



An Coimisiún um  
**Rialáil Cumarsáide**  
Commission for  
**Communications Regulation**

# Determination of a dispute between NBI and Eircom - Annex 4

**Concerning the Validity of an Access Request.**

**Determination Annex 4**

**Reference:** 22/89b

**Date:** 27 October 2022

## Annex 4.1: NBI Response to Draft Determination

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12 October 2022

**Re: Case COM-22-762 – Investigation of a Dispute between National Broadband Ireland (NBI) and Eircom Limited (Eircom) (the “Dispute”)**

Dear Harry

We refer to the above investigation and to NBI’s Draft Determination of a dispute between NBI and Eircom concerning NBI’s request for Duct Access (“**Draft Determination**”).<sup>1</sup> NBI welcomes ComReg’s findings as outlined in the Draft Determination, as well as the opportunity to submit comments on the Draft Determination.

NBI’s comments on the Draft Determination and next steps are set out below.

## **1. Chapter 5 ‘Analysis’ – Paragraph 5.4 – A new product**

- 1.1 We note ComReg’s view that the product sought by NBI “*would clearly be a new product distinct and separate from Eircom’s currently available SDSI product*”. If the access requested by NBI is to be provided in the form of a new product, it is essential that there be no further unnecessary delays on Eircom’s part in relation to the development and implementation of such a product, in particular given that the provision by Eircom of the requested duct access to NBI via a new product would not differ fundamentally from the access sought by NBI to be provided as a change to the existing Sub-Duct Self-Install (“**SDSI**”) product. Specifically:

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<sup>1</sup> ComReg Draft Determination (Document No. 22/80) dated 28 September 2022.

- (a) Providing duct access in the form requested by NBI would in practice be very similar to Eircom's existing SDSI product, which is already available;
  - (b) The existing SDSI product information would for the most part be sufficient for the purposes of a new product;
  - (c) The bespoke processes already agreed between NBI and Eircom for duct access under the Major Infrastructure Programme ("**MIP**") would be transferable for use as part of the product; and
  - (d) The only additional information required in order to address NBI's specific access needs would be the development of a process by which NBI is enabled to undertake all duct blockage, clearance and remediation when undertaking SDSI works on Eircom's ducts as part of the MIP or otherwise. In that regard, the significant volume of information including operational detail, benefits and clarifications already provided by NBI to Eircom in the SOR, Revised SOR and RAP Request must be taken into consideration.
- 1.2 Accordingly, there would be no requirement for Eircom to consider the issues referred to at points (a) to (c) above such that consideration should instead be given to design, delivery and implementation of the process enabling NBI to undertake duct blockage, clearance and remediation works.
- 1.3 Further, in order to assist with the availability and implementation of the product, including in relation to the operational requirements described above, it is imperative that the Joint Project Team ("**JPT**") be reconstituted at the earliest possible opportunity but by no later than 1 April 2023, assuming the new product is available then (see Para. 3.1 below). It may also be beneficial for JPT meetings to be conducted under the auspices of ComReg to ensure that appropriate milestones are achieved.

## 2. Chapter 5 'Analysis' – Paragraph 5.5 – Non-pricing amendment

- 2.1 We welcome ComReg's finding that NBI's access request is clearly not a request for a pricing amendment. This finding aligns with the submissions NBI has made to Eircom, including in its access request, supporting documentation provided with the access request and in the Statement of Requirements ("**SOR**") and revised SOR.

- 2.2 The scope of NBI’s request has been for a process to be developed which is non-pricing in nature, with the liability for the costs relating to the product process enhancement remaining unaltered or otherwise to be determined by ComReg. The fact that NBI’s access request may require Eircom to publish a new price and amend the applicable Access Reference Offer (“**ARO**”) Price List does not make the request a pricing amendment for the purpose of the Wholesale Local Access Market (“**WLA**”) Decision Instrument.<sup>2</sup>

**3. Chapter 6 ‘Conclusions’ – Paragraph 6.1(d) – Timeframe for completion of step 8.10(iv) and for product availability**

