



Commission for
Communications Regulation

Final Determination in a dispute between Cloud 9 and Eircom

Concerning Eircom charges for facilities and services for the separate sale of regulated retail roaming services

Final Determination

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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1 Glossary

Term	Definition
(EU) No 531/2012	Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).
(EU) No 1203/2012	Official Journal of the European Union (Non-legislative acts) Commission Implementing Regulation (EU) No 1203/2012 of 14 December 2012 on the separate sale of regulated retail roaming services within the Union (OJ L 347, 15.12.2012, p.1)
ARP	Alternative Roaming Provider
Authorisation Regulations	European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011)
Authorised Undertaking	has the same meaning as under Regulation 2 of the Authorisation Regulations
BEREC	Body of European Regulators for Electronic Communications, established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009.
BoR (12) 107	BEREC Guidelines on the application of Article 3 of the Roaming Regulation - Wholesale Roaming Access, 27 September 2012
BoR (12) 109	Roaming Regulation – Choice of Decoupling Method. BEREC opinion on article 5 implementing act, (BoR (12) 109, 27 September 2012).
BoR (13) 15	BEREC Guidelines on Roaming Regulation (EC) No 531/2012 (Third Roaming Regulation) (Excluding Articles 3, 4 and 5 on wholesale access and separate sale of services).
BoR (13) 82	BEREC Guidelines on Roaming Regulation (EC) N 531/2012 (Third Roaming Regulation) (Articles 4 and 5 on Separate Sale of Roaming Services), 5 July 2013.
Cloud 9	Cloud 9 Mobile Communications Limited
Communications Regulation Acts	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)
ComReg	the Commission for Communications Regulation

Term	Definition
Direct Wholesale Roaming Access	the making available of facilities and/or services by a mobile network operator to another undertaking, under defined conditions, for the purpose of that other undertaking providing regulated roaming services to roaming customers.
Domestic Mobile Network	a terrestrial public mobile communications network situated in a Member State that permits a customer to make or receive calls, to send or receive SMS messages or to use packet switched data communications, providing a customer with domestic mobile communications services
Domestic MNO	an Authorised Undertaking operating a Domestic Mobile Network
Eircom	Eircom Limited and its subsidiary Meteor Mobile Communications Limited
ETSI	European Telecommunications Standards Institute
ETSI Standards for the implementation of SSRRRS	Standard technical interfaces, protocols and processes for the implementation of SSRRRS including but not limited to implementation, provisioning, and billing produced maintained and updated from time to time by ETSI which are publicly available through the cooperation platform maintained by ETSI ¹
Framework Directive	Official Journal of the European Communities, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services (2009/140/EC, OJ L 337, 18.12.2009, p. 37).
Framework Regulations	European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)
Member State	Member State of the European Union
Meteor	Meteor Mobile Communications Limited, a subsidiary of Eircom Limited
MNO	The Operator of a terrestrial public mobile communications network situated in a Member State

¹ http://docbox.etsi.org/Reference/Cooperation_Platform_Separate_Sale_of_Roaming_Services/

Term	Definition
Mobile Roaming Regulations	Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013)
NRA	National Regulatory Authority
SSRRRS	separate sale of regulated retail roaming services
Roaming Provider	an undertaking that provides a roaming customer with regulated retail roaming services
regulated data roaming service'	a roaming service enabling the use of packet switched data communications by a roaming customer by means of a mobile device while connected to a visited network. A regulated data roaming service does not include the transmission or receipt of regulated roaming calls or SMS messages, but does include the transmission and receipt of MMS messages;
regulated retail roaming services	regulated roaming services offered by Roaming Providers to Roaming Customers
regulated roaming message SMS	an SMS message sent by a roaming customer, originating on a Visited Mobile Network and terminating on a public communications network within the Union or received by a roaming customer, originating on a public communications network within the Union and terminating on a visited network;
regulated roaming call	a mobile voice telephony call made over a communications network within the Union or received by a roaming customer, originating on a public communications network within the Union and terminating on a visited network
regulated roaming services	Collectively, regulated data roaming services; regulated roaming calls and regulated roaming SMS
roaming call	a mobile voice telephony call made or received on a Visited Mobile Network
Roaming Customer	A customer of a Roaming Provider
Specific Directives	Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) ²

² OJ L 201, 31.7.2002, p. 37.

Term	Definition
Specific Regulations	The Framework Regulations, the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011), the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011). ³
Single-IMSI	Single International Mobile Subscriber Identity. A technical modality to implement the separate sale of roaming services as a bundle that involves the sharing of one IMSI between the Domestic MNO and the ARP. Single-IMSI is the standard technical modality for implementing the separate sale of regulated retail roaming services, under (EU) No 531/2012 and (EU) No 1203/2012.
SMS message	a Short Message Service text message, composed principally of alphabetical and/or numerical characters, capable of being sent between mobile and/or fixed numbers assigned in accordance with national numbering plans
Wholesale Roaming Access	Direct Wholesale Roaming Access or Wholesale Roaming Resale Access
Wholesale Roaming Resale Access	the making available of facilities and/or services by a mobile network operator to another undertaking, under defined conditions, for the purpose of that other undertaking providing regulated roaming services to roaming customer.
Wholesale Charges for Regulated Roaming Services	The wholesale charges provided for at Articles 7, 9 and 12 of (EC) 531/2012.
Visited Mobile Network	a terrestrial public mobile communications network situated in a Member State other than that of the roaming customer's domestic provider that permits a roaming customer to make or receive calls, to send or receive SMS messages or to use packet switched data communications, by means of arrangements with the home network operator;
Visited MNO	an undertaking operating a Visited Mobile Network

³ As defined at Regulation 2 of the Framework Regulations.

2 Introduction

- 1 This document sets out the Final Determination of the Commission for Communications Regulation (**'ComReg'**) in a dispute between Cloud 9 Mobile Communications Limited (**'Cloud 9'**) and Eircom Limited⁴ (**'Eircom'**).
- 2 This dispute relates to mobile roaming. Traditionally when roaming, mobile users are connected to a **Visited Mobile Network** and can make and receive calls, send and receive SMS and use data services. The Visited Mobile Network is different from the **Domestic Mobile Network** that the mobile user would use while at home. In general, a Visited Mobile Network Operator (**'Visited MNO'**⁵) will only allow a roaming user to connect to its network if there is a roaming agreement in place between the Domestic Mobile Network Operator (**'Domestic MNO'**) and the Visited MNO. Such agreements are required as the Visited MNO has no billing relationship with the roaming user. Under the roaming agreement, wholesale charges relating to the users activities while roaming on a Visited Mobile Network are charged by the Visited MNO to the user's Domestic MNO who, in turn, charges the user the retail amount. When abroad, the roaming user may have a choice of Visited Networks this is typical where the roaming user's Domestic MNO has roaming agreements in place with a number of Visited MNOs.
- 3 In these circumstances the Domestic MNO is both a **Roaming Provider**, charging for mobile services used when abroad and a Domestic Provider, charging for mobile services used when not abroad.
- 4 In the past Domestic MNOs have offered domestic services and roaming services as a bundle. If a customer chooses a particular MNO for their domestic service a roaming service was provided as part of the bundled offer. It was not possible for a customers to choose one operator for domestic service and a different operator as their roaming provider.
- 5 Recently, Regulation (EU) No 531/2012 of the European Parliament and of the Council⁶ (**'(EU) No 531/2012'**) set out that that mobile users should have a choice in their provider of roaming services. Therefore, mobile users can either buy roaming services from their Domestic MNO bundled with a domestic service or can choose to have the Domestic MNO as their domestic provider only and buy roaming services from an Alternative Roaming Provider (**'ARP'**). This 'unbundling' of domestic services from roaming services allows domestic and roaming services to be sold separately.
- 6 (EU) No 531/2012 requires that any operator providing roaming services to mobile users (both MNOs and ARPs) must put measures in place to facilitate a change of

⁴ Including its subsidiary Meteor Mobile Communications Limited.

