Commission for
Communications Regulation

Response to Consultation and Decisions

Wholesale Call Origination and Wholesale Call Termination Markets

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

Decision No:	**D07/11**
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1 Introduction

1.1 Consultation Document No. 10/76 'Wholesale Call Origination and Wholesale Call Termination Markets: Consultation and draft decisions in relation to proposed amendments to the price control obligations and further specifications of the transparency obligations' dated 28 September 2010 ("Consultation Document No. 10/76") set out the Commission for Communications Regulation's ("ComReg") views in relation to a proposed amendment to the existing price control obligations and a further specification of the transparency obligations in the Call Origination[1] and Call Termination[2] markets.

1.2 As noted in Consultation Document No. 10/76, the proposals were in response to the introduction by Eircom Limited ("Eircom") of a Wholesale Switchless Voice ("SV") product. Wholesale SV, sold as "White Label Voice" by Eircom, is a relatively new commercial wholesale service that allows Other Authorised Operators ("OAO") to purchase end-to-end wholesale call services from Eircom without the need to have its own interconnection infrastructure. The key underlying wholesale inputs of this Wholesale SV service are regulated, including components in the markets of Call Origination, Call Termination and Call Transit[3]. The provision of Wholesale SV itself is not regulated, nor is it proposed to regulate the provision of Wholesale SV.

1.3 ComReg, in making its proposals in Consultation Document No. 10/76 was endeavouring to protect existing investment and encourage appropriate further investment by OAOs in interconnection, while also maintaining Eircom's capability to effectively offer Wholesale SV.

1.4 This document considers responses to that consultation and outlines the rationale for the decisions to (i) amend the price control to include an obligation not to Margin Squeeze[4], (ii) to require Eircom to provide certain pricing information to ComReg and (iii) to withdraw and further specify distinct aspects of the transparency obligations (together "the Decisions"). The Decisions relate to the wholesale products in the regulated markets of Call Origination and Call Termination. Eircom currently has Significant Market Power ("SMP") in those markets. No regulation of the retail calls market is proposed or envisaged.

1.5 The rationale for the further specification of the transparency obligations is that at present there is very limited transparency regarding the provision of the regulated components within Eircom's Wholesale SV services and it is not demonstrably clear to ComReg how precisely Eircom continues to comply with its obligations, in particular its obligation of non-discrimination, in the Call Origination and Call Termination markets. OAOs require assurance that the regulated components

[1] The national wholesale market for call origination services on the public telephone network provided at a fixed location (hereafter "the Call Origination market").

[2] The market for wholesale call termination services used to provide retail calls to end users on each public telephone network provided at a fixed location (hereafter "the Call Termination market").

[3] National wholesale market for call transit services on the public telephone network provided at a fixed location (including incoming international transit services) ("hereafter "the Call Transit market").

[4] "Margin Squeeze" in this context means the setting by Eircom of its wholesale price for the call origination wholesale product and/or wholesale call termination product in its Wholesale SV service below the minimum price floor set by the Margin Squeeze Test model of this Decision.

included by Eircom in its provision of Wholesale SV services are clearly provided on a non-discriminatory basis.

1.6 The remainder of this document is structured as follows:

- Chapter 2 contains an Executive Summary
- Chapter 3 provides a background on the competition problems the Decisions will address
- Chapter 4 contains a summary of the main responses to Consultation Document No. 10/76 and ComReg's positions and conclusions
- Chapter 5 sets out the Decision Instruments
- Annex A sets out the legal basis for the Decisions
- Annex B contains a review of other responses to Consultation Document No. 10/76
- Annex C contains the final Regulatory Impact Assessment ("RIA").

2 Executive Summary

Background:

2.1 ComReg is responsible for the regulation of the electronic communications sector in Ireland. Part of ComReg's remit is the regulation of the Call Origination and Call Termination markets where Eircom is the SMP operator.

2.2 Eircom was designated with SMP in the Call Origination and Call Termination markets pursuant to market analyses carried out in 2007[5]. As an undertaking designated as having SMP, Eircom has a number of obligations in those markets. Those obligations include obligations of price control and transparency.

2.3 In 2008, ComReg was made aware of the availability of a new wholesale service (Wholesale SV) offered by Eircom which allowed OAOs, mainly mobile operators, to enter the retail fixed voice market without the need to invest in interconnection infrastructure. ComReg welcomes the introduction of any wholesale service by Eircom and OAOs alike as ComReg considers that the ability of operators to innovate, compete and maximise the use of their networks is paramount to a successful and thriving telecommunications sector which ultimately delivers high quality and better value services to end users.

2.4 Following complaints from industry in 2008 and further investigation, ComReg had concerns that Eircom was not meeting its existing regulatory obligations in relation to the regulated components within its provision of Wholesale SV. The key underlying wholesale inputs to the Wholesale SV service are regulated, including components in the markets of Call Origination, Call Termination and Call Transit.

2.5 OAOs traditionally provided calls services to retail or other wholesale operators using services known as Carrier Select or Carrier Pre Select ("CS" and "CPS") in practice predominantly CPS. This service allowed operators who had purchased their own switching equipment to interconnect with Eircom and provide calls services by purchasing wholesale voice origination, termination and transit as required. It has been regulatory policy in Ireland for many years to ensure that operators invested in infrastructure where it is rational to do so by pricing these wholesale services in such a way that operators who invested more in their own infrastructure paid less for origination, termination and transit. This is because of ComReg's policy view, consistent with the European legal framework within which it operates, that alternative efficient infrastructure investment provides dynamic benefits in terms of innovation that simple resale models do not.

2.6 It is also of note that infrastructure roll out in the provision of voice services can reinforce investment across a variety of other telecoms markets as much infrastructure can be used to provide different services. ComReg is conscious that its policy in this instance may have implications beyond voice markets. Any change in its long established policy may have important consequences across the sector.

2.7 Eircom's Wholesale SV product, while a useful addition to the competitive landscape can be categorised as a resale product in that it requires little infrastructure investment to avail of it. The key underlying wholesale inputs to the Wholesale SV service are

[5] ComReg Decision D06/07 'Market Analysis-Interconnection Market Review Fixed Wholesale Call Termination Services" dated 21 December 2007 and ComReg Decision D04/07 'Market Analysis-Interconnection Market Review Wholesale Call Origination & Transit Services' dated 5 October 2007.

regulated, including components in the markets of Call Origination, Call Termination and Call Transit. ComReg's concern in the Decisions is to ensure that the regulated elements in the service are priced in a manner consistent with how they are sold to CPS operators ("CPSOs") and also in a manner consistent with ComReg's policy of encouraging efficient infrastructure investment.

2.8 The provision of Wholesale SV by Eircom has led to considerable uncertainty in the provisions of fixed voice services, both at the wholesale and retail level. At a wholesale level, OAOs who have invested in interconnection infrastructure may question whether their investment made commercial sense if the same interconnection inputs can now be purchased directly from Eircom without any such investment being made. At a retail level, OAOs which are considering entry or expansion in the fixed voice market are unsure of the wholesale input costs their competitors may get by availing of Eircom's Wholesale SV whereas the cost-oriented interconnection rates are clear to all OAOs. It is important that the barriers to entry at the retail level are minimised.

2.9 In October 2008 ComReg formed the opinion that Eircom, having launched the Wholesale SV service without publishing terms and conditions, including price, associated with the regulated components of this service in its Reference Interconnect Offer ("RIO"), was not compliant with its existing transparency obligation in the markets of Call Origination, Call Termination and Transit[6]. In a subsequent Information Notice[7], ComReg noted that to help bring certainty to the industry it had decided to address a further aspect, namely the appropriate price control for the regulated wholesale inputs to the Wholesale SV service. Therefore, in September 2010, after extensive engagement with Eircom and OAOs, ComReg issued Consultation Document No. 10/76 proposing an amendment to Eircom's price control obligations and further specifications of the transparency obligations in the markets of Call Origination and Call Termination.

2.10 The consultation proposed an amendment to the price control to include an obligation not to margin squeeze and indicated that Eircom would be considered to have imposed a margin squeeze where it sold call origination and/or call termination within its Wholesale SV below a minimum price floor set by a margin squeeze test model. This model was shared with Eircom and Eircom engaged with ComReg in relation to it. The parameters to be used for calculating the price floor were set out in the consultation. The relevant costs were proposed to be those of a Similarly Efficient Operator ("SEO") availing of the regulated cost-oriented call origination and/or call termination from Eircom for use in its own competing provision of Wholesale SV. A SEO means an operator that shares the same costs as Eircom but does not have the same economies of scale[8] and economies of scope[9] as Eircom so therefore its per-unit costs are higher.

[6] Information Notice 08/83 'Opinion of non-compliance by Eircom with its transparency obligation in relation to call origination, call termination and call transit' dated 23 October 2008.

[7] Information Notice 09/26: 'Update in respect of ComReg's investigation into Eircom's breach of its transparency obligations around the sale of its White Label product' dated 2 April 2009.

[8] Economies of scale means the SEO has a lower volume than Eircom - its lower volume means that its unit costs will be higher.

[9] Economies of scope means the SEO has a lower amount of products than Eircom over which to spread its overhead costs which means that its unit costs will be higher.

2.11 As noted in Consultation Document No. 10/76, the absence of an appropriate price control could seriously jeopardise the existence of interconnected OAOs who, relying on the regulated upstream inputs, offer competing Wholesale SV services and/or retail services further downstream. This could distort competition right across the supply chain including at the retail level and reinforce Eircom's SMP in the relevant upstream markets.

Summary of the Decisions:

2.12 Having assessed the responses to the consultation, ComReg has decided the following:

2.12.1 ComReg will amend the price control obligations in the markets of Call Origination and Call Termination. Following responses to Consultation Document No. 10/76 ComReg has decided to define the term "Margin Squeeze" to avoid any confusion, as outlined in more detail below. Therefore "Margin Squeeze" for the purpose of these obligations has a specific meaning, namely *"the setting by Eircom of its wholesale price for the call origination wholesale product and/or wholesale call termination product in its Wholesale SV service below the minimum price floor set by the Margin Squeeze Test model of this Decision"*. In essence, it refers to an insufficient economic space between the price of wholesale call origination and wholesale call termination when sold on a standalone basis to interconnected OAOs and wholesale call origination and wholesale call termination when sold as part of a Wholesale SV service to resellers. The parameters of the Margin Squeeze Test model are set out in this document at paragraphs 4.99 to 4.101.

2.12.2 The Margin Squeeze Test model is set by reference to a hypothetical similarly efficient interconnected operator offering call origination and call termination in its provision of Wholesale SV who is interconnected at the "weighted average level" as opposed to the "least interconnected level" proposed in Consultation Document No. 10/76. This means that the floor for the regulated inputs within Wholesale SV will be set by reference to an entrant operator with an average level of infrastructure investment (as compared to an operator with a low level of such investment as originally proposed). The reason for this change in the assumed level of interconnection is an acknowledgement that using the least interconnected level would not strike the appropriate balance between protecting OAO investment in interconnection and enabling Eircom to compete fairly in its provision of Wholesale SV.

2.12.3 In addition, flexibility is included in the Margin Squeeze test to allow the "weighted average level" to be updated. Any material update to the "weighted average level" by ComReg will be communicated or consulted upon in the appropriate manner.

2.12.4 ComReg has decided not to further specify the transparency obligations in the markets of Call Origination and Call Termination to specifically require Eircom to publish the minimum price floors associated with its provision of call origination and call termination within SV services (as it proposed to do in Consultation Document No. 10/76). Following consideration of the responses to consultation, ComReg acknowledges that were these minimum price floors to be published, there could be a serious risk that competing Wholesale SV providers might follow or only price slightly below these price floors. This change in approach reduces the risk of the floor being the focal point of competition in the provision of Wholesale SV and ensures consumers of Wholesale SV benefit from the best rates available appropriate to the underlying costs of the Wholesale SV providers. Therefore, ComReg will withdraw this aspect of the transparency obligation in the context of Eircom's provision of these regulated components within its Wholesale SV service. Instead, as an amendment to the price control obligations, Eircom will be required to submit its minimum price floors and any other relevant pricing information for the call origination and call termination component parts as per the applicable Wholesale SV contract in confidence to ComReg in order to demonstrate compliance with the obligation not to Margin Squeeze. Demonstrating compliance will be monitored in a proportionate fashion by ComReg. It is not the intention that demonstrating compliance would impede Eircom's ability to tender on a fair and reasonable basis. It will be up to Eircom to ensure it complies with the relevant obligations imposed in the Decisions where it sells Wholesale SV generally or in large bespoke contracts and for the avoidance of doubt to ensure it complies with its competition law obligations.

2.13 ComReg has decided to further specify the transparency obligations in the markets of Call Origination and Call Termination to specifically require Eircom to publish detailed documentation on all terms (other than price), conditions, service level agreements, guarantees and other product related assurances associated with its provision of call origination and call termination within SV services. These further specifications are simply clarifying the exact scope of the existing obligations. Therefore, Eircom will publicly demonstrate that there is no non price discrimination between wholesale customers buying call origination or call termination standalone or within Eircom's provision of Wholesale SV services.

2.14 Without the additional price control obligation not to Margin Squeeze being imposed in these Decisions, Eircom could act in a discriminatory manner by giving preferential call origination and call termination rates to its Wholesale SV customer that is not available to interconnected OAOs. This is because interconnected OAOs only obtain the lower published rates when they make more infrastructure investments – Eircom's provision of these regulated components in Wholesale SV could bypass this incentive based regulation. Furthermore, Eircom has a "local call advantage" – it can route local calls more efficiently than OAOs – and could pass this advantage to its Wholesale SV customers while at the same time it is not available to its interconnected OAO customers. Eircom also enjoys significant economies of scale and scope compared to OAOs and therefore has a lower unit cost for key inputs for interconnection, for example, interconnect links. Eircom could pass this lower unit cost for network components such as interconnect links to its Wholesale SV customers that an interconnected OAO could not avail at the time of making its decision to invest in interconnection. Eircom would make calls services (whether offered to telecoms resellers or to end users) provided by CPSOs unviable. In effect CPSOs would experience a type of price squeeze in that their input prices would render their own voice services – whether wholesale or retail – uncompetitive. In essence, without an appropriate price control, Eircom could offer prices to one group of wholesale customers in a manner that means another group of wholesale customers would be rendered unable to compete, that is, they could be squeezed by the provision of prices to another group of operators that are discriminatory. The net effect of all this over time could be to force operators who have invested in infrastructure to exit the market or to move to use Eircom's Wholesale SV product in order to survive. This would reinforce Eircom's dominance in the markets for Call Origination and Call

Termination and ultimately diminish the intensity of competition at the retail level to the detriment of end users.

2.15 It should also be noted that this control does not have any impact on the cost of interconnection for those operators that have invested in fixed voice. The cost orientated rates charged to these operators has reduced considerably over recent years and this has been reflected in cheaper retail fixed call charges. OAOs that purchase Wholesale SV may eventually decide to avail of these cost-oriented rates from Eircom where they make the appropriate investment fixed voice technology.

2.16 ComReg, in these Decisions, is seeking to ensure that all the relevant stakeholders (Eircom/other fixed operators/mobile operators and consumers) are faced with a balanced outcome and that no one stakeholder is so adversely affected that it distorts competitive dynamics or the retail/wholesale business case of any one operator. Such an outcome is not intended and to ensure ComReg is in a position to address any such issues once the Decisions comes into effect, ComReg will keep under review the key parameters of the additional price control to ensure it is fulfilling this objective and Eircom is acting in a non discriminatory way towards all its wholesale customers. In the ongoing review of the key parameters of the Margin Squeeze test, ComReg will consider whether:

2.16.1 The current “local call disadvantage” faced by interconnected OAOs is reviewed by Eircom, similar to the amendment made in the UK some years ago, to allow interconnected (i.e. CPS) operators to benefit from Eircom’s “local call advantage” and remove routing inefficiency where possible and appropriate;

2.16.2 Relative volumes between interconnected OAOs and Eircom have changed; and

2.16.3 Issues relating to non price discrimination have been minimised and improvements to transparency have been implemented by Eircom.

2.17 These Decisions were notified to the European Commission[10]. In response ComReg received comments from the European Commission pursuant to Article 7(3) of Directive 2002/21/EC[11] (“the European Commission’s Comments”). ComReg has in this document taken utmost account of these comments prior to making its Decisions. In particular, it clarifies that the obligation not to Margin Squeeze will not lead to different regulated prices for the same call origination and call termination products. This is because the cost oriented prices for individual wholesale call origination and call termination components will continue to apply. These cost oriented prices will be complemented by the obligation not to Margin Squeeze. As Eircom is active in the provision of call origination and termination components supplied separately and call origination and call termination supplied within its Wholesale SV service, an appropriate margin between these different wholesale levels is vital for ensuring the effectiveness of the existing cost oriented remedies in the regulated markets. The importance of ensuring an appropriate margin between different steps on the ladder of investment is clear and widely acknowledged.[12]

[10] By notification dated 16 May 2011.

[11] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

[12] See footnote 15 below.

2.18 Furthermore, the Margin Squeeze test will use the same cost oriented prices for call origination and call termination that are in effect for interconnected OAOs together with the other cost inputs of an interconnected OAO, such as interconnect links etc, to give a fair representation of the likely cost of the hypothetical SEO wishing to compete against Eircom in the provision of Wholesale SV.

Conclusion:

2.19 In conclusion, ComReg in making these Decisions is trying to provide a reasonable balance between the interests of Eircom, Wholesale SV customers, Wholesale SV suppliers, interconnected OAOs and retail customers. ComReg believes that the Decisions present a practical and fair solution that takes into account these conflicting interests. It is anticipated that the Decisions will promote efficiency, sustainable competition and consumer welfare and minimise the risk of any discriminatory and anti-competitive practices by Eircom.

3 Background

The competition problems:

3.1 This chapter provides an overview of the competition problems the Decisions aim to address. These competition problems are also discussed further in the Consultation Document No. 10/76, later in this document and in the associated RIA of this document.

3.2 In providing Wholesale SV services, Eircom as the provider of the market inputs of call origination, call termination and call transit, is competing with OAOs in the provision of Wholesale SV services and in providing retail services. This is represented graphically as follows:

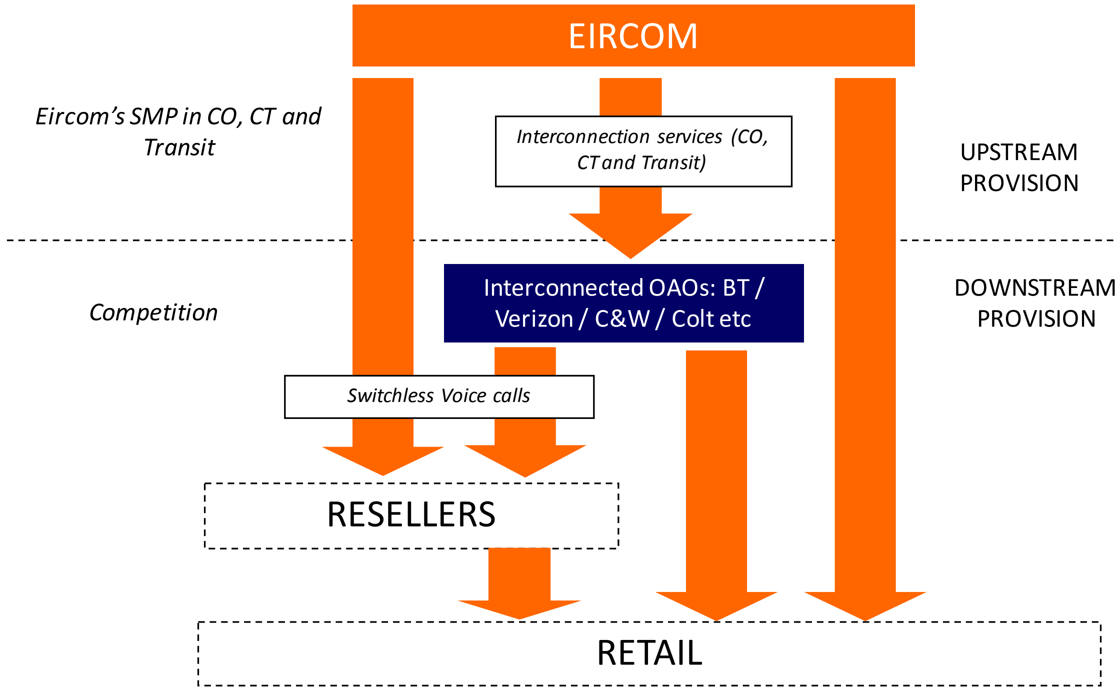


Figure: Overview of provision of SV services - "CO" means call origination / "CT" means call termination

<u>Price control:</u>

3.3 In view of Eircom's integrated position and the close links between the different supply levels, the risk of Eircom simultaneously engaging in behaviour aimed at leveraging its upstream market power into related markets was also identified in the supporting market analyses. Thus, the specific risk addressed by this paper relates to ensuring that there is no Margin Squeeze or price discrimination between Eircom's selling of the call origination and call termination inputs within its Wholesale SV service when compared to the standalone cost-oriented inputs sold by Eircom to interconnected OAOs. Even in the presence of cost orientation of the standalone wholesale call origination and call termination inputs, a Margin Squeeze could still derive from Eircom's pricing of those components when sold as part of a Wholesale SV service which would effectively undermine the cost-oriented remedies in the Call Origination and Call Termination markets and thus distort competition right across the supply chain.

