



Commission for
Communications Regulation

NON-CONFIDENTIAL VERSION

Final Determination

Determination in the dispute between BT Ireland and Eircom Limited in relation to alleged failure by Eircom to provide Leased Line termination segments based on uncontended Ethernet access.

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The Commission for Communications Regulation and the legislative framework for disputes

1. The Commission for Communications Regulation (“ComReg”) was established under Section 6 of the Communications Regulation Act, 2002 (“the Act of 2002”)¹. ComReg is the regulator for the electronic communications and postal sectors. It is charged with the regulation of amongst other things, fixed and mobile electronic communications service providers in the State. ComReg is the national regulatory authority in the State for the purpose of Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (“the Framework Directive”). The functions of ComReg are set out in Section 10 of the Act of 2002 and a body of secondary legislation, including statutory instruments that transpose the requirements of various EU directives.
2. The Framework Directive was transposed into Irish law by the Act of 2002 and the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (“the Framework Regulations”)².
3. Article 20 (1) of the Framework Directive obliged member states to provide in their national legislation for dispute resolution mechanisms for the purpose of issuing “*binding decisions*” to resolve disputes between undertakings³. Regulation 31 of the Framework Regulations transposes Article 20 (1) of the Framework Directive into Irish law and provides that:

“In the event of a dispute arising between undertakings in connection with obligations under the Framework Directive, the Specific Directives, these Regulations or the

¹ As amended by the Communications Regulation (Amendment) Act, 2007.

² The Framework Regulations have been amended by the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2006 and the European Communities (Electronic Communications Networks and Services) (Framework) (Amendment) Regulations 2007.

³ Under Regulation 2 of the Framework Regulations an “undertaking” means a person engaged or intending to engage in the provision of electronic communications networks or services or associated facilities.

Specific Regulations, the Regulator shall, subject to paragraph (2), at the request of either party, initiate an investigation of the dispute and, as soon as possible but, except in circumstances which the Regulator considers exceptional, within 4 months from the date on which the dispute was notified to it by either party, make a determination, aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute.”

4. Under Regulation 31 (6) of the Framework Regulations, an undertaking to which a determination applies must comply with it.
5. Regulation 31 (8) of the Framework Regulations provides that an undertaking which fails to co-operate with an investigation under Regulation 31 or to comply with a determination thereunder is guilty of an offence.
6. Regulation 31 (9) of the Framework Regulations provides that any obligations imposed on an undertaking by ComReg in resolving a dispute must respect the provisions of “*the Framework Directive, the Specific Directives, these Regulations, the Specific Regulations and section 12 of the Act of 2002*”.
7. Section 12 of the Act of 2002 describes the objectives of ComReg in exercising its functions under s 10 of the Act of 2002. This issue is addressed in greater detail in this Determination.
8. Regulation 31 (11) of the Framework Regulations provides that neither party to a dispute is precluded from bringing an action before the courts and that the dispute resolution procedure is without prejudice to their rights of appeal
9. In accordance with the Framework Regulations and Section 12 of the Act of 2002, ComReg set out its Decision Notice on Dispute Resolution Procedures, D18/03. This document outlines what constitutes a dispute and the procedures that must be followed.

The parties to this dispute

10. Eircom Limited (“Eircom”) is an authorised undertaking under the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations, 2003 (“the Authorisation Regulations”). Eircom has registered in the Electronic Register of Authorised Undertakings maintained by ComReg that it provides Data Services, Internet Access Services, Publicly Available Telephony Services and other Voice Services.
11. BT Communications Ireland Limited (“BT”) is also an authorised undertaking under the Authorisation Regulations. BT has registered in the Electronic Register of Authorised Undertakings maintained by ComReg that it provides Data Services, Internet Access Services, Publicly Available Telephony Services and other Voice Services

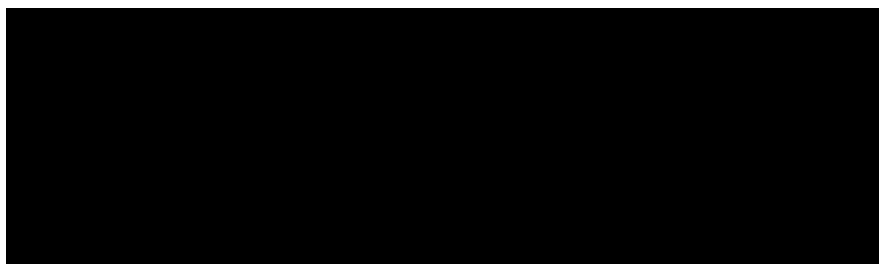
Background to this dispute

Service requested

12. BT has requested Eircom to provide Wholesale uncontended Ethernet access segments. BT believes Eircom has an obligation to meet reasonable requests for access to the access segments of leased lines on foot of ComReg document D7/05⁴ which imposes obligations pursuant to Eircom’s designation following a market analysis as having Significant Market Power (‘SMP’) in the market for Terminating Segments of Leased Lines.
13. This determination relates to a dispute between BT and Eircom in relation to an alleged failure by Eircom to provide Leased Line access segments based on uncontended Ethernet Access to BT in response to its request.

⁴ Decision Notice - Designation of SMP and Related Remedies: Market Analysis: Retail Leased Line and Wholesale Terminating and Trunk Segments of Leased Lines (National) (Decision No: D7/05, Document No: 05/29, Date: 30 March 2005)

14. BT sent a Statement of Requirements ('SOR') on 9 October 2007 to Eircom, requesting it to provide Wholesale uncontended Ethernet access segments based on uncontended Ethernet Access. Eircom did not formally respond to the BT request.
15. On 10 December 2007, BT formally wrote to ComReg pursuant to ComReg decision notice D18/03 requesting resolution in respect of a dispute with Eircom over its failure to provide wholesale uncontended access segments to support an Ethernet service, in breach of Eircom's obligations under D7/05. ComReg wrote to BT acknowledging receipt of the request.
16. In Eircom's response to the draft determination Eircom stated the following:



§< [confidential to Eircom]

17. ComReg is of the view that the section quoted by Eircom from BT's dispute resolution request is a clear statement of the scope of the dispute: that Eircom is in breach of its obligation failed to provide a form of access which it had an obligation to provide specifically Ethernet Services. In the dispute resolution request BT set out that it had made a request for access and by way of attachment of the SOR it had submitted, BT had set out the technical details of this requested access.

18. Eircom in its letter on 23 December 2008 stated that [REDACTED] [REDACTED] [REDACTED] & [confidential to Eircom] BT sent a SOR on 9 October 2007 to Eircom, requesting it to provide Wholesale uncontented Ethernet access segments based on uncontented Ethernet Access.

19. Eircom did not formally respond to the BT request, which is not consistent with Eircom's obligation to negotiate in good faith or Eircom's RIO contractual agreements. Eircom had the opportunity to clarify any uncertainty it believed existed with BT's SOR which was initially forwarded to it on the 9 October 2008.

20. In Eircom's response of 23 December 2008 Eircom stated the following:
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

21. BT sent its SOR on 9 October 2007 to Eircom, requesting it to provide Wholesale uncontended Ethernet access segments. On 15 October 2007 Eircom acknowledged receipt of the SOR describing it as a “formal request”. The acknowledgement advised BT that Eircom would respond in due course. As set out in paragraph 19 Eircom acknowledges that it did not respond to the BT request prior to the dispute submission. ComReg notes that Eircom has published a process in its Reference Interconnect Offer setting out how it will deal with requests for new products. This would have required Eircom to respond to BT within a defined timescale. Further Eircom has an obligation to negotiate in good faith with parties requesting access in both the market for Terminating Segments and Trunk Segments of Leased Lines. This obligation copper fastens the contractual process set out by Eircom. It is for Eircom to arrange its affairs so that it meets these commitments. BT had complied with its portion of the published process. It is not BT’s role to ensure that Eircom complies with its contractual and regulatory commitments. If the published process is to be operated so that parties submitting requests for access must follow up with Eircom after the expiry of the defined period for Eircom’s response and afford Eircom a further period to respond before submitting a dispute then this negates the defined period for response to requests. This approach would afford Eircom as an SMP operator additional and unspecified time before it must make available requested access. ComReg is of the view therefore that it was sufficient in the context of this dispute for BT to have

complied with the defined process for requesting new services and for Eircom to have failed to comply with these processes for BT to state in its dispute resolution request “...either eircom have failed to inform BT of their plans to offer the Services to the SOR or eircom have breached their own reference offer and legal contract with BT. In both cases this is demonstrating that eircom is not negotiating properly in dealing seriously with SORs”.

22. In its submission of 28 January Eircom set out that it did not believe that it had an obligation to meet BT’s request for access.

23. ComReg also notes that Eircom had previously advised ComReg⁵ of its view that “eircom thus rejects the stated position: “ComReg considers the access segment of the Eircom National Ethernet product to be subject to the obligations identified in Annex C – Decision Notice D7/05 – Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National).”

24. The formally stated position that Eircom had no obligation to provide this access together with Eircom’s failure to respond to BT’s request for access, notwithstanding its contractual and regulatory obligations, are sufficient for ComReg to form a view that it was “not satisfied that bilateral negotiations are likely to resolve the dispute in a timely manner to allow suspension of ComReg’s investigation of the dispute for four months under step 2(a) of the dispute resolution procedures.”⁶

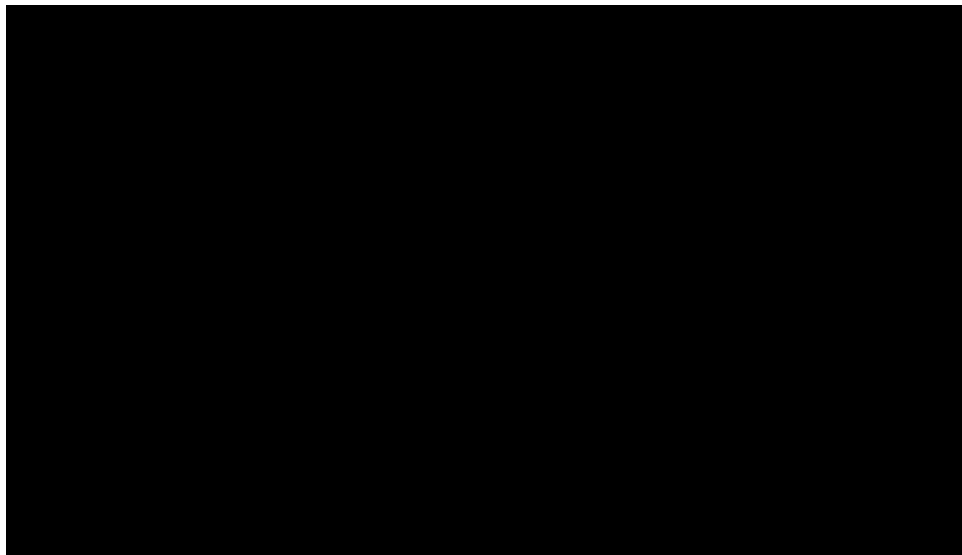
25. ComReg sent a letter on 6 March 2008 to both parties stating that ComReg noted Eircom had previously stated it was in communication with BT regarding a Wholesale Ethernet Access product. The purpose of ComReg’s letter was to confirm that any agreement from these discussions could have been brought to the attention of ComReg at any stage of the dispute resolution process. It should

⁵ In a letter of 30 August 2007

⁶ Letter to Eircom 29 January 2008

be noted that Eircom had the option to contact BT to request a meeting to discuss this matter if it had so wished. ComReg notes that Step 4(iii) of its published dispute process allows that following a detailed analysis of all submissions, ComReg may “*Decide that the issue, in part or in entirety, may be withdrawn from the dispute procedures and would be more effectively dealt with via other mechanisms.*” In this context ComReg’s acceptance of the dispute did not prejudice Eircom as it could have submitted to ComReg that it intended to meet BT’s requests or provided such other information as to provide a basis which would allow ComReg to decide that the issue would be more effectively dealt with via other mechanisms.