Availability of the product

- 3.1 As ComReg will be aware, timing is a key concern for NBI in the context of the effective deployment of the National Broadband Plan (“**NBP**”). To be consistent with the objectives of the NBP and the European Electronic Communications Code (“**EECC**”) requirements of encouraging and ensuring adequate access in the context of the deployment of very high capacity networks , it is imperative that the new SDSI product addressing NBI’s access requirements for a duct blockage, clearance and remediation process is available as soon as possible but in any event by no later than 1 April 2023 and is implemented as part of the MIP by no later than 1 June 2023. Within this timeframe the necessary bilateral JPT discussions for implementing NBI’s use of the new product within its existing MIP would also need to be successfully concluded.
- 3.2 The Draft Determination does not prescribe a date by which Eircom is required to make available the new product for use by NBI. Given the extent of the delays already experienced, NBI considers that ComReg’s final determination should prescribe the date by which Eircom is required to make available the new SDSI product. NBI considers that 1 April 2023 would be an appropriate backstop date in relation to product availability, with a view to securing delivery more promptly if possible, and allows ample time for an appropriate access product to be developed and made available to NBI. NBI further considers 1 June 2023 as being the latest date by which the product should be implemented as part of its existing MIP. This timeframe

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<sup>2</sup> ComReg Decision D10/18 (Document No. 18/94) dated 19 November 2018.

also allows for NBI to meet deployment and connection milestones for the roll out of high-speed broadband in the NBP Intervention Area.

*Timeframe for completion of step 8.10(iv) of the WLA Decision Instrument*

- 3.3 ComReg proposes that Eircom be required to complete the step at Section 8.10(iv) within 55 working days of the final determination. In so doing, Eircom would be required within 55 working days to:
- (a) confirm in writing whether it agrees to provide the access requested; or
  - (b) propose in writing to provide access that is different to the requested access giving a sufficiently detailed description of the differences between the requested access and the proposed access and objective reasons for such differences.
- 3.4 Notwithstanding that ComReg has proposed a shorter timeframe than the 85 working days prescribed in the WLA Decision Instrument, NBI's view is that, in light of the delays already incurred and the discrete nature of the access being requested, a period shorter than 55 working days would be reasonable, fair and timely to address the issues raised.<sup>3</sup> The reasons for a shorter timeframe are outlined below.
- 3.5 In relation to reasonableness and fairness, ComReg acknowledges in the Draft Determination that *"much information has been provided since NBI provided Eircom with its initial Statement of Requirements"*.<sup>4</sup> Given the extent of information already provided by NBI and considering that the only information required for the new product will relate to the development of a duct blockage, clearance and repair process, NBI's view is that affording Eircom with 55 working days to respond to NBI is unnecessary in the circumstances and a shorter timeframe (as proposed below) would be reasonable.
- 3.6 In relation to timing, ComReg notes in the Draft Determination that *"significant time already has elapsed"* in relation to Eircom's

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<sup>3</sup> Regulation 12(3) of the Access Regulations permits ComReg to impose obligations relating to fairness, reasonableness and timeliness on SMP operators when meeting reasonable requests for access.

<sup>4</sup> Draft Determination, Chapter 5, Paragraph 5.6.

consideration of NBI's access request.<sup>5</sup> Indeed, more than one full calendar year has passed since NBI submitted its SOR to Eircom. Given the significant delays to date and the fact that Eircom has clearly demonstrated its ability to rapidly progress access requests relating to development of its own products,<sup>6</sup> NBI does not consider that Eircom would, in practice, reasonably require 55 working days to comply with section 8.10(iv) of the WLA Decision Instrument. NBI's view is that 15 working days would be a more reasonable and appropriate period in the circumstances.

#### 4. Annex 1 Draft Determination Notice – Scope of the Dispute

- 4.1 The definition of "Dispute" in the Draft Determination Notice refers to a ComReg document which has not yet been identified, whereas the scope of the Dispute is defined by ComReg by reference to ComReg's letter of 26 August 2022 as:

*"Whether or not the request for access described in the dispute and the documents submitted by NBI with the dispute, constitute a valid access request by NBI to Eircom pursuant to the Wholesale Local Access Market Decision Instrument, ComReg Decision D10/18 (Document No. 18/94) dated 19 November 2018 and if so, the steps that should be followed by the parties to progress the request, and any applicable timelines."*<sup>7</sup>

- 4.2 In light of the scope of the Dispute as defined by ComReg (and the subsequent correspondence between Eircom and ComReg in relation to that defined scope), it is important that the final determination does not in any way restrict the scope of the dispute in such a manner as to permit Eircom essentially to ignore the significant and continuous efforts made by NBI in good faith to obtain access on an appropriate basis to regulated duct infrastructure from Eircom and the reality of the timelines faced by NBI to date when seeking such access.

