



Consultation Paper

**Wholesale Physical Network Infrastructure  
Access (WPNIA) Market Review –  
Market Definition**

**Consultation on European Commission invitation for  
ComReg to include alternative fibre networks in the  
WPNIA market**

<b>Document No:</b>	<b>09/42</b>
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All responses to this consultation should be clearly marked:-  
“Reference: Submission re ComReg 09/42” as indicated above,  
and sent by post, facsimile, e-mail or on-line at [www.comreg.ie](http://www.comreg.ie)  
(current consultations), to arrive on or before 5.30pm on 16 June  
2009 to:

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Please note ComReg will publish all respondents submissions  
with the Response to this Consultation, subject to the provisions  
of ComReg’s guidelines on the treatment of confidential  
information – ComReg 05/24

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## Introduction

- 1.1 This Consultation is published in fulfilment of the Commission for Communications Regulation's (ComReg's) role as the body responsible for regulating the electronic communications sector in Ireland. The document relates to a review being undertaken by ComReg of the Wholesale Physical Network Infrastructure Access (WPNIA) market.
- 1.2 This purpose of this consultation is to seek comment from interested parties on a specific invitation made by the European Commission to ComReg in relation to the inclusion of alternative Fibre to the home (FTTH) networks in the WPNIA market (letter from European Commission to ComReg dated 20 February 2009)<sup>1</sup>. This comment was issued by the European Commission following ComReg's formal notification of its WPNIA market review and draft decision notice on 22 January 2009.
- 1.3 The scope of this consultation is limited to the European Commission's invitation to ComReg to include all access products based on fibre networks whether or not such network is owned by the incumbent operator, within the relevant market in its final measure. Having recently consulted on broader matters relating to the WPNIA market review in ComReg's Response to Consultation and Draft Decision for the Wholesale Physical Network Infrastructure Access (WPNIA) market analysis<sup>2</sup> (the "Response and Draft Decision document 08/104"), ComReg continues to consider submissions received in response to that consultation as a separate and concurrent exercise
- 1.4 The European Commission did not challenge ComReg's finding but invited ComReg to reconsider its definition of the relevant market and, in particular, to include OAO fibre within the market.<sup>3</sup> The European Commission has noted that such an inclusion does not affect the regulatory outcome with respect to the Significant Market Power (SMP) designation.
- 1.5 ComReg is now consulting with interested parties on this issue, on foot of which it intends to consider and analyse this matter further before a final decision is reached. Accordingly, ComReg is issuing this public consultation and is seeking comment on this specific matter.

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<sup>1</sup> See Appendix C

<sup>2</sup> Market Review: Wholesale physical network infrastructure access (Market 4). Response to ComReg Document 08/41 and Draft Decision available [Here](#)

<sup>3</sup> The European Commission has the power to do so under Regulation 20(b)(6) of the Framework Regulation

