



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Draft Determination of a dispute between Siro and Eircom (Non-Confidential)

Concerning disclosure by Eircom of its NGA rollout plans pursuant to ComReg Decision D10/18.

Draft Determination



Reference: 20/13

Date: 6 March 2020

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Chapter 1

Executive Summary

- 1.1 On 18 November 2019, Siro Limited (**'Siro'**) submitted a request for dispute resolution under Regulation 31 of the Framework Regulations¹. The respondent was Eircom Limited (**'Eircom'**).
- 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'**) must make a determination aimed at ensuring compliance with the obligations of the Framework Directive², the Specific Directives³ and the Specific Regulations⁴ to resolve the dispute.
- 1.3 ComReg accepted the dispute on 28 November 2019 and published the scope on the ComReg website on 29 November 2019 as follows:

“Whether Eircom may require Siro to comply with conditions, and if so which, in respect of access to information regarding Eircom’s “NGA [Next Generation Access] rollout plans” (as provided for under Section 10.25 of the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18)”.
- 1.4 Section 10.25 of the Wholesale Local Access Decision Instrument at Appendix 20 of ComReg Decision D10/18⁵ (**'the WLA DI'**) states that:

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

² Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 as amended by Regulation (EC) No. 717/2007 of the European Parliament and of the Council of 27 June 2007, Regulation (EC) No. 544/2009 of the European Parliament and of the Council of 18 June 2009 and Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

³ Authorisation Directive (Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 as amended by Directive 2009/140/EC of the European Parliament and of the Council of the 25 November 2009), Access Directive (Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 as amended by Directive 2009/140/EC of the European Parliament and of the Council of the 25 November 2009), Universal Service Directive (Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009) and Directive on privacy and electronic communications (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 as amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009).

⁴ 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).

⁵ 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; ComReg 18/94 Decision D10/18 19 November 2018.

“10.25 Without prejudice to the generality of Section 10.24 Eircom shall in particular make available on its publicly available wholesale website in advance of implementation, information regarding its NGA rollout plans, and information relating to wholesale products, services and facilities, such as the expected time for service availability ...”

- 1.5 It is ComReg’s view that, to resolve this dispute, ComReg must determine:
- (a) To whom must Eircom make NGA rollout plans available?
 - (b) May Eircom apply conditions, and if so, what conditions?
- 1.6 This dispute centres on the transparency obligations that ComReg imposed on Eircom pursuant to Regulation 9 of the Access Regulations in the market for wholesale local access (**‘WLA’**)⁶. It should be noted that when ComReg imposes a significant market power (**‘SMP’**) obligation on an Undertaking that obligation must, among other things, be based on the problem identified⁷.
- 1.7 Accordingly, an important consideration in the context of this dispute is the purpose of the transparency obligation under Section 10.25 of the WLA DI and what problem ComReg sought to resolve in the WLA market when this obligation was imposed.
- 1.8 Having considered ComReg Document 16/96 (**‘the Consultation document’**)⁸; and ComReg Decision D10/18 (the response to Consultation document) and the submissions of the parties, the competition problem ComReg sought to resolve in the WLA market, was Eircom’s ability, absent regulation, to leverage its market power, to create or exploit information asymmetries and to withhold, in a discriminatory manner, relevant information on the roll out and delivery of Eircom’s supply of WLA products to users of those wholesale services i.e. Access Seekers.
- 1.9 To address this competition problem, ComReg proposed a transparency obligation that required Eircom to make NGA rollout plans available to Access Seekers. In ComReg’s view this was necessary to ensure that Access Seekers (that are reliant on Eircom’s upstream input) are provided with up to date information with respect to Eircom’s network rollout, so as to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End-users. This transparency obligation, which supported the non-discrimination obligation, was imposed on Eircom at Section 10.25 of the WLA DI.

⁶ Access Regulations (S.I. No. 334 of 2011).

⁷ Regulation 8 of the Access Regulations.

⁸ Market Review Wholesale Local Access (WLA) provided at a Fixed Location, Wholesale Central Access (WCA) provided at a Fixed Location for Mass Market Products- Consultation and Draft Decision; ComReg 16/96 11 November 2016.

- 1.10 In the context of Decision D10/18, Access Seekers were defined as those “...seeking to purchase services in the WLA market”. Therefore, when considering the transparency obligation to make NGA rollout plans available, it was ComReg’s position that the obligation was necessary to ensure that ‘Access Seekers’ i.e. those seeking access to or seeking to purchase services in the WLA market had access to NGA rollout plans.
- 1.11 As NGA rollout plans relate to the deployment of Fibre to the Home (**‘FTTH’**) they are therefore relevant to those seeking access to, or seeking to purchase access to, FTTH in the form of Eircom’s Virtual Unbundled Access (**‘VUA’**) products.
- 1.12 In terms of, to whom must Eircom make NGA rollout plans available, it is ComReg’s preliminary view that Eircom must make NGA rollout plans available only to Undertakings⁹ that avail of access to Eircom’s VUA.
- 1.13 For Eircom to ensure that the NGA Rollout plans are only available to Undertakings that are purchasing access to VUA, it is acceptable that Eircom put in place reasonable conditions that facilitate this.
- 1.14 This is consistent with the non-discrimination obligation at Section 9.1(ii) of the WLA DI which requires that Eircom provides access and information in relation to such access to all other Undertakings under the same conditions and of the same quality as Eircom provides to itself.
- 1.15 Eircom currently applies two conditions on the availability of NGA rollout plans. Information on NGA rollout plans is available to Undertakings that have:
- (a) Signed the Eircom Access Reference Offer (**‘ARO’**) schedules for VUA; and
 - (b) Signed a non-disclosure agreement.
- 1.16 In ComReg’s preliminary view, both conditions are reasonable. The first is reasonable to ensure that Eircom’s NGA rollout plans are only available to Undertakings that are purchasing access to VUA. The second is reasonable as information that is exchanged between Eircom and Undertakings that are purchasing access may be of a confidential or commercially sensitive nature. Information received from Eircom for the purpose of access to WLA services must be used for that purpose only and not used for purposes that are not related to access to WLA.
- 1.17 ComReg therefore proposes to make the following determination:

⁹ “Undertaking(s)” shall have the same meaning as under Regulation 2 of the Framework Regulations (see Glossary).

- (a) Eircom may apply reasonable conditions in respect of access to information regarding Eircom's NGA rollout plans in order to ensure that access is limited to Undertakings purchasing access to relevant access products.
- (b) A condition whereby Eircom limits access to information regarding its NGA rollout plans only to those Undertakings that have entered into an access agreement with Eircom in respect of VUA, having executed the particular schedules of the ARO concerning VUA and the associated non-disclosure agreement is reasonable.
- (c) Eircom is not required to provide Siro with access to information regarding NGA rollout plans until such time that Siro has met the requirements contained in paragraph (b) above or any other reasonably imposed conditions for the purpose of (a) above that are also consistent with ComReg Decision D10/18.