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<sup>5</sup> Draft Determination, Chapter 5, Paragraph 5.6.

<sup>6</sup> See, for example, Open Eir Request CRD-926.

<sup>7</sup> Draft Determination, Chapter 2, Paragraph 2.6.



We would be grateful for ComReg's consideration of the points raised in this letter and we remain available to discuss further any of above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Gunnigan', written in a cursive style.

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## **Annex 4.2: Eircom Response to Draft Determination**

**Eircom Submissions**  
**Draft Determination of a dispute between NBI and Eircom**  
**Case COM-22-762**

**Introduction**

- 1 The Commission for Communications Regulation (**ComReg**) issued a draft determination on 28 September 2022, chapter 7 of which invited submissions by 12 October 2022.
- 2 Eircom Limited (**Eircom**) is disappointed that ComReg has concluded that NBI Infrastructure DAC (**NBI**) provided notice of a valid Access<sup>1</sup> request. NBI should have (according to ComReg in its own analysis in the draft determination) made a request for a new product but instead NBI incorrectly made a request for an amendment to the Sub-Duct Self-Install (**SDSI**) product that Eircom is temporarily required by ComReg to provide pursuant to a Stay Compromise Agreement in extant legal proceedings relating to Direction 21/60R (under appeal).<sup>2</sup>
- 3 ComReg is required to give reasons for its analysis and conclusions in the draft determination. It is required to invite submissions on its draft determination, and therefore it is assumed that having done so, these submissions will be taken into account.

**Eircom's position on the Access request is supported by ComReg's analysis**

- 4 Eircom has, throughout its engagement with NBI, contended if that the product sought by NBI was a new product, then it should reformulate and resubmit its request. On 2 March 2022 Eircom wrote to NBI saying:

*"If NBI wishes to request the development of a new SDSI product (one which differs from that currently available) then it can of course submit a RAP request through the published process."*

- 5 NBI could have avoided this entire dispute and this entire dispute resolution procedure if it had properly reformulated its request as one for a new product, which ComReg has now confirmed is the course of action it should have taken. Instead, according to ComReg, NBI wrongly submitted its request as one for an amendment to an existing product. It submitted a Change Request Document to the SDSI product temporarily mandated by ComReg in the proceedings referred to above relating to Direction 21/60R.

- 6 The draft determination states at paragraph 5.4 that:

*"ComReg considers that the product sought by NBI would clearly be a new product distinct and separate from Eircom's currently available SDSI Product".*

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<sup>1</sup> As defined in Regulation 2 of European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011.

<sup>2</sup> *Eircom Limited v Commission for Communications Regulation 2021 No. 288 MCA.*

ComReg here confirms that the request by NBI was incorrectly formulated. The appropriate finding therefore in this dispute resolution procedure is that NBI should correct and reformulate its request as a new product request, which sets out all the features of the new product sought. It should be noted that this is not simply a technical distinction; of necessity a request for an amendment will only set out the changes sought, while a request for a new product will detail all the requested new product features. Further, different industry notification periods apply to product amendments (two months) and new products (six months) under section 10 of ComReg Decision D10/18 (**D10/18**); indeed Eircom understands this is why NBI formulated its request as an amendment, in order to benefit from this shorter time-frame. ComReg's draft determination confirms that this was incorrect.

### **ComReg's analysis contradicts NBI's position on pricing amendment**

7 NBI in any event viewed its requests as requiring a pricing amendment to the existing SDSI product. The two Statements of Requirements submitted by NBI request that a "*commercial arrangement*" be reached on pricing and address issues such as the upfront payment of remediation and blockage clearance costs in the context of a Major Infrastructure Programme (**MIP**), the product request requiring calculation of rental charges, and NBI receiving a discount from the standard SDSI charges. Curiously, without any explanation given by NBI - or any comment by ComReg in its draft determination – the issue of pricing proposals is dropped in its entirety from the Regulatory Access Product Request (**RAP Request**) of 8 April 2022. However this does not mean that there are no new pricing elements to its request, as Eircom maintains.

