



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Draft Determination of a dispute between BT and Eircom

Concerning CEI Access.

Draft Determination

Reference: 22/26

Date: 14 April 2022

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

1 Dockland Central, Guild St., Dublin 1, D01 E4X0.


1 Lárcheantar na nDugaí, Sráid na nGildeanna, BÁC 1, D01 E4X0.

Tel | Teil +353 1 804 9600 Fax | Facs +353 1 804 9665 www.comreg.ie

Legal Disclaimer

This Draft Determination is not a binding legal document and also does not contain legal, commercial, financial, technical or other advice. The Commission for Communications Regulation (the Commission) is not bound by it, nor does it necessarily set out the Commission's final or definitive position on particular matters. To the extent that there might be any inconsistency between the contents of this document and the due exercise by it of its functions and powers, and the carrying out by it of its duties and the achievement of relevant objectives under law, such contents are without prejudice to the legal position of the Commission. Inappropriate reliance ought not therefore to be placed on the contents of this document.

Redacted Information

Please note that this Draft Determination is a **non-confidential** version. Certain information may be redacted for reasons of confidentiality and commercial sensitivity, with such redactions indicated either by the symbol 'X' or by .

Contents

Chapter 1	4
Executive Summary	4
Chapter 2	7
Background to the Dispute	7
2.1 Chronology	7
2.2 The parties to the dispute	10
2.3 ComReg’s Dispute Resolution Powers	10
2.4 Scope of the Dispute	11
Chapter 3	13
Regulatory Framework	13
3.1 Regulation 31 of the Framework Regulations	13
3.2 Relevant obligations	13
Chapter 4	16
Submissions of the parties	16
4.1 Summary of email correspondence	16
4.2 Summary of Relevant BT submissions	18
4.3 Summary of Eircom’s submissions	20
Chapter 5	22
Analysis	22
5.1 BT’s Access request	22
5.2 The Eircom conditions	22
5.3 Whether purpose of Access is relevant	23
Chapter 6	27
Preliminary Conclusions	27
Chapter 7	28
Next Steps	28
Annexes	29
Annex: 1 Draft Determination Notice	30
Annex: 2 WLA DI Definitions	33
Annex: 3 Correspondence and Submissions	34

Chapter 1

Executive Summary

- 1.1 On 25 January 2022, BT Communications Ireland Limited (**'BT'**) submitted a request for resolution of a dispute with Eircom Limited (**'Eircom'**) under Regulation 31 of the Framework Regulations.¹ The Dispute arises in the context where BT requests access to Eircom's Civil Engineering Infrastructure (**'CEI'**) at the Kilbarry Mast Site, Old Whitechurch Rd, Cork (the **'Requested Route'**) for the purpose of providing an Electronic Communication Service (**'ECS'**) to a Mobile Network Operator (**'MNO'**) and is concerned with the conditions which Eircom seeks to impose in respect of the Access sought by BT.
- 1.2 Regulation 31(2) of the Framework Regulations requires that within 4 months from the date on which the dispute was notified, the Commission for Communications Regulation (**'ComReg'**) make a determination aimed at ensuring compliance with obligations, including in particular obligations imposed under the Specific Regulations² to resolve the dispute.
- 1.3 ComReg accepted the dispute on 09 February 2022 and published the scope on the ComReg website on the same day as follows:

Whether Eircom is permitted to require BT to agree to the following conditions:

- (a) "No ingress or egress point will be included for the purpose of serving the mast access site";
- (b) "An Undertaking (e.g. MNO) will not be connected";
- (c) "Network-network interconnect connections will not be provided",

prior to Eircom supplying Access to CEI to BT at the Kilbarry Mast Site, Old Whitechurch Rd, Cork.

- 1.4 The Eircom CEI required for the Requested Route includes Duct, Sub-duct, Chambers, Ingress and Egress. Under Section 7 of the WLA DI, Eircom is obliged to offer and grant access to this CEI, irrespective of the electronic communications service that the requested access product, service or facility are used to provide

¹ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011).

² Framework Regulations (S.I. No. 333 of 2011), Authorisation Regulations (S.I. No. 335 of 2011), Access Regulations (S.I. No. 334 of 2011), Universal Service Regulations (S.I. No. 337 of 2011) and Privacy and Electronic Communications Regulations (S.I. No. 336 of 2011).

and is not limited to the provision of electronic communications services to End-Users only.

1.5 The conditions that Eircom sought to place on Access to its CEI at the Kilbarry Mast Site, Old Whitechurch Rd, Cork are inconsistent with Section 7.6 of the WLA DI in that they would prohibit access under Section 7 of the WLA DI from being used to provide electronic communications services to an Undertaking.

1.6 Prior to agreeing to the supply of Access to CEI to BT at the Kilbarry mast site, Old Whitechurch Rd. Cork between Eircom may not require that BT to agree to the following conditions:

(i) *“No ingress or egress point will be included for the purpose of serving the mast access site”;*

(ii) *“An Undertaking (e.g. MNO) will not be connected”;*

(iii) *“Network-network interconnect connections will not be provided” ,*

1.7 ComReg therefore reaches the following preliminary conclusions:

(a) BT has requested access to Eircom CEI for the Requested Route for the purpose of providing an ECS to an MNO. The Eircom CEI required for the Requested Route includes Duct, Sub-duct, Chambers, Ingress and Egress. The underground pipes or conduits for the Requested Route come within the definition of Duct contained in Section 2.1 of the WLA DI.

(b) Under Section 7 of the WLA DI, Eircom is obliged to offer and grant access to this CEI regardless of whether Access is sought for purpose of providing services to End-Users; Access provided under Section 7 of the WLA DI may be used to provide electronic communications services to Undertakings, including MNOs.

(c) The current version of the Access Reference Offer (“**ARO**”)³ sets out the conditions for Access under Eircom’s obligations at Section 7.2(xiii) of the WLA DI. Eircom may not impose further conditions, that would prevent such Access from being used to provide services, such as a leased line, to an MNO.

(d) There are no technical or other reasons why Eircom cannot provide the Access requested by BT in respect of the Requested Route.

³ Access Reference Offer, Version 17, dated 18 February 2022. Paragraph 2.4 of the ARO details the set of Eircom documents that form part of the ARO.