3.4 As such, given that Eircom provides regulated inputs into OAOs' competing offers of Wholesale SV services, ComReg believes that it would be possible for Eircom, because of its scale and because of the legacy advantage of incumbency, to price call origination and call termination within its provision of Wholesale SV at a level that could unfairly impact on interconnected OAOs. OAOs that have made infrastructure investment in interconnection to avail of the applicable cost oriented rates, such as lower primary rates, associated with that level of interconnection might not be able to compete profitably over the medium to long term.

3.5 Therefore, absent an appropriate price control, and given the lack of public detail in relation to Eircom's provision of Wholesale SV, OAOs have concerns as to whether:

3.5.1 it would be more advantageous for them to avail of Eircom's Wholesale SV instead of making infrastructure investments in call origination and call termination as there may be better product quality assurances using Eircom's Wholesale SV;

3.5.2 it would be more advantageous for them to avail of Eircom's Wholesale SV in the context that the move to Next Generation Networks will change the points of interconnection in the future;

3.5.3 it is possible to compete fairly when using cost-oriented call origination and call termination from Eircom, in the retail market against those OAOs who avail of Eircom's Wholesale SV; and

3.5.4 it is possible to compete fairly, when using cost-oriented call origination and call termination from Eircom, in the provision of Wholesale SV where Eircom also provides a competing Wholesale SV service.

3.6 Also, those OAOs who offer competing Wholesale SV services and retail services rely on call origination and call termination from Eircom in order to provide fixed voice services nationally, as Eircom has SMP in respect of these key inputs. Therefore, without an appropriate additional price control, Eircom, as the provider of:

3.6.1 the regulated call origination and call termination components required for competing Wholesale SV and retail calls services by OAOs,

3.6.2 its own Wholesale SV service,

3.6.3 its own retail calls services,

has the ability and incentive to act in an anti-competitive and discriminatory manner to distort competitive conditions right across the supply chain.

3.7 Furthermore, if those OAOs who have invested in interconnection are squeezed out of the markets of call origination and call termination due to anti-competitive pricing of those components by Eircom within its provision of Wholesale SV, competition by OAOs at the retail level could be solely dependent on the use of Eircom's Wholesale SV services. Consequently, absent any wholesale competition, Eircom could then raise the prices of its Wholesale SV services which would ultimately be to the detriment of end-users.

3.8 Therefore, these are immediate concerns which could manifest as reduced wholesale competition to the detriment of retail consumers in the medium to long-term. Consequently, an appropriate price control is required and ComReg believes the additional obligation not to Margin Squeeze with its associated detailed model will achieve this.

3.9 For the avoidance of doubt, the existing price control obligations in the Call Origination and Call Termination markets remain so that any OAO who is interconnected can avail of cost-oriented rates for their level of interconnection e.g. the lowest priced primary interconnection rate applies to those OAOs with a higher level of infrastructure investment. Those OAOs with low levels of interconnect are subject to higher priced tandem and double tandem interconnection rates applicable for lesser levels of infrastructure investments. This is because, as identified in the respective market analyses, Eircom continues to have the ability and incentives to engage in behavior that exploits its wholesale customers within those markets via such practices as excessive pricing.

Transparency:

3.10 Eircom needs to comply with its existing transparency obligation for the regulated components in the Wholesale SV in order to demonstrate publicly that no discrimination[13] occurs between the provision of the regulated components offered to interconnected OAOs and those components when offered within its provision of Wholesale SV. Without compliance with this obligation it is considered that Eircom may, for example, have an incentive to offer better services to its Wholesale SV customers than to its interconnected customers who offer their own competing Wholesale SV service. Also, for example, Eircom may have an incentive to utilise the information it gathers in relation to competing interconnected OAOs' utilisation of the Eircom network to tailor their own competing Wholesale SV offers. ComReg believes that such discriminatory action by Eircom in its provision of Wholesale SV services has the potential to undermine infrastructure investments by interconnected OAOs in the markets of Call Origination and Call Termination. The inappropriate use of internal information not available to others may also give an unfair advantage to Eircom when tendering for SV contracts.

[13] The obligation not to discriminate is contained at section 7.1 - 7.2 of ComReg Decision D06/07 and at section 7 of ComReg Decision D04/07.

4 Summary of main responses to Consultation Document No. 10/76 and ComReg's position and conclusion

Introduction

4.1 On 28 September 2010, ComReg published Consultation Document No. 10/76. Six responses were received to the consultation from the following:

1. Eircom Limited;
2. BT Communications Ireland Limited ("BT");
3. Alternative Operators in the Communications Market ("ALTO");
4. Telefonica Ireland Limited ("O2")
5. Vodafone Ireland Limited ("Vodafone"); and
6. Magnet Networks Limited ("Magnet")

4.2 Also, the European Commission responded with two comments.

4.3 ComReg has carefully considered all the submissions received in response to Consultation Document No. 10/76. In the following sections, ComReg summarises the key points of each non-confidential response received in relation to each of the questions raised in the Consultation Document No. 10/76. ComReg then responds and gives its final view in relation to each of the questions posed. It would not be practical for ComReg to respond in detail to each aspect of every response received and therefore this response to consultation summarises the major elements of comments provided and ComReg's views in relation to these. It should be noted that all responses were considered and account taken of the views expressed. However, it is not practical for ComReg to provide commentary on every comment made. A response to each of the other points raised by respondents is provided in Annex B. The Decisions are set out in Chapter 5.

Proposal to amend the price control

4.4 In Consultation Document No. 10/76, ComReg sought views on ComReg's proposal to amend the price controls in the markets of Call Origination and Call Termination to include a general obligation not to margin (price) squeeze on OAOs and the specific obligation to ensure that the pricing of the products and services in the markets of Call Origination and Call Termination do not squeeze other interconnected OAOs in those markets when sold within Wholesale SV services. Therefore, it was proposed to specify an ex-ante margin (price) squeeze test which would be utilised to set minimum prices for call origination and call termination when offered by Eircom in the provision of SV services. The rationale for ComReg's proposal was set out and the following question was asked.

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

4.5 In response to this question three respondents agreed and three respondents did not agree. The three respondents that agreed are or represent OAOs who have made infrastructure investments in interconnection infrastructure (BT, ALTO and Magnet).

The three respondents that did not agree are the SMP operator (Eircom) and the two main mobile network operators who use Wholesale SV services to offer fixed-line voice services to their retail customers (O2 and Vodafone).

4.6 Of the respondents that did agree, the reasons for agreement with ComReg included that:

4.6.1 Eircom has the ability and motive to margin squeeze/leverage (ALTO, BT and Magnet)

4.6.2 the proposal will provide a fairer trading environment for sustainable competition (ALTO and BT)

4.6.3 this price control is good for the Irish economy, investment, jobs and the customer (ALTO and BT)

4.6.4 the lack of a price control stymies OAOs and prevents them from climbing the ladder of investment as they are unsure that if they invest Eircom won't find some way to undercut their proposed pricing and thus that investor will not gain a return on that investment (Magnet).

4.7 Of the respondents that did not agree, the following main issues were raised and for each issue ComReg provides its position:

<u>Claim that ComReg is not lawfully entitled to amend without conducting a market analysis (Eircom)</u>

4.8 ComReg does not agree with this claim. Market analyses have been conducted in the markets where the obligations are being amended i.e. Call Origination and Call Termination. Eircom has been found to have SMP in those markets and a price control obligation has been imposed. This consultation proposed to amend the price control that was lawfully imposed and remains currently in place. ComReg is fully entitled to so amend. The proposed amendments are aimed at ensuring the effectiveness of the existing SMP remedies in the markets of wholesale Call Origination and Call Termination. A margin squeeze between wholesale call origination/termination sold on a standalone basis and wholesale call origination/termination when sold as part of a Wholesale SV service could undermine the existing cost-oriented remedies and render investment in physical interconnection redundant and further reinforce entry barriers in the upstream markets of Call Origination, Call Transit and Call Termination. The proposed amendments are thus necessary to safeguard the existing SMP remedies in the wholesale call origination and call termination markets, as well as to protect against potential leveraging behaviour (in this case effectively caused by price discrimination) as identified in the current market analysis[14].

<u>Claim that ComReg is proposing to regulate provision by Eircom of services on a market downstream from the markets of Call Origination and Call Termination (Eircom)</u>

4.9 ComReg is not proposing to regulate Eircom's Wholesale SV service but to ensure that remedies in the regulated markets of Call Origination and Call Termination are

[14] The competition problems of leverage and foreclosure were noted in the current SMP designations and supporting market reviews. These were also set out in paragraphs 2.12 – 2.26 of Consultation Document No. 10/76.

effective. The Margin Squeeze test concerns the relative price difference between wholesale call origination and termination sold on a standalone basis and sold as component parts of a Wholesale SV service. ComReg is of the view that by ensuring that call origination and call termination are sold to all parties at non-discriminatory prices the concerns that operators who have invested in infrastructure will be unfairly impacted will be mitigated.

4.10 While a cost orientation obligation is necessary to protect against possible exploitative behaviour in the wholesale Call Origination and Call Termination markets, it is not on its own sufficient. This is because an insufficient margin between those upstream wholesale interconnection services and the wholesale resold services which Eircom provides at successive levels of the supply chain could in effect "squeeze" and render those upstream remedies redundant. Ensuring the existence of this economic space between Eircom's various wholesale services is necessary to preserve the effectiveness of the existing cost-oriented remedies in the markets of Call Origination and Call Termination. The importance of recognising the close interrelationship between different levels in the supply chain (including between regulated and unregulated levels) and thereby ensuring an appropriate margin between those different levels is clear and the principle is widely acknowledged.[15]

4.11 Eircom will be free to price its Wholesale SV above the minimum price floors for the regulated call origination and call termination components set by reference to the Margin Squeeze test. Also, as Wholesale SV is not regulated, Eircom can also include other services within its provision of Wholesale SV which are outside the scope of the Call Origination and Call Termination markets.

[15] In European Commission Decision of 04.07.2007 relating to proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – *Wanadoo España vs. Telefónica*), the Commission, when assessing the replicability of Telefonica's retail prices, notes that the process of climbing of the ladder of investment can only be effective if there is a margin between all the steps of the ladder. It also points to a report by Prof. Martin Cave: "A key precondition for neutrality across different wholesale broadband products is satisfaction of a margin squeeze test. [...] A prohibition of a margin squeeze thus lends itself to the task of ensuring that prices are set in a way designed to prevent the dominant firm from leveraging its market power from one stage of the production process into a neighbouring one. Applying it consistently over a range of broadband wholesale (and retail) products should avoid exclusionary behaviour of this kind. [...]", Martin Cave, Remedies for Broadband Services, Paper prepared for DG INFSO, September 2003. See also ERG (09)21 "ERG Report on price consistency in upstream broadband markets", June 2009 which specifically recognises a possibility for regulatory action "where there may be a price squeeze between a regulated wholesale service (e.g., mandatory WBA) and a non-regulated wholesale service (e.g., other forms of bitstream access or resale)". In its "Direction setting the margin between IPStream and ATM interconnection prices" (August 2004) Ofcom set out its proposals to specify the level of the margin such that there was no price squeeze between BT's ATM interconnection charges and its prices for the relevant downstream services, in particular IPStream. According to a notification of the Belgian wholesale broadband markets to the European Commission in May 2011, the Belgian regulator proposed, in addition to imposing a cost-orientation obligation on Belgacom, to apply a margin squeeze test in order to ensure a sufficient margin between LLU prices and the prices of services provided in downstream markets (wholesale Bitstream, resale products and retail services) (See Case BE/2011/1227-1228). In the context of competition law cases, the Court of Justice of the European Union has also recognised that where markets are closely associated: "*certain conduct on markets other than the dominated markets and having effects either on the dominated markets or on the non dominated markets themselves can be categorised as abusive (see, to that effect, Tetra Pak v Commission, paragraph 25)",* Judgment of the European Court of Justice (ECJ) of 17 February 2011 in the case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB.

4.12 The minimum price floors set by the Margin Squeeze test will ensure that Eircom in its provision of Wholesale SV does not discriminate against its cost-oriented call origination and call termination rates offered to interconnected OAOs who require those components to offer their own competing Wholesale SV services. These interconnected OAOs have made infrastructure investments to avail of the lower primary rates of interconnection. These cost oriented rates are set to ensure Eircom recovers its efficiently incurred costs and also recovers the appropriate rate of return. As noted in Consultation Document No, 10/76, the existing cost orientation obligation on its own is not sufficient to guard against the anti-competitive effects caused from leverage, discrimination and foreclosure. ComReg is therefore of the view that its suggested approach is reasonable and proportionate.

Claim that it is not appropriate for ComReg to favour infrastructure investment (Eircom & O2)

4.13 ComReg does not agree. ComReg is statutorily obliged to promote competition and encourage efficient investment in infrastructure.

4.14 Section 12(1) (a) of the Communications Regulation Acts 2002 to 2010 provides that it is an objective of ComReg in exercising its functions *"...in relation to the provision of electronic communications networks, electronic communications services and associated facilities.. (i) to promote competition.."* and section 12(2) of that Act provides that ComReg shall take all reasonable measures which are aimed at achieving those objectives, including:

"(a) in so far as the promotion of competition is concerned-

(ii) Ensuring that there is no distortion or restriction of competition in the electronic communications sector,

(iii) Encouraging efficient investment in infrastructure and promoting innovation".

4.15 Regulation 16(2) of the European Communities (Electronic Communications Networks and Services)(Framework)Regulations 2011 provides:

"In pursuit of its objectives under paragraph (1) and under section 12 of the Act of 2002, the Regulator shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by, among other things-

... (b) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services.

(c) safeguarding competition to the benefit of consumers and promoting, where appropriate, infrastructure based competition.

(d) promoting efficient investment and innovation in new and enhanced infrastructures, including by ensuring that any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, while ensuring that competition in the market and the principle of non-discrimination are preserved....."

4.16 Furthermore, a statutory Ministerial policy decision[16] was given to ComReg in which the importance of sustainable competition was recognised[17] and ComReg was directed to focus on the promotion of competition, with a particular focus on *"ensuring that the applicable margin attributable to a product at the wholesale level is sufficient to promote and sustain competition"*.

4.17 If ComReg did not protect and encourage infrastructure investment in the markets of Call Origination and Call Termination, the following could arise:

4.17.1 Efficient investment in infrastructure would not be encouraged as OAOs who have not invested in infrastructure could avail of lower wholesale prices for their retail call service by availing of Eircom's Wholesale SV services when such lower wholesale prices are normally associated with a high level of infrastructure investment in interconnection;

4.17.2 OAOs will likely move to Eircom's Wholesale SV services as competing OAOs' Wholesale SV services would be more expensive. Consequently, interconnected OAOs might exit the provision of Wholesale SV services or retail voice services entirely. This is because competing infrastructure based OAOs will not be able to compete on price as they rely on the regulated components of call origination and call termination from the incumbent, Eircom, which are set at cost oriented prices (taking account of Eircom's efficiently incurred costs only and its regulated rate of return) based on the level of infrastructure investment in interconnection that they have made;

4.17.3 If there is a significant take-up of Eircom's Wholesale SV services at the expense of efficient infrastructure investment in interconnection, this will likely re-inforce Eircom's dominance and SMP in the Call Origination and Call Termination markets and ultimately, retail markets;

4.17.4 Without an appropriate price control, OAOs may be forced to move to a Wholesale SV solution themselves if this is more economically viable as a result of insufficient margins between the regulated components. A reduced number of infrastructure based OAOs would not be good for retail customers, as OAOs that simply rely on Eircom's resale wholesale products are not in a strong position to offer differentiated products or lower retail call prices generally. Furthermore, there would be no innovation by OAOs using their own networks;

4.17.5 Eircom now provides the option for purchasing wholesale call origination and call termination without the need to invest in switching or interconnect links technology, without an appropriate price control in place; this has created uncertainty in the fixed wholesale voice market. Much of the investment in interconnect infrastructure, such as switching, interconnect links and in network management personnel made by some OAOs will be stranded where Wholesale SV is seen as the best wholesale solution in the short-run to sell retail calls. Such signals could create very negative incentives to investing in

[16] Directions by the Minister for Communications, Marine and Natural Resources to the Commission for Communications Regulation under Section 13 of the Communications (Regulation) Act, 2002, dated 26 March 2004.

[17] "The creation of sustainable competition between other authorised operators (OAO) and incumbents across different technical platforms and markets will benefit the economic and social development of Ireland by increasing the choice and decreasing the price to consumers and businesses".

future voice technology and more generally in telecoms services such as broadband.

Claim that the availability of competition law remedies means that ComReg's proposed intervention is not justified or reasonable (Vodafone)

4.18 ComReg has considered this claim but does not agree. ComReg's proposal relates to markets that are subject to ex-ante regulation (and which are also listed by the European Commission as markets which have characteristics rendering them susceptible to ex-ante regulation[18]). ComReg identified in the supporting market reviews the competition problems that the proposed Margin Squeeze test based on a SEO aims to address. The aim of ex-ante price controls, such as the proposed Margin Squeeze test, is to prevent competition problems from occurring in the first place, such as undue discrimination, leverage and foreclosure resulting from Eircom's SMP position in the relevant Call Origination and Call Termination markets. They are also aimed at protecting the existing SMP price controls already applied in the Call Origination and Call Termination markets pursuant to the above-mentioned market reviews. Competition law would not be sufficient in this case as it is an ex-post review after any alleged anti-competitive practice has occurred and may be too late to prevent competition and efficient infrastructure investment being adversely affected beyond repair. Furthermore, as the ex-ante Margin Squeeze test is based on a SEO it will ensure that existing competition across the supply chain is encouraged and maintained as the use of SEO:

4.18.1 Includes all the relevant costs that an interconnected OAO availing of the cost-oriented rates of call origination and call termination, which are key inputs for the provision of Wholesale SV, must consider in order to offer a competing provision of Wholesale SV.

4.18.2 Recognises the lower economies of scale and scope and resulting higher per-unit costs that interconnected OAOs have as they do not have the advantage of incumbency.

4.18.3 Prevents discrimination between those who have made infrastructure investments to purchase call origination and call termination at cost oriented rates against those who have not invested in interconnection by charging the same or similar rates for the call origination and call termination components that should only apply for a significant investment in interconnection within the provision of Wholesale SV.

Claim that cannot lawfully impose several price control methods simultaneously (Eircom)

4.19 ComReg has considered this position and does not agree. ComReg can see no reason why the price control cannot include both the cost orientation obligation and the obligation not to Margin Squeeze as long as there is consistency between the two elements. This position is supported by the European Commission's Comments in

[18] Wholesale call origination on the public telephone network provided at a fixed location and wholesale call termination on individual public telephone networks provided at a fixed location are listed in the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation - C(2007) 5406.

which there is no indication that there is any difficulty in principle with two aspects of the price control co-existing as long as consistency is ensured between the two. As outlined in detail at paragraph 4.91 below, such consistency does exist. Remedies by their nature must remain flexible so that they can remain appropriate to current circumstances. It is not necessary, however, to address an amendment to a remedy through a full market analysis and this was never the intention of the regulatory framework.

