Commission for
Communications Regulation

Bitstream price control

Responses to ComReg Document No 13/90

Submissions to Consultation 13/90

Reference: ComReg 13/90s

Version: Final

Date: 18/12/2013

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Submissions Received from Respondents

Document No:	13/90s
Date:	18 December 2013

Consultation:	13/90

Content

Section

1: ALTO

alto

alternative operators in the communications market

Consultation: Wholesale Broadband Access: Price control obligation in relation to current generation Bitstream - Ref: 13/90

Submission By ALTO

Date: November 15th 2013

ALTO is pleased to respond to the Consultation: Wholesale Broadband Access: Price control obligation in relation to current generation Bitstream.

ALTO welcomes this opportunity to comment on this wide ranging and complex consultation and would like to make the following general comments before addressing the questions in detail.

Preliminary Remarks

ALTO submits remarks below in a number of specific areas that we would like ComReg to consider carefully.

Margin Squeeze Testing

ALTO notes with certain interest that it appears to be the case that ComReg has omitted to properly consider the impact to modifications to the Wholesale Broadband Access – WBA, price control obligations when related to current generation Bitstream and most particularly products falling clearly into the category of Wholesale/retail or “white label” offerings. In particular ALTO calls on ComReg to consider Margin Squeeze Testing in respect of this area of the market considering competition in both the retail and wholesale segments.

Financial Information and Inputs

ALTO notes that ComReg’s price control proposals are wholly dependant on financial data and inputs received from Eircom Limited. It is apparent that the industry is unable to readily access or check the veracity of much of the financial data which feeds the work that ComReg is obliged to fulfil at this time. ALTO does not make the point that there are glaring issues with this, but it is the case that certain redactions and unavailability of information inhibits the ability of new entrant operators to properly plan and forecast. It is quite apparent that certain cost and overhead allocation calculation methodologies are omitted from the consultation, thus making it extremely difficult for operators to transparently assess costing information.

ALTO calls on ComReg to use best endeavours to avoid Garbage In, Garbage Out logic, which may have the effect of irreparably damaging the market, if left unchecked.

Price Increases for Broadband Customers

It is ALTO's view that ComReg appears to indicate in this consultation that it views Eircom as using its margin in the urban locations which as we know are now defined as Large Exchange Areas – LEAs, this is in order to cross-subsidise Eircom's operations in what might be described as semi-rural and rural locations, or those areas which are by definition outside the LEA. Should ComReg accept this as accurate, then the new price control provides the imprimatur for price increases in semi-rural and rural locations.

ALTO suggest that in order to minimise the potential hardship for the semi-rural and rural communities, we suggest that ComReg carefully considers the following:

The potential and medium to long-term risk of double recovery for copper line maintenance. That is where broadband is being facilitated over copper and may fall into the category of uneconomic on closer analysis.

ALTO members note that Eircom is already currently operating a product type distinction between rural and urban areas where the Eircom Bitstream Managed

Broadband – BMB, becomes less available as the location becomes more rural. Given that this is ALTO member experience and is being mentioned in this response, we consider that ComReg must address this in the context of its analysis and consideration during this Consultation, in addition to the below points:

1. Rural and semi-rural broadband services are primarily bitstream (Standalone broadband having only been launched this year) and thus piggybacking on the existing PSTN/WLR cooper line services. It is therefore consistent that all rural and semi-rural copper access costs are borne by the PSTN/WLR services and do not exist in the WBA market.

2. ALTO considers that service management of the DSLAMs in the rural and semi-rural exchanges should be by remote access, hence we believe there should not be a need for frequent visits to these exchanges and the costs such entails, however where such is required we consider it efficient for the local field engineers to be multi-skilled to carry out necessary maintenance and repair.

3. ALTO understands that backhaul will be of a longer distance and slightly more expensive but the cost of this has the characteristic of reducing as volumes increase.

ALTO also understands that backhaul will be of a longer distance and slightly more expensive but the cost of this has the characteristic of reducing as volumes increase.

In conclusion we consider that copper access costs for PSTN/WLR lines should not be addressed in the Outside-the-LEA model.

Compliance Analysis and Testing

ALTO remarks further to the points made above, that many members have already raised the issue of on-going compliance and testing with ComReg. It appears to be the case that some issues ventilated in the response here, have not been thoroughly addressed in the body of the consultation document and are hangovers from historical and possibly retentive methods maintained by operators in the execution and conduct of business with ComReg. To that end, ALTO requests that due consideration be given to easy, transparent and flexible methods by which competitors could ready reckon and assess aspects of the market that they wish to address. As matters currently stand and excluding the current WBA consultation, new entrants are not instilled with confidence relative to the deep investment and business decisions that they are required to make in order to remain competitive and generate sustainable business in the communications market.

Response to Consultation Questions:

Q.1. Do you agree with ComReg's preliminary views as set out above in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period? Please provide reasons for your response.

A. 1. ALTO submits the below remarks on issues arising from Chapter 5 of the Consultation document.

Appropriate forms of Price Control

Noting the appropriate forms of price control, ALTO remarks that owing to Eircom's vertical integration, thereby creating incentives and opportunity for the vertically integrated undertaking to price and/or margin squeeze.

ALTO agrees with the need for *ex ante* preventative price control and we deem such activity appropriate. Further, we note that the European Commission has declared that Market 5 is a market that is appropriate for *ex ante* regulation.

Implementation of Cost Based Price Control

ALTO generally agrees with ComReg proposals for both national and outside LEA geographic controls. Further, ALTO agrees that costs be actual costs with a reasonable return plus and adjustment for efficiencies. ALTO also agrees with prevention proposals relating to cross-subsidisation, thus preventing the potential for unreasonable competitive distortions in LEAs.

ALTO maintains one significant concern relative to ComReg's proposals. That concern is that we query the quality of the information being furnished to ComReg relating to Eircom's actual costs. Should the information not be satisfactory, that presents insurmountable challenges in properly determining precisely what elements/components should be included in the cost stacks. It is ALTO's strong preference that ComReg retain an independent and accountable party to deal with this concern, and on an on-going basis.

Retail Margin Testing

ALTO generally agrees with the retail margin testing methodologies being deployed by ComReg. It appears that ComReg has logically applied the mechanisms adopted in the NGA market. Though we remark that these mechanisms are, as yet, inconclusive.

ALTO also agrees that is appears to be appropriate, given Eircom's vertical integration, to impose *ex ante* retail margin squeeze controls additional to the cost orientation controls, as set out.

Price Control Period and Annual Reviews

ALTO agrees with ComReg's suggested three-year price control period, as this seeks to preserve market stability.

ALTO firmly believes and calls on ComReg to publish the outcome of the annual reconciliation of Eircom's national and outside LEA cost review. This is in order that the industry understands precisely and transparently, what the performance environments of the market are from time-to-time. It will be quite apparent from such work, that under-recovery and over-recovery will be exposed and required remedial action can thus be taken on an *ex ante* basis.

Wholesale Price Notification and Compliance Procedures

ALTO agrees with ComReg's structured approach proposals in this area. ALTO members believe it is reasonable to expect at a minimum, that a period of four months in time be allowable for pricing notifications and amendments, however, it is the case that a longer period will be required in the case of product notifications, particularly when technical details and standards will need to be properly tested in advance of launch. It of course can be the case that the four and six month periods mentioned above run concurrently.

ALTO reminds ComReg that EU Competition Law principles should be fully adhered to in the context of notifications and compliance procedures. ALTO also remarks that notification and compliance procedures have been found to be wanting in the market for quite some time.

Q. 2. Do you agree with ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model? Please provide reasons for your response.

A. 2. ALTO agrees with ComReg's preliminary views regarding appropriate cost methodology for the Bitstream cost model.

ALTO agrees that cross-checking Eircom's statutory accounts appears to be appropriate and valid test for whole network cost, that is given the relative maturity of current generation broadband.

ALTO has certain and valid concerns over the veracity of the financial information available to ComReg in order to properly assess cost splits in the forms outlined (LEA and outside LEA). It is a commonly held perception that the costing data is not as reliable as it could be.

ALTO cautions ComReg in respect of modelling that may give rise to incorrect assumptions and concomitant arbitrary results. Such modelling and results would create significant price distortions when considering LEA versus outside LEA pricing.

ALTO is concerned that ComReg's proposed use of Fully Allocated Costing for some key aspects of this consultation has not been properly elucidated. We required further transparency as to the operation of this proposal.

Q. 3. Do you agree with ComReg's preliminary view in relation to Eircom's usage charges Outside the LEA where Eircom should not recover in excess of the long run incremental cost that is caused by the additional traffic by operator on the core network, over and above the average cost for usage in the Bitstream cost model. Please provide reasons for your response.

A. 3. ALTO agrees that the competitive constraints within the LEAs such as alternative provision from LLU and cable operators, etc. seems to negate the need for LRIC control on usage charges in the LEAs.

ALTO also agrees that action needs to be taken to militate against excess usage charges outside the LEA, as outlined in paragraph 6.115 and that Eircom should recover "no more than the long run incremental cost" that is caused by the additional traffic (above the average) from operators whose average usage is higher than Eircom wholesale's average usage, the latter of which is used as the basis for assessing a cost oriented Mbps backhaul charge.

Q. 4. Do you agree with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6? Please provide reasons for your response.

A. 4. ALTO agrees with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6.

Q. 5. Do you agree with ComReg's preliminary views above in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream? Please provide reasons for your response.

A. 5. ALTO submits that in the absence of functional separation and Equivalence of Input – EOI, that we agree with ComReg's preliminary views in relation to the proposed retail margin squeeze tests including the proposals relating to notification and compliance procedures for retail prices associated with current generation Bitstream.

ALTO supports general alignment with work already carried out and implemented relative to the NGA markets on margin squeeze testing. Additionally ALTO requests that ComReg consider Statements of Compliance and the proper treatment of network/service Promotions in the context of this consultation.

Q. 6. Do you agree with ComReg's preliminary views set out above regarding the assessment of the various Bitstream ancillary charges to ensure that the charges are in line with Eircom's cost orientation obligation? Please provide reasons for your response.

A. 6. ALTO members have valid concerns as to the proper definition of ancillary service relative to a given product.

Two examples are:

1. Eircom's BIP and BMB offerings – core offering; and

2. BECs and WEIL – ancillary and cost oriented.

ALTO members remain concerned that improper classification can lead to incorrect assignment for the purposes of cost and price modelling.

Q. 7. Do you agree that the current level of Bitstream price floors should remain in place? Please provide reasons for your response.

A. 7. Many ALTO members are also LLU providers so we are unable to, and are precluded from discussions as to the quantitative reviews of our members' costs in order to determine whether the Bitstream price floor is at the correct level. Based on public and qualitative analysis we consider the current floor needs to rise.

ALTO members operating in this market should be best placed to offer the required quantitative data to assist ComReg in the circumstances.

Q. 8. Do you agree with ComReg's preliminary views above with regard to the imposition of an obligation of cost orientation for SABB Outside the LEA? Please provide reasons for your response.

A. 8. ALTO agrees with ComReg's preliminary views with regard to the imposition of an obligation of cost orientation for SABB Outside the LEA in order to prevent overcharging.

ALTO members consider that a Margin Squeeze Test the same as for BIP and BMB is also required. Eircom could conceivably avail of wider savings than just the cost orientated price of the SABB and thus have the potential to unreasonably undercut other operators that have to pay for interconnect and additional routing into their own networks as well as economies of scale and scope issues.

ALTO considers that a margin squeeze test aligned with the Outside-the-LEA and LEA as appropriate to ensure other network providers are not foreclosed from using the SABB product and its expected support of advanced IP services.

Q. 9. Do you believe that the draft text of the proposed Decision Instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A. 9. ALTO makes the following observations in relation to the Decision notice.

1) ALTO has already noted that ComReg proposes regulatory remedies that are dependent on the availability of good quality financial information from Eircom. As discussed ALTO has concerns this will be estimated and as such this information could lead to an unreasonable balance of the LEA and Outside LEA geographies.

2) Clause 4.3 – ALTO agrees with this specific obligation which we believe will to some extent prevent Eircom from using its Outside LEA income to cross subsidise LEA income preventing a competitive distortion of Eircom's LEA pricing. However, we believe ComReg should include relevant clauses that make it clear that cross-subsidisation from Outside LEA to LEA is prohibited. Such should also make clear that Eircom is not permitted to apply costs or cost allocations into the Outside-the-LEA area that should rightfully exist in the LEA area.

3) Clause 4.4 – Given the potential impact on competition we fully agree with the proposed remedy that once the model exists, it is not onerous for Eircom to demonstrate compliance to ComReg for proposed price changes. However, if forward-looking price reductions are factored into the model, such information should be made available to other operators as such is pricing information?

4) Clause 4.5 – Agreed as such will keep a holistic view of compliance.

5) Clause 4.6 –Please see our comments to question 8.

6) Clause 4.7 – ALTO considers that ComReg is effectively foreclosing the opportunity to invest Outside-the-LEA; ALTO members see that as a disappointing development, however we understand the purpose.

7) Section 5 – Generally agreed – however in clause 5.2 if ComReg is to apply discretion to shorten notification periods it should be cognisant of not causing others to breach their Users Rights obligations such as customer notifications.

8) Section 6 – We support section 6 of the Draft Decision notice for the reasons we have explained earlier in our response.

9) Section 7 paragraph 7.2 – As discussed in our answer to question 6 we consider ComReg need to be careful in the definition of backhaul for current generation bitstream services.

Q. 10. Do you have any views on the Regulatory Impact Assessment above and is there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

A. 10. ALTO submits that the Draft Regulatory Impact Assessment carried out by ComReg has addressed the correct issues and indeed provides a summary of the document, however ALTO continues to hold the positions outlined above.

ALTO

15th November 2013

Submitted: 20th November 2013

2: BT Communications Ireland Ltd.

BT Communications Ireland ("BT") Response to ComReg's Consultation:

Wholesale Broadband Access Price Control Obligations in Relation to Current Generation Bitstream

Issue 1 – 20th November 2013

1.0 Introduction

We welcome the opportunity to comment on this critical price control consultation. We note ComReg is generally attempting to align the current generation Wholesale Broadband Access ["WBA"] price controls with those recently deployed for Next Generation Access WBA.

We remain concerned that neither regulatory Functional Separation nor Equivalence of Input (EOI) exist in the Irish market for current generation upstream wholesale infrastructure services[1] and believe this has hindered the growth of telecoms competition in Ireland. The consequence is that additional regulatory remedies are required in downstream markets such as WBA where competition is not yet effective. Based on the competitive environment that is emerging in Ireland we generally agree with ComReg's proposals although we are taking this opportunity to offer constructive comments based on our experience in the market.

Upon consideration the following key issues have emerged from the consultation proposals:

1. Potential price increases for semi-rural and rural broadband customers.
2. Risk to competition in urban areas – concern over the operation of the national cost orientation obligation.
3. Quality of the underlying financial data.
4. Further price controls for the Stand Alone Broadband (SABB) are required.