26. In its response to the draft determination Eircom stated the following:



✂ [confidential to Eircom]

27. ComReg believes that the scope of BT’s complaint has been clearly set out from the outset of this dispute for the following reasons:

1. In BT’s SOR sent to Eircom on 9 October 2007, BT requested Eircom to provide Wholesale uncontended Ethernet access segments based on uncontended Ethernet Access. In section 1.1 of the document it states the following;

“To make available to BT on a non-discriminatory basis a set of Ethernet wholesale uncontended access products to enable BT to provide Ethernet access connectivity and transmission services to its customers”

2. In section 1.3 of the document as part of BT’s formal request for service to Eircom it states the following:

“BT formally requests that eircom offer BT wholesale uncontended Ethernet access segments to enable it to offer Ethernet access products to its own customers”

3. In BT’s SOR sent to ComReg on 10 December 2007, BT stated the following:

That in accordance with D7/05 7 “BT submitted an SOR to eircom early in October 2007 seeking the relevant access segments”

4. Additionally BT set out its scope in section 2.6 as follows

“the grounds for the complaint are basically a breach of the obligation to supply Ethernet services and a breach of the non-discrimination regulations by eircom providing to itself such facilities, whatever they maybe, to offer retail Ethernet products. BT is seeking a full range of Wholesale Ethernet products that eircom are offering themselves on equivalent terms, conditions and timescales,”

28. It is clear from the above paragraphs that ComReg had a clear scope from the outset of this dispute from which it begun its investigation.

⁷ Decision Notice – Designation of SMP and related Remedies. Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National)

29. On 28 March 2008 in accordance with step 4 of annex B of the dispute resolution procedure, ComReg sent a letter to BT requesting it to provide information to ComReg's questions concerning its SOR. BT's response to this clarification response was forwarded to Eircom on 8 April 2008.
30. Eircom stated above that it "submits that BT's clarification that in case of ambiguity, "ComReg should give preference to the SOR" gives little indication of ComReg's findings in this matter"

BT had contradicted its SOR by stating that it was seeking Wholesale Uncontended and Contended Ethernet Access Segments in its cover letter. BT's SOR had clearly set out that it was only seeking Wholesale Uncontended Ethernet Access Segments in accordance with D7/05. This would have been in line with BT's initial request to Eircom and had therefore been considered the primary document by ComReg. On 8 April 2008, to clarify this discrepancy ComReg asked the following question:

Question 1:

There is possible ambiguity between the information in the Ethernet dispute covering letter and the BT statement of requirements (SOR) for Wholesale uncontended access segment to support Ethernet services. Is ComReg correct that in the case of any ambiguity preference should be given to the SOR?

BT response stated the following:

BT agrees with the ComReg interpretation that in the case of ambiguity as to what has been requested from eircom, ComReg should give preference to the SOR.

ComReg also requested BT to clarify technical points from section 3.1 of its SOR.

Scope of this dispute

31. Eircom stated that BT's dispute submission set out the scope of the dispute as follows "*the grounds for the complaint are basically a breach of the obligation to supply Ethernet services and a breach of the non-discrimination regulations by eircom providing to itself such facilities, whatever they maybe, to offer retail Ethernet products. BT is seeking a full range of Wholesale Ethernet products*

that eircom are offering themselves on equivalent terms, conditions and timescales,”

32. ComReg is of the view that the section quoted by Eircom from BT’s dispute resolution request is a clear statement when taken in the context of the document as shown in paragraphs 27-28. In the dispute resolution request BT set out that it had made a request for access and, by way of attachment of the SOR it had submitted, BT had set out the technical details of this requested access, in this case Wholesale Uncontended Ethernet Access Segments up to and including 100 Base-T (100Mbit/s). The SOR also sets out the Eircom retail services for which BT was seeking equivalent wholesale inputs, this being Eircom’s National Ethernet Product.

33. Eircom in its submission on the Draft Determination set out that
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ✕ [confidential to Eircom] ComReg notes that its approach is entirely consistent with the scope of the dispute.

34. Eircom submits that *“As eircom explained in its letter of 28 January 2008, eircom does not consider that in the circumstances of the case, ComReg was entitled under the terms of Regulation 31 of the Framework Regulations and its own Decision D18/03 (Dispute Resolution Procedure) to find that there was a dispute between eircom and BT which ComReg could usefully adjudicate on. eircom notes that Annex C of D18/03 requires a “detailed and clear description of the dispute”. BT’s application contained no such description but rather a very vague and broadly defined grievance.”*

35. Footnote 1 of Eircom’s response to the Draft Determination states
[REDACTED]

[REDACTED]
[REDACTED] ✕ [confidential to Eircom]

Based on this ComReg notes that Eircom considered the scope sufficiently detailed so that it could set out its belief that an Ethernet product at a particular speed would be clearly outside the scope of the dispute.

36. In dealing with the substance of Eircom's comment at its footnote ComReg notes that BT's SOR explicitly requested the provision of 100 Base-T (or 100 Mbit/s) services.

Summaries of the parties' submissions

37. BT formally wrote to ComReg on 10 December 2007 requesting resolution of the dispute. ComReg analysed the material received and formed a view that the request fell within the parameters of acceptable disputes as set out in D18/03.
38. On 18 December 2007 ComReg sent a letter of acknowledgement to BT.
39. On 15 January 2008, ComReg wrote to both BT and Eircom confirming its initial acceptance of the dispute. In accordance with the Dispute Resolution Procedures established under D18/03, ComReg provided a copy of the dispute to Eircom and allowed it five working days within which Eircom could comment on whether the use of the dispute resolution process was appropriate.
40. Eircom replied requesting an extension to this deadline.
41. ComReg was of the view that an extension for comments by Eircom until close of business Monday 28 January 2008 was possible in this particular instance without jeopardising the overall timescale, and communicated this to Eircom.
42. In Eircom's response on 28 January 2008 it made the following points:

- It recognised that Eircom should have formally responded to BT's SOR on the 9 October 2007, confirming that it does not provide the service requested.
- Eircom considered the service requested by BT to be outside of the markets defined in D7/05.
- Eircom stated that it believed that the SOR raises fundamental issues about the extent of its obligations and the scope of D7/05.

43. On 29 January 2008 ComReg confirmed final acceptance of the dispute.⁸

44. In its letter to Eircom on 29 January 2008 confirming acceptance of the dispute, ComReg enclosed a copy of the dispute and requested Eircom to respond to the issues raised and explain the rationale for any decision not to provide the requested service by close of business 12 February 2008.

45. Eircom responded to ComReg on 12 February 2008 in relation to the final acceptance of the dispute stating that Eircom did not consider BT's request to be reasonable in accordance with Section 5.1 of D7/05⁹.

46. Eircom also stated that it believed its ability to respond was impacted by the fact that the information provided was redacted and confidential information was withheld. ComReg had analysed the material withheld due to its confidential status and confirmed to Eircom dated 18 March 2008 that it did not rely upon this information to form its opinions in relation to the substance of the dispute.

⁸ ComReg has up to 4 months from the date of receipt of the dispute to issue its Final Determination: Framework Regulations, Regulation 31 (1): the Regulator shall, subject to paragraph (2), at the request of either party, initiate an investigation of the dispute and, as soon as possible but, except in circumstances which the Regulator considers exceptional, within 4 months from the date on which the dispute was notified to it by either party, make a determination.

⁹ eircom shall adhere to the principle of non-discrimination when providing leased lines referred to in Regulation 15 of the Universal Service Regulations. eircom shall apply similar conditions in similar circumstances to organisations providing similar services, and shall provide leased lines to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners.

47. ComReg sent a letter on 6 March 2008 to both parties, noting that in previous correspondence Eircom had stated it was still in communication with BT regarding Wholesale Ethernet Access products and that any outcome or agreement from these discussions could be brought to the attention of ComReg at any stage of the dispute process.
48. BT responded to ComReg's letter on 6 March 2008 confirming that there was no on-going communication between BT and Eircom regarding the Ethernet Dispute.
49. ComReg sent a letter to Eircom on 18 March 2008 clarifying its position regarding the treatment of confidential information¹⁰.
50. ComReg also requested a non-confidential redacted copy of Eircom's letter sent to ComReg on 12 February 2008 as well as specific technical Ethernet product information.
51. On 28 March 2008, ComReg sent a letter to BT requesting clarification on the technical information contained in section 3.1¹¹ of its SOR. BT's letter of clarification was returned on 4 April 2008 and once BT confirmed it contained no confidential information, this was forwarded to Eircom for comment on 8 April 2008.
52. In accordance with ComReg's Dispute Resolution Procedures¹² ComReg published the Information Notice below on its website on 15 April 2008

ComReg has received and accepted a request for dispute resolution from BT Communications Ireland Limited under Regulation 31 of the Framework Regulations. The scope of the dispute concerns an alleged

¹⁰ Guidelines on the treatment of confidential information, document no. 05/24, 22 March 2005.

¹¹ Section 3.1 of BT's SOR contains detailed technical information that describes the interface presentations that BT is seeking.

¹² ComReg document D18/03

failure by Eircom to provide Leased Line terminating segments based on uncontended Ethernet Access.

53. On 16 June 2008, ComReg sent a letter to both parties informing them that this dispute would not be resolved within the four month timeline.
54. On 8 September 2008, ComReg asked Eircom to confirm the factual accuracy of a number of technical statements after reviewing the technical documents received from Eircom. Eircom replied on 15 September 2008.
55. On 2 October 2008, ComReg sent a letter to both parties stating that ComReg is currently deliberating the issues and will endeavour to circulate a draft determination to the parties as soon as practicable.
56. On 21 November 2008 ComReg sent a copy of its draft determination to both parties. Eircom requested an extension for it to reply to this document. ComReg granted Eircom an extension until 23 December 2008.
57. On 5 December 2008 BT sent in its response.
58. On 23 December 2008 Eircom sent in its response.

Market analysis issues

ComReg had to assess the impact of D6/08 on the determination:

In considering the circumstances of the dispute it is appropriate for ComReg to consider the obligations that applied at the time that the dispute arose. ComReg concluded based on the circumstances of this dispute that D7/05 is the appropriate market analysis as BT initially requested the Ethernet access segment under market analysis D7/05.

ComReg analysis has shown that the facility requested by BT was within the Terminating Segment Market as defined under D7/05 and also was a reasonable

request for access. Accordingly Eircom had an obligation to provide the access requested and should have granted this facility at the time of the request.

ComReg published its new Leased Line market analysis D6/08 on 22 December 2008, Section 6.2 (iii) of D6/08 states:

“iii. Pursuant to Regulation 13(2)(c) of the Access Regulations, not withdraw access to facilities granted without the prior approval of ComReg. For the avoidance of doubt, Eircom shall continue to make available the in-situ transfer of end to end leased lines;”

If Eircom had met its obligations under D7/05 in respect of BT’s request this would have been a facility already granted prior to the publication of ComReg decision D6/08 and so would have been comprehended by Section 6.2 (iii) of D6/08 and could not have been withdrawn without ComReg’s permission.

Considering the situation that would exist if Eircom had met this request ComReg notes that there is demand for the service, it falls within a regulated market and it is based on a reasonable request. Accordingly ComReg does not consider that there would be any basis for it to agree to a withdrawal of access to this requested service had it been in existence at the effective date of D6/08.

ComReg considers that in determining this dispute it should attempt to put the parties in the position they would have been in had the obligations at the time that the dispute arose been met.

A determination which effectively voided Eircom’s obligation (and conversely BT’s rights to have its request met) because Eircom delayed meeting these obligations would not be aimed at ensuring compliance with obligations.

Additionally ComReg notes that the access obligations under D6/08 would independently apply to this request had it been made after 22 December 2008 and therefore a determination which required Eircom to meet this request would

not have the effect of imposing an access requirement on Eircom that would not also exist under the current set of obligations.

59. The new EU electronic communication regulatory framework required ComReg to define relevant communication markets appropriate to national circumstances, in particular relevant geographical markets within its territory, in accordance with the market definition procedure outlined in the Framework Regulations. D7/05 was ComReg's Market Analysis for Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines in which Eircom was designated as having SMP when this dispute was initiated.

60. There were three markets analysed in this document, the market for retail leased lines and the wholesale markets for both terminating and trunk segments of leased lines. For the purposes of this dispute, only the Wholesale Terminating Segments of Leased Lines is relevant (based on the analysis set out at paragraphs 68 to 90). Pursuant to this market analysis Eircom was designated as having SMP, and the following obligations were mandated: Access, Non-Discrimination, Transparency, Accounting Separation, Price Control and Cost Accounting.

Dispute Analysis:

61. BT has made a request for service that falls within the current obligations applicable to Eircom, the SMP operator in the relevant market, particularly the obligations of access and non-discrimination imposed on foot of this designation. These obligations remain in force until amended or revoked following completion of a new market analysis. If ComReg formulated a determination that Eircom did not have to fulfil BT's request under the current market review simply on the basis that there was a new market review underway it would in effect be sanctioning a regulatory "holiday" for Eircom.

