



Commission for  
**Communications Regulation**

# **Final Determination in a dispute between (i) BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited and Vodafone Ireland Limited and (ii) Eircom Limited**

Final Determination

**Reference:** ComReg 17/08

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# 1 Executive Summary

1. BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited and Vodafone Ireland Limited (together, the **Referring Parties**) submitted<sup>1</sup> a dispute to the Commission for Communications Regulation (**ComReg**) on 16 November 2015 (the **Dispute Referral**).
2. The dispute relates to provisions within Eircom's service level agreements (**SLAs**) relating to the repair of faults for local loop unbundling (**LLU**) and single billing wholesale line rental (**SB-WLR**). Under the existing SLAs, Eircom must compensate operators by way of service credits (**SC**)<sup>2</sup> when it fails to achieve certain targets in respect of the repair of faults.
3. On 2 December 2015, ComReg published an Information Notice defining the scope of the dispute (the **Scope**) and appended the non-confidential version of the Dispute Referral. These documents were published on ComReg's website as ComReg Document No 15/127<sup>3</sup> and 15/127a<sup>4</sup> respectively.
4. The respondent, Eircom Limited (**Eircom**), was provided with a copy of the Scope<sup>5</sup> as well as a non-confidential copy of the Dispute Referral.<sup>6</sup>
5. On 10 December 2015, Eircom submitted its response to the dispute (see Annex 3 of the Draft Determination). In that response, Eircom disagreed with the submissions made by the Referring Parties and argued against the claims made by the Referring Parties for the areas to be considered within the scope of the dispute.
6. ComReg published its Draft Determination in the dispute on 20 May 2016 as ComReg Document No 16/40<sup>7</sup> (the **Draft Determination**). The submissions received in response to the Draft Determination were published as ComReg Document No 16/40s.

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<sup>1</sup> The dispute was submitted on behalf of the Referring Parties by Towerhouse LLP (Towerhouse).

<sup>2</sup> The Referring Parties use the term "Service Level Guarantees" to denote the financial payments made on foot of SLA provisions. This paper uses the term "Service Credits" as this is consistent with terminology used in previous ComReg decisions.

<sup>3</sup> [http://www.comreg.ie/fileupload/publications/ComReg\\_15127.pdf](http://www.comreg.ie/fileupload/publications/ComReg_15127.pdf)

<sup>4</sup> <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf>

<sup>5</sup> Published on 2 December 2015.

<sup>6</sup> Provided by email on 26 November 2015.

<sup>7</sup> [http://www.comreg.ie/publications/towerhouse\\_vs\\_eircom\\_dispute\\_-\\_draft\\_determination.583.105114.p.html](http://www.comreg.ie/publications/towerhouse_vs_eircom_dispute_-_draft_determination.583.105114.p.html)

7. ComReg has considered this dispute pursuant to Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011<sup>8</sup> (the **Framework Regulations**).
8. In this Final Determination, the matter has been considered in light of ComReg's statutory objectives, including under Section 12 of the Communications Regulation Act (the **Acts**)<sup>9</sup>. In particular, ComReg is mindful of its responsibility under Section 12(1)(a): "*(i) to promote competition, (ii) to contribute to the development of the internal market, and (iii) to promote the interests of users within the Community.*" This is considered in more detail in Section 6.2.
9. ComReg has considered four possible options for resolving the dispute:
  - (a) Option (a) Breach determination.
  - (b) Option (b) Select one of the proposals put forward by the Referring Parties and/or Eircom.
  - (c) Option (c) Oblige the parties to enter into good faith negotiations.
  - (d) Option (d) Oblige the parties to implement ComReg's proposed solution.
10. These options are considered at Section 6.1 below.
11. In the Draft Determination, ComReg proposed that Option (d) was the most appropriate for the reasons set out in Sections 5 and 6 of the Draft Determination. Having considered the submissions received<sup>10</sup> in response to the Draft Determination, ComReg remains of the view that Option (d) is the most appropriate resolution to the dispute. However, for reasons set out below, ComReg has amended certain aspects of its determination in light of the submissions received in response to the Draft Determination.
12. The Draft Determination set out that each fault, extant in excess of two (2) working days, shall attract a SC per line per working day until such time as that fault is cleared. ComReg retains this position in the Final Determination. ComReg clarifies that this Final Determination does not mandate a performance target requiring that all faults be repaired by Eircom within two working days
13. In response to submissions made, ComReg has also amended its proposal to clarify that SCs be calculated on a periodic basis. This, ComReg believes, will make it easier to implement the solution while, in essence, retaining that basis of calculation of the Draft Determination.

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<sup>8</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)

<sup>9</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

<sup>10</sup> The key points of the submissions are set out in Section 4 below and all non-confidential submissions received have been published as ComReg Document No 16/40s.

14. The Draft Determination proposed that a SC be payable irrespective of whether the fault is wholly or partly attributable to a force majeure incident. Having further considered the matter and the submissions made, ComReg is of the view that faults which are specifically and incrementally caused by force majeure events may be excluded from the calculation of SCs. Having reviewed the latest versions of the SLAs in scope, ComReg considers that the existing SLA provisions operate in a manner consistent with this principle and therefore there is no need to intervene at this stage. Under the existing SLAs, in the event of a force majeure event, a fault is only excluded from the payment of SCs if the fault or non-availability of service is caused or contributed to by that force majeure event. Faults or non-availability of services that are not caused or contributed to by the force majeure event will continue to trigger payment of SCs where appropriate.
15. Eircom's application of force majeure exclusions under the existing SLA impacts the payment of SCs in respect of faults extant in excess of two working days as required by this Final Determination. To ensure that there is clarity with regard to this application, ComReg amends the Determination to require that a comprehensive set of terms and conditions be put in place governing the circumstances and the process by which faults are excluded from the payment of SCs due to force majeure.
16. In the Draft Determination, ComReg considered that SCs which are paid in circumstances where Eircom's performance is equal to or better than a "Reference Performance" should not represent a net cost to Eircom. This point is outside the scope of the Final Determination and is without prejudice to any decisions taken in the context of access pricing. Nevertheless, ComReg remains of the view that such SCs should, in principle, be recoverable by Eircom via wholesale access charges.
17. The remaining sections of this Final Determination are structured as follows:
  - **Section 2** defines the scope of the dispute.
  - **Section 3** sets out the key points of the submissions received in response to the Draft Determination.
  - **Section 4** identifies ComReg's dispute resolution powers and the Eircom obligations at issue.
  - **Section 5** sets out ComReg's analysis of the dispute and conclusions.
  - **Section 6** evaluates ComReg's proposal for resolving the dispute in light of statutory and other objectives.
  - **Annex 1** sets out an example calculation of SCs.
  - **Annex 2** sets out the Final Determination.

## 2 Scope of the dispute

### 2.1 The Dispute Referral

18. On 16 November 2015, the Referring Parties submitted a Dispute Referral. A non-confidential version of the Dispute Referral was published on ComReg's website on 2 December 2015.<sup>11</sup>
19. The Dispute Referral relates to Eircom's current generation access (**CGA**) regulated contract terms, in particular, to the performance targets for repair times offered as part of SLAs between Eircom and each of the Referring Parties.
20. Under the existing SLAs, Eircom is subject to performance targets for the repair of faults on its wholesale lines. To the extent that it does not meet those performance targets (as calculated on an aggregated basis for each operator), a SC will be payable to the affected operator (customer).
21. The regulated services within the scope of the dispute are: local loop unbundling (**LLU**) in the form of unbundled local metallic path (**ULMP**), line sharing (**LS**) and combined GNP and ULMP (**GLUMP**); and single billing wholesale line rental (**SB-WLR**).<sup>12</sup> The Referring Parties consider that Eircom's existing SLAs for repair on each of these services are not fair, reasonable and non-discriminatory.
22. In April 2012, Eircom and the Referring Parties initiated negotiations on the fault-repair performance targets contained in Eircom's SB-WLR and LLU SLAs. A fault-repair performance target (**performance target**) represents the percentage number of faults that Eircom would have to fix within a stipulated number of days of being notified. Those negotiations concluded with Eircom's Best and Final Offer (**BAFO**).
23. The Referring Parties state that they have made all reasonable efforts to negotiate better SLAs but have been unable to do so. In their view, Eircom is thus contravening obligations imposed on it as an operator with Significant Market Power (**SMP**) in the relevant markets (namely, the Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Location (**WPNIA**) Market and the Wholesale Call Origination on Public Telephone Networks provided at a Fixed Location (**FACO**) Market).
24. Eircom's BAFO took effect from 1 September 2015 and reflects the existing performance targets that are the subject of the dispute. The table below sets out the performance targets that arose in the context of negotiations. The first column sets out the performance targets, at the beginning of the negotiation period in 2012. The second column sets out performance targets requested by the Referring Parties. The third column sets out Eircom's BAFO as part of those negotiations and reflects the existing performance targets.

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<sup>11</sup> Document 15/127a.

<sup>12</sup> In the remainder of this Final Determination, ULMP, LS and GLUMP are referred to collectively as LLU.

25. The figures apply equally to LLU and SB-WLR services. The table has been adapted from Table 3 on page 4 of the published Dispute Referral.

#### Requested SLAs vs Eircom's offer<sup>13</sup>

	Performance targets at the beginning of the negotiation period in 2012	Performance targets requested by the Referring Parties	Eircom's BAFO and current performance targets contained in SB-WLR and LLU SLA
<b>2 working days</b>	73%	85%	77% by 1 September 2015  80% by 2016 (conditional on reductions in "No Fault Found" levels)
<b>5 working days</b>	92%	95%	No change
<b>10 working days</b>	100%	100%	Reduction discussed

26. Eircom's BAFO set out in the table above provided an improvement to the performance target SLA for both SB-WLR and LLU for repairs to be completed within two working days from 73% to 77% (which took effect from 1 September 2015, prior to the Dispute Referral). The Referring Parties accepted Eircom's BAFO but also referred the present dispute to ComReg in parallel.
27. Annex 4 of the published Dispute Referral sets out the faults with the line test data supplied by Access Seekers (**AS**) effective from 1 September 2015 for the services agreed by ComReg to be in scope for the dispute (that is, SB-WLR and LLU).
28. Annex 3 of the Dispute Referral contains a summary of the Referring Parties' interactions with Eircom in relation to the SLAs.<sup>14</sup> The CGA SLA negotiations between Eircom and Industry (including the Referring Parties) were initiated when Industry submitted statements of requirements (**SoR**) to Eircom in April and May 2012 and were concluded in September 2015. The SLA negotiations were conducted at numerous industry meetings, bilateral meetings and at dedicated SLA workshops. ComReg supported Eircom and Industry (including the Referring Parties) through the course of the negotiations by providing meeting and secretarial facilities, when requested.
29. Prior to the submission of the Dispute Referral, Eircom offered (by way of a **BAFO**) to increase the performance target for repairs to be completed within 2 working days from 73% to 77%, in

<sup>13</sup> Source: Table 3 on page 4 of the published Dispute at : <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf>

<sup>14</sup> See page 27 Annex 3 "Chronology of Core Correspondence in the Dispute and Index of Attachments".

respect of both SB-WLR and LLU. That BAFO was accepted by the Referring Parties and took effect from 1 September 2015. The Referring Parties stated that they accepted the offer because they regarded any improvement in the relevant SLA repair performance targets as a positive step. However, the increased performance target is 8% below the performance target of 85% requested by the Referring Parties for both SB-WLR and LLU repairs to be completed within 2 working days. The Referring Parties also request an improvement in the performance targets at 5 and 10 working days.