1.18 The draft determination notice (which is the legal instrument that contains ComReg's determination) is contained in Annex: 1 of this document. It should be noted that the draft determination notice contains the text of what ComReg has preliminarily concluded in relation to this dispute at this point. This position is however subject to consultation. 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 – Summary of preliminary conclusions
- (f) Chapter 7 – Next Steps

Chapter 2

Background to the Dispute

2.1 Chronology

2.1 Below is a chronology of events relating to this dispute:

- (a) 18 November 2019 Siro submits a request for dispute resolution.
- (b) 28 November 2019 ComReg notifies Siro that the dispute is accepted.
- (c) 28 November 2019 Siro is notified of the scope of the dispute. Eircom is notified of the dispute, and is provided with a non-confidential version of the Siro submission and given until 11 December 2019 to respond.
- (d) 29 November 2019 An information Notice (ComReg 19/106) (Annex: 4) is published on the ComReg website setting out the scope and details of the dispute.
- (e) 11 December 2019 Eircom provides its response.(Annex: 7)
- (f) 18 December 2019 ComReg issues letters to Siro and Eircom with specific questions. The closing date for return is 10 January 2020.
- (g) 10-13 January 2020 Eircom and Siro provide their responses to the questions asked by ComReg.(Eircom Annex: 9, Siro Annex: 10 and Annex: 11)
- (h) 6 March 2020 ComReg issues the Draft Determination

2.2 The parties to the dispute

2.2 Siro is an alternative network operator and wholesale operator. Siro results from a joint venture between the Electricity Supply Board and Vodafone Ireland. Siro has a FTTH network across 50 towns in Ireland and offers a Virtual Unbundled Local Access (**'VULA'**) service at the wholesale level only.

2.3 Eircom Limited, is the incumbent fixed and mobile telecommunications company in Ireland. Eircom operates a wholesale fixed-line network through its Open eir unit (Eircom Wholesale), providing copper and fibre based access products to a wide range of Irish telecommunications companies. Its services include next generation access products, such as FTTH and Fibre to the Cabinet (**'FTTC'**).

Eircom's retail division markets these services directly to homes and businesses. 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) 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.¹⁰

2.3 Siro's pre dispute complaint to Eircom

- 2.4 Prior to submitting a dispute request to ComReg, Siro submitted a complaint to the Eircom's Wholesale Regulatory Complaint mailbox on 16 October 2019 (Annex: 5), complaining about the *"failure of eir to comply with its Transparency obligations (D10/18 WLA) regarding the provision of FTTH Rollout Information."*
- 2.5 In summary, Siro complained that Eircom did not provide the FTTH Rollout Information specified in Section 10.25 of the WLA DI on its "publicly available wholesale website". Furthermore, Eircom had refused to provide this information to Siro on request, which Siro said was in non-compliance with Eircom's regulatory obligations.
- 2.6 Below is a chronology of events relating to the pre-dispute complaint:
- (a) On 23 October 2019, Siro sent an email to Eircom's wholesale regulatory complaints department notifying it that Siro had not received a response to its complaint of 16 October 2019.
 - (b) On 7 November 2019 Eircom responded to the Siro complaint, and issued its report entitled *"Complaint W/SCust16"* (see Annex: 6) stating that Eircom had *"... found no basis for Siro's complaint that open eir was in breach of its transparency obligations."* In that report, Eircom noted that
 - (i) *"The FTTH Rollout Information is published on the wholesale website for all operators with the correct access credentials."*
 - (ii) *"This information is available to all Wholesale Customers that have signed a WBARO11 and /or ARO."*

¹⁰ 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.

¹¹ Wholesale Bitstream Access Reference Offer.

- (iii) *“Open eir requires a reference offer to be signed before providing access to this information as this is the best way to ensure that the NGA Rollout Information is used for the purpose for which it is required, i.e. to inform its Wholesale Customers where and when open eir is rolling out FTTH network capability so that they can consume the open eir FTTH services (Bitstream and VUA) in order to provide broadband services to their end users.”*
 - (iv) *“Siro has not yet provided the clarity required to demonstrate that this is the purpose for which they require access.”*
- (c) On 18 November 2019, Siro submitted a dispute to ComReg under Regulation 31 (Annex: 3).

2.4 ComReg’s Dispute Resolution Powers

- 2.7 Regulation 31 of the Framework Regulations sets out ComReg’s powers regarding disputes arising either between:
- (a) Undertakings providing electronic communications networks or services in the State in connection with existing obligations under the Framework Directive, Specific Directives or Specific Regulations, or
 - (b) such Undertakings and other Undertakings benefiting from obligations of access or interconnection arising under the Framework Directive, Specific Directives or Specific Regulations.
- 2.8 ComReg’s determination in the dispute must ensure compliance with the obligation and resolve the dispute. Regulation 31 of the Framework Regulations transposes Article 20 of the Framework Directive.
- 2.9 In accordance with Regulation 31(2) of the Framework Regulations, ComReg published Dispute Resolution procedures in ComReg Document No. 10/18 R¹².
- 2.10 Regulation 31(2) of the Framework Regulations requires that 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 to resolve the dispute.

¹² 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).

- 2.11 In determining this dispute, ComReg will do so with 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.

2.5 Scope of the Dispute

- 2.12 In its submission of 18 November 2019 (Annex: 3), Siro defined the scope of the submitted dispute as “*Whether Eircom is meeting their obligation to provide NGA rollout information*” and cited the full text of section 10.25 of the WLA DI.
- 2.13 As set out above, while ComReg’s jurisdiction under Regulation 31 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, 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.
- 2.14 ComReg, having reviewed Siro’s submissions, was satisfied that Siro had raised a dispute for the purpose of Regulation 31 between two Undertakings providing electronic communications networks or services in the State, and that the dispute concerned an existing regulatory obligation, namely that set out in a 10.25 of the WLA DI. More particularly, the dispute to be resolved was concerned with the following matters:
- “Whether Eircom may require Siro to comply with conditions, and if so which, in respect of access to information regarding Eircom’s “NGA rollout plans” (as provided for under Section 10.25 of the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18).”*
- 2.15 This scope was published on the ComReg website as Information Notice 19/109 on 29 November 2019 (Annex: 4).
- 2.16 In its response to ComReg’s questions of 13 January 2020 (Annex: 11) Siro agreed to ComReg formulation of the dispute. Eircom made no comment.

Chapter 3

Regulatory Framework

- 3.1 This chapter provides a brief overview of the legal framework for managing the dispute and for the regulation of access by Undertakings providing electronic communications networks or services in the State, in connection with existing obligations under the Access Regulations, concerning access to information in Eircom's NGA rollout plans. This overview is limited to the scope of those regulations specifically applicable or related to the circumstances of this dispute.