- 1.8 The Draft Determination Notice (which is the legal instrument that contains ComReg’s Determination) which ComReg proposes to make, subject to consultation, is contained in Annex 1 of this document. The resolution to this Dispute is detailed at Section 4 of the Draft Determination Notice at Annex 1 as follows:
- (a) Eircom’s obligation to provide Access to CEI is not limited by the purpose to which Access is sought and Eircom may not subject Access to the conditions set out in Section 3.1 of the Draft Determination Notice at Annex 1 of the Draft Determination.
 - (b) In the absence of any valid reasons why Access is not capable of being delivered at the Requested Route, BT’s Order is a reasonable request for Access at the Requested Route which Eircom shall meet without any further delay in accordance with Eircom’s Access Reference Offer.
 - (c) BT may use Access on the Requested Route for the purpose of providing any ECS or ECN as it sees fit.
- 1.9 Parties to the dispute and/or the wider industry will have 10 working days following publication, to submit comments on the Draft Determination.
- 1.10 The remainder of this document (**‘the Draft Determination’**) is structured as follows:
- (a) Chapter 2 - Background to the Dispute
 - (b) Chapter 3 – Regulatory Framework
 - (c) Chapter 4 – Submissions of the parties
 - (d) Chapter 5 – Analysis
 - (e) Chapter 6 - Preliminary Conclusions

Chapter 2

Background to the Dispute

2.1 Chronology

- 2.1 On 25 January 2022, BT Communications Ireland Limited (**'BT'**) submitted to ComReg a request for resolution of a dispute with Eircom Limited (**'Eircom'**) under Regulation 31 of the Framework Regulations⁴ (the **'Dispute'**). The Dispute arises in the context where BT requested access to Eircom's Civil Engineering Infrastructure (**'CEI'**) at the Kilbarry Mast Site, Old Whitechurch Rd, Cork (the **'Requested Route'**) for the purpose of providing an Electronic Communication Service (**'ECS'**) to a Mobile Network Operator (**'MNO'**) and is concerned with the conditions which Eircom seeks to impose in respect of the Access sought by BT.
- 2.2 ComReg accepted the dispute on 09 February 2022 and published the scope on the ComReg website on the same day. The scope of the Dispute is considered at Section 2.4 below.
- 2.3 The following is a chronology of events relating to this dispute:
- (a) 3 November 2021 - Email from BT to Eircom CEI Order Submission for the supply of Duct Access. The order relates to the Kilbarry Mast Site, Old Whitechurch Rd, Cork (the **'Order'**).
 - (b) 5 November 2021 - Email from Eircom to BT seeking clarification regarding the Order.
 - (c) 5 November 2021 - Email from BT to Eircom providing the clarification requested.
 - (d) 5 November 2021 - Email from Eircom to BT acknowledging receipt of the above email.
 - (e) 15 November 2021 - Email from Eircom to BT advising of management decision that the request is not reasonable.
 - (f) 26 November 2021 - Email from BT to Eircom disputing rejection of the order.

⁴ European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011).

- (g) 2 December 2021 - Email from BT in follow up to the above email of 26 November 2021.
- (h) 6 December 2021 - Email from Eircom to BT reiterating its decision to reject the order.
- (i) 7 December 2021 - Email from BT to Eircom regarding the rejection.
- (j) 8 December 2021 - Email from Eircom to BT again confirming rejection of the order.
- (k) 8 December 2021 - Email from BT to Eircom providing a revised order with accompanying map.
- (l) 13 December 2021 - Email from Eircom to BT advising the order will not be progressed.
- (m) 15 December 2021 - Email from BT to Eircom requesting confirmation the order will proceed citing clause 7.6 of the WLA DI.
- (n) 15 December 2021 - Email from BT to Eircom following up on the above email.
- (o) 20 December 2021 - Email from Eircom to BT advising that Eircom will follow up internally.
- (p) 22 December 2021 - Email from Eircom to BT advising that Eircom disagrees with BT's interpretation of Section 7.6. Eircom suggests that perhaps ComReg may be able to clarify.
- (q) 22 December 2021 - Email from BT to Eircom advising the matter will be on hold until January due to staff leave. Email also refers to sharing ComReg's interpretation of this matter.
- (r) 22 December 2021 - Email from Eircom to BT acknowledging the above.
- (s) 6 January 2022 - Email from BT to Eircom with updated request.
- (t) 10 January 2022 - Email from Eircom to BT advising Eircom cannot proceed with the original request. The email lists the parameters within which the order can be granted.
- (u) 11 January 2022 - Email from BT to Eircom requesting that Eircom re-consider BT's request from 6 January 2022 on the basis that BT would stand down serving the mast site until the matter is resolved between BT, Eircom and ComReg.

- (v) 12 January 2022 – Email from Eircom to BT indicating that BT’s email of 11 January 2022 has been shared with and was being reviewed by relevant Eircom management.
- (w) 14 January 2022 – Email from Eircom in response to BT’s email of 11 January 2022 requesting confirmation that BT’s revised requirement conforms with the three requirements listed.
- (x) 25 January 2022 - BT submits the Dispute to ComReg.
- (y) 4 February 2022 - Letter from ComReg to BT seeking clarification on the dispute.
- (z) 4 February 2022 - Letter from ComReg to Eircom seeking clarification on the dispute.
- (aa) 7 February 2022 - Letter from Eircom to ComReg 7 February 2022 in response to request.
- (bb) 7 February 2022 - Letter from BT to ComReg in response to request.
- (cc) 9 February 2022 - Letter from ComReg to Eircom to confirm that the Dispute has been accepted.
- (dd) 9 February 2022 - Letter from ComReg to BT to confirm that the Dispute has been accepted.
- (ee) 9 February 2022 - Information Notice Published.
- (ff) 22 February 2022 - Letter from Eircom to ComReg providing Eircom’s Representations in response to BT dispute.
- (gg) 2 March 2022 - Letter from ComReg to BT providing Eircom’s representations and seeking some clarifications.
- (hh) 7 March 2022 - Letter from BT to ComReg in response to letter of 2 March 2022
- (ii) 1 April 2022 – Email from BT in follow up to its 7 March 2022 submission. BT states it maintains its position and requests that ComReg reaches a determination on the dispute expeditiously.
- (jj) 14 April 2022 - ComReg issues the Draft Determination

2.2 The parties to the dispute

- 2.4 Eircom Limited, is a fixed and mobile telecommunications company that provides retail and wholesale ECS in Ireland. Eircom has been designated as having Significant Market Power on a number of wholesale markets, including in particular by ComReg Decision D10/18 (ComReg Document 18/94) in respect of the market for Wholesale Local Access (WLA) provided at a Fixed Location and the market for Wholesale Central Access (WCA) provided at a Fixed Location⁵.
- 2.5 BT Communications Ireland Limited is a fixed telecommunications company that provides retail and wholesale ECS in Ireland.