30. The Dispute Referral also makes reference to Eircom's obligations as Universal Service Provider, specifically the Performance Improvement Programme 3 (**PIP3**)<sup>15</sup>. PIP3 was an extension of the performance improvement programme which was first established in 2010 based on the legally binding performance targets set out in D02/08 in relation to Eircom's quality of service performance under certain aspects of the Universal Service Obligation (**USO**). Eircom established the PIP in 2010 and this was then extended to the PIP2, then subsequently to the PIP3. The period for the improvement programme PIP3 ended in December 2015.
31. The enforcement mechanism set out in Appendix A to ComReg Decision D02/08 sets a level which, if not achieved for USO, triggered penalty payments to ComReg. The Referring Parties submit that, by failing to offer repair targets within the CGA SLAs that are at least as good as those offered to retail customers under PIP3, Eircom is in contravention of its regulatory obligations (in particular, the obligation of non-discrimination).
32. The Referring Parties requested ComReg to resolve the dispute by means of a series of directions and determinations as described in Section 2.2 below.

## 2.2 Scope of the dispute

33. The Referring Parties submitted that ComReg should resolve this dispute by means of<sup>16</sup>:
  - a. *"A direction under regulation 36 of the Framework Regulations fixing the terms of the Regulated Contracts by increasing the performance target for each SLA to the levels requested by the Referring Parties as set out in Table 3;*
  - b. *A determination under regulation 31(2) of the Framework Regulations stating that, under the current terms of the Regulated Contracts, eircom is in breach of the SMP conditions set by ComReg in the 2007 RNA Decision, the 2015 FACO Decision, the 2010 WBA Decision and the 2010 WPNIA Decision, in particular, the requirement to offer and provide network access to CGA services in a fair, reasonable and timely manner; and*
  - c. *A direction imposing an obligation which is enforceable against eircom by each Referring Party which purchases Regulated Services from eircom, to enter into a*

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<sup>15</sup> See ComReg Document No 14/129 at: <http://www.comreg.ie/fileupload/publications/ComReg14129.pdf>.

<sup>16</sup> See ComReg Document No 15/127 at [http://www.comreg.ie/publications/information\\_notice\\_-\\_comreg\\_accepts\\_request\\_from\\_towershouse\\_llp\\_for\\_the\\_resolution\\_of\\_a\\_dispute\\_with\\_eircom\\_ltd.583.104999\\_p.html](http://www.comreg.ie/publications/information_notice_-_comreg_accepts_request_from_towershouse_llp_for_the_resolution_of_a_dispute_with_eircom_ltd.583.104999_p.html)

*transaction between each relevant Referring Party and eircom on the terms and conditions fixed by ComReg (consistent with the approach taken above) within a specified period of not more than two weeks.”*

34. In section 9.6 of the Dispute Referral, the Referring Parties note that that “... *the discussion on the appropriate level of service level guarantees (SLGs) [SCs] ...are an essential component of any measure designed to encourage improved performance by a service provider such as eircom. Advancing the discussion on the appropriate level of SLGs [SCs] cannot commence until the appropriate level of the SLAs has been determined.*”
35. Having considered the Dispute Referral and the scope of ComReg’s dispute resolution powers, ComReg defined the scope of the dispute as follows:

- a. *“ComReg is of the view that it is not appropriate to resolve this matter pursuant to Regulation 36 as the relevant legislation for resolution of disputes is Regulation 31 of the Framework Regulations. ComReg therefore intends to progress this under Regulation 31.*

*ComReg will consider the terms of the regulated contracts for the products specified below:*

- *Local loop unbundling in the form of unbundled local metallic path (**ULMP**); line sharing (**LS**); combined GNP and ULMP (**GLUMP**) in the Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Location (**WPNIA**) Market; and*
- *Single billing wholesale line rental (**SBWLR**) in the Wholesale Call Origination on the Public Telephone Networks Provided at a Fixed Location (**FACO**) Market.*

*ComReg considers that bitstream managed backhaul in the Wholesale Broadband Access (Market 5) is out of the scope of this investigation as the Referring Parties have not presented any evidence of engagement or dispute.*

- b. *ComReg is of the view that a breach determination is out of scope in the context of a dispute. In resolving this dispute ComReg will consider and respond, where appropriate, to the points raised by the Referring Parties. ComReg will assess whether it is appropriate to adjust the relevant SLA metrics with a view to resolving the dispute, and if so determine the relevant metrics. ComReg will take the relevant significant market power (SMP) obligations into consideration in any such determination under Regulation 31(2).*
- c. *In relation to the Referring Parties’ point (c) above, a consideration of any determination made under the Referring Parties’ point (a) above will also address the appropriate timescale for implementation.*

*Finally, in relation to section 9.6 of the dispute [Referral], ComReg notes that in its view service level agreements (SLAs) and SLGs [SCs] are linked, however, it notes the Referring Parties’ views that SLGs are not in scope and as such the SLGs [SCs] are considered out of scope.”*

The Scope was published on ComReg's website on 2 December 2015<sup>17</sup>.

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<sup>17</sup> See ComReg Document No 15/127 at [http://www.comreg.ie/publications/information\\_notice\\_-\\_comreg\\_accepts\\_request\\_from\\_towershouse\\_llp\\_for\\_the\\_resolution\\_of\\_a\\_dispute\\_with\\_eircom\\_ltd.583.104999.p.html](http://www.comreg.ie/publications/information_notice_-_comreg_accepts_request_from_towershouse_llp_for_the_resolution_of_a_dispute_with_eircom_ltd.583.104999.p.html)

## 3 Submissions received in response to the Draft Determination

36. ComReg received three submissions in response to its Draft Determination. The three respondents were Eircom, the Referring Parties and Alternative Operators in the Communications Market (**ALTO**). These submissions have been published by ComReg as Document number 16/40s.
37. The key aspects of the submissions are summarised below under the following headings:
- 3.1 General submissions
  - 3.2 No genuine dispute for ComReg to solve
  - 3.3 Determination and the scope of existing obligations
  - 3.4 Force majeure

### 3.1 General submissions

#### *Eircom*

38. Eircom restated its “*serious concerns*” with ComReg’s proposed approach to the dispute and elaborated in more detail on its key points raised in its previous letter dated 10 December 2015<sup>18</sup>.
39. Eircom stated that for ComReg to give preliminary views in respect of matters which ComReg had stated were outside the scope of the Draft Determination (i.e. recovery of costs by Eircom and Eircom’s reference performance level), is “*unhelpful and inconsistent with ComReg’s statutory duty to ensure regulatory certainty*” because Eircom is unsure of ComReg’s expectation of its performance and its financing of such a performance.
40. These concerns are addressed below, in particular in Sections 5.3 and 5.4 in relation to SLA incentives and Eircom’s Reference Performance and cost recovery. ComReg’s view remains that the recovery of Eircom’s costs through wholesale access pricing and setting a mandatory performance target are both outside the scope of the dispute. This point has been clarified in the Final Determination. Nevertheless, ComReg maintains that these matters are important factors in the analysis of whether or not the solution presents a disproportionate or unreasonable burden on Eircom.

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<sup>18</sup> The letter of 10 December 2015 was published as Annex 3 to the Draft Determination.

### ***The Referring Parties***

41. The Referring Parties welcomed the Draft Determination. They were supportive of the proposal that Eircom must pay a SC in relation to all faults that remain unresolved after two days. The Referring Parties also noted that depending on the level of SC negotiated with industry, the proposals in the Draft Determination have the potential to provide Eircom with the appropriate incentive to improve the service to Irish customers and reduce the level of faults on the network.
42. The Referring Parties welcomed ComReg's clarification that the line fault index (LFI) is outside the scope of this dispute.

### ***ALTO***

43. In its submission, ALTO was supportive of the Draft Determination and set out its view that the proposals in the Draft Determination bring Ireland back in line with other EU Member States for communications services and service levels which will ultimately result in a better network performance and consumer experience. ALTO is of the view that the Draft Determination sets out an "*innovative and forward-looking*" mechanism to resolve the dispute.
44. ALTO made reference to the line fault index. The line fault index is, however, outside the scope of this dispute.

## **3.2 No genuine dispute for ComReg to resolve**

### ***Eircom***

45. Eircom disagreed that the matter constitutes a genuine dispute. Eircom noted that it had made a BAFO on 3 February 2015 which was accepted by the Referring Parties and which took effect on 1 September 2015. It also disagreed with ComReg's preliminary conclusion that the existing SLAs do not comply with Eircom's SMP obligations, commenting that ComReg had no basis for reaching this conclusion. In particular, Eircom contends that the structure of the SLAs is fit for purpose and has not been disputed by the Referring Parties.
46. Having considered Eircom's submissions, ComReg remains of the view that the matter does constitute a genuine dispute, the reasoning for which has been set out in Section 5.1 below.

## **3.3 Scope of existing obligations**

47. In its submission, Eircom raised a number of points in relation to the Draft Determination with regard to the scope of Eircom's obligations.

### **3.3.1 Level of service performance**

#### ***Eircom***

48. Eircom stated that it would not be able to guarantee the level of performance that generates service credits for all faults that are not repaired within two days. This level of performance

was not requested by the Referring Parties and is not, according to Eircom, required as a result of its existing obligations. Eircom is also of the view that ComReg may not make this Determination under Regulation 31 of the Framework Regulations and it may not impose new SMP obligations exceeding the scope of the existing SMP obligations.

49. These points are considered generally below in Section 5.1 where ComReg sets out its rationale for accepting the dispute under Regulation 31 of the Framework Regulations and in Section 5.2 where ComReg sets out its analysis of the requirements to ensure that the Final Determination ensures compliance within the scope of Eircom's existing obligations.
50. Eircom is of the view that a service level of 85% for two day repair is not reasonable and the Referring Parties have not offered any justification for such a performance level.
51. In relation to the service level, Eircom is of the view that in the Draft Determination, ComReg is effectively setting wholesale performance levels, which ComReg does not have the power to do. Eircom believes that there is no difference between setting SLA performance levels and stipulating when SCs will be paid. Eircom notes in particular that ComReg acknowledged at the clarification meeting<sup>19</sup> that, by way of dispute resolution, it could not set mandatory wholesale performance targets
52. ComReg notes that the Draft Determination was not concerned with setting mandatory performance targets<sup>20</sup>. Rather, the Draft Determination was designed to establish the circumstances in which SCs would be paid.
53. ComReg's intervention is necessary given the inability of the parties to the dispute to reach agreement. In both the Draft Determination, and now the Final Determination, ComReg has applied the appropriate criteria (as described in Section 4) in arriving at a solution that it regards as both fair to all parties and consistent with its own objectives. In this regard, the Final Determination remains unchanged in structure from the Draft Determination in that it sets out the "trigger" for the payment of SCs after a fault has been extant for two days.
54. The actual level of performance achieved by Eircom, and the circumstances in which Eircom bears or recoups costs associated with a failure to meet a particular performance level, are outside the scope of the dispute. In particular, ComReg is not determining the "Reference Performance" referred to above in this Final Determination. This point is clarified in Section 5.4 below.

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<sup>19</sup> On the 9 June 2016, ComReg received a request for a Clarification Meeting in relation to the Draft Determination. In response ComReg published Information Notice 16/47 on 9 June 2016 at <https://www.comreg.ie/publication/towerhouse-llp-eircom-dispute-update/>. On 22 June 2016, ComReg held a Clarification Meeting with Eircom Limited, the four Referring Parties and Towerhouse LLP. See ComReg's Information Notice 16/52 published on 23 June 2016 <https://www.comreg.ie/publication/towerhouse-llpeircom-dispute-update/>.

<sup>20</sup> By 'mandatory wholesale performance targets', ComReg means targets whereby a failure to achieve the target would result in regulatory action.