⁵ For the purpose of this document where the term Mobile Network Operator or MNO is used it also refers to Mobile Virtual Network Operator unless stated otherwise.

⁶ Official Journal of the European Communities, Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).

roaming provider. MNOs are also required to put in place measures that will allow ARPs to offer roaming services to a MNO's customers as an alternative to the roaming services already offered by the MNO.

- 7 Cloud 9 wishes to become an ARP and sell roaming services to Eircom customers as an alternative to the roaming services offered by Eircom to its customer's. Cloud 9 requires facilities and services that will allow Cloud 9 to sell roaming services to Eircom customers
- 8 This dispute relates to charges⁷ that Eircom proposes to levy on Cloud 9 for access to facilities and services that will allow Cloud 9 to sell roaming services to Eircom customers.
- 9 The scope of the dispute was published on the ComReg website on 8 August 2014 as follows:

Whether it is permissible for Eircom to impose the following on Cloud 9 for facilities and support services for the separate sale of regulated roaming services ('**SSRRRS**):

- (a) One-off connection and set-up charges.
- (b) Monthly/Recurring charges.
- (c) Requirement for a Bank Guarantee
- (d) Wholesale charges for the making of regulated roaming calls.

- 10 This document is structured as follows:

- **Chapter 3:** provides an executive summary of the main points of the determination.
- **Chapter 4:** provides a brief overview of the framework for the regulation of roaming.
- **Chapter 5:** discusses the background to the dispute.
- **Chapter 6:** provides analysis of the subject of the dispute, the submissions of the parties and sets out ComReg's conclusions.
- **Annex 1:** provides ComReg's Final Determination.

⁷ The charges proposed by Eircom were predominantly one-off charges. Monthly recurring charges were also proposed but the amounts for these were marked as "TBC". The full list of charges is at Figure 1 below.

3 Executive Summary

- 11 This dispute, brought by Cloud 9 regarding Eircom, concerns whether Eircom can levy certain charges on Cloud 9 for facilities and services for SSRRRS to Eircom customers.
- 12 Cloud 9 seeks access to Eircom facilities and services for the implementation of SSRRRS pursuant to Article 5 of (EU) No 531/2012. Eircom proposes to levy charges on Cloud 9 for access to such facilities and services and requires a Bank Guarantee.
- 13 Cloud 9 argues that Article 5 of (EU) No 531/2012 sets out that facilities and support services necessary for the implementation of SSRRRS shall be free of charge. It is Cloud 9's position that the proposed charges are not compliant with Article 5 of (EU) No 531/2012. Cloud 9 argues that the amount of the Bank Guarantee is high and presents a barrier to entry
- 14 Eircom argues that the proposed charges are justified and that the amount of the Bank Guarantee is reasonable.
- 15 Pursuant to Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011⁸ ('**the Framework Regulations**'), where a dispute arises between undertakings providing electronic communications networks or services in the State in connection with existing obligations, ComReg shall, upon request, initiate an investigation and make a determination which ensures compliance with the obligation and resolves the dispute.
- 16 In making its Determination, ComReg considered:
 - a. What facilities and support services are necessary for the implementation of SSRRRS?
 - b. Are the charges proposed by Eircom for facilities and support services necessary for the implementation of SSRRRS?
 - c. Is a Bank Guarantee an appropriate mechanism?
- 17 The full text of ComReg's Final Determination is at Annex: 1. A summary of the Final Determination is as follows:

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

- (i) Access includes connection as set out in the Access Directive and directly cross referenced in (EU) 531/2012.
- (ii) The facilities and services detailed in the ETSI Standard for the implementation of SSRRS are necessary for the implementation of SSRRS.
- (iii) Regarding the Eircom implementation of SSRRS:
 - (a) Where access to a facility or service is necessary for the implementation of SSRRS, Eircom shall not charge, pursuant to Article 5(1) of (EC) 531/2012.
 - (b) Where access to a facility or service is not necessary for the implementation of SSRRS under the ETSI Standard, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
 - (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Eircom may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.
 - (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Eircom may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.
- (iv) A Bank Guarantee is permissible and where required should be based on 3 months forecasted traffic and subscriber numbers provided by Cloud 9. The Bank Guarantee shall specifically relate solely to the provision of Wholesale Roaming Access pursuant to Article 3 of (EU) No 531/2012 and the associated Wholesale charges set out at Articles 7, 9, and 12 of (EU) No 531/2012 which are applicable to Wholesale Roaming Access pursuant to Article 3(4) of (EU) No 531/2012. Where the Bank Guarantee does not cover Eircom's actual financial exposure specifically from the provision of Wholesale Roaming Access, Eircom has the right to require that Cloud 9 increase the Bank Guarantee to a level more reflective of the actual traffic levels experienced. Any revised Bank Guarantee must not pose an insuperable barrier to entry.

4 Regulation of Roaming

- 18 This section provides a brief overview of the framework for the regulation of roaming. This overview is limited to the scope of those regulations specifically applicable or related to the circumstances of this dispute. Additional consideration of specific regulations and relevant legislation will be considered at Section 6 below.

4.1 (EU) No 531/2012

- 19 In (EU) No 531/2012, the European Commission set out its view that charges for roaming were significantly higher than domestic charges and may act as an obstacle to consumers using mobile devices when travelling within the Union thereby constituting a significant barrier to the internal market. The envisaged sale of retail roaming services, separate from domestic services, in the view of European Commission, would increase competition and lower prices for consumers creating an internal market for roaming services in the Union with no significant difference between domestic and roaming charges⁹.
- 20 Article 1(4) of (EU) No 531/2012 states that the regulations contained therein are a specific measure within the meaning of Article 5(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March, 2002, on a common regulatory framework for electronic communications networks and services¹⁰ (**‘the Framework Directive’**). For Reference, Article 5(1) of the Framework Directive provides that **the Framework Directive and the Specific Directives¹¹** are without prejudice to any specific measure adopted for the regulation of international roaming on public mobile communications networks within the Community.

⁹ Recital 2 of (EU) No 531/2012.

¹⁰ Official Journal of the European Communities, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services (2009/140/EC, OJ L 337, 18.12.2009, p. 37).

¹¹ As set out at Article 2 of the Framework Directive, ‘Specific Directives’ means Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

- 21 Article 5 of (EU) No 531/2012 relates to the implementation of SSRRRS but does not specify the technical details of how SSRRRS should be implemented. Instead, Article 5(2) of (EU) No 531/2012 sets out that the European Commission will adopt a technical solution for the implementation of SSRRRS in an implementing act following a consultation with the Body of European Regulators of Electronic Communications ('BEREC'). At Article 5(3) of (EU) No 531/2012 the European Commission sets out the criteria that the technical solution for the implementation of SSRRRS shall meet.

4.2 BEREC opinion BoR (12) 109

- 22 Pursuant to Article 5(2) of (EU) No 531/2012, BEREC published its recommendations on technical solution for the implementation of SSRRRS in the BEREC opinion on Article 5 implementing act¹² ('BoR (12) 109').
- 23 BEREC opined that there was no single technical solution which met all of the criteria specified by the European Commission at Article 5(3) of (EU) No 531/2012. BEREC therefore recommended the combination of two technical modalities to meet all of the criteria.
- 24 The first of these technical modalities, known as the 'Single-IMSI technical modality', was recommended for use in circumstances where regulated roaming services are provided as a bundle. Under the Single-IMSI technical modality, the implementation of SSRRRS is provided by the Domestic MNO on a wholesale basis, to the ARP. The ARP then resells the services to the roaming customer at the retail level. The Single-IMSI technical modality relies on Wholesale Roaming Resale Access in that the Domestic MNO resells wholesale roaming access to the ARP¹³. The ARP cannot control which Visited Networks are to be used in preference to others.
- 25 The second technical modality relates to the provision of data roaming services to roaming customers directly on a Visited Network. The second technical modality is not relevant to the scope of this dispute and is not considered further.

