



Commission for
Communications Regulation

Response to Consultation & Notification to
European Commission

**Response To Consultation on Remedies and Notification
to European Commission–Wholesale Voice Call
Termination on Individual Mobile Networks**

(Relates to Consultation on Remedies –Wholesale Voice Call Termination on Individual Mobile Networks Document 04/62b and Response to Consultation and Notification to European Commission Document 04/62a)

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All responses to the draft decision should be clearly marked “Reference: Submission re ComReg 05/51” as indicated above, and sent by post, facsimile, e-mail or on-line at www.comreg.ie (current consultations), to arrive on or before 5.30 pm 3 August 2005, to:

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Please note that ComReg will publish all respondents submissions, subject to the provisions of ComReg’s guidelines on the treatment of confidential information-ComReg 05/24

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Contents

1	Executive Summary	2
2	Introduction	4
	<i>Process to Date.....</i>	<i>4</i>
	<i>Structure of this Document.....</i>	<i>4</i>
3	Proposed Market Remedies	6
	<i>Remedies Available in the Access Regulations.....</i>	<i>6</i>
	<i>Proposed Remedies.....</i>	<i>7</i>
4	Consultation Issues-Background to the Proposed Remedies.....	9
	<i>The Nature of the Potential Competition Problems.....</i>	<i>9</i>
	<i>ComReg's Objective.....</i>	<i>15</i>
	<i>Principles to be applied when selecting remedies.....</i>	<i>16</i>
5	Consultation Issues-Proposed Remedies	19
	<i>Forbearance.....</i>	<i>19</i>
	<i>Using Costs of an efficient operator to set a uniform target voice call termination charge</i>	<i>21</i>
	<i>Proportionality of remedies on the smaller operators</i>	<i>24</i>
	<i>Proposed Access Remedy.....</i>	<i>26</i>
	<i>Proposed Transparency Remedy.....</i>	<i>29</i>
	<i>Proposed Non-discrimination Remedy.....</i>	<i>32</i>
	<i>Proposed Price Control Remedy.....</i>	<i>37</i>
	<i>Calculating Termination Rates.....</i>	<i>40</i>
	<i>Proposed Supporting Remedies.....</i>	<i>42</i>
	<i>Conclusion on Market Remedies</i>	<i>46</i>
6	Proposed Implementation of Cost Orientation Obligation.....	48
	<i>Proposed Cost-orientation obligation effective until September 2005.....</i>	<i>48</i>
	<i>Proposed Cost-orientation obligation effective after September 2005.....</i>	<i>49</i>
7	Regulatory Impact Assessment.....	58
	Appendix A – Proposed Decision on Voice Call Termination Remedies.....	60
	Appendix B – Notification of Draft Measures Pursuant to Article 7 (3) of the Directive 2002/21/EC	655

1 Executive Summary

1.1 This document is the response to consultation on the proposed remedies for operators with SMP in the market for wholesale voice call termination on each individual mobile network (Consultation on Remedies- voice call termination on individual mobile networks, ComReg Doc No. 04/62b). The consultation document followed the market analysis process and outlined the nature of the potential competition problems identified, given that Vodafone, O₂, Meteor and ‘3’ had been designated as having significant market power (SMP, equivalent to dominance in competition law terms) in the wholesale market for the termination of voice calls on their network in the Republic of Ireland. The document also consulted on what principles ComReg would apply when selecting the appropriate remedies and the detail of the proposed remedies.

1.2 ComReg is obliged to impose at least one obligation listed in Regulations 10 to 14 inclusive of the Access Regulations¹ which are as follows:

- Obligation of Transparency (Regulation 10)
- Obligation of Non-discrimination (Regulation 11)
- Obligation of Accounting Separation (Regulation 12)
- Obligation of Access to, and use of, specific network facilities (Regulation 13)
- Obligation of Price Control and Cost Accounting Systems (Regulation 14)

1.3 ComReg believes that it is appropriate, justified and proportionate to impose the following obligations, as summarised in the table below, on the SMP operators, Vodafone, O₂, Meteor and ‘3’:

SMP MNO	Access	Transparency	Non-discrim	Cost Orientation	Cost Accounting Systems	Accounting Separation
Vodafone	✓	✓	✓	✓	✓	✓
O ₂	✓	✓	✓	✓	✓	✓
‘3’	✓	✓	✓	✓		
Meteor	✓	✓	✓	✓		

1.4 ComReg believes that competition problems may arise in this market because each SMP MNO has 100% market share for termination of calls on their respective networks. There are insufficient constraints on the SMP MNOs to ensure that they do not leverage this market power by setting excessive prices or behaving in an

¹ Regulation 9 (1) of S.I. 305 of 2003.

anti-competitive manner. This could result in, for example, higher end-user prices for both fixed to mobile calls (F2M) and mobile to mobile off-net calls (M2M). Low on-net charges, relative to off-net, may also give rise to barriers to entry for new entrants or indirect access operators by giving mobile operators with a high subscriber base a potential competitive advantage in attracting or retaining customers. Or alternatively, by giving them the potential to leverage market power to increase the costs of competing retail services.

- 1.5 ComReg aims to ensure that voice call termination charges are set at efficient levels and to impose obligations that will provide for sustainable competition and greater predictability and legal certainty over voice call termination rates. An efficient level in this context means a rate that fulfils the obligation of cost orientation. ComReg will set any rate to balance objectives or issues such as sustainable competition and the lowest cost operator.
- 1.6 ComReg is imposing the obligations of price control based on cost orientation on all SMP operators. A first step in the process of moving towards a cost oriented rate will be the publication of a consultation on accounting separation (to apply to Vodafone and O2). ComReg will ultimately follow this by the collection of cost data for cost modelling and a consultation on a cost oriented price/or prices. In the meantime ComReg will also impose a price ceiling at current mobile termination rates and ComReg will monitor the market to ensure that Irish mobile termination rates benchmark below EU averages.
- 1.7 ComReg believes that the obligations it is imposing are appropriate and justified to remedy the competition problem. They are also proportionate as the benefits that result from ensuring that SMP MNOS do not price voice call termination charges excessively will ultimately be of benefit to end-users.
- 1.8 This document is the response to the consultation document in relation to the proposed remedies above. ComReg welcomed all comments received from interested parties on the questions posed in the consultation on remedies and has considered these comments in coming to its conclusions on the implementation of the proposed remedies.
- 1.9 As required by Regulation 20 of the Framework Regulations, ComReg is now making the draft decision accessible to the European Commission and the national regulatory authorities of other member states of the European Community prior to making a final decision. ComReg is also seeking views from interested parties on the draft decision contained in Appendix A.

2 Introduction

Process to Date

- 2.1 In October 2003 ComReg issued a market analysis consultation paper on ‘Wholesale mobile call termination on individual mobile networks, (ComReg Doc. No. 03/127), in accordance with the Recommendation by the European Commission on relevant product and service markets (“the Relevant Markets Recommendation”²).
- 2.2 ComReg issued the response to consultation and notification in June 2004 (ComReg Doc. No. 04/62a). Pursuant to Article 7 (3) of the Framework Directive, the EU Commission commented on the ComReg notification (ComReg Doc. No. 04/62a) on 14 July 2004.³ The EU Commission had no comment on ComReg’s definitions of the wholesale voice call termination markets or on its subsequent analysis and findings of SMP.
- 2.3 In August 2004 Vodafone, O₂, Meteor and ‘3’ were each designated as having SMP on the wholesale markets for the termination of voice calls on their individual networks in the Republic of Ireland.⁴
- 2.4 The documents referred to above signalled ComReg’s intention to consult on the details of the proposed remedies for these markets and on 8 June 2004 ComReg issued a national consultation on the proposed remedies (Consultation on Remedies-Wholesale voice call termination on individual mobile networks, ComReg Doc No 04/62b). Interested parties were asked to submit comments by 20 July 2004 on a number of questions pertaining to the implementation. ComReg received submissions from six respondents by the close of the consultation period.

The six respondents to the Consultation by the closing date were:

- ALTO (alternative operators in the communications market);
- *eircom*;
- Hutchison 3G Ireland (‘3’);
- Meteor Mobile Communications Ltd;
- O₂ Communications (Ireland) Ltd.;
- Vodafone Ireland Ltd.

Structure of this Document

- 2.5 The remainder of this consultation document takes into consideration the views expressed by respondents to the national consultation and is structured as follows:

² 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.

³ Case IE/2004/0073: Wholesale voice call termination on individual mobile networks. Article 7(3) of Directive 2002/21/EC1:

⁴ ‘3’ have appealed the designation of SMP: Ref No. ECAP 2004/01

Response to Consultation & Notification- Remedies for wholesale voice call termination on individual mobile networks

- Section 3 contains the proposed market remedies;
- Section 4 contains the consultation issues in regard to the background to the proposed remedies, respondents' comments and ComReg's consideration of these comments;
- Section 5 contains the consultation issues in regard to the proposed remedies, respondents' comments, ComReg's consideration of these comments and as appropriate, further justification of the remedies;
- Section 6 contains the consultation issues in regard to the proposed implementation of the obligation of cost orientation;
- Section 7 contains the regulatory impact assessment (RIA);
- Annex A contains the draft decision on remedies to be applied to the operator with SMP in the markets for wholesale voice call termination on individual mobile networks;
- Annex B contains the notification to the EU Commission;

Submitting Comments

2.6 ComReg is seeking views from interested parties on the draft decision contained in Appendix A and will accept written comments on or before 5.30 pm 3 August 2005. In order to promote further openness and transparency, ComReg will publish the names of all respondents and the responses on its website.

3 Proposed Market Remedies

The need for ex-ante regulation

- 3.1 As set out in the Guidelines⁵, the purpose of imposing *ex-ante* obligations on undertakings designated as having SMP is to ensure that such undertakings cannot use their market power either to restrict or distort competition in the relevant market, or to leverage such market power onto adjacent markets. The Framework Directive states that it is essential that *ex-ante* regulation should only be imposed where there is lack of competition that is, “in markets where there are one or more undertakings with significant market power (SMP) and where national and Community competition law remedies are not sufficient.”⁶ The Guidelines also make it clear that the mere designation of an undertaking as having SMP on a given market, without imposing any appropriate regulatory obligations, is inconsistent with the provisions of the new regulatory framework, notably Article 16 (4) of the Framework Directive⁷. Indeed, NRAs must impose one or more regulatory obligations on an undertaking that has been designated with SMP⁸.
- 3.2 For the reasons detailed in the response to consultation (Market Analysis - Wholesale voice call termination on individual mobile networks ComReg Doc. No. 04/62a), ComReg found Vodafone, O₂, Meteor and ‘3’ to have significant market power on the wholesale markets for termination of voice calls on their individual networks in the Republic of Ireland.
- 3.3 *Ex-ante* regulation is to deal only with those areas where any sector specific competition is not yet effective and there is evidence of potential or persistent market failure⁹.
- 3.4 When considering the imposition of *ex-ante* regulation, ComReg has an obligation to encourage efficient investment in infrastructure and promote innovation¹⁰ and to take into account the risks involved in such investment¹¹.

Remedies Available in the Access Regulations

- 3.5 As set out previously ComReg is obliged by the Framework Regulations to impose an obligation on undertakings with SMP¹². ComReg also has the obligation under

⁵ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 16.

⁶ Recital 27 of the Framework Directive.

⁷ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services at paragraph 114.

⁸ *Ibid*, paragraphs 21 and 114.

⁹ *Ibid* paragraph 31.

¹⁰ Framework Directive Article 8(2)

¹¹ Access Regulation 14(2)

Regulation 6¹³ to act in pursuit of its statutory obligations to ensure adequate access, interconnection and interoperability of services without prejudice to any measures which may be imposed on undertakings designated as SMP operators and subject to obligations listed in Regulation 10 to 14 of the Access Regulations¹⁴. The obligations are:

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

Proposed Remedies

3.6 ComReg has considered the above remedies and believes that it is appropriate, justified and proportionate to impose the following obligations, as summarised in the table below, on the SMP operators, Vodafone, O₂, Meteor and ‘3’:

SMP MNO	Access	Transparency	Non-discrim	Cost Orientation	Cost Accounting Systems	Accounting Separation
Vodafone	✓	✓	✓	✓	✓	✓
O ₂	✓	✓	✓	✓	✓	✓
‘3’	✓	✓	✓	✓		
Meteor	✓	✓	✓	✓		

3.7 **The obligation of Access:** ComReg considers that this is appropriate and justified because each operator has SMP on its individual mobile network and other operators have no choice but to conclude access agreements with the SMP MNO.

¹² Framework Regulation 27(4) states ‘Where the Regulator determines that a relevant market is not effectively competitive, it shall designate undertakings with significant market power in accordance with Regulation 25 and it shall impose on such undertakings such specific obligations as it considers appropriate’

¹³ Access Regulation 6(1-5)

¹⁴ Access Regulation 9(1) states ‘Where an operator is designated as having a 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 an operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate’

- 3.8 **The obligation of Transparency:** ComReg considers that this is appropriate and justified because it allows for easy access to information for example for operators and new entrants and it makes information available to ComReg for monitoring the market prices and the obligation of non-discrimination. The benefits of this will outweigh the costs, as it provides new entrants, fixed operators or MVNOs with sufficient information on processes and so on, to which they would not otherwise have access. This may ultimately result in lower end-user prices. There is also a natural linkage between an access obligation and a transparency requirement making publicly available any technical and/or financial information to make the access obligation feasible.
- 3.9 **The obligation of Non-discrimination:** ComReg considers that this is appropriate and justified because it will assist in preventing a SMP MNO from leveraging its market power or engaging in a potential margin squeeze which would unduly disadvantage competing providers. ComReg considers that this obligation is proportionate as ultimately, it will be of benefit to end-users. However, ComReg notes that care must be taken in the application of this remedy, particularly in the pricing of on-net and off-net termination and will evaluate the impact on competition and the long term benefit to consumers before intervening in this particular circumstance.
- 3.10 **The obligation of Accounting Separation:** ComReg considers that this is appropriate and justified because it is necessary to monitor the obligation of non-discrimination. ComReg considers that it is proportionate as the benefits should outweigh the costs, in particular as operators already have accounting systems in place that will help to produce the desired information. The benefits of this obligation include an assurance that prices are non-discriminatory, cost allocations are transparent and that any excessive profits are revealed. Also, according to the ERG Common Position on Remedies, in order to calculate a cost oriented price an NRA may have to impose an obligation of accounting separation.¹⁵
- 3.11 ComReg considers that it is disproportionate to apply these obligations to Meteor and '3' given the small total market share held by these operators, the length of time in the market and the economies of scale achieved by operators with a larger total market share. ComReg will hold a further consultation on the detail and nature of the implementation of the accounting separation mechanism.
- 3.12 **The obligation of Cost Orientation:** ComReg considers that this is appropriate and justified, to prevent excessive pricing of wholesale mobile voice call termination rates, which have negative effects for end-users and for competition in the mobile market. ComReg considers that the benefits of this obligation in terms of ultimately lower prices for end-users will outweigh any costs of implementation.
- 3.13 **Cost Accounting Systems:** ComReg considers that this is appropriate and justified because it is necessary to determine a cost oriented price. ComReg considers that it is disproportionate to apply these obligations to Meteor and '3' given the small total market share held by these operators, the length of time in the market and the economies of scale of the operators with a larger total market share.

¹⁵ ERG Common Position ERG (03)30 of 2 April 2004 on the approach to appropriate remedies in the new Regulatory Framework.

4 Consultation Issues-Background to the Proposed Remedies

The Nature of the Potential Competition Problems

Summary of Consultation Issue

- 4.1 ComReg described the competition problems that it considered may arise due to an operator having SMP in the wholesale market and the absence of viable alternatives. The potential competition problems identified included;
- Higher end-user prices for both fixed to mobile calls (F2M) and mobile to mobile off-net calls (M2M) as high network termination charges often feed through to the retail price.
 - Barriers to entry for new entrants or indirect access operators resulting from low on-net charges that may give mobile operators with a high subscriber base a potential competitive advantage over smaller operators when attracting or retaining customers.
 - The potential to raise rivals' costs by discriminating in the way mobile operators charge for voice termination, that can also cause the costs of competing retail services to rise.

Consultation question 1

Q.1. Do you agree with ComReg's description of potential competition problems arising in these wholesale markets? Are there any further competition problems that you believe ComReg should consider? Please elaborate in your response.