3.1 Relevant Markets and their Regulation

- 3.2 The relevant regulations are those applicable to the regulation of competition within the markets for the provision of WLA. WLA services are wholesale inputs used in the supply of a range of downstream wholesale and retail telecommunications services, such as broadband internet connectivity, television services, and the provision of fixed telephony to residential and business consumers. WLA inputs can also be utilised by Service Providers ('**SP(s)**') to supply downstream Wholesale Central Access ('**WCA**') or other wholesale services.
- 3.3 At the wholesale level, Access Seekers purchase WLA inputs, such as VULA or WCA inputs such as Bitstream, to provide retail services to End-users (or wholesale services to other SPs). In the case of VULA, an Access Seeker gains control of the fibre or hybrid copper/fibre path from the local exchange or aggregation node to the End-user's premises. The Access Seeker can then supply retail services to the End-user, or sell wholesale services, such as those sold in the WCA market, to other Access Seekers
- 3.4 Access in the WLA market comprises both Current Generation ('**CG**') WLA over copper and Next Generation ('**NG**') WLA over fibre as FTTH and FTTC.
- 3.5 Eircom' VUA product offers Virtual Unbundled Access across Eircom's FTTC and FTTH networks. The VUA Schedules attached to Eircom's ARO sets out the terms and conditions under which VUA is made available.

3.2 The Market Analysis process

- 3.6 The Market Analysis process is relevant to this Draft Determination in that the obligation at Section 10.25 of the WLA DI was imposed as a remedy to a particular current or future competition problem arising from Eircom's SMP in the WLA

market. ComReg considered and consulted upon the obligation and the competition problem of the WLA market as part of the Market Analysis process. This consultation included a public consultation and with the European Commission, the Body of European Regulators of Electronic Communications (**'BEREC'**) and other National Regulatory Authorities (**'NRAs'**).

- 3.7 The following ComReg documents relate to Eircom's obligations in the WLA Market and are therefore relevant to this dispute:

Year	Month	Type	Decision - Doc. No.	Market		Relevance
2016	November	Consultation	16/96	Wholesale Access	Local	Consultation on WLA
2018	November	Decision	D10/18 - 18/94	Wholesale Access	Local	Response to 16/96

- 3.8 Furthermore, the NGA Recommendation¹³ published by the European Commission is relevant to this dispute as discussed at paragraph 5.15 of this Draft Determination.

3.3 Current Applicable Regulation

- 3.9 The current regulation in relation to the WLA market is outlined in the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18 (**'the WLA DI'**). Section 10 of the WLA DI describes Eircom's transparency obligations. In particular Section 10.25 of the WLA DI sets out the obligation on Eircom to provide access to its NGA rollout plans. The full paragraph is included in Annex: 2 of this document. The key reference from this paragraph is:

"10.25 Eircom shall in particular make available on its publicly available wholesale website in advance of implementation, information regarding its NGA rollout plans..."

- 3.10 As can be seen in Annex: 2, Section 10.25 of the WLA DI defines what information should be *"made available on its publicly available wholesale website"* along with the lead times for providing this information. In addition to information regarding rollout plans, Eircom is obliged to provide information relating to

¹³ Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), 2010/572/EU (OJ L 251, 25.9.2010, p. 35–48) (**'the NGA Recommendation'**).

“wholesale products, services and facilities, such as the expected time for service availability”.

3.11 Section 10.25 of the WLA DI specifies information to be provided for key lead times in advance of the Ready for Order Date (“**RFO**”). These lead times are 6 months, 3 months, 1 month and 28 days. These requirements are summarised as follows.

3.12 Eircom is obliged to provide NGA rollout plan Information as follows:

“(i) to exchange level “at least 6 months in advance of the Ready for Order Date”

3.13 This covers:

- (a) a list of cabinets with their associated geographic coordinates;
- (b) the location and name of the Exchange which houses the Metropolitan PoP (“MPoP”) for each cabinet and for each proposed FTTH network;
- (c) the expected Ready for Order Date for each cabinet or fibre based FTTH network; and
- (d) for each Exchange area the number of premises that Eircom forecasts will be passed by FTTH.

3.14 At Section 10.25(ii) of the WLA DI, Eircom is obliged to provide, at least 3 months in advance of the RFO, sufficient information to enable Undertakings to identify locations of FTTH availability.

“(ii) For the Exchange areas included in Eircom’s NGA rollout plan Eircom shall make available on its publicly available wholesale website at least 3 months in advance of the Ready for Order Date sufficient information to enable Undertakings to identify the addresses that will be passed by FTTH. Such information may take the form of a detailed map or cross references to Eircom’s address database”

3.15 At Section 10.25(iii) of the WLA DI, Eircom is obliged to provide, at least 28 days in advance of the RFO, pre-qualification values for each premises capable of receiving FTTC, and the MPoP for each premises capable of receiving FTTH:

“(iii) For the Exchange areas included in Eircom’s NGA rollout plan the following details shall also be made available on Eircom’s publicly available wholesale website at least 28 calendar days in advance of the of the Ready for Order Date by way of a data file which shall include the following information:

- (a) *a list of the premises, as uniquely identified, that are capable of receiving FTTC and the associated Pre-Qualification Value for each such line/premises; and*
- (b) *a list of all addresses passed by FTTH categorised by the Exchange area and showing the MPoP for each address;*

3.16 The part (iv) of Section 10.25 of the WLA DI places obligations on Eircom to publish any updates or changes to its previously published information:

“(iv) Eircom shall publish on its publicly available wholesale website on a monthly basis, or as reasonably required by ComReg, in advance of particular cabinets becoming enabled or any FTTH fibre routes being completed, information to update, reconcile or revise any previous announcements or notifications, projections or plans, regarding NGA rollout, as matters progress in order that accurate, clear and current information is made available in respect of plans for particular cabinets or plans for particular FTTH fibre routes. Material amendments or changes to information may not be notified by way of such an update but shall be notified in accordance with this Section 10.25 or by agreement with ComReg, or at ComReg’s discretion”

Chapter 4

Submissions of the parties

4.1 Summary of Siro submissions

- 4.1 This chapter draws on the Siro's dispute submission to ComReg of 18 November 2019 (Annex: 3), the Siro complaint to Eircom Wholesale of 16 October 2019 and the Siro submission of 13 January 2020.
- 4.2 ComReg understands Siro's position to be that Eircom is non-compliant with its obligations under Section 10.25 of D10/18 on the basis that NGA rollout plan information should be made available on a publicly accessible website, and that access should not be limited to a closed user group.
- 4.3 Siro requires the information "to plan for and to deliver products and services on a wholesale basis or to End-users" in three ways
- (a) Assess whether to use Eircom WLA as inputs to wholesale offerings;
 - (b) ✂ [REDACTED] ✂;
 - (c) ✂ [REDACTED] ✂
- 4.4 ✂ [REDACTED] ✂
- 4.5 Siro cites three competition problems which are addressed by the requirement to provide NGA rollout plans, including to an Undertaking which does not directly provide retail services.
- (a) The exercise of Eircom's SMP in the exploitative practices as outlined at Paragraphs 7.18 to 7.23 of the Consultation document. In paragraph 7.23 ComReg outlines that a transparency obligation addresses this potential behaviour.