62. Eircom's response 23 December 2008 identified an editorial error in the draft determination which ascribed an argument as having been made by Eircom. This should have been couched as being a potential argument that might be made. This editorial error does not affect the analysis of this potential argument nor the assessment that this line of argumentation would not result in a decision not to consider the dispute.

In assessing the issues in the dispute ComReg has considered the following

63. In assessing this dispute a question arises as to whether Eircom has an obligation to provide the form of access requested. A second question arises as to whether BT's request is reasonable and technically feasible for Eircom to provide. Answers in the affirmative to these questions are likely to lead to a conclusion that in the circumstances of the dispute Eircom has an obligation to provide the access requested.

64. Regulation 31 (1) of the Framework Regulations requires that ComReg "*make a determination, aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute*". Therefore these questions regarding whether Eircom has met the requirements currently imposed on it are material to a proper determination of the dispute.

65. In examining these questions ComReg has considered the following issues

- What obligations relate to the issue under dispute?
- What was requested from Eircom?
- Is what is requested in the market for Wholesale Terminating Segments of Leased Lines?
- Is what was requested reasonable?
- Is the request for associated facilities reasonable?
- What considerations should be taken into account to formulate the determination?

1. What obligations relate to the issue under dispute?

66. BT alleged Eircom's failure to provide its request for wholesale uncontended Ethernet access segments based on uncontended Ethernet Access breached Eircom's obligation to Provide Access. BT based its belief that Eircom has an obligation to meet this access request on Eircom's obligations as imposed by way of ComReg decision D7/05 on foot of Eircom's designation of having SMP in the market for Wholesale Leased Line Terminating Segments.

67. ComReg document D7/05 sets out Eircom's access obligation in the market for Wholesale Terminating Segments of Leased Lines:

“Eircom shall have the obligation to meet reasonable requests for access to, and use of, such wholesale access products, features or additional associated facilities by undertakings requesting access or use of such access products, features or additional associated facilities, which form part of the market for wholesale terminating segments of leased lines.”

2. What was requested from Eircom?

68. BT has requested Eircom to *“offer BT wholesale uncontended Ethernet access segments to enable it to offer Ethernet access products to its own customers BT has no visibility as to how eircom are offering the wholesale elements to itself, but BT requests to the access components to achieve a product akin to that offered by eircom for its National Ethernet Product.”*. Based on the customer access portion of Eircom's retail National Ethernet Product offering (which in summary is an uncontended connection between the customer premises and the serving Ethernet enable exchange)¹³ and its own understanding of the meaning of “Ethernet access segment”, ComReg is of the view that what was requested was a connection between an end user's premises and a local Eircom exchange to be implemented using uncontended Ethernet technology for speeds of up to 100Mb/s.

¹³ Eircom letter to ComReg, 12 February 2008.

3. Analysis of whether what was requested falls within the market for Wholesale Terminating Segments of Leased Lines

69. ComReg has considered whether access segments based on uncontended Ethernet technology fall within the market for Wholesale Terminating Segments of Leased Line

Market definition issues

70. Section 1.5 of D7/05 states:

“As a starting point of its review, ComReg established that the functional characteristics of a leased line are: ‘point to point symmetric capacity between network termination points, whether contended or uncontended, which does not include ‘on demand switching’ or routing functions controlled by the end user.’”

71. In Eircom’s response of 23 December 2008 it disagreed with ComReg’s reliance on section 1.5 of D7/05 in its analysis. Eircom states:

[REDACTED]
[REDACTED]
[REDACTED] ✂ [confidential to

Eircom]

72. Section 1.5 sets out the functional characteristics of a leased line used as the basis for the market analysis. This was set out at the initial stages and remained unchanged throughout the market analysis process. Section 1.6 of the Decision instrument sets out that *“Hence as part of the market definition process, the functional characteristics of a leased line were used to assess the intended use of products offering a service similar to a traditional (i.e. dedicated) leased line.*

Where demand-side substitution is evident, then the market is broadened to include products similar to a traditional leased line.”

73. Section 1.15 of D7/05 also states:

“As far as managed services are concerned, ComReg concluded on the basis of substitutability from a demand and supply-side perspective that certain contended capacity based products (ATM, IP VPN and Ethernet) are to be included in the scope of the market for retail leased lines for bandwidths above 2 Mb/s.”

74. Retail product functionality must be supported by underlying wholesale input functionality. As such it is directly relevant to the wholesale market to consider the retail functionality that must be supported. To the extent that leased lines based on Ethernet are part of the retail market then wholesale inputs to support these Ethernet products must be in the related wholesale market.

75. Paragraphs 98 to 102 of this determination set out that the existing wholesale inputs are not sufficient to support OAOs offering retail Ethernet offerings and therefore a Wholesale Ethernet offering is required.

Technology neutrality

76. In Eircom’s response of 23 December 2008 it stated:

[REDACTED]

[REDACTED]
[REDACTED] ✂ [confidential to Eircom]

77. ComReg's position is not that technology neutrality is sufficient in itself to cause Ethernet based products to be included in the market. Rather that the fact that the obligations in D7/05 are technologically neutral does not allow a request to be excluded simply on the basis of the technology.

78. Therefore, the fact that the requested access is based on a different technology (Ethernet) to existing mandated products which fall within the Market for Wholesale Terminating Segments of Leased Lines does not in itself form a basis to conclude that Eircom's access obligation does not apply to this request for Ethernet based access.

79. In Eircom's response of 23 December 2008 it stated:

[REDACTED]
[REDACTED] ✂ [confidential to Eircom]

80. It should be noted that the obligations in D7/05 are technologically neutral. Therefore, the fact that the requested access is based on a different technology to existing mandated products which fall within the Market for Wholesale Terminating Segments of Leased Lines does not in itself form a basis to conclude that Eircom's access obligation does not apply to this request for access.

81. Market definitions describe the functional characteristics of products or services which fall within a market. Where a product or service has functional characteristics which conform to these, it is by definition within the market. It is

sufficient for ComReg to show that a particular product or service conforms to the market definition for it to fall within the market. Any other approach including conducting a substitutability analysis amounts to a redefinition of the market. The purpose of *ex ante* regulation is prospective in nature and must be sufficiently flexible to encompass market developments, including the introduction of new products, during the period covered by the review. Any requirement for a new market analysis each time a new product is introduced would render unworkable the process of market review set out in the Framework Regulations. There is therefore no need for the determination to analyse the substitutability or otherwise of products that fall within the market definition.

82. It should be noted that products based on Ethernet technology were clearly considered to be encompassed by the market definition as is evidenced by the reference to Ethernet based products in ComReg document 05/03¹⁴ and their explicit inclusion in the related retail market.
83. Notwithstanding ComReg's position that a substitutability test is not required ComReg is of the view that if Ethernet products are in the same retail market as leased lines based on traditional solutions then if a hypothetical monopolist increased the price of the wholesale terminating segment inputs to traditional leased lines OAOs would switch to Ethernet based terminating segments in order to remain competitive in the related retail market. ComReg notes that this might also prompt a migration to an Ethernet based trunk segment however this migration would be in a separate market.

Boundary split between Trunk and Terminating Segments

¹⁴ Response to Consultation and Draft Decision Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National) 05/03. 17 January 2005

84. The definition as set out in D7/05 encompasses services based on uncontended Ethernet technology and as such services based on this technology fall into the markets for trunk and terminating segments of leased lines, as defined in D7/05.

85. In Section 1.18 of D7/05 ComReg sets out that the appropriate boundary split between trunk capacity and terminating segments occurs at the customer's Leased Line serving exchange.

86. Eircom's relevant Ethernet products comprise of two components, a core network component and a customer access component.

[REDACTED]
[REDACTED]
[REDACTED] ✕ [confidential to

Eircom] The customer access component is an uncontended connection between the end-user's premises and the serving exchange and falls within the definition of the market for Wholesale Terminating Segments of Leased Lines.

87. In its response to the Draft Determination Eircom states that:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ✕ [confidential to Eircom]

88. In this regard ComReg notes that as set out at paragraph 50 of the draft determination the boundary split for Terminating Segments is the customer's leased line serving exchange and not as stated by Eircom in its response the local exchange. Eircom's statement that for Eircom to provide the product would require that it must be extended to the relevant Ethernet Switching Unit (ESU) reflects ComReg's understanding of the Technical Design Document for National Ethernet. The ESU acts as the exchange based Ethernet interface for the customer connection and Ethernet based services cannot be offered without connection to the ESU. Therefore for the purposes of an Ethernet based leased line the leased line serving exchange is the relevant ESU in the Eircom network. Based on the Technical Design Document for National Ethernet where the ESU is not in the same exchange as the copper loop access to the customer's premises (the local exchange) then the connection to the ESU is effected using an "access tail" between the local exchange and the ESU exchange. This enables a dedicated uncontended connection between the customer's premises and the ESU. For Ethernet based services the earliest point in the Eircom network where it would be possible to hand a customer's Ethernet connection over to another operator for onward routing is the exchange where the relevant ESU is located. On this basis the totality of the connection between the customer's premises and the ESU is in the terminating segment market.

89. Based on Eircom's National Ethernet product [REDACTED]
[REDACTED]
[REDACTED]
✂ [confidential to Eircom] The access link is therefore a distinct element of Eircom's overall retail Ethernet product.

90. In Eircom's response of 23 December 2008 it stated:

[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

91. As can be seen from paragraphs 69-90 ComReg's analysis shows segments based on uncontended Ethernet technology fall within the market for Wholesale Terminating Segments of Leased Line and is consistent with section 1.20 of D7/05

92. Based on the above ComReg is of the view that an access Segment of a Leased Line provided using uncontended Ethernet technology, falls within the market for Wholesale Terminating Segments of Leased Lines but not into the market for Wholesale Trunk Segments of Leased lines.

Setting out of analysis in Draft determination

93. In Eircom's response of 23 December 2008 Eircom stated:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂
[confidential to Eircom]

94. ComReg disagrees with Eircom on this issue. The draft determination at paragraph 47 defines the characteristics of a leased line, paragraph 48 sets out that services based on Ethernet may be leased lines, paragraphs 68 to 72 set out

that the provision by BT of Ethernet wholesale inputs based on the existing PPC portfolio is not viable. Paragraph 50 describes the boundary split for Terminating and Trunk Segments, paragraphs 51 to 53 set out that the requested access conforms to the functional definition of a leased line and also conforms to the boundary split for trunk and terminating segments.

95. This final determination expands on these points and addresses additional issues raised by Eircom such as the requirement for a substitutability test.

Conclusion

96. BT wishes to be able to provide services akin to the Eircom National Ethernet product with speeds up to 100Mb/s. For this product, access between the serving exchange and the customer premises is required. BT has requested that Eircom “offer BT wholesale uncontended Ethernet access segments to enable it to offer Ethernet access products to its own customers”. The functionality that would be required would be equivalent to that which comprises Eircom’s own Ethernet customer access links that is an uncontended connection between the customer’s premises and the serving exchange.

97. This functionality falls within the definition of the market for Wholesale Terminating Segments of Leased Lines and therefore BT’s access request is for wholesale terminating segments of leased lines. Requests for access based on this functionality are subject to the obligations set out in D7/05.

a. Assessment of the facilities that Eircom provides to itself in respect of Ethernet Access segments.

98. Eircom in its response to the Draft Determination states that [REDACTED]
[REDACTED]
[REDACTED] ☒ [confidential to Eircom].

99. Eircom stated in its letter on 28 January 2008 that it doesn't provide the service requested by BT.

“eircom does not provide the capabilities requested by BT, and, as far as an obligation to do so is concerned, eircom considers that the capabilities fall outside of the scope of the markets defined for purposes of D7/05.”

100. ComReg has examined whether Eircom provides an input to its own retail Ethernet product, facilities which fall into a regulated market and which have been requested by BT.

101. The two components of Eircom's retail Ethernet product as set out at Paragraph 86 correspond to underlying inputs to the overall retail Ethernet product. The customer access connection is a connection between the customer premises and the serving Ethernet exchange. This input falls into the market definition for Wholesale Leased Line Terminating Segments as set out in D7/05. The second input consists of the Ethernet Core Network. [REDACTED]
[REDACTED]
[REDACTED] [confidential to Eircom] This input falls into the market definition for Wholesale Leased Line Trunk Segments

102. Based on the above it is ComReg's view that Eircom supplies itself Wholesale Terminating Segments of Leased Line based on uncontended Ethernet technology as an input to its retail Ethernet product.