Responses to question 1

- 4.2 There were five responses to this question. One respondent agreed with ComReg, while four disagreed with ComReg's description of potential competition problems.
- 4.3 Of these, two of the respondents held the same position in response to all the questions: they disagreed with the imposition of remedies overall. One respondent stated that ComReg failed to take account of its specific position and how its termination charges were set and paid in practise. It considered that ComReg had provided no evidence that it had been or would be able to add a mark-up to charges for termination to the 2G network.
- 4.4 The other respondent stated that its wholesale charges were currently set below costs and that ComReg had failed to demonstrate how this gave rise to a market failure. The respondent stated that ComReg had based its finding of its dominance on inadequate and ambiguous reasoning, failing to take into account amongst other things, the competitive constraints on it, the rolling out of its network, its life cycle traffic volumes, market share and its tariffs. The respondent also stated that the market information relied on by ComReg in its assessment, was outdated, particularly as it related to the dynamic mobile communications sector.
- 4.5 Another respondent stated that it disagreed with the description of competition problems. The respondent considered that ComReg had not provided any detail on

the alleged competition problems and so failed to meet the Regulations of the EU Framework under which clear reasons underlying the proposal must accompany a remedy. The respondent considered that ComReg had not substantiated the evidence of potential competition problems. For example, the respondent would like to know what evidence ComReg had in relation to the differential in fixed and mobile generally and more particularly in Ireland. The respondent stated that it disagreed with ComReg that a differential of nine times greater than the fixed voice call termination rate was unjustified as its analysis showed that the differential in the Ofcom approved fixed and mobile termination charges was approximately fifteen times and the average differential in Europe was approximately sixteen times.

- 4.6 This respondent also stated that the Market Analysis of Wholesale Voice Call Termination on individual mobile networks was redundant, as it was difficult to see how a new player could enter into the market for providing termination on a specific network that already existed. The respondent stated that a more relevant question to ask was whether there were technological developments which acted as a constraint on the level of mobile termination rates (MTRs) for example, SMS or push to talk.
- 4.7 Also, the respondent disagreed that the retail market was uncompetitive. It was concerned that ComReg's use of a preliminary mobile retail market analysis to justify detailed remedies in this market was incorrect. In addition, the respondent stated that it would expect that profits would increase given that mobile penetration and usage had been increasing and MNOs had made investments to support this demand.
- 4.8 According to another respondent, while F2M termination charges might be set above efficient levels in the absence of regulation, it did not accept that MNOs were earning excess profits. In a competitive environment each mobile operator would have the incentive to maximise the consumer surplus of subscribers to its network. Therefore it would set MTRs in combination with outbound services with the result that any excess profits were competed away in the outbound market. This respondent disagreed with ComReg's view that price competition in the mobile retail market had stagnated and consequently profits from termination would not be fully competed away. The respondent stated that frequent (independent) changes in tariff packages / minimum monthly bills, promotions / provision of free extras and customer switching provided evidence for retail competition. It considered there was strong evidence of price and non-price competition in the market.
- 4.9 In relation to the profitability calculations the respondent also stated that it was not the case that operators were earning persistent super normal profits (SNP). The respondent stated that the retail market for mobile services was competitive and that the calculation of the return on capital employed (ROCE) was flawed. It argued that ComReg had improperly used an accounting estimation of ROCE rather than an economic estimate. The respondent provided its own calculations using ComReg's methodology, combined with an economic estimate and came up with an adjusted ROCE estimate substantially lower than that provided by ComReg (31.7% versus 39% in 2003, 25.4% versus 31% in 2002 etc). The respondent argued that ComReg should factor in a longer period than one year when

calculating ROCE and ARPU, as this took into account the effects of business cycle fluctuations and random fluctuations in supply and demand.

- 4.10 The respondent disputed ComReg's analysis of both the operation and the efficiency of the waterbed effect. It considered that ComReg had misunderstood the operation of this effect. It considered that ComReg should present a formal and credible theoretical model that could predict the relationship between access charges and the intensity of competition. The respondent stated that the waterbed would only be less than 100% effective if an increase in termination charges reduced the intensity of competition between operators in the retail market. The respondent stated that there was no logical reason for this to take place as it might be that an increase in termination rates could increase the intensity of mobile competition, for example by making the acquisition of each other's subscribers more attractive and in this case the waterbed effect would be greater than 100%. The respondent stated that models had shown that F2M termination charges did not affect the intensity of competition between mobile operators and so the waterbed effect could in this case be 100% effective.
- 4.11 The respondent further submitted that ComReg had failed to properly analyse the incentives on and the impact of M2M termination. In particular, it believed that there was no theoretical basis for the idea that high M2M or on-net /off-net differentials could be used as a mechanism to foreclose smaller rivals. As outlined, M2M termination was not set in isolation. There was no incentive for mobile operators to set M2M charges above efficient levels. For instance, the mobile operators, in addition to setting M2M rates, had also to pay similar rates themselves. To the extent that mobile termination rates were reciprocal, therefore, any rise in revenues would be matched by a rise in costs, assuming traffic flows were relatively even. The incentive was for mobile operators to keep termination charges low. Furthermore, the incentives on operators with respect to M2M call termination rates were such as to place an additional constraint on termination rates in general.
- 4.12 Equally in the case of M2M termination charges, the respondent stated that economic models held that, in the presence of on-net/off-net tariff differentials, setting reciprocal termination charges above cost intensified competition between operators and so reduced profits. In that regard, the respondent disagreed that high M2M charges advantaged larger networks relative to smaller rivals or could be used as a foreclosure device.
- 4.13 The respondent considered that mobile termination rates in Ireland had fallen to among the lowest in Europe in the absence of regulation. Therefore it was not regulatory pressure but the business needs of the company and the competitive nature of the market that was driving its termination pricing decisions.

ComReg's Position

- 4.14 Having considered all of the responses to the consultation, ComReg is still of the view that the potential competition problems outlined in the consultation document are indicative of those that may arise because MNOs have SMP in the market for wholesale voice call termination on their individual networks.

- 4.15 Absent regulatory pressure, MNOs will have less of an incentive to orient their termination rates towards cost. In its response to consultation 04/62a ComReg stated that regulatory pressure had been the dominant factor in the mobile termination reductions of the Irish mobile operators, in particular since June 2001.¹⁶ Mobile termination rates in Ireland are indeed lower than the EU average. However, while reductions in termination rates may reduce the need for early regulatory intervention, they are not in themselves a guarantee that rates will be set at an efficient level. For instance, UK or EU mobile termination rates themselves are not necessarily at an efficient level.
- 4.16 In response to the comments on the market analysis and SMP finding, ComReg considers that it deals with this in detail in ComReg documents 03/127 and 04/62a. The relevant market for termination is on an individual network, regardless of the originating network. ComReg designated four operators with SMP on the market for termination of calls to subscribers on their individual network. Market forces are insufficient to ensure that the pricing of mobile voice call termination services is set at efficient levels. Therefore, ComReg considers that consumers should get the same protection from high prices irrespective of the market share of the mobile operator. ComReg has taken into account the particular circumstances specific to individual MNOs when determining the remedies proposed.
- 4.17 At present the mechanisms of supply and demand side substitution are not effective in this relevant market due to the absence of alternatives. ComReg considers that it has already answered the argument made by one respondent in relation to possible substitutes for mobile voice termination in its Response to Consultation 04/62a.¹⁷ As stated there, ComReg does not consider that there are realistic alternatives to calling a mobile phone at this time, for example SMS. The calling party pays (CPP) arrangement and current technologies do not allow any other provider to offer termination on the mobile network other than the specific network operator.
- 4.18 To address the comments made by one respondent that its wholesale termination charges are currently set below cost, which does not support the idea that there is market failure, the observation that small operators tend to set termination rates above the established operators is evidence of market power, to the detriment of consumers. This paper proposes cost orientation as a remedy and ComReg will seek input from interested parties prior to any determination of the efficient operator price/or prices.
- 4.19 With regard to the incentives for mobile operators not to set M2M charges above efficient levels, it is interesting to note the concluding comments of a paper by Frontier Economics.¹⁸ Given, the clear incentive for mobile operators to set high

¹⁶ ComReg Document 04/62a- Market Analysis Consultation-Wholesale Voice Call Termination on Individual Mobile Networks, p.37-44

¹⁷ ComReg documents 04/62a Market Analysis-Response to Consultation-Wholesale Mobile Voice Call Termination p.22-23.

¹⁸ Frontier Economics: On-net/off-net differentials, March 2004: <http://www.frontier-economics.com/publications/en/89.pdf>

F2M rates, this tends to drag up M2M charges. This in turn leads to on-net/off-net differentials simply because off-net charges reflect the higher perceived marginal cost of off-net calls. ComReg considers that the termination of a call to a mobile user initiated by a fixed user (F2M) presents many points in common with the termination of a call initiated by a mobile user (M2M). The recipient mobile network has significant market power (SMP) over the calls it receives from other customers, be they fixed or mobile users. M2M termination rates set above efficient levels lead to unreasonable off-net mobile to mobile retail tariffs, just as F2M termination rates set above efficient levels lead to unreasonable charges for calls from fixed networks to mobile phones.

- 4.20 In relation to the comments on setting termination rates to maximise consumer surplus, and on the waterbed effect, ComReg recognises that in a competitive market, mobile operators may set charges that maximise the consumer surplus for their subscribers. However, the overall welfare implications of high termination charges are complex. This issue was addressed in ComReg document 03/127a¹⁹ but in summary, ComReg does not consider that subsidising mobile operators' retail arm at the expense of those subscribers who do not have a mobile phone is either efficient in itself or likely to lead to broader competitive results. For instance, ComReg does not accept the justification for continued high mobile termination charges on the basis that excess profits generated from above cost termination permits operators to offer handset subsidies and low outgoing call rates thereby increasing mobile subscribers. There is no guarantee that mobile operators will choose the optimal level of subsidy. In addition, as mobile subscription tends toward saturation point the need to effectively "tax" F2M calls to subsidise mobile subscription diminishes.
- 4.21 Concerning profits from termination, the respondent in question would argue that as the overall market is competitive, MNOs are unable to retain profit from call termination, as it will be competed away, for instance by pricing subscription below cost. Therefore, competition from other MNOs prevents excess profits from call termination charges for the mobile industry as a whole. Firstly, ComReg has completed its analysis of the wholesale mobile access and call origination market and concludes that it is not yet effectively competitive.²⁰
- 4.22 Secondly, as part of this market review ComReg reviewed the Statutory Accounts of Vodafone and O₂ for the year to 31 March 2004 and notes that the profitability trends it outlined in ComReg Documents 03/127a and 04/62A broadly continue.²¹ Moreover, ComReg has commented on the criticisms of its methodology for calculating its profitability estimates in ComReg Document 04/118a, Market Analysis Mobile Access and Call Origination.²² In light of the continued trend for

¹⁹ ComReg Document 04/62a- Market Analysis Consultation-Wholesale Voice Call Termination on Individual Mobile Networks p. 48-52.

²⁰ ComReg document 04/118 and 04/118a, Market Analysis-Wholesale Mobile Access and Call Origination p. 175-177.

²¹ ComReg Documents 03/127 Market Analysis- Consultation Wholesale Mobile Voice Call Termination and 04/62a Market Analysis- Response to Consultation Wholesale Mobile Voice Call Termination p. 29-32 and 50-52 respectively.

²² ComReg document 04/118 and 04/118a, Market Analysis-Wholesale Mobile Access and Call Origination p. 175-177.

excess profit in mobile retail markets, it is unlikely that any excess profits made from excessive voice call termination charges will be competed away at the retail level. ComReg considers that intervention is appropriate to ensure that voice call termination rates are not set at excessive levels.

- 4.23 In response to the respondent who submitted that the growing literature does not support the idea that high M2M charges or off-net /on-net differentials can be used as a mechanism of foreclosure, ComReg would submit that the model put forward is based on a number of simplifying assumptions or contingencies, which if relaxed might significantly alter the results. For example, under the alternative assumptions of non reciprocal rates and traffic imbalances, MNOs may have the incentive to set high termination charges in order to raise rivals cost or to squeeze smaller networks. Under these circumstances, the smaller network may not be able to fully neutralise any advantage given to larger networks by high termination charges and or higher off net charges.²³
- 4.24 ComReg remains of the view contained in ComReg Document 04/62a, that there is a traffic imbalance between MNOs. In such cases one MNO receives more termination revenue from the other and therefore benefits if M2M rates are set above costs. This also provides a barrier to entry where the size of the mobile operators differs substantially. A MNO with a smaller total market share will have a higher percentage of off-net calls per average subscriber than an operator with a larger total market share. Where a M2M termination rate is not set at the efficient level, this could potentially restrict the operator with the smaller market share from competing effectively on the retail market. Also, the scenarios outlined by the respondent do not include the effects of above cost rates on FNO.
- 4.25 ComReg remains of the view that in appropriate circumstances a potential exists for MNOs to behave strategically using high M2M charges and on-net /off-net differentials to leverage their position. Economic literature²⁴ suggests that networks individually gain from charging different prices for on-net and off-net calls. While price discrimination in respect of termination rates may increase welfare in the case of competition among equals, for competition between asymmetric networks (for example, a less than full coverage network), price differentiation may threaten smaller networks and foreclose competition. Even where the dominant network is constrained to offer reciprocal charges, it can block entry by an appropriate choice of on-net and off-net charges.
- 4.26 In relation to concerns expressed over the validity of the characterisation of competition problems for this relevant market, ComReg considers that in line with other NRAs, and the legislation, when imposing *ex ante* regulation it may not be possible to clearly observe a certain type of anti-competitive behaviour.²⁵ However, ComReg notes the agreement of a number of respondents with the characterisation of the competition problems in these markets. To prevent the exercise of identified market power ComReg has to anticipate the manifestation of

²³ See also, Frontier Economics.

²⁴ Laffont et al (1998), Rand Journal of Economics. Network Competition: II Price Discrimination.

²⁵ ERG Common Position on the approach to Appropriate remedies in the new regulatory framework, ERG (03) 30 p.5

a particular competition problem based on the incentives of an SMP undertaking to engage in such behaviour or to take steps to prevent certain abuses from occurring.

ComReg's Objective

Summary of consultation issue

- 4.27 ComReg's stated objective is to address the potential competition problems in the relevant market and to influence operators' behaviour such that the market becomes more competitive. The principal competition problem is that there are insufficient competitive constraints to ensure that voice call termination charges are set at efficient levels.
- 4.28 In selecting the appropriate remedies, one of ComReg's aims is to ensure that voice call termination charges are set at efficient levels. A second aim is to provide sustainable competition and greater predictability and legal certainty over voice call termination rates while keeping regulation to the minimum to achieve this. ComReg's view is that this will replicate effective competition and will be in the interests of end-users, in line with ComReg's objectives in Section 12 of Communications Regulation Act, 2002.

Consultation question 2

Q.2. Do you agree with ComReg's objective for remedies in these wholesale markets?

Responses to question 2

- 4.29 There were two responses to this question and both disagreed with ComReg's objective.
- 4.30 One respondent asked that ComReg explain what it meant by "efficient or inefficient" in the context of setting voice call termination rates at efficient levels. If it was the case that ComReg was equating efficiency with lowest cost then it disagreed with the objective. The respondent didn't accept that it was appropriate to apply a uniform efficient termination charge to all mobile operators given the relative market shares held to date by the four operators.
- 4.31 The respondent also disagreed with the objective as it stated that ComReg should instead pay attention to incentives for further investment and the Minister's direction on industry sustainability.²⁶
- 4.32 Another respondent agreed that ComReg should keep regulation to the minimum necessary but stressed that ComReg already regulated call termination and that the failure of the old regime should be demonstrated using specific examples before moving to a new one. This respondent repeated its view that the overall mobile market was competitive and that even if F2M charges were set above efficient levels any excess profits earned from this would be competed away in the form of

²⁶ 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, 21 February, 2003 and 29th March 2004.

subsidies for outbound retail services. The respondent disagreed that there was a competition problem.

- 4.33 The respondent also stated that termination rates in Ireland had fallen to among the lowest in Europe in the absence of a specific regulatory obligation. It therefore questioned the need for what it considered intrusive and burdensome regulatory obligations. The respondent didn't believe that the remedies proposed were proportionate or justified. It stated that ComReg should consider the overall impact of the remedy on the mobile market. The respondent also stated that applying remedies in a discriminatory manner would distort market development.

ComReg's Position

- 4.34 In response to the comment on an efficient voice call termination rate, ComReg agrees that lowest cost may not always equate with efficiency or achieve other objectives, such as sustainable competition. In response to the other comments on having a uniform efficient termination rate ComReg will deal with these concerns when determining the price/or prices for the cost orientation obligation. ComReg will seek further input from interested parties at that time. ComReg will also be mindful of the need to encourage sustainable competition and the incentives to invest and innovate when implementing the cost orientation obligation.
- 4.35 In response to the comments on demonstrating the failure of the old regime ComReg refers the respondent to its response to question one above where it discusses ex ante regulation. ComReg has already stated that the mobile market is not competitive at the retail level and that excess profits from setting termination rates above the efficient level will not be competed away at the retail level. In any case, ComReg found the SMP MNOs to have 100% market share for the termination of voice calls on their individual networks. In the absence of sufficient countervailing buyer power or potential competition, ComReg considers it necessary to impose obligations that would prevent the leveraging of this market power.
- 4.36 ComReg's requirement to be proportionate means that it is applying the remedies taking into account the total market share of each of the operators, economies of scale and the length of time in the market. ComReg notes that one respondent referred to the effect of the remedies on the entire mobile market and in this context ComReg considers it appropriate to consider sustainable competition when applying different remedies to different operators.
- 4.37 ComReg agrees that termination rates have fallen in Ireland but as stated in the response to question one, does not consider that this is any guarantee that the rates are set at an efficient level. ComReg considers that the remedies it has proposed are proportionate and justified and address the competition problems identified.