- (b) Eircom has the ability to engage in vertical leveraging of its SMP in the WLA market as outlined at paragraphs 7.28 and 7.29 of the Consultation document. This leveraging occurs by Eircom phasing its FTTH roll-out to maximise benefit to Eircom's retail arm at the expense of other retail providers. Providing visibility of Eircom's rollout plans allows for deployment of alternative FTTH services in areas where retail competitors of Eircom retail have offerings with different demand side characteristic.
- (c) Without the requirement to provide rollout information, there is scope for Eircom to exercise its SMP the information asymmetries outlined at paragraph 7.37 of the Consultation document, by restricting access to information in areas where Eircom's FTTH is not present. This restricts the ability of Undertakings other than Eircom to plan for the network deployment required to supply WLA products.

4.6 Siro has not yet signed an ARO because Siro has not made a definitive decision to purchase Eircom's WLA services. There is no business reason to enter into a formal purchase agreement at this time. Siro would not enter into such a commercial contract without a legitimate business need.

4.7 When asked if Siro would sign an NDA, in order to reassure Eircom, Siro's response was that, with the WLA Decision, Siro should not be required to provide reassurances to Eircom. ✂ [REDACTED]

[REDACTED] ✂. NDAs could leverage Eircom's SMP via information symmetries. Section 10.21 of the WLA Decision sets out that Eircom shall inform ComReg where information is confidential and/or commercially sensitive. Eircom should notify ComReg why the information is sensitive and thus requires protection via an NDA. It would be unreasonable for Eircom to require Siro to enter into an NDA which provides more assurances than a basic undertaking not to publish in bulk information supplied by Eircom. Retailers who sign a Wholesale Bitstream Access Reference Offer ('**WBARO**') can communicate this information to End-users. It effectively enters into the public domain.

4.2 Summary of Eircom submissions

4.8 In its submission of 11 December 2019 (Annex: 7), in response to ComReg notification of the dispute, Eircom claimed that it is compliant with its obligations under Section 10.25 of the WLA DI., Eircom's letter submission made several points which are outlined as follows:

- (a) It is necessary to sign an ARO to enable Eircom to support Regulation 5(6) of the Access Regulations:

“5(6)...an undertaking that acquires information from another undertaking before, during or after the process of negotiating access or interconnection arrangements shall not use that information for a purpose other than that for which it was supplied and shall respect at all times the confidentiality of information transmitted or stored.”

- (b) It would be a breach of Regulation 5(6) of the Access Regulations if Eircom allowed the information to be used for purposes other than those outlined by 7.979 and 7.980, such as another operator’s network rollout planning, particularly if the inappropriate use of information distorts competition and/or undermines Eircom’s investment incentives. Signing an ARO helps commit Operators to use information for the purposes of providing services to End-users. Use of the information by Siro for network planning would therefore constitute a breach of Access Regulations. Eircom had attempted to get an assurance from Siro on the intended use of the information but Siro refused to engage:

“Eircom believes it would be a breach of Regulation 5(6) if the information was used for other purposes such as, for example, another operator’s network rollout planning, particularly if the inappropriate use of information distorts competition and/or undermines Eircom’s investment incentives. I note that Siro did not subsequently re-engage with open eir and appears unwilling to make the implicit assurances that it will comply with regulation 5(6)”.

- (c) It is “reasonable” to manage access to commercially sensitive information and referenced the Remedies chapter of ComReg document 18/94 to point out that information published on the Eircom website is intended to be used by Access Seeker’s for providing service to either wholesale or End-users¹⁴:

*“7.980 ComReg considers that the requirement summarised in paragraph 7.979 is necessary so that Access Seekers are provided with up to date information with respect to network rollout **so as to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users**”.*

¹⁴ A user not providing public communications networks or publicly available electronic communications services (Regulation 2 of Framework Regulations).

“7.979 For Exchange areas included in Eircom’s NGA rollout plan Eircom shall publish on its publicly available wholesale website on a monthly basis, or as reasonably required by ComReg, in advance of particular cabinets becoming enabled or any FTTH fibre routes being completed, information to update, reconcile or revise any previous announcements or notifications, projections or plans, regarding NGA rollout, as matters progress in order that accurate, clear and current information is made available in respect of plans for particular cabinets or plans for particular FTTH fibre routes”.

- (d) The second part 7.980 justified Eircom controlling access to the information:

“ComReg considers that it would not be a burdensome requirement for Eircom to have a process in place to keep its network rollout information up to date for use by it and by Access Seekers.” “This is the best way to ensure that the NGA Rollout Information is used for the purposes for which it is required, i.e. to inform its Wholesale Customers where and when open eir is rolling out FTTH network capability so that they can consume the open eir FTTH Services (Bitstream and VUA) in order to provide broadband services to their end users.”

- (e) All Undertakings seeking access to Eircom’s NGA rollout plans have signed AROs, with the exception of Sky Ireland. However, Sky is a reseller of BT Ireland products, and BT is a signatory.
- (f) Siro is aware of Eircom’s NGA footprint because it is publicly known. This source of information has been sufficient for other operators seeking to interconnect to the Eircom NGA network.
- (g) Eircom’s letter also referred to its investigation of a direct complaint, relating to the same issue, from Siro on 16 October 2019. The report “W/SCustomer16” found *“no basis for Siro’s complaint that open eir was in breach of its transparency obligations.”* on the basis of the following four points:
- (i) *“The FTTH Rollout Information is published on the wholesale website and for all operators with the correct access credentials.*
 - (ii) *This information is available to all Wholesale Customers that have signed a WBARO and / or ARO.*
 - (iii) *open eir requires a reference offer to be signed before providing access to this information as this is the best way to ensure that the NGA Rollout Information is used for the purposes for which it is required, i.e. to inform its Wholesale Customers where and when open eir is rolling out FTTH network capability so that they can consume*

the open eir FTTH Services (Bitstream and VUA) in order to provide broadband services to their End-users.

(iv) Siro has not yet provided the clarity required to demonstrate that this is the purpose for which they require access.”

(h) Eircom invited Siro to re-engage “...with a view to on-boarding for the purpose of availing of open eir’s FTTH services in order to provide Broadband services to end users.”

(i) Eircom has not sought ComReg agreement to categorise the information as confidential because it did not consider it necessary on the basis that the process of accessing this information has continued unchanged for several years, since D10/13. Therefore this process existed well before D10/18.

4.9 Eircom’s letter of 11 December 2019 quoted the Siro Dispute Submission which indicated the purpose of Siro seeking access to the NGA rollout information:

“Without NGA planned rollout information Siro is unable to fully evaluate the opportunity of connecting to the eir NGA network.”

