the documents relating to the call termination market.
- 6.191 Respondents were asked whether they considered that the current process for updating of the RIO was adequate.

Views of Respondents

- 6.192 Two of the respondents agreed that the current process for updating of the RIO is adequate. Another respondent reiterated the point above that the current process did not allow for an OAO to instigate a RIO change. In addition this respondent also believed that the 21 calendar day notice period for RIO price changes should be extended to 30 to line up with the minimum contract terms relating to consumer legislation. This respondent also added that a standing forum should be established to manage the RIO text change process to allow OAOs to negotiate Eircom proposed changes and OAO proposed changes.

ComReg's Position and Conclusion

- 6.193 ComReg has already addressed the point raised regarding a process to allow OAOs to instigate a RIO change in the section above on 'Publication of manuals and documentation'. With regard to the point raised on an extension of the 21 calendar day notice period, ComReg believe that at a minimum Eircom should give 21 calendar days notice of RIO price changes. If the price change is material, Eircom should ensure that sufficient time is allowed to operators.
- 6.194 Eircom should continue with the current process for updating of the RIO.

v. Billing

- 6.195 ComReg proposed in the initial response to consultation to consult further on the issue of itemised billing. Since the time of the initial consultation, Eircom has been providing itemised billing on an ad hoc basis as requested by other operators. There have been no recent complaints. ComReg therefore was of the preliminary view that a consultation on this issue was disproportionate and unjustifiable at this time.
- 6.196 It must be noted however that it is general practice in any industry that prior to payment of any bill a full breakdown of what the bill relates to is required by the paying party. Following from this, the paying party should be able to reconcile the bill in an efficient manner to their in-house system.
- 6.197 ComReg will continue to monitor the process and will ensure that Eircom continues to provide a satisfactory level of granularity so that Eircom bills can be reconciled in an efficient manner to operator systems.
- 6.198 Respondents were asked if they agreed that the Eircom billing reports in relation to call termination services to wholesale customers are sufficiently granular so that operators are in a position to reconcile their bills in an efficient manner to their in-

house systems. Respondents were also requested to indicate if the current level of detail on wholesale bills for call termination services provided by Eircom is sufficient.

Views of Respondents

- 6.199 Two of the respondents agreed that the Eircom billing reports in relation to call termination services to wholesale customers are sufficiently granular so that operators are in a position to reconcile their bills in an efficient manner to their in-house systems. A third respondent did not believe that this was the case and it was of the opinion that greater granularity should be provided as standard.
- 6.200 With regard to the current level of detail on wholesale bills for call termination, one respondent commented that industry had agreed the levels of billing information exchanged and the levels necessary to obtain dispute resolution. It further added that it was unreasonable to raise this complex issue in this consultation and it did not propose to expand their views on this topic in this consultation but would reserve its right to engage in a full industry analysis should a specific operator demand arise at some point in the future. The respondent who did not believe that the billing reports were sufficiently granular included an example of credits which were often applied under a catch all ‘miscellaneous’ heading. This respondent believed that full granularity should be provided for both reconciliation and audit purposes.

ComReg’s Position and Conclusion

- 6.201 The Interconnect bills should be sufficiently granular to allow for reconciliation of the bill to an OAO in-house system. Where complaints are received from operators in this regard, ComReg will make an assessment as to whether requests are reasonable and if so Eircom will be requested to provide the relevant information in a timely manner. If they fail to do so Eircom may be found to be in breach of its obligation. ComReg does not believe that it is currently necessary to hold a public consultation in this regard.
- 6.202 Eircom’s billing should be sufficiently granular for OAO purposes, but that a public consultation on this issue at this time is neither necessary nor proportionate.

c) Non-Discrimination

- 6.203 ComReg proposed that the imposition of a non-discrimination obligation should continue to be imposed on Eircom.
- 6.204 Non-discrimination requires that the SMP undertaking ‘applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners’. The general non-discrimination obligation requires that third party access seekers are treated no less favourably than the operator’s internal divisions.
- 6.205 ComReg was of the view that non-discrimination obligations should be imposed on Eircom to prevent additional competition problems such as quality discrimination and undue use of information about competitors which the transparency obligation would not prevent. Further to this, non-discrimination is an essential complement to the transparency and access obligations.

- 6.206 The application of a non-discrimination obligation would require Eircom to offer equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and require Eircom to provide services and information to others under the same conditions and of the same quality as it provides for its own services or those of its subsidiaries or partners. In particular, ComReg considered that Eircom must provide information and services to alternative operators in timescales, on a basis, and of quality, which are at least as good as those provided to Eircom's retail arm and associates.
- 6.207 Respondents were asked if they agreed that Eircom should be required to provide call termination information and services on a non-discriminatory basis to its retail arm and alternative operators.

Views of Respondents

- 6.208 Two of the respondents agreed that Eircom should be required to provide call termination information and services on a non-discriminatory basis to its retail arm and alternative operators. One of these operators believed that this obligation needed to be underpinned by a transparency obligation to ensure there is a level of trust that this is in fact the case. This respondent further added that this could be done by enforcing publication of data in relation to Eircom's performance in the provision of termination services to its retail downstream arm versus its performance in relation to the provision of termination services to OAOs. The third respondent believed that this call for non-discrimination in relation to its own retail arm was inappropriate and that it fundamentally disagreed with ComReg's attempts to present Eircom's retail arm as an OAO. It further added that Eircom's retail arm is Eircom and that it is not in the same position as an OAO terminating calls on Eircom's network.

ComReg's Position and Conclusion

- 6.209 The point raised with regard to the need for a transparency obligation to underpin the obligation of non-discrimination is something which ComReg will revisit at a later stage. This may require a consultation with industry.
- 6.210 ComReg has addressed above, the point raised by one respondent who suggested that ComReg attempted to present Eircom's retail arm as an OAO in the section on *Equivalency*.
- 6.211 The remedy of non-discrimination will continue to be imposed on Eircom.

i. Level of Access to Downstream Arms

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

provide examples of where and how it might be appropriate to make different levels of information available in this regard.

Views of Respondents

6.214 Two respondents agreed that Eircom’s downstream arms should only have the same level of access to Eircom wholesale as alternative operators. One respondent added that this level of access should apply also to any other areas of Eircom such as Eircom networks. The third respondent again reiterated its point from above that it fundamentally disagreed with ComReg’s attempts to present Eircom’s retail arm as an OAO.

ComReg’s Position and Conclusion

6.215 The point raised by the respondent regarding ComReg’s alleged attempt to present Eircom’s retail arm as an OAO has been addressed under the section on *Equivalency*.

6.216 As part of the non-discrimination obligation Eircom’s downstream arms should not have privileged access to Eircom wholesale.

ii. Process for development and introduction of new services

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

6.218 Respondents were asked if they agreed that Eircom should be required to apply a standard process for the development and introduction of new call termination services and elements.

Views of Respondents

6.219 Two respondents agreed that Eircom should be required to apply a standard process for the development and introduction of new call termination services and elements. One of these respondents pointed out that the process should be sufficiently high level to allow for the various types of services ranging from the routine to those that may involve a large amount of development to become established. The requests for new development should also be reasonable and the SMP operator should be afforded adequate time to meet requests. The third respondent added that it did not foresee any further product developments relating to call termination services and therefore, seen no basis for this question.

ComReg’s Position and Conclusion

6.220 ComReg agrees with the respondent view that it did not foresee any further product developments relating to call termination services. However, if the case arises where new call termination services are developed or introduced Eircom should ensure that it is transparent in this regard and that standard documentation and timescales are available to operators as soon as possible.

- 6.221 Eircom should apply a standard process for the development and introduction of new call termination services and elements, including standard documentation and timescales as part of its non-discrimination obligation.

d) Price control and Cost Accounting

- 6.222 The transparency, non-discrimination and access obligations discussed above would assist in creating a level playing field enabling greater service-based competition in the retail calls market. However, on their own these obligations would not be able to tackle the possibility of the setting of excessive prices by a dominant operator, or deal with problems related to possible inefficient investments undertaken by a dominant operator. As such, while competition in service provision may be fostered, consumer benefits may not be maximised, due to the setting of excessive prices or occurrence of excessive costs.
- 6.223 ComReg has continued to apply regulation of call termination since the last review and this has helped to facilitate indirect competition in the retail calls market.
- 6.224 There are a number of forms of price control options open to a regulator. The current price control regulation applied in this market mandates cost oriented tariffs based on a Forward Looking-Long Run Incremental Costing (“FL-LRIC”) methodology.
- 6.225 Competition in the retail calls market has increased since the introduction of CPS and SB-WLR products. However, the ability of the other operators to be in a position to compete is reliant to a large extent on reaching price points at a wholesale level that allow for adequate returns while also encouraging direct investment where commercially feasible by OAOs.

Principles of Price Control

- 6.226 Based on experience to date of regulating interconnect rates in the Irish market and on the conclusions of the market analysis data, ComReg will continue the obligation that interconnection services are offered at cost oriented prices. This will help ensure that the provision of interconnection is on fair and efficient terms and that costs are soundly derived from appropriate costs and give proper economic signals to operators to guide their investment decisions.
- 6.227 ComReg has to date reviewed the rates set by Eircom based on the Eircom Top Down LRIC model. This has been the case since 1999 and the model has evolved considerably since its introduction. The existing model sets prices for call origination, call termination and call transit services. Up until 2006 the rates for the relevant financial year were set as interim for the period until the actual costs and volumes were available from the Eircom separated accounts. ComReg would review the final model and where appropriate changes were made which may have on occasion given rise to a change to the interim rates charged to operators. Where these changes were material, operators may have received refunds or made additional payments depending on the changes to rates.
- 6.228 The principle that only efficiently incurred costs can be recovered through interconnection charges is one that, in ComReg’s view is of vital importance. Eircom at an operational level is free to manage its network, and to route calls across the network however it sees fit (subject to the non-discrimination obligation). However, should Eircom for its own reasons choose to manage its network in a manner that deviates from the standard of efficient operation then it shall only be

allowed to recover those costs that would have been incurred had it operated efficiently.

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

- Encouraging efficient competition;
- Sending appropriate signals that promote forward looking investment decisions;
- Enabling cost recovery by Eircom;
- Facilitating effective means of interconnection;
- Being sufficiently transparent; and
- Being non-discriminatory and non-preferential.

Products subject to Price Control

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

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

Form of Price Control

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

6.233 ComReg was of the view that all operators had significant market power in the provision of their own network fixed end user call termination services. This included all termination to primary level interconnection.

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

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

6.236 The interconnection rates arrived at in recent years would appear to have achieved the aim of encouraging competition and investment. The rates have not seen

material change and more recently the market saw a further progression with the setting of forward looking rates to March 2007.

- 6.237 ComReg would like to take the opportunity presented by a transitional period to next generation technology, of entering into discussions with industry on the future price control mechanisms appropriate to the market in light of technological changes to the core network and consumer usage thereof. Such changes could have a significant impact on the pricing models used to arrive at interconnection rates.
- 6.238 The application of the forward looking long run incremental cost (FL-LRIC) method has been preferred to other cost methods such as fully distributed historical costs. It has also been recommended by regulatory organisations such as the Independent Regulators Group (IRG)⁷⁴, as it leads to a set of prices that reflect the real resource costs taken into consideration by operators in making investment decisions. The application of this method has been used in the past and is commonly seen in other countries as the most appropriate to achieve the desired results.
- 6.239 Respondents were asked if they believed that the current FL-LRIC Top Down model approach to setting call termination rates should be maintained pending the outcome of the consideration of a wholesale price cap.