¹² Roaming Regulation – Choice of Decoupling Method. BEREC opinion on article 5 implementing act, (BoR (12) 109, 27 September 2012).

¹³ Article 3 of (EU) No 531/2012 relates to Wholesale Roaming Access and envisages two types of access, 'Direct Wholesale Roaming Access' and 'Wholesale Roaming Resale Access'. Under Direct Wholesale Roaming Access the ARP has direct agreements with Visited Networks. Under Wholesale Roaming Resale Access, the Domestic MNO resells Wholesale Roaming Access to the ARP. Technical limitations of the Single-IMSI technical modality limit ARPs to Wholesale Roaming Resale Access. Other technical modalities which may have facilitated Direct Wholesale Roaming Access were considered by BEREC and the European Commission but were set aside.

4.3 (EU) No 1203/2012

- 26 In accordance with Article 5(2) of (EU) No 531/2012, considered the opinion of BEREC, the European Commission adopted the technical solution for the implementation of SSRRRS by way of the Commission Implementing Regulation (EU) No 1203/2012¹⁴ ('**(EU) No 1203/2012**').
- 27 (EU) No 1203/2012 provides greater detail regarding the implementation of SSRRRS previously provided for at Article 5 of (EU) No 531/2012 setting out the technical modalities applicable when implementing SSRRRS provided as a bundle¹⁵ and when implementing access to local data roaming services on a Visited Network.
- 28 Article 3(1) of (EU) No 1203/2012 relates to the implementation of SSRRRS provided as a bundle. It sets out that Domestic MNOs must provide necessary network elements and relevant services to allow for the implementation of SSRRRS to customers by ARPs without the need for customers to change SIM Card¹⁶ or mobile device.
- 29 Article 3(2) of (EU) No 1203/2012 provides a non-exhaustive list of some of the necessary network elements and relevant services to allow for the implementation of SSRRRS that must be provided by Domestic MNOs:
- (a) Facilities to support a customer changing roaming provider.
 - (b) Facilities for to support billing of roaming services.
 - (c) Facilities to support the bill shock measure for roaming Data services.

These are considered further at Section 6 below

4.4 Mobile Roaming Regulations

- 30 As EU Regulations, both (EU) No 531/2012 and (EU) No 1203/2012 have binding legal force throughout every Member State, on a par with national laws. Unlike EU Directives, action by National governments is not required to implement EU Regulations, they have immediate legal force in every Member State upon their effective date. However, on 18 June 2013, the Communications (Mobile Telephone Roaming) Regulations 2013¹⁷ ('**the Mobile Roaming Regulations**') gave full effect to (EU) No 531/2012 in the State.

¹⁴ Official Journal of the European Union (Non-legislative acts) Commission Implementing Regulation (EU) No 1203/2012 of 14 December 2012 on the separate sale of regulated retail roaming services within the Union (OJ L 347, 15.12.2012, p.1).

¹⁵ The Single-IMSI technical modality.

¹⁶ Subscriber Identity Module ('SIM') Card.

¹⁷ Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013).

- 31 Regulation 5 of the Mobile Roaming Regulations specified that, in the event of a dispute arising between undertakings in connection with obligations laid down in the Mobile Roaming Regulations, the dispute resolution procedure laid down in Regulations 31 and 32 of the Framework Regulations applies and those Regulations are to be read accordingly.

4.5 BEREC Guidelines on (EU) No 531/2012

- 32 (EU) No 531/2012 provides for BEREC to issue guidelines on the regulations. BEREC has issued three sets of guidelines to date:
- (a) **BoR (12) 107¹⁸** covering wholesale roaming access set out in Article 3 of (EU) No 531/2012.
 - (b) **BoR (13) 82¹⁹** relates to the separate sale of roaming services at Articles 4 and 5 of (EU) No 531/2012.
 - (c) **BoR (13) 15²⁰** covers the remainder of (EU) No 531/2012.
- 33 When resolving disputes, a National Regulatory Authorities ('NRAs') (including ComReg) are required to take the utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC in accordance with Article 1(3) of Regulation (EC) No 1211/2009²¹. The sections of the BEREC Guidelines relevant to this dispute are considered at Section 6 below.

4.6 ComReg's Dispute powers

- 34 ComReg was established under Section 6 of the Communications Regulation Acts 2002 to 2011²² ('the **Communications Regulation 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 NRA in the State. The functions of ComReg are set out in section 10 of the Communications Regulation Acts.

¹⁸ BEREC Guidelines on the application of Article 3 of the Roaming Regulation - Wholesale Roaming Access, 27 September 2012.

¹⁹ BEREC Guidelines on Roaming Regulation (EC) N 531/2012 (Third Roaming Regulation) (Articles 4 and 5 on Separate Sale of Roaming Services), 5 July 2013.

²⁰ BEREC Guidelines on Roaming Regulation (EU) No 531/2012 (Third Roaming Regulation) (Excluding Articles 3, 4 and 5 on wholesale access and separate sale of services), 25 February 2013.

²¹ Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (2009/1211/EC, OJ L 377, 12.12.2009, p.1).

²² 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).

- 35 Regulation 31 of the Framework Regulations sets out ComReg's powers regarding to disputes between undertakings in connection with existing obligations under the Framework Regulations, Specific Directives or Specific Regulations²³. ComReg's determination in the dispute must ensure compliance with the obligation and resolve the dispute.
- 36 In accordance with Regulation 31(2) of the Framework Regulations, ComReg published Dispute Resolution procedures in ComReg Document No. 10/18 R²⁴.

²³ The Framework Regulations, the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011), the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011).

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

5 Background to the Dispute

5.1 Investigative process to date

37 Below is a an outline of ComReg's investigation to date

30 July 2014	Cloud 9 submits a request for dispute resolution.
1 August 2014	ComReg notifies Cloud 9 that the dispute is accepted.
8 August 2014	Cloud 9 is notified of the scope of the dispute. Eircom is notified of the dispute, the scope of the dispute and is provided with a non-confidential version of the Cloud 9 submission and given until 22 August 2014 to respond. An information Notice (ComReg 14/82) is published on the ComReg website setting out the scope of the dispute.
22 August 2014	Eircom provides its response.
29 August 2014	ComReg issues information requests to Cloud 9 and Eircom.
5 September 2014	Cloud 9 and Eircom provide their responses to the information requests.
16 October 2014	ComReg issues Draft Determination to the parties.
28 October 2014	Cloud 9 provides its response to the Draft Determination.
30 October 2014	Eircom provides its response to the Draft Determination.
31 October 2014	ComReg publishes a non-confidential version of the Draft Determination on the ComReg website.

5.2 Summary of the Cloud 9 Submission of 30 July 2014

38 This section summarises the Cloud 9 submission of 30 July 2014. Further submissions were received from Cloud 9 on 5 September 2014 in response to a ComReg information request and these are considered at Section 6 below.

39 The Cloud 9 submission of 30 July 2014 sets out that Eircom proposes to charge for facilities and services for the implementation of SSRRS. These proposed charges are evidenced in a copy of the ARP Agreement offered to Cloud 9 by Eircom.

- 40 The charges proposed by Eircom could be categorised as one off/set up charges and monthly recurring charges. ComReg noted that the monthly recurring charges proposed by Eircom had no associated amount. They were included in the ARP Agreement but marked as ‘TBC’²⁵
- 41 In relation the proposed charges, Cloud 9 referenced Article 5 of (EU) No 531/2012 which sets out that facilities and services necessary for the implementation of SSRRRS should be provide free charge:

“C9M [Cloud 9] takes the view that these charges are contrary to Article 5 of the Regulation [(EU) No 531/2012] – this clearly states, on the ordinary meaning of the words used in the Regulation that ARP’s are to be given everything ‘necessary’ for an ARP service free of charge, and anything not necessary but extra must be a ‘fair and reasonable’ charge.”