4.10 Eircom’s final argument pointed out the continuity of controlled access to its NGA rollout plans since 2013 and the absence of any concerns by the 20 Access Seekers who have complied with the process:

“The reasonable terms on which the NGA rollout plan information can be accessed have remained unchanged since 2013. In the intervening period over 20 Access Seekers have been connected to the eir NGA network. No concerns have been raised by those parties regarding access to NGA rollout plan information and they do not appear to have been hindered in their ability to fully evaluate the opportunity. We would also note that ComReg conducted a forensic review of the operation and effectiveness of D03/13 remedies during the WLA market review. ComReg’s conclusions on the WLA market and remedies documented in D10/18 do not raise any concern regarding the protocol for accessing the NGA rollout plan that has worked effectively since 2013”.

Chapter 5

Analysis

5.1 Analysis Summary

5.1 ComReg has considered the scope of the dispute to be determined:

“Whether Eircom may require Siro to comply with conditions, and if so which, in respect of access to information regarding Eircom’s “NGA rollout plans” (as provided for under Section 10.25 of the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18)”.

5.2 Section 10.25 of the WLA DI states that:

“10.25 Without prejudice to the generality of Section 10.24 Eircom shall in particular make available on its publicly available wholesale website in advance of implementation, information regarding its NGA rollout plans, and information relating to wholesale products, services and facilities, such as the expected time for service availability, as follows.”

5.3 It is ComReg’s view that, to resolve this dispute, ComReg must determine:

- (a) To whom must Eircom make NGA rollout plans available to?
- (b) May Eircom apply pre-conditions, and if so, what conditions?

5.4 Having considered the matter, it is ComReg’s preliminary view that:

- (a) Eircom must make NGA rollout plans available only to Undertakings that avail of access to Eircom’s VUA.
- (b) Eircom may apply reasonable conditions to ensure that information regarding access to VUA is only made available to those Undertakings that avail of access to Eircom’s VUA, including but not limited to making information available to Undertakings that have:
 - (i) Signed the Eircom ARO schedules for VUA and;
 - (ii) Signed a non-disclosure agreement.

5.5 The analysis leading to ComReg’s preliminary views are set out in the following chapters.

5.2 Availability of NGA rollout plans

- 5.6 Where ComReg designates an Undertaking with SMP on a market it shall impose on that Undertaking specific regulatory obligations¹⁵. Decision D10/18 imposed a number of obligations on Eircom such as access, non-discrimination and transparency. This dispute centres on the transparency obligations that ComReg imposed on Eircom pursuant to Regulation 9 (Transparency) of the Access Regulations. It should be noted that when ComReg imposes an SMP obligation on an Undertaking, that obligation must, among other things, be based on the problem identified¹⁶.
- 5.7 Accordingly, an important consideration in the context of this dispute is the purpose of the transparency obligation under Section 10.25 of the WLA DI and what problem ComReg sought to resolve. Chapter 7 of the Consultation document and Chapter 6 of the response to consultation, i.e. Decision D10/18, outline and discuss the specific competition problems that ComReg identified in the WLA Market.

5.2.1 Competition problems and remedies

- 5.8 Paragraph 7.33 of the Consultation document discussed Eircom's ability to leverage its market power, by way of non-price means, from the wholesale WLA market downstream to the retail level. Of relevance to this dispute is paragraph 7.33(c) which discussed Eircom's ability, absent regulation, to create or exploit information asymmetries and to withhold relevant information via vertical leverage. The focus of this analysis is Eircom's behaviour relative to those Undertakings that are dependent on Eircom's wholesale access products i.e. Access Seekers rather than all Undertakings. It was noted that:

"...where downstream competitors are dependent on Eircom to provide WLA and need certain (quality or technical) information in order to effectively compete in downstream wholesale or retail markets, a lack of transparency or asymmetry in the provision of relevant information can impede competition. For example, a lack of transparency in the terms and conditions of supply for WLA products that are self-supplied by the SMP WLA provider could make it difficult for Access Seekers to make effective commercial or operational decisions that involve the use of or investment in WLA inputs for the provision of their own downstream services."

- 5.9 Access Seekers in the context of Decision D10/18 were defined as:

¹⁵ Regulation 27(4) of the Framework Regulations.

¹⁶ Regulation 8 of the Access Regulations.

“An Access Seeker is a Service Provider (‘SP’) that purchases wholesale services from another SP. In this Decision, ComReg refers to SPs seeking to purchase services in the WLA and/or WCA Markets as ‘Access Seekers’.”¹⁷

- 5.10 Furthermore, paragraph 7.37 of the Consultation document discussed information asymmetries as a separate means of vertical leverage. Again, it was seen by ComReg that Eircom had an incentive to provide its own retail arm with more information, concerning network rollout plans, than an Access Seeker. ComReg’s concern related to the information provided to Access Seekers using WLA products (and not Undertakings more generally) in a discriminatory manner:

“7.37 Information asymmetries may also apply to future planning by the SMP undertaking. For example, changes by Eircom to its network topography such as its FTTC and FTTH rollout, to location of points of interconnect or any intentions to withdraw its copper network may have significant implications for Access Seekers using WLA products. Insufficient notice of network and process changes relevant to the delivery of services in the retail market could significantly impede the ability of WLA Access Seekers to launch corresponding retail products and to compete with Eircom on an equivalent basis in downstream markets. A lack of information and the associated uncertainty may discourage Access Seekers from investing in or expanding their network footprint (to avail of WLA products)¹⁸ or downstream footprint (since there may be a perceived risk of stranded assets). Further, such information asymmetries may lead to a delayed consideration of Access Seekers’ wholesale requirements as part of such network developments, also delaying/impeding their ability to respond to any new downstream offerings by the SMP undertaking.” (Emphasis added)

- 5.11 It follows from the above extracts that the potential competition problems posed by information asymmetries, as identified by paragraphs 7.33(c) and 7.37, was the lack of transparency in the roll out and delivery of Eircom’s supply of WLA products to Access Seekers.

5.2.2 Siro’s position on competition problems

- 5.12 In its submissions, Siro states its view that specific remedies were imposed by ComReg to “ensure that new entrants such as Siro could gain a foothold in the market”¹⁹. It observes that the transparency obligation imposed on Eircom, to

¹⁷ See footnote 3 of ComReg Decision D10/18.

¹⁸ Access Seekers’ use of WLA products depends on the extent of their backhaul network. Investing in backhaul depends on the location of Eircom’s Points of Interconnection.

¹⁹ See letter from Siro (Gerry McAndrew) to ComReg (Alan Cox and Michael Patterson) dated 13 January 2020.

publish specific details of its NGA rollout plans on a public website is one of those determined remedies.