Views of Respondents

- 6.240 All three respondents agreed that the current FL-LRIC top down model should be maintained in the interim until such time as a wholesale price cap was established. One respondent however noted that the current Top Down FL-LRIC model was the appropriate basis to set termination rates in the period leading up to the period of implementation subject to a number of adjustments being made to the model. It explained that most of these adjustments arose from the fact that call origination services would be delivered over a hybrid NGN/TDM network before and during the term of the WPC. In the first instance, there would be a pause in investment in TDM network in the period before rollout of the NGN therefore modelling of only TDM costs would not allow full recovery of the costs of call termination. There would also be an effect of higher routing factors arising from calls being handed over at a small number of interconnect or gateway points between the two networks. The respondent noted that from early 2008 Eircom would start to connect customers to NGN line cards providing a PSTN Emulation Service (“PES”). At this point calls from such customers – whether terminating on the Eircom PSTN or on an OAO network must be routed through a small number of media gateways for termination. As a result of this the routing factor for call origination and primary call origination in particular would increase therefore increasing the number of network elements whose costs must be recovered from call origination revenues. For primary call origination in particular Eircom will need to route calls up the NGN to the gateway for hand over to the PSTN. From the gateway this call would then be routed back down the network to the interconnect point to which the OAO had built to qualify the traffic as primary origination.

ComReg’s Position and Conclusion

- 6.241 ComReg notes that all respondents agreed that the current FL-LRIC top down model should be maintained until a wholesale price cap is established. ComReg

⁷⁴ ERG (2006) Regulatory Accounting in Practice, A Report prepared by the IRG Accounting Separation Working Group, 23 April 2006.

notes one respondent's comments in relation to the impact of NGNs. ComReg's initial views are that the current (pure PSTN) model could be used to set a 'starting point' benchmark. As noted in the initial consultation ComReg has built a BU model based on the current network. It may now be appropriate to update this for Eircom plans to invest in the core network which will arrive at a model that meets the needs of Eircom and OAOs. This will involve several months of discussion and modelling between Eircom and ComReg with input from industry where possible. As it is already apparent that Eircom will be looking for full, immediate cost recovery of its NGN transition costs this could easily cause a short term surge in interconnect rates. Depending on how they configure the NGN network in its early days, there might be little 'other' traffic flowing over it which then could easily over inflate the assessment of the cost of the NGN equivalent services (call origination etc) on a per unit basis. ComReg will need to consider the up front costs and the potential saving in years to come, included in this will be areas such as whether Eircom should not be allowed to charge for the transition routings that an NGN based call origination might result in. This may only encourage Eircom to ensure that such over-routings are mandatory which technically speaking does not have to be the case. Such factors will need to be taken into account once further detail on the rollout of NGNs is available.

- 6.242 The current FL-LRIC Top Down Model should be maintained as an approach to setting call termination rates pending the outcome of the consideration of a wholesale price cap.

Wholesale price cap

- 6.243 In the responses to the initial consultation there was general agreement among operators that moving to a wholesale price cap ("WPC") regime would be desirable. ComReg has taken note of this and has over the past two years been engaged in a significant project in preparation for such a move. In light of this ComReg decided in ComReg Document 07/03 to consult with industry on the principle issues surrounding a WPC.
- 6.244 Respondents were asked if they agreed that ComReg should consider possible approaches to, and implementation of, a WPC.

Views of Respondents

- 6.245 All three respondents agreed to the implementation of a WPC. One respondent commented that under the current regime the wholesale fixed interconnection charges had been determined annually, based on costs that Eircom had incurred which ensured that it could only earn its reasonably incurred costs (including a return on capital employed) but did not give Eircom much incentive to increase its efficiency. The respondent also referred to ComReg Document 03/57, D14/03⁷⁵ which set down possible alternatives to the current regime. They requested that ComReg carry out an examination of the issues as soon as possible. The respondent also highlighted the issue of NGNs and the need for ComReg to note that the effectiveness of such a regime would be dependent on its ability to promote future investment and encourage sustainable competition. The respondent also noted that the price cap would apply over the period of NGN rollout in parallel with the

⁷⁵ Decision Notice on Fixed Interconnection Charging Mechanisms, 29 May 2003

existing TDM network where the NGN investment would lead to a surge in both operating and capital costs which would persist at least as long as the period of control. Any price cap must therefore recognise these cost movements in order to send the correct signals to new entrants to make complementary investments.

ComReg's Position and Conclusion

6.246 ComReg notes one respondent's concerns regarding the need to 'send the correct signals to new entrants to make complementary investments'. ComReg will carry out detailed modelling work, will participate in the NGN forum and intend to do all possible to arrive at interconnection rates that meet the needs of all industry.

6.247 ComReg will proceed in establishing an appropriate WPC as soon as possible.

e) Cost Accounting Systems

6.248 A cost accounting⁷⁶ system will be necessary where an obligation has been imposed on a dominant operator in relation to cost oriented pricing, price controls, recovery of costs and/or retail tariff controls. With regard to the interconnection markets, the obligation of cost orientation is an appropriate obligation to be imposed on Eircom and therefore ComReg proposed to impose a further obligation with regard to cost accounting systems on Eircom.

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

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

6.251 Respondents were asked if they believed that the obligation to maintain cost accounting systems should be imposed on Eircom.

Views of Respondents

6.252 All respondents agreed that the obligation to maintain cost accounting systems should be maintained on Eircom. One of the respondents commented that Eircom currently operated accounting separation and cost accounting systems pursuant to obligations imposed under the 1998 Regulatory Framework which the European Commission had acknowledged to be "best practice". The respondent reiterated that it understood that these systems required adjustment to reflect differences between the structure of the 1998 regulatory framework and the New Regulatory Framework,

⁷⁶ Cost accounting is the process of tracking, recording and analysing costs associated with the products or activities of an organisation.

specifically to reflect the movement to market-based regulation. The respondent expressed the view that the systems did not need to be redesigned in the manner proposed by ComReg in the consultation and therefore the respondent maintained that the obligations proposed in the pending consultation were not justified, reasonable or proportionate. The respondent also believed that the current cost accounting systems imposed on Eircom to comply with existing obligations of accounting separation and transparency were sufficient to inform the setting of wholesale prices for call conveyance services.

ComReg's Position and Conclusion

- 6.253 ComReg will consult further on cost accounting systems and accounting separation methodologies supporting cost accounting. It should be noted that a comprehensive price control obligation is linked to the obligation for cost accounting systems and accounting separation. In the interim, ComReg is proposing that it maintains the existing level of cost accounting system obligation on Eircom until any further consultations are completed.
- 6.254 The obligation to maintain cost accounting systems should continue to be imposed on Eircom.

f) Accounting Separation

- 6.255 Accounting separation⁷⁷ will help disclose possible market failures and provide evidence in relevant markets of the presence or absence of discrimination and price squeeze. It will make visible the wholesale prices and internal transfer prices of a dominant operator's products and services. It can also provide ComReg with relevant data which will allow it to perform its duties to ensure prices are not set in a predatory manner or at an excessive level and provide greater certainty about the costs and volumes for a given service.
- 6.256 An obligation of non-discrimination can require, inter alia, the imposition of financial reporting regimes in order to monitor Eircom's compliance with such an obligation.
- 6.257 ComReg believed that Eircom as an SMP operator should have an obligation not to unduly discriminate. The obligation of accounting separation would support ComReg in its monitoring of Eircom's behaviour with regard to non-discrimination by clearly reporting its wholesale prices and internal transfer prices for its services.
- 6.258 ComReg would implement the accounting separation obligation on a service and/or product basis. ComReg was of the view that it was not sufficient to implement such an obligation at a market level as it was important to discourage possible cross-subsidisation of pricing at a service level. If ComReg were to impose accounting separation at the market level, it would not be able to identify whether products and services were being provided on a non-discriminatory basis.
- 6.259 As discussed earlier, in deciding upon the imposition of obligations to support the remedy of competition problems, ComReg must ensure that the obligation is based on the nature of the problem identified, justifiable and proportionate in the light of the objectives laid down in Section 12 of the Communications Regulation Act 2002.

⁷⁷ The purpose of accounting separation is to provide an analysis of information derived from financial records to reflect as closely as possible the performance of parts of the business as if they were operating as separate businesses.

In this regard, the accounting separation obligation is designed to help provide evidence from Eircom which may demonstrate the presence or absence of price discrimination. In this regard, ComReg believed the imposition of an obligation of accounting separation upon Eircom would be justifiable and based upon the nature of the problem identified.

- 6.260 If ComReg were to withdraw this obligation, it would be difficult for it to effectively monitor compliance with any obligation of non-discrimination that may be imposed, or to obtain any information on margins in the retail business. ComReg does not consider that this obligation will be time consuming and impose a heavy burden on Eircom, as, given Eircom's size, it would already have management accounting systems in place to support internal business decision-making.
- 6.261 Respondents were asked if they believed that Eircom should have an obligation of accounting separation in the wholesale call termination market.

Views of Respondents

- 6.262 All three respondents agreed that Eircom should have an obligation of accounting separation in the wholesale call termination market. One operator commented that the same obligation should apply to other operators.

ComReg's Position and Conclusion

- 6.263 ComReg has entered into a public consultation on the detailed implementation of the accounting separation and cost accounting remedies under the new framework. A significant amount of work and engagement with Eircom has been carried out to date and based on this and responses received from industry a further response to consultation is proposed following the completion of all the outstanding market reviews. It is ComReg's intention that any further consultation on Accounting Separation will improve the current Accounting Separation reporting requirements and enhance the current reporting structure. It is the intention that the structure should help ComReg make more informed decisions in a more timely and efficient manner on submissions for wholesale price changes that may be made by Eircom to ComReg at any given time in the future. The Separated Accounts of Eircom should provide such additional cost accounting information to ComReg where the annual historic accounts do not. In the interim, ComReg is proposing that Eircom be required to maintain the existing level of accounting separation, until any further consultations are completed.
- 6.264 ComReg is of the view that it is not proportionate to impose accounting separation on the OAOs. The imposition of an accounting separation obligation on OAOs would be disproportionate, as it would be a cost burden considering the volume of traffic terminated by OAOs on their networks. An accounting separation obligation is one of the more burdensome remedies, and would involve considerable effort for smaller operators. ComReg is of the view that the imposition of accounting separation would involve significant additional accounts preparation requirements, review and expense which would be an excessive burden on both OAOs and ComReg. Given the potential for abuse and the impact such an abuse might have on the market, ComReg is of the view that an obligation of accounting separation would not be proportionate or appropriate to the competition problems identified.
- 6.265 The obligation of accounting separation on the call termination market should continue to be imposed on Eircom.