- 42 As set out at paragraph 35 above, ComReg’s dispute powers specifically relate to existing obligations and any determination should resolve the dispute and ensure compliance with those existing obligations. The Cloud 9 submission included issues which were beyond the scope of a dispute under Regulation 31 of the Framework Regulations. In the same regard, the outcome of a dispute is limited, consequently a number of the desired remedies sought by Cloud 9 could not be considered in the context of a dispute. As discussed further at paragraph 48 below, when responding to the Cloud 9 submission, Eircom provided its position on some of these out of scope issues. ComReg’s consideration of matters beyond the scope of the dispute are not included in this Final Determination.

5.3 Scope of the Dispute

- 43 Having considered the Cloud 9 submission and the scope of ComReg’s Dispute powers, and within the context of (EC) 531/2012, the scope of the dispute was defined as follows:

Whether it is permissible for Eircom to impose the following on Cloud 9 for facilities and support services for the separate sale of regulated roaming services:

- (a) One-off connection and set-up charges.
- (b) Monthly/Recurring charges.
- (c) Bank Guarantees.
- (d) Wholesale charges for the making of regulated roaming calls.

- 44 This scope was published on the ComReg website on 8 August 2014.

²⁵ ‘To Be Confirmed’

5.4 Summary of the Eircom Submission of 22 August 2014

- 45 Following the definition of the scope, the Cloud 9 submission of 30 July 2014 was provided to Eircom. On 22 August 2014, Eircom provided its response. This section summarises the Eircom response of 22 August 2014. Further submissions were received from Eircom on 5 September 2014 in response to a ComReg information request and these are considered at Section 6 below.
- 46 In relation to the charges proposed by Eircom in the ARP Agreement, Eircom contended that there were no set-up or one off charges proposed. Regarding ongoing charges, Eircom noted that these relate to costs resulting from activities of ARP customers when roaming on Visited Networks which are over and above the cost of conveyance of calls SMS or Data services and that these are not covered by the Wholesale Charges for Regulated Roaming Services provided for at Articles 7, 9 and 12 of (EC) 531/2012.
- 47 Regarding the Bank Guarantee sought from Cloud 9, Eircom notes that the amount of the Bank Guarantee is a set amount of € or an amount equivalent to 12 months forecasted traffic charges, whichever is the greater. Eircom noted its concerns regarding the accuracy of the 3 month forecasts provided by Cloud 9 and how it had used the Cloud 9 forecasts in combination with other data calculate the set amount of € .
- 48 Eircom also included submissions in response to matters which were not included in the scope of the dispute as published on the ComReg website, as referenced at paragraph 42 above. While ComReg notes Eircom's position on these matters, they are not relevant to the dispute and are not considered further in this Final Determination.
- 49 Regarding one off charges, Eircom stated in its submissions that no one off charges were proposed. However ComReg noted that the Eircom ARP Agreement included set-up charges for 'NRTRDE' and 'DCH Services'. A consideration of these charges is at paragraphs 79 to 83 below

5.5 Summary of the Cloud 9 response to the Draft Determination

- 50 On 28 October 2014, Cloud 9 confirmed that it had no comments in response to the Draft Determination.

5.6 Summary of the Eircom response to the Draft Determination

- 51 On 30 October 2014, Eircom made its submission in response to the Draft Determination. The submission is summarised below.

- 52 Eircom noted that in relation to traffic forecasts forming the basis of the Bank Guarantee, any traffic forecasts provided by Cloud 9 should be reasonable and realistic in the context forecasts provided to Eircom by Cloud 9 previously. This is considered at paragraphs 90 to 93 below.
- 53 Eircom refers to Guideline 33 of BoR (12) 107 regarding the application of Article 3 of (EC) 531/2012 and contends that through the Bank Guarantee, it may impose safeguards to recovery of investments undertaken specifically to provide access. This is considered at paragraphs 95 to 100 below.

6 Analysis and conclusions

54 This section includes ComReg’s consideration of the subject of the dispute and presents the conclusions which lead to ComReg’s Final Determination at Annex: 1 below.

6.1 The charges proposed by Eircom

55 The following is a table of Set-up and Monthly/Recurring charges proposed by Eircom in the ARP Agreement offered to Cloud 9:

Item.	Charge Description	Amount	Type
1	NRTRDE Option 1 - ARP: Setup and Implementation	∞	Set-up
2	NRTRDE Option 1 - Monthly Minimum Fixed Fee	∞	Monthly
3	NRTRDE Option 1 - Price per CDR ²⁶	∞	Monthly
4	NRTRDE Option 1 - Monthly Subscription Fee (without VPN connectivity)	∞	Monthly
5	NRTRDE Option 1 - Monthly Subscription Fee (with VPN connectivity)	∞	Monthly
6	NRTRDE Option 2 – Direct Transfer	∞	Monthly
7	DCH SERVICES Option 1 - ARP: Setup and Implementation	∞	Set-up
8	DCH SERVICES Option 1 – Monthly Minimum Fixed Fee	∞	Monthly
9	DCH SERVICES Option 1 - Price per Transaction ²⁷	∞	Monthly
10	DCH SERVICES Option 1 - Monthly Subscription Fee (without VPN connectivity)	∞	Monthly
11	DCH SERVICES Option 1 - Monthly Subscription Fee (with VPN connectivity)	∞	Monthly

²⁶ CDR is a Call Data Record

²⁷ Eircom states “A Transaction is defined as one (1) outgoing TAP record forwarded to an ARP subject to minimum monthly fee of ∞ per month”

Item.	Charge Description	Amount	Type
12	DCH SERVICES Option 2 – Direct Transfer	∞	Monthly
13	Signalling – Fixed Monthly fee	∞	Monthly
14	Signalling - SCCP MSU - Charge per MSU	∞	Monthly

Figure 1 - Table of Set-up and Monthly/Recurring charges proposed by Eircom in the ARP Agreement offered to Cloud 9

56 The charges in the table above are considered in the following sections.

6.2 Access to facilities and services for the implementation of SSRRRS

57 In addition to requiring Wholesale Roaming Resale Access, ARPs wishing to implement SSRRRS will require facilities and services that will allow them to interface with the Domestic MNO and allow the ARP to provide and bill for separate regulated roaming services. Guideline 37 of BoR (13) 82 offers examples of the type of interface required between the ARP and the Domestic MNO:

- (a) Online charging systems interconnection to allow ARPs to manage prepaid customers using their own on-line charging system. This interface should be provided by using standard real time protocols;
- (b) Support needed from the Domestic MNO for customer provision related to the required collaboration among actors for customer subscription/un-subscription and basic support for billing information both on prepaid and postpaid necessary to perform retail billing by the ARP;
- (c) Basic support for allowing the ARP to implement the bill shock measure²⁸.

58 Article 3 of (EU) No 1203/2012 requires that domestic providers operating a terrestrial public mobile communication networks (in this case Eircom) shall implement the Single IMSI technical modality for the implementation of SSRRRS. Article 3 of (EU) No 1203/2012 also imposes obligations regarding the network elements and services that are necessary must be provided by Domestic MNOs when implementing SSRRRS. These correspond to the recommendations of BEREC at Guideline 37 of BoR (13) 82:

- (a) facilities necessary for the procedure to change the roaming provider in accordance with Article 5(5) of (EU) No 1203/2012;

²⁸ A real-time subscriber spend notification and a cut-off mechanism triggered when a customer's spend reaches a defined limit. See Article 15(3) of (EU) 531/2012.

- (b) facilities related to customer information, such as location data of the customer and customer data records for billing support, that are necessary for the provision of retail roaming services;
- (c) Facilities necessary to support the implementation of the financial limits for the specified period of use of data roaming services in accordance with Article 15 of Regulation (EU) No 531/2012.