103. In Eircom's communication to ComReg dated 12 February 2008, Eircom compared BT's request to Eircom's retail Ethernet product. However, the requested access is different to the Eircom retail Ethernet product, in that the Eircom retail Ethernet product has as inputs underlying components, which fall into two wholesale markets, the market for Wholesale Trunk Segments of Leased Lines and the market for Wholesale Terminating Segments of Leased Lines. Only functionality equivalent to the terminating segment input to

Eircom's overall retail Ethernet product has been requested. This is the same functionality as Eircom self supplies as part of its National Ethernet Product.

104. In Eircom's response of 23 December 2008 Eircom disagreed with ComReg's analysis. Eircom states:

[REDACTED]

[confidential to Eircom]

ComReg has clearly set out its rationale in paragraphs 69-98 for its conclusion that only functionality equivalent to the terminating segment input to Eircom's overall retail Ethernet product has been requested. In this dispute determination ComReg is not attempting to directly or indirectly regulate Eircom's retail National Ethernet product, but only relevant wholesale inputs to Eircom's products which fall into regulated markets.

4. Is what was requested reasonable?

105. In assessing whether or not Eircom has an obligation to meet this particular request, ComReg has considered whether BT's request is reasonable. In doing so it considered the Access Directive¹⁵ and Regulation 13(4) of the Access Regulations. This analysis underpinned ComReg's reasons for adopting this approach in this case are set out below.

¹⁵ Directive 2002/19/EC Of The European Parliament And The Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

106. In the Response to Consultation and Draft Decision for the existing market analysis ComReg document 05/03¹⁶ issued by ComReg prior to the publication of D7/05, ComReg set out as follows:

“Additionally and to allow innovation, ComReg considers that an obligation to meet reasonable requests should be attached to the access obligation. This is necessary to allow OAOs to request variants of products (for example the provision of wholesale leased lines above 2 Mb/s or non traditional interface products such as Ethernet backhaul) and is appropriate given the experience of OAOs and ComReg to date in requiring Eircom to introduce new products. ComReg does not propose at this stage to mandate the provision of any such new products or features but expects Eircom to consider requests for such from OAOs in the light of Regulation 13 (4).”

107. Therefore ComReg believes it is appropriate to assess BT’s request in the light of Regulation 13 (4) of the Access Regulations. Eircom itself used this approach in its submission of 12 February 2008.

108. Regulation 13(4) of the Access Regulations sets out the factors that must be taken into account when assessing whether or not to impose access obligations. These are:

(a) The technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;

(b) The feasibility of providing the access proposed, in relation to the capacity available;

¹⁶ Response to Consultation and Draft Decision Market Analysis: Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines (National) 05/03. 17 January 2005

(c) The initial investment by the facility owner, bearing in mind the risks involved in making the investment;

(d) The need to safeguard competition in the long-term;

(e) Where appropriate, any relevant intellectual property rights; and

(f) The provision of pan-European services.

109. Therefore, in considering the reasonableness of this request for access in the context of an access obligation, ComReg has assessed the request against each of these factors.

110. Recital 19 of the Access Directive states the following :

“Where obligations are imposed on operators that require them to meet reasonable requests for access to and use of networks elements and associated facilities, such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity.”

111. As has been set out at paragraph 67 an access obligation in the market for Wholesale Terminating Segments of Leased Line has been imposed on Eircom. As has also been set out above at paragraphs 68 to 74 the service requested by BT falls into this market. Therefore ComReg considers it appropriate to consider whether there are objective criteria for Eircom not to meet this access request.

Assessment of BT’s Request for Wholesale Terminating Segments of Leased Line in the light of Regulation 13 (4) of the Access Regulations.

- a. Consideration of the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;**

112. In ComReg's view it maybe technically possible for BT to provide the requested service using elements purchased from the existing PPC product set. For a 10 Mbit/s Ethernet connection this would require BT to buy 5 separate 2Mbit/s EULs and "bond" these circuits together to form a composite 10Mbit/s connection. Ordering this would require co-ordination of the five individual EUL orders and purchase and installation of additional requirement to "bond" the individual circuits together.
113. It is ComReg's understanding that in order to provide one 2Mbit/s leased line; ■ ✂ [confidential to Eircom] copper pairs are used between the customer premises and the local Eircom exchange. In the case of Eircom's National Ethernet product, Page 10 of the technical description sets out that a 10Mbit/s Ethernet connection requires ■ ✂ [confidential to Eircom] copper pairs. A solution that requires the bonding of 2Mbit/s leased lines together would require ■ ✂ [confidential to Eircom] pairs, rather than the ■ ✂ [confidential to Eircom] pairs required in Eircom's solution. It is likely that the former configuration would have a longer delivery lead time due to the requirement to use and source this greater amount of copper pairs in the access network.
114. The resulting configuration would have a higher likelihood of faults as the number of components used in its construction would be much higher with up to six separate pieces of customer premises equipment (one for each of the 5 2MBit/s EULs plus one to bond them together) together with ■ ✂ [confidential to Eircom] times as many copper pairs than the equivalent implementation used by Eircom Retail. This means that from a quality and economic point of view, it would be extremely difficult for BT to replicate the wholesale input supplied to Eircom Retail.
115. For a 100Mb/s Ethernet product, a similar situation applies. BT could bundle separate 34Mb/s, 45 Mb/s EULs or use an STM1 EUL. In these scenarios BT would be forced to buy multiple products or alternatively a product which is

larger than required. This approach would require BT to purchase bundled elements which are not necessary for the provision of the requested service.

116. For the reasons set out in paragraphs 112,114 and 115, ComReg does not consider that it is technically or economically viable for BT to install competing facilities, in light of the rate of market development, taking into account the nature and type of access involved. Further to this, having regard to ComReg’s objectives under section 12 of the Communications Regulation Act 2003 (“the 2003 Act”), and in the interests of promoting competition and contributing to the development of the internal market, ComReg considers that BT’s request, in relation to Regulation 13(4)(a), appears to be reasonable.

117. ComReg notes that Eircom’s response to the draft determination did not refer to the analysis of or conclusions on the technical and economic feasibility of using or installing competing facilities.

b. The feasibility of providing the access proposed, in relation to the capacity available;

118. In its letter of 15 September 2008 Eircom stated that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ✂ [confidential to Eircom]

119. ComReg notes that this response indicates that the capacity on Eircom’s National Ethernet Platform is currently capable of meeting the request for access. Any capacity constraint appears to be in the management of capacity based on future service demands. The Eircom submission implies that the National Ethernet platform is capable of being augmented. This is supported by the Eircom Technical Design Document for National Ethernet

[REDACTED]
[REDACTED]
[REDACTED] ✂ [confidential to Eircom]

120. Based on the fact that Eircom envisages the augmentation of capacity on the National Ethernet platform it is ComReg's view that there is no absolute capacity constraint which would prevent this access request being met.

121. Also given that the purpose of BT's request as explicitly stated in its SOR is to replicate Eircom's overall National Ethernet product any end user consuming capacity on the Eircom National Ethernet platform could be either a wholesale or an Eircom Retail customer and it is ComReg's view that wholesale demands on the Ethernet platform will not be entirely incremental to Eircom's own requirements but will in some measure substitute for it.

122. Based on the above analysis it is ComReg's view that it is feasible to provide the access requested in relation to the capacity available.

c. The initial investment by the facility owner, bearing in mind the risks involved in making the investment.

123. As the systems to support terminating segments are already in place for Eircom Retail, any investment required would only be to the extent necessary to productise these elements for external supply. It is ComReg's view that the technology used for its own self supply could be substantially re-used by Eircom to supply this product to BT. This in turn would spread the cost of any fixed elements associated with this product improving the cost recovery of the initial investment and lowering investment risk.

124. In the market for Wholesale Terminating Segments of Leased Lines, Eircom has an obligation of cost orientation, imposed by way of Section 10 of the

Decision and pursuant to Regulation 14 of the Access Regulations¹⁷. Cost orientation guarantees Eircom a set level of return. Eircom's Weighted Average Cost of Capital (WACC) is currently set at 10.21%.¹⁸ This ensures that Eircom has an adequate rate of return and has the ability to recover its network build costs.

125. ComReg is of the view that based on the analysis set out at paragraphs 112 to 115 the use of Ethernet based technology to deliver the wholesale inputs to retail customer access links is a more cost efficient means of delivering dedicated capacity than the use of the existing wholesale inputs. Hence there was very little risk involved for Eircom in investing in Ethernet based wholesale inputs once it had decided to offer a retail Ethernet offering. (This investment choice was in essence a choice to use higher cost existing wholesale inputs or lower cost Ethernet based wholesale inputs to the customer access link portion of its product)

126. Eircom may also benefit from additional economies of scale due to the fact it will be able to factor in BT's future Ethernet orders into its future network build plans.

127. Given the investment risks already assumed by Eircom in relation to the Ethernet product deployment and the potential additional revenue stream that arises from the offering of a Wholesale Uncontended Ethernet Access product, ComReg considers that under Regulation 13(4)(c), BT's request appears reasonable.

128. In Eircom's response of 23 December 2008 it stated:

¹⁷ Section 6, Market Analysis for Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines 07/05 30 March 2005.

¹⁸ Review of Eircom's Cost of Capital 07/88 1 November 2007

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

129. ComReg notes that Regulation 13(4) of the Framework Regulations sets the criteria to be used by ComReg in deciding whether or not to impose an access obligation. In the context of the absence of regulation it is therefore an *ex ante* test prior to the imposition of regulation. ComReg notes that in this market Eircom has had an access obligation imposed. In this context the consideration of BT's request in the light of Regulation 13(4) is not an *ex ante* test prior to imposing an obligation but an *ex post* test after the imposition.

130. ComReg notes that the requested service falls within a regulated market. Even if Eircom had not launched an Ethernet product then based on the market definition this service would fall within this market. Provided it passed the other tests for reasonableness, and provided Eircom could recover its costs, Eircom would have to meet requests for this product even in the absence of its self-

supply. ComReg is of the view that the share of innovation issue raised by Eircom is therefore not relevant in the context of the access obligation.

131. ComReg considers that it is proper to consider investment risks in the context of regulation having been imposed and obligations existing and in the context that Eircom had already launched the product and as such had already assumed the investment risk for this wholesale input. As set out at paragraph 125 in ComReg's opinion this is a low risk

132. As previously stated in paragraph 127 Eircom may also benefit from additional economies of scale due to the fact it will be able to factor in BT's future Ethernet orders into its future network build plans.

133. Given the investment risks already assumed by Eircom in relation to the Ethernet product deployment and the potential additional revenue stream that arises from the offering of a wholesale Ethernet Access product, ComReg considers that under Regulation 13(4) (c), BT's request appears reasonable.

d. The need to safeguard competition in the long-term

134. Eircom's letter dated 12 February 2008, stated the following:

“Eircom's National Ethernet product was developed in response to competition in the retail leased lines market and that is it is priced competitively in order to meet competition.”

135. BT's request is for access to a wholesale product that Eircom acknowledges was developed in response to competition in the related retail market. On this basis, and in light of the difficulties set out above relating to the replicability of the product by BT of the wholesale input, if this access request is not met it will limit the ability of BT and Other Authorised Operators (OAOs) to compete in the related retail market. If Eircom's Retail Ethernet product is priced as competitively as indicated by Eircom's response then it will force offerings and

products based on traditional leased line solutions out of the market. This in turn will reduce overall competition in the market in the long term. This access request therefore does not have the effect of reducing long term competition but safeguarding it, as it ensures that competitive offerings will be available even in the face of declining demand for Leased Lines based on traditional solutions.

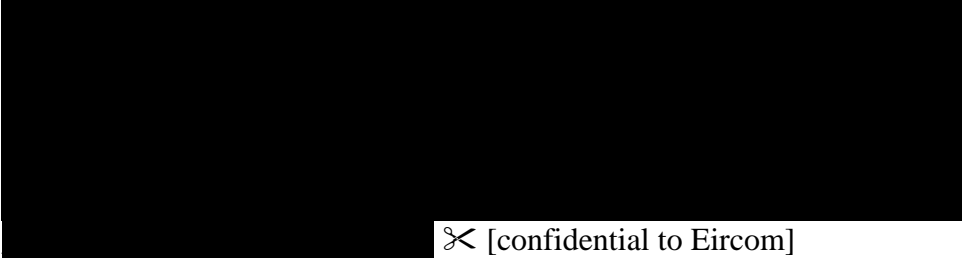
136. Eircom in its submission on the draft determination states that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ✂

[confidential to Eircom]

137. ComReg has already mandated that Eircom should meet reasonable requests for access that fall within the market for Wholesale Terminating Segments of Leased Lines. As set out in the determination the provision of this wholesale input would allow BT to offer competing retail services. The form of access which is the subject of this dispute is only one wholesale input to a retail offering and requires investment by BT in the other wholesale inputs before it can be translated into a such a retail offering. Therefore granting this request for access encourages investment by BT.