7 Other Services Necessary for the Provision of Interconnection

Capacity Based Interconnection Products

- 7.1 Earlier in this document, ComReg set out its views on the appropriate obligations to be imposed on the markets for call termination. It is important to note that these obligations cannot be availed of without certain ‘supporting’ products which are necessary in order to avail of mandated obligations. These are known as capacity based interconnection products.
- 7.2 ComReg considered the products described in Service Schedules 002 (Interconnect Paths) and 005 In Span Interconnection (“ISI”) in Eircom’s current Reference Interconnect Offer on the Eircom wholesale website (www.Eircomwholesale.ie) and Eircom RIO Network Price List (also on the Eircom wholesale website) fall within the definition of these capacity based products. The existing Interconnect Operations & Maintenance (“O&M”) Manual and the Service Level Agreement (“SLA”) for Interconnect Paths and Traffic Designation for Inbound & Outbound Interconnection Paths document published on Eircom’s wholesale website, support provision and operation of these services.
- 7.3 Without these services, interconnection for the purposes of origination, termination and transit cannot be effected and therefore ComReg intended to mandate the provision of capacity based interconnection products outside the market review process; that is without a designation of SMP or without definition of a relevant market. ComReg noted the statement of the European Commission in its Explanatory Memorandum to the Recommendation on Relevant Markets, in which it explicitly addressed the question of imposing SMP remedies in an area outside a defined market. The Commission recognised that in dealing with lack of effective competition in an identified market, it may be necessary to impose several obligations to achieve an overall solution. The Explanatory Memorandum states:
- “For instance, it may often be the case that adjacent or related remedies are applied to technical areas as part of the over all obligation that addresses SMP on the analysed market. If specific remedies are thought to be necessary in a specific narrow technical area, it is not necessary or appropriate to identify each technical area as a relevant market in order to place obligations in that area.”*
- 7.4 ComReg considered its approach in mandating capacity based interconnection products to be consistent with the approach set out in the Access Regulations and the Explanatory Memorandum.
- 7.5 In addition, Regulation 6(2) of the Access Regulations provides ComReg with discretionary powers to ensure adequate access, interconnection and interoperability. In particular, without prejudice to measures that may be taken regarding undertakings with significant market power, ComReg is able to impose, to the extent that it is necessary to ensure end to end connectivity, obligations referred to in Regulations 10 to 14 of the Access Regulations inclusive on undertakings that control access to end users, including in justified cases the obligation to interconnect their networks where this is not already the case.
- 7.6 ComReg noted that with ISI, the precise position of the handover to Eircom is not mandated by Eircom but is determined by the OAO. Thus, at least in theory, the handover point could be anywhere from just outside the OAO to just outside the Eircom interconnect node. To a large extent, therefore, ComReg would argue that if

ISI is mandated, then the question of whether or not CSH/CSI is also mandated is largely academic. ComReg also noted that the relevant market for CSH/CSI would be a national one, whereas the fibre infrastructure being rolled out by the MANs and by the ESB, only covers a limited number of routes and locations. Thus there is no guarantee that the MANs or the ESB would have the required infrastructure in the right place to always facilitate ISI.

- 7.7 ComReg was of the view that it was not the case that merely having the choice between CSH/CSI and ISI makes the market for interconnect links a competitive one. ComReg's reasoning is that the alternate fibre infrastructure is only available at a limited number of locations, whereas the relevant market for interconnect links is a national one. In areas where alternate infrastructure is not available, the only realistic product available to the OAO, as ComReg understands, would be CSH/CSI. If that product is not available at a realistic price, then the OAO would only be able to achieve interconnect by physically digging its own fibre link(s). Given the economies of scale and scope available to Eircom, but not to the OAO, this would more than likely be cost prohibitive in many cases.
- 7.8 ComReg interpreted this to mean that the products described in Service Schedules 002 (Interconnect Paths) and ISI in Eircom's current RIO and Eircom RIO Network Price List as well as the Interconnect O&M Manual, the SLA for Interconnect Paths and the Traffic Designation for Inbound & Outbound Interconnection Paths document published on Eircom's wholesale website, would continue to be supplied under the current terms and conditions. This means the current obligation to provide such products on a reasonable request basis continues. Obligations in respect of transparency and non discrimination also continue. These products will remain subject to price control as in the current regime. Such charges are based on LRIC and must also be consistent with the principles applicable to charging of Partial Private Circuits given their deployment in provision of PPCs.

Views of Respondents

- 7.9 Only two respondents gave comments in relation to this question. One of the respondents agreed that it is absolutely critical that ComReg continue to mandate capacity based interconnect products. The second respondent stated that it does not accept ComReg's blanket approach to mandating the provision of the interconnect capacity based products without any analysis of market share or SMP in this market. It further stated that it believes that these individual capacity based interconnect products should be considered for mandated provision only following an analysis of the competitive nature of the existing market. This respondent then commented on the options available to operators whereby the operator can choose to purchase CSI/CSH interconnect from Eircom, whereby Eircom builds out its network infrastructure to the OAOs designated premises and locates its terminal transmission equipment in the OAO premises. Alternatively the OAO can choose to build its own infrastructure or purchase the required transmission capacity on the existing or developing MAN or ESB fibre networks and build to a nominated ISI interconnect point close to Eircom interconnect node. It then added that there is clearly a choice here for OAOs and Eircom believes that this choice makes the market competitive. The respondent then commented that while mandating ISI interconnect may be justifiable (on the basis that Eircom has bottleneck control over facilities between the Eircom exchange and the In-span hand-over point) Eircom considered that CSH/CSI interconnect products should not be mandated or priced on a LRIC basis but should be offered on the basis of a purely commercial offering. It also believes that the

competitive nature of the infrastructure market will ensure that Eircom CSI/CSH price would be controlled by market forces and it therefore urges ComReg to consider the full range of market forces that operate prior to mandating the provision of all the existing capacity based interconnect products.

ComReg's Position and Conclusion

- 7.10 ComReg believes that the argument put forward by the last respondent above is circular. Both ISI and CSI could be viewed as having bottlenecks at the “Eircom end”, Eircom in effect having control over the facilities in both instances. It also ignores potential barriers to entry on the basis of both the cost and the time taken to establish an In-span interconnect, both of which can be considerable, particularly in the case of a new entrant. Furthermore, both the ESB and MAN networks are limited geographically and procuring permissions for rights of way, and the ploughing of fibre, can be an extremely protracted and expensive process. A business case may also conceivably depend on time to launch and time to build market share in order to justify network expansion and corresponding effort and cost to establish In-span interconnect. CSI/CSH capacity products could be considered a more suitable solution in this instance.
- 7.11 ComReg will mandate capacity based interconnection products.

Fixed SMS

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

Views of Respondents

- 7.13 One of the respondents believed that any obligations relating to fixed SMS would be covered under the non-discrimination obligations applicable to the wholesale line rental offering and that specific obligations would not be appropriate given the stage of development of this market. A second respondent stated that it was satisfied with this approach and that it fully agreed that this market needs to be closely monitored. The third respondent called on ComReg to apply under the principle of technology neutrality in the EU Regulatory Framework symmetric regulatory obligations for wholesale mobile SMS on mobile network operators found to have SMP in the wholesale market for mobile call termination.

ComReg's Position and Conclusion

- 7.14 In relation to the point raised regarding ComReg applying specific SMS obligations on mobile network operators found to have SMP, ComReg believe that this is outside the scope of the current market analysis and that technology neutrality does not mean that a fixed network is equivalent to a mobile network.

- 7.15 Fixed SMS will be covered through the remedy for Wholesale Line Rental Non-discrimination.

Calls to directory enquiry and operator assisted services and subsequent call completion services for calls originating on the Eircom network

- 7.16 It was outlined that the charges for access to Eircom’s directory enquiry (“DQ”) and operator assisted (“OA”) services in its RIO included both the costs of conveyance and the labour costs of the operator. Nothing has come to the attention of ComReg since the initial review that would indicate a need to investigate the labour costs of providing a DQ service and therefore no change is proposed currently in this regard.

Views of Respondents

- 7.17 Two of the respondents agreed that the market for the labour element of DQ services is effectively competitive and therefore should not be subject to ex-ante regulation. The third respondent did not necessarily agree and believed that the DQ is not competitive on the basis that rates are high and thus some review of the labour costs would be appropriate.

ComReg’s Position and Conclusion

- 7.18 Nothing has been brought to the attention of ComReg that would suggest that this is not competitive.
- 7.19 ComReg believe currently that the market for the labour element of DQ services to be effectively competitive and therefore not suitable for ex-ante regulation.

8 Regulatory Impact Assessment

Introduction

- 8.1 According to ComReg’s Guidelines on its Approach to Regulatory Impact Assessment (“RIA”)⁷⁸, the purpose of a RIA is to establish whether regulation is actually necessary, to identify any possible negative effects which might result from imposing a regulatory obligation and to consider any alternatives. ComReg’s approach to RIA is that in the future it will continue to conduct RIAs in respect of any proposed statutory instruments which would impose regulatory obligations, or in respect of any market analyses which propose to impose, amend or withdraw obligations, through the finding of SMP or effective competition. Appropriate use of RIA should ensure the most effective approach to regulation is adopted.
- 8.2 In conducting RIA ComReg will take into account the Guidelines on Regulatory Impact Assessment (“the RIA Guidelines”) issued by the Department of the Taoiseach and adopted under the Government’s Better Regulation programme.⁷⁹ The RIA Guidelines are not formally or legally binding upon ComReg, however, in carrying out RIA ComReg will have regard to them, while recognising that regulation by way of issuing decisions, e.g. imposing obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. In conducting a RIA ComReg will take into account the six principles of Better Regulation that is, necessity, effectiveness, proportionality, transparency, accountability and consistency. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach will be taken towards RIA. As decisions are likely to vary in terms of their impact, if after initial investigation a decision appears to have relatively low costs, then ComReg would expect to carry out a lighter RIA in respect of those decisions.
- 8.3 The Government’s RIA Guidelines set out the stages it believes are necessary for minor impact regulations and a more detailed set of steps for a more comprehensive or full RIA. ComReg has taken these steps into consideration and has come up with a 5 step approach as follows which will be used:
- (a) Description of policy issue to be addressed and identification of objectives;
 - (b) Identify and describe the regulatory options;
 - (c) Determine the impact on stakeholders;
 - (d) Determine the impact on competition; and
 - (e) Assess the impacts and select the best option.
- 8.4 In determining the impacts of the various regulatory options, current best practice appears to recognise that a full cost benefit analysis would only arise where it would be proportionate or in exceptional cases where robust, detailed and independently verifiable data is available. Such comprehensive review will be taken when necessary.

⁷⁸ ComReg (2007) Guidelines on ComReg’s approach to Regulatory Impact Assessment, Document 07/56a

⁷⁹ See “RIA Guidelines: How to conduct a Regulatory Impact Analysis”, October 2005, www.betterregulation.ie

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

Description of Policy Context and Objectives

- 8.6 The European Commission, in its adoption of a new common regulatory framework for electronic communications networks and services on 7th March 2002, acknowledges the need for *ex ante* regulatory obligations in certain circumstances in order to ensure the development of a competitive communications market. The European Commission's Recommendation on Relevant Markets⁸⁰ identifies electronic communications markets, the characteristics of which may be such as to justify the imposition of such regulatory obligations. Regulation 26 of the Framework Regulations⁸¹ requires that, as soon as possible after the adoption by the European Commission of this Recommendation, ComReg shall define relevant markets in accordance with the principles of competition law, including the geographical area within the State of such markets. In addition, Regulation 27 requires that, as soon as possible after ComReg defines a relevant market, ComReg should carry out a market analysis of these markets. Where ComReg determines that a recommended market is not effectively competitive, it shall designate undertakings with SMP on that market, and it shall impose on such undertakings such specific obligations as it considers appropriate.
- 8.7 Regulation 9(1) of the Access Regulations⁸² states that: "*Where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate.*" Furthermore, paragraph 21 of the SMP Guidelines⁸³ states that, "*if NRAs designate undertakings as having SMP, they must impose on them one or more regulatory obligations, in accordance with the relevant Directives and taking into account the principle of proportionality.*" ComReg is therefore compelled to impose at least one obligation where an undertaking is designated as having SMP.
- 8.8 ComReg can impose any or a combination of obligations from those obligations listed in Regulation 10 to 14 of the Access Regulations. Under Regulation 9(6) of the Access Regulations, obligations shall be "*based on the nature of problem identified; be proportionate and justified in the light of the objectives laid down in section 12 of the Act of 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations*".
- 8.9 As part of the process of selecting appropriate obligations which satisfy the requirements of Regulation 9(6), ComReg is conducting, *inter alia*, a RIA in

⁸⁰ Commission Recommendation of 11/02/2003 On Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

⁸¹ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, S. I. No. 307 of 2003.