4.20 By virtue of Eircom's SMP position in the Call Origination and Call Termination markets and its activities in the related provision of Wholesale SV services and end user services, ComReg believes that it has both the ability and incentives to engage in pricing of Wholesale SV services that could significantly undermine efficient infrastructure investment and further reinforce entry barriers in the Call Origination, Call Transit and Call Termination markets. Given this potential risk of anti-competitive behaviour, amending the price control to include a general ex-ante regulatory obligation not to Margin Squeeze is considered by ComReg to be an appropriate supplementary measure and is necessary to ensure the effectiveness of the existing cost oriented remedies in the Call Origination and Call Termination markets as well as to protect against potential leveraging.

Claim that the proposed price control will not promote efficiency or maximise customer benefits (Eircom)

4.21 ComReg has considered this claim and does not agree. As noted by ComReg in Consultation Document No. 10/76, ComReg believes that safeguarding efficient competitors who have made efficient interconnection infrastructure investment from possible Margin Squeeze by an SMP operator in the markets of Call Origination and Call Termination would help to facilitate greater regulatory certainty for longer-term competition based on efficient infrastructure investment. In the event that the regulation of Call Origination and Call Termination markets is undermined by Eircom squeezing call origination and call termination by its offer of these regulated components in its Wholesale SV, this could foreclose the market to competitors who have made or are contemplating investing in interconnection infrastructure in Ireland.

4.22 In the long run, if the regulated components of call origination and call termination were not safeguarded, it would be highly likely that many competitors in the retail calls market would therefore rely on Eircom's provision of Wholesale SV to resell retail voice services at very low margins with consequent limitations on price and service innovation. This would not send out the right signals to OAOs considering "build" or "buy" in the future and would not be in the interests of sustainable competition.

4.23 BT Ireland, Magnet, Verizon and other fixed operators have provided and continue to provide significant investment in fixed voice and broadband in Ireland. Some of these fixed operators who have invested in fixed voice infrastructure also offer competing Wholesale SV services based on their own infrastructure investment and wholesale inputs from Eircom.

4.24 Currently Wholesale SV services are mainly used by operators who have little or no infrastructure investment in the fixed voice market. As the provision of Wholesale SV is a relatively recent development it was not available at the time that the infrastructure based operators where making their choice whether to "build" or "buy".

4.25 Therefore, if the regulated inputs into Eircom's Wholesale SV were inappropriately priced, Eircom's Wholesale SV customers could get preferential rates for the regulated inputs of call origination and call termination when compared to the rates for those regulated inputs to infrastructure based operators which is based on the level of infrastructure investment that they have made. This would not be in the spirit of the regulatory framework and could seriously jeopardise the fundamental regulatory objectives previously outlined in this document, Consultation Document No. 10/76 and the supporting market analyses.

4.26 Ultimately, if the regulated inputs into Eircom's Wholesale SV were inappropriately priced, this could lead to the exit of the infrastructure based operators as they could not offer competing Wholesale SV services or retail services based on the regulated inputs from Eircom and, furthermore, in the retail calls market they may be unable to compete if those operators on Eircom's Wholesale SV service avail of the regulated inputs from Eircom in the Wholesale SV service at a preferential rate not reflective of their investment in interconnection infrastructure. With fewer infrastructure based operators and more operators on Eircom's Wholesale SV services, ComReg believes Eircom would not be subject to the same level of competition in the retail calls market. The retail calls market was considered not susceptible to ex ante regulation by ComReg in Decision D07/07[19]. This was a welcome development to reflect the choice available to consumers from those infrastructure based operators who had made the necessary investment to be in a position to compete in the retail calls market. However, the inappropriate pricing of Eircom's regulated inputs into its Wholesale SV service could undermine the sustainability of these infrastructure based operators in the retail calls market.

4.27 Therefore, it is ComReg's view that the proposed prohibition on Margin Squeeze will have positive implications for efficiency, price, choice and quality of services ultimately delivered and should therefore maximise consumer benefits.

Claim that ComReg's proposal will exclude Eircom from providing Wholesale SV services

4.28 In order to address this concern ComReg has revised the parameters used for calculating the price floor by reference to the Margin Squeeze Test. The SEO utilised in the calculation of the price floor was proposed to be based on a "Lower Interconnected Level" hypothetical OAO. ComReg has decided to change this to an SEO based on the "Weighted Average Level" of interconnection and believes that as a result Eircom will be position to compete on an equivalent basis with other efficient Wholesale SV operators. The "Weighted Average Level" will be flexible and can be updated from time to time if market conditions warrant an update. In assessing whether an update to the "Weighted Average Level" is warranted, ComReg will consider whether:

4.28.1 the "local call dis-advantage" is reviewed by Eircom, similar to that introduced in the UK some years ago, to allow all OAOs benefit from Eircom's "local call advantage" and remove inefficient routing where possible and appropriate;

[19] 'Decision Notice and Decision Instrument – Assessment of the Three Criteria for ex ante Regulation and Withdrawal of SMP Obligations: Market Analysis – Retail Fixed Calls Market Review' dated 28 December 2007.

4.28.2 relative volumes between interconnected OAOs and Eircom have changed; and

4.28.3 concerns about non price discrimination and transparency have been alleviated.

ComReg will follow any required processes prior to any such update. ComReg believes that this revision strikes an appropriate and fair balance between the needs of all relevant parties and that Eircom will not be excluded from providing Wholesale SV services as a result of the prohibition on Margin Squeeze.

4.29 Furthermore, the proposed Margin Squeeze test is aimed at facilitating the development of sustainable competition across all levels of the supply chain. In the absence of a sufficient economic space between the price of call origination and call termination sold on a standalone basis and call origination and call termination when sold as part of a Wholesale SV service, OAO infrastructure investments would be undermined and their future business case would largely depend on Eircom's resold inputs thereby limiting the scope for price and service differentiation/innovation which would ultimately to the detriment of end users. Also, where an OAO can purchase Wholesale SV at very favourable terms, conditions and prices, it may no longer make commercial sense to invest in infrastructure, employ own network staff, maintain own billing systems etc. Potentially all OAOs could eventually migrate onto Eircom Wholesale SV which would undermine the objective of promoting infrastructure based competition and protecting consumer welfare over the long term.

Proposal to further specify the transparency obligation

4.30 In Consultation Document No. 10/76, ComReg sought views on ComReg's proposed further specifications of the transparency obligations in the Call Origination and Call Termination markets. ComReg proposed to further specify the transparency obligations in the Call Origination and Call Termination markets to clarify that Eircom is required to publish the minimum prices in the RIO[20] price list together with detailed documentation on all terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of call origination and call termination within SV services in the RIO itself.

4.31 The rationale for ComReg's proposal was set out and the following question was asked:

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

4.32 Three respondents agreed, three respondents did not agree.

4.33 Of the respondents that did agree, the reasons for agreement with ComReg included that:

4.33.1 Evidence from other jurisdictions shows that this remedy makes the non-discrimination remedy effective (BT and ALTO)

4.33.2 The transparency remedy will remove the confidentiality and secrecy veil and expose whether anti-competitive behaviour exists (ALTO and BT)

[20] Reference Interconnect Offer, hereafter known as the "RIO"

4.33.3 Transparency ensures that an OAO can truly assess the market and see if it is worth moving up the ladder of investment and purchasing interconnection (Magnet).

4.34 Of the respondents that did not agree, the following main issues were raised and for each issue ComReg provides its position:

Claim that the proposal amounts to imposing a new obligation in relation to Eircom's provision of an unregulated service (Eircom)

4.35 ComReg has considered this proposition and does not agree. As noted in Consultation Document No. 10/76, the proposed further specification is to simply clarify the exact scope of the existing obligations in the Call Origination and Call Termination markets. ComReg is not proposing to regulate Wholesale SV; it is simply continuing to regulate two of the regulated inputs into the Wholesale SV product. As noted above, Eircom will be free to price its Wholesale SV above the minimum price floors for the regulated call origination and call termination components set by reference to the Margin Squeeze test. Also, as Wholesale SV is not regulated, Eircom can also include other services within its provision of Wholesale SV which are outside the scope of the Call Origination and Call Termination markets.

4.36 Eircom further say in this regard that "*The regulation applicable to certain products does not extend to all services for which they are used as inputs. This indeed would result in all possible telecoms markets being regulated*". In response, ComReg notes that key inputs to the provision of Wholesale SV are regulated and the pricing of these inputs could lead to distortion in the upstream regulated markets. Furthermore, if regulated inputs to an unregulated product could not be regulated it would be possible to avoid regulation simply by bundling regulated products with unregulated products. Therefore, it is appropriate in this instance to regulate the key inputs to this bundled product.

Claim that ComReg's transparency proposals in relation to minimum price floors would adversely affect competition (Eircom, Vodafone & O2)

4.37 ComReg has considered the views of respondents in this respect and as a result is proposing a "middle ground" in relation to the publication of minimum price floors. ComReg has decided to require the provision of pricing information to ComReg only (as opposed to publishing as was originally proposed). The decisions reflect this by:

(i) withdrawing the aspect of the transparency obligations in the Call Origination and Call Termination markets which obliges Eircom to publish minimum prices for call origination and call termination parts when offered in Wholesale SV and

(ii) amending the price controls in the Call Origination and Call Termination markets to add an obligation to require Eircom to submit in confidence to ComReg all the required detail to confirm that its pricing of the call origination and call termination components within Wholesale SV does not apply a Margin Squeeze. The model shared with Eircom makes it clear what information and details are required.

4.38 Therefore, the minimum price floors, as specified through the pre-defined ex-ante Margin Squeeze test model, for call origination and call termination when provided in Wholesale SV will remain confidential to ComReg and Eircom. This will mean that following the Decisions being effective, on request by ComReg, Eircom, for the provision of the regulated call origination and call termination components within particular Wholesale SV contracts, will be required to submit the Margin Squeeze Test model for those particular Wholesale SV contracts in order to demonstrate that Eircom is compliant with the obligation not to Margin Squeeze. There is likely to be commercially sensitive and confidential information in this model depending on Wholesale SV contracts tendered for, therefore, sharing this information with industry is not possible as a result.

4.39 ComReg considers that this revised approach will adequately address the concerns highlighted by some respondents. In particular, this approach ensures that Eircom's ability to offer competing Wholesale SV services is not adversely affected by publication of the minimum price floors set by the Margin Squeeze test model and also ensures that OAOs are in a position to compete for the business of those OAOs who wish to remain resellers availing of Wholesale SV services only. It also ensures that those resellers have a choice when purchasing call origination and call termination.

4.40 For the avoidance of doubt, ComReg is not withdrawing the aspect of the existing transparency obligation that requires Eircom to publish the terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of call origination and call termination within Wholesale SV services. ComReg is proceeding with its proposal to further specify the transparency obligations in the Call Origination and Call Termination markets to clarify that Eircom is required to publish detailed documentation on all terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of all origination and call termination within SV services in the RIO itself. This should only involve confirmation that there is no discrimination in the provision of the regulated inputs between an OAO directly interconnected and Eircom's Wholesale SV customers.

Claim that ComReg has not identified any competition problem that the proposed further specification intends to address and therefore the proposal is accordingly unjustified and unjust (Eircom)

4.41 This is not correct. The supporting market analysis and Consultation Document No. 10/76 noted the potential for Eircom to act in a discriminatory manner and the possible issue of leverage. The rationale for the proposed further specification of the transparency obligations is that at present there is very limited transparency regarding the provision of Wholesale SV services by Eircom and it is not demonstrably clear what precisely the nature of the regulated component products included by Eircom in its provision of Wholesale SV services are or that they are clearly provided on a non-discriminatory basis in terms of quality. ComReg believes that the proposed further specifications will ensure that Eircom demonstrates that it is not acting in an anti-competitive manner and thus ensures the effectiveness of its SMP obligations. For example, an OAO availing of Eircom's Wholesale SV cannot be provided with call origination and call termination services in a timeframe that might be different to an OAO that has or is intending to invest in interconnection. A typical associated facility that must be provided by Eircom for the interconnected OAO would be interconnect links which are essential to the provision of cost orientated call origination and call termination and there must not be any discrimination associated with the provision of these essential links.

Proposal on the structure of the Margin Squeeze test

4.42 In Consultation Document No. 10/76, ComReg sought views in relation to ComReg's proposed structure of the proposed margin squeeze test. ComReg proposed that the proposed margin squeeze test would:

- be assessed based on a SEO standard. That is that the type of OAO that the test would protect from possible margin squeeze would be a SEO and to ascertain the SEO ComReg proposed to utilise Eircom's efficiently incurred costs, which are utilised in the pricing of Eircom's regulated components, adjusted to reflect different economies of scale based on the interconnection structure of the hypothetical SEO. ComReg was of the preliminary view that it was appropriate to set the level of interconnection of this hypothetical SEO at the lower interconnected level.
- be assessed at a static point in time. That is, the test would be assessed at a point of time and not over a long period of time which may allow initial losses to be recovered later.
- be assessed by time of day gradient. That is, the call origination and call termination components would be assessed by day, evening, weekend respectively.
- use 'LRAIC plus' as its cost standard. That is, the test includes all relevant long run fixed, variable, common and joint costs.

The rationale for ComReg's proposal was set out and the following question was asked:

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

4.43 Four respondents agreed, two respondents did not agree.

4.44 Of the respondents that did agree, the reasons for agreement with ComReg included that:

4.44.1 In view of the fact that no operator in Ireland interconnects with Eircom exclusively at the primary level only (thereby suggesting that it may not be efficient to do so); a Margin Squeeze test based on a "Similarly Efficient Operator" standard recognises this. (Eircom[21])

4.44.2 The test should apply by time of day as to apply the test on a 24 hour basis would run the risk of implementing a control that would distort the level of competition between the providers of SV services to mainly business (daytime) end users, as opposed to providers of SV services to mainly residential (evening and weekend) end users. (Eircom)

4.44.3 The test should apply at a static point in time as this is more timely and efficient. (Magnet)

[21] Notwithstanding Eircom's general view that ComReg's proposal will regulate Wholesale SV itself and therefore should not be allowed. This caveat applies to all Eircom's responses to this question.

4.44.4 The use of LRAIC plus is the appropriate costing methodology as it will promote regulatory consistency as it is used in the main network component inputs (Eircom).

4.45 For those who did not agree, the following main issues were raised and for each issue ComReg provides its position:

Claim that the use of 'LRAIC plus' as the cost basis is not appropriate as Wholesale SV is run on a marginal cost basis (Vodafone)

4.46 ComReg has considered the submissions in this regard but does not agree. The majority of costs within the Margin Squeeze test model are Eircom's cost oriented call origination and call termination rates. These rates contain carrier administration and carrier billing costs which include recovery of overhead costs and therefore the existing cost oriented call origination and call termination rates are set akin to 'LRAIC plus' basis. As noted above this view is shared by Eircom who notes in its response to the consultation that *"…we note that the main network component inputs used in the provision of SV services are, in effect, price regulated using a 'LRAIC plus' cost standard. In this sense, Eircom is of the opinion that the cost standard for network components of SV services should not deviate from that basis."*[22]

4.47 As noted by ComReg in Consultation Document No. 10/76, ComReg believes that using 'LRAIC plus' includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter the market or expand. It would not be appropriate to prevent a competing OAO providing Wholesale SV from recovering some of its common costs when Eircom in its cost oriented call origination and call termination rates is allowed to recover some of its joint and common costs. Therefore, ComReg disagrees with Eircom's further point that the absorption of fixed and common costs need to be considered given their claim that the provision of Wholesale SV is incremental. Furthermore, as ComReg wishes to promote and protect efficient infrastructure investment in the markets of Call Origination and Call Termination, the use of short-run marginal costs in the Margin Squeeze test would not be appropriate. ComReg maintains that the cost standard applied should reflect the competitiveness of the market. It has been shown in the supporting market analysis that Eircom has SMP in the Call Origination and Call Termination markets.

Claim that the proposed use of "least interconnected operator" as the level of interconnection of the hypothetical OAO used to ascertain the SEO is inappropriate (Eircom & O2)

4.48 ComReg has considered the views of respondents in this respect and has come to the view that utilising the "weighted average level" of interconnection for the purpose of calculating the SEO is more appropriate than "least interconnected operator" (as proposed in Consultation Document No. 10/76). As indicated in Consultation Document No. 10/76 the weighted average level would currently imply 66% primary interconnection, 24% tandem interconnection and 10% double tandem interconnection. ComReg believes that this revision strikes the appropriate balance between ensuring that efficient infrastructure investments in the markets of Call

[22] At page 8 of Eircom's response to consultation – but subject to Eircom's claim that the absorption of the joint and common costs need to be considered in the context of Wholesale SV being an incremental service.

Origination and Call Termination are protected and promoted and that Eircom can offer competing Wholesale SV services based on its regulated inputs. ComReg is of the view that this will ensure that Eircom remains able to provide Wholesale SV services. As discussed earlier, ComReg will keep the level of interconnection of the hypothetical OAO under review and will update if competitive conditions warrant the update. ComReg's assessment of competitive conditions will include any issues of discrimination in relation to the provision of call origination and call termination.

Claim that Margin Squeeze test should use "more interconnected level" (O2)

4.49 ComReg does not agree that it would be appropriate to move to the more interconnected level hypothetical OAO in its pricing model at this point in time. ComReg considers that the use of "more interconnected level" would probably give rise to a Margin Squeeze against those interconnected operators who have not interconnected to 88% primary. As noted in paragraph 4.48 above, cognisant of the need to promote efficient investment and competition and to avoid incentivising inefficient investment, ComReg has revised the interconnection structure of the SEO to "weighted average level". Taking existing competitive conditions into account, ComReg believes that, in addition to Eircom, this will enable efficient market participants to provide competitive Wholesale SV services on a sustainable basis.

4.50 However, ComReg is conscious of the pace of evolution within the telecoms market (in particular for voice), as such it would like to ensure that the interconnection structure taken now can be revised to meet market conditions and ensure no operator, including Eircom, are negatively impacted by a test that is rigid and not sufficiently flexible to adopt to circumstances as they arise. Therefore, as discussed above, the Decisions will allow the interconnection structure of the "weighted average level" to be updated as required. However, where any material updates are proposed in the future, these will be communicated or consulted upon in the appropriate manner.

Level of aggregation

4.51 Having considered the respondents (the elements in relation to this aspect were for the most part confidential), ComReg has decided that the Margin Squeeze test will now use the time of day gradient of the particular Wholesale SV contract in question as opposed to Eircom's general time of day gradient for its retail traffic. This amendment is appropriate as significant differences between the requirements for peak, off-peak and weekend calls can exist in Wholesale SV contracts depending on the operator and the type of retail customers the contract aims to serve e.g. a Wholesale SV contract to an operator that has mainly business customers would have a lot of day traffic. ComReg believes that this is supported by a comment Eircom's response where they note that there should be no distortion of "*… the level of competition between the providers of SV services to mainly business (daytime) end users, as opposed to providers of SV services to mainly residential (evening and weekend) end users*."[23]

Proposal on the costs to be included in the Margin Squeeze test

4.52 In Consultation Document No. 10/76, ComReg sought views in relation to ComReg's proposed costs to be included in the margin squeeze test. ComReg proposed to take

[23] At page 8 of Eircom's response.

the costs facing a hypothetical interconnected OAO offering SV services into account in calculating the minimum prices/price floors of the regulated components of the SV product for the margin (price) squeeze tests. These costs include the regulated cost-oriented prices of call origination and call termination applicable to the assumed level of interconnection, the cost of the interconnect paths ("I/C paths") with the assumed level of interconnection and other network, billing and carrier administration costs. The rationale for ComReg's proposal was set out and the following question was asked.

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

4.53 Four respondents broadly agreed, two respondents did not agree.

4.54 Of the respondents that did agree, the reasons for agreement with ComReg included that:

4.54.1 If a margin squeeze test on the SV market was justified then the costs listed by ComReg, including call origination, interconnect paths, call termination and the OAOs' costs for using their network and support facilities, would be relevant to the Margin Squeeze test (Eircom).