- 59 Article 5 of (EU) No 1203/2012 also sets out that roaming providers are to cooperate in order to ensure the interoperability of interfaces for the implementation of SSRRRS, on the basis of common agreed standards. The reference documents and procedures used must be publicly available and must conform to the requirements of (EU) No 531/2012 and (EU) No 1203/2012.
- 60 In response to Article 5 of (EU) No 1203/2012, a cooperation platform was established jointly by BEREC, the European Telecommunications Standards Institute ('**ETSI**') and Industry including a large number of MNOs. The platform allowed stakeholders in the implementation of SSRRRS to provide their input into the common agreed standards for the implementation of SSRRRS. The purpose of this cooperation was to ensure the interoperability of the interfaces used when implementing SSRRRS.
- 61 The cooperation platform produced a body of documents which set out standard technical interfaces, protocols and processes for the implementation of SSRRRS including but not limited to implementation, provisioning, billing. For the purpose of this document these standards will be referred to as the '**ETSI Standards for the implementation of SSRRRS**'. In accordance with Article 5 of (EU) No 1203/2012 the ETSI Standard for the implementation of SSRRRS are publicly available through the cooperation platform maintained by ETSI²⁹.
- 62 When considering the facilities and services offered to Cloud 9 for the implementation of SSRRRS, and which of these were necessary for the implementation of SSRRRS, ComReg took the view that the technical interfaces, protocols and processes for the implementation of SSRRRS detailed in the ETSI Standard for the implementation of SSRRRS should be considered to represent the facilities and services necessary for the implementation of SSRRRS.
- 63 ComReg also noted that the Eircom ARP Agreement cited the ETSI Standard for the implementation of SSRRRS in terms of associated documentation.
- 64 On 29 August 2014, ComReg wrote to Eircom setting out the view that the ETSI Standard for the implementation of SSRRRS represent the facilities and services necessary for the implementation of SSRRRS. ComReg noted that it was not clear to what extent the Eircom implementation of SSRRRS proposed to Cloud 9 differs from the ETSI Standard for the implementation of SSRRRS and asked Eircom to confirm which of the facilities or services proposed to Cloud 9 are not included in the ETSI Standard for the implementation of SSRRRS and are therefore potentially beyond those necessary for the implementation of SSRRRS.

²⁹ http://docbox.etsi.org/Reference/Cooperation_Platform_Separate_Sale_of_Roaming_Services/

65 Eircom's response of 5 September 2014 states:

"[...] regarding the services and facilities proposed by Eircom in the agreement offered to Cloud 9 and confirm that these services and facilities have been designed to fully comply with the standard interfaces and processes for implementation of SSRRS."

66 It could be noted that Eircom contends that it does not propose to charge implementation or set-up charges. ComReg noted that the Eircom ARP agreement proposed an implementation charge for 'NRTRDE' and for 'DCH Services'³⁰

67 In relation to these implementation charges, ComReg refers to Article 5 of (EU) No 531/2012 which specifically states that access to facilities and support services necessary for the implementation of SSRRS shall be free of charge.

68 Article 2(1) of (EC) 531/2012 states that for the purposes of this Regulation, the definitions set out in Article 2 of the Access Directive, Article 2 of the Framework Directive, and Article 2 of the Universal Service Directive shall apply. ComReg refers to Access Directive which sets out that access includes connection to facilities or services.

69 It is therefore ComReg's conclusion that access, including connection, to facilities and services necessary for the implementation of SSRRS shall be free of charge.

70 Having reviewed the ETSI Standards for the implementation of SSRRS, Items 1 and 7 in Figure 1 relate to access to interfaces set out in the ETSI Standards for the implementation of SSRRS and access to these interfaces is necessary for the implementation of SSRRS. ComReg considers that access to Items 1 and 7 in Figure 1 are necessary for the implementation of SSRRS and shall be free of charge in accordance with Article 5(1) of (EU) No 531/2012. ComReg therefore concludes that it is not permissible for Eircom to charge Cloud 9 for Items 1 and 7 in Figure 1.

71 ComReg also notes that a facility or service may fall outside the ETSI Standard for the implementation of SSRRS. Access to such facility or service are therefore is not necessary for the implementation of SSRRS. These facilities or services may be required by one party or the other but as SSRRS may be implemented in its absence they are optional. It is ComReg's view that a party requiring an optional facility or service shall bear the cost. A party offering the optional facility or service may charge a fair and reasonable price.

6.3 Wholesale Charges for Regulated Roaming Services

72 Wholesale Charges for Regulated Roaming Services are set out at Articles 7, 9 and 12 of (EC) 531/2012. The Wholesale Charges for Regulated Roaming Services are maximum charges for Voice, SMS and Data applicable retrospectively on a 12 monthly basis to the average wholesale charge levied on the customer's roaming provider for a

³⁰ See Items 1 and 3 In Figure 1. Ongoing charges were also proposed for 'NRTRDE' and 'DCH Services'. These are considered at paragraphs 72 to 83.

regulated roaming services. This maximum charge is not applied to each and every charge but to a 12 month average. Wholesale Charges for Regulated Roaming Services averaged over 12 months shall be compliant if the charges are at or below the level set out at Articles 7, 9 and 12 of (EC) 531/2012.

- 73 Article 3(4) of (EC) 531/2012 provides that these charges relate to the Wholesale roaming access referred to Article 3(3). Pursuant to the definition at Article 2(2)(o) of (EC) 531/2012, Wholesale roaming access includes both Direct Wholesale Roaming access and Wholesale Roaming Resale Access³¹. Consequently the Wholesale Charges for Regulated Roaming Services provided for at Articles 7, 9 and 12 is applicable to both Direct Wholesale Roaming Access and Wholesale Roaming Resale Access. Article 3(3) provides that Wholesale roaming access shall cover access to “[...] *all network elements and associated facilities, relevant services, software and information systems, necessary for the provision of regulated roaming services to customers.*”
- 74 Under (EC) 531/2012, the maximum 12 monthly average Wholesale Charges for Regulated Roaming Services apply to both Direct Wholesale Roaming Access and Wholesale Roaming Resale Access.
- 75 Eircom contends that it may charge monthly for ‘Signalling’ ‘NRTRDE’ and ‘DCH Services’:
- (a) ‘Signalling’ is the exchange of information between involved points in a network
 - (b) ‘NRTRDE’ (Near Real Time Roaming Data Exchange) provides a revenue assurance and fraud protection process through a fast exchange of roaming data between operators. NRTRDE files are typically exchanged between the Visited MNO and the Domestic MNO in a short timeframe to prevent fraud. NRTRDE files are exchanged within a number of hours but not in real-time. This is in contrast to billing file processing (TAP file processing) which may take more than 24 hours to process and exchange.
 - (c) ‘DCH Services’ (Data Clearing House Services) are services used to clear and settle the billing files (TAP files) from the Visited MNO to the Domestic MNO. These relate to the regarding the activities of Roaming Customers on the Visited Network.
- 76 ComReg has considered Signalling, NRTRDE and DCH Services in relation to the implementation of SSRRRS. These charges are items .2 and 4 to 14 in Figure 1.
- 77 ETSI Standard for the implementation of SSRRRS envisages either a real-time implementation or a non-real-time/near-real-time implementation. Eircom proposes to implement a ‘real-time’ interfaces for the implementation of SSRRRS. The ETSI

³¹ Wholesale Roaming Access constitutes the Direct Wholesale Roaming Access offered to Eircom by Visited Networks and Wholesale Roaming Resale Access offered to Cloud 9 by Eircom.

Standard for the implementation of SSRRRS contains nine defined interfaces (IF1 to 9):

IF1: A real-time interface for voice retail billing.

IF2: A real-time interface for SMS retail billing.