⁸² European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003, S.I No. 305 of 2003.

⁸³ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

accordance with the Ministerial Policy Direction on RIA⁸⁴. ComReg is also paying close attention to best practice, and specifically, to the RIA Guidelines issued by the Department of the Taoiseach.

- 8.10 ComReg has undertaken a market analysis of the markets for wholesale call termination on individual fixed networks (one of the markets identified in the Recommendation as having characteristics which may be such as to justify the imposition of regulatory obligations). ComReg has made the finding that the market is not effectively competitive and has designated the FNOs in Table 8.1 below with SMP in the market for call termination on their respective markets, as required under Regulation 27 of the Framework Regulations.

Table 8.1: FNOs designated with SMP in the market for wholesale voice call termination to end users on a fixed network

BT Ireland
Colt Telecom
Eircom
Magnet Communications
Ntl Ireland and Chorus
Smart Telecom
Verizon

- 8.11 As such, ComReg is obliged to impose at least one regulatory obligation on these operators in light of this finding. It is considered that the following regulatory obligations should be imposed on Eircom:

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

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

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

⁸⁴ Section 6 of the Directions by the Minister for Communications Marine and Natural Resources to the Commission for Communications Regulation under s. 13 of the Communications Regulation Act 2002, published in February 2003.

8.13 ComReg believes that the above *ex ante* regulatory obligations would be proportionate and justified on the basis of ensuring the development of a competitive communications market. The justification for imposing the above regulatory obligations on Eircom and the OAOs is detailed further below.

Options for Obligations on Eircom

8.14 The regulatory options open to ComReg to impose on Eircom (Regulations 10-14 of the Access Regulations) are as follows:

- **Access to and use of specific network facilities:** An obligation can be imposed on SMP operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, which is justified as a means of increasing competition. In terms of the Directives, this is by far the most extensively described of any of the regulatory obligations, reflecting the importance of this obligation and its central role in affecting competitive markets.
 - A potential competition concern in the call termination markets is the denial of access to facilities or the application of unreasonable terms and conditions by Eircom. In the absence of regulation, Eircom would be free to deny access to its call termination services or at the least offer such access on uncompetitive terms. While Eircom does have incentives to interconnect, especially to maintain the ubiquity of its network, ComReg is of the view that the potential for any such refusal by Eircom to provide access to termination would create such serious difficulties for its competitors competing on the retail voice market, that it is likely, at a minimum, an access obligation should continue to be imposed. It should be noted that this is not likely to have any up-front cost to Eircom.
- **Transparency & Non-discrimination:** In general, an access obligation will rarely operate as a stand alone obligation. Instead it is likely to be accompanied by a transparency obligation. Non-discrimination is also likely to accompany such an obligation as, often where access is required, vertically integrated entities are capable of acting in ways so as to leverage market power from the upstream to the downstream firm's advantage. The imposition of a non-discrimination obligation would guard against such behaviour.
 - Eircom currently publishes a full suite of reference documentation in relation to the interconnect products they provide, including termination services. However, in the absence of an enforceable transparency obligation on Eircom, there would be no guarantee that it would continue to publish a RIO and ComReg would have no means of remedying any deficiencies in the RIO as a result. In addition, the general non-discrimination obligation currently imposed on Eircom requires that third party access seekers are treated no less favourably than Eircom's internal divisions. In the absence of a non-discrimination obligation, Eircom would be free to treat access seekers less favourably than its own retail arm, thus inhibiting their ability to compete effectively at the retail level.
 - Out of the five SMP obligations available to ComReg, these two obligations are the least burdensome (apart from the obligation of transparency alone) as, together, they constitute a minimum intrusion on an SMP operator's business. It is unlikely that the imposition of an obligation of transparency would impose a high cost burden on Eircom in terms of administrative costs.

- **Accounting Separation⁸⁵:** NRAs should then consider whether sufficient information is available to ensure efficient monitoring of the non-discrimination requirement or whether additional obligations in terms of accounting separation are necessary to ensure effective compliance. In the past, it has been deemed appropriate to impose such an obligation on Eircom to ensure effective compliance with the non-discrimination requirement.
 - ComReg is of the view that an accounting separation obligation is appropriate to impose on Eircom. This obligation would not necessarily impose additional costs on Eircom as such reporting systems are already in place. While there may be some on-going costs of compliance, ComReg is of the view that these would be outweighed by the benefits of regulation in this area, to demonstrate that costs are appropriate and transparency and compliance with obligations is properly demonstrated, in addition to its importance for monitoring non-discrimination and fulfilling price control.
- **Price Control and Costs Accounting Obligations:** Where a lack of effective competition means that the operator concerned might apply excessive prices to the detriment of end users then this obligation may apply.
 - Absent regulation, the current termination market structure would appear to allow for such an outcome. In addition, a benefit of setting termination rates *ex ante* would be to provide certainty in the market in particular for operators when setting their retail prices, as the retail price is a function of the termination charge. ComReg is of the view that the current termination markets do not provide sufficient constraints to ensure that prices reflect costs and are not excessive. As stated in section 6, excessive pricing is the key competition problem in termination markets, and given Eircom’s size in the sector, and the number of calls that terminate on its network, the competition harm to allowing it to price excessively would be very high. Thus a price control remedy is considered appropriate.

8.15 These options are summarised in the table below:

<p>Option 1: Do nothing (discontinue all existing SMP obligations).</p> <p>Option 2: Impose Access obligation only.</p> <p>Option 3: Impose Access, Transparency and Non-discrimination obligations.</p> <p>Option 4: Impose Access, Transparency, Non-discrimination and Accounting Separation obligations.</p> <p>Option 5: Impose Access, Transparency, Non-discrimination, Accounting Separation and Price Control & Cost Accounting obligations.</p>
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8.16 Option 1, the “do nothing” option is primarily being included for benchmarking purposes only. Therefore it is not examined in great detail as part of this RIA because it is not envisaged that this option will be pursued in practice. To impose no

⁸⁵ The purpose of accounting separation is to provide an analysis of information derived from financial records to reflect as closely as possible the performance of parts of the business as if they were operating as separate businesses.

regulatory obligations on an undertaking designated as having SMP would mean a failure to comply with EU obligations and could result in prosecution by the European Commission.

- 8.17 In relation to the market for wholesale call termination on Eircom's network, it is considered that the obligations set out above under **Option 5** would be proportionate and justified to address the potential competition problems that could arise. ComReg again sets out the reasons here as to why it considers that these obligations continue to be necessary for this market. In choosing obligations, ComReg has taken into account the potential impact of each option (see below) on consumers, competitors and on Eircom.

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

Option 1 - Do Nothing⁸⁶			
Eircom	Competition	Consumers	Overall Impact
<p>Positive impact</p> <p>Eircom would benefit from a reduced regulatory burden. Eircom would have increased flexibility to use its market power at the wholesale level to influence market developments at the retail level.</p>	<p>Negative impact</p> <p>High risk that, absent regulation, resulting market strategy of Eircom would be to foreclose the market by charging OAOs higher termination rates than those charged to its own retail arm.</p>	<p>Negative impact</p> <p>Consumers would likely have a much reduced choice of fixed telecoms provider and significant scope for prices of fixed telecoms services to increase substantially if high termination rates were passed through.</p>	<p>Positive impact on Eircom;</p> <p>Highly negative impact on competition and consumers.</p>
Option 2 - Obligation of Access			
Eircom	Competition	Consumers	Overall Impact
<p>Positive impact</p> <p>As above.</p>	<p>Negative impact</p> <p>High risk that, even though access afforded, there would be insufficient regulation to ensure that Eircom was not adversely affecting competition through its terms and conditions of access, resulting in foreclosure of the market by charging OAOs higher termination rates than those charged to its own retail arm.</p>	<p>Negative impact</p> <p>As above.</p>	<p>Positive impact on Eircom;</p> <p>Highly negative impact on competition and consumers.</p>
Option 3 - Obligations of Access, Transparency & Non-discrimination			
Eircom	Competition	Consumers	Overall Impact
<p>Positive impact</p> <p>As above.</p>	<p>Negative impact</p> <p>High risk that there would be insufficient transparency for ComReg to ensure that competition was not adversely</p>	<p>Negative impact</p> <p>As above.</p>	<p>Positive impact on Eircom;</p> <p>Highly negative impact on</p>

⁸⁶ This option would leave ComReg open to legal challenge from the European Commission for not imposing an obligation on an SMP operator.

	affected by Eircom; and risk of excessive pricing.		competition and consumers.
Option 4 - Obligations of Access, Transparency, Non-discrimination and Accounting Separation			
Eircom	Competition	Consumers	Overall Impact
Positive impact As above.	Negative impact High risk of excessive pricing by dominant firm.	Negative impact Possible that the retail prices of making a fixed call would increase for consumers if high termination rates were passed through to retail prices.	Positive impact on Eircom; Highly negative impact on competition and consumers.
Option 5 - Obligations of Access, Transparency, Non-discrimination, Accounting Separation & Price Control & Cost Accounting			
Eircom	Competition	Consumers	Overall Impact
Negative impact Existing regulatory burden on Eircom would remain. Wholesale price cap would afford Eircom more flexibility in setting wholesale prices in response to market conditions.	Positive impact OAOs would have certainty regarding Eircom’s wholesale pricing allowing them to compete more effectively at the retail level.	Positive impact Consumers would benefit from increased choice of fixed provider and the risk of excessive pricing feeding into retail prices would be mitigated.	Negative impact on Eircom (although regulation already in place); Highly positive impact on competition and consumers.