55. Eircom contends that ComReg's Draft Determination is beyond Eircom's obligations, outside ComReg's jurisdiction under Regulation 31 of the Framework Regulations and does not solve the dispute.
56. ComReg remains of the view that the Draft Determination and Final Determination are in line with Eircom's obligations pursuant to the relevant market reviews as set out in Section 4.2. ComReg has also set out how the issues raised in the dispute constitute a dispute within the scope of Regulation 31 in Sections 2.2 and 5.1 below.
57. ComReg is of the view that the Final Determination resolves the dispute within the parameters of the dispute. As noted in Section 5.4, while the quantum of SCs is outside the scope of the dispute, ComReg is conscious that it is a critical consideration in order to implement "fit-for-purpose" SLAs. ComReg has therefore allowed, in the Final Determination (Annex: 2), Eircom a period of three months to offer the Referring Parties an SLA in respect of LLU and SB-WLR. This offer will include a SC for all faults extant in excess of two working days as set out in Section 4.1 (ii) of the Final Determination (Annex 2).
58. ComReg's views on these points is set out in Section 5.

### **3.3.2 Cost recovery**

#### ***Eircom***

59. Eircom stated that it does not believe that there is any reality to the financing mechanism in spite of ComReg's discussion of compensation beyond a "Reference Performance". Eircom states that ComReg also explained that the mechanism for recovery of excess costs is outside the scope of the dispute. Eircom is of the view that both the Draft Determination and its financing are outside the scope of Regulation 31 and SMP regulation in general.

#### ***The Referring Parties***

60. The Referring Parties noted some confusion around the example provided by ComReg in Section 5.5 of the Draft Determination concerning what could constitute a "reference network" and around the level of SCs.
61. In this Final Determination, ComReg has modified the relevant Section in order to remove any confusion.
62. The Referring Parties are also of the view that any consideration of cost recovery by Eircom should be the subject of a public consultation.
63. Cost models that ComReg imposes as part of a cost orientation remedy to deal with the competition problems identified in the relevant market analyses are always subject to public consultation. It is likely any material changes to such models, during the duration of the relevant ComReg Decision, would also be publicly consulted upon.

### 3.3.3 SLA structure

#### *Eircom*

64. Eircom expressed the view that the existing SLA structure does incentivise Eircom to repair faults at a level of performance that is consistent with the efficient operation of its network. Eircom is of the view that ComReg's rationale to justify its Draft Determination appears to be linked to ComReg's views on the costs of faults to operators and the potential harm to competition. Eircom re-iterated its view that SCs compensate operators where Eircom fails to deliver an agreed level of service and there is not necessarily a direct relationship between the compensation and costs incurred in respect of each fault. Eircom stated that there could be no understanding, on the part of OAOs, that they are provided "*access to a fault-free network.*" Eircom disagreed that SCs reflect the cost to society, retail costs and reputational damage and believed that such a view is at odds with the nature of an SLA. Eircom also objects to the suggestion that customers may perceive that faults for Open Eir's customers are repaired faster than for OAO customers. This is addressed in Sections 5.2 and 5.3 below.

#### *The Referring Parties*

65. The Referring Parties concluded that the parties to the dispute now need to embark on a process of negotiation in order to agree the level of SCs that will provide Eircom with the incentives that will drive improved network performance.
66. ComReg agrees with the Referring Parties and believes that it is important to set a timeframe in which this should occur, in order to bring about an effective resolution to the dispute. Accordingly, in this Final Determination, ComReg has set a three month timeline for Eircom to offer the Referring Parties an SLA based on the methodology set out in this Final Determination: see the Final Determination set out at Annex 2.

## 3.4 Force majeure

67. The issue of "*force majeure*" exemptions (which could include, but is not limited to, storms, floods and third party damage and would include what Eircom describes as "Storm Mode") was raised in the dispute and discussed in section 6.4 of the Draft Determination. ComReg expressed the preliminary view in the Draft Determination that Eircom should not be exempt from the requirement to make SC payments where force majeure arises. All respondents made reference to force majeure in their submissions.

#### *Eircom*

68. Eircom is of the view that ComReg's arguments around efficiency are "*fundamentally flawed and incorrect*" and that ComReg's proposals would provide for "*an unwarranted selective advantage to the benefit of other operators and the detriment of Eir.*" Eircom does not agree that it should pay for unforeseeable or exceptional events that impact on its performance; it believes that imposing SCs where "*force majeure*" applies is not in accordance with the principles of "*reasonableness and fairness*".

**ALTO**

69. ALTO recognised and supported the all-inclusive range of faults considered in the Draft Determination (specifically including “*storm mode*”).

***The Referring Parties***

70. The Referring Parties were encouraged by ComReg’s explicit recognition that SCs should reflect the range of costs which are borne by the Referring Parties including the “*costs of compensating end users, revenue foregone, reputational damage....and also that “Storm Mode” does not have the effect of suspending the operation of the SLAs*”.
71. ComReg considers the various submissions regarding force majeure at Section 5.6 below and has amended the Final Determination to allow for exemptions from the requirement to make SC payments on grounds of force majeure.

## 4 Dispute Resolution Powers

### 4.1 Legal basis

72. ComReg was established under Section 6 of the Acts. ComReg is the regulator for the electronic communications and postal sectors. It is charged with the regulation of, amongst other things, fixed and mobile electronic communications service providers in the State. ComReg is the national regulatory authority in the State. The functions of ComReg are set out in Section 10 of the Acts.
73. Regulation 31 of the Framework Regulations sets out ComReg’s powers regarding disputes arising between undertakings in connection with existing obligations under the Framework Directive<sup>21</sup>, the Specific Directives<sup>22</sup> or the Specific Regulations.<sup>23</sup>
74. Regulation 31(2) of the Framework Regulations provides that, in the event of a dispute, ComReg shall, at the request of either party, initiate an investigation and make a determination aimed at ensuring compliance with the obligations of the Framework Directive, the Specific Directives or the Specific Regulations to resolve the dispute.
75. When making a determination under Regulation 31 of the Framework Regulations, Regulation 31(7) provides that ComReg must have regard to its objectives under Section 12 of the Acts and Regulation 16 of the Framework Regulations.
76. Section 12 of the Acts sets out ComReg’s objectives in the performance of its functions. Section 12(1)(a) sets out ComReg’s objectives in respect of electronic communications networks, services and associated facilities as follows:

*“12. (1) The objectives of the Commission in exercising its functions shall be as follows—*

- (a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities—*
- (i) to promote competition,*
- (ii) to contribute to the development of the internal market, and*
- (iii) to promote the interests of users within the Community”*

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<sup>21</sup> Directive 2002/21/EC as amended.

<sup>22</sup> Directives 2002/20/EC, 2002/19/EC, 2002/20/EC, 2002/22/EC and 2002/58/EC each as amended.

<sup>23</sup> The Regulations implementing the Framework Directive and the Specific Directives into Irish law, namely SI 333 of 2011, SI 334 of 2011, SI 335 of 2011, SI 336 of 2011 and SI 337 of 2011.

77. In relation to the objectives at Section 12(1)(a), Section 12(2) requires that ComReg take all reasonable measures which are aimed at achieving those objectives. The relevant measures listed in Section 12(2) include the following:

*“12. (2)(a) in so far as the promotion of competition is concerned:*

- (i) ensuring that users... derive maximum benefit in terms of choice, price and quality*
- (ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector”*

78. The objectives and regulatory principles set out in Regulation 16 of the Framework Regulations include:

*“16. (2) 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—*

*...*

- (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.”*

79. In light of the context of the dispute (i.e., access obligations), ComReg is also cognisant of its obligations under Regulation 6 of the Access Regulations which provides as follows:

*“6. (1) The Regulator shall, acting in pursuit of its objectives set out in section 12 of the [Communications Regulation Acts] and Regulation 16 of the Framework Regulations, encourage and, where appropriate, ensure, in accordance with these Regulations, adequate access, interconnection and the interoperability of services in such a way as to—*

- (a) promote efficiency,*
- (b) promote sustainable competition,*
- (c) promote efficient investment and innovation, and*
- (d) give the maximum benefit to end-users.”*

80. ComReg’s determination under Regulation 31 is binding. Failure to comply with such a determination is an offence.

81. In accordance with Regulation 31(2) of the Framework Regulations, ComReg has published its dispute Resolution Procedures.<sup>24</sup> In Annex B of ComReg's published Dispute Resolution Procedures, step 7 states that:

*"The final determination of a dispute will be made having regard to the relevant regulatory framework. Such an outcome may be one other than what was requested by either party."*<sup>25</sup>

## 4.2 Eircom's SMP obligations

82. Eircom has been designated as an undertaking with significant market power (**SMP**) in a number of markets relevant to the dispute and is subject to related SMP obligations as set out in the following decisions:

- Wholesale Fixed Voice Call Origination and Transit (ComReg Document No 15/82, Decision No D05/15) (the **FACO SMP Decision**<sup>26</sup>); and
- Wholesale (Physical) Network Infrastructure Access Market (Market 4) (ComReg Document No 10/39, Decision No D05/10) (the **WPNIA SMP Decision**<sup>27</sup>).

### 4.2.1 Fixed Access and Call Origination (SB-WLR)

83. The FACO SMP Decision sets out the obligations for SB-WLR SLAs in Section 8.1 - 8.3 of the Decision Instrument at Appendix H thereto. Eircom is obliged to comply with the following obligations:

*"8.1 Pursuant to Regulation 12(3)<sup>28</sup> of the Access Regulations, Eircom shall, in relation to the obligations set out in Section 7 above, grant Undertakings Access in a fair, reasonable and timely manner.*

*8.2 Without prejudice to the generality of Section 8.1 above and pursuant to Regulation 12(3) of the Access Regulations, where Eircom receives a request for Access (including Access to those products, services and facilities referred to in Sections 7 and 8 of this Decision Instrument) in accordance with the requirements of this Decision Instrument at the same point in time as a request for another wholesale access product, service or facility, on foot*

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<sup>24</sup> Response to Consultation and Decision Notice, Dispute Resolution Procedures - Framework Regulations (Response to Consultation Document No. 09/85) (Document No: 10/18R, Decision No: D03/10 Date: 29 March 2010).

<sup>25</sup> Step 7, page 26 of ComReg Doc No 10/18R

<sup>26</sup> [http://www.comreg.ie/publications/market\\_review\\_-\\_wholesale\\_fixed\\_voice\\_call\\_origination\\_and\\_transit\\_markets.583.104910.p.html](http://www.comreg.ie/publications/market_review_-_wholesale_fixed_voice_call_origination_and_transit_markets.583.104910.p.html)

<sup>27</sup> [http://www.comreg.ie/publications/response\\_to\\_consultation\\_-\\_market\\_review\\_wholesale\\_physical\\_network\\_infrastructure\\_access\\_market\\_4\\_further\\_response\\_to\\_comreg\\_document\\_no\\_08\\_104\\_response\\_to\\_comreg\\_document\\_no\\_09\\_42\\_and\\_decision\\_the\\_decision\\_document\\_583.103625.p.html](http://www.comreg.ie/publications/response_to_consultation_-_market_review_wholesale_physical_network_infrastructure_access_market_4_further_response_to_comreg_document_no_08_104_response_to_comreg_document_no_09_42_and_decision_the_decision_document_583.103625.p.html)

<sup>28</sup> Regulation 12(3) of the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011)

*of another Decision Instrument issued by ComReg, Eircom shall ensure that both access requests are met concurrently.*

8.3 *Without prejudice to the generality of Section 8.1 above, pursuant to Regulation 12(3) of the Access Regulations, Eircom shall:*

- (i) conclude, maintain or update, as appropriate, legally binding SLAs with Undertakings, which shall include provisions for Performance Metrics;*
- (ii) negotiate in good faith with Undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs (either in the case of a new SLA or an amendment to an existing SLA). Following a request from an Undertaking for a new SLA or an amendment to an existing SLA Eircom shall within one (1) month of the receipt of such a request provide the Undertaking with details of the SLA Negotiation Period. Negotiations in respect of a new SLA or an amendment to an existing SLA shall be concluded, unless otherwise agreed by ComReg, within six (6) months of the date the Undertaking makes such a request. Within one (1) month of the date the Undertaking makes such a request Eircom may seek an extension to the six (6) month period from ComReg;*
- (iii) ensure that all SLAs include provision for Service Credits arising from any breach of an SLA;*
- (iv) ensure that the level of the Service Credits are fair and reasonable;*
- (v) ensure that SLAs detail how Service Credits are calculated and shall include the provision of an example calculation; and*
- (vi) ensure that application of Service Credits, where they occur, shall be applied automatically, and in a timely and efficient manner.”*

#### **4.2.2 WPNIA (LLU)**

84. The WPNIA SMP Decision set out the obligations for LLU SLAs at Sections 8.1 and 8.2 of the Decision Instrument at Appendix C thereto. Eircom is obliged, amongst other obligations, as follows:

*“8.1 Pursuant to Regulation 13(3)<sup>29</sup> of the Access Regulations, Eircom shall, in relation to the obligations set out under section 7, grant Access to Current Generation WPNIA, in a fair, reasonable and timely manner.*

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<sup>29</sup> Regulation 13(3) of the European Communities (Electronic Communications Networks and Services)(Access) Regulations 2003 (S.I. No. 305 of 2003) (**2003 Access Regulations**)

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

- (i) Conclude, maintain or update, as appropriate, legally binding SLAs which include provision for associated Performance Metrics with OAOs<sup>30</sup>;
- (ii) Negotiate in good faith with OAOs in relation to the conclusion of legally binding and fit-for-purpose SLAs;
- (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter for negotiation between Eircom and Access Seekers and recovery of service credits shall be in the first instance, a matter for the individual Access Seeker and Eircom”

#### 4.2.3 Regulation 13(1) to 13(3) of the 2003 Access Regulations

85. Regulation 13 of the 2003 Access Regulations (which grounded the WPNIA SMP Decision) empower ComReg, *inter alia*, to impose access obligations on operators.