4.55 For those who did not agree, the following main issues were raised and for each issue ComReg provides its position:

<u>Claim that ComReg has provided no justification why certain costs are reckonable when call origination and call termination are sold within Wholesale SV services but not when sold as individual components (Vodafone)</u>

4.56 ComReg does not agree, it has provided justification and again re-iterates this justification. The aim of the obligation not to Margin Squeeze in the markets of Call Origination and Call Termination is to protect efficient investment in infrastructure in those markets and mitigate against discriminatory behaviour, i.e. to avoid existing cost-oriented remedies in those regulated markets being undermined by an insufficient economic space relative to Eircom's other wholesale services. Thus, while the existing cost-oriented remedies remain appropriate in the upstream markets, the relative price difference between those upstream inputs sold on a standalone basis and sold as part of a Wholesale SV service respectively are the focus of the Decisions. Therefore, to consider if Eircom's offer of the regulated components in the provision of Wholesale SV is squeezing those regulated products in the interconnection markets, the additional costs for an interconnected OAO availing of call origination and call termination from Eircom needs to be considered. ComReg considers that this is similar in principle to the existing ex-ante margin squeeze obligations that Eircom must comply with including those margin squeeze tests between a regulated to unregulated market, e.g. the Wholesale Broadband Access ('WBA') to retail broadband margin squeeze test which protects WBA, which is a regulated market, from squeezes from Eircom's pricing of retail broadband, which is unregulated but relies on Eircom's provision of components from the regulated WBA market. Again the margin squeeze test for WBA is based on a SEO.

Claim that a 'Local Calls Disadvantage' remedy would be better (Vodafone)

4.57 ComReg did refer to this issue in the Market Analysis paper for Call Origination and Eircom responded "*(a)ll of the OAOs that operate in this market are aware of the remedy that is available in the United Kingdom, and none have sought this remedy in Ireland.*"[24] No other OAO expressed a real desire to move on this issue at that time.

4.58 ComReg maintains that it is open for OAOs to request a product from Eircom that remedies the 'local calls disadvantage' for interconnected OAOs . Such a remedy would likely eliminate some of the additional costs faced by the SEO and therefore the Margin Squeeze Test model would be updated to reflect any reduced cost where this change is brought into effect by Eircom. If this issue is not resolved, there is also a risk that that OAOs availing of Wholesale SV may be getting the benefit of more efficient routing of calls compared to interconnected OAOs and if this occurs this could be considered to be discriminatory.

Confirmation that all relevant costs are included (BT and ALTO)

4.59 Two respondents seek confirmation that all relevant costs will be included in the Margin Squeeze test.

4.60 ComReg can confirm that the proposed Margin Squeeze test will include all relevant costs to assess whether the regulated components of call origination and call termination are being squeezed by Eircom's provision of those components in Wholesale SV. For assessing off-net calls, the test will also add any applicable off-net charges as required, for example, a call to Meteor will include the applicable Meteor Mobile Termination Rate and a call to a Premium Rate Number will include all applicable wholesale charges. This will therefore minimise the risk of leverage and foreclosure of the markets of Call Origination and Call Termination. However, the detailed Margin Squeeze test model will be with Eircom and the onus is on Eircom to ensure that it is compliant with its obligation not to Margin Squeeze. Consequently, Eircom must ensure that the relevant costs associated with the provision of Wholesale SV by an interconnected OAO (the SEO) availing of Eircom's regulated components of call origination and call termination are included in the test. ComReg will continually monitor whether all relevant costs are included.

Proposal on preliminary view in relation to the structure of the minimum price floors set by the Margin Squeeze test

4.61 In Consultation Document No. 10/76, ComReg sought views in relation to ComReg's preliminary view in relation to the structure of the minimum price floors set by the Margin Squeeze test. ComReg set out two possible options for structuring the minimum prices/price floors for the margin (price) squeeze test. It proposed that the tests be assessed on six price floors, namely on-net by day, evening and weekend (based on a combination of one call origination and one call termination within Eircom's network) and off-net by day, evening and weekend (based on one call origination only within Eircom's network). The rationale for ComReg's proposal was set out and the following question was asked.

[24] At page 25 of Eircom's response to Consultation Document No. 07/02 which can be found at http://www.comreg.ie/_fileupload/publications/ComReg0751a.pdf.

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

4.62 Three respondents agreed, two respondents did not agree.

4.63 Of the respondents that did agree, the reasons for agreement with ComReg included that:

4.63.1 it will prevent anti-competitive behaviour by Eircom. (BT and ALTO)

4.64 For those who did not agree, the following main issues were raised and for each issue ComReg provides its position:

Claim that ComReg proposed minimum price floors will exclude Eircom from providing Wholesale SV services

4.65 This has been addressed at 4.28.

Claim that the 'Local Calls Disadvantage' remedy would be better

4.66 This has been addressed at 4.57.

Other issues:

4.67 In Consultation Document No. 10/76, ComReg indicated that it would welcome any views of respondents on issues that ComReg had not considered in relation to the amendment of the price control obligations and further specification of the transparency obligations in the Call Origination and Call Termination Markets. ComReg asked the following question:

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

4.68 The following main issues were raised by respondents and for each issue ComReg provides its position:

ComReg's proposal is welcomed (BT and ALTO):

4.69 Two respondents welcomed the consultation given their concerns with the secretive approach that they claim Eircom has taken towards the transparency of Wholesale SV and their entrenched dominant market share of the wholesale Call Origination and Call Termination markets in Ireland. They claim that Eircom's offering of Wholesale SV leverages Eircom's dominant position in the provision of regulatory products into the provision of wholesale solutions for re-sellers.

4.70 ComReg agrees with the above risks and these Decisions seek to address them.

Claim that an obligation not to unreasonably bundle should also be specified (BT and ALTO)

4.71 Two respondents considered that Eircom could attempt to circumvent the margin test and transparency obligations by offering associated or other facilities bundled in a Wholesale SV package. They therefore considered that an unreasonable bundles / unreasonable wholesale package test and regulation should apply.

4.72 ComReg has decided to address the issue using the Margin Squeeze. The Margin Squeeze test is a test of replication for a hypothetical operator availing of Eircom's interconnection components to provide Wholesale SV. Therefore, if Eircom bundles in certain associated and other facilities, ComReg will consider the cost of those associated and other facilities in the test of replication to ensure that Eircom is not causing a Margin Squeeze in respect of the regulated wholesale call origination/termination components. It will be clear to Eircom what products/services are outside the scope of the test given its simplicity as set out later in this paper and as the Margin Squeeze test model will be shared with Eircom.

Eircom’s obligation to not discriminate (BT and ALTO)

4.73 Eircom retail is a sales channel and therefore pursuant to its obligation not to discriminate it must ensure that OAOs receive the same terms and conditions. Two respondents note the determination of ComReg in Document No. 09/30 ‘Determination in the dispute between Colt Telecom Ireland and Eircom in relation to alleged failure by Eircom to provide Wholesale Terminating Segments of Leased Line based on Uncontended Ethernet Access’ dated 8 April 2009 which noted that Eircom retail is a sales channel within Eircom[25]. On that basis it is claimed that Eircom should offer the same terms and conditions to OAOs as to Eircom retail in accordance with its obligation not to discriminate.

4.74 In response, ComReg notes that the existing transparency obligation and the Margin Squeeze test imposed in this paper will minimise any possible discriminatory practice by Eircom. While Eircom has a non-discrimination obligation in the Call Origination and Call Termination markets, it would not be possible for ComReg to monitor compliance with the non-discrimination obligation from a pricing perspective in the absence of the specified Margin Squeeze test now being applied. In the event of a compliance action, ComReg reserves the right to take an action under either the non-discrimination obligation or the amended price control obligation or both where Eircom provides Wholesale SV below the floors set by the Margin Squeeze test model.

Claim that it appears that Eircom’s actual internal costs are lower than the cost imputed for the test (Vodafone)

4.75 A respondent claimed that Eircom because it appears that Eircom’s actual internal costs are lower than the floor imputed for the test, Eircom can price at the floors and still retain a larger margin not available to competing OAOs.

[25] At para 160.

4.76 ComReg considers that the use of the cost-oriented rates for call origination and call termination within the Margin Squeeze test model should minimise this risk as the cost-oriented rates are based on Eircom's own efficient costs. However, these regulated cost inputs do give Eircom its required rate of return so in this respect it earns a margin in the floor that is not available to other competing SV providers. ComReg notes that this issue is beyond the scope of the current consultation and it may revisit it in a different context.

Preliminary views expressed in Consultation Document No. 10/76:

4.77 In Consultation Document No. 10/76, ComReg sought views in relation to ComReg's preliminary views generally and asked the following question:

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

4.78 Three respondents agreed, two respondents did not agree.

4.79 For those who did not agree, the following main issues were raised and for each issue ComReg provides its position:

<u>Claim that the proposals will regulate provision by Eircom of services on a market downstream of Call Origination and Call Termination</u>

4.80 ComReg does not agree; this was addressed at paragraph 4.9.

<u>Claim that justification for the proposals is lacking</u>

4.81 ComReg does not agree; this was addressed at paragraph 4.8.

Summary of ComReg's final position in relation to the price controls and transparency obligations

4.82 Having considered the views of all respondents' to Consultation Document No. 10/76, the following sets out ComReg's position as compared to its preliminary views in the consultation. Any changed position is highlighted in green.

Obligation not to Margin Squeeze	**Preliminary view**	**ComReg's final position**
Type of operator:	*SEO based on "least interconnected operator: 12% primary, 70% single tandem and 18% double tandem*	*SEO based on "weighted average level" of interconnection: currently set at 66% primary, 24% single tandem and 10% double tandem for the time being.*
Time period:	*Static*	*Static*
Level of aggregation:	*Assessed by Day / Evening / Weekend split between on-net and off-*	*Assessed by Day / Evening / Weekend split between on-net and off-*

	net	*net*
Cost standard:	*LRAIC+*	*LRAIC+*
Obligation of transparency	**Preliminary view**	**ComReg's final position**
Minimum price floors:	*Further specify the obligation to require publication*	*Price control to be amended to require Eircom to submit confidentially to ComReg. This aspect of transparency obligation withdrawn.*
Terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of call origination and call termination within Wholesale SV services:	*Further specify the obligation to require publication*	*Further specify the obligation to require publication in Reference Interconnect Offer.*

Decisions

4.83 In Consultation Document No.10 /76, ComReg sought views on the draft decisions:

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

4.84 ComReg has considered the views of respondents and where it considered it to be appropriate reflected the views in the finalised Decisions at Chapter 5. The major change from the draft Decisions is the change to the SEO test from being based on the "Least Interconnected Level" to the "Weighted Average Interconnected Level". As discussed earlier ComReg believes that this revision strikes the appropriate balance to enable competition in the provision of Wholesale SV. The other major change is the removal from the existing transparency obligation of the requirement to publish the minimum price floors for call origination and call termination provided in Wholesale SV. The Decisions amend the price control obligation to require Eircom to submit this information in confidence to ComReg in order to demonstrate compliance with the obligation not to Margin Squeeze. Another change from the draft Decisions is that Margin Squeeze is now defined for the specific context of these Decisions as follows:

"Margin Squeeze means the setting by Eircom of its wholesale price for the call origination wholesale product and/or wholesale call termination product in its Wholesale SV service below the minimum price floor set by reference to the Margin Squeeze Test model of this Decision. "

4.85 This definition is provided in order to provide clarity and avoid any potential for confusion in regard to terminology that is commonly used on a number of regulatory and competition law fronts. ComReg notes, however, the core of the concern is consistent with the logic and principles of margin/price squeeze in regulatory law and policy.

4.86 This results in the removal of the general obligation not to margin squeeze proposed as Margin Squeeze is defined in the Decision. Another change made, following a request from Eircom, is to include the parameters of the Margin Squeeze Test model in the respective Decisions. It is not practical for the specific model to be inserted into the Decisions as it cannot be released into the public domain as it contains cost information confidential to Eircom. However, the specific model will be provided to Eircom at the same time as publication of this document.

Regulatory Impact Assessment

4.87 In Consultation Document No.10 /76, ComReg sought views on the Regulatory Impact Assessment ('RIA') by asking the following question:

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

4.88 Three respondents had issues with the RIA. ComReg has considered in detail the comments made. Following review, given the amendments made following review of responses to Consultation Document No. 10/76, and to reflect the change to the proposals outlined above, ComReg has updated the RIA as part of making its final decision.

4.89 It is noted that the RIA did not consider the further specifications of the transparency obligations because, as noted in Consultation Document No. 10/76, the further specifications proposed were simply to clarify the exact scope of the existing obligations. Therefore, this did not need to be considered in the RIA as they were existing regulatory obligations.

Utmost consideration of the comments from the European Commission

4.90 These decisions were notified to the European Commission[26]. In response by letter dated 16 June 2011, ComReg received the European Commission's Comments[27]. These comments are summarised as follows:

4.90.1 ComReg was invited to clarify the impact of the Margin Squeeze test to ensure consistency between the already existing cost-orientation obligation and the price floors resulting from the application of the Margin Squeeze test

4.90.2 ComReg, in the context of the forthcoming revision of its costing model was invited to align the termination rates with the European Commission's Termination Rate recommendation

[26] By notification dated 16 May 2011.

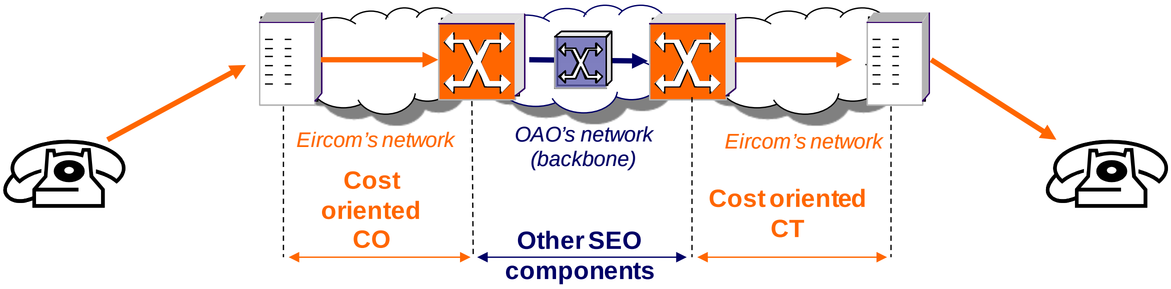
[27] at the following link http://circa.europa.eu/Public/irc/infso/ecctf/library?l=/ireland/registeredsnotifications/ie20111220/ie-2011-1220_endatenrpdf/_EN_1.0_&a=d.

The issue of consistency between price floors and cost orientation obligation

4.91 In response to the first comment, ComReg wishes to make it clear that the obligation not to Margin Squeeze will not lead to different regulated prices for the same call origination and call termination products.

4.92 Wholesale SV enables OAOs, who do not have their own fixed network (i.e. switchless), to offer their own branded telephony service to their end retail customers. The OAO availing of Wholesale SV needs no physical network infrastructure and as such limited up front capital investment is required.

4.93 When provided by OAOs, Wholesale SV is built with a technical combination of Eircom's wholesale services (depending on OAO's level of interconnection) and other components such as their own backbone network services as illustrated in the diagram below:



4.94 As Eircom is competing with OAOs on downstream markets (wholesale and retail), while being dominant on the upstream market (composed of the interconnection services, such as call origination and call termination), ComReg has computed a Margin Squeeze price floor comprising of:

4.94.1 the cost-oriented call origination tariff,

4.94.2 the cost-oriented call termination tariff,

4.94.3 other complementary components that are required for an interconnected OAO to provide Wholesale SV, such as OAO's own backbone network services.

4.95 As proposed within Consultation Document No. 10/76, the sum of these items sets the minimum price floor to ensure that no Margin Squeeze occurs. As a consequence, there is:

4.95.1 only one single regulated tariff for call origination (cost-oriented) applied both in the regulation of call origination and in the computation of the minimum price floor to ensure that there is no Margin Squeeze,

4.95.2 only one single regulated tariff for call termination (cost-oriented) applied both in the regulation of call termination and in the computation of the minimum price floor to ensure that there is no Margin Squeeze,

4.95.3 the SEO cost of other components to provide a competing Wholesale SV service so as to finalise the computation of the minimum price floor to ensure that there is no Margin Squeeze.

4.96 Therefore, this is not different from any test to assess margin squeeze and ensures that interconnected operators availing of the regulated components of call origination and call termination are not squeezed by Eircom offering those components within its provision of Wholesale SV.

European Commission's Termination Rate recommendation

4.97 In response to the second comment, ComReg confirms that in the context of the forthcoming review of the Call Termination market and any revision of the costing model, ComReg will be guided by the European Commission's Termination Rates Recommendation where SMP is found. The review of the Call Origination and Call Termination markets will commence shortly and any remedies as a consequence of this will be consulted on.

The Margin Squeeze Test Model used to set the minimum price floors

4.98 To summarise and conclude, having considered the views of respondents, the following are the components of the final Margin Squeeze Test model used to set the minimum price floors. The model is based on responses from OAOs and Eircom to data requests sent. The finalised model has been issued to Eircom at the same time as this Decision.

Minimum price floor for call origination offered by Eircom in Wholesale SV:

4.99 The minimum price floor for primary call origination when offered by Eircom in its provision of Wholesale SV is calculated by adding the following costs:

4.99.1 The applicable cost-oriented interconnection call origination rates that are in effect and charged to interconnected OAOs which are applied to the weighted average level structure to get a total cost.

4.99.2 The cost of another wholesale service from Eircom, namely interconnect paths, which interconnected OAOs must purchase. This is to be based on the cost of interconnect paths for the weighted average level structure applicable for the Wholesale SV contract under review and this cost is adjusted using the time of day gradient applicable to the Wholesale SV contract under review. The appropriate unit costs will be kept under review each quarter as the traffic and number of interconnect paths bought changes over time.

4.99.3 The internal costs of the SEO, namely its own network costs and the specific billing and carrier administration expenditure. For the SEO network costs, this is based on ComReg's Bottom Up LRAIC model ("BU-LRAIC") adjusted for the time of day gradient applicable to the Wholesale SV contract under review. For the specific billing and carrier administration expenditure, this is based on Eircom's latest Top Down model and adjusted for the time of day gradient applicable to the Wholesale SV contract under review. Any future amendments to how these costs are modelled in the cost oriented rates of Eircom will give rise to a change in these inputs from time to time.

Minimum price for call termination offered by Eircom in Wholesale SV:

4.100 The minimum price floor for primary call termination when offered by Eircom in its provision of Wholesale SV is to be calculated by taking the applicable cost-oriented interconnection call termination rates that are in effect and charged to interconnected OAOs which are applied to the weighted average level structure to get a total cost.

Example of Margin Squeeze test:

4.101 To summarise, ComReg provides an example of the Margin Squeeze test below using the actual cost-oriented call origination and call termination rates currently in effect, the proposed SEO structure and an example below showing the nature of the type of other costs facing an interconnected OAO that must be considered:

High-level example of Margin Squeeze Test Model

1. Use latest actual cost-oriented Call Origination and Call Termination Rates applicable for interconnected OAO

Interconnection Rates (€c)	Primary			Tandem			Double Tandem		
Origination	D	E	W	D	E	W	D	E	W
Per Call	0.686	0.380	0.333	0.760	0.420	0.367	0.793	0.438	0.384
Per Min	0.252	0.140	0.123	0.365	0.202	0.177	0.451	0.249	0.218
Termination	D	E	W	D	E	W	D	E	W
Per Call	0.698	0.386	0.338	0.774	0.428	0.375	0.815	0.451	0.395
Per Min	0.263	0.145	0.127	0.382	0.211	0.185	0.522	0.289	0.253

2. Use Time of Day gradient as per SV contract

Gradient (Example)	
Day	XX
Evening	XX
Weekend	XX

3. Use hypothetical SEO "weighted average" interconnection structure in effect

Primary	66%
Tandem	24%
Double Tandem	10%

4. Using latest actual rates, gradient per SV contract and SEO "weighted average" interconnection structure gives the following sub-total for an interconnected OAO

€cent per min	D	E	W
Termination	XX	XX	XX
Origination	XX	XX	XX

5. For origination offered within SV, include all other relevant costs (over long-run) that interconnected OAO would separately incur

€cent per min	D	E	W
I/C paths	XX	XX	XX
OAO Network	XX	XX	XX
Billing & Carrier Admin	XX	XX	XX

6. FLOORS FOR TERMINATION AND ORIGINATION WHEN OFFERED IN WHOLESALE SV

€cent per min	D	E	W
Termination	XX	XX	XX

(plus all relevant termination fees e.g. MTR)

€cent per min	D	E	W
Origination	XX	XX	XX

Conclusion

4.102 To conclude, the rationale for these Decisions is that Eircom (as the SMP operator) provides the regulated components of call origination and call termination required for a Wholesale SV. Eircom is also vertically integrated and since 2008 sells its own Wholesale SV service, as well as its own retail services to end users. Therefore, without an appropriate safeguard, Eircom has the ability and incentive to act anti-competitively and to discriminate between wholesale customers buying call origination or call termination standalone or within Eircom's provision of Wholesale SV services. If Eircom conducted such behaviour, and in particular if it applied a 'squeeze' between the regulated prices of wholesale call origination and call termination when sold as standalone inputs and those components when sold as part of a SV service, it would likely lead to the following outcomes:

4.102.1 Efficient investment in infrastructure would be undermined as, regardless of their level of interconnection, OAOs could potentially avail of lower wholesale prices by availing of Eircom's Wholesale SV services for which no infrastructure investment is needed.