- 5.13 In support of its position, Siro refers to ComReg’s emphasis on the importance of “*alternative network investment*” as an enabler for a competitive market – Siro also referred to ComReg’s statement that network competition being the “*most effective driver for investment in high quality networks*”²⁰. It is Siro’s position that to limit the applicability of remedies in a manner that only benefits those who purchase Eircom’s wholesale services i.e. Access Seekers would “*significantly reduce their effectiveness*” and in some cases might actually act to reinforce and entrench Eircom’s SMP position²¹. Siro considers that, to have its intended effect, the information must be provided to all Undertakings without pre-condition.
- 5.14 ComReg has considered Siro’s argument but does not agree. ComReg recognises that Siro is providing services in the relevant market and that Eircom’s market power is exercised not only in its own supply²². It is ComReg’s position that it is proportionate and justified to allow Eircom to limit to whom it provides its NGA rollout plans to i.e. those Undertakings availing (actually or potentially) of VUA.
- 5.15 To enable this, it is appropriate for Eircom to impose reasonable conditions for the purposes of ensuring the recipient is an Access Seeker and will use the information only for the purposes for which it has been provided and to ensure that confidentiality of the information is protected²³. ComReg considers that this is consistent with the objective of section 10.25 of the WLA DI (and section 10.21 of the WLA DI).
- 5.16 As highlighted by ComReg in the Consultation document (and noted by Siro in its submissions), the competition problem that ComReg was seeking to address in ComReg Decision D10/18 was the potential to vertically leverage and discriminate in favour of its own retail arm. In particular, as set out above, ComReg had a concern that changes by Eircom to its network topology such as its FTTC and FTTH rollout (i.e. VUA FTTC and FTTH) may have significant implications for Access Seekers using WLA products. An important distinction needs to be

²⁰ Point 4 on page 2 of Siro’s letter of 13 January 2020, which referred to paragraph 7.368 of Decision D10/18.

²¹ Page 2 of Siro’s letter of 13 January 2020.

²² For example, when setting price control obligations ComReg is very mindful of setting the correct ‘build-or-buy’ signals.

²³ This position is consistent the European Commission’s recommendation, as set out in recital and paragraph 41 of the NGA Recommendation of 2010 (2010/572/EU), that highlighted the importance of Undertakings enjoying access to the SMP operator’s network getting access to all necessary information, in a timely fashion, to adjust their own networks and network extension plans accordingly. The European Commission also recognised the need to ensure that information is used only for the purpose that it is intended to serve and that the confidentiality of information is ensured throughout the process.

highlighted in this regard. In identifying the competition problems²⁴ and justifying the obligation²⁵ it is clear that ComReg imposed the obligation, not generally, but only in relation to those Undertakings that are reliant on Eircom’s wholesale input (i.e. VUA). The same issues do not arise for platform competitors that are not dependant on the upstream input to decide how and where to rollout their network.

5.17 Siro states that it intends to use the information obtained through access to Eircom’s NGA roll out plans in three ways, namely:

(a) to assess and plan whether or not to use Eircom WLA products as an input into an aggregated wholesale offering;

(b) ✂ [REDACTED] ✂; and

(c) ✂ [REDACTED] ✂

5.18 ComReg considers that if there is a realistic prospect that Siro will avail of VUA services, it would be reasonable for Eircom to expect Siro to sign an ARO for VUA and for Siro to comply with this condition. Siro could only use that information for the purposes for which it was provided i.e. facilitate the provision of retail services by means of Eircom’s VUA.

5.19 In relation to the second and third purposes ComReg would have significant concerns ✂ [REDACTED] ✂. ComReg considers that such practices would be quite likely to create distortive effects that could restrict competition to the detriment of End-users. As Siro has noted, network competition is considered to be a key driver for long term competition in the WLA market. It is important however that this is true competition based on free market conditions and that parties are acting independently of each other.

²⁴ See paragraph 7.37 of the Consultation which is discussed in paragraph 5.10 above - changes by Eircom to its network topography such as its FTTC and FTTH rollout, ...may have significant implications for Access Seekers using WLA products. Insufficient notice of network and process changes relevant to the delivery of services in the retail market could significantly impede the ability of WLA Access Seekers to launch corresponding retail products and to compete with Eircom on an equivalent basis in downstream markets”.)

²⁵ See paragraph 7.980 of the Decision 10/18 which is discussed in paragraph 5.25 below. This paragraph stated that it “*is necessary so that Access Seekers are provided with up to date information with respect to network rollout so as to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users*” to allow Access Seekers (i.e. not all Undertakings) to “*efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users*”).

- 5.20 While ComReg recognises that Eircom has market power and notes the efficiencies that Siro considers could accrue from information sharing, ComReg does not consider that the remedies imposed under Decision 10/18 should extend to the means suggested by Siro - that NGA rollout plans be made available without any pre-condition. On balance, ComReg considers that for Siro to ~~XXXXXX~~ ~~XXXXXX~~ would reduce strategic uncertainty between competitors thereby constraining the independence of Siro's conduct in the WLA market and diminishing its incentive to compete against Eircom. This would raise concerns for ComReg under the *ex ante* regime as well as under competition law.

5.2.3 Remedies

- 5.21 Having considered the specific competition problems that ComReg identified in the WLA Market, Chapter 8 of the Consultation document and Chapter 7 of Decision D10/18 outline and discuss the specific remedies that ComReg proposed to address the identified competition problems.
- 5.22 Paragraphs 8.444 to 8.568 of the Consultation document set out the justification for the proposed transparency obligations. In particular, ComReg considered obligations relating to the "*Transparency requirement with respect to network roll out and network development*" at paragraphs 8.509 to 8.537. As can be seen from these paragraphs, the target recipients of FTTH rollout plans (that ComReg mandated Eircom to provide) were "Access Seekers":

"8.521 ComReg is of the view that, for the purposes of marketing and selling of FTTH services, more granular and accurate location information is required in sufficient time to allow Access Seekers to compete effectively in the downstream market for FTTH customers."

*"8.522 ...with regard to rolling out FTTH and providing **information to Access Seekers** marking a cabinet as "Dual FTTH/FTTC" does not in ComReg's view give sufficient detail as to the location of the premises to be served by FTTH.*

"8.525 Given the nature of the FTTH topology both in urban and rural areas and the gradual rollout of the network, it is critical that Access Seekers have sufficient and timely clarity as to the proposed roll out areas in question and the numbers of potential customers in each area, in order to be able to plan and execute operational and sales activities.

"8.526 Accordingly ComReg considers that an amendment to the existing transparency obligation is required to ensure that Access Seekers in addition to having sufficient information with respect to FTTC will have sufficient clarity with respect to the planned roll out of FTTH, the areas where it will be deployed and the corresponding number of potential premises served.

“8.537 *“... The proposed remedy is reasonable and proportionate given that Eircom is already adopting the use of Eircodes in their processes for FTTH deployment and will have the ability to provide unique address identifiers, as it is a fundamental part of its network planning and roll out process for FTTH. **Therefore providing the information to Access Seekers does not create an unreasonable burden on Eircom**”* (Emphasis added)

5.23 The remedies set out in the above paragraphs sought to place obligations on Eircom to provide information on the planned rollout of its FTTH network. It is clear from the text that ComReg intended these remedies to oblige Eircom to provide information to Access Seekers.