“13. (1) The Regulator may in accordance with Regulation 9 impose on an operator obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities *inter alia* in situations where the Regulator considers that the denial of such access or the imposition by operators of unreasonable terms and conditions having a similar effect –

- (a) would hinder the emergence of a sustainable competitive market at the retail level,
  - (b) would not be in the interests of end-users, or
  - (c) would otherwise hinder the achievement of the objectives set out in section 12 of the Act of 2002.
- (2) Without prejudice to the generality of paragraph (1), the Regulator may require an operator, *inter alia*:
- (a) to give third parties access to specified network elements, facilities or both such elements and facilities, including unbundled access to the local loop;
  - (b) to negotiate in good faith with undertakings, requesting access;
  - (c) not to withdraw access to facilities already granted;
  - (d) to provide specified services on a wholesale basis for resale by third parties;
  - (e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;

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<sup>30</sup> See Appendix C, Section 8 of the following link:  
<http://www.comreg.ie/fileupload/publications/ComReg1039.pdf>

- (f) *to provide co-location or other forms of facility sharing, including duct, building or mast sharing;*
  - (g) *to provide specified services needed to ensure interoperability of end-to end services to users, including facilities for intelligent network services or roaming on mobile networks;*
  - (h) *to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services; or*
  - (i) *to interconnect networks or network facilities.*
- (3) *The Regulator may attach to an obligation imposed under paragraph (1), or a requirement imposed under paragraph (2), conditions dealing with fairness, reasonableness and timeliness.”*

#### **4.2.4 Regulation 12(1) to 12(3) of the Access Regulations**

86. Regulation 12 of the Access Regulations (which superseded the 2003 Access Regulations, and grounded the FACO SMP Decision, also empower ComReg, *inter alia*, to impose access obligations on operators.

- “12. (1) *The Regulator may in accordance with Regulation 8 impose on an operator obligations to meet reasonable requests for access to, and use of, specific network elements and associated facilities in situations where the Regulator considers that the denial of such access or the imposition by operators of unreasonable terms and conditions having a similar effect—*
- (a) *would hinder the emergence of a sustainable competitive market at the retail level,*
  - (b) *would not be in the interests of end-users, or*
  - (c) *would otherwise hinder the achievement of the objectives set out in section 12 of the Act of 2002 and Regulation 16 of the Framework Regulations.*
- (2) *Without prejudice to the generality of paragraph (1), among other things the Regulator may require an operator—*
- (a) *to give third parties access to specified network elements or facilities, including access to network elements which are not active or unbundled access to the local loop, to allow carrier selection or preselection or subscriber line resale offers,*
  - (b) *to negotiate in good faith with undertakings requesting access,*
  - (c) *not to withdraw access to facilities already granted,*
  - (d) *to provide specified services on a wholesale basis for resale by third parties,*
  - (e) *to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services,*
  - (f) *to provide co-location or other forms of associated facilities sharing,*
  - (g) *to provide specified services needed to ensure interoperability of end to- end services to users, including facilities for intelligent network services or roaming*

*on mobile networks,*

- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services,*
  - (i) to interconnect networks or network facilities, or*
  - (j) to provide access to associated services such as identity, location and presence service.*
- (3) The Regulator may attach to obligations imposed under paragraphs (1) and (2) conditions covering fairness, reasonableness and timeliness.”*

## 5 Analysis and final conclusions

87. In this Section of the Final Determination, ComReg considers the issues arising in the dispute and in the relevant submissions of the parties to the dispute.
88. As preliminary matters, ComReg, first, considers whether the issues raised constitute a dispute within the scope of Regulation 31 of the Framework Regulations, and whether there is a need for ComReg to act to ensure compliance with Eircom's SMP obligations. ComReg then considers the incentives of all parties to an SLA and the appropriate service levels to be delivered. Finally, ComReg makes some remarks on certain issues which are relevant to explaining the context of the Final Determination but which are outside the scope of the dispute.

### 5.1 Do the issues raised constitute a dispute within the scope of Regulation 31?

89. The first issue to address is whether the dispute constitutes a dispute falling within the scope of Regulation 31 of the Framework Regulations.
90. The issue arises between the Referring Parties and Eircom. Each of the parties provide electronic communications networks and services in the State.
91. The issues relate to Eircom's obligations as an operator with SMP in various markets (as described in Section 4.2 above). The relevant obligations were imposed pursuant to Regulation 12(3) of the 2011 Access Regulations and Regulation 13(3) of the 2003 Access Regulations.
92. The Parties have been unable to agree satisfactory SLAs in respect of repairs for the CGA products in question. Since 2012, one or more of the Referring Parties has been requesting Eircom for an improvement in the 2 working day and 5 working day SLA repair performance targets. The improvements requested utilise the same SLA structure as is currently in use. Eircom submitted a BAFO which, although accepted by the Referring Parties, did not meet the repair performance targets requested by the Referring Parties.
93. Eircom's BAFO took effect from 1 September 2015 and reflects the existing performance targets that are the subject of the dispute. The table below (and previously explained in Section 2) sets out the performance targets that arose in the context of negotiations. The first column sets out the performance targets, at the beginning of the negotiation period in 2012. The second column sets out performance targets requested by the Referring Parties. The third column sets out Eircom's BAFO as part of those negotiations and reflects the current performance targets.
94. The figures apply equally to LLU and SB-WLR services. The table has been adapted from Table 3 on page 4 of the published Dispute Referral.

**Requested SLAs vs Eircom's offer<sup>31</sup>**

	<b>Performance targets at the beginning of the negotiation period in 2012</b>	<b>Performance targets requested by the Referring Parties</b>	<b>Eircom's BAFO and current performance targets contained in SB-WLR and LLU SLA</b>
<b>2 working days</b>	73%	85%	77% by 1 September 2015  80% by 2016 (conditional on reductions in "No Fault Found" levels)
<b>5 working days</b>	92%	95%	No change
<b>10 working days</b>	100%	100%	Reduction discussed

95. ComReg considers that, given the duration of discussions on the subject and the failure to agree revised terms, the matter constitutes a genuine dispute. This conclusion is not affected by Eircom's contention that there is no dispute between the parties, in particular on the grounds that the Referring Parties accepted the BAFO.
96. ComReg is thus satisfied that the dispute falls within the scope of Regulation 31 of the Framework Regulations.

## **5.2 Is there a need for ComReg to act to ensure compliance with Eircom's SMP obligations?**

97. ComReg's function under Regulation 31 is to make a determination to ensure compliance with (SMP) obligations to resolve the dispute.
98. Eircom considers that the existing SLAs are fully in line with its SMP obligations, as they set out service levels and provide for compensation when these levels are not met.
99. Having considered the dispute and the submissions received in response to the Draft Determination, ComReg is of the view that the terms of the existing SLAs the subject of the dispute (as they apply to performance targets for repair times) are matters which are in connection with existing obligations under the Access Regulations. ComReg notes Eircom's obligations to provide access in a fair, reasonable and timely manner and more specifically to

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<sup>31</sup> Source: Table 3 on page 4 of the published Dispute at : <http://www.comreg.ie/fileupload/publications/ComReg15127a.pdf>

do the following: conclude legally binding SLAs which include provisions for performance metrics; and negotiate in good faith in relation to the conclusion of legally binding and fit-for-purpose SLAs.

100. ComReg is obliged in making its determination to have regard to the objectives set out in Section 12 of the Acts and Regulation 16 of the Framework Regulations. Having considered the matter, and as explained further in Section 5.3 below, ComReg's view is that the structure of the existing SLAs in question inadequately reflect these. The lack of agreement between the parties to the dispute necessitates that ComReg act to resolve it.
101. As explained in Section 5.3 below, ComReg's view is that the existing SLAs do not adequately compensate retail operators for costs incurred as a consequence of failures in wholesale performance; do not encourage Eircom to optimise its performance in respect of fault repair since there is only a limited incentive to improve performance beyond the thresholds in the existing SLAs; and do not promote efficiency in that Eircom does not face the correct price signals by which to evaluate its investments because the true cost of service outages are not reflected in the SCs of existing SLAs. ComReg's view is that the existing SLAs are therefore not fit for purpose.
102. Furthermore, ComReg's view is that the inability of the parties to the Dispute to agree revised repair performance targets indicates that there is a genuine dispute in connection with whether the SLAs are fit-for-purpose. ComReg's conclusion is not intended to constitute a finding of breach on the part of Eircom. Rather, in the context of resolving the dispute, ComReg is conscious of the need for it to make a determination in order to ensure compliance with Eircom's obligation to provide access in a fair, reasonable and timely manner.<sup>32</sup>

### 5.3 SLA incentives

103. The dispute centres on the fault repair performance targets in the SLAs for SB-WLR and LLU. For the purposes of resolving the dispute it is thus essential to consider the purpose of SLAs in the context of ComReg's objectives.<sup>33</sup>
104. Eircom highlighted that the structure of SLAs is not in scope for this dispute and fundamentally disagreed with ComReg's view in the Draft Determination that the structure of the existing SLAs means that they are not "fit for purpose" on the basis that they do not compensate operators for the costs associated with wholesale performance below a certain level. It is Eircom's view that the main objective of an SLA is to agree service levels and to provide for compensation when they are not met. When service levels are met, according to Eircom, there is no basis for claiming compensation.
105. ComReg in its Draft Determination did not suggest that the Referring Parties should have "access to a fault-free network" nor did ComReg mandate a performance target in that all faults must be repaired in two days. ComReg proposed a point in time, a trigger, at which point

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<sup>32</sup> With particular reference to Regulation 12(3) of the Access Regulations: see Section 4.2 above.

<sup>33</sup> ComReg's proposed determination is evaluated more fully in Section 6.

the SC should be paid by Eircom to operators. ComReg acknowledges that there is a balance to be maintained to ensure that there is an incentive for Eircom to improve performance in order to avoid paying out SCs. Once Eircom meets a “reference performance”, any SCs paid on those lines where the reference performance has been met would, in principle, be recoverable through wholesale access pricing. Wholesale access pricing is, however, outside the scope of this dispute and the Final Determination. ComReg did not propose to set a mandatory performance target in the Draft Determination nor does it do so in this Final Determination.