Options for Obligations on the OAOs

8.18 The regulatory options open to ComReg to impose on the OAOs (Regulations 10-14 of the Access Regulations) are as follows:

- **Access to and use of specific network facilities:** ComReg is of the view that this obligation is necessary in Eircom’s termination market, but that it would be disproportionate to impose a requirement of access on the OAOs. This is primarily because the provisions of Regulation 6 of the Access Regulations go some way towards lessening ComReg’s concern that OAOs could unreasonably deny access. As outlined in section 4, it is also the case that commercial incentives exist to interconnect for the provision of termination services. ComReg is of the view that this will not harm end-users in the market nor will it adversely affect fixed operators in the telecommunications market.
- **Transparency & Non-discrimination:** The same arguments as outlined in relation to Eircom under paragraph 8.16 apply here.
- **Accounting Separation:** ComReg is of the view that an accounting separation obligation would be disproportionate to impose on the OAOs. ComReg is of the view that the imposition of accounting separation would involve significant additional accounts preparation requirements, review and expense which would be an excessive burden on both OAOs and ComReg considering the volume of traffic terminated by OAOs on their networks. Given the potential for abuse of

market power and the impact such an abuse might have on the market, ComReg is of the view that an obligation of accounting separation would not be proportionate or appropriate to the potential competition problems identified. ComReg is also of the view that the imposition of the price control remedy above should provide sufficient regulation to guard against the potential abuse of dominance by OAOs on their networks. In addition, the obligations of transparency and non-discrimination will ensure that operators can observe and easily compare the factors over which discrimination could take place. Transparency can assist in discouraging anti-competitive behaviour by supporting an implicit threat of regulation. While ComReg acknowledges the usefulness of imposing accounting separation for monitoring compliance with non-discrimination in relation to pricing and cost accounting, it is of the view that it would not be proportionate to impose an obligation of accounting separation on the SMP OAOs.

- **Price Control and Cost Accounting Obligations:** The same arguments as made under the point in paragraph 8.16 apply here in respect of price control of the OAOs. However, ComReg is of the view that it would not be proportionate to impose a cost accounting obligation on the OAOs as the end result can be achieved more effectively in the manner outlined in section 6. This provides for a price control obligation on the OAOs but bearing in mind the subscriber numbers and the revenues earned from termination, it would not be proportionate to impose a specific price limit on the OAOs until they have received 5% market share, or until five years has elapsed from the date of any final decision. The main justification for this approach is that the competitive harm caused by excessive pricing by a smaller operator (with, say, 2% of the total fixed-line sector) will be considerably less than the harm from excessive pricing from a much larger operator (with, say, 30%), but the direct costs of imposing the remedy may vary less. As such, the benefits of imposing a strict price control on firms with a very small share of the total fixed-line sector are likely to be small compared to the costs, and may overburden operators who may be quite small in total size, thus making it more difficult for smaller, newer firms to grow. It should be noted that this argument is stronger for the fixed sector than the mobile, as the absolute difference between the termination rates of the regulated firm and non-regulated firms in the fixed sector is considerably less than in the mobile sector.

8.19 These options are summarised in the table below:

<p>Option 1: Do nothing (maintain status quo i.e. impose no SMP obligations).</p> <p>Option 2: Impose Transparency and Non-discrimination obligations.</p> <p>Option 3: Impose Access, Transparency and Non-discrimination obligations.</p> <p>Option 4: Impose Transparency, Non-discrimination and Price Control obligations.</p> <p>Option 5: Impose Transparency, Non-discrimination, Accounting Separation and Price Control & Cost Accounting obligations.</p>

8.20 (Option 1), the “do nothing” option, which is the situation at present, is primarily being included for benchmarking purposes only. Therefore, it will not be examined in great detail as part of this RIA because it is not envisaged that this option would be pursued in practice. To impose no regulatory obligations on an undertaking

designated as having SMP, or vice versa, would mean a failure to comply with our EU obligations and could result in legal challenge by the European Commission.

- 8.21 In relation to the market for wholesale call termination on OAO's fixed networks, it is considered that the obligations set out under **Option 4** would be proportionate and justified on the basis of competition. ComReg again sets out the reasons here as to why it considers that these obligations continue to be necessary for this market. In proposing obligations, ComReg has taken into account the potential impact of each option (see below) on consumers, competitors and on OAOs.

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

Option 1 - Do Nothing⁸⁷			
OAOs	Competition	Consumers	Overall impact
<p>Positive impact</p> <p>OAOs would benefit from maintaining the status quo of no obligations. OAOs would have more flexibility than Eircom in setting prices and the potential to use their market power at wholesale level.</p>	<p>Negative impact</p> <p>Risk that excessive termination rates would be charged by OAOs to their competitors.</p>	<p>Negative impact</p> <p>Potential for high retail prices.</p>	<p>Highly negative impact on competition and consumers;</p> <p>Positive impact on OAOs.</p>
Option 2 -Obligations of Transparency & Non-discrimination			
OAOs	Competition	Consumers	Overall Impact
<p>Neutral impact</p> <p>OAOs would have lightest form of regulation imposed on them. Low cost of compliance as rates are already published and to date no discrimination on rates charged to different operators.</p>	<p>Negative impact</p> <p>High risk that even though obligation of transparency and non-discrimination, there would be insufficient regulation to ensure that each OAO was not adversely affecting competition or exercising its market power through charging higher than efficient termination rates to its competitors.</p>	<p>Negative impact</p> <p>As above.</p>	<p>Highly negative impact on competition and consumers;</p> <p>Neutral impact on OAOs.</p>
Option 3 -Obligations of Access, Transparency & Non-discrimination			
OAOs	Competition	Consumers	Overall Impact
<p>Negative impact</p> <p>With the additional obligation of Access imposed on them, OAOs would have the effect of targeting the competition problems.</p>	<p>Negative impact</p> <p>As above, as access would not address the main competition problem.</p>	<p>Negative impact</p> <p>As above.</p>	<p>Negative impact on OAOs;</p> <p>Negative impact on competition and consumers.</p>

⁸⁷ This option would leave ComReg open to legal challenge from the European Commission for not imposing an obligation on an SMP operator.

Option 4 - Obligations of Transparency, Non-discrimination & Price Control			
OAOs	Competition	Consumers	Overall Impact
<p>Negative impact</p> <p>Increased regulatory burden on OAOs. However, this would be minimised by the proposal to have a relatively less intrusive form of price control.</p>	<p>Highly Positive impact</p> <p>Customers and competitors would have certainty regarding OAO wholesale termination pricing in the market which would benefit competition at the retail level.</p>	<p>Highly Positive impact</p> <p>Consumers would benefit as it would mitigate the risk of excessive pricing feeding into retail prices.</p>	<p>Negative impact on OAOs.</p> <p>Highly positive impact on competition and consumers.</p>
Option 5 - Obligations of Access, Transparency, Non-discrimination & Price Control & Cost Accounting & Accounting Separation			
OAOs	Competition	Consumers	Overall Impact
<p>Highly Negative impact</p> <p>To impose these additional obligations on OAOs would be disproportionate as while they target the competition problem they are not at the minimum level required to achieve the desired effect.</p>	<p>Highly Positive impact</p> <p>Customers and competitors would have certainty regarding OAO wholesale termination pricing in the market which would benefit competition at the retail level.</p>	<p>Highly Positive impact</p> <p>Consumers would benefit from ensuring that the risk of excessive pricing that would feed into retail prices was mitigated.</p>	<p>Highly Negative impact on OAOs;</p> <p>Highly positive impact on competition and consumers.</p>

Views of Respondents

8.22 Only one respondent referred to ComReg’s RIA in their response. This respondent referred to their previous submission on RIA (see ComReg Document 06/69) where they highlighted the need to ensure that each RIA is comprehensive and takes account of current market conditions. In the aforementioned consultation, ComReg expressed the view that a RIA need not be conducted in cases where it is proposed by ComReg that existing regulatory measures should be kept in place. The respondent highlighted considerable risks in failing to fully review existing regulation in light of market changes over time and argued that this applies to the market in question as the Draft Decision was based on a market analysis that took place in excess of two years ago. The respondent goes on to argue that it is not appropriate to assume that the relative costs and benefits of the proposed regulation have not changed in the period since the draft decision was issued given the time lag. The respondent states that ComReg must have regard for the opportunity cost of regulation and how this can change over time. The respondent notes ComReg’s openness to revise its RIA after the initial analysis, but urges ComReg to review each of the options available, through a comprehensive RIA in order to assess whether the proposed remedies continue to be justified, necessary and proportionate relative to the alternative regulatory options.

Conclusion

- 8.23 ComReg have fully considered a range of regulatory options. In imposing obligations on the operators designated with SMP, ComReg has chosen obligations which are in line with the Better Regulation principles.
- 8.24 The obligations imposed under this market review are periodically reviewable at the end of the timeframe of the review or before this time if market conditions change sufficiently to render the findings of the current review inappropriate. ComReg is obliged to monitor developments in this market to assess whether the obligations in place remain appropriate.

Annex A: Draft Decision Instrument

1 STATUTORY POWERS GIVING RISE TO THIS DECISION INSTRUMENT

1.1 This Decision Instrument relates to the market for wholesale call termination services used to provide retail calls to end users on each public telephone network provided at a fixed location. It is a market that differs from any defined in the EU Commission’s Recommendation⁸⁸ and is made by the Commission for Communications Regulation (“ComReg”):

- i. Having had regard to sections 10 and 12 of the Act of 2002⁸⁹;
- ii. Having taken account, of its functions under Regulation 6 (1) of Access Regulations⁹⁰;
- iii. Having taken account of and assessed the proportionality of the obligations herein, relative to the objectives of ComReg set out in section 12 of the Act of 2002;
- iv. Having taken in to account the matters set out in Regulation 13 (4) of the Access Regulations;
- v. Having (where appropriate) complied with the Policy Directions made by the Minister⁹¹;
- vi. Having taken the utmost account of the EU Commission’s Recommendation and the SMP Guidelines⁹²;
- vii. Having taken account of the submissions received in relation to ComReg Document No.07/03; and
- viii. Pursuant to Regulations 25, 26 and 27 of the Framework Regulations⁹³, and Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations.

1.2 This Decision Instrument is based on the market analysis and reasoning conducted by ComReg in relation to the market for wholesale call termination services used to provide retail calls to end users on each public telephone network provided at a

⁸⁸ EU Commission Recommendation of 11 February, 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

⁸⁹ The Communications Regulation Act, 2002.

⁹⁰ The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

⁹¹ Policy Directions made by the Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

⁹² Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

⁹³ The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

fixed location, and the reasoning set out in the body of *[this decision]*, which shall be construed together with this decision instrument.

2 MARKET DEFINITION

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

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

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

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

1. BT Communications Ireland Limited;
2. Verizon;
3. Ntl Communications (Ireland) Ltd and Chorus Communications Ltd;⁹⁴
4. Colt Telecom Ireland Ltd;
5. Smart Telecom; and
6. Magnet Networks Ltd.

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

⁹⁴ UPC is the new parent company of Ntl Communications (Ireland) Ltd and Chorus Communications Ltd. Chorus, the wholly owned subsidiary of UPC, acquired Ntl in 2005. UPC (Chorus) is in the process of merging these entities. The amalgamated entity is intended to be designated with SMP by section 3.1. This is a specific illustration of the situations intended to be covered generally by section 3.2.

4 SMP OBLIGATIONS⁹⁵

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

5 EIRCOM - OBLIGATION TO PROVIDE ACCESS

5.1 Pursuant to Regulation 13 (1) of the Access Regulations, Eircom shall meet all reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities, by undertakings⁹⁶ requesting access, or use of such access products, features or additional associated facilities, included in the Market.

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

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

5.3 Pursuant to Regulation 13 (1) and 13 (2) of the Access Regulations, Eircom shall have an obligation to meet reasonable requests for access to, and use of the

⁹⁵ ComReg is legally obliged to impose ex ante SMP obligations that are appropriate, based on the nature of the problem identified, proportionate and justified in the light of the objectives set out in Article 8 of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications.