Principles to be applied when selecting remedies

Summary of consultation issue

- 4.38 When selecting the appropriate remedies to address the competition problems identified in this market, ComReg has to abide by a number of principles. ComReg has an obligation to consider the objectives of Section 12 of the Communications (Regulation) Act 2002 (to promote competition, to contribute to the development of

the internal market, and to promote the interests of users) and the Ministerial Directions of February 2003 and March 2004.²⁷ Furthermore, Regulation 9 of the Access Regulations requires that any obligations imposed by ComReg must be based on the nature of the problem identified, be proportionate and be justified in the light of the objectives laid down in Section 12 of the Communications Act 2002 and only be imposed following consultation in accordance with Regulations 19 and 20 of the Framework Regulations.

- 4.39 While ComReg is obliged to impose the least burdensome and most effective remedy or remedies to address the competition problems in this market, the interplay of a number of remedies might often be necessary. Therefore, the remedies available to ComReg could be seen as a complementary suite of remedies that support and reinforce each other, to which ComReg must give careful consideration.

Consultation questions 3 & 4

- Q.3. Do you agree with the principles which ComReg believes should be used when selecting remedies?**
- Q. 4. Do you think that there are other principles that ComReg should consider when selecting appropriate remedies?**

Responses to questions 3

- 4.40 ComReg received two responses to this question. One of the respondents did not agree with the principles applied. This respondent stated that it was necessary to quantify the costs and benefits of a remedy clearly and unambiguously before imposition. The respondent questioned the value of the regulatory impact assessments carried out to date and urged ComReg to demonstrate why a particular remedy was necessary. The respondent also highlighted the importance of promoting infrastructure based competition while safeguarding the ability of the sector to attract capital for further innovation. The respondent welcomed the inclusion of the ministerial direction but was disappointed that the proposed remedies then seemed at odds with it.
- 4.41 The other respondent agreed that ComReg should impose the least burdensome remedies. But also stated that ComReg should impose all remedies in the market symmetrically across all operators. The respondent stated it was not possible to be a little bit dominant as each operator enjoyed an equivalent level of dominance.

Responses to question 4

- 4.42 There were two responses to this question. One of the respondents considered that ComReg should take the following principles into account; that the least burdensome remedy/remedies were chosen, that the costs and benefits of all remedies were quantified and that remedies should stimulate infrastructure based competition, while safeguarding the ability of the sector to innovate.

²⁷ 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, 21 February, 2003 and 29th March 2004

- 4.43 Another respondent urged ComReg to be mindful of the incentive to invest and of the impact that the remedy would have on the retail sector of the market. This respondent considered it was inappropriate to take into account Ministerial Directives in deciding on what remedies to select.

ComReg's Position

- 4.44 ComReg believes the market analysis process represents a comprehensive review of the market under consideration and is approximate to a regulatory impact assessment. Indeed ComReg has assessed the impact of the remedies proposed throughout the market review. ComReg has given structured consideration of alternatives to regulation and of different regulatory approaches. For example, ComReg has considered forbearance, retail price control and the need to impose each individual remedy. ComReg considers that the remedies imposed will encourage competition in the overall mobile market and ultimately provide a major benefit to end-customers in the form of lower retail prices. Further, ComReg will consider the need for investment incentives concerning infrastructure based competition in any price determination that it makes.
- 4.45 In relation to the comment on applying remedies symmetrically to all operators, ComReg considers that it will apply remedies in a similar manner where appropriate. It is proportionate to impose some of these remedies on all operators to address the lack of competition in this market. However, supporting remedies such as accounting separation (AS) and cost accounting systems (CAS) may be too burdensome to apply to operators with a smaller total market share and therefore are not appropriate or proportionate. ComReg is obliged under Section 13 of the Communications Act 2001, to have regard and to comply with policy directions given to the Commission by the Minister and considers that it has done so in carrying out its market analysis and proposals on remedies.

5 Consultation Issues-Proposed Remedies

Forbearance

Summary of consultation issue

- 5.1 ComReg stated in the consultation that it had a number of choices available when trying to resolve any potential competition problems arising in this market, such as forbearance or a direct assessment of mobile operator cost and/or the imposition of a price control. ComReg considered that forbearance in the form of simply monitoring the trend in termination charges would potentially maintain prices above the competitive level for a longer period. This would be to the disadvantage of potential competitors and ultimately end-users. In addition, under the Framework Regulations, ComReg is obliged to impose an appropriate remedy or remedies following the designation of SMP in the relevant market.

Consultation question 5

Q.5. Do you agree with ComReg's assessment of forbearance?

Responses to question 5

- 5.2 ComReg received five responses to this question. Two of the respondents agreed with ComReg that forbearance was insufficient to remedy the competition problem identified and four disagreed. One of the respondents in agreement noted the principle of technology neutrality that required the symmetrical and proportionate imposition of regulatory remedies on both mobile and fixed operators where warranted.
- 5.3 One respondent stated that it did not understand why the existing voluntary undertakings were not appropriate, effective and a less intrusive form of regulation. It considered that there had been no meaningful discussion concerning alternative remedies such as voluntary reductions. For example, ComReg had failed to investigate the ability of mandated reductions by Vodafone and O₂ to force by themselves voluntary reductions by Meteor, particularly in light of *eircom's* transparent billing practices.
- 5.4 Another respondent considered that Ireland had some of the lowest mobile termination rates in Europe, largely resulting from an environment of regulatory forbearance and proactive voluntary MTR reductions after constructive engagement with ComReg. This respondent stated that under paragraph 27 of the Commission's Guidelines, ComReg should not ignore past evidence when assessing the future prospects of the relevant market.
- 5.5 The respondent considered that the competitive forces in the fixed and mobile sector were different and that it was inappropriate to have a checklist of remedies that were nothing more than a copy of those in the fixed sector. It didn't believe that the focus of the remedies was on the solution to the competition problem identified, especially as technological developments could act as substitutes for voice call termination. ComReg should focus on creating an environment that promoted further innovation and investment rather than on cost-orientation.
- 5.6 Another respondent considered that the remedies were overly intrusive. It considered that the voice call termination rate fell due to the business needs of the

company and the competitive nature of the market. It didn't believe the fall resulted from regulatory pressure, so ComReg's assessment was flawed. The respondent considered that ComReg had not supplied any evidence that current rates were set at inefficient levels and considered that ComReg should provide this before imposing remedies on the market. The respondent's view was that regulatory intervention was justified only where benefits outweighed cost.

- 5.7 While the respondent accepted that F2M call termination rates might be set above efficient levels it considered it returned any resulting loss in consumer surplus in the form of lower prices for other elements of the bundle of mobile services. This led to a question of distributional effects rather than its effect on the efficiency of the market. The respondent stated that ComReg should conduct a cost benefit analysis before it made a decision to impose these remedies and forego forbearance.

ComReg's Position

- 5.8 ComReg notes the agreement of two of the respondents to this question. In relation to the respondents' comments on the low termination rates in Ireland, and the effectiveness of forbearance, ComReg dealt with this in the market analysis consultation paper²⁸ and interested parties had an opportunity to input their views in addition to the opportunity given in this consultation.
- 5.9 ComReg still considers that regulatory pressure was largely responsible for the decrease in mobile voice termination rates. In addition, while it might be that mobile termination rates in Ireland are indeed lower than the EU average, they are not in themselves a guarantee that rates will be set at an efficient level. ComReg considers that without regulatory pressure, MNOs have less of an incentive to lower their termination rates. ComReg took into account the EU Regulations and Guidelines in carrying out this market analysis. Additional evidence of inefficient termination rates is provided by the existence of excess profits made by mobile operators.
- 5.10 ComReg considers that the SMP held by each MNO will not be diluted in any meaningful way in the absence of appropriate and proportionate *ex ante* regulation. ComReg had identified negative effects of this, that include higher prices to end-users, barriers to entry, the potential to raise rivals' costs and, particularly in the case of MVNOs, to squeeze margins. It is ComReg's view that MNOs in the Republic of Ireland are not subject to constraints from competitors, customers or consumers that would lead them to lower their termination rates to competitive levels. ComReg does not consider that there will be technological developments that act as substitutes for voice call termination in the timeframe of this review.²⁹
- 5.11 The remedies proposed should ensure termination rates set at efficient levels and a transparent market place. ComReg believes that this will ultimately benefit end-

²⁸ ComReg Document 04/62a: Response to Consultation and Notification-Wholesale Voice Call Termination on Individual Mobile Networks p.37-43 & 61-64 and ComReg Document 04/62b: Consultation on Remedies-Wholesale Voice Call Termination in Individual Mobile Networks p.13-14.

²⁹ ComReg Document 04/62a: Response to Consultation and Notification-Wholesale Voice Call Termination on Individual Mobile Networks p.18-23.

consumers through lower retail prices. ComReg acknowledges that investment and innovation should also be encouraged and plan to consider this when making pricing decisions.

- 5.12 One of the respondents commented on the fact that even if termination rates were set above efficient levels that any corresponding loss of consumer surplus would be off-set in the form of lower prices for other elements of the mobile service. ComReg again points out that it does not believe that termination rates set above costs for sustained periods will ultimately be of benefit to end-users.

Using costs of an efficient operator to set a uniform target voice call termination charge

Summary of consultation issue

- 5.13 The consultation paper discussed whether it would be appropriate to apply a uniform termination rate based on the appropriately calculated costs of an efficient operator. ComReg considered that in effect an efficient 2G operator is the standard for an efficient operator and for this reason it should set voice call termination charges (2G or 3G) using the appropriate 2G efficient costs. ComReg also considered a number of issues that would arise including proportionality and the promotion of competition in the overall mobile market and for this reason proposed setting different time-periods for SMP MNOs to reach the uniform target voice call termination charge.

Consultation question 6

Q.6. Do you agree that ComReg should use the costs of an efficient operator as a basis for setting a uniform target voice call termination charge for all SMP operators?

Responses to question 6

- 5.14 There were five responses to this question. Three of the respondents agreed there was some merit in the proposal while two of the respondents disagreed. One of the respondents noted the principle of technology neutrality that required the symmetrical and proportionate imposition of regulatory remedies on both mobile and fixed operators where warranted.
- 5.15 Another respondent considered there was some merit in the concept of an efficient operator as a useful costing standard when setting cost oriented prices but considered that the use of this concept as the basis for setting a target voice call termination charge for operators should not result in a uniform charge for all operators. The respondent stated that there were legitimate cost differences between operators due to for example, technology, spectrum allocated and economies of scale. The respondent considered that given the existing market shares, a uniform efficient voice call termination rate would enhance Vodafone's position as the largest operator in Ireland. The respondent provided further detail on these points in its submission.
- 5.16 The respondent considered that it would be wrong to equate the lowest unit costs in the market with the most efficient cost estimate because it was conceivable, that an operator with higher unit costs was more efficient than its larger rivals. The

respondent pointed out that if a public authority treated parties in objectively different situations in the same way, this was discriminatory. Applying the efficient operator concept should result in operator specific charges which were non-uniform. It stated that the choice of mechanism for setting a mobile voice call termination charge would have a great influence on the further development of competition in the overall mobile market. The respondent wondered how setting a uniform rate would assist in fostering investment and promoting choice and competition.

- 5.17 The respondent also stated that “individual efficient operator” MTRs could be set for Meteor and 3 by pegging their MTRs to those of Vodafone or O₂ or to an average of both. It stated that the two largest operators could still build individual top down LRIC models to set their individual rates and then ComReg could build a more generic bottom up model for checking the top down results.
- 5.18 Another respondent stated that in the event of regulation, ComReg should base F2M termination charges on the costs of an efficient operator and that it was necessary that all such charges were set uniformly across all network operators. The respondent argued that the price for F2M termination should include:
- A mark-up based on Ramsey pricing principles, to cover the substantial fixed and common costs that existed in the provision of mobile communication services.
 - A mark-up to account for the positive externalities created by mobile communications networks, so that mobile customers were the welfare maximising number of consumers.
- 5.19 This respondent was strongly opposed to ComReg setting different time-periods for mobile operators to reach the uniform target voice call termination charge, which was consistent with its general view that remedies should not discriminate between operators. The respondent considered that setting different timeframes would burden the larger and more efficient operators while promoting and advantaging inefficient operators. The respondent considered that less efficient operators would have the ability to set a higher termination rate in this period to subsidise their outbound retail services and thus obtain an unfair advantage over other operators.

ComReg's Position

- 5.20 Having considered the views of the respondents, and as stated in section 4 ComReg retains an open mind on this issue and would wish to have further evidence available, for example detailed cost data, before arriving at a conclusion.
- 5.21 In relation to the comments on including a mark-up on F2M termination based on Ramsey pricing principles and a mark-up to account for network externalities, ComReg discusses both of these in the forthcoming consultation on mobile accounting separation (AS). In summary, ComReg has a number of concerns, for example, the information requirements for implementing Ramsey pricing are extensive including estimating own and cross-price elasticity and the extent to which these vary with prices.
- 5.22 ComReg also believes that there is a high degree of uncertainty about the optimal level of any mark-up for network externalities. But it believes that it is likely to be

small because of the combination of inelastic demand for subscription at current prices, low externality factor and current prices and penetration rates. ComReg notes that it makes no allowance for network externalities in the fixed market and handset penetration for mobiles is now higher than that for fixed networks.

- 5.23 ComReg would seek to obtain any evidence, including supporting quantitative data to support the use of externalities/Ramsey pricing and the impact of economies of scale before making any pricing decisions.
- 5.24 In relation to the respondent's disagreement with different time-periods for MNOs to implement the uniform charge, ComReg considers that it has a duty to encourage competition in the overall mobile market and to be proportionate. Different time-periods may help operators with a smaller total market share to adjust to any efficient operator rate however as stated above this matter will be consulted upon in the context of any price setting decision.

Consultation question 7

Q.7. Do you agree that the costs of an efficient 2G network should be used to set the uniform target voice call termination charge for operators with 3G networks at this time?

Responses to question 7

- 5.25 There were five responses to this question. One of the respondents agreed with ComReg, while the other four disagreed. One of the respondents considered that ComReg had not provided evidence to suggest that it would be able to add a mark-up for termination on the 2G network. The respondent considered there was no separate market for 2G termination to its 3G subscribers, as it would only roam onto the 2G network where there were gaps on its own 3G network.
- 5.26 Another respondent disagreed with the setting of a uniform target voice termination rate. It also believed that the proposal to use the costs of an efficient 2G operator to set the target voice call termination rate for operators with 3G networks was flawed. The respondent considered that the proposal:
- was not forward looking;
 - ignored the large capital cost facing the industry at the moment;
 - ignored investment risk; and
 - sent the wrong signals to the market regarding future investment and innovation within the industry.
- 5.27 Another respondent considered that rollout costs of 3G were legitimate and that ComReg could not elect to let operators carry the start-up costs of a new technology only to potentially cap the returns of mobile termination at a later stage and possibly at a level that was insufficient to recover costs. Whether 2G or 3G networks provided termination at a lower cost was largely dependent on which network was used to terminate the traffic. The respondent considered that a blended rate was more appropriate that would take into account 3G costs relevant for the provision of termination services.

- 5.28 The respondent did not agree that ComReg should regulate termination on 3G networks. It considered there was little or no empirical data to quantify the voice/data service use split for 3G networks versus 2G networks. The respondent considered that it was invalid to apply 2G costs to a network that would carry a different service mix. The respondent argued that the “efficiency” issues facing 2G were not the same for 3G and likewise the differences between TDMA (time division multiplexing) and CDMA (code division multiplexing) would affect the underlying network architecture which would affect any assessment of what an “efficient” operator was.
- 5.29 The respondent’s view was that any early regulation of the 3G termination rate was only justified if there was a commitment that in the case of a cost recovery shortfall in the early stages, ComReg would allow an operator to recover the costs in the later stages. The respondent was alarmed at the apparent u-turn ComReg had made on this issue. It stated that ComReg initially proposed a light touch for 3G regulation and to monitor developments in the market in line with the practice of other NRAs. The respondent considered that ComReg had not properly consulted on this issue and that if ComReg did apply cost orientation it should base it on all the regulated costs.

ComReg’s Position

- 5.30 ComReg notes the disagreement of operators with using the costs of an efficient 2G operator to set the target rate for operators with 3G networks. However, as stated earlier, the termination of a voice call on a 3G network is not in principle different to the termination of a voice call on a 2G network. In accordance with the principle of technological neutrality, the market definition is based on the services provided and not on the technological platform used to provide them. 3G telephony services from a demand side functionality perspective seem to be no different from their 2G equivalents. Subscribers are likely to have the same mobile number for termination, irrespective of whether the call terminates on a 2G or 3G network. Also, the European Commission has commented that although 3G retail services might constitute an emerging market that should not be subject to inappropriate regulation, termination of voice calls is not as such a novel service or newly emerging market.³⁰
- 5.31 ComReg believes that it needs more empirical data and to debate the matter further before forming a firm view on this issue. It will however, have regard to the principle of technology neutrality.