106. Appropriate service performance is of critical importance to the development of competition, particularly as retail operators can be constrained in their ability to offer a credible level of service to their customers if they do not have some degree of assurance over the quality of service provided to them by Eircom. If there are service faults at a wholesale level, this directly affects the quality of the service that a retail operator can provide to its end user. This can have other consequences for the retail operator in terms of its costs and ability to compete. There are also obvious implications for the welfare of end users of telecommunications services.
107. The Referring Parties sought to put in place repair performance targets which incentivise Eircom to achieve a repair performance of 85% of faults repaired within 2 working days, 95% within 5 working days and 100% within 10 working days. Eircom maintains that these targets are not reasonable and has therefore offered a figure of 80% (with some caveats) of faults within 2 working days, 92% within 5 working days and 100% within 10 working days. The Referring Parties accepted this offer but submitted this dispute in parallel.
108. The existing SLA regime results in a situation whereby if Eircom achieves its proposed SLA targets of 80%, 92% and 100% no SC payments would be made for repairs which fall inside that repair performance target. If, for example, Eircom’s actual performance is that 22% of faults take more than 2 working days to repair, 9% of faults take more than 5 working days to repair and 3% of faults take more than 10 working days to repair; compensation would be paid for 2% of faults (2 working days), 1% of faults (5 working days) and 3% of faults (10 working days). The Final Determination eliminates the averaging of fault durations inherent in the existing SLA structure whereby long duration faults (i.e. fault which last in excess of the SLA target repair timeline (such as the two day targets)) can be offset against faults that are repaired more quickly. This means that long duration faults can exist without any service credits being paid which in turn limits the incentive to repair these faults more quickly.
109. The Parties to the dispute appear to accept that there is some measure of performance short of perfection which should be deemed to be acceptable. It also seems to be accepted that there should be some form of compensation paid by Eircom when service levels drop below this acceptable level. However, the level of performance that should be treated as acceptable is not agreed between the parties.
110. It is notable that under the existing SLA regime, the method of calculating SCs provides no incentive to Eircom to improve its repair performance once it achieves the SLA repair performance targets. In the example above there is no incentive arising from the proposed compensation mechanism to increase the percentage of repairs completed within five working days once the 92% target is achieved.

111. ComReg also notes that there appears to be a limited correlation under the parties' proposals between the duration of a fault and the level of SC payable. It seems likely that the level of cost caused by a particular service outage is proportional to its duration (i.e. the longer the service outage, the greater the cost). This would suggest that SCs should reflect the duration of particular faults. However, there may also be an argument, on grounds of practicality and proportionality, that a brief outage due to a fault should attract no SC payment. Accordingly, ComReg proposed that SCs would be payable, on a per day basis, only on faults extant for more than two working days.
112. ComReg notes that its revised SC structure means that Eircom always has an incentive to complete fault repairs. Although the level of SCs is outside the scope of this dispute, ComReg notes that to the extent that SCs were to reflect the overall cost to end users of an outage then Eircom would be incentivised to improve services up to the point where the incremental cost of doing so is less than the out-payments in the form of SCs.
113. Eircom submits that the SLAs should be established on the basis of the aggregate performance levels that have been the practice to date, with percentage targets for two day, five day and ten day fault repair times. ComReg is of the view that aggregating (i.e. averaging) of fault durations inherent in the existing SLA structure means that long duration faults (i.e. faults which last in excess of the SLA target repair timeline, such as the two day target), can be offset against faults that are repaired more quickly. The outcome of this averaging is that long duration faults can exist without any SCs being paid, this in turn limits the incentive to repair long duration faults more quickly.
114. As a related matter, ComReg notes that it did not intend that an individual payment be made for every fault which lasted for more than two days as this would be administratively difficult. ComReg has therefore clarified in the Final Determination that, for the purpose of payment, the relevant calculation should be made on a periodic basis (for example, monthly or quarterly, as agreed between the parties).
115. It is ComReg's intention that no individual fault would attract more than one two-day threshold. So, for example, a fault occurring in mid-July which lasted until mid-August would attract a two-day threshold in July but none in August (i.e., all fault days in August would attract an SC). A fault which occurred on the last day of July and lasted a week would attract a threshold of one day in July and one day in August.
116. ComReg has not taken a view as to whether the quantum of SC that is applicable per line per day should be set at either a fixed daily rate or change in value as the fault duration increases. SCs are outside the scope of this Final Determination are to be agreed between the parties.
117. Annex 1 sets out example calculations of SCs.

## 5.4 Cost Recovery

118. As previously noted and referenced above, ComReg remains of the view that the Draft and Final Determinations are within ComReg's remit under Regulation 31 of the Framework Regulations. The cost to Eircom of paying the SCs would, in principle, be recoverable through wholesale access prices where a separately agreed level of performance (i.e. the "reference

performance” established by ComReg through separate submissions from Eircom to ComReg as part of the existing process for the periodic review of wholesale access pricing provided for in D03/16) has been met. ComReg’s view remains that the Final Determination is not about setting binding wholesale performance targets or determining the implications on wholesale pricing. However, ComReg has acknowledged that the Final Determination may have implications for wholesale pricing. Fault repair is already included in the wholesale access pricing cost stack.

119. At or above a certain “reference performance” level, costs arising from SCs paid for the fault repair of SB-WLR and LLU would be included in the Eircom cost stack used for the purpose of setting the appropriate level of wholesale access pricing under Eircom’s Price Control obligations for SB-WLR and LLU. On this basis, it is ComReg’s view that, although the mechanism for recovery of excess costs from SCs is not within the scope of this dispute, it is within the scope of SMP regulation in general. ComReg considers that it is appropriate to confirm that costs incurred pursuant to this Final Determination may be recovered by Eircom through the mechanisms already imposed under other existing SMP obligations.
120. Eircom also states that ComReg’s recent market analysis of the call origination market<sup>34</sup> did not impose specific service levels for SLAs. Eircom is of the view that “*ComReg may not do now what it did not find necessary to do when imposing on eir obligations based on the nature of the problems identified in the market analysis.*” Eircom believes that ComReg, in determining a dispute, must ensure that its proposals ensure compliance with existing obligations. Eircom claims that the requirement in the Draft Determination that Eircom pays SCs for all faults not repaired within two days is “*outside the scope of what ComReg may require of Eir*” and is unreasonable and inconsistent with Eircom’s obligation to meet “reasonable” requests for access. Eircom also implies that it is difficult to understand how a requirement to exceed, in its view, an “efficient” level of performance could be consistent with Eircom’s obligations and more generally with ComReg’s statutory duties and objectives to ensure efficient investments.
121. In response to these points, ComReg reiterates that its Determination relates to SLAs and the circumstances under which SCs will be paid and is not concerned with the setting of mandatory performance targets. ComReg has considered Eircom’s points around the scope of the dispute in Section 2.2 as well as Eircom’s SMP obligations in Section 4.2 below. It should be noted that a two day fault repair was not mandated as part of the Draft Determination as a binding target nor is it mandated in the Final Determination. ComReg is establishing a point in time, at which point the SCs should be paid by Eircom to operators. There is a balance to be maintained in order to ensure that there is an incentive for Eircom to improve performance in order to avoid paying out SCs. Once Eircom meets a “reference performance”, any SCs paid on those lines where the reference performance has been met would, in principle, be recoverable through wholesale access pricing. Eircom may choose to reduce or eliminate altogether its SC payments by exceeding the reference performance but it is not obliged to do so. In these circumstances there would be no net cost to Eircom. Wholesale access pricing is, however, outside the scope of this dispute and the Final Determination. It is

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<sup>34</sup> ComReg Document No 15/82 (Decision No D05/15) - <https://www.comreg.ie/publication/market-review-wholesale-fixed-voice-call-origination-and-transit-markets>

for Eircom to apply to ComReg to adjust wholesale prices to reflect these costs in wholesale prices.

## 5.5 Relationship to USO PIP3 penalties

122. In paragraph 23.1 of the Dispute Referral, the Referring Parties make reference to the PIP3 mechanism. The Referring Parties submit that, by failing to provide at least equivalent SLA performance metrics at wholesale level under the SLAs, Eircom is in breach of its obligation to offer and provide access on a non-discriminatory basis.
123. Eircom's position is that it is not appropriate to establish a formal and direct link between its formal obligations to achieve USO performance targets and the construction of a CGA SLA.
124. PIP3 was based on D02/08 issued in May 2008 which set legally binding retail performance targets in relation to Eircom's quality of service performance under certain aspects of the USO. Eircom established the PIP in 2010 which was then extended to the PIP2 and then to the PIP3 (which ended in December 2015).
125. The enforcement mechanism established by PIP3 set a level which if not achieved for USO triggered penalty payments to ComReg.
126. ComReg notes that the associated metrics which were in place for PIP3 and the SLAs relating to the CGA products are not the same. The definition applied to the relevant metrics (i.e. the definition of a fault) also differs.
127. The PIP3 mechanism and the associated payment to ComReg related to a penalty for a failure to meet PIP3 requirements rather than the SC provided for retail costs associated with the delays in repair of the wholesale product under the SLA.
128. Eircom's *actual* performance delivery as between its retail arm and OAOs must be non-discriminatory and is monitored by way of the publication of KPIs which compare retail and wholesale performance. This implies that service improvements driven at the retail level by USO targets must be achieved in equal measure at the wholesale level.

## 5.6 Force Majeure

129. The submissions received from Eircom, ALTO and the Referring Parties regarding force majeure are summarised at Section 3.4 above.
130. The Draft Determination proposed that a SC shall be payable irrespective of whether the fault is wholly or partly attributable to a force majeure incident.
131. Eircom is of the view that ComReg's arguments around efficiency are "*fundamentally flawed and incorrect*" and that ComReg's proposals would provide for "*an unwarranted selective advantage to the benefit of other operators and the detriment of Eir.*" Eircom does not agree that it should pay for unforeseeable or exceptional events that impact on its performance, it believes that imposing SCs where "force majeure" applies is not in accordance with the principles of "reasonableness and fairness".

132. The Referring Parties were encouraged by ComReg’s explicit recognition that SCs should reflect the range of costs which are borne by the Referring Parties including the “*costs of compensating end users, revenue foregone, reputational damage....and also that “Storm Mode” does not have the effect of suspending the operation of the SLAs*”.
133. ComReg notes that there are force majeure provisions in:
- (a) the Eircom Access Reference Offer;
  - (b) the Reference Interconnect Offer;
  - (c) the existing LLU SLA; and
  - (d) the existing SB-WLR SLAs.
134. The provisions in the Eircom LLU and SB-WLR SLAs are relevant to the exclusion of faults from the calculation of SLA SCs. Below is an extract from Appendix 1 of the Eircom SB-WLR SLA Issue 3.0 (Effective from 1 December 2016)<sup>35</sup>:
- “Exclusions*
- The circuit will be deemed available to the SB-WLR Operator and is therefore excluded for the purposes of calculating credits if the non-availability arises from or is otherwise caused or contributed to by the following circumstances:*
- *Where the fault is caused by, third party activities such as cable damage, or gunshot.*
  - *Where the fault is caused by severe weather conditions such as storms, flooding fire or lightning ...”*
135. On this basis, under the existing LLU or SB-WLR SLA, a fault is only excluded from the payment of SCs if the fault or non-availability of service is caused or contributed to by the force majeure event. Faults or non-availability of service that are not caused or contributed to by the force majeure event will not be excluded from the payment of SCs.
136. Having considered the submissions, ComReg has accepted that it would be disproportionate to insist that the impact of genuine force majeure events should attract a SC. ComReg's view is that faults which are specifically and incrementally caused by force majeure events may be excluded from the calculation of SCs. Having reviewed the latest versions of the SLAs in scope it appears that existing provisions operate in a manner consistent with this principle and therefore there is no need to intervene at this stage.
137. ComReg has therefore amended its Final Determination to remove the requirement that a SC shall be payable irrespective of whether the fault is wholly or partly attributable to a force majeure incident.