⁹⁶ In this Decision Instrument an “undertaking” has the meaning as that contained in the Framework Regulations and includes OAOS.

wholesale access products, features or additional associated facilities, which are described in:

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

6 EIRCOM - CONDITIONS ATTACHED TO ACCESS OBLIGATIONS

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

7 EIRCOM AND OAOs - OBLIGATION OF NON-DISCRIMINATION

Eircom

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

to enable those undertakings to provide end to end services which are the equivalent of those offered by the retail divisions of Eircom.

OAOs

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

8 EIRCOM AND OAOS - OBLIGATION OF TRANSPARENCY

Eircom

8.1 Pursuant to Regulation 10 (1) of the Access Regulations, in furtherance of its obligation of non-discrimination under section 7 and for the purpose of ComReg monitoring compliance with that obligation, Eircom shall, ensure that it is transparent in relation to interconnection and access in the Market.

8.2 Without prejudice to the generality of paragraph 8.1, Eircom shall:

- i. Publish on its wholesale website, and keep updated, a RIO in respect of the services and facilities referred to in section 5;
- ii. Ensure that the RIO is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested;
- iii. Ensure that the RIO includes a description of the relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices; and
- iv. Ensure that the RIO contains details of the terms and conditions of access in respect of facilities already granted.

8.3 Without prejudice to the generality of paragraphs 8.1 and 8.2, Eircom shall continue to publish the call termination schedules, prices, product descriptions and inter-operator process manuals contained in “*Core RIO document Version 3.14*” (as amended from time to time) and Eircom RIO Price List Version 1.64 (as amended from time to time)⁹⁷.

8.4 Eircom shall make public such information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the services and facilities referred to in section 5, as specified by ComReg from time to time.

8.5 Eircom shall comply with the processes developed in accordance with ComReg Decision Notice D10/02.

⁹⁷ These documents are currently published on the Eircom wholesale website www.Eircomwholesale.ie

OAOs

- 8.6 The OAOs shall publish on their websites (or make public in an easily accessible manner where no website exists), their prices and associated terms and conditions (and any amendments thereto) in respect of wholesale call termination services in the Market.
- 8.7 The OAOs shall give a minimum of 21 calendar days notice of a change in their termination rate to other operators.

9 EIRCOM - OBLIGATION OF ACCOUNTING SEPARATION

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

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

Eircom

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

OAOs

- 10.3 Pursuant to Regulation 14 (1) of the Access Regulations, the OAOs shall have price control obligations: once a OAO reaches a 5% share of the Market (as determined by ComReg in accordance with statistics to be obtained and compiled by it) of total direct access paths, it shall, from a date to be determined by ComReg, become subject to a price control obligation taking the form of a glide path towards an efficient rate. ComReg will consult on the appropriate period for such a glide path period and the appropriate level of the regulated price to be achieved by the OAO, once ComReg has determined that the OAO has reached the 5% share of the Market threshold.

- 10.4 If a OAO does not reach the 5% share of the Market of total direct access paths within a five-year timeframe, ComReg may decide to impose a price control regulation, following consultation on an appropriate glide path and an appropriate level of a regulated price to be achieved at the end of the glide path period.
- 10.5 ComReg may, issue directions to the OAOs for the purposes of establishing a glide path and setting regulated prices for the OAOs.

11 STATUTORY POWERS NOT AFFECTED

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

12 EFFECTIVE DATE

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

MIKE BYRNE
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
DATED THIS THE ● DAY OF ● 2007

Annex B: Notification of Draft Measures Pursuant to Article 7(3) of the Directive 2002/21/EC

Under the obligation in Article 16 of the Directive 2002/21/EC, ComReg has conducted an analysis of the markets for wholesale voice call termination to end users located on individual networks at fixed locations.

In accordance with Article 6 of the Directive 2002/21/EC, ComReg has conducted a national consultation, contained in ComReg Document 07/03. This consultation ran from 19 January 2007 to 16 March 2007. The responses to this consultation have been taken into consideration and ComReg has now reached decisions in relation to market definition, designation of SMP and imposition/withdrawal of regulatory obligations, which are contained in ComReg Document 07/83.

ComReg hereby notifies the Commission of its proposed remedies and obligations in accordance with Article 7(3) of Directive 2002/21/EC. These remedies and obligations are set out in the attached summary notification form. Under Regulation 27(1), ComReg is required to liaise with the Competition Authority in its definition and analysis of markets. ComReg has consulted with the Competition Authority in relation to its findings on the markets for wholesale voice call termination and provided the Competition Authority with a summary of these findings. The Competition Authority considered these findings, discussed them with ComReg and concluded that they were appropriate.

Section 1 - Market Definition

Please state where applicable:

1.1	The affected relevant product/service market (s). Is this market mentioned in the Recommendation on relevant markets?	ComReg proposes to define the following markets: • Call Termination to End Users on Individual Fixed Networks. The above market is mentioned in the Recommendation.	Pages 11-24
1.2	The affected relevant geographic market (s)	Ireland.	Page 24
1.3	A brief summary of the opinion of the national competition authority where provided;	The Competition Authority considered ComReg's findings and following discussions with ComReg concluded that they were appropriate in relation to the market definition exercise.	
1.4	A brief overview of the results of the public consultation to date on the proposed market definition (for example, how many comments were received, which respondents agreed with the proposed market definition, which respondents disagreed with it)	Three responses to the consultation were provided by: • BT Ireland Ltd., • Eircom Ltd., and • Vodafone Ltd. There was general agreement among respondents on the analysis and	

		conclusions reached. While one respondent disagreed with the market definition exercise for the markets, no robust alternative market definitions were put forward, overall the proposed conclusions remained unchanged after the consultation.	
1.5	Where the defined relevant market is different from those listed in the recommendation on relevant markets, a summary of the main reasons which justified the proposed market definition by reference to Section 2 of the Commission’s Guidelines on the definition of the relevant market and the assessment of significant market power ⁹⁸ , and the three main criteria mentioned in recitals 9 to 16 of the recommendation on relevant markets and Section 3.2 of the accompanying Explanatory Memorandum ⁹⁹ .	Not Applicable.	

Section 2 - Designation of undertakings with significant market power

Please state where applicable:

2.1	The name(s) of the undertaking(s) designated as having individually or jointly significant market power. Where applicable, the name(s) of the undertaking(s) which is (are) considered to no longer have significant market power	The following operators are designated as having SMP in the market for wholesale call termination to end users on their respective networks: <ul style="list-style-type: none"> • BT Ireland, • Colt Telecom, • Eircom, • Magnet, • Ntl and Chorus¹⁰⁰, • Smart Telecom, and • Verizon. 	Page 39
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⁹⁸ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications and services, OJ C 165, 11.7.2002, p. 6.

⁹⁹ Commission Recommendation of 11.2.2003 on Relevant Product and Service Markets with the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for ECNs and ECSs, C (2003) 497

¹⁰⁰ UPC is the new parent company of Ntl Communications (Ireland) Ltd and Chorus. Chorus, the wholly owned subsidiary of UPC, acquired Ntl in 2005. UPC (Chorus) is in the process of merging these entities. The amalgamated entity is intended to be designated with SMP. All references to Ntl should be taken to refer to the amalgamated entity controlled by UPC (Chorus).

2.2	The criteria relied upon for deciding to designate or not an undertaking as having individually or jointly with others significant market power	<ul style="list-style-type: none"> • Market Share; • Lack of existing competition; • Barriers to entry and potential competition; and • Absence of or low countervailing buyer power. 	Pages 26-38
2.3	The name of the main undertakings (competitors) present/active in the relevant market.	Not Applicable.	
2.4	The market shares of the undertakings mentioned above and the basis of their calculation (e.g., turnover, number of subscribers)	Each fixed network operator (identified in 2.1 above) has 100% market share of wholesale termination to end users on its network. It is not possible for any operator other than the operator controlling the network terminating point to a particular end user and geographic number to terminate calls to that end user.	Pages 28-29

Please provide a brief summary of:

2.5	The opinion of the national competition authority, where provided	The Competition Authority considered ComReg’s findings and following discussions with ComReg concluded that they were appropriate in relation to the market analysis exercise.	
2.6	The results of the public consultation to date on the proposed designation(s) as undertaking(s) having significant market power (e.g., total number of comments received, numbers agreeing/disagreeing)	<p>Three responses to the consultation were provided by :</p> <ul style="list-style-type: none"> • BT Ireland Ltd., • Eircom Ltd., and • Vodafone Ltd. <p>There was general agreement among respondents on the analysis and conclusions reached. While one respondent disagreed with the market analysis findings, arising from the market definition exercises as noted above, overall the proposed conclusions remained unchanged after the consultation.</p>	

Section–3 - Regulatory Obligations

Please state where applicable:

3.1	The legal basis for the obligations to be imposed, maintained, amended or withdrawn (Articles 9	The following obligations are proposed for Eircom in the market for fixed call termination on its own network:	Pages 54-87
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	to 13 of Directive 2002/19/EC (Access Directive))	<p>Under the Access Regulations which transpose Articles 9 to 13 of Directive 2002/19/EC (Access Directive):</p> <ul style="list-style-type: none"> • Transparency – Regulation 10, • Non-discrimination – Regulation 11, • Accounting Separation – Regulation 12, • Access to, and use of, specific network facilities – Regulation 13, and • Price Control and Cost Accounting – Regulation 14. <p>In the case of BT Ireland, Colt Telecom, Magnet, Ntl and Chorus, Smart and Verizon, the following obligations are proposed in the markets for fixed call termination on their respective networks:</p> <ul style="list-style-type: none"> • Transparency – Regulation 10, • Non-discrimination – Regulation 11, • Price Control– Regulation 14. 	Pages 46-54
3.2	The reasons for which the imposition, maintenance or amendment of obligations on undertakings is considered proportional and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found	Such information can be found in sections 6, 7 and 8 of this document.	Pages 40-100
3.3	If the remedies proposed are other than those set out in Articles 9 to 13 of Directive 2002/19/EC (Access Directive), please indicate which are the ‘exceptional circumstances’ within the meaning of Article 8(3) thereof which justify the imposition of such remedies. Alternatively, indicate the paragraphs, sections or pages of the draft measure where such information is to be found	Not Applicable.	

Section–4 - Compliance with international obligations

In relation to the third indent of the first subparagraph of Article 8(3) of Directive 2002/19/EC (Access Directive), please state where applicable:

4.1	Whether the proposed draft measure intends to impose, amend or withdraw obligations on market players as provided for in Article 8(5) of Directive 2002/19/EC (Access Directive)	Not Applicable.	
4.2	The name(s) of the undertaking(s) concerned	Not Applicable.	
4.3	Which are the international commitments entered by the Community and its Member States that need to be respected	Not Applicable.	