5.24 The reasons why obligations are needed in the WLA market and what those obligations should be was also described at Chapter 7 of Decision D10/18. Regarding the obligation at Section 10.25 of the WLA DI, paragraphs 7.979 and 7.980 of Decision D10/18 are of particular relevance.

5.25 Paragraph 7.979 of Decision D10/18 described the type of information that Eircom should make available in respect of NGA rollout plans. Paragraph 7.980 of Decision D10/18 describes why the obligation is necessary:

“7.980 *ComReg considers that the requirement summarised in paragraph 7.979 **is necessary so that Access Seekers are provided with up to date information with respect to network rollout so as to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End Users. ...**”* (Emphasis added)

5.26 Paragraph 7.980 of Decision D10/18 therefore clearly specifies that the obligation on Eircom to provide NGA rollout plans is in respect of “Access Seekers”.

5.27 Therefore, when considering the transparency obligation to make NGA rollout plans available, it was ComReg’s position that the obligation was necessary to ensure that ‘Access Seekers’ i.e. those seeking access to or seeking to purchase VUA services had access to NGA rollout plans. NGA rollout plans relate to the deployment of FTTH and are therefore relevant to those seeking access to or seeking to purchase Eircom’s VUA.

5.2.4 Text of the decision instrument

5.28 The WLA DI is the operative part of the Decision D10/18 and imposes the relevant transparency obligation on Eircom. It is notable, that section 10.25 of the WLA is *without prejudice* to the generality of section 10.24 of the WLA DI. Section 10.24 imposed a more general transparency obligation on Eircom to make certain information available on its wholesale website (which had to be publicly available).

That obligation was a further specification of section 9.1 of the WLA DI (which contained the general non-discrimination obligation) and section 10.1 (which contained the general transparency obligation). Consistent with the above analysis, the transparency obligation contained in section 10.25 was imposed to support the non-discrimination obligation and to ensure that Undertakings availing of Eircom’s network receive all necessary information to ensure that they can effectively compete at the retail level. ComReg’s analysis and draft determination is also consistent with section 10.21-10.23 of the WLA DI which recognises that confidentiality of the SMP Undertaking’s information is ensured.

5.2.5 Preliminary conclusions on the availability of NGA rollout plans

- 5.29 Having considered all of the above, the competition problem that ComReg sought to remedy through the transparency obligation under Section 10.25 of the WLA DI problem specifically related to making NGA rollout plans available on its wholesale website (which must be publicly available) to those Undertakings seeking access to or seeking to purchase VUA services in the WLA market.
- 5.30 As noted above, ComReg would have significant concerns about ComReg considers that such practices would be quite likely to create distortive effects and restrict competition to the detriment of End-users.
- 5.31 In that respect it is ComReg’s preliminary view that Section 10.25 of the WLA DI requires that Eircom must only make NGA rollout plans available to Undertakings that avail of Eircom’s VUA.

5.3 Applicable conditions

5.3.1 May Eircom apply conditions?

- 5.32 For Eircom to ensure that the NGA rollout plans are only available to Undertakings that are purchasing access to VUA, it is reasonable that Eircom put in place conditions that facilitate this.
- 5.33 This is consistent with the non-discrimination obligation at Section 9.1(ii) of the WLA DI which requires that Eircom provide access (including access to those products, services and facilities described in Sections 7 and 8 of the WLA DI) and information in relation to such access to all other Undertakings under the same conditions and of the same quality as Eircom provides to itself.

5.3.2 Which conditions may Eircom apply?

5.34 Eircom currently applies two conditions on the availability of NGA rollout plans. Information is available to Undertakings that have:

- (a) Signed the Eircom ARO schedules for VUA and;
- (b) Signed a non-disclosure agreement.

5.35 In ComReg's preliminary view, both conditions are reasonable. The first is reasonable as it allows Eircom to ensure that NGA rollout plans are only available to Undertakings that are purchasing access to VUA. The second is reasonable as information exchanged between Eircom and Undertakings that are purchasing access may be of a confidential or commercially sensitive nature. Information received from Eircom for the purpose of access to WLA services must be used for that purpose only and not used for purposes that are not related to access to WLA.

5.36 ComReg notes that Siro has signed the service schedules of the Eircom ARO for Duct access and Pole access and consequently, a NDA should already be in place between the parties in respect of any information received from Eircom regarding Eircom's WLA access.

5.3.3 Preliminary conclusions on applicable conditions

5.37 It is ComReg's preliminary view that Eircom may apply reasonable conditions to ensure that information regarding access to VUA is only made available to those Undertakings that avail of access to Eircom's VUA. Including but not limited to making information available to Undertakings that have:

- (a) Signed the Eircom ARO schedules for VUA and;
- (b) Signed a non-disclosure agreement.

5.38 The preliminary conclusions discussed in sections 5.2 and 5.3 are summarised in chapter 6 below.

Chapter 6

Summary of preliminary conclusions

- 6.1 This dispute centres on the transparency obligations that ComReg imposed on Eircom pursuant to Regulation 9 of the Access Regulations. It should be noted that when ComReg imposes a SMP transparency obligation (pursuant to Regulation 8 and 9 of the Access Regulations), that obligation must, among other things, be based on the problem identified. Accordingly, an important consideration in the context of this dispute is the purpose of the transparency obligation under Section 10.25 of the WLA DI and what problem ComReg sought to resolve in the WLA market when this obligation was imposed.
- 6.2 The competition problem ComReg sought to resolve in the WLA market, was Eircom's ability, absent regulation, to leverage its market power, to create or exploit information asymmetries and to withhold relevant information on the roll out and delivery of Eircom's supply of WLA products to Access Seekers and to act in a discriminatory manner.
- 6.3 To address this competition problem, ComReg imposed a transparency obligation that required Eircom to make NGA rollout plans available to Access Seekers. In ComReg's view this was necessary to ensure that Access Seekers were provided with up to date information with respect to Eircom's network rollout so as to efficiently and effectively plan for and deliver products and services on a wholesale basis or to End-users. This transparency obligation was imposed on Eircom at Section 10.25 of the WLA DI.
- 6.4 In the context of D10/18, Access Seekers were defined as those "*...seeking to purchase services in the WLA market*". Therefore, when considering the transparency obligation to make NGA rollout plans available, it was ComReg's position that the obligation was necessary to ensure that 'Access Seekers' i.e. those seeking access to or seeking to purchase services in the WLA market had access to NGA rollout plans.
- 6.5 As NGA rollout plans relate to the deployment of FTTH and are therefore relevant to those seeking access to or seeking to purchase access to FTTH in the form of Eircom's VUA products.
- 6.6 In terms of, to whom must Eircom make NGA rollout plans available, it is ComReg's preliminary view that Eircom must make NGA rollout plans available only to Undertakings that avail of access to Eircom's VUA.