2.3 ComReg's Dispute Resolution Powers

- 2.6 Regulation 31 of the Framework Regulations sets out ComReg's powers regarding disputes between undertakings in connection with existing obligations under the Specific Regulations. ComReg's determination in the dispute must aim to ensure compliance with those obligations to resolve the dispute.
- 2.7 In accordance with Regulation 31(3) of the Framework Regulations, ComReg published Dispute Resolution procedures in ComReg Document No. 10/18 R⁶.
- 2.8 Regulation 31(2) of the Framework Regulations requires that, other than in exceptional circumstances, within 4 months from the date on which the dispute was notified, ComReg must make a determination aimed at ensuring compliance with the relevant obligation.
- 2.9 In determining this dispute, ComReg has regard to its functions and objectives at Section 12(1)(a) of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations.

⁵ The WLA and WCA markets correspond to Markets 3(a) and 3(b) respectively of the European Commission's 2014 Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁶ Response to Consultation and Decision Notice, Dispute Resolution Procedures - Framework Regulations (Response to Consultation Document No. 09/85) (Document No: 10/18, Decision No: D03/10 Date: 29 March 2010).

2.4 Scope of the Dispute

- 2.10 In its submission of 25 January 2022 (Annex 3.1), BT indicated that the dispute, as submitted, focused on one of the conditions required by Eircom, and defined the scope of the submitted dispute as:

“Eircom has provided itself with duct facilities that it uses to sell BT NGN/WDM services to mast sites nationally for H3G .

We dispute Eircom’s refusal to supply BT with CEI for BT to serve a mobile operator with Leased Line backhaul for mobile access services (for the transport of e .g., end user mobile data or voice calls).”

- 2.11 BT further indicated in its submission of 25 January 2022, that a separate dispute would be submitted relating to the two additional conditions required by Eircom.

- 2.12 As set out above, while ComReg’s jurisdiction under Regulation 31 of the Framework Regulations must be exercised with the view to ensuring compliance with existing obligations, it is grounded in resolving a dispute between Undertakings. In exercising its powers under Regulation 31 of the Framework Regulations, ComReg accordingly must be first satisfied that there is a dispute that is arising either between Undertakings providing electronic communications networks or services in the State in connection with existing regulatory obligations or between such Undertakings and other Undertakings benefiting from obligations of access or interconnection. A complaint that an Undertaking is not complying with its obligations is insufficient to trigger ComReg’s jurisdiction under Regulation 31 of the Framework Regulations.

- 2.13 ComReg, having reviewed BT’s submission, and having sought clarification from the parties to the dispute, was satisfied that BT has raised a dispute for the purpose of Regulation 31 of the Framework Regulations between two Undertakings providing electronic communications networks or services in the State. However, ComReg was not satisfied that the scope of the dispute should be confined to a determination in respect of one of the conditions required by Eircom, as such a determination may not bring the dispute to a conclusion. ComReg suggested to the parties that the scope of the dispute be defined as:

Whether Eircom is permitted to require BT to agree to the following conditions:

1. “No ingress or egress point will be included for the purpose of serving the mast access site”;
2. “An Undertaking (e.g. MNO) will not be connected”;
3. “Network-network interconnect connections will not be provided”,

prior to Eircom supplying Access to CEI to BT at the Kilbarry Mast Site, Old Whitechurch Rd, Cork.

- 2.14 Neither BT nor Eircom objected to the scope of the dispute, as proposed by ComReg and on 9 February 2022, ComReg published on its website Information Notice 22/08 setting out that it had accepted a request for resolution of a dispute between BT and Eircom, and the scope of the Dispute.
- 2.15 Eircom was provided with an opportunity to make representations in respect of the dispute and on 22 February 2022 Eircom provided ComReg with their initial representations (Annex 3.9).
- 2.16 The existing regulatory obligations relevant to this dispute are set out at Section **Error! Reference source not found.** of this Draft Determination.

Chapter 3

Regulatory Framework

3.1 This chapter provides a brief overview of the legal framework for managing disputes and for the regulation of Access by Undertakings⁷ providing electronic communications networks or services in the State, in connection with existing obligations under the Access Regulations.⁸ This overview is limited to the scope of those regulations specifically applicable or related to the circumstances of this dispute.

3.1 Regulation 31 of the Framework Regulations

3.2 Regulation 31 of the Framework Regulations provides for ComReg’s statutory role in resolving disputes. ComReg considered the circumstances presented by the parties in their initial submissions and is satisfied that these meet the requirements set out at Regulation 31(1) of the Framework Regulations

3.3 As set out at Regulation 31(2) of the Framework Regulations, ComReg will, at the request of either party, initiate an investigation of the dispute and as soon as possible but, except in exceptional circumstances, within 4 months make a determination aimed at ensuring compliance with the obligations of the Specific Regulations to resolve the dispute.

3.4 In the following sections ComReg will outline the obligations relevant to this dispute.

3.2 Relevant obligations

3.2.1 ComReg Decision D10/18

3.5 This Dispute is concerned with the obligations imposed on Eircom in respect of the market for the provision of Wholesale Local Access (**‘WLA’**) under ComReg Decision D10/18 published on 19 November 2018 (ComReg 18/94)⁹.

⁷ “Undertaking(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations (see Glossary).

⁸ European Communities (Electronic Communications Networks and Services) (Access) Regulations, 2011 (“the Access Regulations”).

⁹ Market Review Wholesale Local Access (WLA) provided at a Fixed Location; Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products.

- 3.6 In Decision D10/18, ComReg found that access to CEI is an important aspect of facilitating entry in telecommunications markets. By allowing use of the SMP Undertaking's network at the highest rung of the 'ladder of investment', Access (as defined in section 2.1 of the WLA Decision Instrument) to CEI allows other Undertakings¹⁰ to build out their own network infrastructure avoiding the very significant costs of duplicating CEI where it is not economically efficient to do so. On this basis, ComReg Decision D10/18 imposed an obligation on Eircom to provide Access to CEI (section 7.2(xiii) of the WLA Decision Instrument).

3.2.2 Obligations

- 3.7 Regulation 31(2) of the Framework Regulations requires that ComReg make a determination aimed at ensuring compliance with specific obligations to resolve the dispute.
- 3.8 The current obligations in relation to the WLA market are set out in the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18 ('**the WLA DI**').
- 3.9 Section 7 of the WLA DI imposes on Eircom obligations of Access. In particular Section 7.2 (xiii) of the WLA DI sets out the obligation on Eircom to provide Access to its Civil Engineering Infrastructure, as follows.

"7.2 Without prejudice to the generality of Section 7.1 of this Decision Instrument and pursuant to Regulation 12(2) of the Access Regulations, Eircom shall provide and grant Access to Undertakings for the following particular products, services and Associated Facilities:-

[...]

(xiii) Civil Engineering Infrastructure and in particular the following:

- a. Duct Access and Pole Access;*
- b. Direct Duct Access, Sub-Duct Access;*

[...]

d. To the extent utilised in combination with (a) or (b) above:

- I. Ingress and Egress points;*

[...]

¹⁰ Other Undertakings are those Undertakings availing of access to CEI which are not Eircom or its subsidiaries.

III. Chambers”

3.10 Section 7.6 of the WLA DI sets out the obligation on Eircom to provide Access irrespective of the electronic communications service that the requested access product, service or facility shall be used to provide -

“7.6 The access obligations set out in this Section 7 shall apply irrespective of the electronic communications service that the requested access product, service or facility shall be used to provide. For the avoidance of doubt, the purpose for which the access request is made is not limited to the provision by the Undertaking of services to End Users.”

Chapter 4

Submissions of the parties

4.1 Summary of email correspondence

4.1 This chapter summarises the email correspondence between BT and Eircom prior to BT submitting the dispute to ComReg (Emails are contained in Annex 3.2 unless otherwise stated).

4.2 On 3 November 2021 BT made the CEI Order Submission for the supply of Sub-Duct Access at the Kilbarry Mast Site, Old Whitechurch Rd, Cork. On 5 November 2022 Eircom sought clarification on the intended purpose of the sub-duct access, this was provided by BT on the same day.

4.3 On 15 November 2021 BT received an email from Eircom which informed BT of an Eircom management decision that BT's request was not reasonable:

"In following this order through I have been advised by the relevant management that it is open eir's understanding that it is not a reasonable request to provide service to an Undertaking (e.g. a Mobile Operator) and that such a request does not fall within the scope of open eir's CEI Access obligations as they relate to End Users. This is consistent with the definitions within D10/18 and Appendix 12 of 19/96 [Sic]"

4.4 On 26 November 2021 and 2 December 2021, BT wrote to Eircom to query the rejection of the order. On 6 December 2021 Eircom reiterated its decision to reject the order:

"The update received - as stated originally in our mail of 15 November (below) - is that open eir believes the provision of service to an undertaking is outside the scope of open eir's CEI Access obligations as outlined, and as such open eir will not progress this order based on this assessment."

4.5 On 7 December 2021 BT again wrote to Eircom regarding the rejection stating "Your response surprises me. We can point to OE using the OE duct network to supply us (at least) with 30 leased lines to mast sites. Refusal to supply here is not equivalent." Eircom again confirm order rejected.

4.6 On 8 December 2021 BT provided Eircom with a revised order with accompanying map. The Email from Eircom to BT advised that the order would not be progressed.

"Thank you for the detail provided in your mail of 8 December. open eir's position remains as previously communicated - that this duct access order is not valid as

it does not align with the defined CEI obligations. Therefore, this order will not be progressed.”

- 4.7 BT wrote to Eircom on 15 December 2021 asking for confirmation the order would proceed citing clause 7.6 of the WLA DI.

“The WLA Decision Instrument at Appendix 20 of D10/18, specifically clause 7.6 (extract below), is relevant and supersedes the OE view on the limitation to End Users only”

- 4.8 On 22 December 2021 Eircom advised BT that Eircom disagreed with BT’s use of Section 7.6.

“open eir does not agree that section 7.6 supersedes open eir’s view of the access obligation defined in D10/18. open eir is obliged to grant ‘Duct Access’. A ‘Duct’ is a pipe capable of carrying cables that are used to deliver electronic communications services to End Users. However, BT wants to use the duct to deliver services to an MNO (not to End Users), so open eir considers that this is a different kind of ‘duct’ access, not covered by the regulation in the first place. open eir notes that the interaction with section 7.6 is not entirely clear and could perhaps be helpfully clarified by ComReg.”

- 4.9 On 6 January 2022 BT sent Eircom an updated request.

“You’ll know we’re progressing OE’s refusal to supply duct access to serve the leased line requirements of an MNO. In the meantime, may I ask OE to progress (as requested 8th Dec) this route on the basis of us not using the route to serve the MNO (until the matter has been resolved). The route from Penrose Wharf to customers in the Blackrock area and the Kilbarry Industrial Estate are valid uses of CEI.”

- 4.10 On 10 January 2022 Eircom advised BT that it could proceed with the original request. The email listed the conditions under which the order could be granted.

“As advised, open eir cannot proceed with the original order received, for the reasons outlined in detail in our correspondence below. Should BT wish, a new order could be placed, containing revised diagrams, in line with the following parameters:

- No ingress or egress point should be included that could serve the mast access site*
- An Undertaking (e.g. MNO) may not be connected*
- Network-network interconnect connections may not be provided We trust that this clarifies the situation”*

- 4.11 On 11 January 2022 – An Email from BT to Eircom disputed the proposed conditions and indicated the dispute would need to involve ComReg.

“The egress point of this CEI route must be UUB5060 for us to reach the Kilbarry Industrial Estate. Thus, we request OE re-consider our 6th January request knowing that we’ll stand down serving the mast site until this matter is resolved between yourselves, ourselves and ComReg. Should the matter not be resolved, then OE are free, per the product documentation, to audit our installations/services in life to ensure that our use of CEI is valid.”

- 4.12 On 14 January 2022 Eircom responded to BT’s email of 11 January 2022 (Annex 3.11)

“In order to make progress, could you please confirm that BT’s revised requirement as outlined in your mail conforms with each of the following requirements

- *No ingress or egress point will be included for the purpose of serving the mast access site*
- *An Undertaking (e.g. MNO) will not be connected*
- *Network-network interconnect connections will not be provided”*

- 4.13 Following the receipt of this Email, BT submitted its request for Dispute resolution to ComReg on 25 January 2022.

4.2 Summary of Relevant BT submissions

- 4.14 In its submission of 25 January 2022 (Annex 3.1), BT summarises the position as follows:

“In early Nov 2021, BT submitted a Duct order for a deployment that included a chamber at the foot of a mast site. BT confirmed, when asked by Eircom, that the route would be used to collect local mast site traffic.”

“Eircom refused to supply the route stating that serving an Undertaking is outside the ComReg D10/18 definition of End Users.”

- 4.15 In its submission, BT claims that Eircom’s decision not to grant its request is not in accordance with its obligations under Section 7.4 and 7.6 of the WLA DI Instrument (D10/18):

- 4.16 BT also refers to Section 1.3 of the WLA DI Instrument (D10/18) and submits that the provisions of that Decision Instrument prevail over those of other prior ComReg Decisions, where any conflict arises.

“1.3 The provisions of ComReg Document Number 16/96 and ComReg Decision 10/18, together with ComReg Document Number 17/51 and ComReg Decision D12/18 shall, where appropriate, be construed consistently with this Decision Instrument. For the avoidance of doubt, however, to the extent that there is any conflict between a decision instrument dated prior to the Effective Date (as defined in Section 2.1 of Decision Instrument) and this Decision Instrument, this Decision Instrument shall prevail.”

- 4.17 In addition, BT claims that the 2016 WCA/WLA Market Review (16/96) exhibits evidence of ComReg’s intent that CEI may be used by Access Seekers for the provision of leased lines and backhaul for fixed and mobile services.

“8.215 For the avoidance of doubt, ComReg notes that the use of Eircom CEI by an Access shall be limited to the provision by an Access Seeker of an ECS and/or ECN. In particular, Access Seekers should not be restricted from using the CEI for the purposes of providing broadband, broadband enabled services (eg. IPTV, VOIP), leased lines, backhaul for fixed and mobile services, and for network rollout etc”.

- 4.18 According to BT, *“From the above extracts, ComReg’s intention (16/96) and regulation (D10/18) allow for OAO’s to purchase CEI for the provision of downstream WLA access facilities such as data solutions or leased lines services to other operators (including MNOs) as well as end-users”*. BT claims further that Eircom’s refusal to meet BT’s requirements means that:

“• Competition in the market is limited as BT (without access to lower cost inputs) cannot efficiently compete to win new MNO local access leased line services;

• Absent the supply of CEI, BT is burdened with unnecessary costs such as expensive fully managed NGN/WDM solutions or self-build construction costs to serve local access requirements of MNOs. These higher costs flow downstream – this is adverse for retail customers;

• Absent the supply of CEI, end customers face downstream product limits when the local NGN exchange is only 1G enabled but the cost to buy a 10G WUP is not cost effective for the MNO. This is adverse for retail customers.”

- 4.19 Accordingly, BT sought *“resolution so that Eircom will provide the service requested without delay.”*

4.3 Summary of Eircom's submissions

- 4.20 In its submission of 22 February 2022 (Annex 3.9), in response to ComReg's notification of the dispute (Annex 3.7), Eircom expresses the view that the definitions of 'Duct' and "End Users" mean that BT's Order does not fall within the scope of its obligation of Access under Section 7.1 and 7.2 of the WLA DI Instrument D10/18, namely under Section 7.1, a general obligation on Eircom to meet:

"All reasonable requests from Undertakings for the provision of Wholesale Local Access";

and under Section 7.2, specific categories of Access including at Section 7.2(xiii):

"Civil Engineering Infrastructure and in particular the following a. Duct Access" [emphasis by Eircom].

- 4.21 Eircom also refers to the definitions of Duct and End Users set out at Section 2 of the WLA DI D10/18. "Duct" is defined as a conduit for carrying cables used to deliver services to End Users:

"An underground pipe of conduit that carries or is capable of carrying cables that are in turn used to deliver electronic communication services to End Users¹.

[...]

¹ *Note also that a Sub-Duct is defined as 'a tube..inserted in a Duct' i.e. the same restrictions apply to Sub-Duct" [emphasis by Eircom].*

"End Users" are defined "...under Regulation 2 of the Framework Regulations...[and] deemed to include and natural of legal person who facilitates or intends to facilitate the provision of public communication networks...to other End Users and who is not acting as an undertaking" [emphasis by Eircom].

- 4.22 Eircom notes also that in turn the Framework Regulations (and the underlying Directive) define End User as:

"a user not providing public communication networks of publicly available electronic communication services." [emphasis by Eircom]

- 4.23 According to Eircom, *"The above definitions make it clear that a Duct covered by Eircom's Access obligations is solely one used by an Undertaking to carry cables to deliver services to End Users, not to another Undertaking. For this reason, Eircom considers that a 'duct' (or sub-duct) to be used to provide services from one Undertaking to another Undertaking (as proposed by BT here) does not fall within the definition of 'Duct' set out in Decision D10/18. Eircom does not therefore*

have an access Obligation to provide this type of Duct or Sub-Duct.” [emphasis by Eircom]

4.24 Eircom submits that Paragraphs 7.381 and 7.376 are relevant to this dispute And also refers to Appendix 12 of ComReg 16/96¹¹. These submissions are considered in paragraph 5.12 below.

4.25 Eircom disagrees with BT’s interpretation of Section 7.4 and 7.6:

“Eircom notes that BT relies on the provisions of section 7.4 and 7.6 to claim that the Duct Access obligation may be extended to mandate use of Ducts to provide backhaul to a mobile operator. However, neither provision supports this interpretation, particularly when the binding definitions of Duct and End Users are taken into account, together with the statements in Response to the Consultation.”

4.26 In response to Clause 7.4 Eircom states that:

“This Clause relates to the imposition on restrictions under Clause 7.2 (xiii). However, as noted above, Eircom considers that it is clear that Ducts to supply Undertakings are not covered by Clause 7.2 (xiii) in the first place, in light of how Duct is defined (and as supported by ComReg’s statements in 7.381 and 7.376.)”

4.27 In response to Clause 7.6 Eircom states that:

“This provision applies to all forms of Access request under Section 7, which include e.g Access to VUA, Co-Location and Migration. However, this does not change the fundamental point that the definition of Duct for the purposes of Clause 7.2 (xiii) is limited to ducts providing services to End Users, so that a duct to provide backhaul services to a MNO Undertaking is simply not covered in the first instance.”

4.28 Eircom adds *“Finally, BT rely on a statement in the initial 2016 Consultation document 16/96. However, with respect, the fact that ComReg may have expressed an initial view in an early consultation document, cannot override the explicit language of a Decision Instrument adopted two years later, after consultation of submissions received. The statement is clearly not consisted [Sic] with the statements made in subsequent Response to Consultation cited above, which indicate that access to CEI is for the purposes of deployment of access networks i.e not for the provision of backhaul to Undertakings.”*

¹¹ ComReg Consultation and Draft Decision in respect of the market for Wholesale Local Access (WLA) provided at a Fixed Location and the market for Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products. Date: 11/11/2016

Chapter 5

Analysis

5.1 BT's Access request

5.1 This Dispute is concerned with Eircom's refusal to provide BT with access to an Eircom Sub-Duct on the route between the following two points (the '**Requested Route**')

- (a) Eircom Chamber "UUB3095" located at the entrance to Penrose Wharf Carpark, Alfred Street, Cork the ('**Requested Ingress Point**') and
- (b) Eircom Chamber "UUB 5060" located outside the Kilbarry Mast Site, Kilbarry, Old Whitechurch Road, Cork ('**Requested Egress Point**').

unless BT agrees to a number of conditions, further detailed below.

5.2 ComReg understands that the Requested Ingress Point is the Eircom Chamber closest to BT's Penrose Wharf site, and the Requested Egress Point is an Eircom Chamber adjacent to a Mobile Mast Site. Within this Mobile Mast Site, two MNOs have radio equipment that provide Mobile services to End-users in the area. In its submissions BT has stated that the intended purpose of the requested Access is to "[...] *serve a mobile operator with Leased Line backhaul for mobile access services (for the transport of e.g., end user mobile data or voice calls)*". The requested Access will accordingly be used by BT to provide an ECS in the form of a leased line to an MNO.

5.3 Considering the above ComReg notes that to meet the BT request requires that Eircom provide access to the following types of Eircom CEI:

- (a) Sub-Duct
- (b) Ingress and Egress
- (c) Chambers

5.2 The Eircom conditions

5.4 Based on the correspondence exchanged between the parties and their submissions to ComReg to date, Eircom has refused to meet BT's request for Access to the Requested Route unless BT agrees to the following three conditions:

- (a) “*No ingress or egress point will be included for the purpose of serving the mast access site*” – This means that the BT fibre cable within Eircom Sub-Duct may not ingress or egress the Eircom Sub-Duct at the Kilbarry mast site if doing so is for the purpose of providing services at the Kilbarry mast site.
- (b) “*An Undertaking (e.g. MNO) will not be connected*” – This means that the BT fibre cable within the Eircom Sub-Duct on the Requested Route may not be connected to an Undertaking, for example an MNO.
- (c) “*Network-network interconnect connections will not be provided*” – This means that the BT fibre cable within the Eircom Sub-Duct on the Requested Route may not provide a connection between the BT network and the network of another network operator including an MNO.

5.5 The net consequence of the conditions is to limit BT’s purpose or use of Eircom Sub-Duct by prohibiting Access for the purpose of providing an ECS to an MNO.

5.6 ComReg notes that conditions of Access to CEI under Section 7 of the WLA DI are published by Eircom on its public website in the current version of the ARO. The conditions that Eircom proposes for CEI Access on the Requested Route are additional to the existing conditions in the ARO.

5.3 Whether purpose of Access is relevant

5.7 In its submissions of 22 February 2022, Eircom seeks to restrict the scope of its obligation to provide Access to CEI, more particularly its obligation to provide Sub-Duct Access, by reference to the purpose for which Access is sought by an access seeker. According to Eircom its obligation of Access under Section 7 of the WLA DI only applies where Access is to be “*used by an Undertaking to carry cables to deliver services to End Users*”. As a consequence, Eircom would be entitled to impose restrictions on Access provided under Section 7 of the WLA DI, so that a Sub-Duct may not be used to carry cables to provide an ECS to a Mobile Operator, as it is not an End-User. For Eircom for the Access to be within the Scope of Section 7 of the WLA DI, it must serve or be capable of serving an End-user.

5.8 In this context Eircom points to the definition of Duct which specifically refers to it carrying or being capable of carrying cables to deliver services to End Users, the effect of which would be to place a limitation on the use of Duct by those seeking Access. Eircom also argues that because Sub-Duct is, by definition, inserted in a Duct that this limitation on the use of Duct extends to the use of Sub-Duct.

- 5.9 However, ComReg does not agree that the scope of Eircom’s obligation to provide Access to CEI, including Sub-Duct Access, is limited in the manner set out by Eircom.
- 5.10 First, the definition of Duct at Section 2.1 of the WLA DI describes the physical characteristics of Eircom-owned pipes or conduits to which Eircom is required to provide Access. The Ducts are installed for the purpose of carrying telecommunications cables underground and the cables are used for the purpose of conveying telecommunications signals. However, in order for a pipe or conduit to come within the definition of “Duct” under Section 2 of the WLA DI, it is not necessary for the pipe or conduit to actually carry such cables to an End-User. Rather, all that is required is that it is capable of carrying such cables. ComReg notes that the physical characteristics of fibre cables that carry telecommunications signals are the same regardless of the entity they are connected to or the ECS that the cables are used to provide. For example, there is no material difference between a fibre cable carrying a residential broadband service to an End-user; a Leased Line service to an End-User or a fibre cable carrying a Leased Line service to an MNO.
- 5.11 In addition, the Access sought by BT in this case will allow the provision of ECS to End-Users. ComReg understands that BT seeks Access with the view to providing an ECS to an Undertaking, specifically an MNO, in the form of Mobile Backhaul. The MNO has radio equipment at the Mast Site used to provide an ECS to End-Users and the Mobile Backhaul service will convey signals to and from End-Users. In other words, Access is required in this case for the purpose of installing cables that will be used to deliver an ECS to End Users.
- 5.12 Eircom submits that Paragraphs 7.381 and 7.376 of ComReg Decision D10/18, together with Appendix 12 of ComReg 16/96 are relevant to this dispute. Paragraph 7.381 of ComReg Decision D10/18 makes reference to Access Seekers access networks being from the MPOP to the End-User. In ComReg’s view, this does not constrain the use of CEI by Access Seekers to only serving End-users. Paragraph 7.376 of ComReg Decision D10/18 provides the submissions of a respondent and are not the views of ComReg.
- 5.13 ComReg notes that in January 2017, Eircom removed a restriction on the use of Access to its Ducts and Poles. By removing the restriction, Eircom permitted the use ducts and poles for the purpose of providing leased lines.
- 5.14 ComReg also notes that paragraph 1.3 of ComReg Decision D10/18 sets out that Access in the WLA market may be used to supply a range of downstream wholesale and retail telecommunications services. Specifically, that WLA services may be used by an operator to provide services to another operator:

“WLA and WCA services are wholesale inputs used in the supply of a range of downstream wholesale and retail telecommunications services such as broadband internet connectivity, television (‘TV’) services, and the provision of fixed telephony to residential and business consumers (collectively, ‘End Users’). WLA inputs can also be utilised by Service Providers (‘SP(s)’) to supply downstream WCA or other wholesale services.”

- 5.15 Eircom’s CEI Access obligations are explored further in an annex to ComReg’s Decision on Wholesale High Quality Access at a Fixed Location (D10/20) (the ‘**WHQA Decision**’)¹² where ComReg states at A1.807: *“In its 2018 WLA/WCA Decision, ComReg imposed CEI Access remedies which Eircom must implement by 18 May 2019 and 18 September 2019 to the standard of EoO and EoI respectively. ComReg clearly stated in the 2018 WLA/WCA Decision that such access to CEI is to be provided by Eircom without imposing any restrictions to the services which Access Seekers can provide using CEI Access, including for example, WHQA services. For this reason, ComReg does not specify requirements governing CEI Access in the MI WHQA Markets”.*
- 5.16 Further at A1.808 ComReg states: *“CEI Access remedies reside in the WLA market and apply to the WLA market which is national. Hence, the CEI remedies can be used by Access Seekers to provide services, including MI WHQA services anywhere within the Eircom CEI footprint...”* Therefore, ComReg considers, that its position in respect of restrictions by Eircom to CEI Access has been clearly set out in these statements.
- 5.17 It is ComReg’s view that the Eircom Duct required for the Requested Route falls within the scope of the definition Duct at Section 2.1 of the WLA DI.
- 5.18 Contrary to Eircom’s submission, the definitions of “duct” and “end-user(s)” do not have an effect of limiting the use of Access. The definition of Duct at Section 2.1 of the WLA DI describes the capability of the Duct itself and does not impose limitations on either –
- (a) the type of ECS that an Undertaking requesting Access can provide or
 - (b) to whom an Undertaking requesting Access can provide an ECS to.
- 5.19 ComReg notes in this regard that this is clearly stated in Section 7.6 of the WLA DI. Section 7.6 of the WLA DI states for the avoidance of doubt, that the purpose for Access requested pursuant to Section 7 of the WLA DI is not limited to the provision of services to End-users.

¹² ComReg Ref: 20/06. Date: 24/01/2020

- 5.20 On the basis that the three conditions sought to be imposed on Eircom are conditions that seek to prevent BT from using the Access sought to provide services to other network operators on the basis that they are not End-Users, such conditions are impermissible under the WLA DI.

Chapter 6

Preliminary Conclusions

6.1 ComReg makes the following preliminary conclusions -

- (a) BT has requested access to Eircom CEI for the Requested Route for the purpose of providing an ECS to an MNO. The Eircom CEI required for the Requested Route includes Duct, Sub-duct, Chambers, Ingress and Egress. The underground pipes or conduits for the Requested Route come within the definition of Duct contained in Section 2.1 of the WLA DI.
- (b) Under Section 7 of the WLA DI, Eircom is obliged to offer and grant access to this CEI regardless of whether Access is sought for purpose of providing services to End-Users; Access provided under Section 7 of the WLA DI may be used to provide electronic communications services to Undertakings, including MNOs.
- (c) The current version of the ARO sets out the conditions for Access under Eircom's obligations at Section 7.2(xiii) of the WLA DI. Eircom may not impose further conditions, that would prevent such Access from being used to provide services, such as leased line, to an MNO.
- (d) There are no technical or other reasons why Eircom cannot provide the Access requested by BT in respect of the Requested Route.

Chapter 7

Next Steps

- 7.1 The parties to the Dispute and Industry members have until 5pm on 3 May 2022 to provide comments on this Draft Determination.
- 7.2 The task of analysing responses received will be made easier if all comments are referenced to the specific paragraph or chapter numbers used in this Draft Determination.
- 7.3 Having analysed and considered the comments received, ComReg will review the proposals set out in this Draft Determination¹³ ComReg will then seek to adopt and publish the Final Determination.
- 7.4 In order to promote further openness and transparency, ComReg will publish the parties' responses, subject to the provisions of ComReg's guidelines on the treatment of confidential information in ComReg Document No.05/24¹³.
- 7.5 ComReg appreciates that many of the issues raised in this Draft Determination may require the parties to provide confidential information.
- 7.6 As it is ComReg's policy to make all responses available, the parties are requested to clearly identify confidential material within their submissions and place any such confidential material in a separate document to their response, with this also being provided by the date referred to in paragraph 7.1 above.
- 7.7 Such Information will be treated subject to the provisions of ComReg's guidelines on the treatment of confidential information as set out in ComReg Document No.05/24.
- 7.8 In submitting comments, the parties are also requested to provide a copy of their submissions in an unprotected electronic format in order to facilitate their subsequent publication by ComReg.

¹³ Response to Consultation - Guidelines on the treatment of confidential information (Date: 22nd March 2005, Document Number: 05/24).

Annexes

Annex: 1 Draft Determination Notice

1 STATUTORY POWERS GIVING RISE TO THIS DETERMINATION NOTICE

1.1 This Determination is made:

- (i) Pursuant to Regulation 31 of the Framework Regulations;
- (ii) Having had regard to Sections 10 and 12 of the Communications Regulation Act 2002 (as amended) and Regulation 16 of the Framework Regulations;
- (iii) Having taken account of the submissions received from the Parties and following publication of a draft of this Determination by way of ComReg 22/26 on 14 April 2022; and
- (iv) Having regard to the analysis and reasoning set out in Chapters 2 to 5 of ComReg 22/26 and in ComReg Decision D10/18.

2 DEFINITIONS

2.1 In this Determination, capitalised terms shall have the same meaning as those terms in the WLA Decision Instrument.

2.2 In addition:

“**BT**” means BT Ireland Limited, an Undertaking authorised pursuant to Regulation 4 of the Authorisation Regulations;

“**ComReg Decision D10/18**” means ComReg Document No. 18/94, entitled “Market Review - Wholesale Local Access (WLA) provided at a Fixed Location & Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products: Response to Consultation and Decision”, dated 19 November 2018;

“**Determination Notice**” means this Determination;

“**Dispute**” means the dispute between BT and Eircom brought by BT to ComReg for resolution the scope of which is set out in ComReg 22/...;

“**Effective Date**” means the date set out in Section 6 of this Decision Instrument;

“**Parties**” mean BT and Eircom;

“**Requested Route**” means the request for access to an Eircom Sub-Duct between Eircom Chamber “UUB3095” located at the entrance to Penrose Wharf Carpark, Alfred Street, Cork and Eircom Chamber “UUB 5060” located outside the Kilbarry Mast Site, Kilbarry, Old Whitechurch Road, Cork; and

“WLA Decision Instrument” means the Decision Instrument at Appendix 20 of ComReg Decision D10/18.

3 SCOPE AND APPLICATION

- 3.1 This Determination resolves the Dispute brought by BT as regards whether Eircom may, upon a request from BT that Eircom provides to it, further to Eircom’s obligation under Section 7 of the WLA Decision Instrument, Access to CEI at the Kilbarry Mast Site, Old Whitechurch Rd, Cork, subject the provision of Access to BT agreeing to the following conditions:
- 3.1.1 That no ingress or egress point will be included for the purpose of serving the mast access site;
 - 3.1.2 That BT will not use the CEI to which Access is provided to connect an Undertaking (e.g. MNO); and
 - 3.1.3 That BT will not use the CEI to which Access is provided to provide Network-network interconnect connections.
- 3.2 The Determination is binding upon the Parties and their subsidiaries and any related companies, and any Undertaking which they each own or control, and any Undertaking which owns or controls either of them, and their respective successors and assigns, who shall comply with it in all respects from the Effective Date. For the purpose of this Determination, the terms “subsidiary” and “related company” shall have the meaning ascribed to them in the Companies Act 2014.

4 RESOLUTION

- 4.1 The Dispute is hereby determined as follows:
- 4.1.1 Eircom’s obligation to provide Access to CEI is not limited by the purpose to which Access is sought and Eircom may not subject Access to the conditions set out in Section 3.1 above.
 - 4.1.2 In the absence of any valid reasons why Access is not capable of being delivered at the Requested Route, BT’s Order is a reasonable request for Access at the Requested Route which Eircom shall meet without any further delay in accordance with Eircom’s Access Reference Offer.
 - 4.1.3 BT may use Access on the Requested Route for the purpose of providing any ECS or ECN as it sees fit.
- 4.2 ComReg’s right to make further directions as required to ensure that Access is provided in accordance with the Determination is expressly reserved.

5 STATUTORY POWERS NOT AFFECTED

- 5.1 Nothing in this Decision Instrument shall operate to limit ComReg in the exercise and performance of its statutory powers or duties conferred on it under any primary or secondary legislation from time to time (in force prior to or after the Effective Date of this Decision Instrument).

6 EFFECTIVE DATE

- 6.1 The Effective Date of this Determination shall be the date of its notification to the Parties.

**ROBERT MOURIK
CHAIRPERSON
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE [] DAY OF [] 2022**

Annex: 2 WLA DI Definitions

“**Civil Engineering Infrastructure**” or “**CEI**” also known as passive access infrastructure means the physical access path facilities deployed by Eircom to host cables such as copper wires, optical fibre and co-axial cables. It includes, but is not limited to, subterranean or above-ground assets such as Sub-Ducts, Ducts, Chambers and Poles.

“**Duct**” means an underground pipe or conduit that carries or is capable of carrying cables that are in turn used to deliver electronic communication services to End Users.

“**Duct Access**” means Access to Eircom’s Duct.

“**End User(s)**” shall have the same meaning as under Regulation 2 of the Framework Regulations. For the avoidance of doubt, End User(s) shall be deemed to include any natural or legal person who facilitates or intends to facilitate the provision of public communications networks or publicly available electronic communications services to other End Users and who is not acting as an Undertaking.

“**Egress**” means the point on Eircom’s CEI where, in the case of Direct Duct Access, Duct Access and Sub-Duct Access, an Undertaking’s cable or Sub-Duct exits an Eircom Duct, Sub-Duct or Chamber. In the case of Pole Access, Egress is the last Eircom Pole used by an Undertaking on a particular route;

“**Ingress**” means the point on Eircom’s CEI where, in the case of Direct Duct Access, Duct Access and Sub-Duct Access, an Undertaking’s cable enters the Eircom owned Sub-Duct, Duct or Chamber. In the case of Pole Access, the ingress point is the first Pole used or to be used by the Undertaking on an Eircom aerial route;

“**Sub-Duct**” means the tube or tubes inserted in a Duct through which a cable is installed

“**Sub-Duct Access**” means Access to Eircom’s Sub-Duct.

Annex: 3 Correspondence and Submissions

Please see separate document 22/26a