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<sup>35</sup> This text is mirrored in Appendix 1 of the Eircom SLA for Local Metallic Path (ULMP), Line Sharing (LS) and Combined GNP and ULMP (GLUMP) Issue 14 (Effective from 1 December 2016).

138. ComReg notes that Eircom's application of force majeure exclusions under the existing SLA impacts the payment of SCs in respect of faults extant in excess of two working days as required by this Final Determination. To ensure that there is clarity to the Referring Parties with regard to this application, ComReg has amended the Determination to require that a comprehensive set of terms and conditions be put in place governing the circumstances and the process by which faults are excluded from the payment of SCs due to force majeure.

## **5.7 Summary: Proposed Basis for a Repair SLA**

139. ComReg still considers that the level of SCs, which are outside the scope of the dispute, should be determined through negotiation between Eircom and the Referring Parties. This would provide Eircom with an incentive to improve services up to the point where the incremental cost of doing so is less than the out payments in the form of SCs.
140. SCs should, in principle, address all faults which are not repaired, not just a proportion of these faults. ComReg therefore requires that SCs would apply to all faults extant for more than 2 working days.
141. ComReg's view remains that the timescales themselves should be a proxy for the severity and hence associated retail costs for operators of such faults. SCs should therefore be proportionate to the duration of a fault. ComReg requires that this be done by calculating SCs on a per diem per fault basis, in a defined and agreed period such that the amount paid per fault reflects the duration of the outage in excess of two working days.
142. In the event there are genuine practical difficulties in implementing this structure, ComReg may, at its absolute discretion, accept a proposal from Eircom which may vary in detail, but not in substance, from the requirements of the Final Determination.

## 6 Evaluation of ComReg's Solution

### 6.1 Options for resolving the dispute

143. As noted at paragraph 9 above, ComReg has considered a number of options for resolving the dispute:

- (a) Option (a) Breach determination.
- (b) Option (b) Select one of the proposals put forward by the Referring Parties and/or Eircom.
- (c) Option (c) Oblige the parties to enter into good faith negotiations.
- (d) Option (d) Oblige the parties to implement ComReg's proposed solution.

144. ComReg will now consider each of these options in turn.

#### 6.1.1 Breach determination

145. The alleged failure of Eircom to negotiate fit-for-purpose SLAs raises the issue of Eircom's potential non-compliance with an SMP obligation. Regulation 31 of the Framework Regulations does not oblige ComReg to make a finding of non-compliance, or to make such a finding prior to making a dispute determination. In defining the scope of the dispute, ComReg noted that a breach determination was out of scope in the context of a dispute. Accordingly, ComReg does not propose to make a formal finding on the issue of Eircom's compliance with its SMP obligations in the context of this dispute resolution process. ComReg considers that its primary obligation in the context of dispute resolution is to resolve the dispute and ensure future compliance with Eircom's SMP obligations.

#### 6.1.2 Select one of the approaches suggested by the Referring Parties

146. The Referring Parties requested ComReg to increase the performance targets in each of the SLAs under dispute as follows:

Repair time	Performance target requested by the Referring Parties
2 working days	85%
5 working days	95%
10 working days	100%

147. ComReg notes that the performance targets requested by the Referring Parties is based on essentially the same methodology as Eircom's BAFO – both of which reflect existing SLAs. Consequently they both, in ComReg's view, suffer from similar deficiencies in that they:
- (a) do not adequately compensate retail operators for costs incurred as a consequence of failures in wholesale performance;
  - (b) do not encourage Eircom to optimise its performance in respect of fault repair since there is only a limited incentive to improve performance beyond the thresholds in the proposed SLAs; and
  - (c) do not promote efficiency in that Eircom does not face the correct price signals by which to evaluate its investments because the true cost of service outages are not reflected in the proposed SCs.
148. ComReg thus considers that the performance targets requested by the Referring Parties are not an optimal solution to ensure compliance with the underlying SMP obligations.

### **6.1.3 Oblige the parties to enter into good faith negotiations**

149. A further option would simply be to oblige the parties to enter into good faith negotiations in order to conclude a fit-for-purpose SLA. This would essentially be a restatement of Eircom's obligations under the relevant SMP decisions to "*negotiate in good faith with undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs*".
150. However, given that negotiations have already taken place between Eircom and the Referring Parties and that they have been unable to reach a satisfactory agreement, this approach is unlikely to yield a different outcome, unless ComReg sets out a framework for the negotiations. Accordingly, simply requiring the parties to engage in negotiations would not, in ComReg's view, amount to an effective or certain resolution of the dispute.

### **6.1.4 Oblige the parties to implement the proposed solution**

151. ComReg's considered view, taking account of submissions received, is that this is the most appropriate mechanism for resolving the dispute in accordance with Regulation 31 of the Framework Regulations.

## **6.2 Assessment of the solution**

152. When making a determination under Regulation 31 of the Framework Regulations, Regulation 31(7) provides that ComReg must have regard to its objectives under Section 12 of the Acts and Regulation 16 of the Framework Regulations, which ComReg has done in this Final Determination. ComReg considers that the solution proposed under this Final Determination is the most appropriate means of fulfilling its statutory objectives given the nature of the Dispute.

153. Section 12 of the Communications Regulation Acts sets out ComReg's objectives in the performance of its functions. Section 12(1)(a) sets out ComReg's objectives in respect of electronic communications networks, services and associated facilities as follows:

*"12. (1) The objectives of the Commission in exercising its functions shall be as follows—*

*(a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities—*

*(i) to promote competition,*

*(ii) to contribute to the development of the internal market, and*

*(iii) to promote the interests of users within the Community"*

154. In relation to the objectives at Section 12(1)(a), Section 12(2) requires that ComReg take all reasonable measures which are aimed at achieving those objectives. The relevant measures listed in Section 12(2) include the following:

*"12. (2)(a) in so far as the promotion of competition is concerned:*

*(i) ensuring that users... derive maximum benefit in terms of choice, price and quality*

*(ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector"*

155. ComReg has also had regard to the objectives and regulatory principles set out in Regulation 16 of the Framework Regulations. These include:

*"16. (2) 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—*

*...*

*(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."*

156. In light of the context of the dispute (i.e., access obligations), ComReg is also cognisant of its obligations under Regulation 6 of the Access Regulations which provides as follows:

“6. (1) *The Regulator shall, acting in pursuit of its objectives set out in section 12 of the [Communications Regulation Acts] and Regulation 16 of the Framework Regulations, encourage and, where appropriate, ensure, in accordance with these Regulations, adequate access, interconnection and the interoperability of services in such a way as to—*

*(a) promote efficiency,*

*(b) promote sustainable competition,*

*(c) promote efficient investment and innovation, and*

*(d) give the maximum benefit to end-users.”*

157. ComReg considers that the most relevant objectives and principles for the purposes of the determination can be classified into the following headings:

- (a) Impact on competition, including any potential distortions of competition and the impact on infrastructure-based competition;
- (b) Impact on the internal market/provision of pan-EU services;
- (c) Impact on end users/ the maximisation of consumer benefits;
- (d) Efficiency
- (e) Objectivity, transparency, non-discrimination and proportionality;

### **6.2.1 Impact on competition**

158. ComReg regards the Final Determination as having a positive impact on competition. It will tend to improve the competitiveness of the Eircom platform relative to other platforms in the market thereby stimulating inter-platform competition. It will also provide greater certainty to the Referring Parties who can have greater confidence that they can meet their customers' requirements. ComReg does not consider that the proposal causes any distortion of competition or inhibits infrastructure-based competition.

### **6.2.2 Impact on the internal market/provision of pan EU services**

159. ComReg remains of the view that the Final Determination leans positively towards the internal market in that a pan EU operator considering entering the Irish market can do so with extra confidence that its service offering will be attractive to end users. Similarly the Final Determination will benefit existing operators who are active in more than one member state.

### **6.2.3 Impact on end users/ the maximisation of consumer benefits**

160. ComReg's view remains that the Final Determination is positive for end users in that it will encourage improved fault repair performance up to the point where it makes economic sense.

The Final Determination, in ComReg's view, ranks well against the parties' proposals in this regard.

#### **6.2.4 Efficiency**

161. ComReg believes the Final Determination will encourage efficiency. This is because by capturing the cost of outages to the Referring Parties and structuring SCs in a way that encourages Eircom to repair faults up to the point where it makes economic sense enhances overall efficiency. If SCs are structured to reflect the true costs to the Referring Parties and their customers, this would set an appropriate measure of cost for Eircom by which to evaluate its investment decisions. If the cost of extra investment in service repair performance or fault mitigation is less than the cost of paying SCs then it will be encouraged to do so. Similarly if the benefits (or avoided cost) to the Referring Parties and their customers of reduced fault durations are less than the cost to Eircom of investing to reduce outlays on SCs then that investment would be inefficient. Under ComReg's Final Determination such inefficiency would not be incentivised. This would be true regardless of the level of performance actually being achieved by Eircom.
162. The parties' proposals are less strong in this regard because there is limited incentive to improve performance beyond the parameters set out in their proposals even where it may make sense to do so in overall economic terms.

#### **6.2.5 Objectivity, transparency, non-discrimination and proportionality**

163. It is ComReg's position that the structure under the Final Determination is preferable to the existing SLA structure in a number of respects:
  - (a) Firstly, the Final Determination eliminates the averaging of fault durations inherent in the existing SLA structure whereby long duration faults (i.e. fault which last in excess of the SLA target repair timeline (such as the two day targets)) can be offset against faults that are repaired more quickly. This means that long duration faults can exist without any SCs being paid which in turn limits the incentive to repair these faults more quickly.
  - (b) Second, the Final Determination should encourage efficient outcomes. If the quantum of SC is set to reflect the cost to users of the network of an outage, the cost structure that Eircom faces will reflect the costs to users of a fault occurrence. Eircom, if it behaves rationally, will invest in fault prevention or repair up to the point at which the incremental cost of such investment equals the incremental amount of SC to be saved by such investment. Since the amount of SC saved should reflect the incremental benefit to users of the network (in terms of shorter fault durations) this will lead to an economically efficient outcome.
  - (c) Third the Final Determination means that it is unnecessary for ComReg to decide what the optimal duration of a fault should be. Eircom is not compelled to achieve any particular level of fault duration. Instead, Eircom would be encouraged to achieve an efficient level of repair performance whereby the incremental benefits of improving the level of service equate to the incremental cost of doing so.

164. The Final Determination is transparent and easily understood since it is based on a simple formula which should be easily implemented.
165. The Final Determination is proportionate in that faults attributable to genuine force majeure events will be excluded from the calculations and greater clarity will be brought to bear on the conditions in which a force majeure event is declared.
166. Furthermore, if ComReg treats SCs paid in circumstances where the reference performance has been achieved as an efficient cost and therefore recoverable through regulated wholesale prices, there would be no net cost to Eircom. Indeed, if Eircom exceeds the reference performance, it would obtain a net financial benefit. A net cost would only arise where Eircom has failed to achieve its reference performance. ComReg views this as a reasonable outcome.
167. ComReg's view remains that the Final Determination is objective and non-discriminatory in that all operators would share in the benefits of Eircom achieving the level of performance. There is a balance to be maintained to ensure that there is an incentive for Eircom to improve performance in order to avoid paying out SCs. Network improvements as a result of this Final Determination will benefit all operators in that Eircom will minimise its SCs and all operators will benefit from Eircom's investment in the network.
168. Finally, the Final Determination incorporates the ability to calculate and make payments on an periodic basis in a defined and agreed period, thus ensuring that no disproportionate administrative burden is placed on Eircom.