## Background

- 1.6 On 23 December 2008 ComReg published its Response to Consultation and Draft Decision for the Wholesale Physical Network Infrastructure Access at a fixed location (WPNIA) market analysis<sup>4</sup> (the “Response and Draft Decision document 08/104”). This paper considered and analysed comments submitted by interested parties on the substance of ComReg’s initial WPNIA Consultation paper<sup>5</sup> (the “Consultation Document 08/41”).
- 1.7 A Draft Decision was published as an Appendix to the Response and Draft Decision document 08/104, which set out the key preliminary findings of the market review, and set out the specific legally-binding regulatory obligations that ComReg proposed to impose on any operator that is found to have Significant Market Power (SMP). ComReg notified the SMP designation to the European Commission seeking approval, as it is legally required to do pursuant to Regulation 20 of the Framework Regulations. In parallel, ComReg invited submissions from interested parties on the Response and Draft Decision document 08/104. Submissions received in response to this public consultation are currently being considered by ComReg and will be considered in parallel to the responses to this consultation.
- 1.8 The European Commission has the option to veto a National Regulatory Authority’s decision if it considers that the market definition or competition analysis is flawed. The Commission may also elect to provide comment on aspects of the NRA’s decision notice if it sees fit.
- 1.9 In the Response and Draft Decision Document 08/104, ComReg proposed that the relevant market includes access to current as well as next generation network infrastructure on the incumbent’s access network (that is, NGA upgrades, including fibre overlays, on the incumbent’s existing access network are included in the WPNIA market). This is because the same conditions of competition are likely to apply in the hypothetical monopolist’s access network regardless of whether current generation networks remain in place or fibre is overlaid on the network.
- 1.10 ComReg considered that, for the purpose of the WPNIA market review, hypothetical products provided over cable, fixed wireless, mobile, satellite, and FTTH networks deployed by alternative operators do not fall within the WPNIA market. Hypothetical products provided over an alternative FTTH network were excluded from the WPNIA market because of the limited scale of alternative FTTH networks in Ireland. This was proposed on the basis that such hypothetical products would not provide sufficient constraint to prevent a hypothetical monopolist from imposing a successful small but significant non-transitory increase in price (SSNIP) of WPNIA. The reasons behind ComReg’s preliminary position in this regard are set out in detail in Appendix B of this document.

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<sup>4</sup> Market Review: Wholesale physical network infrastructure access (Market 4). Response to ComReg Document 08/41 and Draft Decision available [Here](#)

<sup>5</sup> Market Analysis: Wholesale Unbundled Access, ComReg Consultation Document 08/41 available [Here](#)

- 1.11 ComReg defined a WPNIA market that is national in scope. ComReg considered that Eircom had 100% share of the WPNIA market, and had Significant Market Power in that market. ComReg proposed that a suite of remedies be imposed under the headings of access, transparency, price control, non-discrimination, cost accounting and accounting separation. In relation to NGA, ComReg imposed the remedies at a high level only (without detail), and undertook to consult further on the detail of the implementation of regulatory obligations for NGA.
- 1.12 ComReg notified the European Commission of this Draft Decision on 22 January 2009, and received comments back from the European Commission on 20 February 2009.<sup>6</sup> ComReg also received submissions from interested parties on D08/104 on 20 February, and is currently considering those submissions.

### **The European Commission's invitation to include alternative fibre in the WPNIA product Market**

- 1.13 The European Commission noted that ComReg had proposed in its review that fibre is included in the relevant market, but that FTTH network infrastructure deployed by alternative operators is excluded from the product market. The European Commission reminded ComReg that the definition of a relevant product market should be made with reference to the product characteristics, which, in the European Commission's view, at present do not indicate that the functionality of possible access products provided over separate FTTH networks would differ to such an extent that this would justify their exclusion from the WPNIA market.
- 1.14 The Commission stated that it did not challenge ComReg's finding, and noted that in its view, the regulatory outcome (i.e. SMP Designation) is not affected given the very limited roll-out of fibre networks in Ireland. However, the European Commission invited ComReg to include all access products based on fibre networks, irrespective of ownership of such networks, within the relevant market in its final measure. As stated ComReg is, in advance of imposing the final measure, consulting on European Commission's invitation to ComReg to include all access products based on fibre networks.

### **Consultation**

- 1.15 ComReg and the European Commission agree that a consideration of product characteristics indicates that wholesale access products offered over fibre fall within the WPNIA market. ComReg and the European Commission also agree that the ownership of the network is not material to the market definition. The view expressed by the Commission in its comments letter is whether the market definition exercise should be restricted to a consideration of product characteristics. ComReg, as documented in

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<sup>6</sup> See Appendix C

D08/104, considered whether the market definition exercise should also consider other factors such as the extent of network roll-out.

- 1.16 In light of the European Commission’s view and, in the circumstances of this particular case, ComReg has decided to re-open the issue as to whether OAO FTTH also falls within the WPNIA product market. ComReg therefore invites comment from interested parties on this point. For ease of reference, the approach adopted by ComReg in its Response and Draft Decision document 08/104 regarding the inclusion of fibre in the WPNIA market is further explained in Appendix B herein; and the European Commission letter is set out herein at Appendix A.