4.102.2 Much of the investment in interconnect infrastructure, such as switching, interconnect links and in network management personnel made by some OAOs would be stranded where Wholesale SV is seen as the best wholesale solution in the short-run to sell retail calls. Such signals could create very negative incentives to investing in future voice technology and more generally in other telecoms services such as broadband. It could also lead to operator exit from the wholesale fixed voice markets for call origination and termination.

4.102.3 Competing Wholesale SV services which rely on regulated components of call origination and call termination from Eircom, in addition to their own efficient network investments, would potentially be foreclosed.

4.102.4 A reduced number of infrastructure-based OAOs would not be good for retail competition and innovation, as OAOs that simply rely on Eircom's resold wholesale products are not in a strong position to offer differentiated products or prices compared to Eircom's retail call offerings generally. Thus retail customers would ultimately suffer from a reduced level of innovation and differentiation.

4.103 Impeding the ability of efficient interconnected operators to attain customers and scale at downstream levels of the value chain will also delay their entry into upstream wholesale markets, thus reinforcing Eircom's dominance in the Call Origination, Call Transit and Call Termination markets. Furthermore, ComReg believes that the amendments to the price control obligation are proportionate as the amendments to the price control obligations are not overly burdensome or onerous on Eircom, taking account of the potential competition problems in the absence of such measures. Following consideration of the responses to consultation, ComReg has set the SEO based on hypothetical "weighted average level" of interconnection which is less burdensome on Eircom as opposed to the proposed use of the hypothetical least level of interconnection proposed in Consultation Document No. 10/76.

4.104 As discussed above, the amendments to the price control obligation are considered justified as Eircom as both the supplier of the regulated call origination and call termination components in Wholesale SV and of a competing Wholesale SV service has the ability to distort competition right across the supply chain. ComReg believes that there is a risk that Eircom could offer the call origination and call termination components of the Wholesale SV service at rates applicable to a higher level of infrastructure investment (i.e. primary switching) than the OAO availing of the Wholesale SV services may have made. Therefore, Eircom's provision of Wholesale SV services has the potential to bypass the important regulatory goal of efficient infrastructure investment as, without an appropriate price control obligation, the pricing of Wholesale SV services could likely penalise those OAOs who have already made or are planning to make efficient infrastructure investments in interconnection to avail of the lower primary interconnection rates. This could as a result undermine efficient infrastructure development and reinforce entry barriers in the Call Origination, Call Transit and Call Termination markets.

4.105 The proposal in relation to further specifying the transparency obligation is considered proportionate as it is simply clarifying the exact scope of the existing obligation and minimising the risk of discrimination. However, having considered the views of respondents to the consultation, ComReg will withdraw the obligation requiring Eircom to publish and make public the minimum price floors set by the Margin Squeeze test and this amendment is considered proportionate as this should ensure that Eircom is not put at a commercial disadvantage in its offer of competing Wholesale SV services. Instead, ComReg will amend the price control obligation to oblige Eircom to submit its pricing information for the call origination and call termination component parts within its provision of Wholesale SV services in confidence to ComReg in order to demonstrate compliance with the obligation not to Margin Squeeze. Furthermore, ComReg, as proposed in Consultation Document No. 10/76, will further specify the aspect of the existing transparency obligation to clarify that it requires publication of terms, conditions, service level agreements, guarantees and other product-related assurances associated with its provision of call origination and call termination within Wholesale SV services to demonstrate that Eircom is not acting in a discriminatory manner contrary to its regulatory obligation. In essence this is merely a confirmation that there is no difference between the above conditions for interconnected OAOs and that provided to switchless operators.

4.106 The further specification of the transparency obligation is considered justified as ComReg is of the view that there is currently insufficient transparency regarding the terms and conditions of regulated components within Wholesale SV services provided by Eircom. This is despite the existing transparency obligations which apply to the component parts of the Wholesale SV service which are regulated within the Call Origination and Call Termination markets. ComReg believes its amendment to the transparency obligation to remove the obligation requiring Eircom to publish and make public the minimum prices, as set by the Margin Squeeze test, for call origination and call termination component parts within its provision of Wholesale SV services is justified. Having considered the views of respondents, ComReg now believes that to make public the minimum price floors set by the Margin Squeeze test could adversely affect Eircom’s provision of Wholesale SV services.

4.107 In conclusion, ComReg believes that the Decisions present a practical and fair solution that takes into account the interests of Eircom, industry and consumers. It is anticipated that the Decisions will promote efficiency, sustainable competition and consumer welfare and minimise the risk of any discriminatory and anti-competitive practices by Eircom.

5 Decisions

DECISION INSTRUMENT (WHOLESALE CALL ORIGINATION)

1. STATUTORY AND LEGAL POWERS

1.1. This Decision is made by the Commission for Communications Regulation (“ComReg”):

1.1.1. Pursuant to Regulations 8, 9, 13 and 18 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011[1]; and

1.1.2. Pursuant to and having regard to the Significant Market Power (“SMP”) designation on Eircom Limited in the national wholesale market for call origination services on the public telephone network provided at a fixed location contained in ComReg Decision D04/07[2]; and

1.1.3. Having, where appropriate, complied with policy decisions made by the Minister for Communications, Marine and Natural Resources[3]; and

1.1.4. Pursuant to the functions and objectives of the Commission for Communications Regulation as set out in Sections 10 and 12 respectively of the Communications Regulation Acts 2002 to 2010 and Regulation 16 of the European Communities (Electronic Networks and Services) (Framework) Regulations 2011; and

1.1.5. Having had regard to the analysis and reasoning set out in ComReg Decision No. D04/07, which shall, where necessary be construed together with this Decision Instrument; and

1.1.6. Having taken into account the views of interested parties following a public consultation[4]; and

1.1.7. Having notified the draft measure and the reasoning upon which the measure is based to the European Commission, and the national

[1] S.I. No. 334 of 2011 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011, which revoked and replaced the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (which was the statutory instrument in force at the time of consultation in Consultation and Draft Decisions, Document No. 10/76).

[2] ‘Market Analysis – Interconnection and ‘Market Analysis –Interconnection Market Review Wholesale Call Origination & Transit Services’ dated 5 October 2007, Document No. 07/80.

[3] Dated 21 February 2003 and 26 March 2004.

[4] Pursuant to its obligation under Regulation 19 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307/2003).

regulatory authorities in other EU Member States and having taken into account any comments made by these parties[5].

2. DEFINITIONS

2.1. In this Decision Instrument, unless the context suggest otherwise:

"Access Regulations" means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011. (S.I. No. 334 of 2011);

"Call Origination market" means the national wholesale market for call origination services on the public telephone network provided at a fixed location (hereafter "the Call Origination market") contained in ComReg Decision D04/07 'Market Analysis –Interconnection Market Review Wholesale Call Origination & Transit Services' ("D04/07");

"Eircom" means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls and its successors and assigns;

"LRAIC plus" means 'Long Run Average Incremental Costs plus' and means the average efficiently incurred directly attributable variable and fixed costs, plus an appropriate apportionment of joint and common costs;

"Margin Squeeze" means the setting of a wholesale price by Eircom for the call origination component part of a SV service below the minimum price floor set by the Margin Squeeze Test Model for Call Origination;

"Margin Squeeze Test Model for Call Origination" is a model used to calculate the appropriate minimum price floor for a call origination wholesale product in a SV service. The test will be (i) based on a Similarly Efficient Operator ('SEO') at the weighted average level that uses Eircom's cost-oriented call origination rates (ii) assessed at a static point in time (iii) assessed by time of day gradient (i.e. day,evening,weekend) and (iv) use a LRAIC plus (long-run average incremental cost plus) standard.

"Similarly Efficient Operator" means a hypothetical operator which shares the same basic cost function as Eircom but has not interconnected at the same level and therefore does not yet enjoy the same economies of scale and scope as Eircom;

"SV service" means a switchless voice service which allows an operator to purchase end-to-end call services without the need to have its own interconnection infrastructure;

[5] Pursuant to its obligations under Regulation 20 of European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, S.I. No. 307 of 2003 and Regulation 8(4) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

"Weighted average level" means interconnection of 66% at primary level, 24% at single tandem level and 10% at double tandem level. ComReg will keep the apportionment of the levels of interconnection under review and will update the apportionment where it considers that competitive conditions warrant it. Any material update to the apportionment levels will be communicated or consulted upon in the appropriate manner.

3. SCOPE AND APPLICATION

3.1. This Decision Instrument applies to Eircom. The Decision is taken pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations and section10 and section 12 of the Communications Regulation Acts 2002 to 2010 and Regulation 16 of the European Communities (Electronic Networks and Services) (Framework) Regulations 2011 and amends the price control, withdraws one aspect and further specifies another aspect of the transparency obligations imposed in D04/07.

3.2. This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.

4. AMENDMENT TO OBLIGATION RELATING TO PRICE CONTROL

4.1. The following text shall be inserted following s.10.7 of the Decision Instrument (Wholesale Call Origination) of Annex A of D04/07:

4.2. "10.8 Eircom shall not apply a Margin Squeeze.

10.9 Following a request by ComReg, Eircom shall submit to ComReg in confidence its minimum prices and any other relevant pricing information for the Call Origination component part of a SV service in order to demonstrate compliance with its obligation at 10.8."

5. WITHDRAWAL OF OBLIGATION RELATING TO THE OBLIGATION OF TRANSPARENCY

5.1. The aspect of Eircom's transparency obligation in the Call Origination market (at s.8.1 and 8.2(iii) of the Decision Instrument (Wholesale Call Origination) of Annex A of D04/07) which obliges Eircom to publish minimum prices for the Call Origination component part of a SV service is withdrawn.

6. DIRECTION FURTHER SPECIFYING REQUIREMENTS TO BE COMPLIED WITH RELATING TO THE OBLIGATION OF TRANSPARENCY

6.1. For the purpose of further specifying requirements to be complied with relating to Eircom's transparency obligation in the Call Origination market, at s.8.1 and 8.2(iii) of the Decision Instrument (Wholesale Call Origination) of Annex A of D04/07 Eircom is directed to ensure that the Reference Interconnect Offer includes the terms, conditions, service level agreements, guarantees and other product related assurances of the Call Origination component part of a SV service.

7. STATUTORY POWERS NOT AFFECTED

7.1. Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory functions, powers and duties under any primary or secondary legislation (in force prior to or after the effective date of this decision instrument) from time to time as the occasion may require.

8. MAINTENANCE OF OBLIGATIONS

8.1. Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements on Eircom including those set out in D04/07, are continued in force by this Decision Instrument and Eircom shall comply with same.

8.2. If any section, clause or provision (or portion thereof) contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision (or portion thereof) shall, to the extend required be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clauses(s) or provision(s) (or portion thereof) of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

9. EFFECTIVE DATE

9.1. This Decision Instrument shall be effective from 15 September 2011 until further notice by ComReg.

ALEX CHISHOLM
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 15 DAY OF SEPTEMBER 2011

DECISION INSTRUMENT (WHOLESALE CALL TERMINATION)

1. STATUTORY AND LEGAL POWERS

1.1. This Decision is made by the Commission for Communications Regulation ("ComReg"):

1.1.1. Pursuant to Regulations 8, 9, 13 and 18 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011[6]; and

1.1.2. Pursuant to and having regard to the Significant Market Power ("SMP") designation on Eircom Limited in the market for wholesale call termination services used to provide retail calls to end users on each public telephone network provided at a fixed location contained in ComReg Decision D06/07[7]; and

1.1.3. Having, where appropriate, complied with policy decisions made by the Minister for Communications, Marine and Natural Resources[8]; and

1.1.4. Pursuant to the functions and objectives of the Commission for Communications Regulation as set out in Sections 10 and 12 respectively of the Communications Regulation Acts 2002 to 2010 and Regulation 16 of the European Communities (Electronic Networks and Services) (Framework) Regulations 2011; and

1.1.5. Having had regard to the analysis and reasoning set out in ComReg Decision D06/07, which shall, where necessary be construed together with this Decision Instrument; and

1.1.6. Having taken into account the views of interested parties following a public consultation[9]; and

1.1.7. Having notified the draft measure and the reasoning upon which the measure is based to the European Commission, and the national

[6] S.I. No. 334 of 2011 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011, which revoked and replaced the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003 (which was the statutory instrument in force at the time of consultation in Consultation and Draft Decisions, Document No. 10/76).

[7] 'Market Analysis – Interconnection Market Review Fixed Wholesale Call Termination Services' dated 21 December 2007, Document No. 07/109.

[8] Dated 21st February 2003 and 26 March 2004.

[9] Pursuant to its obligation under Regulation 19. of S.I. No. 307/2003 European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003.

regulatory authorities in other EU Member States and having taken into account any comments made by these parties[10].

2. DEFINITIONS

2.1. In this Decision Instrument, unless the context suggest otherwise:

“Access Regulations” means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011. (S.I. No. 334 of 2011);

“Call Termination market” means the market for wholesale call termination services used to provide retail calls to end users on each public telephone network provided at a fixed location contained in ComReg Decision D06/07 ‘Market Analysis – Interconnection Market Review Fixed Wholesale Call Termination Services’(“D06/07”)

“Eircom” means Eircom Limited and its subsidiaries, and any undertaking which it owns or controls and its successors and assigns;

“LRAIC plus” means ‘Long Run Average Incremental Costs plus’ and means the average efficiently incurred directly attributable variable and fixed costs, plus an appropriate apportionment of joint and common costs;

“Margin Squeeze” means the setting of a wholesale price by Eircom for a call termination component part of a SV service below the minimum price floor set by reference the Margin Squeeze Test Model for Call Termination;

“Margin Squeeze Test Model for Call Termination” is a model used to calculate the appropriate minimum price floor for a call termination wholesale product in a SV service. The test will be (i) based on a Similarly Efficient Operator (‘SEO’) at the weighted average level that uses Eircom’s cost-oriented call termination rates (ii) assessed at a static point in time (iii) assessed by time of day gradient (i.e. day,evening,weekend) and (iv) use a LRAIC plus (long-run average incremental cost plus) standard.

“Similarly Efficient Operator” means a hypothetical operator which shares the same basic cost function as Eircom but has not interconnected at the same level and therefore does not yet enjoy the same economies of scale and scope as Eircom;

“SV service” means a switchless voice service which allows an operator to purchase end-to-end call services without the need to have its own interconnection infrastructure;

[10] Pursuant to its obligation under Regulation 20 of S.I. No. 307/2003 European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 and Regulation and Regulation 8(4) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

"Weighted average level" means interconnection of 66% at primary level, 24% at single tandem level and 10% at double tandem level. ComReg will keep the apportionment of the levels of interconnection under review and will update the apportionment where it considers that competitive conditions warrant it. Any material update to the apportionment levels will be communicated or consulted upon in the appropriate manner.

3. SCOPE AND APPLICATION

3.1. This Decision Instrument applies to Eircom. The Decision is taken pursuant to Regulations 8, 9, 13 and 18 of the Access Regulations and s.10 and s.12 of the Communications Regulation Acts 2002 to 2010 and Regulation 16 of the European Communities (Electronic Networks and Services) (Framework) Regulations 2011 and amends the price control, withdraws one aspect and further specifies another aspect of the transparency obligations, imposed in D06/07.

3.2. This Decision Instrument is binding upon Eircom and Eircom shall comply with it in all respects.

4. AMENDMENT TO OBLIGATION RELATING TO PRICE CONTROL

4.1. The following text shall be inserted following s.10.2 of Decision Instrument at Appendix A of D06/07

4.2. "10.2A Eircom shall not apply a Margin Squeeze.

10.2B Following a request by ComReg, Eircom shall submit to ComReg in confidence its minimum prices and other relevant pricing information for the Call Termination component part of a SV service in order to demonstrate compliance with its obligation at 10.2A."

5. WITHDRAWAL OF OBLIGATION RELATING TO THE OBLIGATION OF TRANSPARENCY

5.1. The aspect of Eircom's transparency obligation in the Call Termination market (at s.8.1 and 8.2(iii) of Decision Instrument at Appendix A of D06/07) which obliges Eircom to publish minimum prices for the Call Termination component part of a SV service is withdrawn.

6. DIRECTION FURTHER SPECIFYING REQUIREMENTS TO BE COMPLIED WITH RELATING TO THE OBLIGATION OF TRANSPARENCY

6.1. For the purpose of further specifying requirements to be complied with relating to Eircom's transparency obligation in the Call Termination market at s.8.1 and 8.2(iii) of Decision Instrument at Appendix A of

D06/07, Eircom is directed to ensure that its published Reference Interconnect Offer includes the terms, conditions, service level agreements, guarantees and other product related assurances of the Call Termination component part of a SV service.

7. STATUTORY POWERS NOT AFFECTED

7.1. Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory functions, powers and duties under any primary or secondary legislation (in force prior to or after the effective date of this decision instrument) from time to time as the occasion may require.

8. MAINTENANCE OF OBLIGATIONS

8.1. Unless expressly stated otherwise in this Decision Instrument, all obligations and requirements on Eircom including those set out in D06/07, are continued in force by this Decision Instrument and Eircom shall comply with same.

8.2. If any section, clause or provision (or portion thereof) contained in this Decision Instrument is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision (or portion thereof) shall, to the extend required be severed from this Decision Instrument and rendered ineffective as far as possible without modifying the remaining section(s), clauses(s) or provision(s) (or portion thereof) of this Decision Instrument, and shall not in any way affect the validity or enforcement of this Decision Instrument.

9. EFFECTIVE DATE

9.1. This Decision Instrument shall be effective from 15 September 2011 until further notice by ComReg.

ALEX CHISHOLM
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE 15 DAY OF SEPTEMBER 2011

ANNEX A: Legal Basis

ComReg's Obligations and the Obligations of the SMP Operator

A1. Regulations 8, 9, 13 and 18 of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011[11] and section 10(3) of the Communications Regulation Acts 2002 to 2010 together with the market analyses culminating in 2007 in a finding that Eircom had SMP in the markets of Call Origination (ComReg Decision D04/07) and Call Termination (ComReg Decision D06/07) are the applicable legal bases for the proposed amendments to the price controls, withdrawal of aspects of and further specifications of aspects of the transparency obligations (contained in "the Decisions").

A2. On 16 May 2011in accordance with Article 7 of the Framework Directive[12], Regulation 20 of the Framework Regulations[13] and in accordance with Regulation 9(4) of the Access Regulations[14] ComReg notified the Decisions to the European Commission. On 16 June 2011, ComReg received two comments from the European Commission. In making the Decision, ComReg has taken utmost account of these comments.

A3. ComReg considers that the Decisions are appropriate, in accordance with Regulation 8(1) of the Access Regulations.

A4. The proposed amendment to the price control obligations will in ComReg's view ensure that the SMP operator does not "apply a price squeeze to the detriment of end users", in accordance with Regulation 13(1) of the Access Regulations.

A5. ComReg believes that the Decisions will be in line with ComReg's functions and objectives of the Commission for Communications Regulation as set out in Sections 10 and 12 respectively of the Communications Regulation Acts 2002 to 2010 and Regulation 16 of the European Communities (Electronic Networks and Services) (Framework) Regulations 2011 and in particular the objective to promote competition and to promote the interests of users. The Decisions are also in accordance with Regulation 13(3) of the Access Regulations, namely to promote efficiency and sustainable competition and maximise consumer benefits as the Margin Squeeze test will protect and encourage efficient infrastructure investment in the markets of Call Origination and Call Termination.