Proportionality of remedies on the smaller operators

Summary of consultation issue

- 5.32 ComReg believes that in order to ensure that customers get the best value for money and that SMP MNOs do not make excessive returns it should base voice call termination rates on the costs of an efficient operator. This has the indirect effect that end-users on networks with a smaller total market share are entitled to the

³⁰ Case UK/2003/0040: Wholesale mobile voice call termination. Comments pursuant to Article 7(3) of Directive 2002/21/EC1

same level of protection as those of networks with a larger total market share. However, ComReg also recognised that the imposition of the proposed remedies should be the minimum necessary or the least burdensome to achieve the objective. ComReg therefore believes that the imposition of the obligations of access, transparency, non-discrimination and cost-orientation are the minimum required. However, it might not be proportionate to impose the obligations of accounting separation or cost accounting systems on the operators with a smaller total market share.

Consultation question 8

Q.8. Do you agree with ComReg that the detailed implementation of remedies may differ between mobile network operators depending upon issues such as proportionality and promotion of competition in the market?

Responses to question 8

- 5.33 There were five responses to this question. Three of the respondents agreed with ComReg's view, while the remaining two disagreed.
- 5.34 One of these stated that given the low MTRs in Ireland, the obligations proposed were not justified for any operator, irrespective of size. Without prejudice to this position this respondent stated that ComReg could avoid overly burdensome implementation costs for smaller operators by pegging the rate of voice call termination for smaller operators and new entrants to the unit cost estimates of either O₂ or Vodafone. The respondent also noted that ComReg should extend its recognition of smaller operator size and the potential financial impacts with regard to accounting separation (AS), to O₂, not only in this context but also when ComReg was making a decision on applying a uniform MTR or an individual operator efficient MTR.
- 5.35 Another respondent argued that given that ComReg had accepted the 'competition problem' in the provision of voice call termination was the same regardless of which operator provides termination, then a decision to impose some remedies on only a subset of operators were irrational. The respondent strongly opposed using differential remedies and considered that ComReg should apply price control equally across all operators. It considered that imposing different remedies on different operators was not consistent with proportionality and harmed competition. The respondent stated that discriminatory remedies were tantamount to subsidising less efficient operators who had been unable to match the contestable advantages currently enjoyed by more successful operators. The respondent also wished to know whether ComReg had also estimated the cost of compliance with the remedies for larger operators.

ComReg's Position

- 5.36 ComReg agrees that pegging the rate of voice call termination for operators with a smaller total market share to that of the larger operators may be appropriate. However this could mean either pegging to the same absolute rate, to a percentage difference or a price cap, and the possibility that different MNOs have different rates over a period but tend towards the same absolute rate over a longer period.

- 5.37 In response to the issue of a uniform MTR, ComReg intends to make a decision on harmonised rates at a later stage and will deal with this issue when determining a price/or prices for the cost orientation obligation. ComReg will seek further input from interested parties at that time.
- 5.38 In response to the comments made that O₂ was also a small operator, ComReg does not agree that this is the case. For example, the most recent data available to ComReg indicate that it has a market share of subscribers which is four times greater than that of the next largest operator, Meteor and the difference in terms of mobile revenue shares is even more pronounced.³¹
- 5.39 ComReg will apply remedies in a similar manner where appropriate. Therefore, if the appropriate remedy to apply on a SMP operator is cost orientation then it will apply to all operators. However, when ComReg considers the detailed application of these remedies it needs to be proportionate. Some remedies may be too burdensome to apply to operators with small shares of the total market, (but if AS data was appropriately prepared on a voluntary basis by these operators then this would be considered) and therefore are not appropriate.
- 5.40 Imposing some obligations on only a subset of operators is not in ComReg's opinion a subsidy for less efficient operators. As mentioned earlier, ComReg has to take into account the promotion of competition in the mobile sector and it would not be proportionate to impose cost accounting and accounting separation on operators with a smaller share of the overall mobile market. Throughout the market analysis process ComReg has made arguments on the proportionality of the remedies proposed and believes the market analysis process represents a comprehensive review of the market under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction.³² In addition therefore to the RIA contained in this document, ComReg considers that an assessment has been made of how appropriate the remedies are to operators with a larger total market share. ComReg notes the agreement of three of the respondents with the appropriateness of this approach.

Proposed Access Remedy

Summary of consultation issue

- 5.41 Regulation 13 of the Access Regulations permits the regulator to impose on an operator obligations to meet reasonable requests for access, as this provides greater certainty in the market. ComReg believes that an obligation of access that requires MNOs to meet reasonable requests for access to and use of their network facilities for the purposes of voice call termination is a necessary condition for the interoperability of services and is therefore appropriate for this market. ComReg also stated that it did not believe that an obligation of access alone would be sufficient

³¹ ComReg Document 05/43, Irish Communications Market, Quarterly Key Data Report: http://www.comreg.ie/_fileupload/publications/ComReg0543.pdf

³² Ministerial Direction (issued by the Minister for Communications, Marine and Natural Resources in accordance with S.13 of the Communications Regulation Act, 2002) published in February 2003

to address the competition problems in this market and ensure that charges for this interconnection were set at an efficient level.

- 5.42 ComReg detailed in the consultation that each SMP MNO should provide network access for the provision of voice call termination services to every public electronic communications network (PECN) provider who reasonably requests such access. Network access should be provided together with any services, facilities or arrangements which are necessary for the provision of electronic communications services (ECS) over that interconnection. ComReg believes that the provision of access should occur as soon as reasonably practicable and should be on fair and reasonable terms and conditions.

Consultation questions 9 - 11

Q.9. Do you agree that an obligation of Access is a necessary obligation to include in the remedies for this market?

Responses to question 9

- 5.43 There were four responses to this question. One of the respondents agreed with ComReg while three disagreed.
- 5.44 One respondent stated that the remedy was neither appropriate nor the minimum that could apply.
- 5.45 Another respondent stated that an access obligation was unnecessary because it was in the interest of MNOs to negotiate in good faith with undertakings requesting access. The respondent considered that ComReg was simply imposing a check list of remedies taken from the fixed sector. The respondent did not believe that ComReg had offered a clear and justifiable analysis of the competition problems and as such an access obligation was unnecessary.
- 5.46 Another respondent agreed that a general access obligation was necessary but the specific obligation imposed by ComReg for mobile voice call termination was unnecessary. This respondent also stated that operators could reach voice call termination agreements satisfactorily through the normal process of commercial negotiation. It considered there was no requirement for an access obligation, in particular as the respondent was unaware of any refusals or disputed access on which ComReg had to intervene in the past. The respondent did recognise that an obligation of access might provide certainty to consumers and ensure any-to-any connectivity between subscribers to different public electronic communications networks (PECNs).

Q.10. Do you agree that an obligation of Access by itself will not be sufficient to address the competition problems in the market?
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Responses to question 10

- 5.47 There were four responses to this question. One of the respondents agreed with ComReg while the remaining respondents restated their disagreement with the imposition of an access obligation. One respondent stated, as there was no competition problem, the obligation of access should be sufficient to remedy any perceived problem.

Q. 11. Do you agree with the details of ComReg's proposed obligation of Access as set out above?

Responses to question 11

5.48 There were three responses to this question. One of the respondents agreed with ComReg while the remaining respondents restated their disagreement with the imposition of an access obligation. Two of these respondents stated that they disagreed with the detail of the obligation for the reasons given in answer to question 9.

ComReg's Position

5.49 ComReg considers that it identified a competition problem in the market, as outlined in Consultation 04/62a and notified to the Commission. ComReg considers that an obligation of access will deal in some part with this competition problem by addressing the risk that SMP MNOs can leverage their market power in the wholesale market into the retail market.

5.50 ComReg acknowledges that interconnection for the purpose of voice call termination is routinely taking place with all operators. However, ComReg believes that an obligation of access will provide greater certainty in the market. ComReg considers that the obligation is proportionate as the detail simply provides, amongst other things, that network access for the provision of voice call termination services is provided to all public electronic communications network (PECN) providers, along with any services and facilities or arrangements which are necessary for the provision of electronic communications services (ECNS). Two of the respondents had stated that they negotiated access on a commercial basis at present, so the obligation should not impose great costs on the operators, while the benefits are greater certainty in the market as operators have no choice but to negotiate access for termination of voice calls on the SMP MNOs' individual networks.

5.51 ComReg considers that without an obligation of access, it would not be in a position to require that SMP MNOs negotiate in good faith with requesting undertakings or continue to provide the existing services on the existing terms and conditions in accordance with Regulation 13 of the Access Regulations. Therefore, ComReg considers that access is an appropriate and justified obligation, the benefits of which will ultimately be lower retail prices for end-users and the promotion of competition in the mobile sector.

Summary of ComReg's Position

5.52 ComReg will impose the obligation of access as detailed in conditions 3 of the Decision contained in Appendix A.

5.53 ComReg considers that access is an appropriate and justified obligation, as operators have no choice but to conclude voice call termination agreements with SMP MNOs. The benefits of the obligation are ultimately lower retail prices for end-users and the promotion of competition in the mobile sector.

5.54 However, ComReg does not consider that an obligation of access alone is sufficient to remedy the competition problem because even with an obligation of access

operators may not be required, for example to publicly disclose prices, or offer services on non-discriminatory terms.

Proposed Transparency Remedy

Summary of consultation issue

- 5.55 Regulation 10 of the Access Regulations allows for the imposition of an obligation of transparency on SMP operators, under which the regulator may require an operator to make public specified information such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use and prices.
- 5.56 ComReg believes that an obligation of transparency can have many benefits. It can assist ComReg and the industry in ascertaining and monitoring whether SMP operators are complying with a non-discrimination obligation, under Regulation 11, which can deter potential anti-competitive behaviour from SMP operators. Furthermore, it can serve to speed up negotiation, prevent disputes and give confidence to market players that a service is not being provided on a discriminatory basis. An additional benefit is in terms of the publication of prices, which gives greater certainty to the purchasers of wholesale termination services and provides advance warning of changes in charges at the wholesale level, which they may need to restructure their retail prices. However, as outlined in the consultation, ComReg believed that an obligation of transparency was not sufficient by itself to address the competition problems in this market.
- 5.57 ComReg outlined the detail of the transparency obligation in the consultation, including; filing with ComReg all voice call termination agreements, within 28 days of their becoming effective; the publication of voice call termination charges on the SMP MNO's website; advance notification of price changes and the publication of a suitable unbundled reference offer on their website.

Consultation questions 12-14

<p>Q.12. Do you agree with ComReg that an obligation of Transparency is a necessary obligation to include in the remedies for this market?</p>

Responses to questions 12

- 5.58 There were four responses to this question. Two of the respondents agreed with ComReg's view and three disagreed.
- 5.59 One respondent disagreed with the imposition of remedies. The respondent considered that there was sufficient transparency in these markets given that *eircom* currently identified each mobile operator's termination charge on its end-user bill. The respondent also considered that there were sufficient competitive constraints on operators to keep termination rates low, due to high churn rates and low barriers to switching. Elsewhere this respondent stated that it believed that the obligations of transparency and non-discrimination were necessary in order to prevent mobile on-net calls from preventing, distorting or restricting competition for mobile services in Ireland, especially in terms of margin squeeze or anti-competitive pricing.

- 5.60 Another respondent stated that MTRs had always been transparent and therefore requiring it to publish such rates and provide prior notice was no great departure from current practice. This respondent did not object in principle to transparency or reasonable suggestions for improving it but did not believe that it was necessary to impose an obligation to bring about such further improvements if they were appropriate.
- 5.61 Another respondent stated that this obligation was unnecessary given that ComReg intended to impose a price control remedy. The respondent considered that ComReg had not provided evidence to show prices and conditions were not sufficiently transparent at present or that this lack was adversely affecting competition. In the respondent's opinion there was no justification for the obligation of transparency on the basis that it was necessary to achieve cost orientation in call termination rates. This respondent believed that in order to show that the remedy was proportionate ComReg should refer to specific failures arising from the insufficiency of current remedies. The respondent believed this would be difficult for ComReg to do and it wished to see a calculation of the benefits and costs of this obligation.

Q.13. Do you agree that an obligation of Transparency is insufficient by itself to address the competition problems in this market?

Responses to questions 13

- 5.62 There were three responses to this question. One of the respondents agreed with this view, while two of the respondents disagreed. One respondent was concerned that a reference interconnect offer (RIO) document such as *eircom* is obliged to produce was of questionable value and was concerned that ComReg would use this as a template. It restated the view that ComReg was simply using a checklist of obligations taken from the fixed market and these were not proportionate for the mobile market. The respondent considered it critical that ComReg realised that there could be a substantial cost to operators in such obligations. Another respondent believed that an obligation of transparency was unnecessary and did not contribute to answering the competition problem.

Q.14. Do you agree with the details of ComReg's proposed obligation of Transparency as outlined above?

Responses to questions 14

- 5.63 One of the respondents agreed with the details of the obligation but also considered that a RIO requirement might be onerous for new entrants and that ComReg should reconsider it in that instance. Another respondent considered that as the market was already transparent an obligation of transparency would impose a significant burden on operators through over regulation.
- 5.64 Another respondent disagreed with the details of the obligation. It considered that the requirements would entail additional costs and in the context of a price control remedy would provide little additional benefits to customers. It considered that filing all voice call termination agreements was unnecessary given that all of these would be set at the cost oriented rate. Likewise publishing prices on the website and advance notification of prices was an unnecessary duplication if there was a

uniform target termination rate. The respondent considered that operators avoided the costs of negotiation of essentially reciprocal agreements by offering standard terms and conditions to all operators seeking voice call termination agreements. Therefore, the obligation of transparency imposed costs without providing any benefits. The respondent stated that if ComReg wanted to impose an obligation it should use one that was similar to what was in place at present.

ComReg's Position

- 5.65 ComReg believes that an obligation of transparency is still necessary in addition to a cost orientation obligation. Organisations, for example, prospective competitors, need to have visible terms and conditions and prices to make decisions on entry. If MNOs agree with this in principle and argue that the marketplace is transparent then ComReg does not see why it will impose an undue burden on them to implement this obligation. If MNOs at present offer reciprocal agreements with standard terms and conditions then it is in the interests of competition to make this publicly available for the reasons outlined above.
- 5.66 Also, an obligation of transparency is necessary to help monitor that MNOs comply with elements of the obligation of non-discrimination, for example, those relating to certain terms and conditions. Information used to measure compliance with non-discrimination would not otherwise be available without an obligation of transparency. It will allow interested parties to have confidence that MNO's are not behaving in a discriminatory manner with respect to termination on their individual networks.
- 5.67 ComReg acknowledges that there is some transparency in the mobile market place at present, for example, the voice call termination charges of the mobile operators are publicly available on *eircom's* website, but considers that the obligation of transparency in this market is appropriate to apply to the SMP MNOs as the relevant market is for mobile voice call termination. ComReg considers that the obligation of transparency will give visibility to the terms and conditions on which other organisations can purchase services, enabling negotiations to be undertaken more speedily and reducing potential complaints. Organisations will be able to react to any price changes in a timely manner and the obligation will allow ComReg and other organisations to monitor non-discrimination. ComReg believes that this can deter potential anti-competitive behaviour from SMP operators and it is unlikely in the timeframe of this review that their market power will diminish. Therefore ComReg considers the obligation of transparency to be appropriate and justified.
- 5.68 ComReg intends to impose an obligation on SMP MNOs to provide a reference offer (RO) in the form as specified in the draft decision. ComReg considers that this will help to provide stability in the market and assist in monitoring anti-competitive behaviour. ComReg does not consider that this will be onerous for existing operators. ComReg considers that this will be of similar depth and content as that currently provided for fixed network operators having SMP and for the avoidance of doubt, will include service level agreements (SLAs).
- 5.69 The forthcoming consultation on accounting separation (for Vodafone and O2) will discuss the requirement for transparency associated with these obligations.

Summary of ComReg's Position

- 5.70 ComReg will impose an obligation of transparency as outlined above and detailed in conditions 4 of the Decision contained in Appendix A.
- 5.71 ComReg considers that each element of the obligation of transparency as outlined in the draft decision is appropriate and justified. The filing of agreements will assist ComReg in investigating any complaints and verifying compliance with non-discrimination. Likewise, the publication of tariffs will not be an onerous burden and it will make it easier for customers both at the wholesale and retail level to make informed choices. Furthermore, the disclosure of termination rates will also enable ComReg to monitor more easily the development of the voice call termination market. ComReg believes that the costs associated with a RO will be minimised through using web publication.
- 5.72 ComReg considers that an obligation of transparency is not on its own, sufficient to guard against the setting of excessive prices and the application of discriminatory practises by SMP MNOs, especially concerning their own retail operations. It is 'light-handed' regulation but it is insufficient to deal with the competition problems in this market.