Annex C: Glossary of Terms

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

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

Annex D: Wholesale Price Cap

- 1.1. In section 6 of ComReg Document 07/03, ComReg asked whether operators think now a good time to consider in detail the move to a wholesale price control remedy. A wholesale price control would be necessary for the same reasons as the current price controls in place, to reduce the risk of excessive prices and would also serve to increase the incentive for the incumbent to operate efficiently. ComReg originally raised and discussed this issue in ComReg Document 03/16.¹⁰¹ In the response to the initial interconnection consultation paper (ComReg Document 03/16), a majority of respondents expressed a desire to move the current pricing mechanism from a yearly review to a forward looking price cap regime.
- 1.2. As explained previously in the consultation document the regime to date has involved an annual review of the Eircom Top Down (“TD”) model subsequent to the publication of the Eircom Current Cost and Separated Accounts at the end of September. Operators will pay interconnection rates based on an interim basis during the actual billing period. Where the actual rates arrived at subsequent to the relevant billing period is materially different to the interim rates paid, this may give rise to a “balancing” charge or payment depending on the profile of the traffic carried over the Eircom network by each operator.
- 1.3. While this process has worked well over the past number of years (as is evident from the take up of CPS and WLR products), it has some disadvantages. The annual review has on occasion been time consuming and slow and both OAOs and the incumbent have complained about the consequent uncertainty. A wholesale price cap (“WPC”) for a predetermined future period would be seen as a mechanism which could add the desired certainty and stability to the interconnect market in the coming years.
- 1.4. Currently the main control in place that prevents excessive pricing and protects consumers is the obligation of cost-orientation.
- 1.5. ComReg has completed a full analysis of the Termination interconnection markets to determine if Eircom can act to an appreciable extent independently of its competitors and customers. It concludes that competition in these relevant markets does not yet appear effective. The main concern arising from a finding of SMP in interconnect markets is the ability of Eircom, identified as an SMP provider, to set and/or maintain prices at a level higher than they would be if competition were effective. In the absence of competitive pressure, a firm with market power will be able to sustain prices above cost to the detriment of competition.
- 1.6. A price cap on fixed interconnection markets would constitute a remedy flowing from Regulation 14 of the Access Regulations. In summary, the principal objectives for a price cap should be:
 - To ensure that the prices charged by dominant operators to all other operators are brought closer to competitive prices than they would be in the absence of price controls;
 - That only efficient costs of providing the interconnect services are recovered plus the regulated rate of return;

¹⁰¹ ComReg (2003) Consultation Paper on Fixed Interconnection Charging Mechanisms, Document No. 03/16.

- To encourage the rapid development of effective competition in the supply of telecommunications services; and
 - To achieve the above by the least intrusive means.
- 1.7. On the basis of the market analysis, ComReg believed it was appropriate to consult on the possibility of applying a WPC in the interconnection markets in order to determine the most appropriate and proportionate regulatory response as a result of any SMP designation that might be made following the interconnection market consultation.
- 1.8. ComReg considers that some form of a WPC measure is now appropriate when setting interconnection rates based on the Eircom core network charges.

Application of a Wholesale Price Cap Cost model

- 1.9. In order to implement a WPC it is necessary to agree on the correct basis for setting interconnect rates and to agree on the appropriate cap to be applied to those rates over an agreed period.
- 1.10. In order to decide on the correct basis it is necessary to consider the pricing mechanism appropriate to arrive at forward looking interconnection rates. To date a Top Down (“TD”) Forward Looking LRIC approach has been adopted. The TD modelling approach is based on the Current Cost Accounts (“CCA”) - Separated accounts of Eircom, these accounts can be seen on the Eircom website under Regulatory Information.¹⁰² The most recent year, 1 April 2005 to 31 March 2006 was published on the 30 September 2006. These accounts are then fed into a TD model and following the modelling process the final interconnect rates are arrived at and are then published on the Eircom RIO price list schedules 102, 103 and 104. ComReg however must review the Eircom model for cost orientation prior to approving the final rates.
- 1.11. In January 2005 ComReg undertook a significant project to develop an in-house Bottom Up (“BU”) model of the Eircom Core network in order to get a forward looking view of the potential implications of setting interconnect rates for the coming years based on forecast costs and volumes. ComReg has now completed this project and a final BU model of the Eircom Core network is available to use for reviewing or setting forward looking rates for the purposes of a WPC.
- 1.12. ComReg would acknowledge that there are inherent uncertainties of cost modelling (both TD and BU) and the resultant implications for prudent decision taking. The majority of inputs to the BU model are sourced from Eircom, however ComReg have used external benchmarks in the BU modelling process and expert opinion in some instances where considered more appropriate. ComReg is of the view that basing modelling on the actual costs and network configuration/utilisation of the operator whose network was being modelled is not the only way to avoid bias. It is commonly accepted practice when modelling a network that all reasonable endeavours should be made to ensure potential bias is limited through research and comparison within the telecoms industry. However, ComReg is of the view that in order to build a robust BU model which is not biased towards the actual costs of the incumbent other costs must be looked at to get an objective view. Following on from

¹⁰² http://www.Eircom.ie/bvEircom/pdf/2006_cca_lric.pdf

an operator response to the initial consultation ComReg is of the view that it is not the case that the mere presence of uncertainties renders the cost modelling exercise worthless. The use of forward looking cost estimates based on LRIC are very important tools to regulators when trying to assess the overall reasonableness of the incumbent's efficient cost base. ComReg has striven to reach a balance between the complete use of the actual costs and network configurations/utilisation of the incumbent by looking at other jurisdictions and taking a reasonable view of costs where appropriate.

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

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

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

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

1.15. Price cap type regulation of the format $CPI+/-X$ has the merit of providing visibility of prices over an extended period and also of giving the incumbent an extra incentive in that it knows it can keep the benefits of over-achieving unit cost changes year on year. OAOs on the other hand, assuming reasonable efficiency improvements and

volume growth, may have real price reductions over the time frame of the cap. The financial forecasts used to facilitate the setting of X would use the LRIC costing methodology. However all of these factors will require careful consideration by Eircom/ComReg in the modelling process, whichever one is adopted.

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

- **Duration:** A longer price cap period increases certainty, increases the incentive to the incumbent and is administratively simpler. On the other hand it also increases the risk that prices will not be cost oriented at the end of the period.
- **Structure and flexibility:** Retail price caps usually allow the incumbent some flexibility in terms of an overall price basket target. This may be restricted by the use of individual service sub caps. In general, the greater the flexibility for Eircom in setting rates, the greater the uncertainty for OAOs. In this case a decision will need to be made as to whether each individual service (origination, termination and transit) is capped separately or whether some form of basket – possibly with sub caps - would be allowed.
- **New Technology:** Because of the lengthened duration of the control period it is possible that new technology may have a significant impact on interconnection – for example IP based networks. This will need to be addressed.
- **The appropriate index for price control:** The consumer price index has been used as part of the formula to determine retail rates. A decision will be required to establish if this is also appropriate for wholesale rates such as interconnection.
- **Initial Rates:** ComReg is of the preliminary view that opening rates should be the current rates in place and that changes should be phased in by way of glide paths. However some step change adjustments cannot be ruled out entirely, depending on the outcome of detailed modelling work.
- **The relationship to the retail price cap** would be critical both in terms of timing and duration and in terms of permitted price movements.
- **The extent to which Eircom would still be required to submit detailed periodic cost submissions.** ComReg would continue to monitor annual actual results against the costs recovered by the incumbent under the price cap regime.

a) Wholesale Price Cap

1.17. Respondents were asked whether they foresee any particular difficulties with moving to a WPC regime given the current and possible future changes in the proposed regulated interconnection markets. Respondents were also asked what is the most appropriate modelling approach to take when modelling the core network, current network technology, complete NGN roll out or a hybrid approach of old and new.

Views of Respondents

1.18. With regard to whether operators foresaw any particular difficulties with moving to a WPC regime, one of the respondents agreed that a WPC regime would indeed be appropriate for the coming period. It further added that the combined complexity of the migration from the current TDM network towards an IP network indicate that the

annual setting of prices using a rate-of-return approach applied to a model of Eircom's reported costs was no longer sustainable. A second respondent also expressed its agreement with the move towards a WPC regime. It commented that there are likely to be some challenges due to Eircom's recent announcement on NGN and the eventual timelines associated with such deployment. The third respondent believed that the principal issue faced by ComReg would be to set a value of 'X' in a CPI-X price cap format that allowed for cost recovery and full recovery of the cost of capital while also approximating to the costs of an efficient operator in the context where two generations of technology were being simultaneously maintained by the SMP operator. It added that extensive discussions with industry stakeholders would be necessary and data from Eircom's separated accounts would serve as a useful starting point. The respondent suggested that use of data from independent academic and international sources wherever possible would maximise the probability of developing a price control that encouraged innovation and investment while also properly focusing on the costs of an efficient operator rather than the actual costs of SMP undertakings.

- 1.19. In relation to the most appropriate modelling approach to take when modelling the core network, two of the respondents considered that a hybrid model would be the most appropriate modelling approach to take. One of these respondents highlighted that ComReg should carefully assess the merits of applying an overall price cap, with few or no sub caps given that flexibility would permit the operator of both the legacy network and the NGN to optimally adjust prices in response to the evolution of traffic volumes and associated underlying costs over the period for which a price cap was in force. The third respondent believed that it may be too early to make a call on this as ComReg intervention into the NGN deployment debate has only just commenced. It believed that it would not be reasonable for NGN rollout to happen over the next two years and it therefore was of the view that the WPC could be based on the current network technology only.

ComReg's Position and Conclusion

- 1.20. ComReg notes all issues raised by respondents above with regard to particular difficulties with moving to a WPC. ComReg propose to take these issues into account in terms of finalising a WPC.
- 1.21. In relation to consideration of a modelling approach, ComReg is of the opinion that it will use the most appropriate model which will be considered by ComReg and Eircom in conjunction with all available expert advice on the most appropriate modelling approach to take.
- 1.22. ComReg will establish a WPC based on an appropriate model to be considered by ComReg and Eircom with input from industry where appropriate, with a view to agreeing on final interconnection rates as soon as possible on a forward looking basis.

b) Process

- 1.23. Respondents were asked if they agreed that Eircom and ComReg should enter into bi-lateral discussions on agreeing the most appropriate basis for a WPC to arrive at final rates for publication once agreement is reached, in the interests of reaching a WPC in a timely and efficient manner.

Views of Respondents

1.24. All three respondents believed that Eircom and ComReg should enter into bi-lateral discussions on agreeing the most appropriate basis for a WPC to arrive at final rates for publication once agreement was reached.

ComReg's Position and Conclusion

1.25. On the basis that there is agreement by industry to move to a WPC, ComReg believes that the process involved in establishing such a cap should take place immediately. This process may take some time due to the complexities involved taking the existing BU Core model from its traditional make up to what is forecast over the timeframe of the review. Substantial resources in both Eircom and ComReg will be required to arrive at interconnection rates that are appropriate to the market over the timeframe of the price cap.

1.26. Eircom and ComReg will enter into bi-lateral discussions on agreeing the most appropriate basis for a WPC to arrive at final rates for the price cap period. Input from industry will be sought throughout the process.

c) Base year

1.27. Respondents were asked if they agreed that the year 2005/06 was the most appropriate base year on which to base a price cap setting model.

Views of Respondents

1.28. All respondents agreed that the year 2005/06 was the most appropriate period on which to base a price cap setting model. One of the respondents however raised the point that in the event that the publication of a finalised WPC approach was delayed beyond October 2007, then 2006/07 would be the most appropriate base year to use.

ComReg's Position and Conclusion

1.29. As the most recently available data to ComReg is 2005/06 it seems appropriate to use this data as the basis for the price cap setting model. However in the event that time does elapse and more recent audited accounts are available all relevant information will be taken into account.

1.30. The most appropriate base year on which to base a price cap setting model is 2005/06 subject to substantial progress being made in 2007.

d) Time frame

1.31. Respondents were asked what would be the most appropriate time frame over which the price cap should be effective: two, three or four years.