IF3: A real-time interface for Data/MMS retail billing.

IF4: A near real-time interface for providing mobility information to the ARP, to inform the ARP that one of its customers has started to roam or has changed network.

IF5: real-time Unstructured Supplementary Service Data interface to enable the ARP to provide pre-paid account queries (conditional).

IF6: Invoicing interface, providing Charging Records.

IF7: Provisioning interface enabling the management of ARP subscriptions.

IF8: Interface for high usage and fraud control (conditional).

IF9: Bi- Directional interface for standard SMS exchange (optional).

- 78 IF1, IF2 and IF3 relate to real-time interfaces for Voice, SMS and Data respectively and facilitate the provision of information to Cloud 9 for the purpose of customer billing and implementation of the bill-shock measure. The ETSI Standard for the implementation of SSRRRS provides that signalling for IF1, IF2 and IF3 is necessary. ComReg therefore concludes that where Signalling is necessary for the implementation of SSRRRS it shall be free of charge.
- 79 Regarding NRTRDE and DCH Services for the implementation of SSRRRS, these are required only in instances where no real-time interface is available. As Eircom will provide real-time implementation of SSRRRS to Cloud 9, NRTRDE and DCH Services are not necessary for the provision of SSRRRS. It should be noted that in circumstances where a real-time implementation of SSRRRS was not available, NRTRDE and DCH Services would then be deemed necessary for the implementation of SSRRRS and must be free of charge. ComReg concludes that Eircom in a real-time implementation of SSRRRS, Eircom may propose fair and reasonable optional charges for NRTRDE and DCH Services.
- 80 Signalling, NRTRDE and DCH Services are also relevant in Wholesale Roaming Resale Access. Article 3(3) provides that Wholesale Roaming Resale Access shall cover access to “[...] *all network elements and associated facilities, relevant services, software and information systems, necessary for the provision of regulated roaming services to customers.*” It is ComReg’s view that Signalling NRTRDE and DCH Services is included in Wholesale Roaming Resale Access. This view is supported by BEREC at Guideline 13 of BoR (12) 107 which recommends that Domestic MNOs must provide signalling, fraud handling and data clearing and as part of Wholesale Roaming Resale Access.

- 81 Article 3(4) of (EC) 531/2012 provides that charges for Wholesale Roaming Resale Access are set out at Articles 7, 9 and 12 of (EC) 531/2012. ComReg concludes that Signalling NRTRDE and DCH Services are included in Wholesale Roaming Resale Access therefore the Wholesale Charges for Regulated Roaming Services include Signalling NRTRDE and DCH Services.
- 82 ComReg therefore concludes that for Wholesale Roaming Resale Access charges for Signalling, NRTRDE and DCH Services may be applied but they should be included within the Wholesale Charges for Regulated Roaming Services³². Eircom may not levy charges for Signalling NRTRDE and DCH Services separate from Wholesale Charges for Regulated Roaming Services.
- 83 To summarise ComReg has concluded that for the Eircom implementation of SSSRRS considered in this dispute:
- (a) Where access to a facility or service is necessary for the implementation of SSSRRS, Eircom shall not charge, pursuant to Article 5(1) of (EC) 531/2012.
 - (b) Where access to a facility or service is not necessary for the implementation of SSSRRS under the ETSI Standard, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
 - (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Eircom may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.
 - (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Eircom may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.

6.4 Bank Guarantee

- 84 Based on the submissions of Cloud 9 the Eircom's requirement for a Bank Guarantee is not in dispute, it is the amount of the Bank Guarantee, set at ∞.
- 85 Under non-ARP roaming arrangements there is generally reciprocity in terms of traffic between MNOs, where there is asymmetry, commercial agreements are used. This may be considered a form of guarantee between the parties. This is not the case between ARPs and Domestic MNOs where there is a unilateral payment structure. ComReg recognises that the Domestic MNO faces higher non-payment risks than under normal roaming circumstances and agrees that it is reasonable for Domestic MNOs to put measures in place to mitigate this risk.

³² Articles 7, 9 and 12 of (EC) 531/2012

- 86 Under the Eircom ARP Agreement, the monthly charges are calculated based on traffic³³. Eircom has submitted that Cloud 9 provided 3 month forecasts of Customer numbers which Eircom used in combination with its own data to produce a forecast of 3 months traffic. Using this 3 month traffic forecast, Eircom calculated the estimated charges for 3 months of traffic which Eircom states approximated to the amount of the Bank Guarantee proposed in the Eircom ARP Agreement.
- 87 Therefore both parties agree that a Bank Guarantee is acceptable. Cloud 9 contends that the amount of the Bank Guarantee should be based on a 3 month traffic forecast. Eircom in fact based the Bank Guarantee albeit on its own 3 month traffic forecast. It is therefore forecasting estimation which is at issue.
- 88 Based on wholesale billing cycles, it is ComReg's view that a Bank Guarantee of greater than 3 months traffic forecast would not be proportionate.
- 89 At Guideline 33 of BoR (12) 107, BEREC takes the view that Domestic MNOs may impose safeguards to assure payment for services provided or to assure recovery of investments undertaken specifically to provide access. Any such safeguards must be proportionate, such as would be standard commercial practice between willing buyer and willing seller and should be discontinued when they are no longer necessary. They should not have the effect of imposing insuperable barriers to entry especially for small players. It is clear that where a Bank Guarantee is based on a forecast, from the perspective of an ARP, there is no incentive to provide a reliable/realistic forecast. In fact, it provides a strong incentive to provide a low forecast thereby reducing the Bank Guarantee. However from the from the perspective of an Domestic MNOs a low Bank Guarantee resulting from an unrealistic traffic forecast brings increased financial risk.
- 90 Eircom contends that the Bank Guarantee should also cover investments undertaken specifically to provide ARP access.
- 91 BEREC's position set out in Guideline 33 of BoR (12) 107 relates to Wholesale Roaming Access and recovery of investments made in the provision of Wholesale Roaming Access pursuant to Article 3 of (EU) No 531/2012.
- 92 Eircom is a provider of both types of Wholesale Roaming Access:
- (a) Wholesale Roaming Resale Access provided to ARPs such as Cloud 9.
 - (b) Direct Wholesale Roaming Access provided to MNOs in other Member States for the purpose of customers using roaming on the Eircom Network.
- 93 It is ComReg's view that a Bank Guarantee in respect of Wholesale Roaming Access may incorporate safeguards specifically relating solely to the provision of access to Wholesale Roaming Access pursuant to Article 3 of (EU) No 531/2012 and the associated Wholesale charges set out at Articles 7, 9, and 12 of (EU) No 531/2012 which are applicable to Wholesale Roaming Access pursuant to Article 3(4) of (EU) No 531/2012. The level of this Bank Guarantee shall not exceed the amount associated

³³ The monthly volume of Voice, SMS and Data generated by the ARPs customers.

with the forecast traffic Pursuant to the provisions of Article 5 of (EU) No 531/2012 in that access to those facilities and support services that are necessary for the implementation of SSRRS shall be free of charge. For the avoidance of doubt, it would not be appropriate to incorporate safeguards relating to facilities and services necessary for the the implementation of SSRRS in a Bank Guarantee.