8 The draft determination at paragraph 5.5 contains a statement from ComReg that:

*"The fact that meeting this request may require Eircom to publish a new price and amend the applicable ARO Price List does not make the request a pricing amendment for the purposes of section 8".*

ComReg therefore has no difficulty stating, without any reasons or rationale, what it considers not to be a pricing amendment. However, it has refused to give in its pre-dispute correspondence, or now in its draft determination, any explanation as to what it considers would be a pricing amendment.

9 It is not clear why in its analysis of this issue in paragraph 5.4 of the draft determination, ComReg omits the reference to a pricing or non-pricing amendment as if that distinction doesn't exist, when it clearly does on a plain reading of section 8.10 of D10/18.

10 ComReg confirms that section 8.10 of D10/18 sets out the steps to be followed on receipt of an Access request. However, in its draft determination it disregards key aspects of the wording of section 8.10. These words, which create the parameters of section 8.10 and define the scope of the Access requests that Eircom is required to assess, are rendered meaningless by ComReg. ComReg in effect ignores the fact that section 8.10 stipulates that requests for Access must be for either "*a new product service or facility*" or a "*non-pricing amendment to an existing product, service or facility*". Further it does so in a manner that 'jumps' NBI's request ahead several steps in section 8.10, and places the burden of re-formulating NBI's 'amendment' request as a new product request, on Eircom instead, where the legislation makes clear that this is the Access Seeker's responsibility.

11 ComReg does not identify the power or authority that entitles it to implicitly amend the wording of D10/18 in favour of NBI's request in this way.

**Eircom's rights have been restricted in favour of a quicker process for NBI**

12 As part of the industry consultation leading up to D10/18, and following detailed submission by a number of parties, strict timelines were set out in D10/18 for the process for an Access request. ComReg is not permitted to unilaterally amend those timelines in favour of NBI. No power or authority is identified that allows ComReg to "deem" that certain steps under Section 8 of D10/18 have been completed, as arises from the draft determination.

13 Firstly, it is not clear how ComReg considers it appropriate to deprive Eircom of the 15 working days period provided to Eircom in section 8.10(ii) of D10/18. Paragraph 5.11 of the draft determination appears to suggest that because Eircom assigned a reference number "CRD-902" to the RAP Request dated 8 April 2022, that that also constituted confirmation that the Access request is within the scope of Eircom's obligations under D10/18. That would not be correct. Eircom was given a 15 working days period to consider these matters for a reason, and ComReg has unilaterally taken this right away by "deeming" that the confirmation has been given by Eircom. While it may do so, Eircom has not in fact given that confirmation. Eircom has a right to confirm or not, to NBI, that the Access request is within the scope of its obligations under D10/18 and, for example, to qualify that confirmation if it considers it appropriate to do so.

14 Secondly, Eircom challenged the validity of the notice, so it is not understood how ComReg can "deem" the step at section 8.10(iii) to have been completed. It clearly has not been completed. Eircom has not commented at all on the request, so it is not understood how ComReg can decide that the period for Eircom to seek further information and clarification is to be withdrawn in favour of NBI.

15 ComReg expressly confirms that Eircom is entitled to seek further information, but ComReg is removing Eircom's legal right to do so within the period of 30 working days prescribed in D10/18. This is in circumstances where NBI itself has expressly offered, in its Statement of Requirements and RAP Request, to provide additional information and clarification. This is especially relevant as ComReg is placing the burden of turning NBI's amendment request into a new product request on Eircom. This process, which Eircom has never been required to undertake previously, is likely to necessitate seeking further information and clarification from NBI. There is however no corresponding obligation on NBI to respond promptly, to enable Eircom to comply with the statutory time-frames. ComReg may well say that 30 working days have passed since the request was made, but it knows well that neither party was addressing their minds to the subject matter of the step set out at section 8.10(iii), so it is irrational to "deem" that step completed.

16 NBI admits that it submitted a request for an amendment to an existing product, and not a request for a new product, because it wanted to abridge timeframes in this process, something that ComReg is now facilitating.

17 Eircom is disappointed that ComReg has removed important steps and timeframes prescribed by D10/18 as the process to be followed for an Access request, in favour of NBI. Important information

could have been exchanged during these steps about the nature of the request and detail of what ComReg has determined, is now a new product being requested. As the product requested, if offered, will have a significant market impact, that information exchange would have been very important for all Access Seekers<sup>3</sup> to have been able to consider.