### **6.3 Implications for retail operators**

169. It is likely that a retail operator will wish to understand the details of the resolution of individual faults or reasons for associated delays to resolution of faults as an input to its decision process relating to retail compensation. This will be particularly important where the wholesale SLAs provide for exemptions for SLA SCs. An example may be that a fault is proven to relate to the failure of a customer's own device, such as a phone handset not provided by the retail service provider, or a delay in repair is due to a customer not being available for necessary internal work to be undertaken. Where this is considered appropriate, ComReg considers that the retail operators should engage with Eircom to ensure appropriate information exchange mechanisms are implemented and any relevant system development undertaken.
170. As the terms of the Final Determination are different to the existing model ComReg considers that retail operators may need time to integrate the information flows associated with the service failures and the relevant SCs paid to them. Accordingly ComReg has allowed that a reasonable period for the implementation of the revised SLA parameters as set out in this Final Determination (i.e. within three months of the effective date of the Final Determination – see Final Determination at Annex 2, section 4.1 (ii)).

### **6.4 Other considerations**

171. ComReg notes that the use of calendar days (as opposed to working days) is usually more appropriate as a measure in the context of retail faults given that consumers need access to

telephony services at weekends and during holiday periods as well as on working days. Notwithstanding this, ComReg considers that (unless otherwise agreed between the parties) the wholesale SLA should continue to operate in working days. ComReg would note that the SLA adopted under the Final Determination would still incentivise resolving faults during out-of-hours periods as a means of keeping service level payments to a minimum.

# Annex: 1 Example Calculation

As set out in the Final Determination at 4.1(ii)(a) “...that all faults extant in excess of two (2) working days shall attract a service credit per line per working day, until such time as that fault is cleared;.”

In the following, ComReg sets out an example of the calculation of the SCs payable pursuant to the Final Determination.

## Definitions

For the purpose of this example:

**‘Agreed Daily SC’** is the Service Credit (**SC**) agreed between Eircom and OAOs, payable per line per working day on faults extant in excess of two (2) working days until such time as that fault is cleared. This need not necessarily be the same for every day a fault is extant but, for this example, ComReg assumes in the interest of simplicity a constant value of €2 per fault per day. (While noting that the value(s) of the Agreed Daily SC is outside the scope of this Final Determination).

**‘Fault Duration’** is the number of working days from the day an individual fault on a line was logged to the day that fault was cleared.

- A fault logged and cleared on the same working day has a Fault Duration of 1 working day.
- A fault logged on a non-working day and cleared the same day or the following non-working day has a Fault Duration of 0 working days.
- For a fault logged on a non-working day and cleared on a working day, the Fault Duration is calculated from the next working day after the fault was logged to the day the fault was cleared.
- For a fault logged on a working day and cleared on a non-working day, the Fault Duration is calculated from the day the fault was logged to the last working day before the fault was cleared.

**‘Period’** is a calendar month. A fault is counted in the period in which the fault was cleared.

**‘SC Days’** is the Fault Duration in days minus 2 days.

**‘Working day’** means the time between 09:00 to 17:00 on any day other than Saturdays, Sundays, or Public Holidays as defined in the Second Schedule to the Organisation of Working Time Act 1997.

## Data

The following table presents sample data for 20 lines over 3 operators, ‘Operator A’, ‘Operator B’ and ‘Operator C’ for 2 Periods, January and February 2017.

Line Identifier	Operator	Fault Logged	Fault Cleared	Fault Duration (Working Days)	SC Days	Fault caused by/attributed to Force Majeure
01-0000001	A	Fri 20/01/17	Fri 27/01/17	6	4	Yes
01-0000002	A	Wed 25/01/17	Fri 27/01/17	3	1	No
01-0000003	C	Wed 25/01/17	Mon 30/01/17	4	2	Yes
01-0000004	A	Wed 25/01/17	Tue 31/01/17	5	3	Yes
01-0000005	A	Wed 25/01/17	Fri 03/02/17	8	6	No
01-0000006	B	Thu 26/01/17	Fri 27/01/17	2	0	Yes
01-0000007	A	Thu 26/01/17	Thu 26/01/17	1	0	No
01-0000008	B	Thu 26/01/17	Tue 31/01/17	4	2	No
01-0000009	C	Fri 27/01/17	Mon 30/01/17	2	0	No
01-0000010	B	Sat 28/01/17	Tue 31/01/17	2	0	No
01-0000011	B	Fri 27/01/17	Tue 31/01/17	3	1	No
01-0000012	B	Fri 27/01/17	Wed 08/02/17	9	7	Yes
01-0000013	C	Tue 31/01/17	Wed 01/02/17	2	0	No
01-0000014	B	Tue 31/01/17	Wed 01/02/17	2	0	No
01-0000015	A	Sat 04/02/17	Sun 05/02/17	0	0	No
01-0000016	A	Wed 01/02/17	Fri 03/02/17	3	1	No
01-0000017	C	Wed 01/02/17	Sat 11/02/17	8	6	Yes
01-0000018	B	Wed 01/02/17	Wed 08/02/17	6	4	Yes
01-0000019	C	Thu 02/02/17	Fri 03/02/17	2	0	No
01-0000020	A	Fri 03/02/17	Mon 06/02/17	2	0	No

ComReg will use the data above to provide sample calculations of SCs payable pursuant to the Final Determination to each of the Operators in each of the periods. All operators have a combination of faults logged and cleared in the same period and; faults logged in one period and cleared in the following period. In terms of each operator, the following should be noted:

*Operator A:*

- Has a fault in January logged and cleared on the same working day.
- Has a fault in February logged on a non-working day and cleared the next non-working day.

*Operator B*

- Has a fault in January logged on a non-working day.
- Has SCs payable in January only. 3 faults are cleared in February but no SC Payment is due on the basis of either Fault Duration or Force Majeure.

*Operator C*

- Has a fault in February cleared on a non-working day.
- Has no SCs payable in either period on the basis of either Fault Duration or Force Majeure.

## Operator A

### Period: January 2017

#### Data

Line Identifier	Operator	Fault Logged	Fault Cleared	Fault Duration (Working Days)	SC Days	Fault caused by/attributed to Force Majeure
01-0000001	A	Fri 20/01/17	Fri 27/01/17	6	4	Yes
01-0000002	A	Wed 25/01/17	Fri 27/01/17	3	1	No
01-0000004	A	Wed 25/01/17	Tue 31/01/17	5	3	Yes
01-0000007	A	Thu 26/01/17	Thu 26/01/17	1	0	No

#### Calculation

Total Faults Cleared in period = 4

Total Faults Cleared in period not caused by/attributed to Force Majeure = 2

Aggregate SC Days for Faults Cleared in period not caused by/attributed to Force Majeure [x] = 1

Agreed Daily SC [y] = €2

Total SC Payable to Operator A in January = [x] \* [y] = 1 \* €2 = €2

### Period: February 2017

#### Data

Line Identifier	Operator	Fault Logged	Fault Cleared	Fault Duration (Working Days)	SC Days	Fault caused by/attributed to Force Majeure
01-0000005	A	Wed 25/01/17	Fri 03/02/17	8	6	No
01-0000015	A	Sat 04/02/17	Sun 05/02/17	0	0	No
01-0000016	A	Wed 01/02/17	Fri 03/02/17	3	1	No
01-0000020	A	Fri 03/02/17	Mon 06/02/17	2	0	No

#### Calculation

Total Faults Cleared in period = 4

Total Faults Cleared in period and not caused by/attributed to Force Majeure = 4

Aggregate SC Days for Faults Cleared in period and not caused by/attributed to Force Majeure [x] = 7

Agreed Daily SC [y] = €2

Total SC Payable to Operator A in February = [x] \* [y] = 7 \* €2 = €14

## Operator B

### Period: January 2017

#### Data

Line Identifier	Operator	Fault Logged	Fault Cleared	Fault Duration (Working Days)	SC Days	Fault caused by/attributed to Force Majeure
01-0000006	B	Thu 26/01/17	Fri 27/01/17	2	0	Yes
01-0000008	B	Thu 26/01/17	Tue 31/01/17	4	2	No
01-0000010	B	Sat 28/01/17	Tue 31/01/17	2	0	No
01-0000011	B	Fri 27/01/17	Tue 31/01/17	3	1	No

#### Calculation

Total Faults Cleared in period = 4

Total Faults Cleared in period not caused by/attributed to Force Majeure = 3

Aggregate SC Days for Faults Cleared in period not caused by/attributed to Force Majeure [x] = 3

Agreed Daily SC [y] = €2

Total SC Payable to Operator B in January = [x] \* [y] = 3 \* €2 = €6

### Period: February 2017

#### Data

Line Identifier	Operator	Fault Logged	Fault Cleared	Fault Duration (Working Days)	SC Days	Fault caused by/attributed to Force Majeure
01-0000012	B	Fri 27/01/17	Wed 08/02/17	9	7	Yes
01-0000014	B	Tue 31/01/17	Wed 01/02/17	2	0	No
01-0000018	B	Wed 01/02/17	Wed 08/02/17	6	4	Yes

#### Calculation

Total Faults Cleared in period = 3

Total Faults Cleared in period and not caused by/attributed to Force Majeure = 1

Aggregate SC Days for Faults Cleared in period and not caused by/attributed to Force Majeure [x] = 0

Agreed Daily SC [y] = €2

Total SC Payable to Operator B in February = [x] \* [y] = 0 \* €2 = €0

## Operator C

### Period: January 2017

#### Data

Line Identifier	Operator	Fault Logged	Fault Cleared	Fault Duration (Working Days)	SC Days	Fault caused by/attribution to Force Majeure
01-0000003	C	Wed 25/01/17	Mon 30/01/17	4	2	Yes
01-0000009	C	Fri 27/01/17	Mon 30/01/17	2	0	No

#### Calculation

Total Faults Cleared in period = 2

Total Faults Cleared in period not caused by/attribution to Force Majeure = 1

Aggregate SC Days for Faults Cleared in period not caused by/attribution to Force Majeure [x] = 0

Agreed Daily SC [y] = €2

Total SC Payable to Operator C in January = [x] \* [y] = 0 \* €2 = €0

### Period: February 2017

#### Data

Line Identifier	Operator	Fault Logged	Fault Cleared	Fault Duration (Working Days)	SC Days	Fault caused by/attribution to Force Majeure
01-0000013	C	Tue 31/01/17	Wed 01/02/17	2	0	No
01-0000017	C	Wed 01/02/17	Sat 11/02/17	8	6	Yes
01-0000019	C	Thu 02/02/17	Fri 03/02/17	2	0	No

#### Calculation

Total Faults Cleared in period = 3

Total Faults Cleared in period and not caused by/attribution to Force Majeure = 2

Aggregate SC Days for Faults Cleared in period and not caused by/attribution to Force Majeure [x] = 0

Agreed Daily SC [y] = €2

Total SC Payable to Operator C in February = [x] \* [y] = 0 \* €2 = €0

# Annex: 2 Final Determination

**Determination to resolve the dispute between (i) BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited, Vodafone Ireland Limited and (ii) Eircom Limited relating to Eircom Limited's current generation access regulated contract terms**

## 1. STATUTORY POWERS GIVING RISE TO THIS DETERMINATION

1.1. This Determination is made by the Commission for Communications Regulation (**ComReg**) and relates to a dispute within the scope of Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011 (the **Framework Regulations**) in connection with existing obligations imposed pursuant to Regulations 8 and 12 of the Access Regulations and in the following SMP decisions:

- (i) Market Review: Wholesale (Physical) Network Infrastructure Access Market (Market 4), (ComReg Document No 10/39 and Decision No D05/10); and
- (ii) Market Review Wholesale Fixed Voice Call Origination and Transit Markets (ComReg Document No 15/82 and Decision No D05/15).

1.2. This Determination is made:

- (i) Pursuant to Regulation 31 of the Framework Regulations;
- (ii) Having had regard to sections 10 and 12 of the Communications Regulation Acts (as defined below) and Regulation 16 of the Framework Regulations; and
- (iii) Having taken account of submissions received from the Parties.