2.0 Key Issues

Price Increases for Semi Rural and Rural Broadband Customers

ComReg indicate within the consultation that it believes Eircom have possibly been using their margin in the urban locations (defined as Large Exchange Areas (LEAs)) to cross subsidise its operation in semi-rural and rural locations (defined as Outside-the-LEAs). If ComReg's belief is correct, then the new regulatory proposals to split the geographical areas facilitate potential price increases in the semi-rural and rural locations. To minimise the risk of price increases and

[1] Full term is Wholesale Physical Network Infrastructure Access (WPNIA) – This aligns with the European Commission defined Market 4.

widening of the digital divide we suggest ComReg also consider the following within its modelling exercise;

- Rural and semi-rural broadband services are primarily based on wholesale bitstream products (Standalone Broadband (SABB) was only launched this year) and thus piggy-back on the existing PSTN/WLR copper line services. It is therefore consistent that all of the rural and semi-rural copper access costs are borne by the PSTN/WLR services and do not exist in the WBA market.
- We consider the service management of the DSLAMs in the rural and semi-rural exchanges should be by remote access hence we believe there should not be a need for frequent visits to these exchanges and the costs this entails, however where an actual visit is required we consider an efficient operator should have local multi-skilled field engineers to carry out necessary maintenance and repair – thereby reducing travel cost.
- We have also reviewed the Eircom current generation bitstream portfolio in relation to the distribution of BIP and BMB within and outside of the LEAs and are of the following views:
    - BMB should be priced the same in and out of the LEA as both share the same common multiservice NGN network.
    - BIP products are priced independent of the customers actual usage and should therefore be re-priced to avoid over recovering the cost of backhaul, and should share a common backhaul cost with BMB

In conclusion we are of the view the above should minimise the Outside-the-LEA costs, however, we believe ultimately this set of ComReg price controls will facilitate price increases in rural and semi-rural locations and a widening of the digital divide.

Risk to competition in urban areas
✂ However, we believe there is a risk the further application of the national cost orientation could undermine the WBA cost floor thereby creating economic harm to operators using LLU. The consultation does not appear to envisage this outcome and we don't believe this is the intention of ComReg; however we are seeking clarification this will not happen.

Quality of the underlying financial data
We have no reason to doubt the veracity of Eircom's statutory accounts or documents which report the position of the company; however we note this ComReg proposal effectively splits an existing mature product into two geographical parts that the product was not designed or accounted for in the past.

This split has the potential to change the trading position of Eircom in the WBA market with the associated consequence on competitors. Moreover for such a major undertaking we believe it essential that ComReg ensure its model is robustly tested. We consider it unlikely the initial configuration will be totally correct and ComReg need to create the flexibility to fine tune the model over the coming years. To increase confidence in the model and the source information we consider both should be verified by an auditor function. In addition, given it is unlikely the initial model will be perfect, we are of the view there is a need for on-going transparency to the operation of the model.

Further price controls for the Stand Alone Broadband (SABB) are required

We consider SABBs have the potential to host a significant growth in service such as VoIP in the coming years. We therefore consider the price controls on the SABB should mirror those on bitstream in the LEAs and Outside-the-LEAs (i.e. to include margin squeeze tests) as the same issues as highlighted by ComReg in Section 5 exist.

3.0 BT Response to Detailed Questions

Q. 1 Do you agree with ComReg's preliminary views as set out above in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period? Please provide reasons for your response.

A.1 BT would like to offer the following comments to ComReg's preliminary views as set out in Chapter 5 with regard to the proposed approach for current generation services over the price control period.

I. Appropriate forms of price control
We note the three types of price control available to ComReg, i.e. Regulatory Forbearance, Cost Orientation and Retail minus/retail margin squeeze test. We also note that the current regulation is retail minus.

Eircom is a vertically integrated operator providing wholesale products (Wholesale Regulatory Access Products (WRAPs) and White Label End-to-End solutions) to both infrastructure service providers and to switchless service providers, and at the same time Eircom directly competes with these service providers through Eircom Retail. This by its nature creates the potential for Eircom (whether or not it is acted upon) to create a price/margin squeeze against other service providers using the Eircom network.

Given the time to complete litigation remedies (ex post approach) in Ireland can at times be protracted, and in the absence of more appropriate remedies such as EOI, we support a regulatory price control (ex anti approach) to protect against potential margin/price squeeze. We also note the European Commission has identified the WBA market (Market 5) as appropriate for ex ante regulation. We discuss the types of remedy below.

II. Implementation of the cost based price control
We are of the view the appropriate wholesale price control should be national cost orientation. Allowing a separate test outside LEA may simply allow Eircom to increase costs for "POTS based" bitstream without justification. The subsidy may in fact flow in the opposite direction; from outside the LEA to help Eircom reduce its prices inside the LEA. I.e. Eircom can control the cost orientation within the different regions. However, as set out in our Key Issues we are concerned the national cost orientation obligation could undermine the existing WBA price floor (in place to protect LLU). We are therefore seeking for ComReg to clarify and re-consider the application of this aspect of the price control proposal to ensure it does not undermine the WBA price floor. We agree with ComReg's proposal to prevent Eircom cross subsidisation from the less competitive Outside-the-LEAs into the LEAs thereby removing the opportunity for an unreasonable competitive distortion into LEA (urban areas).

III. We agree with the retail margin tests for the LEA and Outside-the-LEA areas which generally align with the approach in the NGA market and these will protect competitors in both geographies for the reasons ComReg has provided. However ComReg need to take countenance of the fact that in their modelling that the CGA and NGA bitstream network topologies ✂. For the vertical integration reasons as set out earlier we agree an ex-anti Retail Margin squeeze control is required.

IV. Whilst we generally support the proposals above, the correct operation of these controls is dependent on the quality of Eircom's cost information for different geographical locations and for the reasons outlined in our Key Issues we are concerned this may not be of a satisfactory quality to determine the LEA and Outside-the-LEA cost stacks. As highlighted earlier given the initial status of the financial information and the model we consider independent verification would be helpful.

V. Price control period and annual reviews
We agree with the principle of a three year price control period as experience of past reviews has shown this maintains relative stability in the market. However, we are of the view that the outcome of the annual reconciliation of Eircom's National and Outside LEA cost review should be formally reported to the industry to understand the likelihood of pricing changes due to under or over recovery.

VI. Wholesale price notification and compliance procedures
We fully agree to the structured approach to price notification. We assume ComReg's reference to new products relates to pricing only as the technical notifications will be addressed in the regulation derived from the market review.

Q. 2 Do you agree with ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model? Please provide reasons for your response.

A.2 We would like to offer the following comments on ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model

I. The Eircom current generation broadband network is now mature hence we agree with ComReg that it's total modelled costs should generally reflect its total actual costs. We agree a present day replacement cost model could overvalue the network and would be inappropriate other than for network upgrades. We therefore agree cross checking costs against the statutory accounts is valid.

II. As indicated earlier we have concerns about the quality of the geographical split financial information as this has recently been derived. Our view is supported by the need for ComReg to develop a hybrid top down model approach based on the dimensioning, engineering rules and assumptions. We remain concerned arbitrary adjustments could be made to favour the final values which could cause a distortion in pricing between the LEA and Outside the LEA. Please see our earlier answers.

III. We note ComReg's preliminary view to use Fully Allocated Costs for some aspects of the costing as such reflects the actions of the business in allocating overheads; however the consultation does not provide sufficient transparency as to how this will be done. Again we are concerned that the allocations could also distort the balance between the LEA and Non LEA areas creating competitive distortions. For example unreasonably reducing Eircom's costs in the LEAs to allow it to compete more strongly.

Q. 3 Do you agree with ComReg's preliminary view in relation to Eircom's usage charges Outside the LEA where Eircom should not recover in excess of the long run incremental cost that is caused by the additional traffic by operator on the core network, over and above the average cost for usage in the Bitstream cost model. Please provide reasons for your response.

A.3 We agree that competitive constraints within the LEAs such as alternative provision from LLU and cable operators etc. negates the need for such a LRIC control on usage charges in the LEAs.

Q. 4 Do you agree with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6? Please provide reasons for your response.

A.4 We would like to offer the following comments regarding the cost inputs and assumptions associated with the cost model.

- We consider the copper costs (including maintenance) should not be included given these are recovered through the PSTN/WLR service. The exception to this would be the copper costs for the Standalone Broadband (SABB) product which by the absence of the PSTN/WLR service must have the copper costs applied.
- Based on our analysis in Annex B of the current bitstream services we are of the following views:
    - BMB should be priced the same in and out of the LEA as both ✂.
    - BIP products are priced independent of the customers actual usage and should therefore be re-priced to avoid over recovering the cost of backhaul, and should share a common backhaul cost with BMB

Q. 5 Do you agree with ComReg's preliminary views above in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream? Please provide reasons for your response.

A.5 Absent functional separation and EOI we agree with ComReg's preliminary views in relation to the proposed retail margin squeeze tests. We also agree with ComReg's proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream. We would like to offer the following comments to support our view:

I. Margin Squeeze Tests - We support the proposed MST approach which generally aligns with that of the NGA model.

II. Statement of compliance – To incentivise correct behaviour we consider this should be underpinned by the penalty of a serious offence under the regulations, similar to the 13D1 procedures.

III. Promotions – We are of the view ComReg need to urgently consult separately on promotions as they are being applied to various markets. Any such consultation should in our view consider:
   a. The duration of promotions
   b. How discounts of cost orientated products work
   c. The rules to avoid undue discrimination when offering promotions.
   d. Potential competition issues of very long term promotions and should there be an automatic point at say 18 months where a continuing promotion automatically becomes a price change.

Q. 6 Do you agree with ComReg's preliminary views set out above regarding the assessment of the various Bitstream ancillary charges to ensure that the charges are in line with Eircom's cost orientation obligation? Please provide reasons for your response.

A.6 We would like to make the following comments concerning ComReg's preliminary view regarding the assessment of the various Bitstream ancillary charges to ensure that the charges are in line with Eircom's cost orientation obligation.

Within bitstream we consider the definition of what is an ancillary service is important given the nature of the product.

I. Bitstream Products – Eircom's Bitstream IP (BIP) and Bitstream Managed Backhaul (BMB) services are designed to bring customer data from the customer premises to central locations within the Eircom network. We consider this is core to the product rather than ancillary as the bitstream products do not physically break out at local exchanges hence alternative ancillary backhaul is not possible.

II. Backhaul Extension Service (BECs) and Wholesale Ethernet Interconnect Links (WEILs) – These are large connection circuits to join the Eircom Bitstream platform (central locations above) to the other operator networks and we agree these are ancillary services and should be cost oriented. ✂. Please see Annex A figure 1 which highlights this aspect of the service.

Q. 7 Do you agree that the current level of Bitstream price floors should remain in place? Please provide reasons for your response.

A.7 As an LLU provider we have reviewed our costs to determine whether the Bitstream price floor is at the correct level – please see our confidential Annex Figures 1 and 2 for further information. Based on our analysis we consider the variable component of the current floor current floor needs to rise to circa €✂in order to cover our fully allocated costs.

Q. 8 Do you agree with ComReg's preliminary views above with regard to the imposition of an obligation of cost orientation for SABB Outside the LEA? Please provide reasons for your response.

A.8 Absent functional separation and EOI in upstream Wholesale Physical Access[2] (European Commission Market 4) we agree with ComReg's preliminary views with regard to the imposition of an obligation of cost orientation for SABB outside the LEA to prevent overcharging. However, for the following reasons we consider a Margin Squeeze Test the same as for BIP and BMB is also required:

I. We believe Eircom Retail is a switchless provider and as such has no interconnect costs with Eircom Wholesale/Networks unlike other physical operators that use Eircom's platform.
II. Eircom Retail has a large market share and benefits from Economies of scale and scope unlike many other entrants.
III. SABB is the ideal bearer for VoIP services and again Eircom Retail will not have interconnect costs of using such a platform.

These issues mean Eircom can avail of wider savings than just the cost orientated price of the SABB and thus have the potential to unreasonably undercut other operators that have to pay for interconnect and additional routing into their own networks as well as economies of scale and scope issues.

In conclusion we consider a margin squeeze test aligned with the bitstream Outside-the-LEA and LEA is appropriate to ensure other network providers are not foreclosed from using the SABB.

Q. 9 Do you believe that the draft text of the proposed Decision Instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A.9 We would like to offer the following comments to the Decision notice.

Clause References apply to the Draft Decision Instrument in Chapter 11.

I. General – Cost Orientation - We note ComReg's proposed regulatory remedies are dependent on the availability of good quality financial information. As discussed earlier we have concerns this information will be based on estimates and models and errors could lead to an unreasonable balance of the LEA and Outside-the-LEA costs and consequential market distortion. Whilst the obligations appear to propose the appropriate remedies for the model and its outputs, we are concerned as to the allocation of input costs and additionally how overheads etc. are applied to those inputs. We therefore consider the operation of the lower layer inputs need to be built into the remedies.

II. Clause 4.1 – National Cost Orientation - As discussed in our Key Issues section - "Risk to competition in urban areas" we are concerned that this proposed obligation could

[2] Shortened from Wholesale Physical Network Infrastructure Access (WPNIA)

undermine the existing WBA price floor. We don't believe this is the intention of ComReg and are seeking clarification. If there is a potential issue we would request it is removed in favour of keeping the WBA price control.

III. Clause 4.3 – We are of the view the appropriate wholesale price control should be national cost orientation. Allowing separate test outside LEA may simply allow Eircom to increase costs for "POTS based" bitstream without justification. The subsidy may in fact flow in the opposite direction; from outside the LEA to help Eircom reduce its prices inside the LEA. I.e. Eircom can control the cost orientation within the different regions.

IV. Clause 4.4 – Notifications - Given the potential impact on competition we fully agree with the proposed remedy. We would like to add that once the model exists, it is not onerous for Eircom to demonstrate compliance to ComReg for proposed price changes.

V. Clause 4.5 – Annual Cost Reconciliation - Agreed as such will keep a holistic view of compliance.

VI. Clause 4.6 – SABB - Please see our comments to question 8.

VII. Section 5 – Transparency Obligations - Generally agreed however in clause 5.2 if ComReg is to apply discretion to shorten notification periods it should be cognisant of not causing others to breach their Users Rights obligations such as customer notifications.

VIII. Section 6 – Retail Margin Squeeze Obligations - We support section 6 of the Draft Decision notice for the reasons we have explained earlier in our response, however we consider the SAAB should be added to the obligation. Please see our response to question 8.

IX. Section 7 – Miscellaneous Price Control Obligations - paragraph 7.2 – As discussed in our answer to question 6 we consider ComReg need to be careful in the definition of backhaul for current generation bitstream services. I.e. the traditional use of this word does not apply as the service does not break traffic out locally. However we would agree with BECs and WEILs being cost orientated.

Q.10 Do you have any views on the Regulatory Impact Assessment above and is there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.

A.10 We agree the Regulatory Impact Assessment has addressed the correct issues and indeed provides a summary of the document, however we continue to hold the positions we have articulated.

Annex A – Confidential Annex – LLU costing.

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Annex B – Confidential Annex - BT Review of Eircom Bitstream Services

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Document Control

Issued Date: 20th November 2013

Issued version: Issue 1

Status: Non-Confidential Version

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Response on behalf of eircom Group to ComReg Consultation 13/90

Market Review

Wholesale Broadband Access

Price Control Obligation in Relation to Current Generation Bitstream

15 November2013

DOCUMENT CONTROL

Document name	eircom Response to ComReg Consultation 13/90: WBA - Price Control Obligation in Relation to Current Generation Bitstream
Document Owner	eircom
Version	Final
Status	Non-Confidential

EXECUTIVE SUMMARY

eircom welcomes the opportunity to respond to this Consultation & Draft Decision from ComReg around eircom's WBA price control obligations in relation to current generation Bitstream. However, eircom would draw attention to the fact that this consultation is being issued some 27 months following Decision Notice D06/11 which found that eircom had Significant Market Power (SMP) in the national WBA market. This consultation proposes to refine and expand the price control obligations to which eircom is subject, for a three year period from the effective date of the Decision resulting from this consultation process, which is likely to be 6 months into the future. eircom is of the view that ComReg's approach is not consistent with the principles of the EU Regulatory Framework[1] and ComReg's obligations in this respect. We refer in particular to Article 16 which states that:

"National regulatory authorities shall carry out an analysis of the relevant market and notify the corresponding draft measure in accordance with Article 7:

(a) *within three years from the adoption of a previous measure relating to that market. However, exceptionally, that period may be extended for up to three additional years, where the national regulatory authority has notified a reasoned proposed extension to the Commission and the Commission has not objected within one month of the notified extension;"*

This provision is reflected in Regulation 27 of the Framework Regulations.

The effect of Article 16, as transposed by Regulation 27 of the Framework Regulations in Ireland, is that ComReg, three years from imposing a measure in the context of a market analysis must carry a new market analysis. The last market analysis for the WBA market concluded more than two years ago and this market analysis is now due for renewal. However, instead of initiating a full market review of Market 5, ComReg is initiating a process to introduce an expanded price control regime which will continue to be effective some 6 years after the finding of SMP. eircom does not accept that this is consistent with ComReg's obligations under the Framework Regulations. In particular, ComReg may not at this time lawfully seek to amend or specify any obligation in respect of WBA without first undertaking a market analysis so that relevant developments in the competitive state of the market may be

[1]Article 16 of DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (*)as amended by Directive 2009/140/EC and Regulation 544/2009

fully taken into account. This is particularly important in the current environment of rapid technological change (NGA and LTE introduction), significant new market entry (Sky) and the dramatic evolution of the market towards expanded bundling (mobile, TV). These factors have significantly changed the competitive dynamics in the market to such an extent that the data utilised to underpin the current regulatory regime in the market is no longer valid.

Indeed, there is an acceptance throughout the consultation document that the market has become more competitive since the last market review. An example of this is at paragraph 4.11 where ComReg states that eircom "*is losing retail broadband market share to other platforms, most notably cable*". Again at paragraph 4.12, ComReg states that "*the decline in Eircom's retail broadband market share (and UPC's market share gain) is more significant in urban areas than the national figures suggest. The pattern suggests that UPC is able to attract churning subscribers from Eircom retail (and wholesale) products, as well new broadband subscribers, while Eircom is losing subscribers in a growing retail market*". It is impossible to understand that not only ComReg chooses not to review the market but to continue a consultation initiated some three years ago, but also proposes to increase the complexity and the scope of the price control. Again eircom does not believe that ComReg may lawfully do so.

Strictly without prejudice to this position, eircom has considered the proposals set out in this consultation document and the reasons offered by ComReg, including the proposal to introduce an additional cost orientation obligation to sit with the existing retail minus control. While eircom agrees that the intensity of competition in the WBA market is greatest in urban areas, and that some form of price control continues to be appropriate in those parts of the market where competition is weaker, there is a high risk that the complex and prescriptive price control proposed by ComReg could strand parts of eircom's broadband investment. In order to maintain eircom's incentives to invest it is necessary that the following three elements of cost control proposed by ComReg be properly balanced, i.e.

- the WBA floor in urban areas,
- the general control using a retail-minus approach ***or*** obligations not to cause a margin squeeze, and
- the price cap (i.e. requirement to seek ComReg approval for any price increases, and to provide appropriate cost justification) in rural areas intended to police cost orientation.

In particular eircom is concerned that some incorrect conclusions have been drawn from the WBA floor model around the real costs drivers for Bitstream usage on the eircom network. The driver of cost on the eircom network is the traffic carried on the network at peak times and each operator should be obliged to pay proportionately for their share of this peak traffic. The current charge per Mb of data carried achieves this objective. The proposal outlined in the consultation whereby some operators would pay a lesser rate simply because their customer base generated higher levels of usage per customer does not comply with the principle of proportionality. In determining this issue, care is required before any changes are made to the structure of prices for Bitstream usage to ensure that these prices continue to be aligned with costs and do not unduly discriminate between users.

eircom is also of the view that it is premature to introduce a cost orientation obligation for Stand-alone Broadband (SABB). eircom does not believe that it makes sense to adopt and implement this proposal, as ComReg suggests, in advance of the detailed study which is planned for the coming year to determine the appropriate cost basis for SABB. Instead, the imposition of such an obligation should be postponed until this analysis is completed and a further market review has been conducted.

Responses to Consultation Questions

Q.1 **Do you agree with ComReg's preliminary views as set out above in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period? Please provide reasons for your response.**

Despite some outstanding concerns, eircom is in broad agreement with the proposed approach to price control set out by ComReg in Chapter 5 of the consultation paper 13/90. The rationale for the proposed approach is explained at length in the Oxera study published as ComReg 13/90a. In outline the national market is characterised as having two parts – one where eircom faces competition from cable and from OAOs unbundling eircom copper loops ("the LEA"), and the other more rural area where infrastructure-based competition does not exist to any appreciable extent, and as a result, the eircom bitstream service presents the only competitive option reasonably available to operators competing at the retail level. ComReg proposes a general price control by cost orientation to apply at the overall market level. Within that part of the market where eircom faces competition, the WBA price floor is in place to allow sufficient economic space for an efficient LLU investor. In this area, ComReg acknowledge that eircom's ability to charge Bitstream prices much above this level is constrained by competition at both the retail and wholesale levels. The retail competition constrains the eircom Bitstream prices because eircom has a general obligation not to cause a margin squeeze, imposed by ComReg as a remedy following the national finding of SMP in the WBA market. The wholesale prices are constrained because the self-supply by cable operators and the bitstream services provided into the WBA market by LLU operators are at prices below the eircom nationally averaged costs.

ComReg and Oxera have recognised the above distinction in competitive constraints by noting that eircom largely sells a set of legacy Bitstream products into the less competitive parts of the WBA market - and that these services are priced above the Bitstream Managed Backhaul (BMB) service sold into the more competitive areas. ComReg addresses the concern that eircom might set excessive prices for these services by describing the circumstances under which eircom could apply for an increase to the prices for the legacy Bitstream products. Otherwise these products are effectively capped at the current level. One of the circumstances that might trigger a successful application for price increases is a commitment by eircom to extend the current bitstream investment to less economic exchanges – and this indicates that ComReg is aware of the necessity to send appropriate signals for investment.

However, eircom continues to be concerned that ComReg has not properly considered the interplay between the national obligation for cost orientation and the application of the WBA floor to protect LLU investments. There is a risk for eircom that the WBA floor will require eircom to price bitstream above local cost in the more competitive part of the market. If eircom then prices at local cost in the less competitive areas the financial reports may show an excessive return. With no scope to reduce prices in the competitive areas below the WBA floor, the only option available to eircom would be to reduce the prices for the legacy services sold into the less competitive market to a level below local cost. This outcome would have a distorting effect in the downstream retail markets where eircom is progressively excluded from the more competitive markets by high wholesale input prices and ISPs using the eircom Bitstream service would achieve higher margins in the less competitive part of the retail market.

However this risk is offset by the trend that the eircom BMB service is sold into a larger part of the market than has been used to set the WBA floor (i.e. more eircom exchanges than are economic for an unbundling investment). This results in local BMB costs that may be close to, or above, the WBA floor. The control proposed by ComReg will work most efficiently where the average costs of eircom BMB exactly equal the WBA price floor. Even where this is not the case, and if eircom's national bitstream revenues were to exceed national bitstream cost, eircom then has the option to extend the bitstream investment or to reduce bitstream prices. For this form of control to be meaningful it must apply over a number of years and eircom agrees that it is appropriate to specify this control for the remainder of the price control period.

Q.2 Do you agree with ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model? Please provide reasons for your response.

eircom agrees that the costing methodology is broadly appropriate. ComReg has chosen a hybrid model with top down input cost data but with a network dimensioned on the basis of engineering rules rather than based on the Broadband equipment actually deployed by eircom. The transmission network has been modelled based on eircom historic costs forecast over three years with a reasonable assumption around future efficiencies. Use of the FAC basis ensures that the service takes an appropriate allocation of joint and common costs. This combination is the appropriate one to test cost orientation in the areas outside the LEA where competitive entry based on an alternative investment is unlikely.

Within the LEA, however, the main constraints on eircom WBA prices arise from retail competition. These constraints are transferred through to the Wholesale level by an obligation not to cause a margin squeeze between Broadband and Bitstream prices. The price is also constrained by the WBA floor, based on the costs of an efficient LLU investor building their own Bitstream service. This basis for the cost of a Bitstream service based on LLU is necessarily different from the eircom costs for providing Bitstream in the same area for two reasons. The first is that because the efficient LLU operator will have a lower share of the ADSL-delivered Bitstream (the WBA market as defined by ComReg) than will eircom, it will have a higher unit cost per port connected than for an eircom investment in the same exchanges. This is due to the modular nature of DSLAM investments at eircom exchanges and the fact that, therefore, there are some economies of scale. The second reason is that the backhaul service provided by eircom for its own Bitstream service is delivered over a transmission capability that connects all served exchanges for the provision of Bitstream, telephony, and leased line services. The resulting economies of scope allow eircom to achieve a lower unit cost per Mbps of Bitstream traffic than is feasible for an LLU operator building a transmission network solely to backhaul Bitstream traffic. As eircom offers a Wholesale Ethernet Access service to all exchanges of sufficient scale to justify an LLU investment it is appropriate that the LLU operator cost be modelled based on using this service at published prices.

In the light of this, the correct implementation of the complex price control proposed by ComReg requires to use a different model of Bitstream costs for the provincial areas beyond the reach of an efficient LLU investment. This model has correctly been built from eircom actual costs with some adjustments for efficiency. Although the economies of scale and scope discussed above have been available to eircom, the model reflects the higher unit costs resulting from extending the Bitstream investment to several hundred exchanges beyond what is economic for an LLU operator. These sites are characterised by several hundred PSTN lines with a likely Bitstream adoption close to 50% giving a higher unit costs per DSLAM port than can be achieved by the efficient LLU operator in urban areas. The other characteristic of these sites that affects the Bitstream unit costs is that many require a change in transmission technology with a substantial investment to deliver sufficient backhaul capacity to support an adequate Bitstream service.

For these reasons the WBA floor model used to ensure sufficient economic space for an efficient LLU investment in urban areas is not the appropriate cost model to assess eircom Bitstream prices nationally against any possibility of excessive levels.

Q.3 **Do you agree with ComReg's preliminary view in relation to Eircom's usage charges Outside the LEA where Eircom should not recover in excess of the long run incremental cost that is caused by the additional traffic by operator on the core network, over and above the average cost for usage in the Bitstream cost model. Please provide reasons for your response.**

eircom objects to the preliminary view taken by ComReg to usage charges. The implication seems to be that one OAO that takes delivery of 100 Mbps of BMB traffic from the eircom network should pay a different price from another OAO that also receives 100 Mbps of BMB traffic. This difference would seem to be driven by the number of Bitstream ports that the OAO also rents from eircom. And this is despite the fact that BMB traffic and BMB ports have separate charges – and separate costs. The BMB service is provided on a shared basis across the eircom NGN to several OAOs, and to eircom's own downstream businesses. eircom finds that to charge any two OAOs on a different basis for the same usage service would conflict with the obligation of non-discrimination imposed by ComReg Decision D03/11. In particular the obligation to "apply equivalent conditions in equivalent circumstances" may not be met if charging two OAOs at different rates for the same traffic levels.

In consideration of ComReg's concerns around usage charges for BMB services in general, eircom attaches a separate note below (Annex 1), applying the six widely accepted pricing principles applied to recovery of costs from wholesale services subject to a price control by cost orientation.

Another issue that must be considered at this point is the relationship between the WBA cost model and the eircom Separated Accounts. In summary the eircom accounts report the historic costs of the eircom core transmission network and then allocate those costs to services based on a series of network studies. The effect of this approach is that, as the balance of usage of that network by the range of services supported changes over time, the proportions of total transmission cost allocated to each service also changes.

To take a simple example if in Year 1 the total cost of the network is Y and the allocation studies determine that telephony should take 20% of the cost, leased lines 30%, and broadband 50%, then the cost allocated to broadband is 0.5*Y. In year 2 the total cost of the network is unchanged at Y but demand for telephony has declined to the extent that it only takes an allocation of 15%, and leased lines demand has declined so as to take 25%, and Broadband traffic has remained at the same level as 10% port losses to competing platforms are offset by 10% increase in traffic per port. The result of these movements is that the allocation of reported costs of transmission to Broadband increases from 0.5*Y to 0.6*Y – or by 20% - even though the total volume of traffic has remained the same; and the traffic per port has increased by 10%. Using the approach proposed by ComReg the modelled cost for WBA usage would actually decline as figure 6.8 indicates that an increase in traffic per port of 10% should only result in an increase in traffic revenue per port of about 5%. This finding illustrates that it is not appropriate to use a model that attempts to calculate the costs of WBA in isolation to inform a detailed and prescriptive control on eircom usage charges. If such a control is necessary – and eircom does not believe it is – then a cost model that reflects the shared usage by multiple services traversing the eircom NGN core is the only viable basis.

Take the case where two OAOs are competing in the retail Broadband market based on BMB services they purchase from eircom. The 95th percentile of the monthly traffic readings for both is 1 Gbps and the first operator has connected 10,000 ports whereas the second has connected 5,000 ports. The retail services marketed by the first OAO results in average busy hour traffic per user of 100 kbps whereas the retail service offered by the second OAO results in average busy hour traffic per user of 200 kbps. It is implied in Q3 that eircom should somehow charge the OAO renting 5,000 ports less for the 1 Gbps of BMB traffic than we should charge the OAO renting 10,000 ports for the level of busy hour traffic. There is no basis in any of the accepted principles of cost recovery normally applied to the setting of regulated wholesale prices to support such a conclusion.

Q.4 **Do you agree with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6? Please provide reasons for your response.**

The Bitstream Cost Model has been developed over a period for a number of purposes and suffers from the requirement of having to perform a number of roles in the proposed price control. For this reason there are a number of inconsistencies, but these may be unavoidable where a single modelling approach is used to develop an appropriate view of costs in areas outside the LEA with limited infrastructure competition, and of costs inside the LEA where there is infrastructure competition. In particular those aspects of the model that reflect the possible costs faced by an LLU operator building a Bitstream service using eircom Wholesale Ethernet Access services for backhaul have the effect of distorting the view of how Bitstream traffic drives eircom transmission costs. The inferences that are drawn from this form of modelling have no basis in the reality of network cost behaviour in the context of a mix of services where the Broadband peak demand is increasingly the critical driver for the total capacity of the eircom NGN core. In particular the analysis presented in paragraphs 6.99 to 6.100 and the outputs presented at paragraphs 6.113 to 6.115 are deeply flawed.

In Annex 1 below eircom lays out some of the issues around the relationship between transmission costs and charging for Bitstream usage.

Q.5 **Do you agree with ComReg's preliminary views above in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream? Please provide reasons for your response.**

The detailed proposals set out in chapter 7 of the consultation document generally reflect the regime currently in place within the existing Discounted Cash Flow (DCF) model. They also incorporate many of the modifications to this model which were introduced through the NGA and Bundles consultations during 2012. The majority of these modifications applied only within the defined Larger Exchange Area (LEA). For this reason, eircom does not comment in detail on all the proposals set out in this consultation.

At a general level, eircom does not believe that it is appropriate for ComReg to maintain in place a retail-minus regime or impose a *retail* margin squeeze test as a price control on a wholesale market in the presence of a cost-orientation price control. Cleary, this results in the direct regulation of the retail market which ComReg may not lawfully regulate.

In this respect, eircom notes further that, the position in the consumer and small business markets for telecommunications services in Ireland is that all players are competing on the basis of bundles offers. This form of competition is apparent both inside and outside the LEA with the key competitors having a national presence together with an anchor service in each bundle other than fixed telephony or Broadband based on eircom Wholesale inputs. The two key competitors outside the LEA have larger marketing resources than are available to eircom and can quickly achieve unit retail costs at the same, or lower, levels than eircom has achieved. For this reason the NRT must now move to use an EEO assessment for retail costs of Broadband services within multi-service bundles in all areas to allow eircom to compete in the national retail market.

Without prejudice to the above, eircom is also concerned that the obligation that ComReg proposed is not clear. In paragraph 7.44, ComReg proposes that "*in the LEA, the retail margin squeeze test should be applied on a portfolio basis by taking the aggregate of retail services (retail revenues) and testing these against the aggregate of the retail and wholesale costs. Therefore, the retail margin squeeze test in the LEA (known as the "Retail Margin Squeeze test in the LEA") should ensure that Eircom Retail does not create a retail margin squeeze between:*

(i) *the retail price of a single current generation retail product which is supported by a single wholesale offering or, the weighted average (by number of subscribers) of the retail products' individual prices where more than one retail product is supported by a single offering, and*

(ii) *the price for wholesale current generation Bitstream.*"

There appears to be a conflict between these two sentences which is re-enforced by the wording in paragraph 7.49 which states that the test Outside the LEA should be applied on a product-by-product basis but then uses identical wording to expand on this proposal. This text is repeated in paragraphs 6.2 and 6.3 of the draft decision instrument. This text should be amended in the final decision instrument to remove any potential ambiguity.

Q.6 **Do you agree with ComReg's preliminary views set out above regarding the assessment of the various Bitstream ancillary charges to ensure that the charges are in line with Eircom's cost orientation obligation? Please provide reasons for your response.**

ComReg proposes to require that the charges for ancillary services to the basic Bitstream port and usage rental facility are cost oriented. This determination is made in isolation of the form of price control that applies to basic service. Where the price control for the basic service is retail minus through the application of an obligation not to cause a margin squeeze, the requirement that ancillary services be priced strictly in line with a particular view of costs is neither necessary nor appropriate. In this context, if ComReg determines that this obligation of cost orientation requires substantial reductions from the current price levels, the margin between the WBA monthly rental and the Broadband price for the retail service may increase well beyond the level required by the margin squeeze test. One option open to eircom under this circumstance would be to increase the WBA rental to offset the Wholesale revenues lost while maintaining the prior margin between retail and wholesale service revenues.

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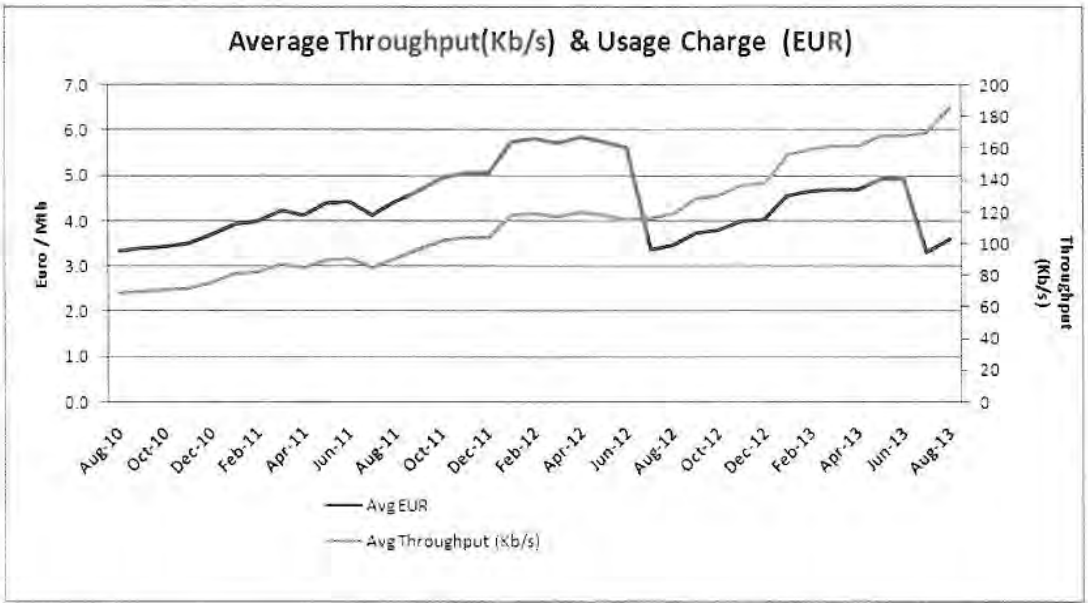
Q.7 **Do you agree that the current level of Bitstream price floors should remain in place? Please provide reasons for your response.**

eircom proposes that the methodology for calculation of the Bitstream Price Floors which was agreed following industry consultation should be strictly applied. This means that where the update of the inputs to the model results in a change in the level of the Price Floor, irrespective of the level of that change, the resulting change must be applied in order to maintain the correct signals to potential investors in the market.

ComReg, in Decision D06/12, published on the 5th April 2012, set the price floors for Bitstream. In section 4.5 of the Decision Instrument, ComReg states that "*The minimum price floors ..... may be amended from time to time by ComReg*". In section 2.15 of the response to consultation document, ComReg states that "*these floors will be subject to review (.........) to ensure that they remain reasonable when compared to actual out-turns*". eircom demonstrates below that the effective difference between the current set of price floors and those derived by ComReg in ComReg 13/90 are significantly above that stated by ComReg and that this difference is likely to increase over time thus underlining the need to implement the revised price floors. eircom is strongly of the view that ComReg must implement the price floor reductions identified in ComReg 13/90.

Eighteen months have passed since D06/12 became effective and a number of months will pass before this new WBA decision becomes effective. ComReg expects this new decision to run for the next three years. It is essential in these circumstances that the decision as to whether the price floors should be changed or not should be made on a forward looking basis.

There have been significant changes to the average throughput since BMB was launched in 2010. The graph below shows that the average BMB throughput grew from 69kb/s in August 2010 to 186kb/s in August 2013 (a 170% increase). ComReg has also identified changes to a number of inputs to the price floor model. These past changes, and the new three year horizon, underline the requirement to reset the Bitstream price floors as part of the current Consultation/Decision process.



The table below shows the BMB price floor (Current (D06/12) and Latest (ComReg 13/90)) based on a variety of throughputs. The 180kb/s instance (the one closest to the latest outturn ✂), illustrates that the two alternative sets of price floors result in a difference of €0.42 per month per subscriber. This is twice the difference indicated by ComReg (€0.22 in section 9.23 of ComReg 13/90)

		Current	**Latest**	**Variance**	
		EUR	EUR	EUR	(%)
Monthly port cost per user		4.55	4.34	-0.21	-4.6%
Monthly backhaul costs per user - Fixed		1.33	1.57	0.24	18.0%
Monthly backhaul cost per Mbps – variable raised at the 95th percentile of the 5 minute readings in any calendar month		8.14	5.60	-2.54	-31.2%
Total @	180 kb/s	7.31	6.89	-0.42	-5.7%
Total @	200 kb/s	7.47	7.00	-0.47	-6.2%
Total @	220 kb/s	7.63	7.11	-0.52	-6.8%
Total @	240 Kb/s	7.79	7.22	-0.57	-7.3%
Total @	260 kb/s	7.95	7.33	-0.61	-7.7%
Total @	280 kb/s	8.11	7.44	-0.66	-8.2%
Total @	300 kb/s	8.26	7.55	-0.71	-8.6%

The table above shows that the variance increases as the throughput increases. We have seen changing usage and changing usage patterns over time.

The graph presented on the previous page shows a time series of the average BMB throughputs for each month from August 2010 through to August 2013. This shows that the average throughput has increased over time and continues to do so. The graph also shows that eircom has reduced the price per Mb over time from €50/Mb to €30/Mb (from 1st July 2012) to €20/Mb (from 1st July 2013). These reductions have meant that the actual cost per subscriber for usage has not increased over the past two years.

In section 9.23 of 13/90, ComReg state that "*However, at a blended level. The proposed changes only result in an overall decrease of 22 cent in the Bitstream price floor for a given level of throughput (although throughput has increased). Therefore we propose that the current Bitstream price floors that are already in place should remain in place given that the changes above do not appear to result in any overall material difference and may not be sufficiently stable to merit a change*".

eircom would make the following comments:

1. Average BMB throughput in August 2013 (as indicated in the graph above) was 186 kb/s. This results in a difference of 43 cent – twice that stated by ComReg in 13/90. The variance between the two sets of price floors increases as the throughput increases.

2. eircom does not agree with ComReg's statement that the new price floors "*do not appear to result in any overall material difference and may not be sufficiently stable to merit a change*". The reduction in the price floors is of importance to eircom in an environment where eircom is subject to significant competitive constraint from services provided on alternative infrastructure and on LLU services.

3. The key driver for the Bitstream price floor is to ensure economic space between LLU and Bitstream while still ensuring that there was a "place" for each in the market. The ComReg proposal not to amend the Bitstream price floor when a review of the model inputs results in the requirement for such an amendment is inconsistent and contrary to this objective.

Therefore, eircom is of the strong opinion that the Bitstream price floor should be amended in line with the output of the update exercise as completed.

Q.8 **Do you agree with ComReg's preliminary views above with regard to the imposition of an obligation of cost orientation for SABB Outside the LEA? Please provide reasons for your response.**

In the first instance it is important to note that eircom has a single national price for Stand Alone Bitstream Managed Backhaul. This price is set close to the price floor based for the service within the LEA – that is the sum of the relevant ULMP and WBA floor inputs – so the risk that this price could be found to be excessive, when offered in an area where network unit costs are higher than those experienced within the LEA, is minimal.

The document ComReg 13/90a is a report by Oxera on price control principles that lays out a rationale for cost orientation as the appropriate control for Bitstream services sold outside the LEA, on the basis of the absence of other constraints on eircom. This is to address the theoretical risk that eircom could charge an excessive price for Bitstream services - including for SABB – sold in this area. eircom agrees that setting a price ceiling based on the costs of delivering SABB outside the LEA would address any potential risk that eircom set SABB prices at an excessive level in this part of the market.

eircom also agrees with the ComReg rationale that the SB-WLR price reduced by the costs avoided by not providing the voice service is the best available surrogate for the cost of copper loops outside the LEA. The ceiling should also include fully allocated cost to eircom of providing the Bitstream service outside the LEA evaluated on a historic basis. However, eircom would point out that the current SB-WLR line rental is a nationally average price which does not necessarily reflect the actual cost of delivering the service Outside the LEA. This calculation would be required to determine whether the price charged for SABB was cost oriented. Similarly, the additional costs associated with provision of the broadband elements of SABB have not been specifically modelled. In the absence of these modelled costs, it is premature to impose an obligation of cost orientation on the provision of SABB Outside the LEA. ✂

Q.9 **Do you believe that the draft text of the proposed Decision Instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.**

The content of ComReg's Decision Instrument is dealt with in the earlier parts of this response document, and these points will not be repeated here. However, we would reiterate that eircom's response to this question should be read in conjunction with the remainder of this response document.

Section 2 of the Decision Instrument on "Definitions and Interpretations" seems excessively wordy and quite repetitive and redundant. There is hardly a need to define a litany of Decision Notices and Documents. For instance, it would be reasonable to assume that there would be no need to define what is meant by ComReg Decision D08/10. Also, a definition such as "***"ComReg Document No. 13/90"** means ComReg Document No. 13/90 …*" appears somewhat repetitive and circular. Against that, as another example, ComReg Document 11/49 is not defined, in spite of the fact that it is referred to in the definition of ***"ComReg Decision D06/11"*.**

eircom would propose that "Bitstream Managed Backhaul" should, more correctly, be defined as "means a form of Bitstream provided in the market".

For clarity, all definitions should be preceded by a line break. e.g. the definition of ***"Eircom"*** is included in the same paragraph as the definition of ***"Discount"*.**

There also appears to be some inconsistence in terminology. For instance, on the top of page 130, the Decision Instrument refers to "*DXX/XX*", which presumably refers to the Decision Notice which ComReg expects to issue on completion of this workstream. "*DXX/13*" in paragraph 1.3 on page 128 would seem to also refer to this Document, as does the reference to "*this Decision Instrument*" in the definition of "***Retail Margin Squeeze in the Larger Exchange Area***" on page 131.

In paragraph 4.2 of the draft decision instrument, ComReg sets out the national obligation for cost orientation. Paragraph 4.3 uses very similar language to set out cost obligation Outside the LEA but does not specify that costs to be considered in this instance relate to the specific costs incurred in that area. eircom would propose that further detail be added to clarify this point.

Paragraph 4.4 of the draft decision instrument amends the transparency obligations of the Decision Instrument in D06/11. While the amendment in relation to the notice period for price increases Outside the LEA is reasonable, the references to the introduction of new prices is unnecessary as the notice period proposed is identical to that already in place from D06/11.

As stated in our responses to various previous questions, eircom would propose that paragraphs 4.6 and 4.7 be deleted from the final decision instrument.

Paragraphs 5.1 and 5.2 do not specify that the increased notification period in relation to price increases only applies Outside the LEA. eircom would propose that this limitation be added to the final text.

As stated in our response to question 5, eircom believe that the text of paragraph 6.2 of the draft decision instrument is internally conflicted. eircom would request that this text be amended prior to finalisation.

Q.10 **Do you have any views on the Regulatory Impact Assessment above and is there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position.**

eircom is disappointed by the approach adopted by ComReg in its regulatory impact assessment (RIA).The approach is wrong because the RIA is little more than a qualitative discussion. No attempt has been to quantifiably assess the efficiency or cost of ComReg's proposals. We believe that there is a clear need for the quantitative standard of ComReg's RIAs to be raised.

While eircom is in general agreement with the substance of the Draft Decision, we disagree with a regime of continuous modification of market remedies rather than regular market reviews. eircom believes and is advised that this is not consistent with the obligations imposed on ComReg under the regulatory framework for electronic communications including, in particular, the mandatory process provided for the imposition, amendment and withdrawal of remedies under the Framework Regulations. In section 12.10 of the RIA, ComReg says that it "*considers that the proposed pricing approach set out in subsection 5.2 of this document should address the specific competition problems noted in the WBA market review* [i.e. ComReg Document No 10/81]. eircom does not believe that ComReg is in the position to say so without having conducted first a market review that will enable it to assess the *present* state of the market, not that that applied two years ago or more.

In section 12.4, ComReg sets out the steps it purports to take in carrying out its RIA. Step 2 is described as "*identify and describe the regulatory options*". Clearly, one of the most feasible, and in our view the soundest, options for ComReg to consider would be to update its market analysis prior to setting a remedy. Yet, this is not considered by ComReg as an option in the RIA. As a result, we consider the RIA to be deficient and not fit for purpose.

Much of the RIA is just a succession of opinions with no supporting bases for these opinions. For instance, in section 12.12 ComReg discusses the proposal for an additional requirement on eircom to "*reconcile the Bitstream cost model with their Regulated Accounts to ensure that there is no material over / under recovery of efficient costs*". ComReg's opinion on the likely impact of this on eircom is that "*This should not be an overly burdensome exercise given that Eircom provide Bitstream costing information to ComReg annually as part of its AFIs in line with the Accounting Separation requirements as set out in ComReg Decision D08/10*". This is despite the fact that ComReg is well aware of the current demands that the production of the Separated Accounts places on eircom on an ongoing basis, and would be equally aware that the placing of additional obligations on eircom (and within the same 7-month timeframe) should not be simply dismissed as not being "*overly burdensome*".

This point is even more pertinent to the proposal in 12.13 where ComReg is requiring eircom to gather localised costs (LEA vs. non-LEA). While ComReg concedes in this case that "*it may take Eircom some time to gather such information*", they contend (with no apparent basis, or effort to quantify the additional costs to eircom) that "*the benefit to other operators and ultimately consumers should outweigh any cost*". Nor does ComReg address how the continually changing and evolving nature of the LEA should be handled by the eircom Regulatory Accounting function in this case.

Annex 1

Charging for usage in the ADSL BMB and VDSL Bitstream Plus products

Background

In 2010 eircom launched Bitstream Managed Backhaul (BMB) and moved from one-part to two-part charging for Bitstream services. This form of pricing is more cost oriented, as those OAOs who sell retail services that drive higher levels of busy hour traffic pay more for the service. Some OAOs have become alarmed by the high level of wholesale bills and the resulting cost per end user served, and ComReg have proposed some initial positions on capping charges for usage in the consultation 13/90.

The nature of the current billing

Under the BMB service, eircom bills each OAO based on the 95th percentile of the measurements for traffic handed over to the OAO at €20 per Mbps per month. In July 2013 the traffic levels were as tabulated below.

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The cost modelling carried out by ComReg for the eircom Bitstream service has demonstrated conclusively that the costs that are driven by the number of ports provided are quite independent of the costs that are driven by the volume of Bitstream traffic carried.

The Graph at "Figure 6.8 Cost at peak hour" in the consultation document also shows that the structure for the traffic cost in the range modelled has fixed element and a variable element. It appears to show that the traffic per user is a driver of the total cost at peak hour. However the curve on the graph shown is for a fixed number of ports. The 95th percentile of the current network level of traffic is close to 60,000 Mbps and the number of ports is close to 400,000 – resulting in an average traffic per port close to 150 kbps. The graph at figure 6.8 implies that if the traffic remained at 60,000 Mbps but the number of ports declined to 300,000 - resulting in an average traffic per port close to 200 kbps – that the total cost of the eircom Bitstream service at the peak hour would increase by about 20%. This is mistaken as the total cost of the transmission element of the Bitstream service is driven by the total traffic at peak hour, and is quite independent of the number of ports generating that traffic.

Application of pricing principles to charging for Bitstream traffic

There is a well established set of six principles that any proposal for wholesale pricing that is required to be cost oriented should follow, namely:

- Cost causation – the costs of Bitstream traffic should be recovered from those who cause them to be incurred.

Ultimately the cost of the eircom transmission network is driven by the total level of busy hour traffic. There is a certain initial cost of building a transmission network out to the DSLAM sites to carry Bitstream traffic, and then there is the cost of adding capacity to this network to carry additional traffic as both the number of Bitstream users and the level of busy hour traffic per user increases. It should be noted that the current Bitstream service requires a transmission capacity per site that is sufficiently in excess of the requirements for voice telephony that the cost of providing that transmission cannot be considered as an increment over and above the cost of a transmission network built for the "anchor" telephony service. This is the case because the additional capacity required has generally led to a change in transmission technology deployed. For the trunk and larger junction routes it was largely the rise in Bitstream traffic that drove the move to DWDM and Ethernet technologies used to replace earlier PDH and SDH technologies. Many of the smaller junction routes used PCM cable to deliver small numbers of 2 Mbps bearers, each carrying 30 voice channels. These are now largely being replaced by CWDM on fibre optic cable to allow increasing volumes of Bitstream traffic to be backhauled across the eircom NGN core.

To the extent that Wholesale customers have purchased Bitstream services, they have caused a proportion of these costs, and the cost causation principle finds that they should be charged in proportion to the level of cost that they have caused. The Bitstream service has been available since the launch of eircom Broadband, and Wholesale customers have bought services and caused transmission costs since that time, so there is no question of Wholesale customers only driving incremental levels of transmission costs.

- Cost minimisation – the costs of Bitstream traffic should be recovered so as to give Bitstream operators incentive to minimise the costs of that traffic

Charging each OAO based on their usage at the network busy hour gives them an incentive to minimise the costs to eircom of providing the traffic service in two ways.

In the first case the OAO can provide signals to their customers to use less traffic at the time of network peak demand. This will reduce the OAO bill to eircom – and will reduce the cost to eircom of providing the Bitstream service hence minimising the total cost incurred.

In addition, the OAO can target customers that have high demand for Bitstream traffic at a time other than the network busy hour. This behaviour will also reduce the OAO bill for Bitstream traffic and will minimise the total cost for eircom adding demand outside the period of peak demand when additional traffic can be carried without driving incremental cost.

- Distribution of benefits – costs of Bitstream traffic conveyance should be recovered from those who benefit from it.

The ultimate beneficiary of Bitstream traffic is the end user (i.e. the OAO's retail customer) but the OAO benefits from the incremental traffic carried at the network busy hour both by collecting revenue from the incremental customers that drive that usage, and from being able to communicate an "unlimited" message around the retail broadband service. Charging for Bitstream traffic carried at the busy hour clearly distributed the wholesale traffic revenues in line with the benefits of the Bitstream service.

- Effective competition – the costs of Bitstream traffic should be recovered in a way which promotes effective competition. This means that the price structure should not distort competition in either the WBA market or in downstream markets.

Any proposal to charge different operators at different rates for the total volume of their BMB traffic has the potential to distort competition. It is the usual practice for NRAs to be very wary of any form of volume discounting for wholesale services as it tends to penalise small operators and discourage entry. Whatever form of discounting that ComReg envisages in proposing that some BMB customers pay a usage charge that reflects the fully allocated costs and others pay a charge that reflects the LRIC, there is clearly a risk that this will distort competition. This will particularly be the case where the impact of any such pricing scheme at the wholesale level is to incentivise to attract those broadband users that drive exceptional levels of busy hour usage simply to reduce their average cost of serving more responsible users.

- Reciprocity and symmetry – reciprocal charging implies that eircom charges relating to Bitstream traffic service should be raised on a similar basis to charges that other providers of Bitstream services apply to eircom. However eircom does not purchase Bitstream services from other operators in Ireland so this principle is not relevant.

- Practicality – the outcome should be easy to implement as a general principle. That means that the basis for charging should be clear and the necessary information for generating bills should be available in robust and reproducible form. In addition, the operator should have the capability to reconcile their use of the Bitstream service to the billed charges.

The current price structure is practical in that it is easy to understand, the data necessary to generate the bills is readily available from the eircom network, and the calculation of the 95th percentile of the month's readings can easily be automated.

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4: Magnet Networks

Magnet Networks welcomes this opportunity to respond to the Consultation: Wholesale Broadband Access: Price Control Obligation in relation to current generation Bitstream.

Q. 1 Do you agree with ComReg's preliminary views as set out above in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period? Please provide reasons for your response.

Magnet submits the following comments with regard to the content set out in Chapter 5:

With regard to the Appropriate Form of Price Control Magnet agrees that preventative price control is appropriate and necessary to ensure that there is sufficient economic space for alternative operators to invest in their own infrastructure and compete successfully.

Magnet agrees with the proposals for both LEA and outside LEA geographic controls. Magnet further agrees that the Eircom shall recover no more that their actual incurred costs plus a reasonable rate of return adjusted for efficiencies. Magnet further agrees with the option (b) approach that allows cross-subsidisation from the LEA to outside the LEA.
Magnet is concerned as mentioned above, that the price control measure is based on information received only from Eircom. If the information provided is not sufficient it is difficult to determine exactly what elements should be included in the cost stacks. Magnet suggests that a full market analysis is carried out with input from all operators.

Magnet agrees with ComReg's view in relation to the retail margin testing methodologies and further agrees with the retail margin squeeze controls and cost orientation controls set out in chapter 5.

Magnet agrees that the three year price control period suggested is sufficient to maintain market stability.

With regard to Wholesale Price Notification and Compliance Procedures, Magnet agrees with ComReg's proposed notification structure and deems the timeline sufficient.

Q. 2 Do you agree with ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model? Please provide reasons for your response.

Magnet agrees with ComReg's views regarding the appropriate costing methodology for the Bitstream cost model.

However, Magnet has concerns with regard to the financial information available to ComReg to allow a full assessment of costs in the LEA and outside the LEA. Magnet is of the opinion that this data is not entirely accurate.

Q. 3 Do you agree with ComReg's preliminary view in relation to Eircom's usage charges Outside the LEA where Eircom should not recover in excess of the long run incremental cost that is caused by the additional traffic by operator on the core network, over and above the average cost for usage in the Bitstream cost model. Please provide reasons for your response.

Magnet agrees with ComReg's preliminary view in relation to Eircom's usage charges outside the LEA where Eircom should not recover in excess of the LRIC that is caused by additional traffic by operator on the core network, over and above the average cost for usage in the Bitstream cost model.

Q. 4 Do you agree with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6? Please provide reasons for your response.

Magnet generally agrees with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model.

Magnet believes that ComReg should cross reference Eircom's data on product costing profitability in line with costs incurred by Eircom's wholesale customers to provide an informed and balanced view.

Q. 5 Do you agree with ComReg's preliminary views above in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream? Please provide reasons for your response.

Magnet agrees with ComReg's preliminary views in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream.

Q. 6 Do you agree with ComReg's preliminary views set out above regarding the assessment of the various Bitstream ancillary charges to ensure that the charges are in line with Eircom's cost orientation obligation? Please provide reasons for your response.

Magnet generally agrees with ComReg's view, however, Magnet has concerns with regard to the definition of ancillary service relative to the product, e.g. BEC's and WEIL. Magnet is concerned that incorrect classification may lead to inappropriate assignment for cost and price modelling.

Q. 7 Do you agree that the current level of Bitstream price floors should remain in place? Please provide reasons for your response.

Magnet agrees that the current level of Bitstream price floors should remain in place. However, Magnet believes that this model should be reviewed on an on-going basis to ensure that the inputs and assumptions are reasonable compared to actual information. Magnet suggests as noted above, that Eircom's data on product costing profitability should be cross-referenced with the cost incurred by Eircom's wholesale customers in order to get an informed and balanced view.

Q. 8 Do you agree with ComReg's preliminary views above with regard to the imposition of an obligation of cost orientation for SABB outside the LEA? Please provide reasons for your response.

Magnet agrees with ComReg's preliminary views with regard to the imposition of an obligation of cost orientation for SABB outside the LEA to ensure healthy competition and to prevent overcharging.

Magnet considers that a Margin Squeeze Test aligned with the LEA and outside the LEA is necessary to ensure that other providers are not foreclosed from using the SABB product. Eircom could potentially undercut other network operators who have to pay various additional costs.

Q. 9 Do you believe that the draft text of the proposed Decision Instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required

Magnets only concern with the proposed decision instrument is as noted above the proposed solutions are dependent on the availability of accurate financial data from Eircom alone.

Q. 10 Do you have any views on the Regulatory Impact Assessment above and is there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position

Magnet believes that the draft Regulatory Impact Assessment carried out by ComReg is sufficient and Magnet has no additional comments, apart from the issues outlined above.

5: Sky

SKY RESPONSE TO

"WHOLESALE BROADBAND ACCESS: PRICE CONTROL OBLIGATION IN RELATION TO CURRENT GENERATION BITSTREAM", COMREG DOCUMENT NO. 13/90

1. SUMMARY

1.1 This is the response of Sky Ireland to ComReg's consultation document *entitled "Wholesale Broadband Access: Price control obligation in relation to current generation Bitstream"*, ComReg Document No. 13/90 ("the Consultation").

1.2 As the Irish broadband market evolves and changes to reflect the growth in Next Generation Access ("NGA") services, the continued importance of Current Generation Access ("CGA") based services needs to be recognised. It is therefore vital that ComReg continues to support policy objectives that promote sustainable competition and investment and that provide a stable regulatory environment, through appropriate price controls and other remedies for NGA and CGA.

1.3 eircom continues to have Significant Market Power ("SMP") in the national Bitstream market and although ComReg posits the existence of some competitive constraints at both the wholesale and retail levels in Large Exchange Areas ("LEAs"), such competitive constraints outside the LEAs remain largely absent and eircom's SMP is entrenched.

1.4 Sky supports ComReg's proposal for a national, Bitstream cost orientation obligation on eircom, while at the same time recognising that allowance may have to made for some degree of national price averaging on wholesale prices from LEA to non-LEA areas, where it can be clearly and appropriately demonstrated that the latter would otherwise not recover efficient costs.

1.5 Given the absence of supply-side competitive constraints outside the LEAs, there remains a strong risk (e.g. through the misallocation of costs) of eircom charging excessive wholesale prices to its competitors in these areas. It is noteworthy that while there have been recent price reductions inside the LEAs (e.g. the WLR[1] discount) there have been none outside the LEAs. In these circumstances, Sky welcomes ComReg's acknowledgement of the fact that absent regulation, eircom has both the incentive and the ability to charge excessive prices outside the LEAs and that therefore, SMP price controls are justified, necessary and proportionate.

1.6 In this regard, ComReg's proposals appear broadly reasonable and appropriate for the attainment of its objectives, but there are a number of issues that need to be carefully monitored and where Sky would urge ComReg to exercise caution.

1.7 Sky's response addresses the following specific issues arising from ComReg's proposals:

i. Sky strongly agrees with ComReg's preliminary view in relation to eircom's usage charges outside the LEA. Sky supports ComReg's proposal that eircom should not be allowed to charge operators with higher usage profiles more than the incremental

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1 Wholesale Line Rental.

cost to the eircom network, generated by that higher usage (see section 2 in answer to question 3 in the Consultation);

ii. The Bitstream Cost Model ("the Model") and the assumptions in it (from assumed volumes to average customer life expectations, to efficiency factors) are the foundation of appropriate price controls. The Model needs to be adapted to these potentially fast changing market variables. It is essential therefore that the Model and the assumptions in it are regularly reviewed for their on-going appropriateness (see section 3 in answer to questions 1, 2, and 4 in the Consultation); and

iii. We comment on ComReg's proposed refinement to eircom's current *ex ante* obligation not to cause a margin squeeze and also Bitstream ancillary charges (see section 4 in answer to questions 5 and 6 in the Consultation).

2. EIRCOM'S USAGE CHARGES OUTSIDE THE LEAS[2]

(i) Sky considers ComReg's proposal to be proportionate and justified

2.1 At paragraph 6.115 of the Consultation, ComReg proposes that eircom can recover no more than the incremental/LRIC[3] cost caused to it by competitor traffic on its network that is above the average traffic/usage assumed in the Cost Model. This would apply to the use of Bitstream Managed Backhaul ("BMB") outside LEAs and eircom would have to show that it is only recovering its incremental costs for additional traffic.

2.2 Sky considers ComReg's proposal to be proportionate (given eircom's cost orientation obligation) and justified, as it promotes the objectives laid down in section 12 of the Communications Regulation Act 2002 and Regulation 16 of the Framework Regulations.[4] Furthermore, ComReg's proposal is based on the nature of the problem identified. As described in paragraph 6.115 of the Consultation, eircom is already recovering its bandwidth costs based on average customer peak throughput on its network. Consequently, where usage beyond that average continues to be charged for in a linear manner, but does not cause eircom to extend/build out its network, this results in an unjustified revenue windfall to eircom i.e. an over-recovery of costs. Sky would therefore urge ComReg to implement its proposal as soon as possible, so as to eliminate the instances where eircom is over-recovering costs.

(ii) ComReg's proposals will remove the distortions (and the harm they cause) which we identify below

2.3 ComReg's proposals, if implemented, will help to ensure that eircom's prices are cost oriented (outside the LEA) generally and to avoid competitive distortions arising from the current regime. These competitive distortions are harmful to the <u>higher usage operator</u> due to being constrained by higher wholesale prices, which impacts its ability to compete with eircom retail.

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2 Question 3 of Consultation asks: "Do you agree with ComReg's preliminary view in relation to Eircom's usage charges outside the LEA where eircom should not recover in excess of the long run incremental cost that is cause by the additional traffic by operator on the core network , over and above the average cost for usage in the Bitstream cost model?"

3 Long Run Incremental Cost.

4 The European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011. Under Regulation 12 of the Communications Regulation Act 2002, ComReg has the policy objective of promoting competition and must take all reasonable measures aimed at achieving that objective, including ensuring that there is no distortion or restriction of competition in the electronic communications sector. Under Regulation 16 (2 (c) of the Framework Regulations, ComReg is tasked with safeguarding competition to the benefit of consumers (and promoting, where appropriate, infrastructure based competition).

2.4 In support of our view that ComReg should implement its proposal, we set out below an analysis of three scenarios where these competitive distortions produce harmful outcomes for the higher usage operator. These scenarios reflect the fact that eircom retail's current subscriber, base (which takes all of its services from eircom wholesale) logically falls into one of 3 categories, namely:

a. the average usage eircom retail subscriber;

b. the below average usage eircom retail subscriber; and

c. the above average usage eircom retail subscriber.

2.5 In each of these examples, we have assumed that eircom retail's average usage is ✂kbps per customer at the peak hour in the month, while for an operator with above average usage, OAO^{kb+}, we have assumed average usage at the peak hour of ✂kbps.[5] For simplicity, we have also assumed that eircom retail and the OAO^{kb+} have the same retail prices **Z.** In reality, a new entrant would need to have a lower price than the incumbent, in order to gain traction in the market, which would exacerbate the concerns we highlight here.

a. The average usage eircom retail subscriber

2.6 Figure 1 highlights how such market distortions can play out, based on eircom's current wholesale backhaul usage rate of €20/Mbps for BMB.

2.7 By paying eircom wholesale €20/Mbps, the OAO^{kb+} therefore faces average costs of €✂ per subscriber per month, compared to eircom retail's payment of the cost orientated rate of €✂ per subscriber to eircom wholesale. Sky considers that this differential (represented by **AB** in Fig 1) represents an over-recovery of costs by eircom. In addition, from Figure 1 (a) if we assume that **Q** represents the retail price floor for the application of eircom's retail margin squeeze SMP obligation , then if **ZA** < **QY** it is arguable that this is no different than if the average usage of the OAO^{kb+}subscribers were equal to eircom's (at ✂ kbps) and eircom subsequently lowered its retail price below **Q**. By logical extension therefore, if eircom's obligation not to cause an *ex-ante* margin squeeze is to achieve its objective, eircom ought not to be permitted to bypass the intent of that remedy by effectively overcharging the OAO^{kb+}.

b. The below average usage retail eircom subscriber

2.8 It is arguable that under-recovery of wholesale costs by eircom from its retail subscribers with lower than average usage needs to be compensated for by wholesale charges on higher usage subscribers, so that the average usage per subscriber wholesale costs are recovered overall. However, that cannot be justified in a multi-operator retail market where there are significant differentials in average usage profiles of those operators, because in this scenario, that compensation is paid for through a cross operator subsidy (in much the same way fixed operator used to argue it subsidised mobile networks when paying above cost mobile termination rates).[6] Figure 1 (b) highlights why subsidising the shortfall in wholesale cost recovery of a low usage eircom retail subscriber, with wholesale revenues from a high usage operator through wholesale charges, can lead to market distortions which can manifest themselves in more than one way.

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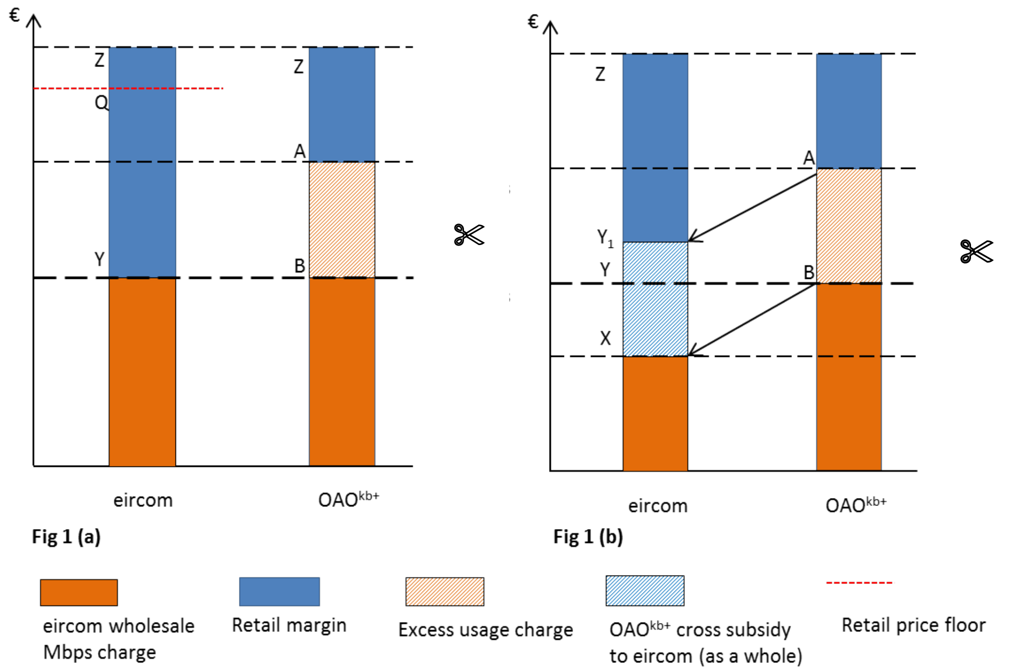
[5] ✂

[6] A mitigating factor for fixed operators, vis-à-vis mobile operators, was that they were at least competing in different economic markets. In the broadband market, the subsidy goes directly to a competitor in the same economic market.

2.9 The over-recovery of costs by eircom wholesale (a market distortion in itself), shown graphically by **AB** in Figure 1 (b), can also benefit eircom retail and give it a competitive advantage beyond that already enjoyed as a result of having below average usage retail subscribers. Its margin for this subset of retail subscribers, net of usage costs, is represented by **ZX** in Figure 1 (b). This compares with a margin as represented by **ZA** for OAO^{kb+} subscribers. Again, we have assumed equal retail prices for both operators.[7] The competitive advantage eircom (<u>as a whole</u>[8]) enjoys for this subset of customers is even greater than outlined in scenario (a) above, because firstly it can use over-recovered costs **(AB)** to <u>more than</u> subsidise its wholesale revenue shortfall represented by **YX**. Secondly the additional subsidy represented by **YY₁** could be used by eircom retail to, for example, compete more aggressively against other operators at the retail level, or it could simply be booked as additional profit by its wholesale division (above the reasonable rate of return it is permitted under its wholesale cost orientation obligation).

Figure 1: Impact on €/sub economics for high usage operator vis-à-vis eircom



c. *The above average usage eircom retail subscriber*

2.10 Here we assume that this subset of eircom retail subscribers has a usage profile equivalent to the average OAO^{kb+} subscriber i.e. ✂kbps–that is, above the average usage. From Figure 1 (a), eircom's retail margin **ZY** for these customers will be reduced by the area equivalent to **AB** as per its competitor's per subscriber economics. Where this theoretically might not comply with eircom's *ex ante* obligation not to cause a margin squeeze for this subset of subscribers (because **QY** > **ZA**) eircom will still not be found to be in breach of that obligation, because it will benefit from the margin squeeze test being applied as against its average subscriber usage profile (✂kbps) and not the actual usage profiles of this subset of its base. Therefore, even for this subset of customers that are apparently equivalent to those of the OAO^{kb+} eircom enjoys an advantage over its higher usage competitors. This is because eircom

7 The market is currently characterised by unlimited download offers or relatively high Gb caps and as noted by ComReg, outside the LEA, eircom faces limited pricing constraints in the retail market.

8 eircom retail and wholesale, which are not functionally separated entities.

can compete for these higher usage subscribers, without being constrained by its *ex ante* obligation not to cause a margin squeeze.[9]

(iii) The competitive distortions we identify and the harm they cause will persist and are likely to get worse absent regulatory intervention

2.11 In summary, in each of the three subsets of customers assessed (which would cover eircom's entire retail base) eircom retail would have a competitive advantage vis-à-vis operators with higher average usage profile subscribers, if those operators are charged for excess usage over the eircom average usage profile in a linear fashion—as currently happens. Sky currently has less than ✂% of eircom's wholesale DSL[10]base,[11]so even doubling or trebling that figure with a sustained, high average usage profile (✂kbps[12]) will have limited impact on eircom wholesale's average subscriber usage profile, which is used to calculate eircom's bandwidth costs in the Model. It is likely that even as eircom's current average usage increases, so too will Sky's (quite possibly at a higher rate) which would only exacerbate the current distortions. This trend is likely to persist, not least because as the incumbent, eircom is likely to always benefit from a degree of inertia and to retain a large percentage of its legacy customer base, which has a lower average usage profile than new entrants. eircom's competitive advantage in this regard (while not unfair) should not be accentuated by over-recovery of costs, as we have outlined above (which *would* be unfair).

2.12 Sky and other OAOs' ability to compete effectively (with the commensurate benefits to consumers) would be greatly enabled were ComReg to implement the proposal in paragraph 6.115 of the Consultation. For the avoidance of doubt, Sky does not object to ComReg's proposal that eircom should be permitted its LRIC costs on this excess traffic. However, we would expect the incremental cost of Sky's excess traffic would be close to zero, given ✂.

2.13 Finally, Sky considers it imperative that any claim for such incremental costs associated with this excess traffic would need to be clearly demonstrated and objectively justified by eircom by reference to the Model.

(iv) ComReg should be able to implement its proposal reasonably quickly—and with positive outcomes

2.14 It should be reasonably straightforward for ComReg to implement the proposal in paragraph 6.115 of the Consultation. Sky considers that the easiest way would be that outside the LEA, eircom applies a 100% discount to usage in excess of the average usage assumption used to calculate eircom's monthly backhaul costs per Mbps. Sky considers that this change could be quickly implemented, given that eircom's IT/billing systems have already been developed to apply differentiated billing, on an exchange-by-exchange basis, depending on whether an exchange is inside or outside the LEA (as, for example, in the case of the €3 discount for WLR).

2.15 This approach would:

9 The counter argument that suggests it is only appropriate to look at the average usage subscriber in the context of the margin squeeze obligation, brings one back to example (a) above and the implications asdiscussed in paragraph 2.7.

10 Digital Subscriber Line.

11 ✂k/✂k. eircom's self-provide market share is 67%, 455k/655k.

12 Notwithstanding the current consultation pertains to CGA, a parallel situation is likely to arise (requiring a parallel solution) with respect to NGA where Sky forecast its fibre base to average over ✂kbps by the end of the first year of operation, rising to ✂kbps by the third year.

- ensure that eircom does not over-recover its costs outside the LEA;
- ensure that eircom does not enjoy an unfair competitive advantage vis-à-vis higher usage operators;
- ensure the consistent application by ComReg of its approach to assessing the retail *ex ante* obligation not to cause a margin squeeze outside the LEA;
- be likely to lead to greater competition (and potentially lower prices) outside the LEA; and
- incentivise proactive, average usage reporting[13] by eircom, which may result in lower wholesale costs for all operators and lower prices for customers inside and outside the LEA.

2.16 Where eircom can adequately demonstrate that there is incremental cost associated with the excess traffic, a retrospective charging mechanism could be implemented for high usage operators, provided those incremental costs could be independently verified in a timely manner e.g. any charge pertaining to incremental traffic should be billed (based on ComReg approved rates) no later than 2 months after the relevant month in which the excess usage was consumed.

3. MAINTENANCE AND REVIEW OF THE MODEL[14]

(i) ComReg needs to keep the Model under review

3.1 Sky is in general agreement with ComReg's preliminary views as outlined in Chapter 5 of the Consultation. However, Sky considers that the Model must be kept under regular review to ensure that it remains relevant and appropriate to changing market dynamics and to reduce the risk associated with any cost misallocations that could ultimately distort competition in the market and in particular, where such distortions could lead to higher prices for consumers.

3.2 At paragraph 5.48 of the Consultation, ComReg notes that the Model does not assume price reductions in the LEA over the control period: *"...i.e. costs, volumes and revenues are expected to remain stable."* ComReg then observes that in a scenario where eircom reduces certain prices in the LEA, this could mean that there is no longer a sufficient contribution from the LEA into all areas, including outside the LEA. However, this may only be the case if the assumptions of stable costs, volumes and revenues remain appropriate, based on a prospective view of the market at the time of any such proposed price changes (be they inside or outside the LEA).

3.3 The data used to inform the Model is based on *"Eircom's HCAs for 2011/12 and projected forward for the three year price control period."*[15] However, subsequent to 2011/12, eircom announced that it was seeking a reduction of 2,000 employees (35%) from its workforce by June 2014—a plan that appears to be still on track, based on recent media reports.[16] The cost savings associated with this level of rationalisation may well deliver *greater* efficiencies than the

13 The incentive for eircom at present is to have a low average usage assumption in the cost model that generates a high €/Mb price and that provides it with a windfall from operators like OAOkb+. The solution outlined above will temper that incentive to encourage early reporting of higher usage trends that should result in lower €/Mb prices for all operators.

14 Question 1 in the Consultation asks: "Do you agree with ComReg's preliminary views in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period?"

15 Paragraph 5.22 of the Consultation.

16 http://www.independent.ie/irish-news/staff-keep-vans-as-eircom-cuts-830-more-jobs-29762669.html

conservative 5% per annum that is assumed in the Model.[17] The Model should therefore be reviewed and it may need to be updated accordingly.

3.4 Sky considers that in <u>any</u> scenario where eircom proposes price increases, particularly, with respect to exchanges outside the LEA (i.e. those exchange areas where ComReg has concluded that eircom faces limited competitive constraints on wholesale pricing) it is essential that ComReg consults with industry (as it has indicated it may do). Equally, it is important that ComReg regularly reassesses whether the assumptions underpinning the Model continue to be relevant and appropriate in the context of on-going market developments, <u>whether or not</u> price changes are being proposed by eircom.[18]

3.5 At paragraph 6.49 of the Consultation, ComReg notes that it: "*...does not expect any material over/under-recovery to arise during the price control period...*" Sky approaches this statement with some caution as it has not yet seen detailed evidence to support it. Sky would encourage ComReg to share the evidence it has, to the fullest extent possible with industry. It is for example, very difficult to predict with any certainty what level of uptake there will be over the control period for eircom's NGA product suite at this early stage. Therefore, knowing what has been assumed in this regard would be helpful to operators, if market developments are different than predicted.

3.6 The impact of NGA's success or otherwise, will see a corresponding shift in costs from the Model to the equivalent NGA model, but there is no clarity on the likely implications for CGA costs, as a consequence of any magnitude of subscribers shifting from CGA to NGA.[19] Furthermore, eircom recently indicated at the ComReg Bitstream Forum that it has seen unprecedented growth for demand in its DSL product suite (particularly for CGA) that it had failed to foresee and the most recent ComReg Key Market Data Quarterly Report indicates that DSL connections in Ireland reached their highest ever level, having increased by circa 10k[20] in Q2 alone. If this trend were to continue, it suggests that eircom wholesale's pool of customers (CGA and NGA) will grow significantly and therefore, higher economies of scale ought to be achievable as a result.

3.7 This recent development, together with the significant and well publicised cost rationalisation project currently being undertaken by eircom through the reduction in head count, highlights the need for ComReg to remain vigilant about maintaining a dynamic Model that responds quickly to market developments.

(ii) Greater transparency on the Model's sensitivities would be appropriate

3.8 It would be useful for ComReg/eircom to provide (at least) high level information on key sensitivities to changes in various underlying assumptions in the Model (e.g. volumes). This would inform stakeholders as to whether their own internal forecasting is in line with

17 Paragraph 6.48 of the Consultation.

18 As noted by ComReg in paragraph 5.55 of the Consultation, exceptional increases/decreases in volumes can occur.

19 While ComReg notes at paragraph 6.56 of the Consultation that it expects the majority of subscribers in the LEA to switch to fibre and further notes at 6.57 of the Consultation that it expects the number of Bitstream subscribers to remain stable over the price control period, there is no breakdown of the expected rate of transition from CGA to NGA and implications for variations on such assumptions would have for costs.

20 Notwithstanding that a proportion of this growth was in Unbundled Local Loop/Line Share connections, where these customers are in a LEA, a large proportion will switch back to eircom port connections when they move to NGA services—the effect of which would be to redirect more costs away from the Model.

ComReg/eircom's view, or where it is not, it can assist in business planning associated with such risks, especially where these have implications for underlying wholesale (input) prices. In Chapter 6 for example, ComReg provides a high level analysis on how it has calculated the fixed and variable portions of Mbps backhaul charges. However, it would be of real value to operators to know what the impact on backhaul charges would be if the average subscriber usage profile increased by 10%, 20% (or whatever) both inside and outside the LEAs. eircom has this information to hand and it gives it a significant advantage in terms of scenario based business planning over its competitors. Sky considers that this information is not commercially sensitive and it should, at the very least, be made available to competitor retail operators using the eircom platform (perhaps under a standard non-disclosure agreement, if necessary).

(iii) Sky agrees with ComReg's general approach to the appropriate costing methodology for the Model but also urges caution[21]

3.9 Sky agrees with ComReg's general approach to cost modelling and that eircom should not be rewarded for investments that it did not make, or may not make. In relation to ComReg using a top-down approach, Sky agrees with the comment that ComReg attributes to Vodafone, when it says that: "…*it is imperative that ComReg obtain independent verification to ensure that all of the cost data obtained from eircom's Regulated Accounts"* accurately reflect those of an efficient operator.[22]

3.10 Sky also agrees that the Model should be dimensioned based on engineering and capacity rules of eircom's actual network—provided that eircom manages its network in accordance with these same rules and in accordance with international best practice. However, there is evidence that eircom has not been managing its network in accordance with its own engineering rules based on recent developments. ComReg is currently investigating this issue ✂

(iv) The proposed principles, inputs, assumptions and outputs associated with the Model appear reasonable—subject to verification of eircom's data[23]

3.11 In general, Sky agrees with the proposed approach in Chapter 6 of the Consultation, but would stress the importance of independently verifying eircom's cost data. Notwithstanding eircom's national obligation for cost orientation for wholesale Bitstream, the proposed regulatory construct does create an incentive for eircom to misallocate costs from inside the LEA to outside the LEA, because it faces less competitive pressure (in both retail and wholesale) in the latter.

3.12 There would be even greater scope for inappropriate allocation of costs to outside the LEA, if the base of CGA costs nationally (inside and outside the LEA) is too high to begin with as a consequence of a prior misallocation of costs between CGA and NGA services that is over-weighted towards the former. ComReg notes at paragraph 6.119 that "…*the move in volumes to NGA Bitstream will mean a greater proportion of the costs (and revenues) will also move to NGA Bitstream."* Sky agrees that this ought to be the case, but would note that no clear process has yet been outlined by which ComReg proposes to require eircom to manage that reallocation of

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[21] Question 2 of Consultation asks: "Do you agree with ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model?"

[22] At paragraph 6.28 of the Consultation, ComReg cites Vodafone's response to the 2010 Bitstream Consultation (ComReg Document No. 10/56).

[23] Question 4 of Consultation asks: "Do you agree with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6?"

costs, within or between the models. Sky considers that ComReg needs to satisfy itself that eircom is firstly, not recovering the same costs twice (in CGA and NGA e.g. backhaul) and secondly, that eircom is not over-recovering costs in one or the other of these services as a consequence of any cost misallocation that could contribute to distortionary effects in both markets.

3.13 Sky again urges ComReg to keep its proposed efficiency adjustment of 5% under review, given the scale of staff rationalisation underway at eircom (and due for completion in mid-2014).[24]

4. COMREG'S PROPOSED RETAIL MARGIN SQUEEZE TESTS AND EIRCOM'S BITSTREAM ANCILLARY CHARGES

(i) ComReg's proposed retail margin squeeze tests[25]

4.1 Sky notes that ComReg's proposal to retain its assumption on 'customer lifetime' of 42 months.[26] Sky has not operated in the Irish market long enough to have the data to support any firm conclusions on this, but ComReg should keep this metric under close review (particularly inside the LEA, where ComReg has indicated there is a higher degree of competition) as competition increases and notes that it may need to be revised, based on trends in customer life moving averages.

4.2 Sky notes ComReg's preliminary view that a 25% retail broadband market share should be applied when adopting the Similarly Efficient Operator ("SEO") cost base in the retail margin squeeze tests. At paragraph 5.40 of the Consultation, ComReg states that: "*…there are a number of smaller operators (IFA Telecom, Digiweb, etc.) Outside the LEA that collectively have [a small] retail market share….Given their lack of scale these are vulnerable to exclusionary behaviour*." ComReg should take this factor into account in determining an appropriate market share assumption.

(ii) eircom's Bitstream ancillary charges[27]

4.3 Sky would like to better understand the basis for ComReg's view that a €15 charge for migrations would be cost oriented and non-discriminatory, when migration charges for eircom NGA services (all of which, at least initially, require a 'truck roll') is €2.50. Sky considers that without objective justification, there should be no difference between these charges. It is important that charges for the same or similar ancillary services for different products be the same, particularly where those products compete in the same market. To have otherwise, invites competitive distortions between the propositions of one operator and its competitor, particularly in the transition from CGA to NGA products. CGA services remain an important part of the Irish broadband market and will continue to do so for some time, especially outside the LEA.

4.4 Notwithstanding the level of the migration charge, Sky notes that the principle of a 'single charge' for the service (even where there is significant cost differences depending on whether

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24 See also our comments at paragraph 3.3 above.

25 Question 5 of Consultation asks: "Do you agree with ComReg's preliminary views above in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream? Please provide reasons for your response."

26 Paragraph 7.14 of the Consultation.

27 Question 6 in the Consultation asks: "Do you agree with ComReg's preliminary views in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period?"

there is a truck roll or not) is largely analogous to ComReg's proposal on wholesale pricing as outlined in paragraph 6.115 of the Consultation. In Sky's view, this lends weight to ComReg's proposal in the Consultation to counteract excess backhaul wholesale charging by eircom.

Sky **20 November 2013**

6: Vodafone

Vodafone Response to ComReg Consultation : Wholesale Broadband Access: Price control obligation in relation to current generation Bitstream

Ref. ComReg Document 13/90

Response Date: 20 November 2013

Introduction

Vodafone welcomes the opportunity to comment on this consultation. As more and more citizens seek to increase their participation in the digital economy it is fundamental that there are a range of suitable services which will enable this access. Even though eircom launched its NGA product earlier this year wholesale CGA services will remain an important part of the Irish Market both inside and outside the NGA footprint for some time.

In this context it is important that there is a strong regulatory framework for CGA WBA services. Eircom still has SMP in market 5 and the market needs stability and certainty to allow it make appropriate investment decisions.

The high level principles proposed by ComReg including a move to cost orientation and the linking of the retail margin squeeze test to the WBA markets are welcome developments. Our detailed comments on the specific implementation of these proposals is set out below.

Consultation Questions

Q. 1 Do you agree with ComReg's preliminary views as set out above in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period? Please provide reasons for your response. .

Vodafone is broadly supportive of the positions proposed by ComReg however we believe that in some aspects ComReg's reasoning is not robust.

We question Comreg's position as set out at a para 5.49 that it is a commercial decision for a dominant operator to reduce its prices below actual costs in an area which has distinct competitive characteristics.

We question ComReg's reliance on a forward view that there will be constraints on wholesale WBA prices in the LEA when the empirical evidence is that eircom prices at a surplus to cost in the LEA, has not reduced its pricing to the levels permitted by the price floor controls and when faced with effecting overall reductions in the composite price of an NGA/WLR bundle did so primarily through reductions in WLR pricing rather than allowing reductions in the price of CGA services.

ComReg does not appear to have taken sufficient account of the fact that eircom's decision to deploy CGA services in areas which require cross subsidisation was a commercial one. eircom was not obliged to offer these services. One sees that UPC has chosen to limit the extent of its network deployment presumably to that which is profitable. ComReg's own assessment that eircom is effectively using profits from services in areas where it faces completion to subsidise discretionary investment and costs in areas where it does not face completion is so counter intuitive that at a minimum it begs a more detailed analysis and explanation of the data upon which it is based.

Q. 2 Do you agree with ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model? Please provide reasons for your response.

Vodafone agrees that for the period of this review a hybrid TD model may be appropriate provided that it excludes inefficient investment including investments which were uneconomic or reduced the overall profitability of the Bitstream service. This is a corollary to the point made at para 6.30 - costs should not be recoverable unless they can be objectively justified. Costs which only serve to inflate wholesale and retail prices cannot be justified without some explicit, countervailing, quantifiable benefit.

Given the nature of the CGA product and a forward looking migration to NGA Vodafone is broadly in agreement with the use of a HCA approach provided the efficiency adjustments are correct.

Vodafone has concerns that the use of a FAC approach would not allow an apportionment which was sufficiently rigorous to prevent OAOs paying for cost elements which were not related to the wholesale service that they are buying.

Vodafone notes that a cost oriented price as a principle does not permit the introduction of wholesale discounts or promotions going forward. In aggregate the total actual cost divided by total volume gives an average unit price for an average unit volume. If the pricing of an average unit recovers the average cost associated with that unit then any discount to the price of that unit cannot be recovering its cost allocation.

There is no mechanism to recover these costs elsewhere in the product or in the future as the pricing of all other units are only recovering their proportion of the overall cost. If they were to recover the cost for the discounted unit then their price cannot be cost oriented as they would be recovering more than their allocation. No special pleading for specific circumstances for particular orders changes this. The unit price recovers the apportionment of the average unit costs. If some costs are lower than average then this must be offset by some that are higher. If none are higher then the aggregate level of cost was overstated and the initial average was too high. If a particular class of order has a different lower cost base then all prices for that class of order should be at a different lower price and not on a promotional basis but as distinct permanent price points.

Q. 3 Do you agree with ComReg's preliminary view in relation to Eircom's usage charges Outside the LEA where Eircom should not recover in excess of the long run incremental cost that is caused by the additional traffic by operator on the core network, over and above the average cost for usage in the Bitstream cost model. Please provide reasons for your response.

Vodafone agrees with ComReg's preliminary view in relation to eircom's usage charges outside the LEA where Eircom should not recover in excess of the long run incremental cost that is caused by the additional traffic by operator on the core network, over and above the average cost for usage in the BitStream cost model.

Given the pricing/cost concerns outlined by ComReg at para 6.114 we believe that this is an appropriate and justified curtailment of an SMP operator's ability to leverage its SMP in a geographic region where it has no competitive constraints.

Q. 4 Do you agree with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6? Please provide reasons for your response.

Vodafone is broadly in agreement with the proposed BitStream Cost Model

However it would make the following observations:

At para 6.50 ComReg outlines that the backhaul is based on a per Mbps price however one of the key the technical characteristics of this backhaul is that it be uncongested. If eircom is to be allowed charge a regulated price based on costs associated with this characteristic then failure to supply the service as described is just that, a failure to supply by a dominant operator. This point is highly relevant in the context of recent issues with node and link congestion and unavailability of ports. This indicates that some cutting of corners is a risk with forward looking prices based on past investment costs.

At para 6.73 – Network Building Costs – This paragraph contains the two following statements
"the network building costs are taken from Eircom's Access Reference Offer price list" and *"Network building costs are taken from Eircom's own operating costs and include a rate of return i.e., the WACC."*
It is not clear which approach is being adopted.

At para 6.73 - Field staff: Operating & Maintenance (O&M) Costs – This paragraph references LFI – ComReg gives no indication of whether it will carry out any assessment of whether the network related drivers for LFI associated with Bitstream are those of an efficient operator. If the LFI is higher than one would expect from an efficient operator then simply accepting the actual LFI rewards inefficiency. Similarly the proposal to take field staff cost directly from eircom's actual costs runs the risk of rewarding inefficiency. Notwithstanding the points advanced by ComReg at para 6.45 Vodafone is mindful that eircom has had a number of recent exercises in operational cost reduction and due to the high levels of staff reduction has a staff demographic which would possibly yield higher unit costs than companies with a more balanced profile of leavers and joiners.

At para 6.73 - Other Direct O&M Costs – similarly to the previous point ComReg does not outline any efficiency adjustments it proposes to make notwithstanding the fact that eircom's operational cost reduction programmes are indicative that past costs were inefficient.

Q. 5 Do you agree with ComReg's preliminary views above in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generation Bitstream? Please provide reasons for your response.

Vodafone has concerns regards ComReg's overall approach to retail margin squeeze tests. ComReg has identified two regions one LEAs where eircom is subject to heightened levels of retail but not necessarily wholesale competition and non LEA where there is no appreciable wholesale competition.

If the purpose of the margin squeeze test is to protect those operators who buy wholesale WBA services from eircom from being squeezed by eircom at the retail level then the size of the margin required is independent of what other retail competitors there are. If the margin that eircom is allowed in the LEA is sufficient to protect competition in the LEA then why is it not sufficient outside of the LEA?

As part of this consultation ComReg has identified that within the LEA eircom is under so little competitive pressure at the wholesale level that it has been able to maintain its WBA prices above the minimum floors and to cross subsidise into the non- LEA areas (para 5.23).

This strongly indicates that any flexibility that is afforded eircom in its retail pricing will not in the first instance be applied to the benefit of wholesale pricing but will be deployed at the retail level to meet competition from its wholesale customers. If eircom was truly concerned with meeting retail competition from alternative infrastructure providers or providers of LLU based WBA it would have already reduced all elements of its retail cost stack including the notional WBA costs it must factor because of the retail bundles price control.

In terms of the model itself Vodafone notes its consistency with the similar other models used by ComReg. Our views on these remain unchanged and are as have been set out in our responses to previous consultations. We are not supportive of the portfolio approach and as set out above believe that the approach of giving additional flexibility in the LEA is misconceived.

Vodafone notes that this proposal breaks the link with the RFNA market which underpinned the existing retail bundles margin squeeze test and ensures that eircom retail bundles based on SABB which may or may not have a retail voice component are comprehended by the margin squeeze test.

Q. 6 Do you agree with ComReg's preliminary views set out above regarding the assessment of the various Bitstream ancillary charges to ensure that the charges are in line with Eircom's cost orientation obligation? Please provide reasons for your response.

Throughout this section of the Consultation ComReg employs words to the effect that "*ComReg considers that Eircom should review these charge as part of this consultation process and provide ComReg with a breakdown of the processes and costs involved on a confidential basis.*"

Essentially having imposed a cost orientation obligation in D3/13 in respect of Ancillary Charges ComReg appears to be supervising this obligation by suggesting to the SMP operator that as part of a public consultation process that it review its compliance and pass the results to the NRA on a confidential basis. This is notwithstanding ComReg's own investigative and information gathering powers which are independent of any consultation process. Vodafone has deep concerns regarding this "light touch" approach to supervising obligations which ComReg was only entitled to impose following the identification of a competition problem (Regulations 8(6)(a) and 13(1) of the Access Regulations, SI 334 of 2011).

We strongly disagree with ComReg's preliminary views. Eircom should not review the charges, ComReg should. They should not be reviewed as part of the consultation process but they should be reviewed as a matter of course by ComReg in discharge of its functions under Section 10(1)(a) of the Communications Act 2002 (as amended).

In relation to the specific ancillary charges Vodafone makes the following comments:

Service establishment charge
Whatever about the level of this charge it is arguable that if it is a necessary and unavoidable cost and the causation can be ascribed to a particular operator then it should be a standalone charge.

Connection Charges
If these are cost oriented the six fold difference between the BitStream MB and BitStream VC would appear to merit detailed examination by ComReg.

Migrations Charges
Vodafone agrees in principle that a single charge which does not disincentivise migration between different services is an appropriate approach. However we would make the following observation, €15 is a "round" number. Vodafone urges ComReg to review the totality of the efficient costs associated with these transactions and the totality of the revenues to ensure that the common price is set at a level which does not allow eircom to over recovery its costs.

Bitstream Backhaul Connection Charges
As these will become redundant from 2014 the only charges in scope are those for connections between the date of the imposition of the obligation and the retirement of the service. ComReg should assess the extent to which these charges have been levied in the relevant period and prioritise the assessment of compliance based on impact on the market and on individual operators.

Bitstream Backhaul Rental Charges
Vodafone agrees that in the circumstances of the retirement of these services it is appropriate that a HCA approach is used in determining the cost oriented price.

Q. 7 Do you agree that the current level of Bitstream price floors should remain in place? Please provide reasons for your response.

Although ComReg sets out the factors which it has considered in recalculating the Price Floor levels based on revised model inputs it is not possible to comment substantively on the calculations for each factor as only eircom and ComReg have access to the model itself. This information asymmetry means that operators must take at face value the summary figure which ComReg presents as being the revised output from the model.

Notwithstanding Vodafone's reservations regarding the transparency associated with the calculation and presuming that the output is accurate Vodafone agrees with ComReg's approach that there is little to be gained by a downward revision of the price floors at this point.

Q. 8 Do you agree with ComReg's preliminary views above with regard to the imposition of an obligation of cost orientation for SABB Outside the LEA? Please provide reasons for your response.

In principle Vodafone agrees that eircom should be subject to a cost orientation obligation in respect of the SABB outside of the LEA.

It is not clear that the proposal by ComReg to allow eircom price SABB in non LEA areas at a level referenced to a fully nationally averaged SB-WLR price would provide adequate protection against foreclosure by eircom of investment in alternative infrastructures. Based on eircom's USO submissions PSTN and by proxy SB-WLR appear to be loss making in these types of areas and areas. Allowing eircom to cross subsidise between economic and non-economic areas might have the perverse effect of further entrenching eircom's SMP in the non-LEA areas as it renders unprofitable other platforms which might be able to compete with eircom's geographically de-averaged cost. This is more relevant where a strong AltNet in the shape of cable already competes in the LEA areas. The potential regulatory foreclosure of a sub national geography must be objectively justified.

As a short term measure this interim price cap as a proxy for a fully justified cost oriented price would only be acceptable where there was also a margin squeeze assessment to ensure that eircom does not leverage its advantages as a vertically integrated entity with SMP in both the FVA and WBA markets to squeeze out potential entrants would might wish to provide OTT voice services in conjunction with SABB.

Vodafone notes that this section of the Consultation paper covers 5 pages only one of which deals with SABB outside of the LEA. The remainder deal with SABB inside the LEA. ComReg has not canvassed views on this material as part of this consultation and Vodafone will accordingly provide its comments on these matters separately.

Q. 9 Do you believe that the draft text of the proposed Decision Instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

To the extent that the Draft Decision Instrument reflects ComReg's preliminary views as consulted on we believe that it sufficiently detailed, clear and precise with regards to the specifics proposed in the Consultation.

This position is without prejudice to our detailed responses where we disagree with ComReg's preliminary view or urge an alternative or additional course. To the extent that the Draft Decision Instrument does not coincide with these views Vodafone considers it deficient.

Q. 10 Do you have any views on the Regulatory Impact Assessment above and is there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position

Conclusion

While we have concerns about its exact form and implementation Vodafone welcomes the principled move towards a cost orientation obligation in the WBA market.

In terms of retail margin squeeze tests we welcome that this is now independent of the Retail Fixed Narrowband Access Market and is underpinned by obligations attached to each regulated component of a bundle. We continue to have strong concerns regarding the application of the test within the LEA.

Going forward the challenge will to ensure that eircom cannot leverage its SMP to obtain excess margin in LEA areas which it uses to effect market foreclosure in non-LEA areas by pricing its access below costs.

7: Viatel

A Digiweb Group Company

Viatel response to Comreg consultation

Wholesale Broadband Access:

Price control obligation in relation to current generation Bitstream

Introduction

Viatel welcomes the opportunity to respond to Comreg's consultation on "Wholesale Broadband Access: Price control obligation in relation to current generation bitstream"

Viatel is one of the Digiweb group of Companies and as such is a purchaser of both Market 4 (WPNIA) and Market 5 (WBA) products. Viatel is currently the largest consumer of full LLU in Ireland (as opposed to line share) and therefore understands the importance on price controls in respect of both markets and how such controls influence purchasing decisions between markets.

The recent introduction of the LEAs, while welcomed, has also created a change in investment decisions regarding Market 4 & 5, not only in terms of further expansion but also in terms of upgrades to existing port densities. This, coupled with the on-going roll out of NGA services mainly within LEA areas, make investment decisions on LLU more challenging for operators who purchase services in Market 4.

This consultation is focused on the appropriate price control for the Standalone Bitstream WBA product (SABB). While Viatel mainly welcome the proposals put forward, we are concerned that the SABB product could be used to undermine LLU investments by existing operators thus handing an almost monopoly status in CGA within both LEA and non LEA areas back to the SMP operator thus allowing foreclosure of the market, in particular if SABB prices are allowed to be set at a price where they are used as a very low cost glide path on on-board customers to NGA. We welcome that Comreg have identified this possibility.

A key flaw with the current retail minus control in the WBA market is that the SMP operator will always have prior retail information on its own plans in the market, placing it at a significant advantage prior to pricing points and pricing notifications being published. A move to an ex-ante price control based on cost orientation is fairer way of setting price points and one which is generally supported by Viatel.

Viatel is supportive of the current Bitstream price floor as it does offer some protection to operators who have made Market 4 investments directly.

Answers to consultation questions

Q. 1 Do you agree with ComReg's preliminary views as set out above in Chapter 5 with regard to the proposed approach for current generation Bitstream and BMB services over the price control period? Please provide reasons for your response.

Viatel is generally supportive of the approach being proposed by Comreg. While it is appropriate to look at a different model for both LEA and non LEA areas we agree that they are by no means exclusive in an overall context. By taking a holistic view, there is little opportunity for pricing outside of the LEA areas, where the SMP operator faces little platform competition, to have a negative impact on that within the LEA areas.

Viatel would have a possible concern regarding the exact split between LEA and non LEA areas. We would advocate that ComReg should adopt the most restrictive interpretation of "reasonable market share" (Section 4.4) when defining the LEA zones. We would consider that there is a potential market niche in the medium sized towns for the emergence of new alternative infrastructure providers. Extending the LEA zone to those areas could be detrimental to the emergence of competition.

Viatel is equally supportive of an ex ante margin squeeze test to ensure that eircom does not set retail prices at a level that is likely to drive retail competition out of the market, in particular in non LEA areas. Equally we are supportive of the test being applied in both LEA and non LEA areas.

A review period of 3 years seems appropriate for such a control, however given the rapidly changing market a smaller interim review should be conducted after 24 months. The market is going to change in the coming years with the rollout of LTE and new mobile services, the continued upgrades to DOCSIS 3.0, 3.1 etc and the possibility of a new infrastructure based market entrant. It would therefore seem prudent that a placeholder is set at a point of 24 months. Viatel agree with Comreg that the SMP operator should submit regulated accounts for review on an annual basis and an interim review after 24 months would also mean that two years of regulated accounts would also be available to form part of the interim review.

Viatel agree in general with the policy for notification and compliance and feel it is both appropriate and proportionate. We would however ask Comreg to include compliance in terms of the use of promotions. Promotions must be used in a way that is both fair and accurate for all operators. Where promotions are used and they satisfy the controls in place from a retail minus perspective, there is an underlying assumption that these promotions are paid and applied at the time the product is purchased. This is important as the SMP operator attracts retail customers by using such promotions therefore OAOs should also have the opportunity to know that such payments and credits will be applied as soon as possible to the point of sale. If this does not happen then it impact cash flow of the business making future acquisition and retention activity more difficult. This is of particular concern to smaller operators.

Q. 2 Do you agree with ComReg's preliminary views regarding the appropriate costing methodology for the Bitstream cost model? Please provide reasons for your response

Viatel is generally supportive of the hybrid Top down model proposed by ComReg for applying a costing methodology. We'd like to get more clarification on how ComReg will "dimension" the hybrid model with "engineering an capacity rules based on actual network alignment"; further information on the methodology used would be welcomed.

Viatel would stress though the importance of using actual costs based not only on eircom's HCA data but also any independently verified confirmation that the HCA data is accurate and reflective of the actual costs being incurred by eircom, where available.

Viatel is also aware that the current main portion of investment within eircom is being made on the deployment of NGA and LTE networks. This does give rise to the question of how much investment is being made within the traditional WBA services and indeed how much of the costs are common to both traditional WBA and NGA services.

Q. 3 Do you agree with ComReg's preliminary view in relation to Eircom's usage charges Outside the LEA where Eircom should not recover in excess of the long run incremental cost that is caused by the additional traffic by operator on the core network, over and above the average cost for usage in the Bitstream cost model. Please provide reasons for your response.

Viatel agree fully with ComReg's preliminary view on usage charges.

There are however several factors to be considered when looking at the costs outside the LEA areas.

Firstly there are two different product sets available depending on the type of aggregation node at each exchange. Where NGN nodes are available then the standard BMB product set is available and where NGN nodes are no available the older product set is available.

BMB attracts usage fees based on 95^{th} percentile billing and the traditional product set does not but instead offers a fixed, higher port charge on a monthly basis.

Currently only the BMB product has a standalone variant but this is not to say that it this position will not change in the future and could offer eircom an opportunity to excessively charge where no infrastructure competition exists.

Any cost model should at a minimum also consider the non BMB exchanges that exist outside of the LEA areas and the possibility of new standalone services coming on stream in those areas.

Viatel also considered the usage profiles being experienced. All main operators now typically offer the fastest port speeds available within BMB areas whereas in the past services were typically offered at up to 8Mbps at the entry level. There is a direct correlation between speed and usage as the port speed will dictate items such as Netflix streaming quality (Standard definition V high definition) and therefore the peak 95th percentile charge applied.

Viatel's key concern is how quickly bandwidth usage is changing and we can see even since the launch of NGA services that we see usage trending to a factor of x2 or x3 times the usage of traditional bandwidth usage and with Netflix about to launch 4K TV services this is rapidly compounded. In the US Netflix now accounts for 1/3 of all internet traffic at peak times. While this consultation does not address NGA it does show how by moving from lower port speeds in general has a direct and dramatic impact on usage and the charges subsequently applied. Viatel would urge ComReg that a regular review of the actual usage incurred is provided (at an aggregate level) by eircom to ComReg to ensure that the usage is in line with that being applied in the model. Viatel recommend that this should be done at least once per quarter as the information is available in real-time from eircom systems.

Viatel would also suggest that as bandwidth needs increase that there is a need in each period to have a maximum charge per customer with a review of this maximum usage charge once every quarter in line with eircom usage reports. There would naturally be a direct correlation between the maximum usage charge and the price per Mbps in the 95th percentile. We also think that all changes to charges should be reflective of customer contracts, i.e. on a standard monthly basis.

Q. 4 Do you agree with the proposed principles, inputs, assumptions and outputs associated with the Bitstream cost model, as set out above in Chapter 6? Please provide reasons for your response.

As outlined above, Viatel is generally supportive of the approach being proposed by ComReg. While there is no perfect model it is accepted that a model that can reflect actual costs as closely as possible is preferable to one that is completely forward looking in a rapidly changing environment and with technology driving new services and speeds.

Equally it is important for the coming years to protect investments made by operators in Market 4 in terms of LLU and EFM based services. It should be noted that the undermining of LLU investments will also have a direct impact on EFM services. We would ask if there is a possible case of "exchange launched" VDSL services to perhaps reduce this risk?

Viatel would believe that it would be much more straightforward for all parties if the €15 connection fee was waved off permanently. First of all, we do believe that associated to volumes the actual connection fee per port is much more negligible to Eircom. In Return, Eircom could partly cease the credit/rebate policy which does not typically allow a product manager to draw a long-term pricing strategy and therefore limit competition.

With regard to backhaul charges we believe that given the rapidly changing number of OTT video services, increasing speeds and increased use of Wifi enabled devices (which ultimately connect to DSL fed access points) that a regular update on aggregate usage needs to be provided and taken into account in the cost stack. HCA alone is not sufficient in our view.

Viatel consider that the “reasonable rate of return” / WACC should be amended. We understand that Eircom’s Cost of Capital has changed significantly since 2008 and notably following the examinership process. We do believe the cost of capital should be updated every two years based on the actual costs involved.

Q. 5 Do you agree with ComReg’s preliminary views above in relation to the proposed retail margin squeeze tests including the proposals regarding the notification and compliance procedures for retail prices associated with current generationBitstream? Please provide reasons for your response.

Viatel support ComReg’s preliminary view with the exception of the Portfolio based test in the LEA areas.

A portfolio based test can lead to downward price pressures on market 4 based products that may, in some instances leave room for margin squeeze to occur, whereas a product by product test will ensure that each individual product passes the relevant test and is compliant.

In the case of a portfolio test, a single product can be tailored to squeeze LLU based services but at an overall level may not impact on the portfolio compliance. This product could be used at the retail level to ensure that there is a migration path from LLU to Bitstream to NGA in a manner which the operator in market 4 will find very difficult to compete against.

With regard retail price points Viatel would question if 5 days notice is adequate time to asses a new retail price point and compliance with the proposed DCF model. While retail price points are commercial decisions for the SMP operator (Compliance obligations understood) given the on-going development of deeper bundles and more complex offerings, 5 days notice may be a challenge.

Viatel welcome that promotions and rebates will also be factored into models but again we would urge that the payment and overhead of managing such promotions is done in a manner that is fair and equitable for both the SMP operator and operators buying Market 5 services and that the timing of such payments do not put smaller operators at a significant disadvantage.

As advised in the previous section, Viatel would highly recommend ComReg to review the WACC value as it may be out of date. As for the other key metrics, Viatel would possibly challenge the modem cost, originated from Eircom’s manufacturer offers, as a SEO player would be unlikely to secure the same discount prices without volume commitment. We would also query based on which source the 42 months customer lifetime value is based on. We would find this value quite optimistic as we do believe the monthly churn rate to be well above 2.38%. Finally, we regret that ComReg is partially opting for a EEO model in the LEA as it de-facto rule out the emergence of competition from an indigenous medium size operator. On the overall – we do believe the metrics used are addressing the largest players in the market, but may cause more difficulty for the SEO player to compete effectively.

Viatel are supportive of the compliance procedures proposed by Comreg.

Q. 6 Do you agree with ComReg's preliminary views set out above regarding the assessment of the various Bitstream ancillary charges to ensure that the charges are in line with Eircom's cost orientation obligation? Please provide reasons for your response.

Viatel do not have enough detail on the cost stack for ancillary charges incurred by eircom to provide a reasoned response to this question. However, we fully support ComReg's questioning regarding the connection fee price gap between Bitstream IP, VC & EA.

Viatel is also not aware of any fully independent cost model that confirms that the HCA provided by eircom are a reasonable representation of the actual costs incurred by eircom in the provision of such services.

Viatel would recommend that ideally a full independent cost model of actual eircom costs incurred would be extremely helpful in this exercise.

Q. 7 Do you agree that the current level of Bitstream price floors should remain in place? Please provide reasons for your response.

Viatel are supportive of the Bitstream price floors remaining in place for exactly the reasons outlined.

Q. 8 Do you agree with ComReg's preliminary views above with regard to the imposition of an obligation of cost orientation for SABB Outside the LEA? Please provide reasons for your response.

Viatel is of the view that the imposition of a cost orientation obligation is appropriate outside of LEA areas to ensure that eircom do not price excessively where little or no platform competition exists.

Q. 9 Do you believe that the draft text of the proposed Decision Instrument is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Viatel believe that in the main the decision instrument is sufficient. We would ask ComReg to consider the additional points highlighted by Viatel in their final decision.

Q. 10 Do you have any views on the Regulatory Impact Assessment above and is there other factors (if any) that ComReg should consider in completing its Regulatory Impact Assessment? Please explain the reasons for your answer, clearly indicating the relevant paragraph numbers to which your comments refer, along with all relevant factual or other evidence supporting your position

Viatel broadly agree with the analysis and conclusions reached by ComReg.

Viatel feel that the measures proposed will protect market 4 investments while at the same tie not hampering innovation or consumer offerings in Market 5. Equally the measures will avoid excessive pricing in the non LEA areas.