Proposed Non-discrimination Remedy

Summary of consultation issue

- 5.73 Under the new framework there is provision under Regulation 11 of the Access Regulations to impose an obligation of non-discrimination on SMP operators in relation to interconnection, access or both interconnection and access. ComReg proposed in the consultation to impose an obligation of non-discrimination on each MNO having been identified with SMP in the relevant markets. Such an obligation would allow ComReg to intervene to ensure that a vertically integrated SMP operator is prevented from acting in such a way as to have a material adverse effect on competition.
- 5.74 Addressing the issue of alternative ways to apply the proposed non-discrimination obligation, the consultation outlined four types of discriminatory behaviour which may apply in respect of the provision of voice call termination services and with the potential to have a positive or negative effect. ComReg invited comments on their relevance or appropriateness.
- A. MNO discriminating between other MNOs and FNOs;
 - B. MNO discriminating between FNOs;
 - C. MNO discriminating between other MNOs; or
 - D. MNO discriminating between itself and other MNOs and/or FNOs.
- 5.75 Concerning other non price aspects in the provision of a voice call termination service, potential delays, poor quality of service and the like, ComReg believes that an obligation of non-discrimination should also apply to each designated undertaking. In addition, ComReg believed that the supporting obligation of accounting separation was a necessary requirement to impose on Vodafone and O₂.

ComReg believes that imposing this obligation on Meteor and '3' would be disproportionate.

Consultation questions 15-18

Q.15. Do you agree with ComReg that an obligation of non-discrimination is a necessary obligation to include in the remedies for this market?

Responses to question 15

5.76 In general there was acceptance among three of the respondents that an obligation of non-discrimination might be necessary in some cases to address the competition problems in this market, although one of these urged ComReg to reconsider the option of forbearance. Two respondents disagreed with the imposition of the remedy. One respondent disagreed that it was necessary if ComReg also imposes an obligation of cost orientation and another respondent stressed that the obligation should not restrict an operators ability to enter into commercial deals based on objective differences between parties. This respondent gave the following example of the different service levels that could arise if IP networks were used. In the move towards IP based core networks in both fixed and mobile telephony, delays might become an issue and deals that guaranteed different price levels for different delay characteristics might occur. Therefore it might be possible to have different interconnection rates for different quality levels.

Q.16. Do you agree that an obligation of non-discrimination either alone or in combination with the obligation of transparency and/ or access is insufficient by itself to address the competition problems in this market?

Responses to question 16

5.77 Two respondents agreed that an obligation of non-discrimination might not be sufficient to address the competition problems in this market. One of these did not agree with the imposition of the remedy but acknowledged that it might not alone, or in combination with the obligations of transparency and access, compel MNOs to set F2M charges efficiently on its own. Another respondent stated that an obligation of no undue discrimination would be more appropriate.

Q.17 In relation to voice call termination, do you agree with ComReg's analysis of types A, B and C discrimination?

Responses to question 17

5.78 Two of the respondents answered this question. One of these considered that differentials in termination rates should reflect differences in costs and the stage of market development. Another respondent considered that the optimal rate of F2M and M2M termination might differ for legitimate reasons, including that they were in separate retail markets. Likewise, it was not clear to the respondent why MNOs would discriminate between fixed operators or between mobile operators. The respondent argued that rates were set at a reciprocal level such that one operator could not change its termination rate without affecting its own costs and added that at present it did not discriminate between fixed operators.

Q.18. In relation to voice call termination charges, please provide your views on the appropriate form of non-discrimination obligation required for type D discrimination? Do you believe there are any circumstances where “on-net” charges would not increase if type D discrimination is prohibited?

Responses to question 18

- 5.79 There were five responses to this question. Three respondents agreed that type D discrimination was a problem. Two of these argued that it was restricting competition for mobile services in Ireland. One respondent stated that MNOs should not set a retail price for a service involving this interconnection below the wholesale rate. The respondent argued that there was no justification for this on a cost basis. It considered that ComReg should strictly implement the obligation of non-discrimination and investigate on-net call charges relative to termination rates, which might result in a realignment of mobile pricing and tariffs. Another respondent argued that on-net pricing policies had led to a network effect and had to a considerable extent, prevented it from gaining market share at the expense of its rivals, which had been harmful to competition. The respondent would welcome some clarity on *ex ante* and *ex post* non-discrimination obligations.
- 5.80 Two respondents disagreed that type D discrimination was an issue. One of these suggested that a remedy of no undue discrimination might be more appropriate. Another respondent stated that in the presence of on-net/off-net tariff differentials, setting M2M access charges above costs had been found to intensify competition between operators and so reduce profits. The respondent disagreed that high M2M charges advantaged larger networks relative to smaller rivals. It also disagreed, that it could use high M2M termination rates as a foreclosure device.

Q.19 In relation to other aspects involved in the provision of a voice call termination service (e.g. terms etc...) do you agree with ComReg’s obligation of non-discrimination?

Responses to question 19

- 5.81 One of the respondents agreed with this obligation. Another respondent suggested that an obligation of no undue discrimination might be more appropriate. Another respondent stated that it was not possible to comment on the question as ComReg had not provided any detail. The respondent considered that ComReg must outline the specific actions it would consider to constitute discriminatory behaviour.

ComReg’s Position

- 5.82 ComReg notes the agreement of some of the respondents that an obligation of non-discrimination is necessary in some, if not all, cases. On the basis of the SMP designation in each relevant market, ComReg believes that forbearance would not solve the competition problems, as MNOs have 100% market share, 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 MNOs are under *ex ante* regulation. ComReg concludes that an obligation of non discrimination is required in addition to the proposed cost orientation requirement to prevent and monitor potential competitive distortions brought about by termination charges (see Section 4 and ComReg

Document 04/62a). Such an obligation is necessary as opportunities exist for MNOs to discriminate in a manner that would disadvantage another provider of electronic communications services. While the price controls proposed will control the overall level of the termination charge an MNO could unfairly discriminate between alternative providers by applying different charges where differences are not justified by reference to objective considerations. Therefore, ComReg believes that the non-discrimination obligation is necessary to address any issues arising in relation to the balance of termination charges.

- 5.83 ComReg does not intend that an obligation of non-discrimination will prohibit the negotiation of commercial deals as long as these offerings do not have adverse effects or operate to the detriment of consumers. Addressing comments made by one respondent on the potential for differing service levels under an IP based network, ComReg notes that non-discrimination does not mean that all parties are treated in exactly the same way, but that parties in similar circumstances are treated identically and that any differences in treatment are justified by reference to objective considerations.
- 5.84 In consultation, ComReg outlined four types of discrimination recognising that, in certain circumstances, discrimination may not raise concerns. As outlined in the consultation, ComReg considers that type A discrimination would not necessarily be of concern where the charges offered for mobile termination are not set above the costs of an efficient operator. Where the cost of mobile voice call termination is the same irrespective of the originating network any discrimination between alternative providers, such as MNOs, FNOs and MVNOs, would not appear to be objectively justified.
- 5.85 For type B discrimination, ComReg believes discrimination of this type is likely to raise concerns about the possible adverse effects on FNOs. It is unclear what the MNOs' incentive would be in this context. ComReg notes the belief of one respondent that all F2M charges should be set at the efficient operator level and that any differences in the termination charge offered to FNOs should only reflect differences in the cost of provision to the particular operator. In principle, ComReg considers that cost differences in the provision of termination services to fixed operators are unlikely to occur, termination incurring all the same costs on the terminating network, but if they did, they would likely be an acceptable form of discrimination. The current practice is not to discriminate between fixed operators in the provision of termination service.
- 5.86 As outlined in the consultation, MNOs could potentially offer volume-based discounts to either FNOs or MNOs to encourage them to terminate on their respective network, as long as such discounts do not adversely affect competition to the detriment of consumers. SMP MNOs should make available equivalent volume discounts to equivalent undertakings.
- 5.87 For the reasons outlined in Section 4, type C discrimination is of particular concern to ComReg. In addition to concerns over the level of termination charges, ComReg may have legitimate concerns as to the balance of termination charges, notably, that such charges may be used to weaken competition in the mobile market. Similar to type B discrimination above, ComReg considers that cost differences in the provision of termination services to mobile operators are unlikely, termination incurring all the same costs on the terminating network. The current practice is not

to discriminate between mobile operators or indeed, between fixed and mobile operators in the provision of termination service.

- 5.88 In relation to type D discrimination ComReg notes the comments made by all five respondents on this issue. Clearly some respondents believe that differentials in on-net and off-net pricing are harmful to competition in the overall mobile market. ComReg recognises that on-net pricing policies may prevent or significantly disadvantage later entrants, new entrants or MVNOs from gaining market share at the expense of their rivals. The conclusions of the market review for mobile access and call origination were that competition in that relevant market is not yet effective. While aggressive on-net pricing has the possibility to foster inter-network competition among the larger MNOs, as outlined in section 4, such a pricing policy also has the potential to make it impossible for competitors to compete if it confers an unfair competitive advantage.
- 5.89 ComReg notes the views expressed by a number of respondents that remedies concerning transparency and non-discrimination are necessary in order to prevent mobile on-net calls from preventing, distorting or restricting competition for communications services in Ireland, particularly in terms of anti-competitive price/margin squeezes. ComReg considers the ability of MNOs to differentiate between their on-net and off-net tariff policies, in a manner that has an adverse effect on competition, has the potential to be harmful and therefore may have to be restrained by the imposition of a non-discrimination obligation. However before intervening ComReg will assess the likely impact on competition and the longer term benefit to consumers.
- 5.90 ComReg will be guided by the principle of non-discrimination under Article 82 of the EC Treaty in the application of this remedy. ComReg considers that a non-discrimination obligation implemented in this manner is an effective and proportionate remedy and will prevent or restrict an imbalance in the competitive position between FNOs and MNOs or between MNOs which has an adverse effect. This requirement will reduce the likelihood of potentially adverse effects on competition and protect consumers whilst not placing too onerous an obligation on the designated undertakings in question.
- 5.91 The forthcoming consultation on accounting separation will discuss the requirement for non-discrimination associated with these obligations.

Summary of ComReg's Position

- 5.92 ComReg will impose an obligation of non-discrimination as detailed in conditions 5 of the Decision contained in Appendix A.
- 5.93 ComReg considers an obligation of non-discrimination is appropriate and justified. SMP MNOs have 100% market share in these markets. Without this obligation, ComReg would not have the means to require that SMP MNOs behave in a non-discriminatory manner.
- 5.94 ComReg considers that the obligation of non-discrimination on its own is insufficient to address the competition problem because it will require the obligations of transparency and accounting separation to monitor compliance and to address the potential competition problems. The additional obligations will

allow ComReg to demonstrate the provision of services to other operators under the same conditions (prices) as the SMP MNO provides to its retail arm.

Proposed Price Control Remedy

Summary of consultation issue

- 5.95 As outlined in the consultation, ComReg has indicated that the competition problem in these markets was the lack of effective constraints on the MNOs to ensure that their call termination charges are set at an efficient level. 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 mobile termination charges to efficient levels.
- 5.96 ComReg considers that price control based on cost orientation directly targets the pricing policy of MNOs on voice call termination and therefore directly influences the level of termination charges paid by other operators when terminating voice calls on the mobile network. In the absence of a price control ComReg expects that the termination charges of the mobile operators would operate against the public interest. The costs incurred by competing fixed operators and mobile operators through paying excessive call termination charges are generally passed through to the retail tariffs. The result is that end users might be paying too much for fixed to mobile and mobile to mobile off-net calls. Price control based on cost orientation can achieve the objectives of promoting competition in the mobile market and protecting the consumer interests by setting mobile call termination charges at an efficient level.
- 5.97 As stated earlier, ComReg believes that the obligations of access, transparency and non-discrimination will not by themselves adequately protect the interests of consumers by creating the necessary conditions to bring down termination charges to an efficient level.
- 5.98 ComReg also concluded that voice call termination is in the same product market, whether provided over 2G or 3G technology, namely the wholesale market for voice call termination services on individual mobile networks. ComReg believes that a cost orientation obligation on each SMP MNO is the appropriate form of price control.

Consultation questions 20-21

Q.20. Do you agree that a price control remedy, namely a cost-orientation obligation is a necessary obligation to include in the remedies for this market?

Q.21. Do you agree with ComReg that a price control obligation, namely cost orientation in combination with transparency, access and non-discrimination obligations is sufficient to address the competition problems in this market?

Response to questions 20-21

- 5.99 Two respondents agreed with ComReg and four disagreed. One respondent called for ComReg to apply cost orientation symmetrically across the fixed and mobile

sub-sectors of the communications industry and to recognise that the appropriate cost standard was LRIC.

- 5.100 Another respondent stated that any reduction in its wholesale voice call termination services would jeopardise its financial position, as it would not be able to compete effectively at the retail level. It would also discourage it from investing in infrastructure which had yet to achieve full geographic coverage. The respondent stated that its rates were currently set below cost and that ComReg had not fully examined the impact of a cost oriented rate on its retail prices. The respondent cautioned against basing the efficient rate on Vodafone and O₂'s costs as these might not be efficient operators.
- 5.101 Another respondent disagreed that a price control remedy was necessary, given that Ireland had some of the lowest termination rates in Europe. This respondent repeated a comment made earlier that ComReg had not provided a clear and unambiguous identification of the competition problems and was simply imposing a checklist of remedies from the fixed sector in Ireland.
- 5.102 Another respondent accepted that F2M charges might be set above efficient levels and might therefore accept some form of cost based remedy. However, it considered that rates set above efficient levels led to subsidies for mobile subscriptions and outgoing call services and not to excess profits. The issue was therefore whether a price control remedy centred on distributional issues rather than on efficiency. The respondent stated that detailed cost modelling was inappropriate for the size of the Irish market and that the costs would outweigh the benefits.
- 5.103 The respondent was strongly opposed to a price control remedy for 3G voice call termination. It stated that positive network externalities justified the need for 3G termination charges to subsidise retail services. It believed that this speeded up take-up of 3G services, which was of benefit to customers and allowed operators to recover their costs. It was of the opinion that if ComReg applied a uniform rate for all termination services then it must base it on all the underlying costs, including the costs of 3G networks.
- 5.104 The respondent also stated that it would only accept cost orientation if a mark-up was included for fixed and common cost based on Ramsey principles and another mark-up was included to account for the positive externalities associated with mobile telephony. It considered that cost orientation would impose a heavy burden on operators without bringing benefits to customers.

ComReg's Position

- 5.105 ComReg will address the respondent's concern for its financial viability in the event of cost orientation by implementing the cost orientation obligation in an appropriate way. In response to the comments on the impact of a cost oriented rate on its prices, ComReg is concerned with establishing an efficient level of costs but agrees that it needs more information to determine whether this will equate to the costs of the two operators with the largest total market share.
- 5.106 ComReg believes that it has answered any comments on forbearance earlier in this response to consultation. Reductions in termination rates may be helpful, while cost data is being gathered but they do not in themselves guarantee that rates

will be set at an efficient level. ComReg considers that a termination rate based on efficient costs will ultimately provide the maximum benefit to consumers. SMP MNOs have 100% market share on their individual networks and there is insufficient pressure on them to set termination rates at a competitive level.

- 5.107 ComReg does not accept that cost modelling is not appropriate for the Irish market. ComReg has already performed modelling exercises in the fixed market, other countries of similar size have used models and ComReg has already received models from an Irish MNO. The implementation of a cost orientation remedy would imply some understanding of the costs in question. Also, ComReg will discuss further the issue of the appropriate cost standard before determining a view on the cost oriented price/or prices.
- 5.108 ComReg considers and has stated elsewhere in this document (paragraph 5.31) that the principle of technology neutrality applies to 2G and 3G networks. ComReg will discuss further the issue of network externalities in the forthcoming consultation on mobile accounting separation (to apply to Vodafone and O2).
- 5.109 ComReg has answered the proposal on including a mark-up on termination rates earlier, in response to question six. ComReg will also consider the need to encourage investment in infrastructure and innovation when implementing this obligation.

Summary of ComReg's Position

- 5.110 ComReg will impose an obligation of cost orientation as detailed in condition 6 of the draft Decision contained in Appendix A of this document.
- 5.111 Having considered all the responses, ComReg believes that an obligation of cost orientation is both appropriate and justified as it is the most effective way to remedy the competition problems in these markets. There is no alternative to voice call termination on a particular operator's individual network. The current termination markets do not provide sufficient pricing constraints to ensure that prices reflect 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. The obligation will ultimately provide the maximum benefit to end-customers and encourages competition in the overall mobile market. Without such an obligation MNOs could abuse their dominant position by setting excess prices, ultimately reducing consumer welfare and end user benefits. ComReg acknowledges that it is important to ensure that the final rate or rates set for voice call termination in the mobile market allows for future investment in the network. This may be the existing networks or the roll out of a new network by other operators.
- 5.112 Imposing an obligation of cost orientation however is not sufficient to remedy the competition problems, as it does not give any information on how or at what level prices under this obligation should be set. In order for ComReg to have this, further information and the appropriate obligations of accounting separation and cost accounting systems will be required for the operators with a larger overall share of the overall mobile market (Vodafone and O₂).