- 94 It is Comreg's view that the ARP is best placed to provide a traffic forecast. Domestic MNOs do not have information regarding launch strategies, marketing plans, or sales targets of the ARP but ComReg does recognise that Domestic MNOs may be finically exposed due to under forecasting To balance this, the ARP should provide the initial forecast but Eircom may require that the Bank Guarantee be adjusted to a level more reflective of the actual traffic levels experienced.
- 95 Eircom contends that the forecast provided by Cloud 9 should be:
- (a) *“reasonable and realistic”*
 - (b) *“based on subscriber numbers already provided to eircom by Cloud 9”*
 - (c) *“forecast of traffic per subscriber”*.
- 96 Regarding a reasonable and realistic forecast, the Final Determination allows Eircom the right to require that Cloud 9 increase the Bank Guarantee to a level more reflective of the actual traffic levels experienced. It is ComReg's view that this is a sufficient mitigation for unreasonable or unrealistic forecasting.
- 97 In relation to the subscriber numbers already provided to Eircom by Cloud 9, ComReg does not agree that this has relevance to any forecast submitted by Cloud 9 for the purpose of a Bank Guarantee following this Final Determination on the basis that, in the intervening period between the previous submission and the Final Determination it is reasonable that Cloud 9 may have updated or amended these forecasts. ComReg also notes that Eircom may exercise its rights under contract to cease services to Cloud 9 if the Bank Guarantee is not maintained at a level reflective of actual traffic levels. It is therefore incumbent on Cloud 9 to provide accurate forecasts thereby ensuring that the Bank Guarantee is at a level which reflects actual traffic levels. Pursuant to Section 18.2 of the General Authorisation³⁴, Eircom must notify ComReg immediately if there is a reasonable probability of a Cessation of Service affecting a substantial number of consumers and no later than ten working days prior to the actual or anticipated cessation³⁵.

³⁴ General Authorisation, Conditions for the provision of Electronic Communications Networks and Services (Document No: 03/81R4, Date: 6 August, 2013).

³⁵ It should be noted that the requirement for notification of cessation of service is not for the purpose of ComReg accepting or rejecting the cessation. Notifications are required to ensure that ComReg is aware of any potential loss of services for consumers. The requirement to notify ComReg of actual or anticipated cessation is without prejudice to Eircom's contractual right to cease services.

- 98 ComReg agrees that it is reasonable that a forecast of traffic per subscriber can be calculated. Eircom may require that Cloud 9 provide both a 3 month forecast of traffic and subscribers to determine the appropriate level of Bank Guarantee.
- 99 ComReg agrees with BEREC's position in BoR (12) 107 in that any revised Bank Guarantee must not pose an insuperable barrier to entry.
- 100 ComReg has concluded that a Bank Guarantee is permissible. The Bank Guarantee shall specifically relate solely to the provision of Wholesale Roaming Access pursuant to Article 3 of (EU) No 531/2012 and the associated Wholesale charges set out at Articles 7, 9, and 12 of (EU) No 531/2012 which are applicable to Wholesale Roaming Access pursuant to Article 3(4) of (EU) No 531/2012. It should be based on a 3 month forecast of traffic and subscribers provided by Cloud 9. Where the Bank Guarantee it does not cover Eircom's actual financial exposure specifically from the provision of Wholesale Roaming Access, Eircom has the right to require that Cloud 9 increase the Bank Guarantee to a level more reflective of the actual traffic levels experienced. Any revised Bank Guarantee must not pose an insuperable barrier to entry.

6.5 Other Considerations

- 101 In this section ComReg explores other relevant considerations ahead of setting out our Final determination as to whether Eircom's proposals for charges for access to facilities and services for the implementation of SSRRRS are permissible under (EU) No 531/2012.
- 102 Article 5(1) of (EU) No 531/2012 sets out that Domestic MNOs shall meet all reasonable requests for access to facilities and related support services relevant for the implementation of SSRRRS. The access to facilities and related support services relevant for the implementation of SSRRRS requested by Cloud 9 is within the ESTI Standard for the implementation of SSRRRS. It is ComReg's view that Cloud 9's access request is reasonable in these circumstances.
- 103 As discussed in Section 4.6 above, ComReg is obliged to handle disputes that fall within Regulation 31 of the Framework Regulations. Having received a Dispute from Cloud 9 on 30 July 2014 and having considered the submission pursuant to the Dispute Procedures, it was concluded that it was appropriate for ComReg to take the matter as a Dispute under Regulation 31 of the Framework Regulations, Consequently the Dispute .was accepted on 1 August 2014.
- 104 When making a determination under Regulation 31 of the Framework Regulations, Regulation 31(6) provides that ComReg must have regard Section 12 of the Communications Regulation Acts.

105 Section 12 of the Communications Regulation Acts sets out ComReg's objectives³⁶ in performance of its functions. Section 12(1)(a) sets out ComReg's objectives in respect of Electronic Communications networks, services and associated facilities.

“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,”

106 In relation to the objectives at Section 12(1)(a), Section 12(2) requires that ComReg take all reasonable measures to achieving that objective. The relevant³⁷ measures are as follows:

Section 12(2)(a)(i) the promotion of competition by ensuring that users, including disabled users derive the maximum benefit in terms of choice, price and quality.

Section 12(2)(a)(ii) the promotion of competition by ensuring that there is no distortion or restriction of competition in the electronic communications sector.

Section 12(2)(b)(i) contributing to the internal market by removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level.

Section 12(2)(b)(ii) contributing to the internal market by encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity.

Section 12(2)(c)(v) the promotion of the interests of users within the Community by encouraging access to the internet at reasonable cost to users.

107 It is ComReg's view that by determining a dispute and ensuring compliance with (EU) 531/2012 ComReg is meeting the objectives set out in the list of Sections above. For

³⁶ Some of ComReg's objectives provided for at Section 12 of the Communications Regulation Acts relate to the Postal Sector, the management of Radio Spectrum or the National Numbering Scheme and are not relevant to this dispute. In the interest of clarity, objectives which are not directly applicable to either Electronic Communications networks, services and associated facilities or to the subject and/or scope of this dispute are not cited and are not considered.

³⁷ See Footnote 36

reference the subject matter and scope of (EU) 531/2012 is set out at Articles 1(1) and 1(2) as follows:

“

Article 1

Subject matter and scope

- (1) *This Regulation introduces a common approach to ensuring that users of public mobile communications networks, when travelling within the Union, do not pay excessive prices for Union-wide roaming services in comparison with competitive national prices, when making calls and receiving calls, when sending and receiving SMS messages and when using packet switched data communication services, thereby contributing to the smooth functioning of the internal market while achieving a high level of consumer protection, fostering competition and transparency in the market and offering both incentives for innovation and consumer choice.*

It lays down rules to enable the separate sale of regulated roaming services from domestic mobile communications services and sets out the conditions for wholesale access to public mobile communications networks for the purpose of providing regulated roaming services. It also lays down transitory rules on the charges that may be levied by roaming providers for the provision of regulated roaming services for voice calls and SMS messages originating and terminating voice calls and SMS messages originating and terminating within the Union and for packet switched data communication services used by roaming customers while roaming on a mobile communications network within the Union. It applies both to charges levied by network operators at wholesale level and to charges levied by roaming providers at retail level.

- (2) *The separate sale of regulated roaming services from domestic mobile communications services is a necessary intermediate step to increase competition so as to lower roaming tariffs for customers in order to achieve an internal market for mobile communication services and ultimately for there to be no differentiation between national and roaming tariffs.”*

108 Regulation 31(6) of the Framework Regulation also requires that ComReg have regard to Regulation 16 of the Framework Regulations when making a determination under Regulation 31.

109 Regulation 16 of the Framework Regulations sets out additional objectives for ComReg. These are without prejudice to the objectives at Section 12 of the Communications Regulation Acts. The text of the relevant³⁸ sections of Regulation 16 is as follows:

³⁸ Some of ComReg's objectives provided for at Regulation 16 of the Framework are not relevant to this dispute. In the interest of clarity, objectives which are not directly applicable to the subject and/or scope of this dispute are not cited and are not considered.

Regulation 16(1)(c) in so far as contributing to the development of the internal market is concerned, co-operate with BEREC in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of European Union law in the field of electronic communications.

Regulation 16(1)(d) in so far as promotion of the interests of users within the European Union is concerned, to promote the ability of end-users to access and distribute information or use applications and services of their choice.