138. In Eircom's response of 23 December 2008 it stated:

[REDACTED]



✂ [confidential to Eircom]

139. In the draft determination ComReg did not state that a product developed as a substitute for other capacity-based products would limit competition. ComReg did state that the inability of OAOs to offer retail services based on this would limit the ability of BT and Other Authorised Operators (OAOs) to compete in the related retail market and ultimately force *products* based on traditional leased line solutions out of the market.

e. Where appropriate, any relevant intellectual property rights;

140. ComReg is unaware of, and neither party has raised to ComReg any difficulties which exist with the intellectual property rights in respect of the request.

141. ComReg notes that intellectual property rights ('IPR') is an issue which is commonly dealt with in commercial contracts and therefore believes that any specific issues relating to IPR in connection with the requested access can also be dealt with by way of contractual agreement.

142. As such this consideration does not impact on the reasonableness of the request made by BT.

f. The provision of pan-European services

143. This access request is only applicable in the Irish market. However, retail services based on Wholesale Terminating Segments of Leased Lines using Ethernet technology can form part of transnational connections between end-user locations.

144. The following is an extract from Eircom’s published offering as it appears on Eircom's website¹⁹

“Private IP MPLS Network Connectivity

eircom business IP, our nationwide IP MPLS network, offers full traffic prioritisation and Quality of Service guarantees for your critical data traffic. Ethernet access speeds from 10Mbps to 100Mbps are ideal for cost effective LAN speed connectivity. Our global partnership with Orange Business Services ensures seamless, end-to-end service for your traffic between Ireland and all your international sites.”

145. From this it can be seen that Retail Ethernet facilitates a transnational service, as such having regard to ComReg’s objectives under section 12, ComReg considers that the provision of Wholesale Ethernet inputs across the market, is not unreasonable in consideration of the furtherance of promoting the interests of users within the European Community.

Assessment of whether there are objective criteria for refusing BT’s request.

146. Eircom stated in its letter of 15 September 2008 that

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

147. ComReg has seen no evidence based on this position that Eircom has carried out an analysis which would allow it to properly conclude that the provision of the requested access would not be technically feasible.

¹⁹ Eircom Enterprise website: <http://enterprise.eircom.net/solutioncentre/products/>

148. In the absence of this analysis the following is ComReg’s assessment of the technical feasibility of providing the access requested.

149. From an examination of the technical documents associated with Eircom’s National Ethernet product, it appears that at least one solution to support BT’s request could be based on the design proposed by Eircom for [REDACTED] [REDACTED] [REDACTED] ✂ [confidential to Eircom] set out at pages 14 and 15 of Eircom’s Technical Design Document for National Ethernet. In the case of BT’s request [REDACTED] [REDACTED] [REDACTED] ✂ [confidential to Eircom] In addition, other more efficient solutions may be possible. Therefore ComReg is of the view that it is technically feasible for Eircom to meet this access request.

150. It is ComReg’s view that if Eircom has designed the solution summarised at paragraph 149 as part of the Retail Ethernet product then it should also have envisaged mechanisms to deal with ordering, provisioning and billing of this solution and therefore it is technically feasible to deal with these ancillary product issues.

151. In respect of the development work which Eircom has outlined as being required on ordering, provisioning and billing systems, ComReg is of the view that in the short term, manual processes can be designed and implemented to meet these requirements as the initial order volumes are likely to be low given that BT will not be in a position to begin making retail offers based on this wholesale input until after the product becomes available and BT has its own network infrastructure in place to interface with this product.

152. In Eircom’s response of 23 December 2008 it stated:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✕ [confidential
to Eircom]

153. ComReg has addressed Eircom concerns in paragraph 149 -151. Eircom has not stated any technical reasons or objected to implementing manual processes until its systems upgrades have been completed. Of these manual processes, prior to Eircom’s minimum 6 month development period, only provisioning should be a significant issue. Leased line billing bills are issues once a quarter, and therefore it is unlikely that BT would be issued a bill within the first 6 month period. Additionally repair issues should be at a minimum on a newly provisioned service.

Conclusion

154. Based on the above it is ComReg’s preliminary conclusion that BT’s request for a Wholesale Terminating Segment of Leased Lines product is reasonable taking account of the criteria set out in Regulation 13(4) of the Access Regulations and the above assessment of whether there are objective criteria for not meeting the request.

5. Is the request for an associated facility reasonable?

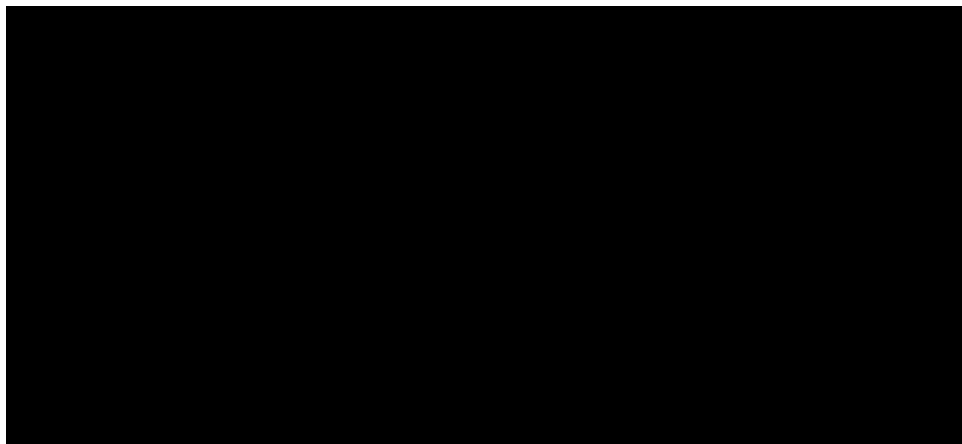
155. In addition to the request for terminating segments, BT also requested co-location for use in association with the requested Ethernet terminating segments and traffic aggregation of terminating segments. In the first instance ComReg has analysed the reasonableness of BT's request in relation to Ethernet terminating segments in paragraphs 63 to 154 above. In relation to the associated facilities requested, that is co-location and aggregation, the equivalent analysis for each is set out below.

Request for associated facility – Co-location

156. As has been set out in paragraph 154 of this document, BT's request for the Uncontended Wholesale Ethernet Access segment, is a reasonable request for a product that is within the relevant Market and therefore subject to the access provisions set out in section 5 of D7/05²⁰.

157. As this request for access is subject to an access obligation, requests for associated facilities related to this form of access may also be subject to the access obligation

158. In Eircom's response of 23 December 2008 it stated:



²⁰ eircom shall adhere to the principle of non-discrimination when providing leased lines referred to in Regulation 15 of the Universal Service Regulations. eircom shall apply similar conditions in similar circumstances to organisations providing similar services, and shall provide leased lines to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners

159. ComReg considers that this position is not supported by the definition of associated facility. While a facility which is indispensable or necessary must be associated with electronic communications service (if they were not then the service could not exist) it is possible for facilities to be associated with a service which support and/or enable the provisions of services but not be indispensable to the provision of services. Eircom's position is that "associated with" means indispensable or necessary. This meaning is at variance with the standard usage and definition²¹ of associated which does not have the requirement that the linkage between the associated elements be one of necessity.
160. ComReg notes that the doctrine of "essential facilities" is an *ex post* competition law concept. The issue of associated facilities is an *ex ante* regulatory framework concept.
161. Arguing in the alternative the definition of associated facility puts no bound on the type of end service to be offered. There is no provision for Eircom to set any constraint on the end service that an OAO might offer. So if an OAO chooses to offer an end service which is based on some feature of its own network (such as the fact that it has extended its infrastructure to a number of Eircom premises and as such may be able to leverage the economics of its network topography to construct a competitive end service) then facilities which are necessary or indispensable to support and/or enable such end services are associated facilities.
162. End-to-end retail services from one end user premises to another cannot be provided solely by use of Terminating Segments. Some other element to connect the terminating segments at each end of the leased line is required. As

²¹ From Concise Oxford Dictionary tenth edition "associate (v) I make a conceptual connection between. 2. (usu associate with) meet or have dealings with. (associate oneself with) allow oneself to be connected with or seen to be supportive of."

this other element is necessary to make use of the terminating segment, it is an associated facility.

163. Eircom at paragraph 23 of its submission concurs with ComReg that this connectivity is required. Based on Eircom's interpretation of the definition of associated facility this connectivity is an associated facility. Requests for specific solutions which allow this connectivity are therefore requests for associated facilities.

164. In the context of the existing mandated products which fall within the Market for Wholesale Terminating Segments of Leased Lines, this is achieved by Eircom providing connectivity by way of PPC transport links between the Terminating Segment and the Access Seeker network. It is then for the access seeker to connect the two ends of the circuit across its own network. The connectivity between the Terminating Segment and the handover point is bundled with the existing product and is an associated facility.

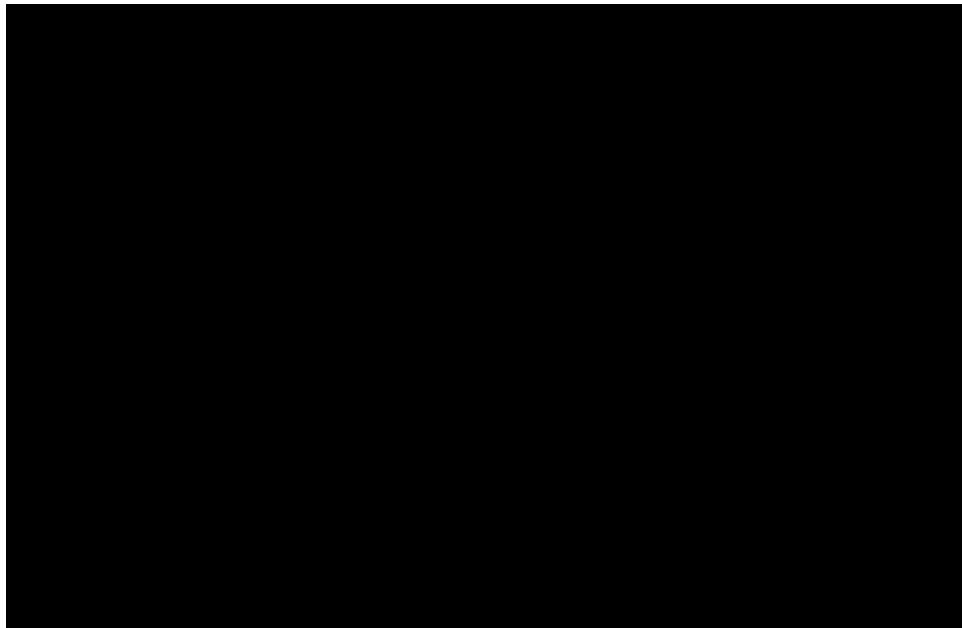
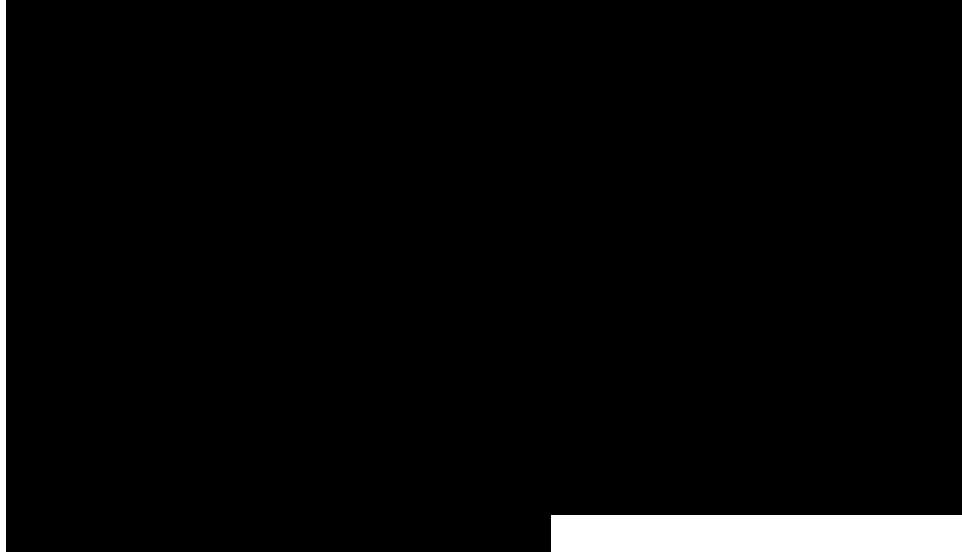
165. This is not the only possible solution to providing the connectivity between the two terminating segments. The alternative is for the handover to the access seeker network to be affected on the Eircom premises where the terminating segment ends.