Calculating Termination Rates

Summary of Consultation issue

- 5.113 ComReg, in consultation, outlined a number of approaches to calculating the costs associated with termination. These included; benchmarking, retail minus, cost models (for example, bottom-up or top-down cost model approaches), retail controls and asked for comments on the merits of these.

Consultation questions 22 -23

Q.22. Do you believe that a benchmarking approach for setting termination charges by itself or in combination with other price control remedies is appropriate for setting mobile voice call termination rates at an efficient level?

Q. 23. What form of benchmarking do you think is appropriate?

Responses to questions 22-23

- 5.114 Five respondents shared ComReg's reservations on using a benchmarking approach. The respondents stated that benchmarking using rates from EU countries might not ensure that Irish termination rates were set at an efficient level, as the EU rates might not be efficient operator rates. Particular concerns were that ComReg should take country specific factors into account in any benchmarking process. For example, geography, population density and tariff structure. Also, if ComReg used benchmarking then it should only include countries that were broadly comparable in terms of market size and development. All respondents acknowledged the simplicity of the approach.
- 5.115 One of the respondents stated that it was not an appropriate approach, but that if it were necessary to address concerns regarding the proportionality of imposing accounting separation and cost accounting on smaller operators then it would be possible to use Irish specific data from the top-down modelling of O₂ and Vodafone to ascertain reasonable rates for smaller operators.

ComReg's Position

- 5.116 ComReg considers that a benchmarking approach is the least burdensome, as it generally requires no costing information. However, it agrees with the respondents that the approach might not ensure that voice call termination charges will be set at an efficient level. ComReg considers that it is a useful approach to use in combination with other costing methodologies, (for example, bottom-up or top-down) to establish some measure of relative efficiency while the modelling exercise is being completed. In considering benchmarks ComReg would look to European and national best practise to ensure Irish termination rates are appropriate. ComReg acknowledges that the use of benchmarking alone would be insufficient to set a truly cost oriented rate.

Consultation question 24

Q.24. Do you agree with ComReg's proposal that a retail minus approach is not appropriate for setting wholesale mobile voice call termination charges to efficient levels?

Responses to question 24

5.117 Three respondents agreed that a retail minus approach was not a suitable approach for setting voice call termination charges at efficient levels.

ComReg's Position

5.118 ComReg agrees that a retail-minus approach is not appropriate for setting mobile voice call termination charges. This is because there may be some difficulty in calculating the relevant retail cost and/or the appropriate retail margin. Retail-minus is not readily applicable given the range of tariffs for calls requiring termination on mobile networks. Also, if retail prices are not set at effectively competitive levels, subtracting retail costs would not necessarily ensure cost-oriented charges.

Consultation question 25

Q.25. Do you agree with ComReg's proposal that a cost model approach may be appropriate for setting wholesale mobile voice call termination charges to efficient levels?

Responses to question 25

5.119 Three respondents agreed that the best approach for arriving at an efficient charge was to base it on costing information. Two respondents were concerned with the complexity of this approach and that its usefulness might depend on the detailed methodology used. One of these respondents was concerned that building cost models and deriving rates could be time-consuming. It urged ComReg to make this cost model as simple as possible to allow the production of rates in a controlled and predictable manner. Another respondent stated that using cost models could impose a significant burden on operators.

5.120 Another respondent agreed that a cost model approach was best where it was justified that regulating MTRs was appropriate. However it considered the use of cost models as the basis for setting a target voice call termination rate should not result in a uniform charge for all operators.

ComReg's Position

5.121 ComReg agrees with the respondents that a cost model approach (whether top down or bottom up) is most suitable for setting mobile voice call termination rates to an efficient level. The advantage of setting a charge using costing information is that it gives greater certainty that the efficient charge level applies to MNOs in the Republic of Ireland. ComReg discusses this further in section 6.

5.122 ComReg accepts that the construction of such models will create some extra work for the operators, but without such work ComReg would not have any means of assessing the prices proposed by operators.

Consultation question 26

Q.26. Do you agree with ComReg that it is inappropriate to consider retail controls in the context of the mobile voice call termination market?

Responses to question 26

5.123 Four respondents agreed with ComReg that retail controls in the form of for example a retail price cap are not appropriate for this wholesale market.

ComReg's Position

5.124 ComReg agrees with the respondents that it is inappropriate to consider retail controls in the context of the mobile voice call termination market, but notes that retail financial information may be required. ComReg will discuss this further during the accounting separation consultation.

Proposed Supporting Remedies

Summary of consultation issue

5.125 ComReg believes there are a number of additional supporting obligations which are appropriate to remedy the competition problems in these markets. ComReg stated in the consultation document that the obligation of accounting separation (AS) was necessary to ensure compliance with the obligation of non-discrimination. It could act as a restraint on potential anti-competitive behaviour such as margin squeeze and unfair subsidy. ComReg also stated that to be proportionate it would only impose this obligation on operators with a larger total market share. ComReg considered that properly formulated cost orientation and non-discrimination remedies would overcome the requirement for accounting separation for operators with a smaller total market share.

5.126 Also, ComReg stated that in support of the obligation of price control, it could in accordance with Regulation 14 of the Access Regulations, impose obligations relating to cost recovery, including obligations relating to cost accounting systems. These cost accounting requirements would support the principle of price control, for example by establishing the efficient charge level and/or price in any price cap. ComReg considers that this is essential to establish the actual efficient costs of mobile voice termination. Again, ComReg considered that imposing this obligation on smaller operators would be disproportionate.

Consultation question 27-28

Q.27. Do you believe that an accounting separation (AS) remedy is required to support ComReg's remedies for this market?

Q.28. Do you believe that it is appropriate to impose an accounting separation remedy on the larger SMP MNOs, Vodafone and O₂ and not on the other SMP MNOs, Meteor and '3'?

Responses to questions 27-28

5.127 Two respondents agreed that an obligation of AS was necessary and appropriate to support the remedies in this market.

- 5.128 Two respondents disagreed with an obligation of AS. One of these stated that it was feasible to calculate and impose cost based MTRs without imposing the additional burden of AS. The respondent stated that ComReg had not established that the market was not transparent or that discrimination existed, so accounting separation was not necessary to monitor this. Also, it stated that if such behaviour existed ComReg could investigate it on a case by case basis after it set a cost based MTR. It believed that ComReg was not being proportionate, in particular given the low level of MTRs in Ireland and strongly disagreed with this obligation.
- 5.129 Another respondent stated that AS was unnecessary if ComReg imposed a price control obligation. The use of AS would add to MNOs' costs without providing additional benefits and the respondent stated that its use had been limited in other mobile markets. The respondent questioned its usefulness given that operators would use different accounting and economic measures of cost and different approaches.
- 5.130 The respondent asked again whether ComReg had estimated the costs of imposing the obligations on larger operators. The respondent was concerned that ComReg seemed to be penalising more efficient operators for their larger market share while actively promoting and advantaging less efficient operators. The respondent considered that the nature of the competition problem was the same for all operators. All operators had the same degree of market power in the provision of call termination on their own networks and therefore ComReg should not impose differential remedies in one market based on differences between operators in other markets. The respondent considered that high termination charges were not anti-competitive provided there was a requirement for charges to be reciprocal.

ComReg's Position

- 5.131 ComReg accepts one respondent's view that it may be possible to calculate MTRs without imposing accounting separation but considers that the results would not be as reliable. Accounting separation is necessary to monitor price discrimination between a dominant MNO's wholesale and retail businesses and other OAOs and to address margin squeezes. Investigating the latter on a case by case basis would be difficult to do in a timely manner because of the lead times for the preparation of high quality financial information.
- 5.132 In relation to the comments that AS was unnecessary given that the market was already transparent, ComReg considers that this is not the case. Operators have 100% market share and this is unlikely to erode over the timeframe of this review. AS is a necessary and appropriate obligation to monitor operators' compliance with the obligations to remedy this competition problem, including the obligation of transparency. ComReg has answered this issue earlier in this document, as it has the issue of reciprocal charges and the differential, asymmetric imposition of remedies.
- 5.133 In response to the comments on the usefulness of accounting separation if different organisations use different accounting and economic cost approaches. The use of different accounting/economic cost approaches by different organisations is just one factor to consider in the setting of prices and should not significantly reduce the value of the information.

- 5.134 In relation to the comments that accounting separation was unnecessary given that ComReg was imposing an obligation of price control based on cost orientation, ComReg considers that accounting separation is required to aid the reconciliation of any cost model (bottom-up or top-down) back to the statutory accounts. ComReg will use AS to ensure that it does not calculate too low a cost for the provision of this service by MNOs, for example by omitting costs.
- 5.135 In relation to the arguments made to impose AS on all operators. ComReg agrees that all operators have SMP on their respective networks. However, ComReg must impose proportionate remedies. Imposing AS on the operators with a smaller total market share may be excessively costly. ComReg considers that appropriately designed cost orientation and non-discrimination obligations can suffice to regulate the operators with smaller total market share.

Summary of ComReg's Position

- 5.136 ComReg intends to impose an obligation of accounting separation on Vodafone and O₂ as detailed in condition 7 of the Decision contained in Appendix A.
- 5.137 Having considered all the responses ComReg considers that the imposition of accounting separation is appropriate and justified to impose on Vodafone and O₂ to disclose possible market failures and to monitor price discrimination and margin squeezes. Accounting separation is necessary as it will provide ComReg with the relevant data to allow it to perform its duties to ensure that prices are not set at an excessive level and to provide greater certainty about the cost base. If ComReg did not impose this obligation it would have no means of monitoring non-discrimination or of having any information on margins in the retail business. ComReg does not consider that it will be time consuming and overly burdensome, as given the size of the SMP MNOs, such organisations already have management cost accounting systems in place to support internal business decision making. ComReg does not consider it proportionate to impose this obligation on the operators with a smaller total market share.
- 5.138 ComReg does not consider that an obligation of accounting separation is sufficient, on its own or in combination with the previous obligations, to remedy the competition problem, as it still does not ensure appropriate pricing of products and services.

Consultation questions 29-30

- Q.29. Do you believe that a cost accounting systems obligation for the purposes of achieving cost oriented wholesale mobile voice call termination charges is required to support ComReg's remedies for this market?**
- Q.30 Do you believe that it is appropriate to impose a cost accounting systems obligation on the larger SMP MNOs, Vodafone and O₂ and not on the other SMP MNOs, Meteor and '3'?**

Responses to questions 29-30

- 5.139 One respondent agreed with this proposal, while two respondents disagreed. One respondent urged ComReg to accelerate the process given that it had consulted on the issue in 2002.

- 5.140 Two of the respondents stated that cost accounting would add substantially to the costs of operators and not contribute any benefit, in particular given the history of low termination rates in Ireland. One of the respondents considered that ComReg had not justified the obligations in terms of the alleged market failure. However, this respondent also stated that apart from this, the data from Vodafone and O₂ could be used to ascertain reasonable rates for Meteor and '3'.
- 5.141 Another respondent disagreed that ComReg should apply some remedies only on a subset of operators. This respondent considered it necessary to collect data from all operators on an equal basis to calculate the costs of an efficient operator. It stated that the costs of Meteor and '3' were more likely to be the costs of an efficient operator as they had entered the market more recently whereas the respondent had made investment decisions based on the fact that it was the first to market. The respondent considered that to find the true efficiency charge level, cost modelling should be based on the costs of Meteor and '3'.

ComReg's Position

- 5.142 As stated earlier, ComReg will make a decision on whether to use a single rate for all operators or operator specific rates when determining a price for the price control (cost orientation) obligation. ComReg would wish to have further evidence available, for example detailed cost data, before arriving at a conclusion.
- 5.143 ComReg considers that it is both appropriate and justified to impose an obligation of cost accounting on the MNOs with a larger total market share. ComReg considers that cost accounting systems, be it top down or bottom up modelling, are the best means of achieving the move towards an efficient termination rate. As outlined in the Response to Consultation 04/62a, ComReg believes that rates set above cost are not providing the maximum benefit to end-customers in the mobile market.³³ An obligation of cost accounting systems is necessary to implement the obligation of cost orientation. Apart from this, ComReg believes that it is not appropriate to impose this obligation on the operators with a smaller total market share, given the costs of implementation. ComReg will endeavour to make sure this process occurs as quickly as possible.

Summary of ComReg's Position

- 5.144 ComReg will impose an obligation of cost accounting systems on Vodafone and O₂ as detailed in condition 32 of the Decision contained in Appendix A of this document. ComReg does not consider it appropriate to impose this obligation on operators with a smaller total market share.
- 5.145 ComReg considers that this remedy is appropriate and justified to impose on Vodafone and O₂ to ensure that MNOs do not set prices at excessive levels. Without this obligation ComReg would not have the means to monitor prices or to change them if it considers them excessive. This remedy ultimately protects the interests of end users by helping to ensure that voice call termination rates will be set at efficient levels.

³³ ComReg Document 04/62a, Market Analysis-Response to Consultation Wholesale Voice Call Termination Rates.

Conclusion on Market Remedies

Summary of consultation issue

- 5.146 ComReg believes that the same sets of remedies are required to address the same competition problems. The common suite of remedies to be applied to each SMP MNO will consist of access, cost-orientation, transparency and non-discrimination obligations.
- 5.147 ComReg believes that supporting obligations of accounting separation and cost accounting systems are also appropriate to impose on Vodafone and O₂ to achieve efficient mobile voice call termination charges.

Consultation question 31

Q.31. Do you agree with ComReg's conclusion on market remedies?
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Responses to question 31

- 5.148 One respondent commented specifically on this question and disagreed with the market remedies proposed. The other respondents expressed their agreement or disagreement with the remedies based on the individual questions.

ComReg's Position

- 5.149 ComReg has taken all views in to consideration and on balance believes that the remedies it has proposed are appropriate and justified to deal with the competition problems in this market. ComReg accepts that the obligations may impose some costs but considers that there will be a greater benefit via decreased prices for end-users.
- 5.150 ComReg considers that these remedies are the minimum required to achieve access to interconnection and other services which will encourage competition in the overall mobile market. They will also ensure that tariffs and other terms and conditions, including service level agreements, are transparent and non-discriminatory and that prices are set at levels which are not excessive, which will benefit end users.
- 5.151 As outlined in the paragraphs above, without the remedies SMP MNOs would have no incentive to set the voice call termination charges at a competitive level. Also, in the absence of these remedies SMP MNOs may be able to, for example, restrict access by competitors (especially by MVNOs), create margin squeezes, restrict competition and fail to pass on the benefits of pricing to end users. ComReg has highlighted the negative consequences for consumers and competition, of setting termination rates at excessive levels in earlier consultations (ComReg Document 04/62a). ComReg therefore considers that the suite of remedies it proposes is proportionate and justified. They are not discriminatory because they apply either to all operators or to operators in similar circumstances and they are transparent because ComReg has set out the remedies and their application clearly in the Decision.
- 5.152 ComReg considers that all of these obligations are justified given that all SMP MNOs have 100% market share and there is insufficient threat of potential

competition or countervailing buyer power that would constrain the exercise of market power in the relevant markets.

6 Proposed Implementation of Cost Orientation Obligation

Proposed Cost-orientation obligation effective until September 2005

Summary of consultation issue

- 6.1 ComReg outlined a number of alternative mechanisms available for setting an 'efficient charge' level. The proposed cost orientation obligation was discussed in two specific timeframes: until September 2005 and after September 2005.
- 6.2 The first proposals related to until September 2005. ComReg proposed that O₂ and Vodafone should adhere to their undertaking (made in 2004) to reduce their mobile termination rates further. ComReg proposed that the current voice call termination charges should act as a ceiling on the mobile voice call termination charges of each MNO. The reduced voice call termination charges would act as this ceiling until September 2005. ComReg did not expect Meteor and '3' to reduce their rates to this level in the intervening period until September 2005.

Consultation question 32

Q.32. Do you agree with ComReg's proposed price control obligation for the period up to September 2005?
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Responses to question 32

- 6.3 One of the respondents agreed to this proposal, while three disagreed. One of these respondents was concerned at the lack of information on the timing of the decrease in rates and considered that the approach was not transparent and did not provide certainty. It was of the opinion that ComReg should proceed to implement this obligation immediately.
- 6.4 Two respondents disagreed that smaller operators should not have to reduce their termination rates in the intervening period. One of these stated that they should move towards their target efficient level while the other stated that they should reduce the rate to the same level as Vodafone and O₂. This respondent also stated that the price cap should be kept in place until Sept 2005 or such time as efficient levels had been satisfactorily estimated and agreed by the parties.
- 6.5 Another respondent believed that the imposition of a price ceiling would prevent it from increasing its charges under cost orientation and that this would be in contravention of the new regulatory framework as its charges were currently below cost.