## 2. DEFINITIONS

2.1. In this Final Determination, unless the context otherwise suggests:

- (i) '**Access Regulations**' means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011);
- (ii) '**Authorisation Regulations**' means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011).

- (iii) **'BT Communications Ireland Limited'** means BT Communications Ireland Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls BT Communications Ireland Limited, and its successors and assigns. For the purpose of this Determination, the terms "subsidiary" and "related company" shall have the meanings ascribed to them in the Companies Act 2014.
- (iv) **'ComReg'** means the Commission for Communications Regulation.
- (v) **'Communications Regulation Acts'** means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).
- (vi) **'Dispute Referral'** means the dispute as submitted by the Referring Parties (via Towerhouse LLP) to ComReg on 16 November 2015.
- (vii) **'Effective Date'** means the date this Determination is published and notified to the Parties.
- (viii) **'Eircom'** means Eircom Limited, trading as Eircom, and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Determination, the terms "subsidiary" and "related company" shall have the meanings ascribed to them in the Companies Act 2014.
- (ix) **'FACO SMP Decision'** means ComReg Decision D05/15<sup>1</sup>.
- (x) **'Framework Regulations'** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011).
- (xi) **'LLU'** means collectively, local loop unbundling in the form of Unbundled Local Metallic Path (**ULMP**), Line Sharing, and combined Geographic Number Portability and ULMP.
- (xii) **'Magnet Networks Limited'** means Magnet Networks Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Magnet Networks Limited, and its successors and assigns. For the purpose of this Determination, the terms "subsidiary" and "related company" shall have the meanings ascribed to them in the Companies Act 2014.

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<sup>1</sup> "Market Review: Wholesale (Physical) Network Infrastructure Access Market (Market 4)", (ComReg Document No.10/39 and Decision No. D05/10);

- (xiii) **'Other Authorised Operator'** or **'OAO'** means an undertaking that is not Eircom, providing an electronic communications network or an electronic communications service authorised under Regulation 4 of the Authorisation Regulations.
- (xiv) **'Parties'** means Eircom and the Referring Parties.
- (xv) **'Referring Parties'** means BT Communications Ireland Limited, Magnet Networks Limited, Sky Ireland Limited and Vodafone Ireland Limited.
- (xvi) **'Sky Ireland Limited'** means Sky Ireland Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Sky Ireland Limited, and its successors and assigns. For the purpose of this Determination, the terms "subsidiary" and "related company" shall have the meanings ascribed to them in the Companies Act 2014.
- (xvii) **'SBWLR'** means single billing wholesale line rental.
- (xviii) **'SLA'** means service level agreement.
- (xix) **'Towerhouse'** means Towerhouse LLP.
- (xx) **'Undertaking(s)'** shall have the same meaning as under Regulation 2 of the Framework Regulations.
- (xxi) **'Vodafone Ireland Limited'** means Vodafone Ireland Limited and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Vodafone Ireland Limited, and its successors and assigns. For the purpose of this Determination, the terms "subsidiary" and "related company" shall have the meanings ascribed to them in the Companies Act 2014.
- (xxii) **'Working day'** means the time between 09:00 to 17:00 on any day other than Saturdays, Sundays, or Public Holidays as defined in the Second Schedule to the Organisation of Working Time Act, 1997.
- (xxiii) **'WPNIA SMP Decision'** means ComReg Decision D05/10<sup>2</sup>

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<sup>2</sup> "Market Review: Wholesale (Physical) Network Infrastructure Access Market (Market 4)", (ComReg Document No.10/39 and Decision No. D05/10);

### 3. SCOPE AND APPLICATION

3.1. This Determination applies to the Referring Parties and Eircom (together the Parties) and is binding upon the Parties. The Parties shall comply with this Determination in all respects.

3.2. This Determination relates to the SMP Obligations set out in:

- Sections 8.1 to 8.4 of the WPNIA SMP Decision as follows
- 8.1 Pursuant to Regulation 13(3) of the Access Regulations, Eircom shall, in relation to the obligations set out under section 7, grant Access to Current Generation WPNIA, in a fair, reasonable and timely manner.
- 8.2 Without prejudice to the generality of section 8.1, Eircom shall:
- (iv) Conclude, maintain or update, as appropriate, legally binding SLAs which include provision for associated Performance Metrics with OAOs;
  - (v) Negotiate in good faith with OAOs in relation to the conclusion of legally binding and fit-for-purpose SLAs;
  - (vi) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter for negotiation between Eircom and Access Seekers and recovery of service credits shall be in the first instance, a matter for the individual Access Seeker and Eircom;
  - (vii) SLAs should detail how service credits are calculated, to include the provision of an example calculation;
  - (viii) Payment of service credits, where they occur, shall be made in a timely and efficient manner.
- 8.3 Pursuant to Regulation 13(3)<sup>3</sup> of the Access Regulations, Eircom shall, in relation to the obligations set out under section 7, grant Access to Current Generation WPNIA, in a fair, reasonable and timely manner.
- 8.4 Without prejudice to the generality of section 8.1, Eircom shall:
- (i) Conclude, maintain or update, as appropriate, legally binding SLAs which include provision for associated Performance Metrics with OAOs<sup>4</sup>;
  - (ii) Negotiate in good faith with OAOs in relation to the conclusion of legally binding and fit-for-purpose SLAs;
  - (iii) Ensure that all SLAs include provision for service credits arising from a breach of an SLA. Agreed service credits shall be a matter for negotiation

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<sup>3</sup> Regulation 13(3) of the 2003 Access Regulations transposed at <http://www.irishstatutebook.ie/eli/2003/si/305/made/en/print#>

<sup>4</sup> See Appendix C, Section 8 of the following link: <http://www.comreg.ie/fileupload/publications/ComReg1039.pdf>

*between Eircom and Access Seekers and recovery of service credits shall be in the first instance, a matter for the individual Access Seeker and Eircom*

- Sections 8.1 to 8.3 of the FACO SMP Decision as follows:

- 8.1 *Pursuant to Regulation 12(3)<sup>5</sup> of the Access Regulations, Eircom shall, in relation to the obligations set out in Section 7 above, grant Undertakings Access in a fair, reasonable and timely manner.*
- 8.2 *Without prejudice to the generality of Section 8.1 above and pursuant to Regulation 12(3) of the Access Regulations, where Eircom receives a request for Access (including Access to those products, services and facilities referred to in Sections 7 and 8 of this Decision Instrument) in accordance with the requirements of this Decision Instrument at the same point in time as a request for another wholesale access product, service or facility, on foot of another Decision Instrument issued by ComReg, Eircom shall ensure that both access requests are met concurrently.*
- 8.3 *Without prejudice to the generality of Section 8.1 above, pursuant to Regulation 12(3) of the Access Regulations, Eircom shall:*
- (i) conclude, maintain or update, as appropriate, legally binding SLAs with Undertakings, which shall include provisions for Performance Metrics;*
  - (ii) negotiate in good faith with Undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs (either in the case of a new SLA or an amendment to an existing SLA). Following a request from an Undertaking for a new SLA or an amendment to an existing SLA Eircom shall within one (1) month of the receipt of such a request provide the Undertaking with details of the SLA Negotiation Period. Negotiations in respect of a new SLA or an amendment to an existing SLA shall be concluded, unless otherwise agreed by ComReg, within six (6) months of the date the Undertaking makes such a request. Within one (1) month of the date the Undertaking makes such a request Eircom may seek an extension to the six (6) month period from ComReg;*
  - (iii) ensure that all SLAs include provision for Service Credits arising from any breach of an SLA;*
  - (iv) ensure that the level of the Service Credits are fair and reasonable;*
  - (v) ensure that SLAs detail how Service Credits are calculated and shall include the provision of an example calculation; and*
  - (vi) ensure that application of Service Credits, where they occur, shall be applied automatically, and in a timely and efficient manner.*

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<sup>5</sup> Regulation 12(3) of the 2011 Access Regulations transposed at: <http://www.irishstatutebook.ie/eli/2011/si/334/made/en/pdf>

- 3.3. In section 9.6 of the Dispute Referral, the Referring Parties highlighted that that *“the discussion on the appropriate level of service level guarantees (SLGs) ...are an essential component of any measure designed to encourage improved performance by a service provider such as eircom. Advancing the discussion on the appropriate level of SLGs cannot commence until the appropriate level of the SLAs has been determined.”* ComReg has thus treated the level of service credits as out of scope of the purposes of the Final Determination.
- 3.4. ComReg has considered the scope of the Dispute Referral and has concluded that the scope for the dispute the subject of this Final Determination is the circumstances in which service credits will be payable in SLAs offered by Eircom in respect of the following:
- (i) LLU in the Wholesale (Physical) Network Infrastructure Access (including shared or fully unbundled access) at a Fixed Location (WPNIA) Market (pursuant to Section 8 of the Decision Instrument at Appendix C of the WPNIA SMP Decision); and
  - (ii) SB-WLR in the Wholesale Call Origination on the Public Telephone Networks Provided at a Fixed Location (FACO) Market (pursuant to Section 8 of the Decision Instrument at Appendix H of the FACO SMP Decision).
- 3.5. Notwithstanding its inclusion in the Dispute Referral, ComReg considers that bitstream managed backhaul in wholesale broadband access (Market 5) is out of the scope of this Final Determination.

## 4. DETERMINATION

- 4.1. In accordance with Regulation 31 of the Framework Regulations, the Communications Regulation Acts, and for the purpose of resolving the dispute between the Referring Parties and Eircom, ComReg hereby determines that:
- (i) The extant contractual obligations in relation to the repair performance targets, under the existing SLAs between the Parties for the services listed at Section 3.4 above, shall, unless otherwise agreed between Eircom and the Referring Parties, continue in force until the newly agreed SLAs pursuant to Section 4.1(ii) of this Determination are implemented.
  - (ii) Within three months of the Effective Date of the this Determination, Eircom shall offer the Referring Parties an SLA in respect of each of the services listed at Section 3.4 above reflecting:
    - (a) that all faults extant in excess of two (2) working days shall attract a service credit per line per working day, until such time as that fault is cleared; and
    - (b) payment of service credits shall be made on a periodic basis for each monthly or quarterly period, such period to be agreed between the parties within the 3 month period from the Effective Date of this Determination; and
    - (c) a comprehensive set of terms and conditions governing the circumstances and the process by which faults are excluded from the payment of SCs due to force majeure.
  - (iii) For the avoidance of doubt, in accordance with Eircom’s obligations of non-discrimination set out at Section 9 of the Decision Instrument at Appendix C of the

WPNIA SMP Decision and Section 9 of the Decision Instrument at Appendix H of the FACO SMP Decision, Eircom must also offer an SLA on the terms set out in Section 4.1(ii) above to any other OAOs to which Eircom provides access to the services listed at Section 3.4 above.

## **5. MAINTENANCE OF OBLIGATIONS**

- 5.1. Unless expressly stated otherwise in this Final Determination, all obligations and requirements contained in Decision Notices, Decision Instruments and Directions made by ComReg applying to the parties and in force immediately prior to the Effective Date of this Final Determination, are continued in force by this Final Determination and the parties shall comply with same.
- 5.2. If any section, clause or provision or portion thereof contained in this Final Determination is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Final Determination and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Final Determination, and shall not in any way affect the validity or enforcement of this Final Determination.
- 5.3. For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and the Parties obligations now set out herein, this Final Determination shall prevail, unless otherwise indicated by ComReg.

## **6. STATUTORY POWERS NOT AFFECTED**

- 6.1. Nothing in this Final Determination shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the Effective Date of this Final Determination).

## **7. EFFECTIVE DATE**

- 7.1. The Effective Date of this Final Determination shall be the date of its publication and notification to the Parties and it shall remain in force until further notice by ComReg.

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**JEREMY GODFREY**

**CHAIRPERSON AND COMMISSIONER**

**THE COMMISSION FOR COMMUNICATIONS REGULATION**

**THE 31<sup>ST</sup> DAY OF JANUARY 2017**