View of Respondents

1.32. All of the respondents had different views in terms of the most appropriate time frame over which the price cap should be effective. One of the respondents believed that a two year period would be appropriate as it believed that the gap between the true costs and the price cap may become too wide over a longer time frame. A second respondent believed that a cap of three to five years would be appropriate on the basis that this would allow a reasonable share of efficiency gains to be retained and to allow for a reasonable prospect of out-performance to promote efficient

operations. A third respondent would favour a price cap for a period of at least four years as this time period would provide the greatest incentives for the SMP operator to innovate and improve efficiency.

ComReg's Position and Conclusion

1.33. ComReg believe that it is necessary to carry out significant research and forecasting work prior to making a decision on the appropriate timeframe. This work will be undertaken as soon as possible with Eircom in order to take a view on what is a reasonable period that does not hold too much uncertainty.

1.34. ComReg will decide on the most appropriate timeframe over which the price cap should be effective during the course of the preparatory work with Eircom.

e) Use of Consumer Price Index

1.35. Respondents were asked if they agreed that the Consumer Price Index (“CPI”) should be used in setting “X” when arriving at the annual adjustment to most recent finalised interconnection rates.

Views of Respondents

1.36. All of the respondents agreed that the CPI should be used in setting ‘X’ when arriving at the annual adjustment to most recent finalised interconnection rates. One respondent added that the key question is the level of the X in the CPI-X wholesale price cap formula and that it must be sufficient to induce Eircom to be efficient and to continue to improve its efficiency.

ComReg's Position and Conclusion

1.37. As there is industry consensus on CPI and on the basis that CPI is the most widely publicised and monitored metric of changes to general price levels in Ireland it therefore appears reasonable that this is the most appropriate index to use in setting ‘X’ when arriving at the annual adjustment to the most recent finalised interconnection rates.

f) Use of Consumer Price Index

i. Treatment of interconnect rates

1.38. Respondents were asked whether they agree that all interconnect rates presented in the table 102/103/104 in the Eircom RIO price list should be treated separately when applying the CPI+/-W control within the overall core network cost basket.

Views of Respondents

1.39. Two of the respondents believed that an overall/single CPI+/-X was appropriate. One of these respondents added that ComReg should forbear from imposing sub-caps on individual interconnect products as sub caps removed flexibility and risked fostering an inefficient price structure where market conditions changed in ways that were not readily foreseeable. The other respondent suggested that such tables as NTC retention rates in the RIO price list should also be included within the scope of the WPC. A third respondent agreed that the different interconnect rates should be treated separately when applying the price cap within the overall core network.

ComReg's Position and Conclusion

1.40. ComReg has noted the responses above and will consider these in determining whether an overall price cap or sub caps are most appropriate.

ii. Rate of return

1.41. Respondents were asked whether the current rate of return allowed (11.5%) was still appropriate or should a more up to date study be carried out in light of the changing telecoms environment.

Views of Respondents

1.42. One respondent agreed that a more up-to-date study should be carried out in light of changes in the telecoms environment. A second respondent believed that the rate of return should be benchmarked and potentially reviewed on a periodic basis. The third respondent commented to the effect that it would not comment on its current allowed rate of return but will provide relevant information or data that ComReg require from Eircom to progress its cost of capital review.

ComReg's Position and Conclusion

1.43. ComReg is currently carrying out a review on the rate of the return based on changes since the current rate was last set. The outcome of this review will be incorporated into the WPC.

iii. Other interconnect services

1.44. Respondents were asked whether other interconnect services such as FRIACO, NEHO, NTCs etc, which are included in the Eircom RIO price list, should also be subject to the WPC for the same period.

Views of Respondents

1.45. All three respondents agreed. One respondent commented that NTCs is one particular product that could be suitable for such a cap however it pointed out that NEHO is not an Eircom interconnect rate, rather only applied to BT Ireland and therefore would not be appropriate for such treatment. Another respondent believed that ComReg should implement an overall CPI-X and should where feasible forebear from imposing sub-caps on individual interconnect products. It further added that it believed that the above services should be included within the overall cap.

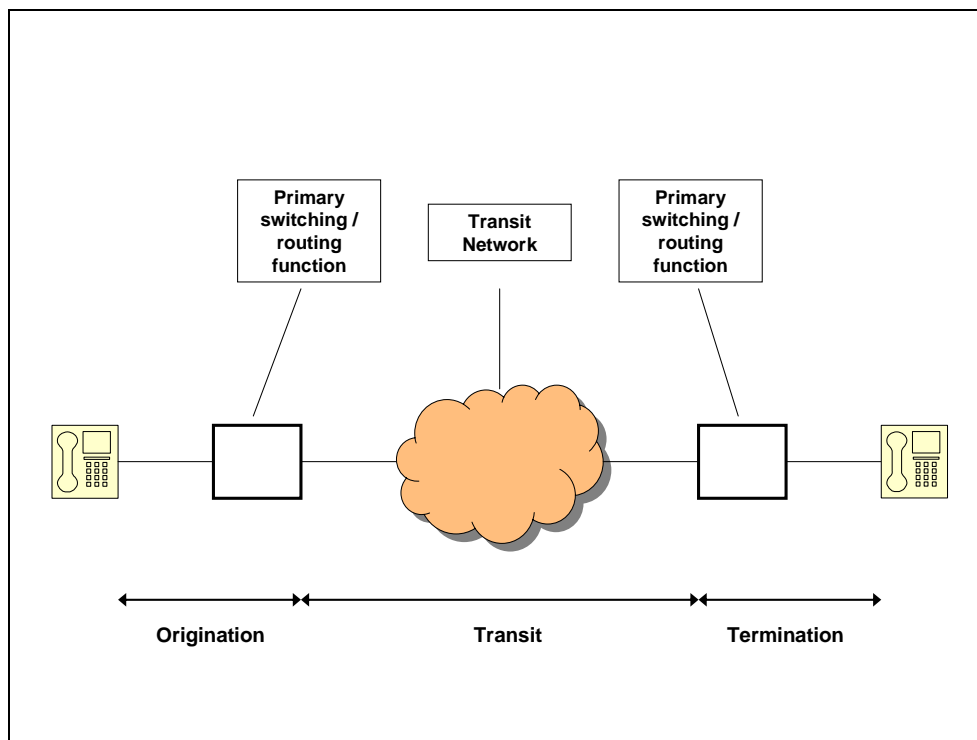
ComReg's Position and Conclusion

1.46. ComReg will decide during the course of the preparatory work for the price cap on the suite of services that should be included. All appropriate interconnection products and services will be included in the price cap to allow as much certainty in the market as possible. This list will be published once all aspects of the price cap is finalised.

Annex E: Interconnection Services

Interconnection refers to the combination of origination, transit and termination services. The boundaries between call origination, call termination and transit are illustrated below:

Figure 3.1: Structure of Interconnection Markets in Ireland



Origination services provide primary switching/routing functionality at the originating end of a call. It incorporates carriage from the service provider's end of the end-user's local loop (which loop includes the subscriber's line card, in its entirety), through the primary switching/routing stage (including, where appropriate, traffic concentration and/or non-call-by-call routing prior to the primary switching/routing stage), to the next stage in the call switching/routing (either call termination or call transit).

Transit conveyance comprises all elements of national call routing that take place between call origination and call termination with the exception of any switching/routing stage that, for the call in question, undertakes a function not typically associated with simple call routing.

Termination services provide primary switching/routing functionality at the terminating end of a call. It incorporates carriage from the end of the previous stage in the call routing (either call origination or transit), through the primary switching/routing stage (including, where appropriate, traffic concentration and/or non-call-by-call routing subsequent to the primary switching/routing stage), to the end-user's local loop, including the subscriber's line card, in its entirety. The primary switching/routing stage is the final point in the network where call routing is done on a call-by-call basis.

Annex F: Other SMP Criteria

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

SMP Criteria	Relevance to SMP Assessment	Relevance to Termination market
Market shares	Market shares are not on their own determinative of SMP but are a useful starting point for defining instances where SMP is more likely to arise. It is clear from EU jurisprudence that concerns about SMP are more likely to arise where a large market share is held over time.	This criterion is relevant because the wholesale termination market is characterised by very high market shares which have persisted over time.
Barriers to entry	Barriers to entry are factors that prevent or hinder undertakings from entering a specific market. They generally comprise any disadvantage that a new entrant faces when entering a market that incumbents do not currently face. Entry barriers may result, for instance, from a particular market structure (structural barriers).	This criterion is relevant as in this market the infrastructure required to enable other providers to offer termination on a specific network, apart from the provider of that network, is not available nor is it replicable in the timeframe of the review.
Sunk costs	Sunk costs are costs which must be incurred in order to enter a market and which are not recoverable on exiting the market.	This criterion is of less relevance as call termination to a particular end user is not replicable during the timeframe of the market review, irrespective of costs of entry.
Control of infrastructure not easily duplicated	This indicator refers to a situation in which certain infrastructure is: <ul style="list-style-type: none"> • Necessary to produce a particular product/service, • Exclusively or overwhelmingly under the control of a certain undertaking, and • There are high and non-transitory barriers to substituting the infrastructure in question. 	This criterion is relevant as it is clear that call termination to a particular end user is not replicable during the timeframe of the market review and wholesale termination access infrastructure is necessary to provide wholesale call termination and retail call services.
Economies of scale	Economies of scale arise when increasing production causes average costs (per unit of output) to fall. By producing above the level that a new entrant might be able to produce at, the incumbent can ensure lower unit costs than the entrant. Where economies of scale are large and/or barriers to expansion exist, the new entrant's expected profit from being in the market may fail to cover its sunk costs and entry may be deterred.	This criterion is of less relevance in this market as the presence of absolute barriers to entry indicates that no operator would be facing potential competition, so cost advantages are of less relevance in this market.
Economies of scope	Economies of scope exist where average costs for one product are lower as a result of it being produced jointly with other products by the same firm. If the presence of economies of scope requires that entrants enter more than one market	This criterion is of less relevance in this market as the presence of absolute barriers to entry indicates that no operator would be facing potential competition, so cost advantages are of less relevance in this market.

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

	saturated markets, where customers are already locked in with a certain supplier and have to be induced to switch.	competition and competition in the market for termination is not likely to expand beyond the fixed operator in question.
Absence of or low countervailing buying power	The existence of customers with a strong negotiating position, which is exercised to produce a significant impact on competition, can potentially restrict the ability of providers to set their prices and/or other commercial terms independently of their customers.	This criterion is relevant in this market. The EU Explanatory Memorandum to its Recommendation on Market Definition sets out that even a 100% market share in itself does not automatically imply that the undertaking in question has SMP. This is because an undertaking's ability to act independently depends, among other things, on the ability of its customers to influence its pricing decisions.
Evidence from behaviour and performance	According to the OFT Market Power Guidelines, an undertaking's conduct in a market or its financial performance may provide evidence that it possesses market power. While high prices or profits alone are unlikely to be sufficient proof that an undertaking has SMP, when considered with other factors, prices that are consistently above an appropriate measure of cost, or returns that are persistently high relative to those that would prevail in a competitive market, may suggest the existence of market power.	This additional criterion is of relevance but it should be noted that excessive pricing is not a prerequisite for a finding of SMP. However, an analysis of pricing can indicate whether any external competitive pressures induced fixed operators to reduce their charges and so whether they have the ability to act independently of their competitors and/or consumers in practice.