ComReg's Position

- 6.6 Given that rates have not increased and Vodafone and O₂ have followed the commitments made to voluntary rate reductions up to the publication of this document, ComReg considers that in effect, this remedy has already been implemented. However given the uncertainty on the final price/or prices that will be determined, ComReg considers that the current rate for each individual voice call termination charge for each SMP MNO, will be a ceiling on the mobile voice call termination charges of each SMP MNO up until September 2005.

Proposed Cost-orientation obligation effective after September 2005

Summary of consultation issue

- 6.7 ComReg stated that it believed that between the consultation and September 2005 it would have a number of alternatives to obtain the relevant costing and other information necessary to establish an 'efficient operator' charge. These options include: benchmarking, bottom-up modelling, top-down modelling or a combination of these. ComReg also recognised that there may need to be a glide path or a once-off adjustment followed by a glide-path for MNOs to reach the target charge level. Any immediate adjustment of the charges could cause problems for some operators and destabilise competition in the mobile sector. The first of the approaches proposed was benchmarking.
- 6.8 Benchmarking was considered to be the least burdensome remedy, as already discussed in section 5. However this remedy may not result in cost oriented rates in the long-term.

Consultation question 33

Q.33. Do you agree with ComReg's approach to a benchmarking exercise? Please elaborate on your response or suggest possible alternatives

Responses to question 33

- 6.9 Three respondents shared ComReg's reservations on using a benchmarking approach. Other respondents had commented on this issue in section 5. The respondents stated that benchmarking using rates from EU countries might not ensure that Irish termination rates were set at an efficient level, as the EU rates might not be efficient operator rates. Particular concerns were that any benchmarking process should take into account differences in cost levels between countries. One respondent stated that if termination rates based on benchmarking were found to be considerably different than the Irish rates then it would favour a glide path, applied equally to all operators.

ComReg's Position

- 6.10 ComReg considers that a benchmarking approach is the least burdensome, as it generally requires no costing information. However, it agrees with the respondents that the approach may not ensure that voice call termination charges will be set at an efficient level. ComReg considers that it is a useful approach to use in combination with other costing methodologies, (for example, bottom-up or top-down) to establish some measure of relative efficiency while the cost modelling exercise is being completed.
- 6.11 In considering benchmarks ComReg would look to European and national best practice to ensure Irish mobile termination rates are appropriate. ComReg considers it could provide an interim level until the time when relevant data from the other models is available or to supplement that data.
- 6.12 Establishing cost oriented mobile termination rates will necessarily require a significant period of time, to gather cost data and conduct further consultations. During this period, ongoing reductions in termination rates would reduce the need

for early regulatory intervention, for instance by setting rates by reference to EU or national benchmarks.

Top-down Approach

Summary of consultation issue

- 6.13 A top-down model is normally derived from an operator's own accounts and is the key element of accounting separation and cost accounting obligations. Such models can be prepared on a current cost accounting basis (CCA) or on a long run incremental cost basis (LRIC). ComReg considered that if CCA accounting was performed correctly, that it should eliminate most of the inefficiencies revealed by a bottom-up model. The benefits are that prices are set using actual costs which reduces the scope for margin squeeze and benefits end-users. The disadvantage is that it might take more time to implement.
- 6.14 ComReg also thought that it would be more appropriate to benchmark Meteor and '3' against the efficient charge level determined from Vodafone and O₂'s top-down model. ComReg considered that Vodafone and O₂ should begin preparing statements when the remedy was notified. ComReg expected that the first set of financial statements would be ready by October 2005 for the year ending 31 March 2005. ComReg considered that a benchmarking approach would be necessary until the relevant data from the top-down model became available.

Consultation question 34-35

- Q.34. Do you agree with ComReg's approach to a top-down modelling exercise? Please elaborate on your response or suggest possible alternatives.**
- Q.35. Do you foresee any specific problems with the use of data from top-down models built from Vodafone and O₂ data to set a target 'efficient charge' level?**

Responses to questions 34-35

- 6.15 Three respondents accepted that a top-down model would be a useful approach to setting the 'efficient charge' level. However, one of these urged that it be as simple as possible and was concerned at the length of time it would take to develop this type of model. This respondent agreed an interim approach might be necessary and in that event, that ComReg should make use of benchmarking if it was the only option available.
- 6.16 Another respondent stated that if ComReg used these models to set a uniform efficient charge for all mobile operators the benefits of the approach would be lost, as the resulting MTR would not reflect any operators actual costs or real accounting data. This respondent believed that ComReg might have pre-judged the outcome of the consultation by requesting operators to begin preparing financial statements, prior to the close of the consultation. In addition the respondent argued that ComReg did not take into account possible comments by the Commission and other NRAs as it was required to do under Regulation 19 (4) of the Framework Regulations. Apart from this, the respondent rejected the statement that it should

begin preparing accounts based on those in the fixed sector and on the Oct. 2002 consultation as ComReg had never finalised the response to that consultation.³⁴

- 6.17 The respondent made a number of points about using actual costs, for example, that low costs due to scale and low costs due to efficiency were not the same thing. It saw no reason to assume that its costs were not those of an efficient operator. It agreed that it would be possible to set rates for Meteor and 3 against what was appropriate for Vodafone and O₂. It thought it was crucial that realistic timeframes were set for completing this significant task and that ComReg should constructively engage with MNOs.
- 6.18 Another respondent accepted that ComReg could use a top-down cost model as an input to determining the efficient charge and that the current cost accounting approach proposed by ComReg was appropriate for this end. However, it believed that ComReg should mandate all operators to develop a cost model. Alternatively, Meteor and 3 should contribute to the costs incurred by Vodafone and O₂ in meeting this regulatory obligation. This respondent also considered that industry involvement would be necessary to identify data streams and agree data collection processes.
- 6.19 One respondent made the point that accounting separation was not required in order to develop a top-down cost model and that the proposed obligation was unnecessary. It also asked ComReg to look at the Commission's comments on FICORA's (Finland) proposal to impose less onerous obligations on smaller operators.

ComReg's Position

- 6.20 In response to the comment on pre-judging the consultation process, ComReg points the respondent to paragraph 5.19 of ComReg document 04/62a, where it states that operators should begin preparing financial statements following notification of the remedy.³⁵ Notification takes place after ComReg has considered all responses to consultation and formed a view on each issue.
- 6.21 ComReg considers that some form of accounting separation is required to develop a top down model, since at a minimum retail costs must be isolated. In addition, ComReg has taken into account the Commission's comments to Ficora. In the Commission's comments on that notification it stated that NRAs must have adequate reasoning for applying different remedies to different SMP operators. These comments were directed in particular at cost orientation and cost accounting systems obligations and the Commission raised the possibility of benchmarking operators with smaller market share to the rates of those with a larger market share.³⁶ ComReg considers that it has provided adequate reasoning on why it is imposing different remedies on different operators. It has imposed cost orientation

³⁴ ComReg Document 02/86, Consultation on the issue of mobile accounting separation and costing methodologies.

³⁵ ComReg Document 04/62a, Market Analysis Response to Consultation-Wholesale Voice Call Termination on Individual Mobile Networks p.35.

³⁶ Case FI/2003/0031: Market for voice call termination on individual mobile networks. Comments pursuant to Article 7(3) of Directive 2002/21/EC.

on all SMP MNOs and, as per the Commission's comments, the mechanism it will consider to implement this for operators with a smaller market share (instead of cost accounting systems), is to benchmark them against the operators with a larger market share.

Bottom-up Approach

Summary of consultation issue

- 6.22 Voice call termination charges can be set without reference to a top-down model by using the alternative of a bottom-up cost model (BUCM). The principal advantage to a BUCM is that it is based on efficient operator costs. It can be useful where there is limited data on operators' actual costs, thus minimising any potential time delay in determining cost-orientated termination charges via option 2 (top-down approach). However, the principal disadvantages with this approach are that it does not relate to an operator's actual costs; OPEX calculations can be difficult and the figures do not reconcile to statutory accounts.
- 6.23 Whichever method is used to set prices, ComReg recognises that it needs to consider issues such as a glide path and/or a possible once-off adjustment.

Consultation question 36

Q.36. Do you agree with ComReg's approach to a bottom-up modelling exercise? Please elaborate on your response and state your preferred route as to how a BUCM might be developed.

Responses to question 36

- 6.24 Three respondents broadly agreed with this proposal. One respondent shared ComReg's appreciation of the timing advantage of this approach and urged ComReg to develop this as soon as possible as the use of a bottom up model might put ComReg in a position to set prices based upon cost information from September 2005. If this was not the case then it accepted that, in the absence of an alternative, benchmarking would be appropriate. The respondent was concerned overall with the timing of the implementation and asked that ComReg develop the model in a transparent manner.
- 6.25 Another respondent agreed with the main advantages and disadvantages of the model. The respondent believed that in this context a bottom up model could be very useful in pegging the rates of Meteor and 3, especially when used in conjunction with other models as outlined in their answer to question 6. The respondent would welcome the establishment of an industry advisory group on bottom-up modelling. The respondent did not agree with using benchmarking as an interim measure and believed that ComReg should take a more cautious approach to setting MTRs whether the decision was interim or final.
- 6.26 Another respondent agreed that bottom-up models encountered a number of difficulties and therefore ComReg should not use the method in isolation. The respondent repeated the view that any proposed cost modelling exercise would only be acceptable if it included a Ramsey based mark-up to account for fixed and common costs and a further mark-up to account for the positive externalities associated with mobile telephony. It also stated that ComReg should apply any

bottom-up model and glide-path approach equally to all operators. It considered that an industry forum would be necessary to agree the approach.

ComReg's Position

- 6.27 ComReg accepts the majority of the points the respondents raised and will consider them when determining the price for the obligation of price control (cost orientation). Given the practical problems (which will be considered in the accounting separation consultation) with Ramsey pricing ComReg will only consider it on the presentation of suitable data as outlined earlier in paragraphs 5.21-5.24. ComReg is still of the view that bottom-up cost modelling may have an important role in establishing efficient level costs.

Conclusions on options for calculating an efficient charge level

Summary of Consultation Issue

- 6.28 ComReg stated that it believed that the most reliable approach was to reconcile top-down and bottom-up approaches to calculating costs. However, this hybrid approach might be resource-intensive and require heavy commitment from both operators and ComReg. In that regard, ComReg believed that it might be more appropriate to use the alternative top-down approach supported by a relevant benchmarking exercise. This approach would reflect the costs of current activities carried out by the MNOs, and enable a comparison with an external price, independent of the organisation.
- 6.29 For the purposes of deriving a top-down model ComReg proposed to impose accounting separation and cost accounting systems obligations on Vodafone and O2. As stated in the previous section, imposing the supporting obligations of cost accounting systems and accounting separation obligations on smaller operators could be disproportionate given the relative size of Meteor and '3' and the potential costs associated with the implementation of a suitable cost accounting system for the purposes of achieving cost-orientation. As stated earlier, ComReg believes that it was more appropriate to benchmark Meteor and '3' against what was subsequently determined as the 'efficient charge' level cost based on a top down analysis of the relevant costs of Vodafone and O2.
- 6.30 In the intervening period, while top down information was being prepared, ComReg would explore a number of options including benchmarking or bottom-up modelling.

Consultation question 37

Q.37. Do you agree with ComReg's proposed approach for setting a target 'efficient charge' level?
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Responses to question 37

- 6.31 Three respondents disagreed with aspects of ComReg's approach. One respondent disagreed that the hybrid approach was resource intensive and required heavy commitments from MNOs and the regulator. It argued that there was sufficient industry expertise and 'off-the-shelf models' on mobile network cost modelling (all models) and economic consultants for ComReg to proceed directly to the proposed

development of the approach to cost modelling. It stated that ComReg had had the regulatory duty to impose the obligation of cost orientation on certain MNOs since 1999.

- 6.32 Another respondent disagreed with the setting of a uniform charge rate. The respondent also disagreed that accounting separation was required to support ComReg's remedies for this market and referred to its response to questions 27 and 28. It considered that European benchmarks were of little use in setting appropriate and proportionate MTRs for the Irish mobile operators and expected ComReg's decision to be robust and proportionate. It was of the opinion that the best way to achieve this was to use the hybrid approach as described earlier.
- 6.33 Another respondent accepted that some kind of cost orientation remedy might be appropriate to ensure that F2M termination rates were not set above efficient levels. It accepted that ComReg could use top-down and bottom-up cost models as an input to the determination of efficient charges; however, it had a number of concerns. The respondent restated its views on allowing a mark-up for Ramsey based pricing and network externalities.
- 6.34 The respondent did not support the need for the obligations of accounting separation and cost accounting systems as it considered it was unnecessary as an input to top-down cost models. The respondent believed that all operators should construct top-down cost models or else contribute to the costs of Vodafone and O₂ for complying with this obligation.

ComReg's Position

- 6.35 Having taken into consideration the disparity of respondents' views, ComReg considers that there is merit in each of the approaches to setting an efficient charge level. At this stage, ComReg intends to impose on each SMP MNO the obligation of price control based on cost orientation. In the meantime ComReg is also imposing a price ceiling on each individual termination rate at current levels, given the uncertainty surrounding any final cost oriented price. The exact mechanism for determining a cost oriented price may likely involve a combination of top-down and bottom-up modelling and in the shorter-term, ComReg may also consider benchmarking.
- 6.36 ComReg accepts that the use of a uniform rate is an issue it will need to review and will do so when cost data becomes available. It does not believe that externality or Ramsey pricing mark-ups are appropriate for inclusion in financial statements. ComReg rejects the notion that accounting separation and cost accounting systems are not an input to top down cost models. They are integral to derive top down models from the financial records of the company, unlike bottom up models.

Options for reaching an efficient charge level

Summary of Consultation Issue

- 6.37 In setting a cost oriented rate ComReg stated that it would give careful consideration to balancing two objectives:
- Adjustments should be achieved sufficiently quickly in order to deliver substantial benefits to mobile competition and to end-users; and

- Adjustments should allow sufficient time for operators, if appropriate, to adjust to the new voice call termination charges.

6.38 Considering the above, ComReg stated that it believed that the imposition of a price cap system or a glide path, whichever was appropriate, over a reasonable period of time might be the most appropriate price control for it to impose. The reasonable period would aim at providing a transition towards efficient charging levels thereby promoting sustainable competition. It would also aim at preventing the continuance of any high termination rates which would ultimately benefit end users. In the interests of consumers ComReg was of the opinion that this period should be as short as possible without creating possible adverse effects on MNOs. ComReg believed that a measured progressive approach to any reduction in mobile voice call termination charges was appropriate.

Consultation question 38

Q.38. Do you agree that measured progressive approach to any reduction in mobile voice call termination charges is appropriate? Please elaborate on your response

Responses to question 38

- 6.39 Five respondents agreed that a measured approach was appropriate to any reduction in mobile voice call termination charges. One respondent stated that ComReg should base the glide-path on solid analysis and that the timing and scale of price changes be transparent to all.
- 6.40 Another respondent stated that in light of ComReg's concerns on developing the hybrid model, ComReg should use wholesale price caps for mobile termination rates, consistent with the respondent's support for the same in fixed interconnection. The respondent recognised that developing LRIC models was burdensome in the first instance but they were necessary in the migration to an eventual wholesale price cap model. The respondent was of the opinion that a price cap could be set at a maximum level of charges over a number of years and add a degree of certainty to these charges. It considered this would benefit consumers and provide efficiency incentives for the operators concerned.
- 6.41 Another respondent supported a glide path approach but questioned the relevance of a glide path or any other mechanism when its prices were already established below cost. The respondent stated that a one-off adjustment of its mobile voice call termination rates would seriously affect its viability in the short to medium term, as this would seriously undermine its business plan. The respondent asked that any glide path should cover the period 2005-2008 so it would at least mirror its profitability and network coverage expectations.
- 6.42 Another respondent agreed that a measured approach to any reduction in mobile voice call termination charges was appropriate. However, it thought that ComReg should have a more informed discussion of the various mechanisms once it had reviewed the proposal to set a uniform efficient MTR for all operators.
- 6.43 Another respondent accepted the principle of price control that gradually brought down termination charges in line with efficient levels, assuming they were not already at such levels. However, the respondent stated that ComReg should only

implement price control once the output from the cost model was relatively stable and that the termination charges of all operators must be brought to the same efficient charge level at the same time.

ComReg's Position

- 6.44 Having considered the views of all the respondents, ComReg believes a measured approach to any reduction in mobile voice call termination charges may still be appropriate. The implementation of a measured approach will ultimately depend on the level of mobile termination rates relative to the final cost oriented price/or prices.

Proposed Decision

Summary of Consultation Issue

- 6.45 ComReg enclosed a draft decision in Annex B of the consultation paper (04/62a). The draft decision set out the statutory powers giving rise to the decision and included details of the proposed obligations. ComReg also asked whether it should issue a separate decision for each undertaking.

Consultation questions 39-40

Q.39. Do you consider that a separate decision should be issued for each undertaking?