166. In order to do this the access seeker would require the ability to locate its own equipment in the Eircom premises. In this configuration the co-location of the access seeker equipment in the Eircom premises is an associated facility, as it is required to make use of the terminating segment.

167. ComReg notes that as set out at paragraphs 153-166 above in the circumstance where the request for the Wholesale Terminating Segments of Leased Lines is reasonable then co-location may be an associated facility and requests for co-

location to be used in conjunction with Leased Line Terminating Segments must be considered on their merits.

168. In Eircom's response of 23 December 2008 it stated:



✂ [confidential to Eircom]

169. As has been set out at Paragraph 163 the connectivity between the Terminating segment and the OAO is an associated facility and requests for solutions that can provide such connectivity are requests for associated facilities. Eircom's arguments as to the length of the copper loop for LLU and

of the capacity based nature of leased lines are not relevant to a consideration of whether the requested co-location is a request for an associated facility.

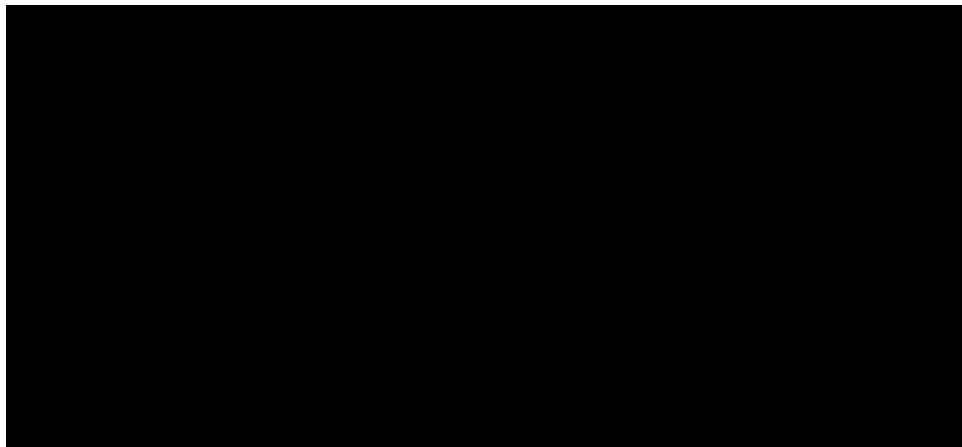
170. This is what BT has requested as an associated facility and it is ComReg's view therefore that this part of BT's request is for an associated facility and would be subject to the provisions of section 5.1 of Annex C to Decision No. D7/05 and Eircom's obligation to meet a reasonable request for access.

171. Not all requests for access must be met but Eircom must meet reasonable requests for access. In assessing whether the request for co-location is reasonable, ComReg has taken account of the criteria set out in Regulation 13(4) of the Access Regulations.

1. Assessment of the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;

172. As has been set out above the alternative facility to co-location would be the use of some form of connection between the Eircom and Access Seeker network other than on the Eircom premises.

173. Eircom in its submission on the draft determination states :



✂ [confidential to Eircom]

174. ComReg is of the view that when the requested access is in the form of a request which specifically leverages the availability of an existing product, whether or not it is in a different market, it is entirely appropriate to take into account the synergies which arise when assessing the economic viability of the request vis a vis alternatives which do not use such leveraging.

175. ComReg notes that at paragraph 24.3 of its submission Eircom itself proposes that account should be taken of the existing services availed of by operators requesting this associated facility where it states “*Indeed operators would have already in place transport link solutions for PPC and interconnect products and it is not clear why this infrastructure should not be used and preference be given to other types of facilities which are not availed of as a matter of course for the provision of dedicated capacity.*”

176. In a situation where an Access Seeker avails of, or intends to avail of, other wholesale products from Eircom which can also be connected by way of a co-location facility not using this facility would mean that the Access Seeker would be required to implement two separate solutions each with its own set-up and operational costs. As there is an existing co-location facility provided in conjunction with Local Loop Unbundling (LLU) this means that the ability to use the co-location for multiple wholesale services spreads the costs of the co-location across multiple services, lowering the overall cost for the Access Seeker.

177. Eircom sets out in its response to the draft determination that

[REDACTED]
[REDACTED]
[REDACTED] ✕ [confidential to Eircom]

178. Eircom has stated that “*Eircom’s National Ethernet product was developed in response to competition in the retail leased lines market and that it is priced*

competitively in order to meet competition". BT stated in its SOR that it wished "to achieve a product akin to that offered by eircom for its National Ethernet Product".

179. As set out above the alternative to collocation is based on using as an input an existing wholesale product. This product has known pricing and associated internal costs for OAOs.

180. In order for an OAO to construct a viable retail offering which is competitively priced it would not incorporate higher cost inputs when lower cost inputs are available. Such an approach would not be economically viable as it would not be in a position to compete to the maximum extent. OAOs are best placed, based on their knowledge of their own networks and businesses, to determine which inputs yield the lowest overall input costs for that OAO.

181. Rationally then demand for one wholesale input over another will only arise if the demanded input offers an ability to compete more effectively in the related retail market. It is not economically sustainable for an OAO to be limited in its ability to compete in the retail market by restricting it only to avail of an input it believes is inferior to its requested input.

182. Requiring an Access Seeker to use separate facilities for Ethernet Terminating Segments and LLU related services would be a requirement to purchase elements which are not necessary for the provision of the service as the functionality provided by these separate facilities could in fact be provided by a single combined co-location facility. This approach conflicts with Eircom's obligations set out in Paragraph 8.2 of Annex C to Decision Notice D7/05²² and

²² "...eircom shall publish and keep updated a reference offer ("RO") in respect of the services and facilities referred to in sections 5 and 7 that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested."

Paragraph 7.1 of Decision D8/04²³ as this would require OAOs to pay for a facility not necessary for the service requested.

183. Eircom at paragraph 24.2 of its submission on the draft determination states :

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

184. If an OAO has co-location footprint for LLU which has a less than full rack and this rack can accommodate the OAOs Ethernet equipment then requiring the OAO to purchase a second co-location footprint to house the Ethernet equipment would not be necessary for the provision of the Ethernet service. The

²³ Designation of SMP and Decision on Obligations: Market Analysis: Wholesale unbundled access (including shared access) to metallic loops and sub-loops - "...eircom shall have an obligation of transparency as provided for by Regulation 10 of the Access Regulations and shall publish an ARO that is sufficiently unbundled to ensure that authorised undertakings are not required to pay for facilities which are not necessary for the service requested."

reason that the LLU co-location facility cannot be used for other services is not technical or operational but contractual. Eircom could choose to allow this facility to be used on a commercial basis but chooses not to. As set out previously the issue of co-location is dealt with in the context of it being an associated facility. There is no prohibition in the Regulations on an associated facility being common to more than one market. For example the ability to electronically place orders for wholesale services is clearly an associated facility. Eircom uses a single IT system, the Unified Gateway, to process orders for multiple regulated markets. Eircom does not require that OAOs interface to multiple IT systems to place orders for products in each of these multiple markets but leverages the operational efficiencies of a shared resource.

185. The use of a common associated facility across multiple markets does not give rise to misconceived linkages if such usage can be justified. As set out above the use of a common co-location facility across LLU and wholesale Ethernet products has economic and operational advantages.

2. Assessment of the feasibility of providing the access proposed, in relation to the capacity available;

186. The co-location requested by BT is technically and operationally equivalent to that already provided by Eircom as an associated facility in respect of LLU. Therefore the provision of this facility is technically and operationally feasible.

187. The LLU co-location product is already subject to availability constraints and as such the requested facility is by definition constrained to be available where capacity exists.

188. Allowing two services such as LLU and Ethernet Terminating Segments to share the same co-location facility is more efficient than requiring each to use a separate co-location facility with a separate floor space allocation. Therefore allowing the services to share co-location facilities optimises the capacity available.

189. While the facility requested is technically and operationally feasible some contractual changes may be required to allow this facility to be shared across two regulated products. ComReg is of the view that these issues are not insurmountable and that the contractual matters do not impact materially on the capacity available.

190. In Eircom's response of 23 December 2008 it stated:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂ [confidential
to Eircom]

191. ComReg notes that Eircom's LLU service comprises three components as set out in Eircom's Access Reference Offer, Physical Co-location Service, Unbundled Local Metallic Path (ULMP) Service and Line Sharing Service. The ULMP service is defined as ending on the Main Distribution Frame.²⁴ The Physical Co-location Service provides that there is a connection from the OAO equipment in the rack of the OAO availing of co-location to the demarcation point of the ULMP product²⁵. ComReg sees no functional difference between this and the provision of a connection between the OAO equipment in the rack of the OAO availing of co-location to the demarcation point of any Wholesale Uncontended Access Segment product. ComReg accepts that there may be

²⁴ Appendix 1 to Service Schedule 102 Product Description for Unbundled Local Metallic Path

²⁵ Technical Manual for Physical Collocation Service as defined in the eircom Access Reference Offer Service Schedule 101 v.2.34, 22 April 2008

technical differences as to the type of cable used to effect this connection (it is likely to be based on Optical Fibre for the Ethernet product as opposed to Copper for the ULMP product). However in the context of the overall co-location product which addresses issues such as power supply, floor space allocation. OAO access to the co-location area, Air conditioning, health and safety etc. this is a minor variation which is not material to the overall assessment that the facility requested is technically and operationally feasible

3. Assessment of the initial investment by the facility owner, bearing in mind the risks involved in making the investment;

192. The facility requested is co-location which conforms to the co-location facility associated with LLU. The price control obligations set out in Decision Notice D7/05 and Decision D8/04 are aligned as they specify that for LLU “Eircom shall have an obligation to offer cost oriented prices for LLU services, co-location, and associated facilities on the basis of forward looking long run incremental costs (‘FL-LRIC’)” and for Terminating Segments of Leased Lines based on PPCs “Eircom’s prices for PPCs shall be cost oriented and such costs shall be calculated using a pricing model based on forward looking long run incremental costs (‘FL-LRIC’).”

193. In addition, ComReg has set a (WACC) as a basis for allowing Eircom an adequate rate of return for regulatory purposes, including the setting of Eircom’s regulated wholesale prices. (ComReg Decision D1/08, document number 08/35, 22 May 2008)

194. Therefore Eircom has scope to recover costs associated with the initial investment by providing this facility, bearing in mind the risks involved in making the investment.

195. In Eircom’s response of 23 December 2008 it stated:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

196. The similarity of the price control regimes for Leased lines and LLU is relevant because it means that Eircom is not constrained to sell at a particular price for example this would be the case if one or both of the price controls were on a “retail minus” basis. Rather in both of the relevant markets ComReg allows Eircom to base its prices on the allowable costs (albeit on a FL-LRIC basis). Further ComReg has a rate of return which allows Eircom to obtain a return on its investment. To the extent that a shared co-location facility incurs additional allowable costs because of the fact that it is availed of in connection with a product other than LLU then these costs can be recovered by Eircom.

4. Assessment of the need to safeguard competition in the long-term;

197. As has been set out in paragraph 116 granting the request for access to Terminating Segments based on Ethernet safeguards competition in the long term. Failing to give access to this associated facility directly diminishes the competition that granting the requested access engenders. As has been set out in paragraph 116, although other mechanisms exist to address the functionality that the requested associated facility addresses these are not economically feasible.

198. BT would also benefit from economies of scale by spreading the cost of co-location (including the set up costs such as the provision of its backhaul

infrastructure to the Eircom premises) over both the LLU and Ethernet product sets. This in turn provides economic incentives for BT to offer a full suite of retail services across both product sets, fostering competition in both retail markets.