**Q. 1.ComReg’s preliminary assessment with respect to OAO fibre, as it was set out in the Response to Consultation Document 08/104 and as articulated in Appendix B of this document, did not include OAO fibre within the relevant product market due to its limited availability, and consequent limited ability to act as a competitive constraint. Do you think this approach was appropriate, or should ComReg amend its position in light of the European Commission’s invitation? Please explain your reasoning**

## **Implications of accommodating the European Commission’s invitation**

- 1.17 This section considers the implications of including alternative operator fibre in the WPNIA market definition on the SMP analysis and remedies as set out in ComReg’s Response and Draft Decision document 08/104.
- 1.18 Were ComReg to include OAO fibre, it would involve a change in the market definition as set out in the Response and Draft Decision document 08/104. ComReg has again considered how an amendment to include OAO fibre in the market would impact upon the WPNIA market review as a whole.
- 1.19 ComReg notes that alternative fibre networks (including FTTH, fibre to the curb and fibre to the premises) make up less than 0.4% of the active lines in Ireland.<sup>7</sup> These lines are spread over a number of small geographically separated locations. Trend observed by ComReg (based on quarterly report analysis) indicate that fibre subscriptions are not showing significant growth at this time. For example, according to ComReg quarterly report results there was a decrease in fibre based subscriber numbers in the fourth quarter of 2008.
- 1.20 ComReg notes that an amendment of its position in light of the Commission’s invitation, would reduce Eircom’s market shares in the WPNIA market from 100% (as it stands under ComReg’s proposed market definition in ComReg’s Response and Draft Decision document 08/104) to approximately 99.6%.<sup>8</sup>
- 1.21 ComReg considers that an amendment in the market definition to include alternative fibre loops would therefore have an insubstantial affect on the competition assessment as set out in Response and Draft Decision document 08/104, and not in any event impact upon the proposed SMP assessment and the proposed designation of Eircom with SMP. On that basis, given the analysis of the actual and potential competition problems identified previously would remain unchanged, ComReg also suggests that the proposed remedies would remain the same.<sup>9</sup>
- 1.22 This view was also expressed by the European Commission in its comments letter to ComReg on 20 February, whereby it stated that the proposed change to the market definition to include fibre would not impact on the regulatory outcome of the market review.

**Q. 2. Do you think that the inclusion of alternative fibre loops within the WPNIA market would impact on ComReg’s overall SMP designation, or on its proposed set of regulatory obligations? Please explain your reasoning.**

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<sup>7</sup> This figure was estimated based on quarterly report data held by ComReg relating to the number of active copper and fibre paths in Ireland.

<sup>8</sup> Based on quarterly report data sourced by ComReg

<sup>9</sup> Subject to consideration of responses to ComReg’s Response and Draft Decision document 08/104

## **Submitting Comments**

- 1.23 The consultation period will run from 13 May 2009 until 16 June 2009, during which ComReg welcomes written comments on any of the issues raised in this paper.
- 1.24 In order to promote further openness and transparency ComReg will publish all respondents' submissions to this consultation, subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24
- 1.25 This consultation is supplemental to the Response and Draft Decision document 08/104 which is still under consideration. There is no need for respondents to restate previous comments unless there is a desire to revise commentary already provided to ComReg.