Q.40. Do you agree with the wording of the draft decision, including that for the options noted above? Please elaborate on your response

Responses to questions 38 and 40

- 6.46 There were three responses to these questions. Two of the respondents agreed that there should be one decision, while one respondent considered there should be a separate decision for each undertaking.
- 6.47 One respondent considered that one decision covering all mobile operators would be the simplest approach for all concerned. The respondent agreed with the wording, subject to its comments on the rest of the consultation. This respondent noted that ComReg should make clear in the text on price control that the prices quoted represented price ceilings and that the actual price to apply would not be more than that quoted in the Decision. This respondent considered that there should be clear text that termination rates would move to a cost oriented rate from September 2005, in line with the outcome of the modelling and cost accounting exercises.
- 6.48 Another respondent considered that ComReg should issue a single decision and restated the view that all remedies be applied symmetrically to all operators; therefore the decision should be identical in all respects for all operators. The respondent considered that ComReg had over-specified the draft decision for fulfilling the stated aim of ensuring that mobile termination rates were set at efficient levels. The respondent considered that ComReg should simply state the obligations imposed, with no detail and it considered that transparency and non-discrimination should be limited to the current obligations on Vodafone and O₂, while cost orientation was imposed if proportionate.

6.49 Another respondent considered that as there were separate defined markets and each operator had SMP in their respective termination market ComReg should issue separate decisions. The respondent wholly rejected the draft decision for the reasons set out in its response. Amongst other things, it considered the remedies to be excessive and onerous, failing to take into account the market structure of the mobile sector and it disagreed with the imposition of a uniform target rate.

ComReg's Position

6.50 Having considered the views of respondents, ComReg considers that a single decision is appropriate, as it is the most straightforward approach. ComReg will issue subsequent separate decisions to ensure compliance with the obligations, for example on accounting separation.

6.51 ComReg considers that it has addressed respondents' comments on the appropriateness of the obligations throughout this response to consultation under the relevant questions. In addition, ComReg believes the market analysis process represents a comprehensive review of the market under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction published in February 2003.³⁷

6.52 As required by Regulation 20 of the Framework Regulations, ComReg is now making the draft decision accessible to the European Commission and the national regulatory authorities of other member states of the European Community prior to making a final decision. The decision contained in Annex A is a draft decision and ComReg is seeking views from interested parties on this.

³⁷ The Ministerial Direction (issued by the Minister for Communications, Marine and Natural Resources in accordance with S.13 of the Communications Regulation Act, 2002) published in February 2003. "*The Commission before deciding to impose regulatory obligations on undertakings in the market for electronic communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practise and otherwise in accordance with measures that may be adopted under the Government's Better Regulation programme.*"

7 Regulatory Impact Assessment

- 7.1 The Ministerial Direction (issued by the Minister for Communications, Marine and Natural Resources in accordance with S.13 of the Communications Regulation Act, 2002) published in February 2003, directs:

“The Commission before deciding to impose regulatory obligations on undertakings in the market for electronic communications or for the purposes of the management and use of the radio frequency spectrum or for the purposes of the regulation of the postal sector, shall conduct a Regulatory Impact Assessment in accordance with European and International best practise and otherwise in accordance with measures that may be adopted under the Government’s Better Regulation programme.”

- 7.2 Regulation 9(1) of the Access Regulations stated that: “Where an operator is designated as having significant market power on a relevant market as a result of a market analysis carried out in accordance with Regulation 27 of the Framework Regulations, the Regulator shall impose on such operator such of the obligations set out in Regulations 10 to 14 as the Regulator considers appropriate.” Furthermore, paragraph 21 of the SMP guidelines says, “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 to have SMP.
- 7.3 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.’ The regulatory impact assessment is required to assess whether the range of obligations proposed are proportionate and justified and meet ComReg’s objectives in terms of the promotion of competition, the development of the internal market and the promotion of the interests of end-users.
- 7.4 In considering these issues, the principles proposed in “Regulating Better: A Government White Paper setting out six principles of Better Regulation”, provide useful assistance. The criteria to be considered when undertaking a regulatory impact assessment include:
- Identification or quantification (where possible) of impacts
 - Structured consideration of alternatives to regulation and of different regulatory approaches
 - Built-in comprehensive, consultation processes
 - Formal consideration of compliance issues
- 7.5 ComReg believes the market analysis process represents a comprehensive review of the market under consideration and is approximate to a regulatory assessment as considered by the Ministerial Direction quoted in 7.1 above.

- 7.6 Furthermore, ComReg has attempted to uphold the principles outlined in the Government White Paper of Better Regulation. ComReg has assessed the impact of the remedies proposed throughout this market review. ComReg has given structured consideration of alternatives to regulation and of different regulatory approaches, in light of the competition problems identified, for example the options of forbearance, retail controls and the need to impose each individual remedy. Indeed, ComReg has been guided by the principle of minimal intervention, when selecting the remedies to address the market failure.
- 7.7 ComReg has attempted to adhere to the guidance of the Recommendation on Relevant Markets; Annex II of the Framework Directive; and the relevant competition case law. The scope of the review extends to incorporate the views and suggestions of respondents, wherever possible. ComReg has liaised with the Competition Authority throughout the process of the market review and ComReg notes the view of the Competition Authority that regulatory intervention based on market failure is justified in this market. ComReg is satisfied it has carried out this review comprehensively and that it has considered the implications for regulatory intervention.
- 7.8 ComReg has considered the impact of regulation in this market and deems that it is both appropriate and justified, in light of the market analysis and the competition problems identified. In a market where each operator has SMP on its individual network, the obligations proposed should result in lower consumer prices, and replicate the effects of effective competition by removing barriers to entry in the mobile market for new entrants or indirect access operators that high termination rates cause.
- 7.9 With regard to the issue raised by a number of respondents to this consultation of ComReg carrying out a cost/benefit analysis in the RIA for each of the proposed obligations, ComReg does not believe that this would be practical, nor indeed necessary. As noted in the White Paper on Better Regulation, it is crucially important to ensure that an RIA does not become an overly bureaucratic exercise and that the practical use of an RIA must take precedence. Accordingly, ComReg believes that its application of the Regulatory Impact Assessment should take into account the overall impact of the measures proposed, rather than each of its individual elements.
- 7.10 ComReg has proposed a regime that takes the cost of compliance and implementation into account. For example, ComReg has taken a proportionate approach to applying remedies to operators with a smaller total market share. In addition, ComReg has taken industry sustainability into account by allowing that the move towards a cost oriented mobile termination price/or prices might have to be achieved in a measured way, depending on the level of mobile termination rates relative to the final cost oriented price/or prices. ComReg has also taken a proportionate approach to the implementation of the obligation of non-discrimination.
- 7.11 ComReg therefore considers that the obligations it is imposing to remedy the competition problems in these relevant markets are appropriate, justified and proportionate.

Appendix A – Proposed Decision on Voice Call Termination Remedies

STATUTORY POWERS GIVING RISE TO DECISION

- 1.1 In making this Decision and imposing the SMP obligations set out herein, ComReg has taken account of, amongst other things, its functions under Regulation 6 (1) of the Access Regulations³⁸, has assessed the proportionality of the obligations imposed relative to the objectives of ComReg set out in section 12 of the Act of 2002³⁹, has taken in to account the factors set out in Regulation 9 (6) and 13 (4) of the Access Regulations, has taken the utmost account of the EU Commission's Recommendation⁴⁰ and the SMP Guidelines⁴¹ and has (where appropriate) complied with and taken in to account the Policy Directions made by the Minister for Communications, Marine and Natural Resources⁴².
- 1.2 This Decision is made pursuant to Regulation 27 of the Framework Regulations⁴³, Regulations 9, 10, 11, 12, 13 and 14 of the Access Regulations, having taken into

³⁸ S.I. No. 305 of 2003 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 which transposes Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

³⁹ Communications Regulation Act, 2002.

⁴⁰ 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.

⁴¹ Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services.

⁴² Policy Directions made by Dermot Ahern T.D. Minister for Communications, Marine and Natural Resources on 21 February, 2003 and 26 March, 2004.

⁴³ S.I. No. 307 of 2003 the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 which transposes Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

account the Consultation⁴⁴, the Response to Consultation⁴⁵, the Remedies Consultation⁴⁶, the SMP Designation⁴⁷ and sections 10 and 12 of the Act of 2002.

1.3 In this Decision:

‘Access’ shall have the same meaning as in the Access Regulations;

‘Agreement’ means an agreement for the provision of voice call termination services;

‘Interconnection’ shall have the same meaning as in the Access Regulations;

‘MVCT’, means mobile voice call termination;

‘SMP’ means significant market power, as referred to in Regulation 25 of the Framework Regulations; and

‘SMP MNO’ means each of the mobile network operators designated as having SMP in the SMP Designation in accordance with Regulations 25-27 of the Framework Regulations.

‘O2’ means O2 Communications (Ireland) Limited which was designated as having SMP on the market for voice call termination on its own mobile network by the SMP Designation in accordance with Regulations 25-27 of the Framework Regulations; and

‘Vodafone’ means Vodafone Ireland Limited which was designated as having SMP on the market for voice call termination on its own mobile network by the SMP Designation in accordance with Regulations 25-27 of the Framework Regulations.

⁴⁴ Document No: 03/127a: Consultation - Market Analysis – Wholesale Voice Call Termination on Individual Mobile Networks, dated 22 October, 2003. See the following link: http://www.comreg.ie/_fileupload/publications/ComReg03127a.pdf

⁴⁵ Document No. 04/62a: Response to Consultation and Notification to European Commission- Wholesale Voice Call Termination on Individual Mobile Networks, dated 8 June 2004. see the following link:

<http://www.comreg.ie/publications/default.asp?nid=101658&ctype=5>

⁴⁶ Document No. 04/62b: Consultation - Consultation on Remedies – Wholesale Voice Call Termination on Individual Mobile Networks, dated 8 June, 2004. See the following link: http://www.comreg.ie/_fileupload/publications/comreg0462b.pdf

⁴⁷ Document No. 04/82: Market Analysis – Wholesale Voice Call Termination on Individual Mobile Networks, dated 29 July, 2004. See the following link:

http://www.comreg.ie/_fileupload/publications/ComReg0482.pdf

2 SMP OBLIGATIONS

- 2.1 ComReg has decided to impose each of the SMP obligations, as provided for by Regulations, 10, 11, 13 and 14 of the Access Regulations, on all of the SMP MNOs. These SMP obligations are described further in the sections below.
- 2.2 ComReg has decided to impose the obligation of accounting separation on Vodafone and O₂.
- 2.3 ComReg has decided to impose obligations in relation to cost accounting systems on Vodafone and O₂.

3 ACCESS

- 3.1 As provided for by Regulation 13 of the Access Regulations, SMP MNOs shall have an obligation to meet reasonable requests for Access to their mobile networks by an Undertaking, if such a request is made by an Undertaking.
- 3.2 Without prejudice to the generality of Section 3.1 of this Decision, a SMP MNO shall:
 - I. Meet reasonable requests for Access to specified network elements, facilities or both such elements and facilities;
 - II. Negotiate in good faith with Undertakings requesting Access;
 - III. Not withdraw Access to facilities already granted prior to the effective date of this Decision; and
 - IV. As a condition of their Access obligations, ensure that all reasonable requests for Access are expedited in a fair, reasonable and timely manner, and in any event no later than 3 months from the initial request for Access.

4 TRANSPARENCY

- 4.1 As provided for by Regulation 10 of the Access Regulations, SMP MNOs shall have obligations to ensure transparency in relation to Interconnection and Access.
- 4.2 Without prejudice to the generality of paragraph 4.1, SMP MNOs shall comply with the obligations set out in 4.3 – 4.8.
- 4.3 SMP MNOs shall file with ComReg all Agreements, including a full description of all terms and conditions, and prices for MVCT. Agreements shall be filed within 28 days of the effective date of this Decision. Updates to Agreements shall also be filed within 28 days of the effective date of this Decision.
- 4.4 SMP MNOs shall each publish all MVCT prices (and all updates thereto) on their websites within 28 days of their being effective.

- 4.5 SMP MNOs shall each notify ComReg of any amendment to MVCT prices, not less than 28 days before any such amendment takes place.
- 4.6 SMP MNOs shall each notify all interconnected parties and ComReg of any amendments referred to in section 4.5 and publish details of any amendments on their websites at the same time that ComReg is notified.
- 4.7 SMP MNOs shall each:
- I. Publish on their wholesale website, and keep updated, a reference offer (“RO”) in respect of the services and facilities referred to in section 3;
 - II. Ensure that the RO includes a description of the relevant offerings broken down into components according to market needs and a description of the associated terms and conditions, including prices;
 - III. Publish a RO which contains details of the terms and conditions of Access in respect of facilities already granted: and
 - IV. Fully and properly maintain supporting records which detail any amendments to the RO for a period of 6 years, and ensure that they are available to ComReg upon request or upon the issuing of a direction by ComReg requiring that such records be made available to ComReg.
- 4.8 SMP MNOs shall each make publicly available 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 3, as may be specified by ComReg from time to time.

5 NON-DISCRIMINATION

- 5.1 The SMP MNOs shall have an obligation of non-discrimination, as provided for by Regulation 11 of the Access Regulations. Without prejudice to the generality of this obligation, each SMP MNO shall:
- I. Ensure that they apply equivalent conditions in equivalent circumstances to Access Seekers and other MNOs providing equivalent services.
 - II. Ensure that they provide services and information to Access Seekers and other MNOs under the same conditions and of the same quality as the SMP MNO provides for their own services or those of their subsidiaries or partners.

6 PRICE CONTROL

- 6.1 As provided for by Regulation 14 of the Access Regulations, SMP MNOs shall each have obligations in relation to cost recovery and price control. The burden

of proof that charges are derived from costs, including a reasonable rate of return on investment shall lie with SMP MNOs.

- 6.2 SMP MNOs shall each have an obligation to offer cost-oriented prices for MVCT.
- 6.3 Vodafone and O₂ shall have imposed on them obligations in relation to cost accounting systems, as provided for by Regulation 14 of the Access Regulations. ComReg will consult further on the detailed requirements of and the practical implementation of these obligations.
- 6.5 Without prejudice to section 6.2, the prices offered by the respective SMP MNOs for MVCT on their respective networks, shall not exceed the prices as set out in the table below, until further notice by ComReg.

Table: Prices for MVCTs to be offered by SMP MNOs

SMP MNO	MVCT Price Cent Per Minute		
	Peak	Off Peak	Weekend
Vodafone	12.90	11.42	5.97
O2	12.90	10.00	7.87
Meteor	17.776333	11.427643	8.888167
3	17.776333	11.427643	8.888167

- 6.6 As and from 1 September, 2005 and prior to the establishment of a definitive level of cost oriented prices for each of the SMP MNOs, ComReg may, in pursuance of the aim of establishing such prices, issue directions to the SMP MNOs for the purposes of establishing a glide path (that is to say, a graduated step approach) towards cost orientation or a price cap in respect of MVCT prices. In doing so, ComReg shall amongst other things, employ benchmarking.

7 ACCOUNTING SEPARATION

- 7.1 Vodafone and O₂ shall have imposed on them obligations in relation to accounting separation, as provided for by Regulation 12 of the Access Regulations. ComReg will consult further on the detailed requirements of and the practical implementation of these obligations.

8 EFFECTIVE DATE

- 8.1 This Decision shall be effective from the date of its publication and shall remain in force until further notice by ComReg.

ISOLDE GOGGIN

CHAIRPERSON

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [•] DAY OF [•] 2005.

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

Pursuant to Article 16 of Directive 2002/21/EC, ComReg has conducted an analysis of the markets for wholesale voice call termination on individual mobile networks

Pursuant to Article 6 of the Directive 2002/21/EC, ComReg has conducted a national consultation, contained in ComReg document 03/127. This consultation ran from 22 October 2003 and ended on 3 December 2003. The responses to this consultation have been taken into account and ComReg reached preliminary decisions in relation to market definition, designation of SMP and regulatory obligations, which are contained in ComReg document 04/62a and were notified to the EU Commission in July 2004. A Decision Notice was issued in July 2004 (D9/04) designating the undertaking with significant market power, in accordance with Regulation 27 (4) of the Framework Regulations. Further to this notification and Decision, ComReg has conducted a national consultation, contained in ComReg document 04/62b on the implementation of remedies. This consultation ran from 8 June 2004 and ended on 20 July 2004.

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.

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 to 13 of Directive 2002/19/EC (Access Directive))	The following obligations are proposed and the detail can be found in the draft decision <ul style="list-style-type: none"> • Transparency- Regulation 10 • Non-discrimination-Regulation 11 • Accounting Separation-Regulation 12 (Vodafone and O₂) • Access-Regulation 13 • Cost Orientation-Regulation 14 • Cost Accounting Systems-Regulation 14 (Vodafone & O₂) 	Pages 60-64
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,	Such information is found in Sections 4, 5, 6 and 7 of this document. In short these obligations are proportionate, appropriate and justified as they address the competition problems identified and will assist in preventing excessive pricing and the leveraging of market power	Pages 9-59

3.3	indicate the paragraphs, sections or pages of the draft measure where such information is to be found		
	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	