199. Eircom in its submission on the draft determination states that

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

200. ComReg has already mandated that Eircom should meet reasonable requests for access that fall within the market for Wholesale Terminating Segments of Leased Lines. As set out in the determination the provision of this wholesale input would allow BT to offer competing retail services. The form of associated facility which is the subject of this dispute is only one wholesale input to a retail offering and requires investment by BT in the other wholesale inputs before it can be translated into such a retail offering. Co-location requires BT to maximise its infrastructure investment as it must extend its network to the Eircom exchange in order to avail of co-location. Connectivity based on PPCs or other transmission services bought from Eircom does not have the same investment requirement for BT. Therefore granting this request for access encourages investment by BT.

201. Based on the above analysis this criterion would not form a basis to conclude that Eircom's access obligation does not apply to this request for access.

5. Assessment of any relevant intellectual property rights;

202. As set out in paragraph 140.

6. Assessment of the provision of pan-European services.

203. As set out in paragraph 143.

Conclusion

204. Based on the above ComReg has concluded that BT's request for co-location is a reasonable one and that its request that sharing of the co-location facility between LLU and Ethernet terminating segments would appear to be also reasonable.

205. In Eircom's response of 23 December 2008 it stated:

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] ✕ [confidential to Eircom]

206. ComReg's assessment regarding Co-location as an associated facility is set out in Paragraphs 155-204 and clearly shows that co-location is an associated facility and also is a reasonable request. As such Eircom has an obligation to provide this facility.

Request for associated facility - Aggregation:

207. As has been set out in paragraph 154, BT's request for the Uncontended Wholesale Ethernet Access (Terminating) segment, is a reasonable request for a product that is within the relevant market, and therefore subject to the access provisions set out in section 5 of Annex C to Decision No. D7/05. As this request for access is subject to an access obligation, then requests for associated facilities related to this form of access may also be subject to an access obligation.

208. BT has requested that a facility to aggregate individual Ethernet Terminating Segments be provided by Eircom in conjunction with the Uncontended Wholesale Ethernet Terminating Segment Service.

209. It is standard network practice to aggregate the local ends of leased lines, or other data products together to provide connectivity between a network operator's point of presence serving one end of a data connection, and its point of presence serving the far end of a data connection. Aggregating individual customer connections together at a point of presence allows connectivity between such points to be effected in a more cost effective and operationally efficient manner. An example of this aggregation is the manner in which End

User Links ('EULs'), which are the product elements that provide the local connectivity for Eircom's existing PPC product are aggregated together onto Transport Links for handing over to OAOs.

210. Based on the technical descriptions of the various Eircom Ethernet products which have been provided to ComReg as part of this dispute, Eircom also aggregates Ethernet customer access connections (these customer access connections correspond to the self supply by Eircom of the Ethernet Terminating Segment requested by BT) at the nodes that make up the core of the Ethernet network associated with each product.

211. In fact the exchange based equipment for the Ethernet customer access connection is described by Eircom [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

✂ [confidential to Eircom] In general the exchange based equipment facing the customer does not have separate transmission equipment for each individual customer connection but the access path serving the customer is connected to one of a number of transmission connections on a single "switch" or "router" which in turn aggregates these individual connections into a composite data stream to be carried on a single transmission link.

212. In assessing whether this request is for an associated facility is reasonable ComReg has considered the following;

1. The technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;

213. An alternative to Eircom providing the aggregation facility requested would be for BT to perform the aggregation function. This would require that Eircom provide exchange based transmission equipment dedicated to each individual

customer connection, which in turn would be connected to BT's aggregation equipment. As has been outlined above this is at variance with Eircom's own practice and would require Eircom to procure new equipment.

214. This new equipment would sit between the BT aggregation equipment, and the access path serving the customer. The equipment would not be necessary for the provision of the service but would add costs. The recovery of these costs by Eircom would increase the price of the service to BT and lead to a situation where in order to be competitive against Eircom Retail; BT would have to accept a lower margin than Eircom on the customer access portion of any service it sold. This would negatively impact on the overall profitability of the BT offering and as such this alternative would be less economically viable for BT.

215. Furthermore, the additional equipment would have a finite probability of failure. This would be in addition to the probability of failure of the customer premises equipment and the aggregation equipment (in this case supplied by BT). This increased probability of equipment failure would render it more difficult for BT to achieve a level of quality of service performance for those services offered on this basis (i.e. that it performs the aggregation), in comparison to those offered by Eircom, which would not have this additional piece of equipment. To achieve an equivalent quality of service, BT would have to provide an aggregation solution that had a failure rate which was sufficiently lower than Eircom's aggregation solution to offset the dis-improvement introduced by the additional equipment. If such improved performance for aggregation equipment was cost-effective, it would be rational for Eircom to be already using such a solution to lower the operational costs associated with equipment failure, and to improve the quality of the product it offers. This leads to a conclusion that the use of equipment which has a lower failure performance than Eircom already uses would not be cost-effective.

216. In addition, requiring an Access Seeker to provide its own aggregation facilities for Ethernet Terminating Segments would be a requirement to purchase the use of transmission equipment dedicated to each customer access connection. This dedicated equipment is not necessary for the provision of the service as the functionality could be provided by a single combined aggregation device, which has multiple transmission connections for customer access connections. This approach would appear to conflict with Eircom's obligations set out in Paragraph 8.2 of Annex C to Decision Notice D7/05²⁶

2. The feasibility of providing the access proposed, in relation to the capacity available;

217. Because of the manner in which Eircom effects aggregation, [REDACTED]
[REDACTED]
[REDACTED] ✕ [confidential to Eircom] the capacity issues that arise in respect of aggregation as an associated facility are the same as those that arise in respect of the requested Wholesale uncontended Ethernet access segments. ComReg's position on these issues is set out at paragraphs 118 to 122 above. In summary it is ComReg's view that it is feasible to provide the aggregation requested in relation to the capacity available.

3. The initial investment by the facility owner, bearing in mind the risks involved in making the investment;

218. The facility requested is governed by the price control obligations set out in Decision Notice D7/05. This sets out that for Wholesale Terminating Segments of Leased Lines based on PPCs "Eircom's prices for PPCs shall be cost-oriented and such costs shall be calculated using a pricing model based on forward looking long run incremental costs ('FL-LRIC')."

²⁶ "...eircom shall publish and keep updated a reference offer ("RO") in respect of the services and facilities referred to in sections 5 and 7 that is sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested."

219. In addition ComReg has set a WACC as a basis for allowing Eircom an adequate rate of return for regulatory purposes, including the setting of Eircom's regulated wholesale prices. (ComReg decision D1/08, document number 08/35)

220. Therefore Eircom has scope to recover costs associated with the initial investment in providing this facility, bearing in mind the risks involved in making the investment.

4. The need to safeguard competition in the long-term;

221. As has been set out previously in paragraphs 116, 134 and 135, granting the request for access to Terminating Segments based on Ethernet safeguards competition in the long term. Failing to give access to this associated facility, which itself makes the uptake of the requested access more likely, directly diminishes the competition that granting the requested access engenders. As has been set out above, although other mechanisms exist to address the functionality that the requested associated facility provides these are not economically feasible. Therefore the criteria does not form a basis to conclude that Eircom's access obligation does not apply to this request for access.

5. Assessment of any relevant intellectual property rights;

As set out in paragraph 140

6. Assessment of whether there are objective criteria for refusing BT's request for Aggregation:

222. Eircom stated in its letter of 15 September 2008 that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ✂ [confidential to Eircom]

223. ComReg has seen no evidence based on this position that Eircom has carried out an analysis which would allow it to properly conclude that the provision of the requested associated facility would not be technically feasible.

224. In the absence of this analysis the following is ComReg's assessment of the technical feasibility of providing the access requested.

225. From an examination of the technical documents associated with Eircom's National Ethernet product, the technical solution identified at paragraph 149 above would also appear to provide aggregation. Therefore ComReg is of the view that it is technically feasible for Eircom to meet this access request. In addition, other more efficient solutions may be possible.

Conclusion

226. Based on the above, aggregation enables and supports the provision of services based on Ethernet Terminating Segments, as evidenced by the use of such aggregation in conjunction with the self supply of Ethernet Terminating Segments by Eircom in the form of Ethernet customer access connections and as evidenced by the use of aggregation in conjunction with terminating segments based on other technologies such as PPCs. Therefore it is ComReg's view that the aggregation facility requested by BT is an associated facility for the purposes of Eircom's obligations imposed on foot of Annex C to Decision No. D7/05.

227. ComReg notes that in its submission on the draft determination Eircom states that [REDACTED]
[REDACTED] ✂ [confidential to Eircom]

Service Level Agreements

228. Eircom is obliged under section 5.3 of Annex C to Decision No., to conclude Service Level Agreements (SLAs) in respect of services provided in the Market. Additionally while negotiating the SLA Eircom is bounded by the obligation to negotiate in good faith.

229. Eircom's response to the Draft Determination stated

[REDACTED]
[REDACTED]
[REDACTED] ✕ [confidential to Eircom]

The Draft Determination set out that ComReg noted that there had been no substantive engagement between the parties on this issue and believes that such engagement in the context of a determination that required Eircom to grant the access requested would be a more appropriate mechanism for determining SLAs.

230. ComReg has not changed its position that it took in the draft determination in regard to SLA's.

6. Considerations taken into account formulating a determination

231. In accordance with Regulation 31(6) of the Framework Regulations ComReg must have regard to section 12 of the Communications Regulation Act 2002.

This states that:

"The objectives of the Commission in exercising its functions shall be as follows-

12. (1) (a) *in relation to the provision of electronic communications networks, electronic communications services and associated facilities-*
 - (i) *to promote competition,*
 - (ii) *to contribute to the development of the internal market, and*
 - (iii) *to promote the interests of users within the Community,"*

“(2) In relation to the objectives referred to in subsection (1)(a), the Commission shall take all reasonable measures which are aimed at achieving those objectives, including-

(a) in so far as the promotion of competition is concerned-

(i) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality,

(ii) ensuring that there is no distortion or restriction of competition in the electronic communications sector,

(iii) encouraging efficient investment in infrastructure and promoting innovation, and

(iv) [...]

(b) in so far as contributing to the development of the internal market is concerned-

(i) removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level,

(ii) encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity,

(iii) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services and associated facilities, and

(iv) co-operating with electronic communications national regulatory authorities in other Member States of the Community and with the Commission of the Community in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of Community law in this field, and

(c) in so far as promotion of the interests of users within the Community is concerned-

(i) ensuring that all users have access to a universal service,

(ii) *ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved,*

(iii) *contributing to ensuring a high level of protection of personal data and privacy,*

(iv) *promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services,*

(v) *encouraging access to the internet at reasonable cost to users,*

(vi) *addressing the needs of specific social groups, in particular disabled users, and*

(vii) *ensuring that the integrity and security of public communications networks are maintained.*

- (3) *In carrying out its functions, the Commission shall seek to ensure that measures taken by it are proportionate having regard to the objectives set out in this section.*
- (4) *In carrying out its functions, the Commission shall, without prejudice to subsections (1), (2) and (3), have regard to policy statements, published by or on behalf of the Government or a Minister of the Government and notified to the Commission, in relation to the economic and social development of the State.*
- (5) *In carrying out its functions, the Commission shall have regard to international developments with regard to electronic communications networks and electronic communications services, associated facilities, postal services, the radio frequency spectrum and numbering.*
- (6) *The Commission shall take the utmost account of the desirability that the exercise of its functions aimed at achieving the objectives referred to in subsection (1)(a) does not result in discrimination in favour of or against particular types of technology for the transmission of electronic communications services....”*

232. In the context of this dispute which deals with Ethernet, ComReg has only considered those parts of section 12 which are relevant to the dispute.

233. In considering the provisions of section 12(2)(a)(I) ComReg is of the view that based on its analysis in paragraphs 123 to 135 that BT's request is reasonable and would require recoverable investment from Eircom to ensure that users derive maximum benefit in terms of choice, price and quality of telecoms supplier. To do this it would be necessary to ensure that BT had access to the necessary wholesale inputs to offer competing retail services to Eircom. The availability of choice should in turn allow a competitive dynamic to develop where quality and price became differentiators between these competing retail offerings. Therefore a determination that gave BT this access would meet this objective. For this reason it is important in the determination that Eircom has to indicate as to when the service requested would be available for BT to order.

234. In considering the provisions of section 12 (2)(a)(ii) and ComReg's view, based on its analysis that BT's request is reasonable, if Eircom did not meet this request from BT it would be in breach of its access and non-discrimination obligations.

235. In considering the provisions of section 12 (2)(a)(iii) ComReg takes into account Eircom rationale for the introduction of the Retail Ethernet products. In Eircom's letter dated the 12 February 2008 it stated the following:

“Eircom's National Ethernet product was developed in response to competition in the retail leased lines market and that is it is priced competitively in order to meet competition”.