110 It is ComReg's view that by determining a dispute and ensuring compliance with (EU) 531/2012 ComReg is meeting the objectives set out in the list above based on the subject matter and scope set out at Article 1 of (EU) 531/2012).

111 Regulation 16(2) of the Framework Regulations provides that In pursuit of its objectives under paragraph 16(1) of the Framework Regulations and under Section 12 of the Communications Regulation Acts, ComReg shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services. It is ComReg's view that (EU) 531/2012) is applicable to all Domestic MNOs therefore, there is no discrimination the treatment of undertakings providing access to facilities and services for the implementation of SSRRRS in similar circumstances.

6.6 Conclusions

112 Access includes connection as set out in the Access Directive and directly cross referenced in (EU) 531/2012.

113 The facilities and services necessary for the implementation of SSRRRS are provided for in the ETSI Standard for the implementation of SSRRRS for the implementation of SSRRRS.

114 Regarding the Eircom implementation of SSRRRS:

- (a) Where access to a facility or service is necessary for the implementation of SSRRRS, Eircom shall not charge, pursuant to Article 5(1) of (EC) 531/2012.
- (b) Where access to a facility or service is not necessary for the implementation of SSRRRS under the ETSI Standard, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
- (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Eircom may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.

- (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Eircom may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.

115 A Bank Guarantee is permissible and where required should be based on 3 months forecasted traffic provided by Cloud 9. Where the Bank Guarantee does not cover Eircom's actual financial exposure, Eircom has the right to require that Cloud 9 increase the Bank Guarantee to this appropriate level. Any revised Bank Guarantee must not pose an insuperable barrier to entry.

Annex: 1 Final Determination

Final Determination to resolve the dispute between Cloud 9 Mobile Communications Limited and Eircom Limited concerning proposed charges for access to facilities and services necessary for the separate sale of regulated roaming services

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 under Regulation 5 of the Communications (Mobile Telephone Roaming) Regulations 2013¹ (**'the Mobile Roaming Regulations'**) and Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011² (**'the Framework Regulations'**) in connection with existing obligations under Regulation (EU) No 531/2012 of the European Parliament and of the Council³ (**'(EU) No 531/2012'**)
- 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 2002 to 2011⁴ (**'the Communications Regulation Acts'**) and Regulation 16 of the Framework Regulations;
 - (iii) Having taken account of submissions received from the Parties

2. DEFINITIONS

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

'(EU) 531/2012' means the Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).

¹ Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013).

² European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)

³ Official Journal of the European Communities, Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).

⁴ 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).

‘access’ shall have the same meaning as under Article 2 of the Access Directive.

‘Access Directive’ means Directive 2002/19/EC of the European Parliament and of the Council of 7 March, 2002 as amended, on access to, and interconnection of, electronic communications networks and associated facilities.⁵

‘Authorisation Regulations’ means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011).

‘Authorised Undertaking’ shall have the same meaning as under Regulation 2 of the Authorisation Regulations;

‘BEREC’ means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

‘Cloud 9’ means Cloud 9 Mobile Communications Limited, an Authorised Undertaking.

‘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)

‘ComReg’ means the Commission for Communications Regulation.

‘Direct Wholesale Roaming Access’ means the making available of facilities and/or services by a mobile network operator to another undertaking, under defined conditions, for the purpose of that other undertaking providing regulated roaming services to roaming customers.

‘Eircom’ means Eircom Limited and its subsidiary Meteor Mobile Communications Limited

‘ETSI’ means the European Telecommunications Standards Institute.

‘ETSI Standard for the implementation of SSRRRS’ means Standard technical interfaces, protocols and processes for the implementation of SSRRRS including but not limited to implementation, provisioning, billing produced maintained and updated from

⁵ Official Journal of the European Communities, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (2002/19/EC, OJ L 108, 24.4.2002, p. 7) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services (2009/140/EC, OJ L 337, 18.12.2009, p. 37).

time to time by ETSI which are publicly available through the cooperation platform maintained by ETSI⁶.

‘Framework Regulations’ means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)

‘Mobile Roaming Regulations’ means the Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013).

‘SSRRRS’ means the separate sale of regulated roaming services as provided for in (EU) 531/2012.

‘Wholesale Roaming Access’ means Direct Wholesale Roaming Access or Wholesale Roaming Resale Access

‘Wholesale Roaming Resale Access’ means the making available of facilities and/or services by a mobile network operator to another undertaking, under defined conditions, for the purpose of that other undertaking providing regulated roaming services to roaming customer.

‘Wholesale Charges for Regulated Roaming Services’ means the wholesale charges provided for at Articles 7, 9 and 12 of (EC) 531/2012.

- 2.2. Terms used but not otherwise defined in this Determination shall have the meaning attributed to them (EC) 531/2012.

3. SCOPE AND APPLICATION

- 3.1. This Determination applies to Cloud 9 Mobile Communications Limited (**‘Cloud 9’**) and Eircom Limited (**‘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 (EC) 531/2012.
- 3.3. The scope of the dispute was published on the ComReg website on 8 August 2014 as follows:

Whether it is permissible for Eircom to impose the following on Cloud 9 for facilities and support services for the separate sale of regulated roaming services (**‘SSRRRS’**):

- (i) One-off connection and set-up charges.
- (ii) Monthly/Recurring charges.
- (iii) Bank Guarantees
- (iv) Wholesale charges for the making of regulated roaming calls.

⁶ http://docbox.etsi.org/Reference/Cooperation_Platform_Separate_Sale_of_Roaming_Services/

4. DETERMINATION

- 4.1. In accordance with Regulation 31 of the Framework Regulations, 2003 as amended; the Communications Regulation Act; the Mobile Roaming Regulations and (EU) No 531/2012; and for the purpose of this Determination in the dispute between Cloud 9 and Eircom, ComReg hereby determines that:
- (i) Access includes connection as set out in the Access Directive and directly cross referenced in (EU) 531/2012.
 - (ii) The facilities and services detailed in the ETSI Standard for the implementation of SSRRRS are necessary for the implementation of SSRRRS.
 - (iii) Regarding the Eircom implementation of SSRRRS:
 - (a) Where access to a facility or service is necessary for the implementation of SSRRRS, Eircom shall not charge, pursuant to Article 5(1) of (EC) 531/2012.
 - (b) Where access to a facility or service is not necessary for the implementation of SSRRRS, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
 - (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Eircom may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.
 - (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Eircom may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.
 - (iv) A Bank Guarantee is permissible and where required should be based on 3 months forecasted traffic and subscriber numbers provided by Cloud 9. The Bank Guarantee shall specifically relate solely to the provision of access to Wholesale Roaming Access pursuant to Article 3 of (EU) No 531/2012 and the associated Wholesale charges set out at Articles 7, 9, and 12 of (EU) No 531/2012 which are applicable to Wholesale Roaming Access pursuant to Article 3(4) of (EU) No 531/2012. Where the Bank Guarantee does not cover Eircom's actual financial exposure specifically from the provision of Wholesale Roaming Access, Eircom has the right to require that Cloud 9 increase the Bank Guarantee to a level more reflective of the actual traffic levels experienced. Any revised Bank Guarantee must not pose an insuperable barrier to entry.

5. MAINTENANCE OF OBLIGATIONS

- 5.1. Unless expressly stated otherwise in this 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 Determination, are continued in force by this Determination and the parties shall comply with same.

- 5.2. If any section, clause or provision or portion thereof contained in this 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 Determination and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Determination, and shall not in any way affect the validity or enforcement of this 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 Determination shall prevail, unless otherwise indicated by ComReg.

6. STATUTORY POWERS NOT AFFECTED

- 6.1. Nothing in this 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 Determination).

7. EFFECTIVE DATE

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

KEVIN O'BRIEN

CHAIRPERSON AND COMMISSIONER

THE COMMISSION FOR COMMUNICATIONS REGULATION

THE [...] DAY OF [...] 201[...]