### ComReg's "typographical errors"

- 18 During the course of the dispute process, ComReg corrected "typographical errors" in the Scope<sup>4</sup> of the dispute. The corrections were of material substance. They allowed ComReg to rely, in favour of NBI, on section 7 of D10/18, and not limit its analysis to section 8 of D10/18. Eircom reserves its position regarding the circumstances surrounding the "typographical errors" including the fact that NBI's submission of 19 September 2022 appears to proceed on the basis of the corrected Scope, even though NBI was only formally advised of the corrected Scope one day later, on 20 September 2022.
- 19 ComReg may wish to note that it has not corrected all of its typographical errors in the version of the Scope in paragraph 1.3 of the draft determination, and that in light of the above, paragraph 2.6 is factually incorrect.

### The Law

- 20 It is a well-established principle of law that any notice must be sufficiently clear and unambiguous in its terms to constitute a valid notice.<sup>5</sup> A notice of a request with an incorrect description of a product, and for the wrong type of product, is not clear and unambiguous.

### Final comments

- 21 The effect of ComReg's draft determination is that, no matter how NBI's request is formulated, what category it is submitted as, and regardless of its contents, it is a valid request. According to ComReg and the draft determination, the wording of Section 8.10 of D10/18 is not relevant to the validity or otherwise of the request.
- 22 ComReg's analysis means that Eircom is not permitted to point out to NBI if it has wrongly formulated its request as an amendment, that it has done so, nor ask that the request be correctly reformulated. It appears Eircom is to make an evaluation of its own as to whether NBI's request is a request for an amendment to an existing product, or a new product, and based on that evaluation proceed to follow the steps set out in section 8.10 (regardless of how NBI formulated the request).
- 23 It is unclear whether the above evaluation is now to form part of, for example, section 8.10 (iv)(b), and if Eircom has to develop a new product, it has to inform NBI that it proposes to provide a product that differs from the original request.

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<sup>3</sup> As defined in ComReg Decision D10/18.

<sup>4</sup> As defined in ComReg's letter to Eircom of 26 August 2022.

<sup>5</sup> *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 W.L.R. 638. See also *May v Borup* [1915] 1 K.B. 830; *Addis v Burrows* [1948] 1 K.B. 444; *Aegnoussiotis Shipping Corp of Monrovia v A/S Kristian Jebsens Rederi* [1977] 1 Lloyd's Rep. 268. cf. *P. Phipps & Co (Northampton and Towcester) Breweries Ltd v Rogers* [1925] 1 K.B. 14

- 24 It is unclear whether ComReg will support Eircom in relation to any complaint by NBI that the reformulation as a new product, which ComReg is compelling Eircom to undertake, is wrong, in the same way it has supported NBI in this dispute when, according to ComReg, NBI has got its request wrong.
- 25 ComReg is silent on where the request for Access is actually to be found. Three different document requests were submitted, each of which differ from the others - the Statement of Requirements of 13 August 2021, the Statement of Requirements of 27 January 2022, and the RAP Request of 8 April 2022. Each Statement of Requirements was, in NBI's words, "*an NBI-specific product process enhancement*". The second Statement of Requirements was a revised version of the first Statement of Requirements, deemed necessary by NBI because of ComReg's decision to withdraw its draft Decision on CEI pricing. NBI then took a different course of action by, it appears, abandoning its Statement of Requirements and issuing a RAP Request which, unlike the two Statements of Requirements, does not deal with any pricing proposals and according to NBI's own submissions was pursued because it thought that would be a quicker alternative route.
- 26 ComReg has an opportunity to revisit its position before issuing a final determination. ComReg has concluded that NBI's request was wrongly formulated by NBI. It should require NBI to reformulate that request, and section 8 of D10/18 should be allowed to operate in the manner intended. This also reduces the risk of a subsequent dispute if for example, NBI complains about Eircom's reformulation of the product amendment as a new product request, or if there is a delay by NBI in responding to requests for information, which then impedes Eircom in properly assessing the proposed product, or meeting the time-frames in section 8.10.
- 27 Eircom consents to the publication of this submission document. All of Eircom's rights are reserved.