[11] Note that on 1 July 2011 the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (hereafter the "Access Regulations") revoked and replaced the 2003 Access Regulations and these regulations replace Regulations 9, 10, 14 and 17 of the 2003 Access Regulations.

[12] Article 7 of 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 ("Framework Directive).

[13] The European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003, S.I. No. 307 of 2003.

[14] European Communities (Electronic Communications Networks and Services) (Access) Regulations 2003.

A6. In considering the proposed amendment to the price control obligations ComReg has taken into account investment made by the SMP operator in electronic communications networks or services or associated facilities which ComReg considers relevant and allowed the operator a reasonable rate of return on adequate capital employed, taking into account the risks involved, in accordance with Regulation 13(2) of the Access Regulations.

ANNEX B: Review of other responses to Consultation Document No. 10/76

B1. The following provides ComReg's views on other responses to Consultation Document No. 10/76:

Question 1 from Consultation Document No. 10/76:

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

Other Responses:

B2. **Eircom** noted that the form in which these services can be availed of directly by OAOs is in the form of the products of origination and termination published by Eircom in its RIO. They are part of Eircom's self provide for the purpose of end-to-end calls resold to OAOs in the form of the SV service. Therefore, Eircom considers that ComReg's Margin Squeeze test is contradictory. Margin Squeeze tests require separate markets upstream and downstream of each other.

ComReg's position:

B3. ComReg disagrees. It is clear that call origination and call termination are properly defined relevant markets and that those purchasing these inputs separately in an unbundled fashion from Eircom operate at a different level of the value chain to those purchasing what is effectively a bundled product (Wholesale SV) at a different level (thus obviating the need to invest in infrastructure by purchasers of the latter). It is clear and coherent (and is not contradictory) that the relative prices at these two different levels of the value chain can have competitive implications, since origination and termination, (along with transit which is also regulated), are the principal inputs into Wholesale SV. ComReg's aim is to protect the Call Origination and Call Termination markets from prices for those regulated interconnected components being set too low when provided by Eircom in Wholesale SV services. Otherwise, there is a risk that reasonably efficient operators purchasing Call Origination and Call Termination as stand-alone products cannot remain viable due to artificially low prices or margins relative to the provision of those inputs within Wholesale SV. While the technical details of the products and the Margin Squeeze test may be relatively complex and detailed, the basic concern that there would be insufficient economic space/margin as between two levels of the supply chain is consistent with regulatory intervention in other wholesale (and retail) markets.

B4. **Vodafone** stated that it was not clear that Eircom's current SV price is currently at a level which prevents other operators competing in this market. Vodafone considers that it may not be Eircom's SV price which is the biggest barrier to a less well connected operator moving up the value chain or increasing market share but may in fact be the best connected operator's. Vodafone considers that ComReg has not advanced any empirical evidence that a margin squeeze test of the type proposed, which only constrains Eircom's SV pricing, will have any effect on the current competitive dynamic in the market.

B5. Vodafone notes that the provision of Wholesale SV had developed prior to Eircom's offering of a Wholesale SV product. During this period Vodafone believes that operator investment stabilised and that there has been limited further investment in switching or interconnection infrastructure. Vodafone considers that this atrophy developed absent any influence by Eircom. In this scenario, Vodafone believes that those operators who had a less extensive interconnect managed to build a business model which did not seem to be limited by their better connected (and prospectively cheaper) competitors.

B6. Vodafone maintains that it is not ComReg's function to limit the operation of the market so that a potential competitor, in Eircom, is excluded from exerting any competitive pressure as opposed to abusing a dominant position. Vodafone considers that constructing a price control where Eircom is constrained to offer prices at or above the pricing of existing market players does precisely that.

<u>ComReg's position:</u>
B7. In response, ComReg notes that the purpose of this Decision is to ensure that Eircom's SMP in the upstream wholesale markets of Call Origination and Call Termination remains properly addressed so that existing SMP remedies in those markets are not undermined through the relative pricing of those regulated components in Eircom's Wholesale SV services. Otherwise, as noted above, competition would be impacted right across the supply chain. Where efficient operators purchasing call origination and call termination as stand-alone products cannot remain viable in the provision of Wholesale SV services as a result of artificially low margins, this could result in insufficient competitive discipline on Eircom over the medium to longer term with consequent impacts for price and service quality. It is also important to take into account the likely dampening effect of that foreclosure of infrastructure-based competitors would have on price and service innovation at the retail level. As noted above, a reduced number of infrastructure-based OAOs would not be good for retail competition and innovation, as OAOs which have network elements of their own are generally better positioned to offer differentiated products or prices compared to Eircom's retail call offerings generally. Thus retail customers would suffer from a reduced level of innovation and differentiation in the absence of the obligation not to Margin Squeeze.

B8. **O2** believes that ComReg's bias for infrastructure competition which has informed its current proposals will also significantly increase the digital divide in Ireland. O2 maintains that the economics of unbundling exchanges outside of the major urban centres was always questionable and non-infrastructure-based approaches to increasing competition in rural Ireland were always the only way forward in the fixed sector. O2 considers that ComReg's proposals as they stand will have two impacts;

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

O2 notes that both of these outcomes will be bad for competition in the fixed sector in Ireland and will be particularly damaging to rural Ireland. O2 recommends that ComReg consider margin squeeze issues with reference to retail prices as opposed to the regulated costs of call origination and call termination. It may be appropriate to set SV product prices on the basis of retail minus as opposed to cost plus. O2 refers ComReg to the most recent edition of Telecommunications Policy and the article by Briglauer, Gotz and Schwarz, "Can margin squeeze indicate the need for deregulation? The case of fixed network voice telephony markets". The authors argue that in the presence of inter-modal competition in retail markets, regulators need to be careful applying margin squeeze tests.

<u>ComReg's position:</u>
B9. ComReg does not have a "bias" towards infrastructure investment. Rather, it encourages efficient investment in line with its statutory mandate. In response, ComReg again notes that the purpose of the Decisions is not to regulate the provision of Wholesale SV. Rather the focus of the Decision is to ensure existing SMP remedies in the wholesale

markets of Call Origination and Call Termination remain viable and are not undermined through the relative pricing of Eircom's Wholesale SV services. This objective is valid in light of the fact that Eircom is designated with SMP in those upstream wholesale markets and the overall competitiveness of downstream retail calls markets rely significantly on the availability of effective call origination and call termination inputs. ComReg also notes that the Decision will not result in a digital divide. It will protect OAO efficient investment in the regulated markets of Call Origination and Call Termination while at the same time facilitating efficient and sustainable competition at downstream levels of the supply chain. Facilitating a stable and self-reinforcing competitive dynamic in the provision of Wholesale SV services will ensure that competitive and effective Wholesale SV inputs remain available on an ongoing basis. Furthermore, Eircom's cost-oriented interconnection rates are currently national prices that only change based on the number of interconnect switches the call must pass through end-to-end. It would ultimately not be in the best interests of consumers to preclude infrastructure-based operators from competing on the basis of their efficient network inputs at the retail level. Such competition provides an important source of competitive discipline on price and service quality delivered by Eircom to end users.

Question 2 from Consultation Document No. 10/76:

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

B10. Eircom finds it unconscionable that ComReg could find Eircom in breach of its obligation of transparency and then seek to specify that obligation without, at least, and simultaneously, withdrawing its finding of breach. Eircom does not accept that its obligation of transparency on the interconnection markets can be "specified" so as to require Eircom to publish products which do not fall within the scope of the regulated markets. Eircom notes that the supposedly regulated components which would be subject to the obligation of transparency cannot be purchased from OAOs, other than bundled together in the form of an end-to-end call, or separately in the form of the published interconnect products.

B11. For SV operators, Eircom notes that there is no material difference between purchasing a SV service from Eircom or from OAOs, and such SV operators availing of Eircom's White Label offers are not thereby provided with access to something that interconnected operators cannot have. Eircom notes that ComReg has not proposed that Eircom publishes these notional products but rather the unregulated end-to-end product. In terms of the publication of the terms, conditions, SLAs, guarantee and other product related assurances, Eircom states that it is incorrect to pretend that Eircom provides its SV customers with access to component parts which are subject to specific terms, conditions etc.

B12. Finally, Eircom notes that ComReg's suggestion, in para. A12 (vii) of Consultation Document No. 10/76, that "ComReg may consider not requiring Eircom to publish the minimum prices of its call origination and call termination components in the provision of SV services" is difficult to understand, including in circumstances where ComReg issued a notification of breach: either Eircom is subject to these obligations as part of its obligations on the call origination and call termination markets or it is not. Eircom maintains that the application of obligations cannot depend on compliance with other obligations as ComReg appears to believe. Eircom believes that this would clearly contradict the requirements of fairness, objectivity and legal certainty. It appears to Eircom that this demonstrates, if need be, that ComReg is seeking to impose on Eircom a range of obligations on an unregulated market which ComReg is not entitled to regulate.

ComReg's position:

B13. In response, as noted by ComReg in Consultation Document No. 10/76, the key objective of the proposal is to preserve the effectiveness of the regulated components in the markets of Call Origination and Call Termination. ComReg is thus simply clarifying the exact scope of Eircom's existing obligation of Transparency in the markets of Call Origination and Call Termination. The existing Transparency obligation is required so that Eircom demonstrates that its offer of call origination and call termination components to interconnected OAOs is provided in a non-discriminatory manner. ComReg welcomes Eircom's statement that there is no material difference between the regulated components within its Wholesale SV and the offer by Eircom of those regulated components to interconnected OAOs who may use those components to offer a competing Wholesale SV service.

Question 3 from Consultation Document No. 10/76:

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

B14. **ALTO** accept, with reservations, the use of 'LRAIC plus' but only on a temporary basis. ALTO considers it is out of synchronisation with EU Commission recommendations relating to LRIC as the most appropriate model and therefore seeks regular and formal reviews in terms of its overall use. ALTO believe that it is possible that in some markets Eircom will have the incentive to load the regulated product with common costs, which is contrary to the intention, which is to minimise such activity. Accordingly, ALTO trust ComReg will take account of what they are seeing as common costs in other markets and ensure such are included here.

B15. **BT** and **Magnet** agree with the use of 'LRAIC plus'. BT and Magnet believe that it's possible that in some markets Eircom will have the incentive to load the regulated product with common costs, however, BT note the incentive here is to minimise such, hence BT and Magnet trust ComReg will take account of what they are seeing as common costs in other markets and ensure such are included here.

B16. With respect to the time period to conduct the test, BT and ALTO think a combined test will be more effective. Their concern is that a test today only shows the compliance at the time of the test. It would appear more effective if the test were taken as now; one year out; and three years out as this will show immediate compliance and pick up any trend issues that may squeeze the regulated inputs in the future.

B17. BT and ALTO agree that the time of day approach is preferable; however, BT and ALTO assume the impact of volumes on the prices will be picked up in the overall pricing model and test.

<u>ComReg's position:</u>
B18. In response, 'LRAIC plus' includes common costs and ComReg will endeavour to ensure the appropriate amount of common costs are included consistent with what would be faced by an efficient operator. In relation to the appropriate cost standard for the regulated components of call origination and call termination, in the next market review which has commenced and subject to SMP being found, ComReg will consider the use of LRIC in line with the recommendation of the European Commission. In relation to the timing and structure of the test, the test will be assessed at any time to ensure that Eircom remains compliant with its obligation not to Margin Squeeze and day/evening/weekend must pass the Margin Squeeze test in its own right.

B19. **Vodafone** is of the view that when assessing the cost standard to be used, ComReg has failed to take into account the extent to which OAOs enter the SV market as an ancillary or marginal adjunct to their primary business. It is Vodafone's view that SV providers' investments in switches and interconnection are driven by selling into the retail market and that the SV business is run on a marginal cost basis. In this context the cost model to use when imputing a cost to Eircom and which appropriately protects OAOs from the impact of Eircom's pricing is unlikely to be LRAIC plus. ComReg has failed to justify why LRAIC plus yields the appropriate comparator costs.

<u>ComReg's position:</u>
B20. In response, ComReg's concern relates to maintaining the effectiveness of regulated inputs in the markets of Call Origination and Call Termination which are used by infrastructure-based operators to compete right across the entire supply chain. In such markets where fixed and common costs are important, ComReg considers that a LRAIC plus model allows appropriate amounts of such costs to be taken into account. In general where cost based pricing remedies are applied common costs are potentially significant in the case of multi-product undertakings and a failure to take those costs into account could result in inefficient entry/expansion decisions as well as running the risk of financial harm to the incumbent over time. In the context of these decisions, common costs are also important. This is because the incumbent has an incentive to price its Wholesale SV services at a level that excludes common costs, particularly in the short to medium term, in a manner that forces other interconnected operators into a position where *they* cannot recover all their own costs in offering competing Wholesale SV services and/or retail services. This may force exit and a diminution of competition. The incumbent can do this because it has greater economies of scale and scope and also because a greater proportion of its costs are sunk and therefore have no cashflow implications in the short run. Other operators must pay out a greater proportion of their cost base in cash (mostly to Eircom) in order to avail of origination termination, transit and interconnect link services. ComReg also refers to paragraph 4.26 of Consultation Document No. 10/76 in that regard. As also already noted by Eircom, the existing cost oriented call origination and call termination rates are set akin to a 'LRAIC plus' standard. The proposed cost standard is thus also consistent with the pricing of the underlying network interconnection components.

B21. Magnet has a caveat that these methodology should be examined within 2 years to ensure that they are consistent with the ongoing offers and to see if there has been an increase in the number of interconnections.

<u>ComReg's position:</u>
B22. In response, the price control and the "weighted average level" used will be kept under review to ensure that it remains appropriate.

Question 4 from Consultation Document No. 10/76:

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

B23. **BT** and **ALTO** are unclear as to how the charges work for lo call, revenue share call, premium rate calls etc and assume the service should be entered into the model for completeness and the Switched Routing and Transit Price List – STRPL, for transparency. BT also seek clarity and transparency as to whether Eircom treat Meteor and eMobile as on net or off net and what benefits, if any, are being packaged into their SV package.

B24. BT propose that the pricing structure offered by Eircom on SV should replicate 100% the pricing structure offered to switched interconnect customers, otherwise Eircom's SV customers will be at an advantage to switched interconnect customers. BT considers that this is due to the fact that switched interconnect customers currently have to manage: - call duration (as a result of 2 part charging) - mix of call termination carriers (more traffic going to Imagine/UPC etc). Hence BT propose that the Switched Transit Routing Price List (STRPL) forms the structure of the Eircom SV with the call origination amount added, and with the service fees (e.g. for CDRs etc.).

B25. BT believe that a further squeeze is taking place as the Double Tandem and Tandem rates are being reduced at a much higher rate than the Primary rates.

<u>ComReg's position:</u>
B26. In response, ComReg notes that the Margin Squeeze test will reflect latest cost information including changes to RIO interconnection rates. ComReg in reviewing any proposed changes by Eircom to its interconnection rates is cognisant of the need for an appropriate economic space between the rates for primary, tandem and double tandem respectively to ensure that efficient infrastructure investment decisions are not adversely affected.

B27. As the Margin Squeeze test is a test of replication, calls to Meteor and E-Mobile must reflect the full charges that an interconnected OAO, as the SEO, would face. Therefore those calls are off-net and include the full applicable MTR charge in the Margin Squeeze test.

B28. **Vodafone** notes that ComReg proposes to use its Bottom Up LRAIC model in assessing costs. However, in common with other proposed price controls, OAOs have had no visibility of this model and have not had the opportunity to examine the appropriateness or otherwise of its detailed assumptions, cost allocation methodology or general fitness for purpose. On this basis, Vodafone considers that it is meaningless for ComReg to purport to "consult" on this issue.

<u>ComReg's position:</u>
B29. In response, ComReg notes that in Consultation Document No. 10/76 it provided as much information as possible on the costs included. ComReg has to balance the confidentiality and commercially sensitivity of providing detail on Eircom's costs used in the Margin Squeeze test model.

B30. **02** do not agree with ComReg's preliminary views on the costs to be included in the margin (price) squeeze test. O2 considers that ComReg has focused entirely on the costs that interconnected OAOs have incurred. O2 states that ComReg has not carried out any assessment of the investment that SV operators have incurred.

<u>ComReg's position:</u>
B31. Although Wholesale SV is unregulated, ComReg would note that it is indeed cognisant of the commercial environment facing purchasers of Wholesale SV services and of the need to facilitate efficient and competitive provisioning of Wholesale SV services. While a key objective of the Margin Squeeze test is to protect existing SMP remedies in the regulated markets of Call Origination and Call Termination, basing the test on the costs of an SEO and recognising only efficient investment in infrastructure by interconnected OAOs ensures that only efficient competition is promoted in the supply of downstream services, including Wholesale SV services. As the focus of the test is on the relative price difference or the margin between the supply of wholesale call origination and termination when sold as standalone network components and wholesale call origination and termination when sold as part of a Wholesale SV service, it would not make sense to take costs of SV purchasers into account in the model since they are not active in the supply of either of these wholesale services.

B32. **Magnet** agrees with utilising the SEO costing model is the most appropriate currently. However, Magnet Networks feel a bottom up input rather than Eircom's top down is more appropriate. Magnet Networks believe utilising BU-LRAIC is more consistent with ComReg's previous consultations.

<u>ComReg's position:</u>
B33. In response, ComReg notes where top-down inputs are used, ComReg has compared these against its BU-LRAIC model to ensure that such costs are reasonable. Using top-down data is consistent with SEO approach. Using top-down data also provides Eircom with visibility as to how it can minimise the risk of Margin Squeeze as the costs are known to it.

Question 5 from Consultation Document No. 10/76:

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

B34. BT and ALTO consider that possible minimum price floors set out in the table in Consultation Document No. 10/76 are too low for the floor and do not appear to reflect costs such as the IN dip charge and a wider range of off-net call types.

ComReg's position:
B35. In response, ComReg notes that the indicative floors in Consultation Document No. 10/76 did reflect relevant costs such as IN dip. However, as would be expected for certain off-net calls, there is a need to also add the any applicable off-net charges as required. For example, a call to Meteor will include the applicable Meteor MTR. These many scenarios were not included in the table in Consultation Document No. 10/76 and therefore the table was not exhaustive for inclusion of each applicable termination payment that would need to be included.

Question 6 from Consultation Document No. 10/76:

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

B36. **Eircom** states that ComReg does not explain why, in the presence of regulation of the upstream level and having regard to competition law rules, Eircom has an incentive to cause a margin squeeze and does not seek to understand and explain how it can be that if this is the case, Eircom was not the first to enter the market and that it is not the dominant provider in the market. Eircom considers that ComReg gives no regard to potentially competing objectives of Eircom as a retail and wholesale operator. Eircom also considers that ComReg does not give any regard to factors such as the weight of Eircom's interconnect business in its SV strategy, or to the existence of interconnect over-capacity. Eircom maintains that these are all essential aspects of the SV market dynamics which ComReg must consider.

ComReg's position:
B37. In response, ComReg again notes that its key concern relates to protecting the existing SMP remedies in the regulated markets of Call Origination and Call Termination and encouraging and protecting infrastructure investment arising from those current cost-oriented remedies. It is clear and coherent that, even in the presence of regulation at the upstream level, the relative pricing of successive levels of the value chain can have a competitive impact, since origination and termination are the principal inputs into Wholesale SV. ComReg's aim is to protect existing cost-oriented inputs in the Call Origination and Call Termination markets from being undermined by prices for those interconnected components being set comparatively too low when provided by Eircom in Wholesale SV services. Otherwise, there is a risk that the existing SMP remedies in those regulated markets are rendered redundant and reasonably efficient operators purchasing Call Origination and Call Termination as stand-alone products cannot remain viable due to artificially low margins relative to the Wholesale SV service. Thus, the basic concern that there would be insufficient economic space/margin as between two levels of the supply chain is consistent with regulatory intervention in other wholesale (and retail) markets.[1]

Furthermore, in the context of competition law cases, the Court of Justice of the European Union (CJEU) has confirmed that conduct that affects a market other than the dominant market can be categorized as potentially abusive, provided the dominant and non-dominant markets are closely associated. In a recent preliminary ruling on a case involving the Swedish telecommunications company TeliaSonera AB and the Swedish Competition

[1] See footnote 15 above.