236. On this basis and in light of the difficulties relating to the replicability for BT and OAOs of the wholesale input, if this access request is not met it will limit the ability of OAOs to compete in the related retail market. Therefore a

determination that requires Eircom to provide this facility would safeguard competition in the market.

237. In considering the provisions of section 12(2)(b)(i) as stated above, failure by Eircom to provide this access to BT will impede competition with Eircom in the retail Leased Line market, effectively acting as a barrier to market entry and thus minimizing user choice.

238. In considering the provisions of section 12(2)(b)(ii) as set out in paragraph 203 retail services based on Wholesale Terminating Segments of Leased Lines using Ethernet technology can form part of transnational connections between end-user locations.

239. In considering the provisions of section 12 (2)(b)(iii) ComReg's analysis in paragraphs 118 shows that Eircom has already deployed the technical, engineering and other systems necessary to provide this facility, as these are already in place for its self-supplied input to its retail product any investment required would only be to the extent necessary be to productize these elements for external supply. ComReg's view that the technology used for its own self-supply could be re-used by Eircom to supply this product to BT and OAOs. This in turn would spread the cost of any fixed elements associated with this product improving the cost recovery of the initial investment and lowering investment risk. Therefore a determination that requires Eircom to provide the requested facility would be considered reasonable.

240. On 8 March 2007 at ComReg's Next Generation Networks (NGN) Industry Summit, a conference at which Eircom's Chairman Pierre Danon made a presentation titled "Working to put Ireland at the forefront of the Broadband revolution"²⁷

²⁷ http://www.comreg.ie/_fileupload/publications/PDanon.pdf

241. In Eircom's presentation, it was stated that in Phase 1 of its overall proposed NGN implementation, Eircom planned to deploy a high bandwidth IP/Ethernet Network to all sites with more than 2000 working lines (240 sites).

242. Based on this Eircom has already made a business decision to invest in this technology and therefore a determination that requires Eircom to provide the requested facility will be in line with its current planned deployment.

243. In considering the provisions of section 12(3) ComReg's analysis shows that any lack or failure by Eircom to provide Leased Line termination segments based on uncontended Ethernet access would not be consistent with its ex ante obligations.

244. The analysis below shows that the costs would be recoverable. Eircom has an obligation to be cost orientated imposed by way of Section 10 of the Decision and pursuant to Regulation 14 of the Access Regulations. Cost orientation guarantees Eircom a set margin level. Eircom's WACC is set at 10.21%.²⁸ This ensures that Eircom has the ability to recover its network build costs. In the light of this and of the consideration of the dispute in the context of the other relevant provisions of Section 12 of the Act of 2002 as set out above ComReg is of the view that a determination that requires Eircom to make the requested access available to BT would be proportionate. A more detailed analysis of the proportionality of the proposed determination is set out below:

245. In considering the provisions of section 12(4) ComReg notes that on 26 March 2004, the Minister for Communications, Marine and Natural Resources issued a General Policy Direction on Competition to ComReg pursuant to Section 13 of the Act of 2002. This Direction provides that:

²⁸ Review of Eircom's Cost of Capital 07/88 1 November 2007

- *“ComReg shall focus on the promotion of competition as a key objective. Where necessary, ComReg shall implement remedies which counteract or remove barriers to market entry and shall support entry by new players to the market and entry into new sectors by existing players”*

246. Eircom has stated that it developed the National Ethernet product in response to competition in the Retail Leased Line market (see paragraph 134). BT has stated that at present due to its lack of access to Ethernet Leased Line Terminating segments it can not compete on price with Eircom Retail.

[REDACTED]

[REDACTED]

✂ [confidential to BT]

247. This means a lack of access to BT would inhibit an alternative technology platform in the form of Ethernet being effectively competitive in the market and bringing price competition to the end user.

248. Additionally as stated in paragraph 241 Eircom has plans to deploy a high bandwidth IP/Ethernet Network. This means that the competitive advantage that Eircom currently hold, if not rebalanced would increase with the further adaptation of Ethernet technology

249. In considering the provisions of section 12 (6) ComReg is of the view that Eircom’s SMP designation and the imposition of remedies on foot of ComReg Decision D7/05, reflect the issues of technology neutrality. A determination which failed to give proper effect to the remedies imposed on foot of this

designation would not be technology neutral and would therefore have a negative impact on the market availability of products based on Ethernet technology. Therefore a determination which requires Eircom to make the requested access available to BT would be consistent with the provisions of section 12(6) of the Act.

Other considerations in formulating a determination

250. Regulation 31 of The Framework Regulations specifies Dispute Resolution Procedures. Regulation 31(1) requires ComReg to make a determination “aimed at ensuring compliance with the requirements of these Regulations and the Specific Regulations, to resolve the dispute”.

251. ComReg in formulating a determination for the dispute has taken into account Eircom Obligations of Non-Discrimination, Transparency, and Price Control

252. Given that ComReg has identified that Eircom has an obligation to meet this access request (paragraphs 66 to 103), any determination under Regulation 31(1) should require that Eircom will meet BT’s request.

253. As has been set out at paragraphs 98 to 102 Eircom currently self supplies an equivalent service to that requested, as an input to its retail Ethernet offering. Therefore a determination which allowed an excess of time before the wholesale equivalent of the retail input was available, would not be consistent with Eircom’s obligation of non-discrimination and would not be consistent with Regulation 31(1) of the Framework Regulations.

Form of determination

254. Based on the considerations set out in paragraphs 231 to 253 above it is ComReg’s view that any determination should require Eircom to meet the request for access made by BT.

255. ComReg has considered whether it would be proportionate that a determination should simply require that Eircom stop providing retail products based on the self supplied input to its retail Ethernet product until such time as the wholesale equivalent is available. While this would deal directly with the issues of access and non-discrimination ComReg is of the view that the negative impact on the users of these retail services would not justify this approach.

256. However this view must be balanced against the ability of BT to offer competing retail Ethernet services based on the requested access. ComReg is of the view that three months is a reasonable period within which Eircom could introduce the requested access product. This view is based on the analysis set out at paragraphs 111 to 122 regarding the technical feasibility of introducing the product and the analysis set out at paragraphs 151-154 regarding the implementation of manual support processes in the short term.

257. Therefore ComReg believes that it is proportionate and fair to the parties to specify that if after three months from the date of the determination Eircom has not made the product available then it shall cease taking new orders for retail products based on the equivalent inputs to its retail Ethernet product until such time as BT is able to place orders for the requested access.

258. In assessing the proportionality of this approach ComReg has considered the scenario that demands for Eircom's retail service are low. In this case there is limited impact on Eircom or end-users. In the alternative scenario where demand for the retail service is high then this approach ensures that BT is not disadvantaged in the market and that Eircom does not unduly benefit from long lead times in fulfilling its non-discrimination obligation.

259. A case could be made that the short timescales will impact on Eircom's ongoing product and network development across a range of products and

services. This position must be viewed in the context that Eircom provides itself the equivalent of the requested access. If the timeline for the introduction of the requested access is affected because Eircom applies resources to alternative non-regulated activities which in turn delays its fulfilment of its non-discrimination obligation and access obligations this in ComReg's view would not be acceptable especially in the circumstance where Eircom derives a competitive benefit from such a delay.

260. In Eircom's submission on the draft determination it stated:

[REDACTED]

✂ [confidential to Eircom]

261. ComReg notes that this submission does not address the issues set out at paragraphs 255 to 259 above. It provides no basis as to why this was not proportionate. Specifically Eircom does not deal with the negative impacts on BT and the market of delays in introducing this product. ComReg notes that Eircom's submission deals with the lead time for implementing an IT based solution but does not address ComReg's view as set out at 151 that manual processes would be achievable and adequate in the initial period following the introduction of any product. Eircom has not stated any technical reasons or objected to implementing manual processes until its systems upgrades have been completed.

262. In accordance with Decision Notice D18/03 ComReg is presenting the determination to the parties. The parties to the dispute will have fourteen calendar days to submit comments on the determination.

263. It is anticipated that ComReg will publish the final determination on its website, having regard to the requirements of confidentiality, as set out in Guideline Document No. 05/24.

Determination

264. Having considered the circumstances of the dispute and having taken account of the considerations set out in paragraphs 231 to 253 ComReg, in accordance with Decision Notice D18/03, hereby makes the following determination:

Determination:

BT Ireland Limited's ('BT') request for Uncontended Wholesale Ethernet Access falls within the market for Wholesale Leased Line Terminating Segments and is subject to the obligations imposed on Eircom Limited ('Eircom') by way of ComReg Decision Notice D7/05. These obligations include but are not limited to obligations of access and non-discrimination.

BT's request is a reasonable request for access and Eircom has an obligation to meet this request.

Eircom shall provide to BT a product to meet its access request.

If BT cannot place orders for this product within three months from the date of a final determination then Eircom will cease taking orders for Ethernet customer access connections until such time as BT can place orders for the requested access.

The facilities of co-location and aggregation requested by BT from Eircom as part of its access request are deemed to be an associated facilities and are subject to the obligations imposed on Eircom by way of ComReg Decision Notice D7/05. These obligations include but are not limited to obligations of access and non-discrimination.

BT's request for these facilities is a reasonable request for access and Eircom has an obligation to meet this request.

Eircom shall provide to BT products to meet its request for associated facilities.

If BT cannot place orders for these products within three months from the date of a final determination then Eircom will cease taking orders for Ethernet customer access connections until such time as BT can place orders for the requested facilities.

**John Doherty
Chairperson
For Commission for Communications Regulation
The 13th day of July 2009**

Annex A

Glossary

Co-location

The use of a telecommunication facility (e.g. telephone exchange) by more than one telecommunications provider.

Contended Access

When two or more users have access to the same line. This means that if five users are using the line at the same time the contention ratio is 5:1.

D7/05

Market Analysis for Retail Leased Lines and Wholesale Terminating and Trunk Segments of Leased Lines. D07/05, 30 March 2005.

Ethernet

Ethernet is a protocol for the management for the transmission of data between points connected to a transmission network.

EUL

End user link: This is the circuit from the Eircom servicing exchange to the end user, via the Eircom exchange serving that end user. For the avoidance of doubt, the end user may be the OAO in whose name the EUL is ordered.

LAN

Local Area Network (LAN) network covering a small local area, such as a home or office.

Leased lines

The term “leased lines” refers to fixed, permanent telecommunications connections providing symmetric capacity between two points. A leased line is permanent, in that capacity is available between the two fixed points. However, capacity could be reserved or shared through the associated network depending on the nature of the leased line.

LLU

Local Loop Unbundling (LLU) is the process where the incumbent operators (Eircom in the Republic of Ireland or BT and Kingston in the UK) makes its local network (the copper cables that run from customers premises to the telephone exchange) available to other companies. Operators are then able to upgrade individual lines using DSL technology to offer services such as always on high speed Internet access, direct to the customer.

MPLS

The essence of Multiple Protocol Label Switching (MPLS) is the generation of a short fixed-length label that acts as a shorthand representation of an IP packet's header. This is

much the same way as a ZIP code is shorthand for the house, street and city in a postal address, and the use of that label to make forwarding decisions about the packet. IP packets have a field in their 'header' that contains the address to which the packet is to be routed. Traditional routed networks process this information at every router in a packet's path through the network (hop by hop routing).

OAD

Other Authorised Operator

Requested service

BT has requested Eircom to provide a wholesale uncontended Ethernet access segments. BT believes Eircom have an obligation to meet reasonable requests for access to the Wholesale Terminating Segments of Leased Lines on foot of D7/05 which imposes remedies following Eircom's SMP designation in the market for Trunk Segments of Leased Lines following a market analysis.

Terminating segments

Leased Line terminating segments are the connection between the customer premises and the local serving exchange

Transport Link

A transport link is the link between the Eircom network and the OAD network.

Uncontended Access

When a single user has access to a line. This means if that user is not using the line, it is not been used. An example of this is a home phone line. The contention ratio in this example is 1:1.

WACC

When imposing obligations relating to cost recovery and price controls, ComReg takes into account investments made by the relevant operators and allows a reasonable rate of return on adequate capital employed. The Weighted Average Cost of Capital ("WACC") provides a measure of the appropriate rate of return on capital or investment employed in the production of regulated services. As the WACC is a key input in the setting of cost recovery/price control obligations, it has implications for the setting of efficient prices for consumers and the creation of ongoing investment incentives for the regulated firm.