### **Please note:**

- 1.26 ComReg appreciates that the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful.
- 1.27 As it is ComReg's policy to make all responses available on its web-site and for inspection generally, respondents to consultations are requested to clearly identify confidential material and place confidential material in a separate annex to their response
- 1.28 Such Information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information – ComReg 05/24



## Appendix A – Consultation Questions

Q. 1. ComReg’s preliminary assessment with respect to OAO fibre, as it was set out in the Response to Consultation Document 08/104 and as articulated in Appendix B of this document, did not include OAO fibre within the relevant product market due to its limited availability, and consequent limited ability to act as a competitive constraint. Do you think this approach was appropriate, or should ComReg amend its position in light of the European Commission’s invitation? Please explain your reasoning..... 5

Q. 2. Do you think that the inclusion of alternative fibre loops within the WPNIA market would impact on ComReg’s overall SMP designation, or on its proposed set of regulatory obligations? Please explain your reasoning..... 6

## Appendix B - Approach adopted by ComReg in considering the inclusion of fibre in the WPNIA market in 08/104

### **Do hypothetical fibre-based products fall within the WPNIA market?**

- 1.29 This section further explains the approach adopted by ComReg in its Response and Draft Decision document 08/104 regarding the inclusion of fibre in the WPNIA market.
- 1.30 The purpose of market definition is to identify the competitive constraints that undertakings face. The market definition is not an end in itself but rather is a means of assessing effective competition for the purpose of determining whether *ex ante* regulation is required. This involves assessing demand and supply for other products, which could be considered to be substitutes for wholesale physical network infrastructure access.
- 1.31 ComReg takes the utmost account of guidance given by the European Commission<sup>10</sup> in defining relevant markets. Such guidance is set out in its Explanatory Memorandum on relevant product and service markets within the electronic communications sector<sup>11</sup> (“the Recommendation” and “the Explanatory Note”), the European Commission’s Notice on Market Definition<sup>12</sup>, and its Guidelines on Market Analysis and Significant Market Power<sup>13</sup> (“the SMP Guidelines”). ComReg also considers guidance given by any relevant competition case law or decisions.
- 1.32 The definition of the relevant market is established by the combination of the relevant product and geographic dimensions.
- 1.33 The European Commission recently revised its recommendation on the previous Wholesale Unbundled Access (WUA) market as follows:<sup>14</sup>

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<sup>10</sup> Paragraph 17 of the Commission’s Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5 states - “The question to be asked is whether the parties’ customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market”.

<sup>11</sup> Commission Recommendation on relevant product and service markets, Commission of the European Communities, 17 December 2007.

<sup>12</sup> European Commission, Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ [1997] C372/5.

<sup>13</sup> European Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, (2002/C 165/03).

<sup>14</sup> Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (second edition) notified under document number C(2007) 5406 (Text with EEA relevance) (2007/879/EC) (OJ L 344, 28.12.2007, p. 65–69)

*Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location.*

- 1.34 This definition is broader than the preceding WUA market (which was associated with access to metallic loops and sub-loops), and is technology-neutral. In that regard, the WPNIA market accounts for the potential impact of NGA deployment. Specifically, the revised definition allows for the inclusion of non-metallic elements of the physical network infrastructure (such as fibre or duct access) in the relevant market.
- 1.35 ComReg defined the relevant market bearing in mind the purpose of the WPNIA market identified by the European Commission, namely, the ability to provide a wholesale physical network connection over which an access seeker can offer retail broadband and telephony products to the end-user. It is important to note that in Ireland, eircom is the only provider of a wholesale physical network connection at present, in the form of local loop unbundling. ComReg therefore took the incumbent's existing WPNIA product as a starting point for its market definition assessment.
- 1.36 In considering the scope of the WPNIA market in an NGN/NGA environment, ComReg's preliminary view is that upgrades of this nature do not present a unique set of competitive conditions. Rather, similar competition conditions are likely to exist where fibre is deployed as full or partial replacement for a ubiquitous copper access network.
- 1.37 ComReg's view as set out in its Response and Draft Decision document 08/104 was that NGA would allow for either the replication of current WPNIA services, or for the provision of higher quality services. Therefore, access seekers are likely to perceive wholesale physical network infrastructure access on the incumbent's fibre network as a suitable substitute for current generation WPNIA. This view is consistent with the European Commission's Recommendation on relevant markets, which indicates that gradual improvements in network infrastructures are rarely translated into a new or emerging market, thus indicating that access seekers will look to NGA as superseding type of WPNIA.
- 1.38 ComReg's preliminary view, as set out in its Response and Draft Decision document 08/104, was that the WPNIA market includes physical access to current generation as well as next generation network infrastructure, particularly in respect of fibre that constitutes the incumbent's fixed network. ComReg's preliminary view was that an operator would consider fibre overlays on a hypothetical monopolist's copper network to be a substitute for current generation WPNIA. This is because in addressing the access bottleneck, it is immaterial whether copper or fibre is used to deliver retail broadband services, as the conditions of competition are similar and it is likely that similar products can be provided over fibre.<sup>15</sup> ComReg therefore maintained that where a hypothetical monopolist switched from providing network access over copper to provide network access over fibre, then both types of access would form part of the same market.