Authority, the CJEU provided useful guidance on assessing margin squeeze abuses under Article 102 of the TFEU and clarified that a margin squeeze does not require dominance across all levels of the supply chain in order for it to be abusive: *"certain conduct on markets other than the dominated markets and having effects either on the dominated markets or on the non dominated markets themselves can be categorised as abusive (see, to that effect, Tetra Pak v Commission, paragraph 25)"* [2]

ComReg also recognises that, as a vertically integrated operator, Eircom can have potentially competing objectives in terms of its wholesale and retail business and that its wholesale business is also valuable in driving volumes across the Eircom network and optimising its capacity. At the same time, however, it is precisely as a result of Eircom's presence at multiple levels of the value chain, its dominant position in the upstream markets of Call Origination and Call Termination, and the long-term competitive threat that interconnected operators pose to Eircom's business at each level of the supply chain that Eircom has both the ability and incentives to "squeeze" the margins of those interconnected operators. Thus, the need ensure a sufficient margin or economic space between call origination and call termination sold as standalone components in the upstream regulated markets and Call Origination and Call Termination when sold as part of a Wholesale SV service is a legitimate concern and one which is indeed consistent with competition law and regulatory principles.

Question 7 from Consultation Document No. 10/76:

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

B38. **Eircom** notes that ComReg is not entitled to assume non-compliance by Eircom with its obligation to justify the imposition of further obligations. Eircom complies with its obligation of non-discrimination, and the call origination and call termination services provided to its downstream operations for the purpose of retail calls or SV services are of the same quality as those provided to interconnected operators. ComReg, without giving any evidence whatsoever of the contrary, cannot assume that this is not the case. Eircom further strongly opposes any suggestion at para. 2.26 of Consultation Document No. 10/76 that Eircom is not complying with its obligations under the Access Regulations.

<u>ComReg's position:</u>

B39. In response, ComReg notes that the non-compliance referred to in the consultation was in relation to the existing transparency obligation and that the purpose of the proposed further specification was to simply set-out the exact scope of that existing obligation. In relation to para 2.26 of Consultation Document No. 10/76, ComReg remains of the view that no separation appears to exist within Eircom Wholesale, in particular between the sale of wholesale products that require infrastructure investment and those re-sale products that require no / minimal infrastructure investment. As noted above, there is a clear risk that Eircom might discriminate in favour of competitors with little or no infrastructure investment as this limits those OAOs' ability to offer differentiated products to end users and possibly at lower prices. Thus the proposed specification of the transparency obligations in the Call Origination and Call Termination markets is aimed at ensuring

[2] See footnote 15 above.

Eircom's compliance with its existing non-discrimination obligations in those regulated markets.

Question 8 from Consultation Document No. 10/76:

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

B40. **Eircom** notes that it is not sufficient to set a mandatory test by reference to a consultation document. In the interest of legal certainty and clarity the test should be set out in the decision instrument itself. Similarly, Eircom cannot publish the terms, conditions, SLAs, guarantees and other product related assurances of the Call Origination part of an SV service because this "part" is not being offered on a separate basis.

<u>ComReg's position:</u>

B41. In response, ComReg notes that the general outline of the Margin Squeeze test model are now added to the Decision Instrument. In relation to the regulated components, Eircom has now to demonstrate publicly that they are provided on the same terms, conditions, SLAs, guarantees and other product related assurances when it is provided in Wholesale SV, that is, when provided in Wholesale SV, there are no advantages or benefits.

B42. **Vodafone** believes that ComReg has not shown the legal basis for regulating the SV product - which contains elements of three separate markets (i.e. Call Origination, Transit and Call Termination). Vodafone believes that the transparency obligation in relation to both Call Origination and Call Termination components should be amended to include only a requirement to satisfy ComReg that Eircom's proposed SV pricing will have no detrimental effect on competition.

<u>ComReg's view:</u>

B43. In response, ComReg again notes that ComReg is not regulating the provision of Wholesale SV services. The key focus of this Decision is to ensure the effectiveness of Eircom's existing SMP remedies in the markets of Call Origination and Termination and to ensure that those remedies are not undermined through Eircom's behaviour in its supply of related wholesale services, In relation to Transparency, ComReg notes that the Transparency obligation requires publication in the public domain.

Question 9 from Consultation Document No. 10/76:

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

B44. **Eircom** considers that no effort is made by ComReg in its RIA to quantify the predicted effect on stakeholder welfare of the various options identified. As a general point, Eircom maintains that ComReg should apply objective cost-benefit analysis principles in its RIAs. Eircom considers the RIA is weak in the consideration of product-by-product and 'LRAIC plus'.

ComReg’s view:

B45. In response, ComReg notes that its aim is to protect existing SMP remedies in the regulated markets of Call Origination and Call Termination. Therefore those regulated markets and efficient infrastructure investment resulting from remedies applied in those markets were a key focus of ComReg’s RIA. At the same time, as ComReg is mindful of the need to promote efficient competition which will ultimately deliver the best result for consumers, ComReg assessed the overall anticipated effects for end users in terms of price and service choice. The anticipated impacts on all affected stakeholders are further elaborated in the RIA below. Given that the proposals relate to the regulated components of call origination and call termination, only a product-by-product basis can be considered.

B46. **O2** believes it is important that ComReg present an empirical assessment of the scale of what ComReg calls “the appropriate economic space for the build or buy options” and also believe it is critical that ComReg properly consider the impact on OAOs currently offering SV products if ComReg's proposals go through as currently drafted.

ComReg’s view:

B47. In response, ComReg notes that the appropriate economic space is determined by the Margin Squeeze test model, it is the extra costs facing an interconnected OAO availing of the cost-oriented regulated products of call origination and call termination from Eircom who wishes to offer a competing Wholesale SV service. As noted above, the anticipated impacts on all affected stakeholders are further elaborated in the RIA below

ANNEX C: Regulatory Impact Assessment

Role of the Regulatory Impact Assessment

C1. Regulatory Impact Assessment ("RIA") is an analysis of the likely effect of proposed new regulation or regulatory change. The RIA should help identify regulatory options, and should establish whether proposed regulation is likely to have the desired impact. The RIA is a structured approach to the development of policy, and analyses the impact of regulatory options on different stakeholders.

C2. ComReg's approach to the RIA is set out in the Guidelines published in August 2007 in ComReg Document Nos. 07/56 & 07/56a. In conducting the RIA, ComReg takes into account the RIA Guidelines[1], adopted under the Government's Better Regulation programme. Section 13(1) of the Communications Regulation Act 2002 - 2010 ("the Act"), requires ComReg to comply with Ministerial directions issued. Policy Direction 6 of February 2003[2] requires that, before deciding to impose regulatory obligations on undertakings, ComReg shall conduct a RIA in accordance with European and International best practice and otherwise in accordance with measures that may be adopted under the Government's "Better Regulation" programme.

C3. In conducting the RIA, ComReg has had regard to the RIA Guidelines, while recognising that regulation by way of issuing decisions, e.g. revising obligations or specifying requirements in addition to promulgating secondary legislation, may be different to regulation exclusively by way of enacting primary or secondary legislation. ComReg's ultimate aim in conducting a RIA is to ensure that all proposed measures are appropriate, proportionate and justified. To ensure that a RIA is proportionate and does not become overly burdensome, a common sense approach should be taken towards a RIA. As decisions are likely to vary in terms of their impact, if after initial investigation, a decision appears to have relatively low impact; ComReg may carry out a lighter RIA in respect of those decisions.

Steps Involved

C4. ComReg presented a draft RIA in Consultation Document No. 10/76 and in finalising this RIA has considered the views of respondents to that consultation and made amendments where appropriate. ComReg has decided to carry out a RIA in order to demonstrate that it has considered and evaluated the regulatory options available, with due regard to necessity, effectiveness, proportionality, transparency, accountability and consistency.

C5. In assessing the available regulatory options, ComReg's approach to RIA follows five steps as follows:

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[1] See 'REVISED RIA GUIDELINES: How to conduct a Regulatory Impact Analysis' dated June 2009 @

http://www.betterregulation.ie/eng/Publications/Revised_RIA_Guidelines.pdf.

[2] Ministerial Policy Direction made by the Minister of Communications, Marine and Natural Resources on 21 February 2003.

Step 1: describe the policy issue and identify the objectives

Step 2: identify and describe the regulatory options

Step 3: determine the impacts on stakeholders

Step 4: determine the impacts on competition

Step 5: assess the impacts and choose the best option

Describe the policy issue and identify the objectives

C6. Consultation Document No. 10/76 sought views on amending the price control and further specifying the transparency obligations in the markets of Call Origination and Call Termination. Having considered the views of respondents, the objectives of this Decision are set out below.

C7. In this proposed amendment of the price control obligations, ComReg has in particular considered its statutory objectives, as set out in section 12 of the Act in particular the objectives in exercising its function in relation to the provision of electronic communications networks, electronic communications services and associated facilities:

- To promote the interests of users within the Community, and
- To promote competition

And the obligations on ComReg to take all reasonable measures which are aimed at achieving its statutory objectives, including inter alia, in so far as the promotion of competition is concerned:

- Ensuring that there is no distortion or restriction of competition in the electronic communications sector;
- Encouraging efficient investment in infrastructure and promoting innovation;
- Ensuring that users derive maximum benefit in terms of choice, price and quality.

C8. Against this background, a key purpose of further specifying the transparency obligations is to ensure that there is no distortion or restriction of competition in the electronic communications sector. The objective for clarifying that Eircom is obliged to publish in its Reference Interconnect Offer the terms, conditions, service level agreements, guarantees and other product related assurances of the regulated component parts of its Wholesale Switchless Voice ('SV') services[3] is purely to ensure compliance with Eircom's existing transparency and non-discrimination obligations in the Call Origination and Call Termination markets. While this does not amount to new regulation or significant regulatory change, ComReg has however considered potential options and impacts concerning the proposed publication requirements.

[3] Sold by Eircom as 'White Label Voice'.

C9. The objectives behind the additional price controls include the promotion of efficient competition and investment that will deliver maximum benefits to end users in terms of price, choice and quality of services. Specifically the aim is to ensure that Eircom does not Margin Squeeze in the markets of Call Origination and Call Termination and in particular when regulated components within those markets are sold within the provision of Wholesale SV services. Cost orientation obligations arising from the existing SMP decisions in the markets of Call Origination and Call Termination are still necessary to address potential exploitative behaviour, such as excessive pricing, within those markets. However, these price controls are not on their own sufficient and these existing remedies could still be undermined by Eircom's relative pricing of its provision of Wholesale SV services further downstream.

C10. In the past Eircom did not provide Wholesale SV services and the issue of ensuring that Eircom's existing regulatory obligations remained appropriate and viable in this context never arose. ComReg believes that Eircom's provision of Wholesale SV services may now undermine the existing cost-oriented remedies in the Call Origination and Call Termination markets and bypass the important regulatory goal of infrastructure investment by offering call origination and call termination at rates applicable to a higher level of infrastructure investment (i.e. primary switching) that the OAO availing of the SV services may not have made. Without an appropriate amendment to reinforce the price control, ComReg believes that this potential development could undermine existing and any continued investment in infrastructure by interconnected OAOs. Insufficient margins imply they could be forced to move to a Wholesale SV solution (involving no / minimal infrastructure investment). If this occurred, future retail provisioning would therefore depend significantly on Eircom's resold inputs thereby limiting the scope for price and service differentiation to the ultimate detriment of end users. Currently, for example, large mobile operators with no little or no presence in the fixed voice market have a number of options when deciding to enter and this allows for a very competitive and effective procurement process for these companies. However, in the event that only one operator, Eircom, is available to offer fixed wholesale voice services, these tender processes could become a non event and only Eircom would be in a position to respond and the mobile operators may have to accept the offered price.

C11. ComReg considers that a key objective should therefore be to ensure the effectiveness of existing cost-oriented obligations in the markets of Call Origination and Call Termination and that efficient investment made or being made by OAOs in their own voice infrastructure as a consequence of those upstream remedies is not undermined by an insufficient margin relative to Eircom's downstream services. It is envisaged that the control specified in this consultation should ensure the appropriate economic space for the "build" or "buy" options are maintained consistent with ComReg's regulatory and statutory objectives.

C12. Based on responses to this consultation, this view is shared by those fixed operators who have made infrastructure investments in interconnection; however, this view is opposed by two of the mobile operators who might purchase Wholesale SV services and by Eircom.

Identify and describe the regulatory options

C13. In essence, the regulatory options of this Decision are:

1. To not amend the price control obligations in the markets of Call Origination and Call Termination.
2. To amend the price control obligations in the markets of Call Origination and Call Termination to include an ex-ante obligation not to Margin Squeeze and the requirement to submit minimum price floors in confidence to ComReg.
3. To amend the transparency obligation in the markets of Call Origination and Call Termination to exempt Eircom from publishing the prices, terms, conditions, service level agreements, guarantees and other product related assurances of the call origination and call termination components when provided in SV services.
4. To specify the transparency obligation to clarify that Eircom is required to publish (in full or in part) the prices, terms, conditions, service level agreements, guarantees and other product related assurances of the call origination and call termination components when provided in SV services.

C14. In relation to the proposed specific requirement not to cause a margin/price squeeze between the price of the component parts of a SV service and the pricing of the corresponding wholesale Call Origination and Call Termination products for interconnected OAOs (option 2), possible specification options for the margin (price) squeeze test included:

a) whether the test is based on an Equally Efficient Operator (‘EEO’), Reasonably Efficient Operator (‘REO’) or Similarly Efficient Operator (‘SEO’)?
b) whether the hypothetical SEO for the test is based on:
    i. OAO providing SV services which is interconnected more than weighted average i.e. more primary interconnection
    ii. OAO providing SV services at the weighted average level of interconnection
    iii. OAO providing SV services which is interconnected at lower than weighted average i.e. less primary interconnection
c) whether the test is conducted on a product-by-product basis?
d) whether ‘Long Run Average Incremental Cost plus’ or ‘Average Avoidable Cost’ or ‘Average Variable Cost’ is the appropriate measure of cost?

C15. As regards the above options for amending, or not, the price control obligations in the Call Origination and Call Termination markets, the following key considerations arise:

i. In its assessment of competition problems in the Call Origination and Call Termination markets, ComReg identified the possible exploitation of market power within those markets as well as the possible leverage of market power by Eircom both horizontally and vertically. Further to the competition problems identified in the original market reviews, ComReg is of the view that Eircom would have the ability and incentives to reinforce and protect its SMP position in the wholesale call markets and to distort competition right across the supply chain through its relative pricing of its

Wholesale SV service. By virtue of Eircom's SMP position in the Call Origination and Call Termination markets, its integrated position across multiple levels of the value chain, and the long-term competitive threat that interconnected operators pose to Eircom at each level of the supply chain, Eircom has both the ability and incentives to "squeeze" the margins of those interconnected operators through its activities in the related provision of Wholesale SV services.

Even in the presence of cost orientation of the standalone wholesale call origination and call termination inputs, a margin squeeze could still derive from Eircom's relative pricing of those components when sold as part of a Wholesale SV service. This would effectively render the cost-oriented remedies redundant, undermine existing and future infrastructure investments by interconnected OAOs and potentially distort competition right across the supply chain. ComReg believes that this would in turn have the effect of delaying/impeding competition in the Call Origination and Call Transit and Call Termination markets. Given this clear risk to competition, ComReg considers that option 1, i.e. to not amend the price control obligations, is therefore not a viable option.

ii. Taking account of ComReg's regulatory and statutory objectives as outlined in the preceding section, amending the price control to include a general ex-ante regulatory obligation not to Margin Squeeze (i.e. option 2) is considered to be appropriate and proportionate to the competition problems highlighted above. It is clear and coherent that, even in the presence of regulation at the upstream level, the relative pricing of successive levels of the market value chain can have a competitive impact, since origination and termination are the principal inputs into Wholesale SV. In ComReg's view the application of the ex-ante Margin Squeeze test will allow for enhanced transparency and confidence in the effective operation of the obligation, ensuring that there is no distortion or restriction of competition and supporting investment.

iii. In the assessment of the type of operator to utilise for the proposed margin (price) squeeze test (option 2a) above), the SEO approach recognises that even in the long-run OAOs may not be able to compete with the SMP operator in the provision of retail calls and where appropriate Wholesale SV due to structural diseconomies of scale and scope, and the nature of the market. This is likely in the markets of Call Origination and Call Termination as no OAO is interconnected to the same level as Eircom. Therefore, to the extent that operators do not benefit from the same economies of scale and scope and have different unit network costs, a test based on SEO is considered more appropriate. Therefore, taking account of ComReg's statutory objective to promote competition, the use of EEO is not considered appropriate as no OAO has interconnected to the same extent as Eircom. The use of REO is akin to SEO except that the costs of the OAOs are used. Taking account of the need to promote efficient competition and to avoid incentivising inefficient entry/expansion, ComReg prefers the use of SEO in this instance as for the most part the costs are based on costs provided by Eircom, which are subject to a cost accounting system and associated audit, thereby providing some assurance that the costs used in the test are reasonable. Furthermore, as the costs are based on Eircom's, Eircom knows the costs included in the test to which it must comply.

iv. In defining a hypothetical SEO providing Wholesale SV services (see option 2b) above), ComReg has reviewed the responses to the Consultation and has amended the SEO to one based on the weighted average operator level as opposed to the least interconnected operator which was proposed in the consultation. Taking existing competitive conditions into account, ComReg believes that, in addition to Eircom, this will enable efficient market participants to provide competitive Wholesale SV services on a sustainable basis. This amendment reduces the price floors set by the Margin Squeeze test model and therefore should also minimise the risk of any inefficient entry/competition. Furthermore, following consideration of the responses to consultation, and in the interests of promoting efficient competition, ComReg agrees that the SEO based on the weighted average should be able to be amended if market conditions warrant such an amendment.

v. In assessing the possible existence of a Margin Squeeze between the price of the component parts of a Wholesale SV service and the pricing of the corresponding wholesale call origination and call termination products for interconnected OAOs, it is proposed to assess this based on six price floors that must be respected in order to avoid a Margin Squeeze, namely on-net by day/evening/weekend (based on the combination of one call origination and one call termination within Eircom's network) and off-net by day/evening/weekend (based on one call origination only within Eircom's network). The day/evening/weekend will be based on the gradient applicable to the Wholesale SV contract entered into by Eircom as this can be very different from contract to contract. The use of day/evening/weekend split is supported by Eircom as in their response they note "(a)*s the Eircom charges for call origination and call termination … have distinct charges for day, evening and weekend, the test should apply separately at each of those times of day. To apply the test only on a 24 hour basis would run the risk of implementing a control that would distort the level of competition between the providers of SV services to mainly business (daytime) end users, as opposed to providers of SV services to mainly residential (evening and weekend) end users.*"[4]

vi. In choosing the appropriate cost standard for the calculation of retail costs (see option 2d) above) ComReg considered using the lower thresholds of average variable cost ("AVC") and average avoidable cost ("AAC") and the respectively higher thresholds of Long Run Average Incremental Cost ("LRAIC plus") and Average Total Cost ("ATC"). ComReg does not believe the use of AVC is appropriate as it does not include fixed costs which over the long-term must be covered by an OAO in order to enter/remain/expand. ComReg does not believe that AAC is appropriate as it does not include an apportionment of joint and common costs which over

[4] At page 8 of Eircom's response to consultation.

the long-term must be covered by an OAO in order to enter/remain/expand. ComReg believes that ATC and 'LRAIC plus' are appropriate as they ensure that all relevant costs are recovered over the long-term. In this instance, ComReg prefers 'LRAIC plus' as it is consistent with the pricing of the underlying network interconnection components. 'LRAIC plus' is defined to include all of the variable and fixed costs that are directly attributable to the activity concerned, plus an apportionment of joint and common costs. ComReg will use 'LRAIC plus' as the cost standard for the Margin Squeeze test as ComReg considers this cost standard to be the most appropriate as it includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any operator when deciding to enter or expand in a market. The majority of cost within the Margin Squeeze test model are Eircom's cost-oriented call origination and call termination rates. These rates contain carrier administration and carrier billing costs which include recovery of overhead costs and therefore the existing cost-oriented call origination and call termination rates are set akin to 'LRAIC plus' cost standard basis. It would not be logical to allow Eircom recover its 'LRAIC plus' costs for its network components within the Wholesale SV service but to not allow the OAO itself to recover its own 'LRAIC plus' costs that are in addition to Eircom's network components that are required to offer a competing Wholesale SV service. However, for information, it is worth noting that in the Margin Squeeze test, Eircom's regulated call origination and call termination rates alone account for over 60% of costs used in the Margin Squeeze test model to set the minimum price floor.

vii. In its assessment of competition problems in the Call Origination and Call Termination markets, ComReg identified possible incentives for Eircom to act in a discriminatory manner. Further to the competition problems identified in the original market reviews, and taking account of Eircom's SMP position in the interconnection markets and the close links between different levels of the supply chain, Eircom has both the ability and incentives to engage in discriminatory action in its provision of Wholesale SV services. For example, it is considered that Eircom may have an incentive to offer better service to its Wholesale SV customers than to its interconnected customers who offer their own competing Wholesale SV service. Also, Eircom may have an incentive to utilise the information it gathers in relation to competing interconnected OAOs' utilisation of the Eircom network to tailor their own competing Wholesale SV offers to interconnected OAOs' SV customers. ComReg believes that such discriminatory action by Eircom in its provision of Wholesale SV services has the potential to undermine existing and future infrastructure investments by interconnected OAOs, thereby limiting the scope for price and service differentiation/innovation by operators relying on their own network inputs. ComReg believes that this would in turn have the effect of reinforcing entry barriers and delaying/impeding competition in the Call Origination, Call Transit and Call Termination markets. As non-discrimination obligations are already in place for the regulated call origination and call termination components and relevant competition problems persist, allowing Eircom to evade these obligations by way of option 3, i.e. to exempt Eircom from publishing terms and conditions of the call origination and call termination components when provided in SV services, is therefore not a viable regulatory option.

viii. ComReg has considered various options for specifying Eircom's publication requirements for its call origination and call termination components when provided in Wholesale SV (see option 4 above). In that regard, ComReg is of the view that publication of terms, conditions, service level agreements, guarantees and other product related assurances of the regulated component parts of a Wholesale SV service are necessary in order to demonstrate compliance with Eircom's existing non-discrimination obligations. However, having considered responses to the consultation, ComReg has amended the transparency obligation to no longer require Eircom to publish the minimum price floors for its call origination and call termination components when provided in Wholesale SV as this minimises the risk of Eircom's minimum prices becoming a focal point for price following / only slightly undercutting by competing Wholesale SV providers which would not be good generally for competition.

