



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Consultation

Draft Decision on Assessment of a wholesale FTTH discount scheme notified by Eircom Limited under ComReg Decision D05/24

NON - CONFIDENTIAL

Consultation and Draft Decision

Reference: ComReg 24/38

Version: Final

Date: 24/05/2024

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

1 Lárcheantar na nDugáí, Sráid na nGildeanna, BÁC 1, Éire, D01 E4X0.

One Dockland Central, Guild Street, Dublin 1, Ireland, D01 E4X0.

Teil | Tel +353 1 804 9600 Suíomh | Web www.comreg.ie

Contents

1	Introduction.....	3
2	Framework	5
3	Eircom’s Wholesale Notification	6
4	ComReg’s assessment	7
5	Draft Decision Instrument.....	21
6	Consultation	23
	Annex 1: Correspondence	25
	Annex 2: Oxera report.....	26

NON - CONFIDENTIAL

1 Introduction

- (1) Under ComReg Decision D05/24, Eircom Limited ('**Eircom**') may not apply any Discounts or Promotions in respect of FTTP-based VUA without the express prior approval of ComReg, which approval ComReg may grant on Eircom's application where the following four criteria are met, namely:
 - a) the proposed price taking account of any Promotion or Discount remains above the Price Floor;
 - b) ComReg is satisfied that the Promotion or Discount does not, in form or in effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers;
 - c) ComReg is satisfied that the Promotion or Discount is not targeted at a specific geographic area and for the avoidance of doubt, no Promotion or Discount will be approved that gives rise to a geographic differentiation of prices; and
 - d) ComReg is satisfied that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.
- (2) On 23 February 2024, Eircom submitted a FTTH Wholesale Discount offer ('**the Notification**')¹ to ComReg and following a number of queries by ComReg, provided further information on 21 March 2024 at which point ComReg considered Eircom's notification to be complete. Further clarifications were provided by Eircom at an online meeting on 18 April 2024 and in follow-up correspondence.
- (3) The notified FTTH Wholesale Discount offer is the first discount that could be implemented in the market further to the relaxation of the ban on discounts and promotions on FTTH in ComReg Decision D05/24, and its impact on the market may be significant. ComReg is accordingly of the view that consultation in this instance is appropriate. (However, this may not be the case in respect of other subsequent promotions and discounts.)
- (4) In this Consultation, ComReg sets out its assessment of the FTTH Wholesale Discount offer notified by Eircom against the criteria set out in Decision D05/24. ComReg proposes to make a finding that the criteria set out in Decision D05/24 are met at this time and, on the basis of the information available to it at this time and on the analysis conducted to date, proposes to approve the publication and two months thereafter, the making available of the offer by Eircom. Certain concerns do arise as

¹ Wholesale Notification 2024-010 ('**WN2024-010**'), also referred to as Change Request Document 994 or '**CRD 994**'.

identified below and in the report prepared by ComReg's advisors, Oxera which accompanies this document. However, ComReg's view at this time is that the FTTH Wholesale Discount offer is not inconsistent with the promotion of network competition and encouraging investment, while ensuring that existing and prospective investment by alternative operators is not jeopardised. ComReg also recognises that the offer may incentivise operators to migrate their copper-based customers to FTTH. This is consistent with ComReg's goal of promoting the take up of Very High Capacity Networks, and it also has the potential to lead to lower prices for consumers.

- (5) In proposing to approve the FTTH Wholesale Discount offer, we are cognisant of the potential for some terms of the proposed FTTH Wholesale Discount to provide an advantage to Eircom Retail compared to other Access Seekers. However, based on its assessment and available information, ComReg considers that any such advantage will not be material and proposes on this basis to find that the FTTH Wholesale Discount offer will not favour Eircom's retail arm, consistent with the second criterion set out in Decision D05/24.
- (6) We are also cognisant of Oxera's concerns that the restriction of the Offer to an RSP's own customers on Eircom's copper and FTTC based network may restrict retail competition on Eircom's network. However, as discussed below the impact of restricting the Offer to upgrades to FTTH of an Access Seeker's own customers is unclear given the presence of other network alternatives in many areas.
- (7) Overall, we have evaluated the proposal as presented to us in the round. On balance, we are currently of the view that the benefits of the Offer outweigh the risks but are open to considered views on this and all aspects of the proposal.
- (8) By this Consultation, ComReg is seeking market participants' views on ComReg's proposal to approve the FTTH Wholesale Discount offer notified by Eircom. It will consider any information or insights received before proceeding to adopt its final decision. All responses to this Consultation should be submitted by **1700 on Monday, 24 June 2024**. ComReg intends to inform Eircom and stakeholders of its final assessment of the FTTH Wholesale Discount offer by **26 July 2024**.
- (9) The remainder of this document sets out the framework ComReg uses in assessing FTTH Wholesale Discounts or Promotions, details on the proposed FTTH Wholesale Discount offer submitted by Eircom, ComReg's assessment of Eircom's submission and the Consultation Process.

- (10) The Notification and additional information provided by Eircom are at Appendix 1. As part of ComReg's considerations, ComReg has obtained economic advice from economic experts Oxera, and a copy of Oxera's report² is at Appendix 2.

2 Framework

- (11) Under ComReg Decision D05/24, any wholesale FTTP VUA promotion or discount proposed by Eircom is subject to case-by-case approval by ComReg. Approval will only be granted where ComReg is satisfied that the proposed discount or promotion will not have a detrimental impact on actual or potential economically efficient alternative investment in VHCN³. In particular, as set out above, ComReg will not approve a wholesale promotion or discount unless it meets the following criteria⁴:
- the proposed price taking account of any Promotion or Discount remains above the Price Floor;
 - ComReg is satisfied that the Promotion or Discount does not, in form or in effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers;
 - ComReg is satisfied that the Promotion or Discount is not targeted at a specific geographic area and for the avoidance of doubt, no Promotion or Discount will be approved that gives rise to a geographic differentiation of prices; and
 - ComReg is satisfied that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.
- (12) Notification by Eircom of a proposed discount initiates a three month assessment period which may be paused where complete information has not been provided, or additional information is required, in which case it will resume on provision of the relevant information by Eircom⁵.
- (13) ComReg is also required to carry out a consultation where it considers that the proposal will have a significant impact on the market within the meaning of the EEC Regulations or, for example, if the proposal is thought to contain aspects of concern

² "Oxera's review of WN 24-010 FTTH Discount_02.05.2024": Hereafter, referred to as the 'Oxera Report'.

³ Para 9.557 of ComReg Decision D05/24.

⁴ ComReg Decision D05/24, Decision Instrument: Section 14.10.1–14.10.4.

⁵ Para 9.566(a) of ComReg Decision D05/24

where the impact on competition is unclear and may require input to be sought from stakeholders⁶.

- (14) The assessment period can be paused for the period of consultation, and subsequently may be extended if necessary. ComReg will inform Eircom and stakeholders at the same time of its final assessment of the relevant offer at the end of the assessment period⁷.

3 Eircom's Wholesale Notification

- (15) The Notification consists of a proposed discount ('the **Offer**', also referred to as the '**FTTH Tariff Proposal**') which would be available to all operators purchasing wholesale inputs from Eircom ('**Access Seeker**'), when they upgrade their respective existing customers from wholesale copper services (FTTC and CGA) to a wholesale FTTH service. Specifically, the Offer provides for a €3 discount to the headline monthly rental price of Eircom's FTTH services on a per line basis to Access Seekers.
- (16) ComReg's understanding is that the Offer comprises the following features:
- A €3 reduction from the monthly rental price for FTTH for any copper-based technology upgrade (including FTTC) to FTTH, available to all Access Seekers (including Eircom Retail);
 - No volume targets are required to be met for Access Seekers to be eligible for the reduction;
 - The reduction is available for new upgrades only, starting from the effective date of the Offer;
 - The reduction applies for the duration of the Offer, which will be for a maximum of 3 years with FTTH prices reverting to the list price 3 years after the Offer commences (Eircom can terminate the Offer earlier subject to 12 month notification to Access Seekers);
 - The reduction applies to all FTTH profiles available from Eircom, including VUA and Bitstream products;
 - The discount in the Offer is only available for upgrades of an Access Seeker's own customers from a CGA or FTTC based broadband service to an FTTH service on the Eircom network. It does not apply to new FTTH connections or

⁶ Para 9.566(c) of ComReg Decision D05/24

⁷ See ComReg Decision D05/24, paragraphs 9.557 to 9.567.

where an Access Seeker, in acquiring a customer from another Access Seeker, upgrades the acquired customer from copper-based broadband to FTTH.

- (17) Eircom states that the Offer is intended to incentivise access seekers to upgrade their connections from copper-based technology services to FTTH. Eircom also states that:

“The FTTH Tariff Proposal promotes the deployment of a high-capacity fibre-based broadband network on a national basis and reduces access costs for wholesale customers. The FTTH Tariff Proposal will incentivise operators to upgrade from FTTC products to higher-capacity FTTH products whilst ensuring that there is robust and vigorous competition between wholesale network operators⁸.”

- (18) Based on its assessment of the Offer under each of the criteria set out in D05/24 and having considered advice from Oxera, ComReg proposes to approve the Offer, for the reasons detailed below.

4 ComReg's assessment

- (19) ComReg's assessment of the Offer based on the framework as set out in ComReg Decision D05/24 is set out below:

Criterion 1: FTTH prices remain above the Price Floor

- (20) The first criterion that must be satisfied is:

The proposed price taking account of any Promotion or Discount remains above the Price Floor.

- (21) Under Decision D05/24 the FTTC VUA price acts as a price floor for FTTH VUA.⁹ The FTTC VUA monthly rental charge is set at €19.12 and will remain at this level until 30 June 2024. At present, the lowest FTTH VUA monthly rental charge is €23.50 and a €3 discount would bring this to €20.50. This is €1.38 (7%) above the €19.12 Price Floor. Therefore, based on the existing FTTC VUA and FTTH VUA prices, the proposed discounted FTTH VUA price is above the Price Floor.

- (22) However, from 1 July 2024, under the pricing continuity approach for FTTC VUA provided for in Decision D05/24, Eircom may increase the FTTC VUA price annually

⁸ Eircom CRD 994, pp 2-3.

⁹ ComReg Decision D05/24, Decision Instrument: Section 14.6.1.

using a CPI-0 formula. "CPI" refers to the Consumer Price Index at the end of the last calendar year. This index measures the rate of inflation and is sourced from the Central Statistics Office (CSO).

- (23) Therefore, the FTTC VUA price, and thus the Price Floor, may increase over time. For example, as the rate of inflation from December 2022 to December 2023 as recorded by the CSO was 4.6%, Eircom has the option to increase the FTTC VUA price by up to 4.6% after 1 July 2024. As noted by Oxera, if Eircom were to use the afforded flexibility to increase the FTTC VUA price, and thus the Price Floor, above €20.50, i.e., in excess of €1.38 (7%) in the next three years without also increasing the undiscounted FTTH VUA list price, the discounted FTTH VUA prices could fall below the Price Floor¹⁰.
- (24) Eircom on 19 April 2024 notified industry that the monthly rental charge for FTTC VUA will increase by €0.88 to €20.00 from the 1 July 2024. While this is the maximum allowable increase for FTTC VUA under the pricing-continuity approach for 2024, ComReg notes that a discounted FTTH VUA monthly rental charge of €20.50 will remain above the FTTC VUA based price floor after 1 July 2024. However, were Eircom to increase the €20 monthly rental charge for FTTC VUA by more than 2.5% in the future, it would also have to increase the FTTH VUA undiscounted price to ensure that the discounted FTTH VUA price remains above the FTTC VUA price floor.
- (25) Consequently, while ComReg finds that the proposed FTTH VUA prices taking account of any Promotion or Discount remains above the Price Floor at existing FTTC VUA price levels, it is also the case that should Eircom continue to increase FTTC VUA prices in the future, Eircom may also need to adjust the FTTH VUA undiscounted list price to ensure that the FTTH VUA price including the discount continues to be above the Price Floor for the duration of the price control period.
- (26) On this basis, ComReg finds that at this time, the proposed prices taking account of the discounts in the Offer remain above the Price Floor. Therefore, ComReg is satisfied that the first criterion is met subject to Eircom ensuring that the discounted FTTP VUA price remains at all times above the Price Floor, including, where necessary, by increasing the undiscounted FTTH VUA list price when increasing the FTTC VUA price.

¹⁰ 'Oxera Report', paragraph 3.8.

Criterion 2: The relative benefit to Eircom Retail

(27) The second criterion that must be satisfied is:

ComReg is satisfied that the Promotion or Discount does not, in form or in effect, favour Eircom's retail arm and is in practice available to a range of Access Seekers.

(28) The Oxera Report identifies two distinct elements to this criterion: (i) whether the discount is available to a range of Access Seekers; and (ii) whether the discount favours Eircom's retail arm¹¹.

(i) Whether the discount is available to a range of Access Seekers

(29) Regarding the first element, there do not appear to be any grounds for concern that the discount would not be available to a range of Access Seekers in practice, for the following reasons:

(30) First, the Offer applies to all FTTH profiles, including Bitstream and VUA that are purchased by Access Seekers¹². This means, as Eircom and Oxera have noted, that Access Seekers, who may have a preferred type of access and/or may focus on providing retail products with certain speeds, can equally benefit from the discount irrespective of the specific FTTH wholesale input used.

(31) Second, there are no explicit volume-based conditions or thresholds pertaining to the Offer, which means, as also noted by Eircom and Oxera, that the discount is attainable on each upgraded line, irrespective of the total volume of upgrades. This means all Access Seekers, irrespective of their existing scale, would be able to obtain the €3 monthly discount for each line they upgrade.

(32) However, the own-customer upgrade restriction within the Offer means that the discount is not available to an Access Seeker that acquires a customer from a rival and, in the process, upgrades them from a copper-based to a FTTH-based product on the Eircom wholesale network. In turn, this means as noted by Oxera, that the degree to which an Access Seeker can benefit from the Offer is dependent on the relative size of its copper/FTTC customer base and that Access Seekers without an existing copper or FTTC customer base would not be able to take advantage of the discount. In Oxera's view, the own-customer upgrade restriction could have an adverse impact on retail competition by reducing incentives to acquire and upgrade rival customers and thus helping to lock-in existing market shares and thereby protect

¹¹ The Oxera Report, paragraph 3.11

¹² Eircom CRD 994, p. 4

the market position of Eircom's retail arm. The extent that this is so is considered below.

(ii) whether the discount favour Eircom Retail

Effect of the own-customer upgrade restriction

- (33) ComReg notes that not only could the own-customer upgrade restriction help lock-in existing market shares but as Eircom Retail has a large copper base, it also has the potential to benefit most from the own-customer upgrade restriction. In particular, it can realise the largest total value of cost savings through obtaining the €3 per line monthly discount for upgrading this base of customers. The Oxera Report observes that any savings an Access Seeker achieves due to discounts on wholesale prices could be used to support a more compelling retail offer, either through lower retail prices, or through other non-price improvements that would provide a competitive advantage, all else being equal.¹³
- (34) Furthermore, the own-customer upgrade restriction means an Access Seeker would be able to upgrade its own copper/FTTC customers to an FTTH service on Eircom's network at a €3 per month cost advantage relative to any customers acquired from rivals and upgraded to FTTH. The Oxera Report notes that, at the margin, Access Seekers will prefer to upgrade their own copper-based customers over seeking to 'win and upgrade' a rival's copper-based customer, given they will get a discount on the wholesale FTTH service for the former, but not the latter. The fact that Eircom Retail has a much larger copper-based broadband base compared to any of its rivals means that any dampening of retail competition between Access Seekers for the upgrade of legacy customers arising from the own-customer upgrade restriction could be of greater benefit to Eircom's retail arm.¹⁴
- (35) ComReg notes that Eircom has offered no clear rationale for restricting the discount to own-customer upgrades. Eircom's Notification suggests that the restriction will facilitate planning and managing the migration of an operator's existing CGA subscribers to FTTH and that the discount structure sought to incentivise Access Seekers to proactively upgrade their own FTTC base. While Eircom had subsequently suggested that operators were currently favouring upgrading to FTTH, copper-based customers gained from other operators, actual data shows that the majority of upgrades to FTTH currently are in fact own-customer upgrades. On reviewing the data Eircom does not dispute that this is the case but notes that nevertheless the Offer will specifically encourage operators to upgrade their existing

¹³ Oxera Report, paragraph 3.20

¹⁴ Oxera Report, paragraph 3.18

base from copper to fibre. Eircom have stated that in future, other promotions and discounts could be devised with different emphases.

- (36) Accordingly, the structure of the Offer, whereby the discount is limited to own-customer upgrades, may, in effect, favour Eircom's retail arm, contrary to the requirement of the second criterion. However, ComReg's assessment indicates that any such advantage is not material, for the following reasons.
- (37) First, a significant proportion of the active copper base has yet to be passed by Eircom's FTTH network. The own-customer upgrade restriction is no impediment to Access Seekers competing, including competing with Eircom Retail, for those customers and could provide an incentive to Access Seekers to increase their share of this copper base, so that they can avail of the discount in the future when the customer's premises is passed by Eircom's FTTH network.
- (38) To illustrate this, ComReg notes that Eircom's Q4-2023 results presentation indicates that there were 452k active FTTC lines as of Q4-2023¹⁵, while 932k premises were passed by FTTC only, which is down from the 1.5m premises that were passed by FTTC only in Q4 2019.¹⁶
- (39) This indicates that Eircom's active FTTC customers are contained within a 1.5m FTTC premises footprint, the majority of which have still to be passed by Eircom's FTTH network. Indeed, ComReg's analysis of the available Eircode data indicates that less than 40% of active FTTC lines were passed by Eircom's FTTH network at the end Q4-2023. It will also take Eircom a number of years to pass the remaining 60% (in recent years Eircom has been passing circa 200k premises annually with FTTH). Hence, a significant proportion of the existing active FTTC base (possibly more than 50%) will still not be passed by Eircom's FTTH network at the time that all Access Seekers become aware of Eircom's proposed discount scheme and, for a period, retail competition will continue to be based on FTTC for this cohort of customers.
- (40) In summary, while the own-customer upgrade restriction may dampen retail competition for those active FTTC lines that are passed by Eircom's FTTH network, there may also be an increase in the incentive for Access Seekers to compete for the significant active FTTC base that is not yet passed by Eircom's FTTH.
- (41) Second, Oxera assessed the potential wholesale cost saving per line that could be achieved by each major Access Seeker (including Eircom's retail arm), assuming that

¹⁵ [PowerPoint Presentation \(eir.ie\)](#), hereafter, referred to as the 'Eircom Q4-2023 Results', slide 6.

¹⁶ Eircom Q4-2023 Results, slide 7.

Access Seekers distribute the total value of cost savings generated on upgraded lines across their entire FTTH customer base at the retail level (including upgraded and existing FTTH lines)¹⁷.

- (42) In undertaking the analysis Oxera recognises that the pace of Eircom's overlay of FTTC with FTTH will impact an Access Seeker's ability to avail of the discount, as Eircom cannot upgrade a line to FTTH until it has passed the associated premises with FTTH. As noted above, it will be a number of years before many active FTTC customers are passed by Eircom's FTTH network. It is also the case, that some active CGA lines will never be passed by Eircom's FTTH network as they are located in the Intervention Area, and outside Eircom's planned FTTH footprint. Oxera's analysis has allowed for these factors in the range of plausible Eircom FTTH overlay scenarios that could pertain at different stages over the next 3 years.
- (43) This analysis allowed for the fact that the potential cost advantage one Access Seeker can achieve relative to another depends not just on its mix of existing lines on copper/FTTC as against those it has on FTTH across all network operators (including Eircom's FTTH network), but also on the share of each Access Seeker's copper/FTTC base that could feasibly be upgraded at different periods within the three-year window of the offer. Oxera's analysis¹⁸ indicates that, if no cap is applied to the number of copper-based lines that Eircom Retail can upgrade, Eircom Retail may realise a higher average cost saving per FTTH line across its FTTH portfolio than could possibly be attained by its main retail rivals¹⁹. In the 100% upgradable base scenario, Eircom achieves broadly the same average cost savings as Sky and Vodafone. Below 100% Eircom Retail can realise higher average cost savings. Given Eircom's rollout target, it is unlikely to reach this level of coverage (outside the NBP IA) before 2026 and Eircom is likely to have an advantage over other retailers for the majority of the period for which the discount will be available.²⁰
- (44) In the compliance statement included as part of its notification, Eircom recognises that its position as having the largest FTTC retail base could provide its downstream

¹⁷For example, suppose that an Access Seeker has a 50:50 mix of copper/FTTC and FTTH lines in their portfolio and, if they upgrade all remaining copper/FTTC customers to FTTH (50% of its base) it can achieve a discount of €3 for each of these customers. If these cost savings are passed through to retail prices on a nation-wide basis across all FTTH lines regardless of whether a specific line was in receipt of a wholesale discount, then each Access Seeker could offer an average retail price reduction across all FTTH lines of €1.50 (50%*€3).

¹⁸ Oxera's analysis considers 2 FTTH overlay scenarios: 100% scenario based Eircom completing all of its planned FTTH overlay; and a 69% scenario based on the % of national premises outside of the NBP IA currently covered by Eircom's FTTH network (as per Q4 2023).

¹⁹ Oxera Report, paragraph 3.30

²⁰ Almost two-and-a-half years out of a maximum of three years, assuming the discount comes into effect in August 2024 and Eircom's FTTH rollout is not completed until the end of 2026.

arm with an advantage relative to other Access Seekers. To address this, Eircom has capped the number of Eircom Retail FTTC lines that are eligible for the discount. Eircom states that:

“This cap is specifically set at 1.32 times the size of the second-largest FTTC customer base within eir's wholesale network as of December 2023. As a result, although eir retail currently serves [X ██████ X] FTTC customers, the number of customers eligible for this promotion is limited to [X ██████ X]”²¹.

(45) Eircom also states that:

“The selection of a 1.32 multiplier is a deliberate, proportional approach to structuring incentives for network upgrades...By basing the cap on the customer base size of the second-largest FTTC provider and then applying this multiplier, we mitigate any potential undue competitive advantage that eir retail might have from its substantial FTTC customer base. Hence this approach promotes fair competition and establishes a level playing field, ensuring that the benefits of network upgrades are accessible in a balanced and equitable manner across the industry.”²²

(46) There is no equivalent cap proposed for other copper-based services (such as CGA) which Eircom has justified by reference to *“the distinct market conditions and competitive dynamics associated with these services”²³*. These included the fact that CGA is characterised by declining demand and reduced strategic importance for investment by operators, including Eircom. Eircom also noted that placing a cap on CGA would be ineffective in assisting planning and managing the migration of the Operator's existing CGA subscribers to FTTH as CGA services are available throughout Ireland and include the Intervention Area.

(47) However, having considered these points, ComReg notes that:

- both FTTC and CGA broadband are technologies that are characterised by declining demand and reduced strategic importance for investment by operators;
- planning and managing the migration of CGA is likely to be similar to planning and managing the migration of FTTC. Before upgrading a line from copper to FTTH an Access Seeker needs to know the Eircode of the premises that it wishes to upgrade so it can use this Eircode to establish if it is passed by Eircom's FTTH

²¹ Eircom CRD 994, p. 4

²² Eircom CRD 994, p. 4

²³ Open eir response of 21 March 2024 to ComReg's queries sent on 15 March 2024 in relation to Wholesale Notification 2024-010 (WN2024-010), p. 2. Hereafter referred to as 'Eircom Clarifications'.

network and/or another commercial operator’s FTTH network, or if it will only be passed by NBI’s FTTH.

- (48) Therefore, Eircom Retail could also favourably benefit from having the largest volume of active CGA lines, so any assessment of the potential benefit to Eircom Retail has to consider the possible extent that the proposed FTTC cap might mitigate any potential undue competitive advantage that Eircom Retail’s larger share of both the FTTC and CGA base might engender.
- (49) The relative benefit of the Offer may be measured by calculating the total discount achieved by each Access Seeker and dividing this total by the number of its FTTH customers, as this may translate into average price reductions or improved retail offerings of the same magnitude. The following table uses “dummy data” to indicate how the average benefit that could be achieved by two Access Seekers with different customer profiles might compare when each Access Seeker achieves the same customer upgrades percentages.

Table 1 – Potential marginal benefit by upgrade scenario

	Existing Copper Base	Existing FTTP Base	% Copper upgraded	Upgraded copper lines	Upgrades eligible for discount	Monthly Savings (€3 per eligible upgrade)	FTTH base after upgrades	Average cost saving per FTTH line €	Marginal Benefit €
Access Seeker A	110,000	50,000	69%	75,900	75,900	227,700	125,900	€ 1.81	
Access Seeker B	75,000	52,500	69%	51,750	51,750	155,250	104,250	€ 1.49	€ 0.32
No Cap									
Access Seeker A	110,000	50,000	100%	110,000	110,000	330,000	160,000	€ 2.06	
Access Seeker B	75,000	52,500	100%	75,000	75,000	225,000	127,500	€ 1.76	€ 0.30
94k cap on A									
Access Seeker A	110,000	50,000	100%	110,000	94,000	282,000	160,000	€ 1.76	
Access Seeker B	75,000	52,500	100%	75,000	75,000	225,000	127,500	€ 1.76	€ (0.00)

- (50) As copper-based services account for a higher proportion of the existing customer base of ‘Access Seeker A’, it can derive a marginal benefit from the Offer relative to ‘Access Seeker B’. In this example, implementing a 94k cap on ‘Access Seeker A’ would effectively eliminate the marginal benefit if both Access Seekers were able to upgrade 100% of their copper base to FTTH. However, the cap is not effective in the 69% upgrade scenario, as the total number of upgrades achieved by ‘Access Seeker A’ under this scenario is less than the 94k cap.
- (51) Oxera has undertaken similar analysis using Q4 2023 customer data for Eircom Retail and the two largest rival Access Seekers. Oxera’s analysis indicates that, in the 100% upgradable base scenario, the cap set by Eircom as detailed in the Notification does limit the estimated average benefit to a broadly equivalent level for all three Access Seekers. However, in any scenario where the upgradable FTTC base is below [X %] of total FTTC lines copper lines (outside the NBP IA), it is unclear how Eircom intends that the implementation of the cap will limit Eircom’s

average cost savings relative to the situation without the cap. In between these two scenarios, it can be shown that the cap does reduce the average cost savings to Eircom Retail, but these could continue to exceed those that might be attainable by its main retail rivals, were each Access Seeker to upgrade all of its eligible copper base (after allowing for CGA presence in the Intervention Area) to Eircom's FTTH²⁴.

- (52) Consequently, Oxera concludes that *“the cap proposed by Eircom does not provide sufficient assurances to eliminate the concern that Eircom’s retail arm would gain an advantage. As such, the offer has a high likelihood of favouring Eircom’s retail arm, and would therefore be in breach of the second criterion, through the likely ‘effect’ of the offer.”*²⁵

However, while ComReg agrees with Oxera's findings that the Offer may give Eircom Retail a marginal benefit of up to 32 cents per FTTH line in some upgrade scenarios, we do not consider this to be material when compared to the current level of Retail FTTH Prices. For example, Eircom Retail currently offers an 'up to 500Mb' broadband product on a 12-month contract for €34.99.²⁶ The estimated marginal benefit that Eircom Retail might derive in any month in that case would be circa 1% of the discounted retail price. This materiality would be even less if compared against Eircom's undiscounted Retail FTTH price for this product of €74.99.

- (53) It is also the case that Oxera's analysis relies on simplified assumptions, such as assuming that each Access Seeker can upgrade all of its existing copper base that is passed by Eircom's FTTH network in each scenario, and that Access Seekers will only upgrade that copper base to Eircom's FTTH network. However, there are factors other than the extent of Eircom's FTTH overlay that can affect an Access Seeker's ability to upgrade its existing copper base. For example, it is unlikely that an Access Seeker will be able to persuade all its customers to upgrade from copper to FTTH. In addition, Access Seekers can opt for an FTTH service provided by a non-Eircom FTTH network. As a result, the competitive advantage that Eircom Retail can actually realise from the Offer may be less than Oxera's analysis suggests.
- (54) ComReg proposes accordingly to find that the second criterion is met, on the basis that the advantage to Eircom Retail is not material and will not as such impact competition in the market, and subject to that advantage remaining so for all the time that the Offer is in place.

²⁴ Oxera Report, paragraphs 3.31 – 3.37.

²⁵ Oxera Report, paragraph 3.39

²⁶ See, <https://www.eir.ie/shop/broadband>, accessed 02/05/2024.

- (55) In this regard, ComReg notes that Eircom Retail's ability to leverage the cost savings from wholesale discounts into lower retail prices for FTTH, is ultimately dependent on the level of wholesale discounts that are included as part of the wholesale network input costs that are modelled in the FTTP Margin Squeeze Test (FTTP MST) so that the FTTP MST may be used also to monitor the materiality of any advantage arising to Eircom Retail from the Offer.
- (56) In particular, under Decision D05/24, the FTTP MST is used to monitor Eircom's obligation not to cause a margin squeeze between its FTTH retail prices (including retail discounts) and the prices/costs of the Wholesale Network Inputs (including wholesale discounts) used in the provision of those FTTH services²⁷. The FTTP MST is forward looking and is based on forecasts of costs and revenues. The Forecasted Wholesale Network Input ('WNI') for FTTH VUA, which is the primary component of the level of wholesale costs in the FTTP MST, is based "*on the forecasted monthly price (based on Eircom's published reference offers) less the forecasted wholesale discounts provided to the retail arm of Eircom for FTTP VUA (for each month of the ACL)*"²⁸. The FTTP MST also uses an Average Customer Life of 42 months.
- (57) This means that the forecast costs and revenues in the FTTP MST will always consider a period that exceeds the maximum 3 year term of the Offer, and that the forecast of wholesale discounts in the FTTP MST will consider the longer time period of the ACL and the pace of own-customer upgrades that Eircom Retail might be expected to achieve across that time period. For example, an FTTP MST submitted in early 2025 will be based on forecasts covering a period up to late 2029, which is a couple of years after Eircom's planned FTTH overlay is expected to be completed and is also a period when the 3 year life of the Offer discounts will have expired. The FTTP MST also has to consider factors affecting upgrade rates other than the degree of FTTH overlay, such as the willingness of FTTC customers to upgrade to FTTH and the level of churn between rival Access Seekers.
- (58) As such the FTTP MST provides the means to check at all times that the forecast wholesale discounts in future FTTP MST models do not reflect a material advantage to Eircom Retail and more particularly, that the forecast of average wholesale discounts across the 42 months of the ACL for Eircom Retail can be attained by a rival Access Seeker with a smaller copper base than Eircom Retail's across the same period.

²⁷ "A margin squeeze occurs when an SMP SP, active in both the wholesale and retail markets, sets prices in such a way as to prevent an RSP from replicating the retail service provided by the SMP SP at the same price (which covers its downstream costs and generates a profit)". Paragraph 9.574, ComReg Decision D05/24.

²⁸ ComReg Decision D05/24, Table 81, p. 651.

Form

- (59) As regards the potential for the 'form' of the Offer to favour Eircom's Retail Arm by dampening retail competition and consequentially locking-in existing retail fixed broadband market shares, ComReg has already discussed in paragraphs (32) to (40), how the prospect of the own-customer upgrade restriction could potentially incentivise retail competition for customers that have an active copper line but are not yet passed by Eircom FTTH.
- (60) Furthermore, Eircode data indicates that a significant cohort of the active VDSL premises that are upgradeable to FTTH are passed by network operators other than Eircom²⁹. This means that any reduction on retail competition on Eircom's network may be compensated for by increased retail competition across all networks. In other words, ComReg would expect that any potential advantage to Eircom Retail from the restriction to own-customer upgrades on the Eircom network, will be lessened by the fact that Access Seekers will have, in a significant number of cases, the option to use an FTTH provider other than Eircom. This option is expected to expand as SIRO extends its FTTH network footprint and VMI continues to overlay its cable network with FTTH and so increase the potential for retail competition.
- (61) Therefore, ComReg does not expect that the 'form' of the Offer will restrict retail competition to an extent that would provide a material benefit that favours Eircom's Retail Arm.
- (62) On this basis, ComReg finds that in practice the Offer is available to a range of Access Seekers and also finds no evidence at this time that the Offer will, in form or in effect, materially favour Eircom's retail arm. Therefore, ComReg is satisfied that the second criterion is met. In order to ensure that this remains the case throughout the lifetime of the Offer ComReg will monitor that no material advantage accrues to Eircom Retail using the FTTP MST model. In particular ComReg will check that the forecast of average wholesale discounts across the 42 months of the ACL for Eircom Retail used in the FTTP MST model can be attained by a rival Access Seeker with a smaller copper base than Eircom Retail's across the same period.

Criterion 3: Geographic pricing

- (63) The third criterion that must be satisfied is:

²⁹ For example, SIRO FTTH is estimated to be available at [x%] of the Eircodes with an active Eircom Retail FTTC line.

ComReg is satisfied that the Promotion or Discount is not targeted at a specific geographic area and for the avoidance of doubt, no Promotion or Discount will be approved that gives rise to a geographic differentiation of prices.

- (64) Eircom states that the Offer makes no distinction between specific geographic areas and there is no geographic price differentiation³⁰. The Oxera Report also concludes that the Offer does not contain any conditions or provisions which would be expected to give rise to the Discount applying in effect to a specific geographic area. Thus, there is no reason to expect that the Offer itself would lead to geographically differentiated prices³¹.
- (65) ComReg finds that the Offer is not targeted at a specific geographic area and agrees with Oxera that there is no reason to expect that it would lead to geographically differentiated prices. Therefore, ComReg is satisfied that the third criterion is met.

Criterion 4: Impact on investments by alternative operators and competition

- (66) The fourth criterion that must be satisfied is:

ComReg is satisfied that the Promotion or Discount will not adversely affect investments by Undertakings or undermine competition.

- (67) Eircom contends that the Offer will have no material impact on competitors' investment plans given that the discounted prices are above the FTTC VUA based price floor.
- (68) Oxera is also of the view that, provided it allows for the recovery of connection costs, the Price Floor proxied by the FTTC VUA price is an appropriate benchmark against which to consider whether the discounted FTTH VUA prices would foreclose competitive alternative network operators. On this basis, Oxera considers that provided that the discounted price remains above the Price Floor the FTTH VUA prices including the discount would remain at a level which would not foreclose the competitive investment by alternative network operators or undermine competition at the wholesale level.
- (69) ComReg notes in this regard that the FTTC VUA rental price does allow for a contribution to the recovery of connection costs. The monthly costs of the LLU and SLU components of the FTTC VUA service include a contribution to the costs of

³⁰ Eircom CRD 994, p.4

³¹ The Oxera Report, para 3.45

providing and maintaining the service lead into the customer premises, and provision of the service lead is the most significant element of the connection cost. The cost modelling underpinning the FTTC VUA rental price also allows for a monthly contribution to the recovery of other connection related costs such as the cross jumpering required in the local exchange and cabinet³².

- (70) Oxera also notes that the Offer does not include conditions that require volume-based targets to be met in order to qualify for the discount. Therefore, in deciding whether to upgrade an existing copper-based customer, an operator can assess the FTTH wholesale price including the discount that it can obtain from Eircom against the wholesale prices offered by alternative network operators, without there being implications for the wholesale prices it pays on other line volumes supplied using Eircom's FTTH network. There is no concern that this offer could have loyalty-enhancing effects as a result of retro-actively applied discounts³³.
- (71) Therefore, on the basis that the discounted price is above the FTTH VUA price floor and that the FTTH Proposal doesn't include volume-based targets, Oxera considers that this fourth criterion is satisfied with respect to the impact on wholesale competition³⁴.
- (72) Eircom also notes that the evaluation of the impact of the Offer can also consider economic and other benefits, such as increased efficiency, technology upgrades, or lower consumer prices, that might potentially offset any negative effects on competition. In this regard, Eircom highlight two potential benefits:
- (a) efficiencies from the copper to fibre transition - Providing a €3 discount will incentivise Access Seekers to upgrade from copper-based products to higher-capacity FTTH products. This should speed up the transition to fibre, which, in Eircom's view, will lead to cost savings and performance improvements for Eircom and the wider economy³⁵.
 - (b) consumer benefits from lower prices - Eircom also contends that competition in the retail market will mean the reductions in wholesale prices arising from the Offer would be expected to modestly reduce customer prices³⁶.
- (73) ComReg has identified a timely and efficient migration to new infrastructure as a key strategic goal, and recognises that the Offer could incentivise Access Seekers to

³² For further information on the cost modelling of FTTC VUA related connection costs see ComReg Decision D05/24, para 9.346

³³ The Oxera Report, paras 351 to 3.53

³⁴ The Oxera Report, para 3.45

³⁵ Eircom CRD 994, p.6

³⁶ Eircom CRD 994, p.7

upgrade their existing copper-based customers to higher-capacity FTTH products on Eircom's network³⁷. However, as noted by Oxera, no evidence has been provided to show that removing the restriction on own-customer upgrades would disincentivise copper to FTTH migration, while, at the same time, the removal would eliminate any risk of a dampening effect on retail competition that may be associated with the restriction on own-customer upgrades.

- (74) However, as ComReg has discussed in paragraphs (59) to (60), any dampening effect on retail competition on Eircom's FTTH network may be mitigated where Access Seekers have the option to upgrade a copper-based customer it wins from a rival Access Seeker to an FTTH service provided by SIRO or VMI. Indeed, the restriction to own-customer upgrades could increase the propensity for Eircom Retail's competitors to opt for a non-Eircom FTTH service when it acquires a copper-based customer from Eircom Retail.
- (75) As Eircom Retail is less likely to purchase an FTTH service from another network operator when there is the prospect of that premises being passed Eircom's FTTH network, the level of discounts available to Eircom Retail is not expected to affect uptake on other FTTH networks to a significant extent.
- (76) However, the own-customer restriction means that those Access Seekers that can be expected to opt to use an FTTH service from a commercial operator other than Eircom will not get a €3 monthly discount should they acquire a copper-based customer from another Access Seeker, including Eircom Retail, and seek to upgrade the acquired customer to FTTH. This could make it easier for rival FTTH network operators to compete with Eircom FTTH in attracting the non-Eircom retail Access Seekers than would be the case if there was no restriction to own-customer upgrades, possibly leading to more vigorous wholesale competition in the future.
- (77) Therefore, on the basis that the Offer does not give rise to prices that are below the Price Floor and having found no evidence that it would foreclose competitive alternative network operators, ComReg is satisfied that the fourth criterion is met with respect to the impact on wholesale competition.

Conclusion

- (78) For these reasons, having assessed the Offer above against each of the 4 criteria from the framework as set out in Decision D05/24, ComReg proposes to make the

³⁷ See para 9.502 of ComReg Decision D05/24

enclosed decision the operative part of which is set out in Chapter 5 below. This is subject to consultation including further inputs as further described in Section 6.

5 Draft Decision Instrument

1. This Decision is made by the Commission for Communications Regulation:
 - 1.1. Pursuant to and having regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended) and Regulation 4 and Regulation 42 of the ECC Regulations;
 - 1.2. Pursuant to and having regard to Regulation 104 of the ECC Regulations;
 - 1.3. Pursuant to ComReg Decision D05/24 of 18 January 2024, in particular Sections 14.9, 14.10 and 14.11 of the Decision Instrument read together with paragraphs 9.497 to 9.569 of ComReg Document 24/07;
 - 1.4. Having regard to Eircom's Notification WN2024-010 received on 23 February 2024, and completed on 21 March 2024, and the further information provided by Eircom including at a meeting held on 18 April 2024 and follow-up correspondence;
 - 1.5. Having regard to the further information provided by [Respondents to Consultation,] in response to the public consultation held between [24 May 2024 and 24 June 2024] further to paragraph 9.566 of ComReg 24/07 and pursuant to Regulation 101 of the ECC Regulations;
 - 1.6. For the reasons set out in paragraphs (1) to (78) above.
2. All capitalised terms in this Draft Decision Instrument have the same meaning of those terms defined in paragraphs (1) to (78) above and/or ComReg Decision D05/24.
3. ComReg hereby approves publication by Eircom, and its making available two months thereafter, of the discount offer set out in Wholesale Notification 2024-010 in the terms and under the conditions set out in Wholesale Notification 2024-010 on the basis that the Offer included in Wholesale Notification 2024-010 meets the four criteria at Section 14.10 of the Decision Instrument in ComReg Decision D05/24.

4. In order that the Offer continues to meet each of the four criteria set out in Section 14.10 at any time in the period that the Offer is available, Eircom is hereby directed to ensure that:
 - 4.1. the discounted price for VUA available under the Offer shall remain at all times above the applicable Price Floor for VUA as set out in Section 14.6.1 of the Decision Instrument in ComReg Decision D05/24;
 - 4.2. the average wholesale discount available to Eircom Retail, calculated by reference to the forecast of average wholesale discounts across the 42 months of the ACL for Eircom Retail in the FTTP MST which Eircom is required to submit under Section 14.14 and 14.19 of the Decision Instrument in ComReg Decision D05/24, does not provide a material advantage to Eircom Retail and is comparable to the average wholesale discount across the 42 months of the ACL available to an Access Seeker with a smaller copper base than Eircom's across the same period.
5. This approval is granted with immediate effect and shall continue for the three-year period that the Offer is available so long as, and subject to, each of the criteria set out in Section 14.10 of the Decision Instrument in ComReg Decision D05/24 being met at all times in accordance with paragraph 4.
6. Where and if necessary, ComReg may issue further directions to Eircom pursuant to Regulation 104 of the ECC Regulations for the purpose of ensuring that the criteria set out in ComReg Decision D05/24 are met for so long as the Offer is available.
7. This Decision shall be served upon Eircom Limited and published on ComReg's public website.

[NAME]
COMMISSIONER
COMMISSION FOR COMMUNICATIONS REGULATION
ON THE ... DAY OF ... 2024

6 Consultation

- (79) On the basis of the assessment of the Offer above against each of the 4 criteria from the framework as set out in Decision D05/24 ComReg proposes to make the finding that all criteria have been met and to approve the Offer in the terms set out in the Draft Decision Instrument above. However given that whether the Criteria are met, in particular Criterion 2, depends on the materiality of the impact of the Offer on retail competition, and ComReg's assessment further depends on a number of assumptions, further inputs are sought from stakeholders by means of Consultation as set out below, prior to ComReg finalising its decision.
- (80) ComReg notes that Decision D05/24 envisages that ComReg consults on offers where it considers it necessary to assess the impact of an offer where the offer does not obviously fail or obviously pass the criteria. ComReg considers further that having regard to the structure and form of the discount, the amount being discounted and the length of the offer, that the Offer could have a significant impact on the market and that it is appropriate to consult on its proposed decision to approve, subject to Eircom ensuring that the criteria set out in Decision D05/24 continue to be met by the Offer at all times that it is applicable.
- (81) ComReg Decision D05/24 set ComReg's assessment period for FTTH wholesale promotions and discounts to be at least three months. As explained in paragraph 9.566 of ComReg Decision D05/24 (ComReg 24/07), the three-month period may be paused where complete information has not been provided, or additional information is required, or for the purpose of carrying out a consultation. In respect of the present Notification, the three-month period commenced on 21 March 2024 where the Notification was deemed complete and will be suspended to allow time for the consultation process. Allowing for a 30-day consultation period and review of the submissions to consultation, ComReg intends to communicate its decision as regards Eircom's Notification on or before **26 July 2024**.
- (82) Respondents are invited to make submissions in particular in respect of the following matters:
- a) the possibility/likelihood that the Offer facilitates migration from legacy to modern networks and the reasons and data supporting the views expressed;
 - b) ComReg's assessment that the Offer may advantage Eircom Retail but that this advantage would be immaterial;
 - c) The operative part of the proposed decision (Section 5 above), including in particular paragraphs 4.1 and 4.2 of the Draft Decision Instrument which ComReg proposes would form part of the approval;

- d) Any other comments in respect of ComReg's assessment and proposed approval.

(83) As part of any submissions, respondents are requested to:

- Provide all relevant factual (data) or other evidence supporting the response;
- Ensure responses contain paragraph numbers and where relevant cross refer to the paragraph numbers in the Consultation document;
- Provide a confidential response with any confidential elements clearly marked using the following format: [⌘ relevant text deemed to be confidential ⌘] and identify why they consider that the relevant text is confidential;
- Provide a non-confidential version of their response which may be published by ComReg, subject to the provisions of ComReg's guidelines on the treatment of confidential information (ComReg Document 05/24). Similarly, any correspondence received by ComReg from Stakeholders in the course of the consultation process may also be published; and
- Provide a copy of submissions in an unprotected electronic format in order to facilitate publication by ComReg.

(84) This is a non-confidential version of the Consultation. Certain information within the Consultation has been redacted for reasons of confidentiality, with such redactions indicated by the symbol "⌘". Should a stakeholder wish to review its own redacted information, it should make a request by email to wholesalepricing@comreg.ie and indicate, where relevant, the specific paragraph numbers within which the redacted information being requested is contained. ComReg will consider requests for redacted information and will, subject to the protection of confidential information, respond accordingly.

(85) All responses should be sent by email to wholesalepricing@comreg.ie to arrive on or before **1700 on Monday, 24 June, 2024**. Responses received after this date may not be considered.

(86) ComReg will inform Eircom and stakeholders of its final assessment of the Offer on or before **26 July 2024** following consideration of any submissions received during the 30 Day Consultation Period.

Annex 1: Correspondence

- A 1.1 Eircom compliance statement (24/38b)
- A 1.2 Eircom price list – clean (24/38c)
- A 1.3 Eircom price list – tracked (24/38d)
- A 1.4 Eircom clarification of 21 March 2023 (24/38e)

NON - CONFIDENTIAL

Annex 2: Oxera report

A 2.1 The Oxera report (24/38a)

NON - CONFIDENTIAL