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<sup>15</sup> It is nonsensical to attempt to carry out a SSNIP test because the eventual "competitor" is the same hypothetical monopolist.

- 1.39 The European Commission agreed with ComReg’s preliminary view that fibre should be included within the WPNIA market (although invited ComReg to also include OAO fibre within the WPNIA market).

**Do hypothetical products provided by alternative FTTH networks in Ireland fall within the WPNIA market?**

- 1.40 The European Commission SMP guidelines note that the relevant product market comprises all of those products or services that are sufficiently interchangeable or substitutable, not only in terms of their objective characteristics, by virtue of which they are particularly suitable for satisfying the constant needs of consumers, their prices or their intended use, but also in terms of the condition of competition and/or the structure of supply and demand on the market in question.
- 1.41 On that basis, ComReg considered whether any other network platforms would be sufficiently interchangeable or substitutable with WPNIA, so as to warrant the inclusion of such networks in the product market. Given that no WPNIA products are made available on other networks in the merchant market, the inclusion of other networks would be considered in terms of self-supply. Section 3.1 of Explanatory Memorandum to the Recommendation of December 2007 noted the following on the inclusion of self-supply in the product market:

*In cases where there is likely demand substitution, i.e. where wholesale customers are interested in procuring from alternative operators, it may be justified to take the self-supply concerned into consideration for the sake of market delineation. However, this is not justified if alternative operators face capacity constraints, or their networks lack the ubiquity expected by access seekers, and/or if alternative providers have difficulty in entering the merchant market readily.*

- 1.42 In a technical sense an operator can provide equivalent or a higher standard of retail broadband and telephony to an end-user customer over a fibre connection as it can over a current generation copper connection. This is the case regardless of whether the fibre is operated by the incumbent network operator or an alternative operator, and this is why ComReg included fibre in the relevant product market.
- 1.43 However, ComReg considered that operators attribute significant value to network coverage (ubiquity) when seeking access to WPNIA. This is due to economies of scale that can be gained when an access seeker has the means to reach large number of retail customers, and those that can be enjoyed by a network operator with greater network coverage. ComReg’s research and analysis suggests that access seekers in the WPNIA market (such as present LLU customers) expect and require the ability to reach a significant number of end-user customers. It is unlikely that operators of these small and dispersed networks could provide an economically viable WPNIA product, regardless of what network technology is employed by the operator.<sup>16</sup>

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<sup>16</sup> In addition, for new entrants, fibre deployment would involve, amongst other things, the exercise of gaining permission to undertake civil engineering work in populated areas, digging up roads and footpaths, building ducting and potentially finding cabinet space. The incumbent network operator will also face these costs when rolling out fibre, but to a lesser extent since the incumbent already has established infrastructure, customers and systems in place which contribute to lower customer acquisition costs, economies of scale and scope in providing WPNIA.