Determine the impacts on stakeholders and competition

C16. Having identified the possible regulatory options, the following determines the likely impacts on stakeholders and competition for taking the preferred approaches:

Summary of Impacts on Stakeholders and on Competition

Option 1 – Price control is not amended		
Impact on incumbent	**Impact on OAOs**	**Impact on consumer**
Incumbent is still constrained by prohibition of margin squeeze under competition law when providing call origination and call termination inputs to interconnected OAOs versus its call origination and call termination components offered in its provision of SV services. However, intervention would be ex-post and after any harm may have been caused.	Interconnected OAOs who have made infrastructure investments to avail of lower primary interconnection rates may be 'squeezed' by Eircom's relative prices for call origination and call termination in its provision of Wholesale SV services and may lead to OAO exit from the provision of Wholesale SV services. Similarly, if the price control is not amended, OAOs may not invest in primary interconnection as they may perceive that there could be a margin (price) squeeze by Eircom's future pricing of Wholesale SV services. There is a risk that such OAOs, who do not have comparable interconnection	'Squeezing' of infrastructure-based operators and a significant move towards retail provisioning based largely on Eircom's Wholesale SV services would ultimately be to the detriment of end consumers as there would less scope for price and service innovation compared to Eircom's offering. Furthermore, a general reduction in the number of OAOs offering wholesale services will likely entrench Eircom's SMP in the Origination and Termination markets. This could lead to higher overall prices and less service innovation over the medium to longer term.

	operations to Eircom, could exit or be forced to move to a Wholesale SV solution where this is more economically viable. OAOs that do not make interconnection investments continue to purchase Wholesale SV services. In the short term they may benefit from Eircom's low relative prices for the regulated components within Wholesale SV services but where other providers of Wholesale SV exit the interconnection markets, reduced competition will ultimately be to the detriment of price and quality of service available to these Wholesale SV customers.	
Option 2 – Price control to include obligation not to Margin Squeeze		
Impact on incumbent	**Impact on OAOs**	**Impact on consumer**
While a degree of monitoring will be required, test is specified so it should not be particularly burdensome on the incumbent. The Margin Squeeze test model has been revised to that based on the weighted average interconnected operator. This amendment, together with the removal of the requirement to publish minimum price floors, should ensure that Eircom can continue to supply competitive Wholesale SV services. The structure of the "weighted average level" for the SEO will be kept under review to ensure it meets	Ensures that all OAOs purchase regulated components in the markets of Call Origination and Call Termination at appropriate prices reflective of their own investment in interconnection infrastructure and minimises the risk of discrimination and/or margin (price) squeeze. Thus it ensures efficient investments are protected and promoted. For OAOs which have chosen not to invest in infrastructure and purchase Wholesale SV, some initial costs may arise where Eircom revises price of call origination and termination components of Wholesale SV services upwards to	Test should ensure medium to long-term competition (from both infrastructure-based and non-infrastructure-based operators) is maintained to the benefit of consumers. The availability of choice where customers can purchase from various efficient operators ensures that a healthy and competitive tender process can be entered into. Furthermore, sustainable competition from infrastructure-based operators provides greater scope for price and service differentiation/innovation to the benefit of end users.

the market requirements.	comply with test if they are currently below the floor. However, through facilitating efficient and sustainable competition in the markets of Call Origination and Call Termination and in the provision of Wholesale SV services, this will ensure ongoing competitive delivery of Wholesale SV services in turn enabling Wholesale SV purchasers to compete for end users. Permitting a margin squeeze on alternative providers of Wholesale SV services could however lead to exit and a situation where only Eircom can tender for Wholesale SV contracts.	
Options 2a) & b) –Margin Squeeze test is based on a SEO using a weighted average level of interconnection		
Impact on incumbent	**Impact on OAOs**	**Impact on consumer**
Minimises the risk of the incumbent causing a Margin Squeeze against interconnected OAO currently offering competing SV services. Should not impact on the incumbent too onerously as the test is based on the incumbent's costs for the most part but adjusted for economies of scale and scope. Using the SEO based on the weighted average may mean that Eircom is not allowed to match the hypothetical "most interconnected operator"; however, this also means that Eircom may be squeezing those interconnected OAOs that are lower than the	Should ensure that all similarly efficient OAOs, availing of the regulated interconnection inputs of Eircom can compete on a more neutral basis with the incumbent as their differing scale/scope economies are taken into account. The SEO approach which reflects the underlying investment in infrastructure made by a comparable efficient operator helps ameliorate some of the barriers to entry/expansion associated with Eircom's incumbency advantages and provides interconnected OAOs with appropriate incentives to compete effectively over the medium to long term. While some initial costs may arise for OAOs which	Allows the promotion of efficient and sustainable competition by OAOs, whether they avail of Eircom's regulated interconnection products or avail of Eircom's Wholesale SV service, which is to the benefit of consumers in terms of the price, choice and quality of services.

"weighted average level". It is believed that the "weighted average level" strikes the appropriate balance and the "weighted average level" structure will be kept under review and may be updated from time to time if competitive conditions warrant the update.	currently purchase Wholesale SV services from Eircom if Eircom is currently pricing its regulated components within Wholesale SV below the minimum floor, they should benefit from the promotion of an effective and sustainable competitive dynamic in the provision of SV services over the medium to longer term.	
Option 2c) –Margin Squeeze test conducted on a product by product basis		
Impact on incumbent	**Impact on OAOs**	**Impact on consumer**
Should not be overly onerous on the incumbent as reflects the actual pricing by Eircom of the regulated inputs in the markets of Call Origination and Call Termination.	Allows the promotion of competition by interconnected OAOs which currently have a smaller range of product offerings than the incumbent. As noted by Eircom; to not apply the test on a product by product basis, that is call origination and call termination by day/evening/weekend respectively, "*would run the risk of implementing a control that would distort the level of competition between the providers of SV services to mainly business (daytime) end users, as opposed to providers of SV services to mainly residential (evening and weekend) end users.*"[5] A stable and efficient competitive dynamic in the provision of Wholesale SV services over the medium to longer term also benefits OAOs purchasing those services.	Allows the promotion of medium to long-term competition by OAOs which currently have a smaller range of product offerings than the incumbent to the benefit of consumers in terms of choice and ultimately price and quality.

[5] At page 8 of Eircom's response to consultation.

Option 2d) – Test uses 'LRAIC plus' as the appropriate measure of cost		
Impact on incumbent	**Impact on OAOs**	**Impact on consumer**
Is consistent with the cost standard basis for Eircom's regulated network components within the provision of Wholesale SV.	Allows the promotion of competition by interconnected OAOs as 'LRAIC plus' includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any OAOs when deciding to enter or expand. The 'LRAIC plus' cost standard includes common costs and to not include any joint or common costs would advantage Eircom relative to OAOs as Eircom has significant economies of scope. Facilitating a sustainable competitive dynamic in the provision of Wholesale SV services over the medium to longer term also benefits OAOs purchasing those services.	Allows the promotion of sustainable competition by OAOs to the benefit of consumers as 'LRAIC plus' includes appropriate amounts of variable, fixed and common costs, which is the calculus faced by any OAOs when deciding to enter or expand.
Option 3– Transparency obligation is amended to exempt Eircom from publishing terms and conditions, etc. for call origination and call termination components within its Wholesale SV services		
Impact on incumbent	**Impact on OAOs**	**Impact on consumer**
Risk for incumbent of non-compliance with its existing transparency and non-discrimination obligations in the regulated interconnection markets when providing call origination and call termination components as part of its SV service.	OAOs have no visible assurance that incumbent is not applying a Margin Squeeze and not applying preferential terms and conditions when providing call origination and call termination components as part of its SV service. To the extent that anti-competitive behaviour arises, or interconnected OAOs anticipate that there is a significant risk of such behaviour arising, efficient investment in physical interconnection may be	Discrimination in respect of infrastructure-based operators and a significant move towards retail provisioning based largely on Eircom's Wholesale SV services would ultimately be to the detriment of end consumers as there would less scope for price and service innovation compared to Eircom's offering. Furthermore, a general reduction in competition for downstream services and consequent delay in

	undermined. A diminution in the number of competing providers of Wholesale SV services could have negative impacts for the price and service quality available to OAOs purchasing Wholesale SV over the medium to longer term.	entry/expansion in the interconnection markets would imply higher overall prices and less service innovation over the medium to longer term
Option 4 – Transparency obligation is specified to clarify that Eircom is required to publish terms and conditions (but exempted from publishing minimum price floors) for the call origination and call termination components when provided in SV services.		
Impact on incumbent	**Impact on OAOs**	**Impact on consumer**
Clarification that Eircom must publish general terms and conditions for the call origination and termination components of the SV service provides a mechanism for incumbent to demonstrate compliance with its existing regulatory obligations. Exemption from publishing minimum price floors reduces the risk of the price floor becoming a focal point for competition and possibility of asymmetric pricing knowledge permitting OAOs to respond more quickly when tendering for SV contracts.	Visibility of general terms and conditions of call origination and call termination components when provided in SV service demonstrates compliance with non-discrimination obligation thus reassuring OAOs and supporting efficient entry/expansion decisions. Exemption from publishing minimum price floors implies OAOs have no visible assurance that incumbent is not margin (price) squeezing but can rely on ComReg to ensure that this is not occurring.	Visibility of general terms and conditions of service allows promotion of sustainable competition and helps avoid inefficient market exit decisions. Consumers should thus be in a position to have greater choice. Exemption from publishing minimum price floors avoids the price floor becoming a focal point for competition. Consumers will benefit from the best available market rates rather than prices tracking or only slightly undercutting Eircom's prices if they were published.

Assess the impacts and choose the best option

C17. ComReg has considered the impacts identified above and is of the view that the amendments of the price control obligations are for the reasons set out in this Decision justified and should foster OAO competition and should ensure that OAOs' efficient investment in interconnection infrastructure is protected.

C18. The price control obligations are amended to include an additional general obligation on Eircom not to impose a Margin Squeeze on OAOs and to submit its minimum price floors in confidence to ComReg in order to demonstrate compliance.

C19. ComReg has further specified the transparency obligations to clarify that Eircom is required to publish in the Reference Interconnect Offer ('RIO') price list detailed documentation on all terms, conditions, service level agreements, guarantees and other product related assurances associated with its provision of call origination and call termination within SV services in the RIO itself. ComReg has amended the transparency obligation to no longer require Eircom to publish the minimum price floors for call origination and call termination offered in its provision of Wholesale SV.

C20. In particular, ComReg is of the view that the amendments are consistent with ComReg's statutory objectives under section 12 of the Act and Regulation 16 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011, as follows:

a. <u>Ensuring that there is no distortion or restriction of competition</u>
ComReg believes that the amendments to the obligations will safeguard efficient competitors from possible Margin Squeeze by the SMP operator in the markets of Call Origination and Call Termination. By ensuring the effectiveness of the existing SMP remedies and that other OAOs' efficient infrastructure investments are not undermined through Eircom's relative pricing of its Wholesale SV service, competition is facilitated right across the market value chain. The test will ensure the selling of call origination and termination components at appropriate prices and in a non-discriminatory manner and should thus ensure that there is no distortion or restriction of competition so that competitors, both switched and switchless OAOs, can avail of effective inputs and maintain and sustain competition over the medium to long term.

b. <u>Encouraging efficient investment in infrastructure and promoting competition</u>
ComReg believes that safeguarding efficient competitors from possible Margin Squeeze by the SMP operator in the markets of Call Origination and Call Termination helps to ensure that OAOs' efficient infrastructure investments are not undermined and therefore should protect/encourage efficient investment in infrastructure. Furthermore, where efficient interconnected OAOs also provide competing Wholesale SV services, sustainable competition at this level of the supply chain should also deliver ongoing price and service benefits to purchasers of Wholesale SV services and facilitate competition by both switched and switchless OAOs in the ultimate provision of end user services.

c. <u>Promoting the interests of users within the community</u>
ComReg believes that safeguarding efficient competitors who have made efficient interconnection infrastructure investment from possible Margin Squeeze and discriminatory behaviour helps to facilitate greater regulatory certainty for longer-term competition based on efficient infrastructure

investment. Sustainable and effective competition yields positive implications for the price, choice and quality of services ultimately delivered to end-users and is therefore consistent with promoting the interests of those end-users in the community.

C21. ComReg is moreover of the view that the amendments to the obligations of price control in the markets of Call Origination and Call Termination set out in this consultation meet the six principles of "Better Regulation" as follows:

i. ComReg has clearly outlined why it is **necessary** to undertake this review on the basis of the potential competition problems which have been identified. As set out in the supporting market review, ComReg believes that Eircom, as SMP operator in the markets of Call Origination and Call Termination and as a vertically integrated operator active across the supply chain, has the ability and incentive to leverage both horizontally and vertically and to act in a discriminatory manner. ComReg considers that the Margin Squeeze obligation is necessary to ensure the effectiveness of Eircom's existing SMP obligations in the interconnection markets which could otherwise be undermined through Eircom's relative pricing of the regulated call origination and termination components within Wholesale SV services. Preserving the effectiveness of these regulated inputs is further necessary to facilitate competition right across the market value chain;

ii. ComReg considers that it is **effective** in addressing the potential for Margin Squeeze and discrimination that could act as a constraint to the growth of OAOs who have made efficient infrastructure investments to avail of primary call origination and primary call termination. In view of the dampening effects on competition and innovation arising from a foreclosure of efficient infrastructure-based operators, ComReg is effective in addressing this serious risk in an ex ante context;

iii. ComReg considers that it has been **proportionate** in its review. ComReg has considered all the views of respondents and in some cases amended its preliminary views of Consultation Document No. 10/76 to views that are less onerous on Eircom. As a result, ComReg believes that, taking account of the serious competition risks involved, the amendments to the price control obligations are not overly burdensome or onerous on Eircom. The specifications to the transparency obligations are also proportionate as they simply provide confirmation of Eircom's existing obligations. Furthermore, the proposed obligations provide Eircom with a mechanism for demonstrating compliance with its existing regulatory obligations;

iv. ComReg considers that its approach, which has been subject to public consultation and considered the views of all respondents, offers **transparency** in reaching the view that the obligation not to Margin Squeeze should be added to the price control and that the transparency obligation be amended in the markets of Call Origination and Call Termination;

v. ComReg considers that it has been **accountable** in its review and that it has provided all of the detail, reasoning and information necessary to justify its approach, including an assessment of relevant impacts for stakeholders and competition. ComReg has clearly demonstrated how it reached the view that the obligation not to Margin Squeeze and to submit the minimum price floors for call origination and call termination within the provision of Wholesale SV in confidence to ComReg is added to the price control in the markets of Call Origination and Call Termination and that the transparency obligation is further specified. ComReg has furthermore demonstrated how its views are consistent with its statutory objectives under section 12 of the Act;

vi. ComReg considers that its view is **consistent** with previous ComReg decisions and that the principle of maintaining sufficient economic space between the prices of wholesale prices so as to minimise the risk of a margin (price) squeeze is clear and widely accepted. For example:

a. Telecom consultants, Analysys Mason, note that margin squeeze can be "*ensuring a particular wholesale service does not squeeze another wholesale alternative*."[6]

b. The French Telecoms Regulator has noted that two wholesale products should maintain sufficient economic space between them so as not to lead to eviction pricing, that is, one product being unduly favoured over another due to inappropriate pricing.[7]

c. The European Regulators Group[8] (now the Body for Body of European Regulators for Electronic Communications) notes that "(*i)t is best practice for [regulators] to ensure consistency between the prices of all SMP player's products available along the whole value chain…. create sufficient economic spaces so as to :*
- Create incentives for new entrants to further climb the ladder of investment;
- Give assurance of protection against downstream price eviction.
- Promote infrastructure based competition…"

d. The UK Telecoms Regulator set the 'margin' between two wholesale products:
"*In this context the term margin has been used to describe the 'space' available, between ATM interconnection and IPStream, for Altnets to compete against BT in the provision of intermediate services, based on ATM Interconnect products*."[9]

e. In European Commission Decision of 04.07.2007 relating to a proceedings under Article 82 of the EC Treaty (Case COMP/38.784 – Wanadoo España vs. Telefónica), the Commission, when assessing the replicability of Telefonica's retail prices, notes that the process of climbing of the ladder of investment can only be effective if there is a margin between all the steps of the ladder. It also points to a report by

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6 http://www.analysysmason.com/PageFiles/16865/Analysys%20Mason%20Expertise%20-%20Margin%20Squeeze%20%5BRead-Only%5D.pdf.

7 http://www.docstoc.com/docs/52208219/Price-squeeze-tests-in-electronic-communications-ARCEP%E2%82%AC%E2%84%A2s.

8 http://erg.eu.int/doc/publications/erg_07_53_wla_wba_bp_final_080604.pdf.

9 http://stakeholders.ofcom.org.uk/binaries/consultations/adsl_price/statement/statement.pdf.

Prof. Martin Cave commissioned by the European Commission: "*A key precondition for neutrality across different wholesale broadband products is satisfaction of a margin squeeze test. […] A prohibition of a margin squeeze thus lends itself to the task of ensuring that prices are set in a way designed to prevent the dominant firm from leveraging its market power from one stage of the production process into a neighbouring one. Applying it consistently over a range of broadband wholesale (and retail) products should avoid exclusionary behaviour of this kind…*".

f. According to a notification of the Belgian wholesale broadband markets to the European Commission in May 2011, the Belgian regulator proposed, in addition to imposing a cost-orientation obligation on Belgacom, to apply a margin squeeze test in order to ensure a sufficient margin between LLU prices and the prices of services provided in downstream markets (wholesale Bitstream, resale products and retail services) (See Case BE/2011/1227-1228).

g. In the context of competition law cases, the Court of Justice of the European Union has also recognised that where markets are closely associated: "*certain conduct on markets other than the dominated markets and having effects either on the dominated markets or on the non dominated markets themselves can be categorised as abusive (see, to that effect, Tetra Pak v Commission, paragraph 25)*", Judgment of the European Court of Justice (ECJ) of 17 February 2011 in the case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB.