



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation


Annexes for Determination of a dispute between Siro and Eircom (Non-Confidential)

Concerning disclosure by Eircom of its NGA rollout plans
pursuant to ComReg Decision D10/18.

Determination

Decision	D06/20
Reference:	20/28A
Date:	29 April 2020

Redacted Information

Please note that this document is a **Non-Confidential** version of ComReg's Determination. Certain information may be redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated by the symbol  or '⌘'.

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Annex: 1 Determination Notice

See Document 20/28–Determination of a dispute between Siro and Eircom.

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Annex: 2 Section 10.25 of the WLA DI

10.25 Without prejudice to the generality of Section 10.24 Eircom shall in particular make available on its publicly available wholesale website in advance of implementation, information regarding its NGA rollout plans, and information relating to wholesale products, services and facilities, such as the expected time for service availability, as follows:

- (i) For the Exchange areas included in Eircom's NGA rollout plan the following details shall also be made available on Eircom's publicly available wholesale website at least six (6) months in advance of the Ready for Order Date:
 - a. a list of cabinets with their associated geographic coordinates;
 - b. the location and name of the Exchange which houses the MPoP for each cabinet and for each proposed FTTH network;
 - c. the expected Ready for Order Date for each cabinet or fibre based FTTH network; and
 - d. for each Exchange area the number of premises that Eircom forecasts will be passed by FTTH.
- (ii) For the Exchange areas included in Eircom's NGA rollout plan Eircom shall make available on its publicly available wholesale website at least 3 months in advance of the Ready for Order Date sufficient information to enable Undertakings to identify the addresses that will be passed by FTTH. Such information may take the form of a detailed map or cross references to Eircom's address database;
- (iii) For the Exchange areas included in Eircom's NGA rollout plan the following details shall also be made available on Eircom's publicly available wholesale website at least 28 calendar days in advance of the of the Ready for Order Date by way of a data file which shall include the following information:
 - a. a list of the premises, as uniquely identified, that are capable of receiving FTTC and the associated Pre-Qualification Value for each such line/premises; and
 - b. a list of all addresses passed by FTTH categorised by the Exchange area and showing the MPoP for each address; and
- (iv) For Exchange areas included in Eircom's NGA rollout plan, Eircom shall publish on its publicly available wholesale website on a monthly basis, or as reasonably required by ComReg, in advance of particular cabinets becoming enabled or any FTTH fibre routes being completed, information to update, reconcile or revise any previous announcements or notifications, projections or plans, regarding NGA rollout, as matters progress in order that accurate, clear and current information is made available in respect of plans for particular cabinets or plans for particular FTTH fibre routes. Material amendments or changes to information may not be notified by way of such an update but shall be notified in accordance

with this Section 10.25 or by agreement with ComReg, or at ComReg's discretion.

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Annex: 3 Siro submission 18 November 2019

Annex C – Guidance note on Information for submitting a dispute

1. Contact details of the individual(s) who are the contacts for the purposes of the dispute.

Guidance note – Mandatory - This is the person to whom correspondence and contacts in respect of the dispute will be directed. If it is possible for the Complainant to provide details of the Respondent's contact individual then these details should also be provided.

[REDACTED]

[REDACTED]

2. A statement of the scope of the dispute.

Guidance note – Mandatory – This scope should set out the net issue which the Complainant wishes ComReg to determine. It should be specific enough to properly describe the dispute and should reflect the specific disagreement giving rise to the dispute. As the scope is a summary statement of the dispute it should not include the background to the dispute, the circumstances which gave rise to the dispute or the desired outcome, the requirements for these are described below

Whether Eircom is meeting their obligation to provide NGA rollout information (as further described in Section 3 below).

3. A statement of the relevant obligation(s) under the regulatory framework which have given rise to the dispute¹⁶, including reference to the Specific Regulation(s), market and decisions imposing the obligation as appropriate

¹⁶ Pursuant to Regulation 31(1) of the Framework Regulations, a dispute can arise between undertakings in connection with obligations under the Framework Directive, the Specific Directives (as defined in Regulation 2 of the Framework Regulations), the Framework Regulations or the Specific Regulations (as defined in Regulation 2 of the Framework Regulations). As such, this also includes relevant decisions made by ComReg pursuant to the Framework Regulations and the Specific Regulations.

Guidance Note – Mandatory – If ComReg identifies an alternative obligation that is relevant to the dispute, the dispute may be progressed on this basis.

The Wholesale Local Access Decision Instrument (*Appendix 20 of ComReg document 18/94*).

This imposes certain obligations on Eircom; in particular, paragraph 10.25 states:

“Without prejudice to the generality of Section 10.24 Eircom shall in particular make available on its publicly available wholesale website in advance of implementation, information regarding its NGA rollout plans, and information relating to wholesale products, services and facilities, such as the expected time for service availability, as follows:

(i) For the Exchange areas included in Eircom's NGA rollout plan the following details shall also be made available on Eircom's publicly available wholesale website at least six (6) months in advance of the Ready for Order Date:

- a. a list of cabinets with their associated geographic coordinates;
- b. the location and name of the Exchange which houses the MPoP for each cabinet and for each proposed FTTH network;
- c. the expected Ready for Order Date for each cabinet or fibre based FTTH network; and
- d. for each Exchange area the number of premises that Eircom forecasts will be passed by FTTH.

(ii) For the Exchange areas included in Eircom's NGA rollout plan Eircom shall make available on its publicly available wholesale website at least three (3) months in advance of the Ready for Order Date sufficient information to enable Undertakings to identify the addresses that will be passed by FTTH. Such information may take the form of a detailed map or cross references to Eircom's address database;

(iii) For the Exchange areas included in Eircom's NGA rollout plan the following details shall also be made available on Eircom's publicly available wholesale website at least 28 calendar days in advance of the Ready for Order Date by way of a data file which shall include the following information:

- a. a list of the premises, as uniquely identified, that are capable of receiving FTTC and the associated Pre-Qualification Value for each such line/premises; and
- b. a list of all addresses passed by FTTH categorised by the Exchange area and showing the MPoP for each address; and

(iv) For Exchange areas included in Eircom's NGA rollout plan, Eircom shall publish on its publicly available wholesale SIRO site on a monthly basis, or as reasonably required by ComReg, in advance of particular cabinets becoming enabled or any FTTH fibre routes being completed, information to update, reconcile or revise any previous announcements or notifications, projections or plans, regarding NGA rollout, as matters progress in order that accurate, clear and current information is made available in respect of plans for particular cabinets or plans for particular FTTH fibre routes. Material amendments or changes to information may not be notified by way of such an update but shall be notified in accordance with this Section 10.25 or by agreement with ComReg, or at ComReg's discretion."

4. Background to the Dispute.

Guidance Note – Mandatory – Details of the background to the dispute including the circumstances leading up to the disagreement. This should be sufficiently detailed and comprehensive so as to avoid the requirement for ComReg to seek further information which on the face of it was related to the scope of the dispute and could have been supplied at the initial stage. This should also be sufficiently comprehensive and should include where appropriate:

Details of the relationship between the parties to the dispute; A full statement of the extent of the dispute, including

- o a list of all issues which are in dispute; and

- o full details of the relevant products or services.

A description of the regulatory conditions to which the dispute relates, including a view on the relevant economic market and whether any communications provider in that market has been designated as having significant market power. This includes an explanation as to why, if appropriate, it is considered that the relevant obligation is not being met, for example, if the dispute involves an allegation that a charge is not cost oriented the reason for this should be provided;

The information set out in Section 3 above is not available on Eircom's publicly available wholesale website; and Eircom have refused to provide this information to SIRO.

5. Desired outcome – the outcome desired by Complainant.

Guidance Note–Desirable-This should include any reasoning as to why the determination should be of the form suggested by the Complainant and the Complainant's view as to the legal basis for ComReg making the intervention sought.

Eircom should come into compliance with its existing obligations as set out in Comreg Document 18/94 which in summary requires it to publish the information described above on its publicly available website; and/or make it available to SIRO on request.

6. Details of any attempts to resolve the dispute.

Guidance Note–Mandatory-This should include comprehensive evidence of any attempts to resolve the issue bilaterally, an explanation of why commercial agreement could not be reached and details of any options or proposed solutions put forward by any party during negotiations (including what, if anything, was accepted or rejected and why) notice of whether the dispute is or has been before any other body, a list of alternative dispute resolution mechanisms employed e.g. mediation. If alternative dispute resolution mechanisms have not been employed please state reasons why not. If no alternatives to dispute resolution have been attempted this section should set out the Complainant's reasoning as to why such alternatives would not result in a more timely resolution of the dispute.

SIRO has made three concerted efforts to resolve this issue:

1. The issue was raised with Eircom at its Product Development Workshop on 26 June 2019 but did not receive a satisfactory response.
2. Eircom provided SIRO with a partial copy of rollout information continuing 6-month forecast only by email on 26 June 2019. However, in subsequent emails from 28 June 2019 – 2 July 2019 Eircom subsequently stated that it has no obligation to provide this information to SIRO and has refused to provide it.
3. On 16 October SIRO submitted a Wholesale Regulatory Complaint to Eircom (attached in Section 9 below). SIRO did not initially receive any of the three responses described in Eircom's process documents. Following subsequent correspondence, Eircom rejected SIRO's complaint on 7 November 2019. A copy of this rejection is included in Section 9 below.

7. Details of any legal proceedings in relation to the dispute that have been initiated by either party.

Guidance note–Mandatory–Where there are no legal proceedings this should be stated.

No legal proceedings have been initiated by SIRO.

8. Details as to the impact of the dispute on the Complainant’s business.

Guidance note – Desirable – Evidence or supporting documentation should be provided for any claims of impact on the Complainant’s business.

Without NGA planned rollout information SIRO is unable to fully evaluate the opportunity of connecting to the eir NGA network.

We note also that a failure by ComReg to ensure compliance with obligations which it has determined as being required to ensure the correct operation of the market and which it imposed 12 months ago would damage have significant adverse impacts on confidence in the regulatory process and inhibit investor confidence when factoring regulatory certainty into investment decisions.

SIRO also notes that eir’s non-compliance with this explicit and clear obligation also calls into question the effectiveness of its Regulatory Governance Model. This undermines confidence in the extent to which eir is complying with other obligations which are less readily monitored

9. Documentary Evidence.

Guidance note–Mandatory–all assertions should be supported by documentary evidence where possible, including correspondence, notes of meetings and telephone calls, and a chronological summary of events. In addition, if there is any relevant documentation that provides further background to the dispute this should also be submitted, in particular:

- - If the dispute relates to a request for new network access products business plans of the relevant product or service including forecasts, demonstrating how and when it is intended to make use of the products or services requested.
- - In cases of disputes involving contracts, copies of the relevant version of the contract, clearly identifying the clauses that are subject to the dispute.

The following correspondence is attached as appendices:

1. Email chain between [REDACTED] SIRO an [REDACTED] Eircom requesting that the information in question be made available to SIRO;
2. Email chain between [REDACTED] and Eircom’s Wholesale Regulatory Complaints team regarding the complaint lodged by SIRO and rejected by Eircom

10. A Non-confidential version of the dispute submission

Guidance note–Mandatory–in the event that the dispute submission contains no confidential information, it should be clearly marked “non-confidential”. If parties to the dispute wish to provide ComReg with confidential information, a non-confidential version of the submission should be provided simultaneously. The non-confidential version should contain all the facts material to the case so that the Respondent has all the facts when responding.



Annex: 4 Information Notice 19/109



Information Notice

ComReg accepts request from Siro for the resolution of a dispute with Eircom



Information Notice

Reference: ComReg 19/106

Version: FINAL

Date: 29/11/2019



Information Notice

ComReg 19/106

1. On 18 November 2019, SIRO Limited ("Siro") submitted a dispute ("the Dispute") to the Commission for Communications Regulation ("ComReg") The Dispute relates to Eircom Limited ("Eircom") providing Siro with access to "NGA rollout plans"¹. The dispute was allocated case number 1452.
2. Following consideration of the request, ComReg has accepted the Dispute pursuant to Regulation 31 of the Framework Regulations². ComReg Document 10/18R³ sets out the procedure for disputes under Regulation 31 of the Framework Regulations.
3. The scope of the Dispute is as follows:

Whether Eircom may require Siro to comply with conditions, and if so which, in respect of access to information regarding Eircom's "NGA rollout plans" (as provided for under Section 10.25 of the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18).
4. This is a dispute arising between undertakings⁴ providing electronic communications networks or services in the State, in connection with existing obligations under the Access Regulations⁵. As set out at Regulation 31(2) of the Framework Regulations, in the event of a dispute ComReg shall, at the request of either party, initiate an investigation of the dispute and as soon as possible but, except in circumstances which the ComReg considers exceptional, within 4 months from the date on which the dispute was notified to it by either party, make a determination aimed at ensuring compliance with obligations to resolve the dispute.
5. Further information notices may be published by ComReg during the 4 month investigation of the dispute.

¹ As set out in Section 10.25 of the Decision Instrument in Appendix 20 of ComReg Decision D10/18 ("the WLA DI").

² European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011 ("the Framework Regulations").

³ Document No 10/18R "Dispute Resolution Procedures - Framework Regulations - (Response to Consultation Document No. 09/85).

⁴ "Undertaking(s)" shall have the same meaning as under Regulation 2 of the Framework Regulations.

⁵ European Communities (Electronic Communications Networks and Services) (Access) Regulations, 2011 ("the Access Regulations").

Annex: 5 Siro complaint to Eircom 16 October 2019

16 October 2019

To: Wholesale Regulatory Operations Team

By email to: wholesaleregulatorycomplaints@openeir.ie

Dear Sir or Madam,

1. I refer to the Wholesale Local Access Decision Instrument (*Appendix 20 of ComReg document 18/94*).

This imposes certain obligations on Eircom; in particular, paragraph 10.25 states:

“Without prejudice to the generality of Section 10.24 Eircom shall in particular make available on its publicly available wholesale website in advance of implementation, information regarding its NGA rollout plans, and information relating to wholesale products, services and facilities, such as the expected time for service availability, as follows:

(i) For the Exchange areas included in Eircom’s NGA rollout plan the following details shall also be made available on Eircom’s publicly available wholesale website at least six (6) months in advance of the Ready for Order Date:

- a. a list of cabinets with their associated geographic coordinates;*
- b. the location and name of the Exchange which houses the MPoP for each cabinet and for each proposed FTTH network;*
- c. the expected Ready for Order Date for each cabinet or fibre based FTTH network; and*
- d. for each Exchange area the number of premises that Eircom forecasts will be passed by FTTH.*

(ii) For the Exchange areas included in Eircom’s NGA rollout plan Eircom shall make available on its publicly available wholesale website at least three (3) months in advance of the Ready for Order Date sufficient information to enable Undertakings to identify the addresses that will be passed by FTTH. Such information may take the form of a detailed map or cross references to Eircom’s address database;

(iii) For the Exchange areas included in Eircom’s NGA rollout plan the following details shall also be made available on Eircom’s publicly available wholesale website at least 28 calendar days in advance of the of the Ready for Order Date by way of a data file which shall include the following information:

- a. a list of the premises, as uniquely identified, that are capable of receiving FTTC and the associated Pre-Qualification Value for each such line/premises; and*



b. a list of all addresses passed by FTTH categorised by the Exchange area and showing the MPoP for each address; and

(iv) For Exchange areas included in Eircom's NGA rollout plan, Eircom shall publish on its publicly available wholesale SIRO site on a monthly basis, or as reasonably required by ComReg, in advance of particular cabinets becoming enabled or any FTTH fibre routes being completed, information to update, reconcile or revise any previous announcements or notifications, projections or plans, regarding NGA rollout, as matters progress in order that accurate, clear and current information is made available in respect of plans for particular cabinets or plans for particular FTTH fibre routes. Material amendments or changes to information may not be notified by way of such an update but shall be notified in accordance with this Section 10.25 or by agreement with ComReg, or at ComReg's discretion."

2. Eircom does not currently provide the website specified in 10.25 (subsections i to iv) on its publicly available wholesale network
3. Eircom has refused to provide this information to SIRO on request when requested in bilateral discussions and the Open eir Product Development Workshop (please see email chain attached)
4. This prevents SIRO from assessing the potential value of interconnecting with Eircom for the purposes of purchasing and/or reselling Eircom's FTTH access products
5. SIRO are of the view that Eircom is not in compliance with its regulatory obligations regarding this decision notice.
6. SIRO request that you make the information specified in the Decision Notice above accessible to SIRO within the next 10 working day and on an ongoing basis thereafter.

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Annex: 6 Eircom Report Complaint W/SCust 16 (Complainant Version)

Note Eircom and Siro have confirmed that this complainant version is not confidential and can be included in the determination

Strictly Private and Confidential

Wholesale Customer Complaint W/SCust16

Internal Investigation Report

Reference: W/SCust16

- **Complainant Version.**

Strictly Private and Confidential

WRO Report

On 16/10/2019 SIRO lodged a formal complaint into the Wholesale Regulatory Complaint mailbox.

In their complaint SIRO highlight two issues about their perceived failure of eir to comply with its Transparency obligations (D10/18 WLA) regarding the provision of FTTH Rollout Information. These are

- Eir does not currently provide the information required on its “publically available wholesale network”
- Eir has refused to provide this information to SIRO on request

Included with their complaint SIRO provided correspondence they had with open eir. This set of emails started on 28/06/2019 when open eir provided the NGA Rollout Information to all its Wholesale Customers, and ended with open eir requesting SIRO to confirm if they were interested in signing a reference offer in order to avail of the NGA services.

The investigation found no basis for SIRO’s complaint that open eir was in breach of its transparency obligations. In summary:

1. The FTTH Rollout Information is published on the wholesale website and for all operators with the correct access credentials.
2. This information is available to all Wholesale Customers that have signed a WBARO and / or ARO.
3. open eir requires a reference offer to be signed before providing access to this information as this is the best way to ensure that the NGA Rollout Information is used for the purposes for which it is required, i.e. to inform its Wholesale Customers where and when open eir is rolling out FTTH network capability so that they can consume the open eir FTTH Services (Bitstream & VUA) in order to provide broadband services to their end users.
4. SIRO has not yet provided the clarity required to demonstrate that this is the purpose for which they require access.

The investigation concludes that SIRO should re-engage with open eir and it is recommended that SIRO contacts open eir with a view to on-boarding for the purpose of availing of open eir’s FTTH services in order to provide Broadband services to end users.

**Annex: 7 Eircom Report Complaint W/SCust 16
(Confidential Version (Redacted))**



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Annex: 8 Eircom Reply 11 December 2019



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11 December 2019

Case 1452 – Dispute between Siro and Eircom

Dear Alan,

I refer to your letter dated 28th November 2019 advising that ComReg has accepted a Dispute raised by Siro against Eircom. As you are aware from the Siro submission an internal investigation into this matter has already been undertaken by the Wholesale Regulatory Operations team. I note in the submission Siro states their complaint was rejected. This is not correct. The complaint was accepted for investigation and an investigation was undertaken. A confidential copy of the full report is appended to this letter. The investigation concluded:

“The investigation found no basis for SIRO’s complaint that open eir was in breach of its transparency obligations. In summary:

- 1. The FTTH Rollout Information is published on the wholesale website and for all operators with the correct access credentials.*
- 2. This information is available to all Wholesale Customers that have signed a WBARO and / or ARO.*
- 3. open eir requires a reference offer to be signed before providing access to this information as this is the best way to ensure that the NGA Rollout Information is used for the purposes for which it is required, i.e. to inform its Wholesale Customers where and when open eir is rolling out FTTH network capability so that they can consume the open eir FTTH Services (Bitstream & VUA) in order to provide broadband services to their end users.*
- 4. SIRO has not yet provided the clarity required to demonstrate that this is the purpose for which they require access.*

Directors: Carolan Lennon, Stephen Tighe

eir is a trading name of eircom Limited,
Registered as a Branch
in Ireland Number 907674
Incorporated in Jersey Number 116389

Branch Address: 2022 Bianconi Avenue,
Citywest Business Campus, Dublin 24
D24 HX03
VAT registration: IE 3286434NH



The investigation concludes that SIRO should re-engage with open eir and it is recommended that SIRO contacts open eir with a view to on-boarding for the purpose of availing of open eir's FTTH services in order to provide Broadband services to end users."

Of particular note is point 3 above which is consistent with Regulation 5(6) of the Access Regulations 2011: "an undertaking that acquires information from another undertaking before, during or after the process of negotiating access or interconnection arrangements shall not use that information for a purpose other than that for which it was supplied and shall respect at all times the confidentiality of information transmitted or stored." It is not unreasonable for open eir to manage access to commercially sensitive information. The NGA rollout plan obligation was imposed in D03/13 and updated in the more recent D10/18. As explained in ComReg 18/94 [emphasis added]: "7.980 ComReg considers that the requirement summarised in paragraph 7.979 is necessary so that Access Seekers are provided with up to date information with respect to network rollout so as to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users. ComReg considers that it would not be a burdensome requirement for Eircom to have a process in place to keep its network rollout information up to date for use by it and by Access Seekers." Eircom believes it would be a breach of Regulation 5(6) if the information was used for other purposes such as, for example, another operator's network rollout planning, particularly if the inappropriate use of information distorts competition and/or undermines Eircom's investment incentives. I note that Siro did not subsequently re-engage with open eir and appears unwilling to make the implicit assurances that it will comply with regulation 5(6).

The Siro Dispute Submission states: "Without NGA planned rollout information SIRO is unable to fully evaluate the opportunity of connecting to the eir NGA network." The reasonable terms on which the NGA rollout plan information can be accessed have remained unchanged since 2013. In the intervening period over 20 Access Seekers have been connected to the eir NGA network. No concerns have been raised by those parties regarding access to NGA rollout plan information and they do not appear to have been hindered in their ability to fully evaluate the opportunity. We would also note that ComReg conducted a forensic review of the operation and effectiveness of D03/13 remedies during the WLA market review. ComReg's conclusions on the WLA market and remedies documented in D10/18 do not raise any concern regarding the protocol for accessing the NGA rollout plan that has worked effectively since 2013.

Eircom believes that it is compliant with its obligations under Section 10.25 of D10/18.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W. McCoubrey', is located below the 'Yours sincerely,' text.

William McCoubrey
Head of Regulatory Strategy

Annex: 9 Eircom Response to Questions 10 January 2020



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10 January 2020

Case 1452 – Dispute between Siro and Eircom

Dear Alan,

I refer to your letter dated 18th December 2019 requesting additional information.

1. In Eircom's view what documents constitute Eircom's NGA rollout plans, as defined at section 10.25 of the WLA Decision? Please list these documents along with descriptions of their content.

Eircom response: The requirement in 10.25(i) is addressed in the NGA Deployment Plan as described in section 2.3 of the NGA Industry Product Manual V13 20052019. ComReg is a recipient of the NGA Deployment Plan and should be familiar with its contents.

The requirement in 10.25(ii) is addressed in the Order of Magnitude file as described in section 2.4 of the NGA Industry Product Manual V13 20052019. ComReg is a recipient of the NGA Deployment Plan and should be familiar with its contents.

The requirement in 10.25(iii) is addressed in the Advanced PreQual File (APQ) as described in section 2.5 of the NGA Industry Product Manual V13 20052019. ComReg is a recipient of the NGA Deployment Plan and should be familiar with its contents.

The above are maintained in accordance with the requirement in 10.25(iv).

Directors: Carolan Lennon, Stephen Tighe

eir is a trading name of eircom Limited,
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Incorporated in Jersey Number 116389

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2. How are the documents referred to at 1 above made available or accessed currently? Please describe all access options or access conditions. (For example some documents may be available via the Eircom website and/or circulated by email attachment to individuals or to an email distribution list).

Eircom response:

File	Accessible through:
NGA Deployment Plan	Email distribution list, private Items section of open eir website
Broadband Order of Magnitude file	Private Items section of open eir website
Advanced Prequal file	UG, Operator Hub

3. In Eircom's view, what are the reasons that undertakings must sign an Access Reference Offer ('ARO') as a pre-requisite to accessing NGA roll-out plans?

Eircom response: Eircom believes that when operators sign the ARO and/or the WBARO, they are demonstrating a genuine intention to use the information for the purposes of providing services to end users. Eircom's rationale was explained in our previous submission.

The broad extent of Eircom's NGA footprint is well documented in publically available company announcements such as the Rural 300K project and the IFN which will deliver FTTH to urban and suburban Ireland; passing 180 towns and cities across the country, including every town with more than 1,000 premises. Please see IFN Press Release appended to this letter by way of example. The availability of this information has in itself proven sufficient for other operators to evaluate the opportunity of interconnecting to the Eircom NGA network.

4. Are there any other pre-conditions, apart from signing an ARO, required by Eircom to grant access to NGA rollout plans? If there are other pre-conditions, please describe them.

Eircom response: There is a requirement for operator's to be appropriately licensed to access information containing Eircodes.

5. In Eircom's view, what is meant by the term "publicly available website"?

Eircom response: A website that is available to the public.

6. Who currently has access to Eircom's NGA rollout plans? Please provide a full list of all recipients. Is access to Eircom's NGA rollout plans available to any individuals or entities that are either:

- a. not authorised undertakings
- b. have not signed the ARO?

Eircom response: [✕]



7. Does Eircom consider that the information regarding NGA rollout plans, required under Section 10.25 of the WLA Decision, to be confidential or commercially sensitive information and potentially within the scope of Section 10.21 to 10.23 of the WLA Decision? What are the objective reasons, if any, justifying why Eircom considers the information to be confidential/commercially sensitive?

Eircom response: Yes, for the reasons previously given.

8. If question 7 applies, then please explain why Eircom has not followed the procedure as set out in section 10.23 of the WLA Decision?

Eircom response: Eircom did not follow the procedure in section 10.23 of the WLA Decision because it was not required. Section 7.3 of the WLA Decisions (Appendix 20 and Appendix 21) required that *“Eircom shall offer and continue to offer and provide Access to the products, services and facilities referred to in Sections 7 and 8 of this Decision Instrument in accordance with the product descriptions and terms and conditions of supply or use, as specified in the current version of the [ARO / WBARO]”*.As noted in our previous submission the protocol regarding access to the information has been standard operating practice for many years.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W. McCoubrey'.

William McCoubrey
Head of Regulatory Strategy

Annex: 10 Siro Cover Letter 13 January 2020

SIRO
The Herbert Building,
The Park, Carrickmines,
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T+ 353 1 258 0000
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www.siro.ie



13 January 2020

Mr Alan Cox and Mr Michael Patterson
Commission for Communication Regulation
One Dockland Centre
Guild St
Dublin D01 E4X0

SENT BY EMAIL ONLY

Re: Dispute SIRO Eircom – ComReg Case number 1452

Dear Alan & Michael,

Please find attached SIRO's responses to the questions raised by ComReg in connection with the above referenced dispute by way of your letter of 18 December 2018.

By way of context SIRO would like to position the Dispute under the current regulatory regime with the following points:

- 1) The Wholesale Local Access (WLA) market (which is the basis for the obligation underpinning the dispute) includes both FTTx services provided by SIRO and Eircom's self-supply of such services¹
- 2) ComReg has undertaken a comprehensive market review including detailed data gathering on the existing market conditions and significant input from all industry participants. This review concluded that Eircom has Significant Market Power in the WLA market. Specifically, ComReg expressed its view that "the Relevant WLA Market is not effectively competitive, and that Eircom would not be sufficiently constrained ... such that it would be prevented from behaving, to an appreciable extent, independently of competitors, customers and consumers in those markets"². This decision has been approved by the EU Commission and accepted by all Operators in the market including Eircom. In its Decision, ComReg determined that the potential for competition issues to arise needed to be counter-balanced by the introduction of specific remedies to ensure that new entrants such as SIRO could gain a foothold in the market. The transparency obligation to publish specific details of its NGA rollout plans on its public website is one of these determined remedies.
- 3) A determination in respect of the Dispute should be "aimed at ensuring compliance with the obligations of the Framework Directive, the Specific Directives and the Specific

¹ Paragraph 4.185 of ComReg document 18/94

² Paragraph 5.118 of ComReg Document 18/94

Regulations...³ and that, by reference⁴ a Determination shall promote competition and in particular infrastructure based competition⁵ and promote efficient investment and innovation in new and enhanced infrastructures⁶.

- 4) ComReg has stated that it believes "that effective competition is key to the development of Ireland's communications infrastructure and that alternative network investment will be a key enabler for a competitive market. ComReg's position is that network competition at the deepest level is likely, where economically viable, to be the most effective driver for investment in high quality, networks. Analysis of network deployment across a number of different countries indicates that the scale of FTTx coverage tends to correlate with the level of network competition"⁷
- 5) ComReg has stated that the purposes of the transparency obligations are to allow the Access Seekers "efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users."⁸

In summary, by virtue of its SMP in the WLA market Eircom has the ability to engage in exploitative practices, non-price vertical leveraging and activities related to information asymmetries as set out in Section 7 of ComReg's consultation on its market review of the WLA market.⁹

The provision of information by Eircom to the market as mandated by Section 10.25 of ComReg Decision D10/18 has the purpose of dealing with these potential competition problems on an ex ante basis. In order for this remedy to have its intended effect the information must be provided without pre-condition. SIRO therefore believes that a plain reading of D10/18 provides for SIRO to have access to the information specified without precondition or restriction. In the alternative, SIRO's position is that the provision of such information by Eircom is in the interests of a competitive WLA market.

SIRO's role in the WLA market is as a market entrant and competitor to Eircom in this wholesale market. Eircom's SMP is exercised not only on its own supply in the WLA market, but on the entirety of the market, including on SIRO's activity in the market. In this regard remedies designed to address wholesale and retail market competition problems cannot solely be to benefit those who purchase Eircom's wholesale services. To limit the applicability of remedies in this manner would significantly reduce their effectiveness and in some cases might actually act to reinforce and entrench Eircom's SMP position.

The information sought by SIRO is necessary to counteract competitive imbalances which arise as a result of Eircom's SMP and its ability to act independently of competitors and customers to the ultimate detriment of consumers.

It is SIRO's position that Eircom's reasoning and its behaviour are contrary to the intent and the specific requirements of the transparency obligation to which it is subject.

³ Regulation 31(2) of the Framework Regulations

⁴ Regulation 31(7) of the Framework Regulations

⁵ Regulation 16(2)(c) of the Framework Regulations and Section 12(1)(a)(i) of the Telecommunications Act


⁶ Regulation 16(2)(d) of the Framework Regulations and Section 12(2)(a)(iii) of the Telecommunications Act

⁷ Paragraph 7.368 of ComReg Document 18/94

⁸ Paragraph 7.780 of ComReg Document 18/94

⁹ ComReg Document 18/94

Yours sincerely



Gerry McAndrew
SIRO Limited

(Note: Attachment enclosed)

Annex: 11 Siro Response to Questions 13 January 2020



SIRO's responses to ComReg's questions – NONCONFIDENTIAL REDACTED VERSION

Question 1

Please provide Siro's view on the scope of this dispute, i.e. whether Eircom may require Siro to comply with conditions, and if so which, in respect of access to information regarding Eircom's "NGA rollout plans" (as provided for under Section 10.25 of the Wholesale Local Access ('WLA') Decision Instrument at Appendix 20 of ComReg Decision D10/18).

SIRO RESPONSE TO QUESTION 1

SIRO agrees that the ComReg formulation of the dispute is a valid approach.

While the underlying cause of the dispute is Eircom's non-compliance with its obligations under Section 10.25 of ComReg Decision D10/18 the substantive effect of this non-compliance can be characterized as, Eircom attaching pre-conditions to the supply of information to SIRO, in circumstances where SIRO believes that such information should be available without pre-condition.

Regulation 31 of the Framework Regulations¹ require that any Determination by ComReg in respect of the Dispute be aimed at ensuring compliance with obligations. Therefore it is SIRO's view that any such Determination must also address the immediate circumstances which gave rise to the dispute, which is the failure of Eircom to publish the information specified in Section 10.25 of ComReg Decision D10/18 in a manner which is publicly accessible.

Question 2

To which specific information or documents concerning Eircom's NGA rollout plans, does Siro require access?

Question 7

At what point in time, prior to implementation of Eircom's NGA roll out plan, would Siro require information relating to Eircom's NGA rollout plan?

SIRO RESPONSE TO QUESTIONS 2 and 7

SIRO has combined its responses to questions 2 and 7 as they are closely linked.

Based on SIRO's own operational network build life cycle, the timelines and information granularity specified in Section 10.25 of ComReg decision D10/18 are the minimum required to allow SIRO to plan and deploy its network in a manner which maximizes the efficiency of its supply of wholesale services

In addition, SIRO requires the information to detect and commercially react to any potential tactical targeting of SIRO's network and service deployment, where these would have the intent

¹ SI 333 of 2011

or effect of acting as a foreclosure mechanism by undermining SIRO's business case. For example, Eircom could purposefully alter its build strategy to target SIRO's build areas from a wholesale perspective, and simultaneously use its retail presence in the WLA market to reduce SIRO's penetration in a town by aggressively contracting customers. Early identification of such behavior and referral to ComReg has the potential to limit the level of damage to SIRO's ability to continue to rollout competitive infrastructure.

Section 10.25(i) of ComReg Decision D10/18 specifies information which must be provided at least six months in advance. This information relates to exchange and cabinet level deployment.

The six month advance notice is the minimum necessary for SIRO effectively make use of the provided information for this purpose and reduction in either the timing or information granularity would render unfit for this purpose.

Section 10.25(ii) of ComReg Decision D10/18 specifies information which must be provided at least three months in advance. This information relates to deployment at the level of housing estates. This information is relevant to the planning and deployment of SIRO's access network. The six month advance notice is the minimum necessary for SIRO effectively make use of the provided information for this purpose and reduction in either the timing or information granularity would render unfit for this purpose.

Sections 10.25(iii) and 10.25(iv) of ComReg Decision D10/18 specifies information which must be provided at least 28 days in advance and information provided for reconciliation purposes. This information relates to the retail availability of services. This information is relevant to the planning of the commercial terms of SIRO's supply. It allows SIRO to respond to tactical targeting by Eircom of SIRO network deployment areas, which have the intent or effect of reducing *the efficiency* of SIRO's market entry, or which have the intent or effect of reducing the viability of SIRO's business case and so act as a foreclosure mechanism, by the SMP operator. The 28 day advance notice is the minimum necessary for SIRO effectively make use of the provided information for this purpose and reduction in either the timing or information granularity would render unfit for this purpose.

Question 3

What is Siro's intended use for the information obtained through access to Eircom's NGA rollout plans?

SIRO RESPONSE TO QUESTION 3:

SIRO intends to use the information obtained for the purpose explicitly set out in paragraph 7.980 of ComReg Document 1894: to "...efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users" in three ways:

- Assessing and planning whether or not to use Eircom WLA products as an input into an aggregated wholesale offering; and



As part of the process leading to the imposition of the Transparency obligation as specified in Section 10.25 of ComReg Decision D10/18 ComReg, at paragraph 7.980 of ComReg Document 1894, summarised its reasoning for the imposition of the obligation and the intended goal of the obligation. Paragraph 7.980 states as follows:

"ComReg considers that the requirement summarised in paragraph 7.979 is necessary so that Access Seekers are provided with up to date information with respect to network rollout so as to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users. ComReg considers that it would not be a burdensome requirement for Eircom to have a process in place to keep its network rollout information up to date for use by it and by Access Seekers."

SIRO intends to use the information requested, **for the purpose explicitly set out in paragraph 7.980 of ComReg Document 1894; i.e. to "...efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users."**

The information may be used in a number of different ways but there are three main uses.

The first of these is as an input to the Assessment and planning whether or not to use Eircom WLA products as an input into an aggregated wholesale offering. In such a scenario SIRO would become a reseller of Eircom's, and potentially other wholesale providers' wholesale services.

[REDACTED]

The second use

[REDACTED]

SIRO's use of the information to effectively plan the delivery of wholesale services also has the benefit of efficiently making retail FTTH services available to end users by accelerating the overall availability of FTTH services in the market. It also increases the availability of the SIRO service to prospective wholesale customers allowing them to competitively differentiate from Eircom in the retail market thus increasing the level of choice available to end-users.

The market requirement for this information has increased by virtue of the increased footprint of both SIRO and Eircom. Assessing the interaction between their respective roll-out plans has increased in relevance regarding the planning of effective and efficient deployment of wholesale services.

The third use is in the identification of areas where SIRO must adjust its business case assessments for its roll-out phasing to account for the availability of alternative FTTH supply in the short to medium term. The deployment of FTTH infrastructure is capital and cash flow intensive. While the overall capital cost of SIRO's planned roll-out is reasonably independent of the presence of alternative FTTH infrastructures the timing of when these alternative infrastructures become active affects the initial uptake and hence cash flow related to SIRO's services. Where there is to be overbuild by Eircom on SIRO's planned or existing footprint this

affects the financial envelope of subsequent SIRO deployments. SIRO has finite resources and must apply these in a manner which generates the maximum cash flow in the shortest time available, in order to effect efficient market entry and to maintain a sustainable business case.

[REDACTED]

Question 4

Does Siro intend to avail of the wholesale services provided by Eircom in the WLA market? If so, which wholesale services; and in what timeframe? What are the business reasons for Siro's interest in availing of these wholesale services at this time and not previously?

SIRO RESPONSE TO QUESTION 4

SIRO has engaged in discussions with Eircom in the past and continues to assess the possibility of obtaining wholesale inputs from Eircom.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Question 5

In Siro's view, what is meant by the term "publicly available website"?**SIRO RESPONSE TO QUESTION 5**

SIRO understands "publicly available website" to mean the plain English reading of the phrase: a website which is generally accessible to the public; and where access is not limited to a closed user group who must meet specific conditions before accessing the information.

This position is supported by an examination of the other transparency and non-discrimination obligations. Such an examination shows that any other interpretation is not consistent with either other obligations or Eircom's behaviour in meeting these other obligations

The obligation in paragraph 10.20 of D10/18 is for Eircom to make network data information available "on" its publicly available website, not "via" or "by means of" a publicly available website. To be 'publicly available' clearly means that there should be no substantive restriction on access to the information on the website.

SIRO notes that the current criteria for accessing the information behind the portal means that the only entities eligible for such access are those holding General Authorisations, who have signed an Access Agreement with Eircom. This is a numerically small closed user group and this can, in no manner, be considered as placing the information on a publicly available website.

SIRO further notes that the fact that the wording of D10/18 specifies that the information is to be placed on Eircom's "publicly available website" (emphasis added) clearly shows that ComReg's intention was that the information not be placed within the restricted portion of the Eircom website.

SIRO notes that Eircom has extensive publication obligations imposed under Section 10 of ComReg Decision D10/18 in respect of other classes of information. These include Access Reference Offer, SLAs, product descriptions. These obligations also require that the information be made available on Eircom's "publicly available wholesale website" and that in meeting these obligations Eircom has made these other classes of information directly accessible without the need for any form of access control. It is SIRO's view that any attempt to restrict access to the information specified under Section 10.25 may be an attempt by the SMP operator to impede efficient entry into the WLA market.

Question 6

In Siro's view, what specific competition problems in the WLA market are addressed by a requirement upon Eircom to provide NGA rollout plans to an undertaking that does not, itself, offer downstream retail services?

SIRO RESPONSE TO QUESTION 6**Summary of SIRO's Response**

SIRO believes that there are three competition problems which are addressed by the requirement to provide the NGA rollout plans including to an Undertaking which does not directly provide retail services. These are:

- The exercise of Eircom's SMP by engaging in the exploitative practices as outlined at Paragraphs 7.18 to 7.23 of the ComReg consultation Document 16/96. At paragraph 7.23 of this document ComReg outlines that a transparency obligation addresses this potential behaviour.

- Eircom has the ability to engage in vertical leveraging of its SMP in the WLA market as outlined at paragraphs 7.28 and 7.29 of the ComReg consultation Document 16/96. This leveraging occurs by Eircom phasing its FTTH roll-out in a manner which maximises the benefit to Eircom's retail arm at the expense of other retail providers. Providing visibility of Eircom's rollout plans allows for the deployment of alternative FTTH services in areas where retail competitors of Eircom retail have offerings with different demand side characteristics
- SIRO believes that absent the requirement to provide rollout information there is scope for Eircom to exercise its SMP via the information asymmetries outlined at paragraph 7.37 of the ComReg consultation document 16/96. This occurs by restricting access to information regarding the areas where Eircom's FTTH offering will not be present and therefore restricts the ability for undertakings other than Eircom to plan for the network deployment required to supply WLA products.

Detailed SIRO response

Exploitative Practices

At paragraphs 7.18 to 7.23 of the consultation document, ComReg 16/96; ComReg sets out a number of competition problems related to **inertia/inefficiency**.

Eircom by virtue of its FTTC footprint, has WLA revenues in nearly all geographic areas where it might consider deploying FTTH technology. In this context, the additional wholesale revenue which it earns from the deployment of FTTH in given areas is likely to be marginal, as it will be converting the existing FTTC based revenue, into FTTH revenue, as end-users migrate from FTTC to FTTH. Therefore, arguably, Eircom is in a position to act independently of the market and it can defer the phasing of its FTTH roll-out, with less regard to the uptake or cash flow to be generated, on foot of these decisions.

Accordingly, in SIRO's view, the provision of information which indicates where Eircom **will not** deploy FTTH services in the short term, provides incentives for alternative supply in those areas, and acts as a direct constraint on Eircom's ability to defer its deployment of this technology, based on changing internal priorities. It acts as a curb on Eircom's ability to divert investment or delay resources for new technology deployment, from a market where it has SMP, to markets where it faces stronger competition. In order to act as an effective constraint on these practices the information must ultimately be provided to potential suppliers of alternative FTTH services in the WLA market, irrespective of whether they directly provide retail broadband services.

Leveraging

SIRO is of the view that Eircom has significant scope to leverage its SMP in the WLA to the benefit of its retail arm. This is because, as a vertically integrated operator, it can choose the phasing of its FTTH rollout to meet the overall commercial requirements of Eircom as a whole. This could occur by prioritising areas where the demand side requirement for FTTH is driven by services where Eircom retail has an advantage. This includes the availability of streaming videos services such as Apple TV and exclusive content such as sports rights. This is a form of the competition problem set out at paragraphs 7.28 and 7.29 of the ComReg consultation Document 16/96. In order to counteract this behaviour the market must have information which allows it to identify where Eircom's FTTH rollout phasing is sub-optimal for competitors of

Eircom retail and to allow alternative sources of supply to be supplied in good time to allow Eircom's retail competitors to optimise their offerings on an equal footing as Eircom.

Information asymmetry

Eircom does not have to adopt a "whole of market" approach in optimizing and designing its FTTH roll-out plan. Absent advance information the only point at which its competitors at the retail level know that these roll plans are not optimized for their requirements would be when the service goes live in an area. As a vertically integrated operator Eircom wholesale division's business objectives will be aligned with the overall business objectives of the entire Eircom group and therefore its retail arm's commercial interests. This alignment means that Eircom retail does not need to seek alternative sources of supply and does not need advance roll-out information for this purpose. Absent an obligation to provide advance rollout information there is an information asymmetry whereby competitors to Eircom retail face a planning lag and cannot seek wholesale inputs optimized for their business plans until after wholesale services aligned with Eircom retail's business needs are placed on the market and are discovered to be sub-optimal. This issue can be addressed by providing advance roll-out information to wholesale suppliers whose interests are focused on meeting the needs of retail providers other than Eircom.

By virtue of its scale and scope Eircom has a substantial field force that is active in the geography of the national market for WLA. This scale and scope are part of the underlying fact pattern that has resulted in Eircom's SMP designation. SIRO's deployment activities are directly observable by Eircom's field force and the precursors to making its services available to end-users, such as the replacement of network, which is directly observable. As such, Eircom by virtue of its scale and scope has access to direct market information regarding the activities of its competitors. SIRO, on the other hand, because of its limited scale does not have access to similar directly observable information regarding Eircom's deployment activities. This creates an information asymmetry, directly attributable to Eircom's SMP position and which is capable of being used to target Eircom's deployment to impede efficient and effective entry to the WLA market and therefore contrary to competition law principles. Access to the information as specified under Section 10.25 of the Decision D10/18 addresses this asymmetry and allows market entrants plan their deployment to avoid any tactical targeting by Eircom of their market entry.

Provision of information to entities not directly active on the retail market

SIRO notes that although it does not directly supply retail services, ComReg has explicitly included SIRO's offering in the upstream WLA market. Remedies targeted at preventing competition harms in the retail market are equally applicable to SIRO and in some cases may be more beneficial as their application to SIRO will address these harms for multiple operators at the same time.

Question 7

(This question is answered with question 2 above)

Question 8

As far as ComReg is aware Siro has, to date, declined to sign Eircom's Access Reference Offer ('ARO') to avail of WLA services, please provide the reasons for this. Further please describe (and where possible quantify) any harm or detriment would be incurred by Siro from signing an ARO.

SIRO RESPONSE TO QUESTION 8

As a point of clarification, SIRO signed an Access Agreement based on the Eircom ARO executed by SIRO on 24th November 2016 and countersigned by Eircom on 6th December 2016. This is in relation to CEI and copper based access.

In relation to WLA services SIRO has not yet signed an Access Agreement based on the WBARO. As SIRO has not made a definitive decision to purchase Eircom's WLA services there is no business reason to enter into a formal purchase agreement at this time. As a matter of governance, SIRO would not enter into such a commercial contract without a legitimate business need.

Question 9

As a condition to access Eircom's NGA rollout plans, would Siro consider it reasonable to provide some form of reassurance to Eircom i.e. a Non-Disclosure Agreement, rather than an ARO?

SIRO RESPONSE TO QUESTION 9

SIRO does not believe that it should be required to provide any reassurances to Eircom given the plain reading of D10/18.

[REDACTED]

For example, an onerous NDA would potentially limit SIRO's ability to communicate to its customers the complementary nature of its network footprint to that of Eircom's. ComReg has already found that Eircom can act independently of competitors and end-users in the market. Therefore, overly restrictive NDAs serve only as a leveraging of Eircom's SMP by way of information asymmetries.

Significantly, Section 10.21 of ComReg Decision D10/18 sets out that Eircom shall inform ComReg "without delay" where it considers certain aspects of information to be provided under the obligations set out in this Section 10 to be of a confidential and/or commercially sensitive nature, in which case, Eircom shall also provide ComReg with complete details of such information along with objective reasons, justifying why it considers the information to be confidential and/or commercially sensitive and thus requiring protection via a non-disclosure agreement.

SIRO assumes that the fact that ComReg has accepted SIRO's dispute, indicates that no such assertion of confidentiality has been made, as ComReg would otherwise have already determined that i) either Eircom was entitled to seek a NDA; or ii) in the alternative, that the information was not commercially sensitive. SIRO notes that in its correspondence to ComReg of 11th December 2018, in respect of the dispute, Eircom makes no specific assertion of confidentiality, but only a general statement that "it is not unreasonable for open eir [sic] to manage commercially sensitive information."

SIRO notes that retailers who obtain the information under the WBARO can communicate to end users by way of advance marketing activities and it therefore effectively enters into the public domain.

It would therefore be unreasonable for Eircom to require SIRO to enter into an NDA which provides more assurances than a basic undertaking not to publish in bulk information supplied by Eircom.

Question 10

Regulation 5(6) of the Access Regulations sets out that an undertaking that acquires information from another undertaking before, during or after the process of negotiating access or interconnection arrangements may not use that information for a purpose other than that for which it was supplied and must respect the confidentiality of information. Please provide Siro's view on the application of (and compliance with) this regulation in these circumstances.

SIRO Response TO QUESTION 10

Summary of SIRO's response

SIRO does not believe that the provision of information to be provided under Section 10.25 of ComReg Decision is part of the process of negotiating Access and therefore the provisions of Regulation 5(6) of the Access Regulations do not apply.

In the alternative, even if the provisions of Regulation 5(6) of the Access Regulations do apply these cannot operate to prevent the use of the information for the purposes of planning for the sourcing and deployment of alternative sources of supply to Eircom's FTTH product in the WLA market.

Detailed SIRO response

It is SIRO's position that the provision and acquisition of information pursuant to the transparency obligations set out in Section 10 of ComReg Decision D10/18 is separate and distinct from information that might be acquired in connection with the process of negotiating access. Therefore any limitations on its use imposed by Regulation 5(6) of the Access Regulations do not apply.

As Eircom has pointed out and emphasized in its correspondence dated 11 December 2019 in respect of the dispute, the purpose of the transparency obligations are **"to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users"**. This does not restrict the use of the information to the planning or delivery of Eircom's wholesale services nor retail services, supplied, using Eircom's wholesale inputs. Clearly, if the information is used for the planning and delivery of wholesale services other than Eircom's, then there is no need to negotiate access with Eircom in respect of these services and the information is not subject to the restrictions of Access 5(6) of the Access Regulations.

In the alternative, even if the information is deemed to be subject to the provisions of Regulation 5(6) of the Access Regulations, then one of the purposes for which it is provided, must be to allow Access Seekers to decide whether or not to make a "build or buy" decision.

It cannot be that the only options available to Access Seekers using the information are limited to either buying from Eircom in a prospective roll-out area, or not being active in the WLA market in that area. Clearly, if there is to be a decision to either buy or not to buy from Eircom, then it must be permissible to test the business case for this, against alternatives which include self-

build or providing the information to potential alternative suppliers with a view to them deploying network to meet un-met demand. It might also be that if an Access Seeker is aware that alternative wholesale suppliers are more cost effective or otherwise preferable to Eircom then they may request, such suppliers to modify their deployment schedule to provide alternative supply even in areas where Eircom intends to deploy FTTH.

A business strategy of maximising “self-build” before committing to “buy” is a valid market entry strategy at either the wholesale or retail level. It is a valid use of the information as an input to assess whether there is a business case to build in a given area and to choose those areas where there is the potential for maximum return. Or, until such time as the business case becomes marginal and the “buy” option becomes preferable. The fact that the economic cut-off for the “buy” versus “build” decision is not imminent is not a valid reason to prohibit the use of the information to assess which areas to build in.

SIRO also notes that in its correspondence of 11th December 2019 Eircom sets out its view that roll-out information is only provided to allow the consumption of Eircom wholesale services. This would appear to preclude a wholesale customer of Eircom from using information to identify geographical areas where it must seek alternative sources of supply of FTTH service, due to the absence of an Eircom FTTH service. Even in circumstances where SIRO does not directly obtain information under the provisions of Section 10.25 of Decision D10/18 on where Eircom is not providing services it must be permissible for Access Seekers in possession of the information to provide it to SIRO with a view to them acquiring WLA products from alternative sources, other than the incumbent.

Any attempt by Eircom to limit the range of commercial options which can be assessed using the information provided, or to prevent it being used to identify areas where it is more beneficial to self-build or to seek alternative sources of supply, is a leveraging of its SMP to raise barriers to entry.

ENDS
13 January 2020



Annex: 12 ComReg Consultation Document 16/96

Extract from ComReg Consultation Document 16/96:

- 7.18 *A firm with SMP in a relevant market may also, by virtue of the lack of effective competitive pressure in that market, be insulated from the need to innovate and improve efficiency and quality of service to stay ahead of rivals. This may limit the development of new technology and/or lead to costlier and less efficient methods of supply⁵²¹ and consequently higher prices for End Users than would otherwise exist under competitive market conditions.*
- 7.19 *It may also decide to withhold investment in related markets to delay or impede the development of competition in those markets, e.g. where the SMP firm has control over certain key inputs necessary for Access Seekers to compete in neighbouring markets and delays upgrading those inputs or providing newer, potentially more cost effective inputs in line with technological developments.*
- 7.20 *Given Eircom's proposed SMP position in the WLA Market, ComReg is of the preliminary view that absent regulation Eircom would face limited competitive pressure to innovate and provide efficient and effective WLA products. This means that Eircom may be in a position where it could delay any implementation of technology and systems without being vulnerable to the threat of competitors acting first. Any such delayed developments might have otherwise enabled the more efficient provision of retail and/or wholesale services by Access Seekers in the interim. Eircom's WLA customers are, to an extent, dependent on Eircom's timely investment in technology and systems to realise certain efficiency gains, which could potentially be passed on, to some degree, to End Users. As such, potential lower levels of innovation and investment resulting from a lack of effective competition in the WLA Market would likely be to the detriment of End Users.*
- 7.21 *ComReg recognises that Eircom's lower incentives to innovate may not be uniform throughout the State, with Eircom more likely to innovate where it faces a degree of competition, including in downstream markets.¹*
- 7.22 *Given the above, apart from price control obligations, ComReg's preliminary view is that access obligations are also justified and required in order to address this potential competition problem. The access obligations may, for example, enable Access Seekers not only to obtain access to currently available services but also to make reasonable requests for access to new services (or more efficient means of providing them) that emerge over the*

¹ Such inefficiency could potentially be considered an abuse under competition law. Article 102(2)(b) of the TFEU and Section 5(2)(b) of the Competition Act 2002 specifically gives, as an example of an abuse, the limitation of production, markets or technical development to the prejudice of End Users.

period of the review (and which fall within the scope of the WLA Market). These access obligations would also be supported by non-discrimination, transparency, accounting separation, and price control and cost accounting remedies to ensure that the effectiveness of such access obligations is maintained.

- 7.23 *For example, transparency remedies should provide Access Seekers with greater visibility of potential efficiency gains that might arise through technological or system developments. Access and non-discrimination remedies could enable Access Seekers to gain access to effective wholesale products or services that are the same as Eircom's self-provided wholesale WLA inputs. Price control remedies, combined with cost accounting and accounting separation remedies, would then help to prevent excessive and/or discriminatory prices being imposed by the SMP undertaking for new services.*

CONFIDENTIAL

Annex: 13 Siro Response to Draft Determination.



20 March 2020

Mr Alan Cox
Commission for Communication Regulation
One Dockland Centre
Guild St
Dublin D01 E4X0

SENT BY EMAIL ONLY

Re: Dispute SIRO Eircom - ComReg Case number 1452

Dear Alan,

Please find attached SIRO's responses to ComReg's Draft Determination of the above dispute, your document reference 20/13 of 6 March 2020.

SIRO would like to raise three points in relation to your preliminary findings regarding Eircom's refusal to share publicly the information specified in Paragraph 10.25 of Appendix 20 of ComReg D10/18 (herein referred to as the "Eircom Information"), under the following headings:

1. Proposed limits placed on sharing of information
2. Incompatibility with support for new entrants
3. Competitive concerns raised by ComReg

1. Proposed limits placed on sharing of information

ComReg's draft determination allows Eircom to place limits on the sharing of the Eircom Information (see for example section 5.15 of the Draft Determination). This is justified by ComReg's fundamental argument as articulated in section 5.14:

It is ComReg's position that it is proportionate and justified to allow Eircom to limit to whom it provides its NGA rollout plans to i.e. those Undertakings availing (actually or potentially) of VUA.

It appears that this argument is the fundamental basis of the Draft Determination.

SIRO notes ComReg's position but submits that the reasonableness of Eircom's position is not the issue that ComReg sought to determine. We note that ComReg themselves defined the dispute as:

"Whether Eircom may require Siro to comply with conditions, and if so which, in respect of access to information regarding Eircom's "NGA rollout plans" (as provided for under Section 10.25 of the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18)." (emphasis added)



While ComReg states that Eircom could make a case to reasonably restrict access to the Eircom Information, the reasonableness of such a position is not the issue to be determined. The question at hand is whether such a restriction is *permissible* under the current regulations. It is clear from any reading of D10/18 that such restrictions are not allowed by the regulatory decision currently in force. ComReg could have allowed such restrictions in D10/18, but chose not to do so.

It is clear under the current text for D10/18, that Eircom **cannot** restrict access to the Eircom Information. This is clear from a plain English reading of the text. In fact, even Eircom acknowledges that their obligation is to provide the Eircom Information on “a website that is available to the public,”¹ and Eircom is not meeting this obligation.

In addition, SIRO and other undertakings were never given any opportunity to consult on such a restriction: any undertaking reading the draft version of D10/18² would reasonably have read the relevant sections of the draft decision as requiring Eircom to provide the Eircom Information publicly and their response to the consultation would have been framed accordingly.

Therefore, SIRO’s position is that ComReg’s Draft Determination as written would amount to a material change to the provisions of D10/18, rather than a simple clarification. SIRO believes that any such proposed change should happen as part of a Market Review involving full industry consultation.

SIRO notes that ComReg has already announced a new Market Review to address complaints raised by another undertaking and to settle legal proceedings brought by that undertaking³; SIRO suggests that a similar process be employed here in order to properly facilitate industry comment on ComReg’s current position.

2. Incompatibility with support for new entrants

SIRO is a new entrant to the Irish telecommunications market and since 2015 has invested €300m into building a new state-of-the-art fibre network. SIRO is a wholesale-only network and does not enjoy the benefits of a downstream retail arm. By contrast, Eircom has SMP in the relevant market and operates a significant retail arm.

Under the European Electronic Communications Code⁴, NRAs are obliged to be cognizant that providers of very high capacity networks (of which SIRO is the sole wholesale-only one operating in Ireland) provide a significant force for promoting consumer choice; the role of ComReg as the NRA should be to encourage new wholesale-only entrants into the market. Section 28 of the ECC states:

It is necessary to give appropriate incentives for investment in new very high capacity networks that support innovation in content-rich internet services and strengthen the international competitiveness of the Union. Such networks have enormous potential to deliver benefits to consumers and businesses across the Union. It is therefore vital to promote sustainable investment in the development

¹ Eircom response to ComReg on 10 January 2020 quoted in ComReg 20/13a

² ComReg document 16/96, Appendix 14, Part II, Section 10

³ See ComReg document 19/92

⁴ Directive (EU) 2018/1972 of the European Parliament and of the Council



of those new networks, while safeguarding competition, as bottlenecks and barriers to entry remain at the infrastructure level, and boosting consumer choice through regulatory predictability and consistency.

SIRO and our investors (as well as other undertakings and their investors) are entitled to rely on the text of ComReg decision notices as inputs into our investment decisions. If ComReg is now proposing to rewrite key provisions of existing decision notices without the benefit of public consultation, this creates significant issues and risks for all investors in the Irish fibre market.

For the reasons outlined in our point 1 above, ComReg's proposed Draft Determination would clearly be a change of existing policy. Therefore SIRO would strongly urge ComReg to undertake such a change only on foot of a public consultation.

3. Competitive concerns raised by ComReg

In sections 5.16-5.20 of the Draft Determination, ComReg raises concerns about the prospect of SIRO using the Eircom Information [REDACTED] SIRO notes ComReg's views but fundamentally disagrees.

Section 27 of the ECC⁵ states that:

Competition can best be fostered through an economically efficient level of investment in new and existing infrastructure, complemented by regulation, where necessary, to achieve effective competition in retail services. An efficient level of infrastructure-based competition is the extent of infrastructure duplication at which investors can reasonably be expected to make a fair return based on reasonable expectations about the evolution of market shares.

(emphasis added)

SIRO's position is that Eircom's SMP in the relevant market provides them with the ability to manipulate this level of infrastructure duplication (or "overbuild") in order to make it uneconomical for competing networks to build alternative infrastructure, using the mechanisms set out in our response of 13 Jan 2020. Access to the Eircom Information as provided for in D10/18 provides competing networks with the opportunity to decide for themselves where the line of "economically efficient" duplication lies in order to establish a "fair return". In other words, public provision of the Eircom Information in accordance with a plain English reading of D10/18 will result in optimal levels of competition.

With respect to the current position, SIRO's view is that ComReg's preliminary view as set out in 6.10 of the Draft Determination that "Information received from Eircom for the purpose of access to WLA services must be used for that purpose only and not used for purposes that are not related to access to WLA" would not be consistent with Section 27 of the ECC. By taking this position, ComReg could materially reduce the level of investment in FTTH networks in Ireland.

⁵ ibid



Conclusion

While SIRO notes ComReg's position in the Draft Determination, SIRO believes that taking such an interpretation of the Decision Instrument as part of a dispute determination is inconsistent with the goals of European Electronic Communications Code and would have far-reaching implications for investment.

SIRO would welcome the opportunity to meet with you to discuss our position [REDACTED]
[REDACTED]

Yours,

Gerry McAndrew
SIRO Limited

cc: Mr Michael Patterson

Annex: 14 Eircom Response to Draft Determination



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20 March 2020

Case 1452 – Dispute between Siro and Eircom – Draft Determination

Dear Alan,

I refer to your letter dated 6th March 2020 and the accompanying draft Determination documentation. Eircom agrees with ComReg's preliminary view (in paragraph 6.6) that Eircom must make NGA rollout plans available only to Undertakings that avail of access to Eircom's VUA. Eircom further agrees with ComReg's view that Siro could not use the NGA plans for other purposes, and that for it to do so would potentially create distortive effects that could restrict competition to the detriment of End-users as noted in paragraph 5.19. Eircom welcomes the draft determination findings, including the finding that a condition whereby Eircom limits access to information regarding its NGA rollout plans only to those Undertakings that have executed the particular schedules of the ARO concerning VUA and the associated non-disclosure agreement is reasonable.

Eircom notes that Siro has explicitly stated interest in using open eir's rollout information for other purposes that could negatively impact on fair competition. However Eircom trusts that Siro would abide by the terms of ComReg's determination and if it did subsequently sign an ARO and NDA to gain access to the rollout plan, its personnel would take appropriate measures to ensure the Determination, ARO and NDA terms are fully complied with within Siro and that the rollout plan is not used for anything other than the permitted purpose.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'W. McCoubrey'.

William McCoubrey
Head of Regulatory Strategy

Directors: Carolan Lennon, Stephen Tighe

eir is a trading name of eircom Limited,
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Annex: 15 Sky Response to Draft Determination

Sky have indicated that the contents of this response are confidential.

Consequently that content has been omitted from this non-confidential Annex.

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