- 1.44 ComReg notes that the coverage of OAO fibre networks in Ireland is very limited covering a total of approximately 15,000 homes<sup>17</sup>, and is fragmented (supplied by three operators across several locations). This therefore has a minimal impact on competitive conditions within the WPNIA market. For example, at the end of the fourth quarter of 2008 less than 0.4% of active lines in Ireland were fibre.<sup>18</sup>
- 1.45 On the whole, ComReg considered that OAO fibre does not fall within the WPNIA market because it did not meet the test set out in the explanatory memorandum and SMP guidelines (for example, OAO fibre lacks ubiquity and is unlikely to be capable of supporting an economically viable WPNIA product). For these reasons, ComReg decided not to extend its market definition to include OAO fibre.<sup>19</sup> Hence, it appeared justifiable to exclude OAO fibre in the Irish context. This means that although OAO fibre is identical to any fibre deployed by Eircom, the limited reach of OAO fibre networks would offer no incentive for the operator to enter the merchant WPNIA market, nor would access seekers look upon it as a suitable substitute for WPNIA provided on Eircom’s ubiquitous network.
- 1.46 It is not ComReg’s view that any network be included or excluded in the market simply by virtue of its ownership. Amongst the distinguishing characteristics of such networks as set out by ComReg was their small scale and their consequential inability to act as competitive constraint from a supply side substitutability perspective. Furthermore, if ComReg, having taken the utmost account of the European Commission’s view, were to retain its proposed market definition, it would ensure that a new market analysis would be carried out if such networks became more widespread.
- 1.47 It is also important to note that a consistent approach to substitutability analysis was taken across the alternative technology platforms considered. ComReg’s approach as adopted was, in its view, consistent with the European Commission’s proposed approach to assessing the substitutability of cable and wireless technologies, where it states that a lack of ubiquity would be relevant when considering whether to include self-supply of alternative networks within the relevant product market. ComReg considers that it applied this same reasoning to its analysis of OAO fibre deployment in Ireland.
- 1.48 ComReg also considered the European Commission’s 1997 Notice on the definition of relevant markets for the purposes of Community competition law, where the section entitled ‘basic principle of market definition’ (paragraphs 12-24) which points to three forms of competitive constraint – demand substitutability, supply substitutability and potential competition. The section entitled ‘Evidence to define markets – product definition’ warns against reliance on the similarity of product characteristic and on considering whether the product is functionally interchangeable when defining the market (paragraph 36).

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<sup>17</sup> Estimate based on information provided by industry participants.

<sup>18</sup> Based on quarterly report data.

<sup>19</sup> Please refer to ComReg D 08/104 for further discussion around the reasoning behind the exclusion of fibre.

- 1.49 With the above European Commission guidance in mind, ComReg assessed whether hypothetical products provided over small alternative fibre loops would fall within the WPNIA market. ComReg considered it unlikely that an economically feasible WPNIA product could be made available on a commercial basis via OAO fibre networks in Ireland within the duration of this review (i.e. at a price that is acceptable for access seekers and would act as a constraint in the WPNIA market).
- 1.50 ComReg was therefore of the preliminary view that hypothetical wholesale products on alternative FTTH networks do not fall within the WPNIA market. This view was not based around ownership of the network or the technology being used, but rather reflected the lack of ubiquity associated with these fibre loops.
- 1.51 ComReg undertook to initiate a further review of the WPNIA market if any significant developments occur within the timeframe of this review such that this assessment is no longer appropriate (for example the significant deployment of fibre by an alternative operator in Ireland).

### **Summary**

- 1.52 To summarise, ComReg defined fibre access as falling within the market (in principle), but considered that for the purpose of this review OAO fibre networks would not be included. ComReg reached its preliminary conclusion in Response and Draft Decision document 08/104 on the basis that:
- The geographical coverage of alternative FTTH networks are limited, and are not of sufficient size to support an economically viable WPNIA product.
  - There is no WPNIA product available on alternative fibre networks, nor is their likely to be within 12 months despite the presence of fibre networks and associated retail broadband products.
  - OAO fibre loops do not impose sufficient constraint on the WPNIA market.
  - ComReg would review the market in the event that the position changed over the life time of this review.

## Appendix C – European Commission Comments Letter to ComReg dated 20 February 2009



EUROPEAN COMMISSION

Brussels, 20/2/2009

SG-Greffe (2009) D/988

Commission for Communications  
Regulation (ComReg)  
Irish Life Centre  
Lower Abbey Street  
Dublin 1, Ireland

For the attention of:  
Mr John Doherty  
Chairperson

Fax: +353-1-804 9680

Dear Mr Doherty,

**Subject: Case IE/2009/0875: wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC<sup>1</sup>**

### I. PROCEDURE

The notification was received from the *Commission for Communications Regulation* ('ComReg') on 22 January 2009 and became effective on that day. It concerns the review of the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location (market 4 of the Recommendation on relevant markets<sup>2</sup>).

The national consultation<sup>3</sup> on the draft measure was launched on 23 December 2008 and lasted until 13 February 2009.

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<sup>1</sup> 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), OJ L 108, 24.4.2002, p. 33.

<sup>2</sup> Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, (the 'Recommendation') OJ L 344, 28.12.2007, p. 65.

<sup>3</sup> In accordance with Article 6 of the Framework Directive.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs) and the Commission may make comments on notified draft measures to the NRA concerned.

## II. DESCRIPTION OF THE DRAFT MEASURE

The notification concerns the second review of this market. The first review was conducted under case IE/2004/0046 concerning the market for local loop unbundling (LLU).

At the time, in the LLU market, ComReg designated Eircom as having significant market power (SMP) and imposed regulatory obligations on it<sup>4</sup>. The Commission made a comment on the costing methodology for the implementation of the price control obligation in view of the relatively high prices and low penetration rate of LLU in Ireland at the time — it called on ComReg to monitor market developments carefully and especially how the implementation of the proposed FL-LRIC (forward-looking long-run incremental cost) methodology could have a positive impact on the level of prices and the numbers of fully unbundled and shared-access lines in Ireland.

### II.1. Market definition

In its notification, ComReg concludes that the relevant product market for (physical) access to network infrastructure at wholesale level (including partially or completely unbundled access) at a fixed location covers all access products irrespective of the supporting technology, including the incumbent's self supply.

In the relevant market, ComReg includes access to the copper and fibre loop<sup>5</sup> but excludes cable and wireless networks based on a substitution analysis. As to the inclusion of fibre, ComReg regards it as an upgrading of the incumbent's existing network, stressing the need to address bottlenecks in the access network by adopting a forward-looking perspective. However, it decided to exclude fibre networks provided by alternative operators given the limited scale of such fibre-to-the-home (FTTH) projects in Ireland and the low probability of their being deployed to an extent that would make them an alternative to the incumbent's network.

ComReg also analyses indirect constraints in the retail broadband market, in particular retail competition from cable and wireless access systems. It concludes that the indirect constraints are not sufficiently strong to justify the inclusion of alternative platforms within the market.

ComReg finds that wholesale broadband access is in a separate product market.

It concludes that the relevant geographical market for unbundled access is national in scope.

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<sup>4</sup> In particular, access obligations, non-discrimination, transparency, accounting separation, price control and cost-accounting obligations.

<sup>5</sup> At retail level, 6 322 broadband subscribers were served over a fibre connection at the end of the fourth quarter of 2007. This includes a range of fibre access installations such as fibre-to-the home (FTTH), fibre-to-the-curb (FTTC) and fibre-to-the-premises (FTTP). This corresponds to 0.56% of total broadband subscriptions.



## II.2. Finding of significant market power (SMP)

ComReg concludes that Eircom has SMP in the market for (physical) access to network infrastructure at wholesale level at a fixed location on the basis of the following criteria, among others: market share (100%<sup>6</sup>), barriers to entry and expansion, and the lack of potential competition.

## II.3. Regulatory remedies

ComReg intends to maintain the existing remedies on Eircom and, in some cases, to extend them to take into account the inclusion of fibre in the revised market definition<sup>7</sup>. The remedies are as follows:

### Access obligations:

- Extension of the access remedy to take account of the revised market definition;
- Extension of the existing obligation that services should be provided on terms and conditions which are fair, reasonable and timely, including the development of Key Performance Indicators as support for Service Level Agreements (SLAs);
- Proposal that ComReg may intervene to ensure that SLAs meet their objectives;
- An obligation that Eircom should develop an Internal Reference Offer (IRO).

### Transparency and Non-Discrimination:

- Extension of these obligations to support the proposed changes to the access obligations.

### Price control:

- A general obligation not to engage in any price/margin squeeze;
- Further consultation on price control of NGA-based wholesale services.

### Cost accounting and accounting separation:

- Obligations concerning cost accounting and accounting separation to be subject to further consultation.

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<sup>6</sup> This market share is based on the fact that only Eircom offers a wholesale physical network infrastructure access product, and in ComReg's assessment it is not likely that any other operator would have the ability or motivation to develop a competing product within the lifetime of this review.

<sup>7</sup> ComReg describes not only the remedies applicable to the current generation of products and services, but also those which should be imposed in an NGA context. As regards the latter remedies, ComReg specifies that the obligations concerning access, transparency, non-discrimination, pricing control, cost accounting and accounting separation are to apply. However, these obligations are set only in principle, and ComReg will consult shortly on the details of these remedies and on how these may be best implemented in an NGA context.

### III. COMMENTS

The Commission has examined the notification and additional information provided by ComReg and has the following comments<sup>8</sup>:

#### **Market definition**

ComReg indicates in its draft measure that fibre is included in the relevant market but excludes from the relevant product market the FTTH network infrastructure of alternative operators. In this respect, the Commission would like to remind ComReg that the definition of a relevant product market should be made with reference to the product characteristics, which at present do not indicate that the functionality of possible access products provided over separate FTTH networks would differ to such an extent that this would justify their exclusion from the relevant market. However, since the regulatory outcome is not affected given the still very limited rollout of fibre networks, the Commission does not challenge ComReg's finding, but would nevertheless like to invite ComReg to include all access products based on fibre networks, whether or not such network is owned by the incumbent operator, within the relevant market in its final measure.

#### **Further consultation planned by ComReg**

ComReg states in its draft measure that further consultation will be held on, *inter alia*, the details and implementation of the price control obligation and the cost accounting separation obligation. ComReg further intends to specify and/or amend the cost orientation and cost accounting obligations at a later date. The Commission would like to remind ComReg that draft measures relating to these regulatory obligations must be notified to the European Commission and the national regulatory authorities of other Member States in accordance with Article 7(3) of the Framework Directive.

#### **Remedies imposed in the context of next-generation access (NGA) development and the need for a consistent European approach**

In addition, the Commission would like to highlight the need to provide further guidance in the context of the NGA rollout in order to ensure legal certainty for investors and to prevent undesirable divergences in regulatory approaches within the internal market. To this end, the Commission is working towards a Recommendation on NGA remedies so that a consistent regulatory approach can be applied to such networks across the EU. Accordingly, the Commission invites ComReg to revisit its analysis when carrying out its next review of these markets along the lines of this Recommendation, once adopted.

#### **Need for an overall analysis of markets 4 and 5**

The Commission considers it important for the NRAs to undertake a single overall analysis of the broadband market to examine in sequence the impact that regulated infrastructure-based access and regulated (non-physical) network-based access could be expected to have on any significant market power that is identified. The Commission considers that this approach is all the more important

<sup>8</sup> Pursuant to Article 7(3) of the Framework Directive.

to ensure the necessary migration within an NGA environment, so invites ComReg to analyse both markets 4 and 5 together at the time of the next review, ensuring a coherent approach to the regulation of NGA.

Pursuant to Article 7 (5) of the Framework Directive, ComReg shall take utmost account of comments of other NRAs and the Commission and may adopt the resulting draft measures and, where it does so, shall communicate them to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>9</sup>, the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>10</sup> within three working days following receipt whether you consider that, in accordance with Community and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for any such request.

Yours sincerely,  
For the Commission,  
Philip Lowe  
Director-General