- 6.7 For Eircom to ensure that the NGA rollout plans are only available to Undertakings that are purchasing access to VUA, it is reasonable that Eircom put in place conditions that facilitate this.
- 6.8 This is consistent with the non-discrimination obligation at Section 9.1(ii) of the WLA DI which requires that Eircom provide access and information in relation to such access to all other Undertakings under the same conditions and of the same quality as Eircom provides to itself.
- 6.9 Eircom currently applies two conditions on the availability of NGA rollout plans. Information on NGA rollout plans is available to Undertakings that have:
- (a) Signed the Eircom ARO schedules for VUA and;
 - (b) Signed a non-disclosure agreement.
- 6.10 In ComReg's preliminary view, both conditions are reasonable. The first is reasonable as it allows Eircom to ensure that NGA rollout plans are only available to Undertakings that are purchasing access to VUA. The second is reasonable as information exchanged between Eircom and Undertakings that are purchasing access may be of a confidential or commercially sensitive nature. Information received from Eircom for the purpose of access to WLA services must be used for that purpose only and not used for purposes that are not related to access to WLA.
- 6.11 ComReg therefore proposes to make the following determination:
- (a) Eircom may apply reasonable conditions in respect of access to information regarding Eircom's NGA rollout plans in order to ensure that access is limited to Undertakings purchasing access to relevant access products.
 - (b) A condition whereby Eircom limits access to information regarding its NGA rollout plans only to those Undertakings that have entered into an access agreement with Eircom in respect of VUA, having executed the particular schedules of the ARO concerning VUA and the associated non-disclosure agreement is reasonable.
 - (c) Eircom is not required to provide Siro with access to information regarding its NGA rollout plans until such time that Siro has met the requirements contained in paragraph (b) above or any other reasonably imposed conditions for the purpose of (a) above that are also consistent with ComReg Decision D10/18.

Chapter 7

Next Steps

- 7.1 The parties to the dispute have until 20 March 2020 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 Determination. 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. 05/24²⁶.
- 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.

²⁶ Guidelines on the Treatment of Confidential Information, Response to Consultation, ComReg Document 05/24, March 2005.

Annexes

Annex: 1 Determination Notice

Determination to resolve the dispute between Siro Limited and Eircom Limited concerning disclosure of its NGA rollout plans pursuant to ComReg Decision D10/18

1. STATUTORY POWERS GIVING RISE TO THIS DRAFT DETERMINATION

- 1.1. This Determination is made by the Commission for Communications Regulation (ComReg) and relates to a dispute within the scope of Regulation 31 of the Framework Regulations in connection with existing obligations imposed pursuant to Regulations 8 and 9 of the Access Regulations and in Market Review: Wholesale Local Access (WLA), (ComReg Document No 18/94 and Decision No D10/18).
- 1.2. This Determination is made:
 - (a) Pursuant to Regulation 31 of the Framework Regulations;
 - (b) Having had regard to sections 10 and 12 of the Communications Regulation Act 2002 and Regulation 16 of the Framework Regulations;
 - (c) Having taken account of submissions received from the Parties; and
 - (d) Having regard to analysis and reasoning set out in ComReg Decision D10/18, ComReg Document No. 20/13 and ComReg Decision [...].

2. DEFINITIONS

- 2.1. In this Determination, unless the context otherwise suggests:
 - (a) 'Access Reference Offer' or 'ARO' means the offer of contract by Eircom to Undertakings in relation to WLA, and shall have the same meaning as under section 2.1 of the decision instrument contained in Appendix 20 of ComReg Decision D10/18
 - (b) 'Access Regulations' means the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011)

- (c) ‘Communications Regulation Act 2002’ means the Communications Regulation Act 2002 (No. 20 of 2002), as amended
- (d) ‘ComReg Decision D [...]’ means the final determination entitled “*Final Determination of a dispute between Siro and Eircom*” dated [...]
- (e) ‘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
- (f) ‘ComReg Document No. 20/13’ means the draft determination entitled “*Draft Determination of a dispute between Siro and Eircom*” dated 6 March 2020
- (g) ‘ComReg’ means the Commission for Communications Regulation, established under Section 6 of the Communications Regulation Act 2002
- (h) ‘Determination’ means this determination
- (i) ‘Dispute Referral’ means the dispute as submitted by Siro to ComReg on 18 November 2019
- (j) ‘Effective Date’ means the date the Determination is published and notified to the Parties
- (k) ‘Eircom’ means Eircom Limited, and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Eircom Limited, and its successors and assigns. For the purpose of this Determination, the terms “subsidiary” and “related company” shall have the meaning ascribed to them in the Companies Act 2014
- (l) ‘Framework Regulations’ means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)
- (m) ‘Parties’ means Eircom and Siro
- (n) ‘Siro’ means Siro Limited, and its subsidiaries and any related companies, and any Undertaking which it owns or controls, and any Undertaking which owns or controls Siro Limited, and its successors and assigns. For the purpose of this Determination, the terms “subsidiary” and “related company” shall have the meaning ascribed to them in the Companies Act 2014
- (o) ‘SMP’ significant market power

- (p) ‘Undertaking(s)’ shall have the same meaning as under Regulation 2 of the Framework Regulations
- (q) ‘Virtual Unbundled Access’ or ‘VUA’ means the wholesale active access product provided by Eircom in accordance with section 7 of the decision instrument contained in Appendix 20 of ComReg Decision D10/18

3. SCOPE AND APPLICATION

- 3.1. This Determination relates to the SMP obligation set out in section 10.25 of the decision instrument contained in Appendix 20 of ComReg Decision D10/18.
- 3.2. ComReg has considered the scope of the dispute contained in the Dispute Referral and has concluded that the scope for the dispute the subject of this Determination is as follows:

“Whether Eircom may require Siro to comply with conditions, and if so which, in respect of access to information regarding Eircom’s “NGA [Next Generation Access] rollout plans” (as provided for under Section 10.25 of the WLA Decision Instrument at Appendix 20 of ComReg Decision D10/18)”.

4. DETERMINATION

- 4.1. In accordance with Regulation 31 of the Framework Regulations, the Communications Regulation Act 2002, and for the purpose of resolving the dispute between the Parties, ComReg hereby determines that:
 - (a) Eircom may apply reasonable conditions in respect of access to information regarding Eircom’s NGA rollout plans in order to ensure that access is limited to Undertakings purchasing access to relevant access products.
 - (b) A condition whereby Eircom limits access to information regarding its NGA rollout plans only to those Undertakings that have entered into an access agreement with Eircom in respect of VUA, having executed the particular schedules of the Access Reference Offer concerning VUA and the associated non-disclosure agreement is reasonable.
 - (c) Eircom is not required to provide Siro with access to information regarding its NGA rollout plans until such time that Siro has met the requirements contained in paragraph (b) above or any other reasonably imposed conditions for the purpose of (a) above that are also consistent with ComReg Decision D10/18.

5. STATUTORY POWERS NOT AFFECTED

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

6. EFFECTIVE DATE

- 6.1. The Effective Date of the Determination shall be the date of its publication and notification to the Parties and it shall remain in force until further notice by ComReg.

ROBERT MOURIK
COMMISSIONER
THE COMMISSION FOR COMMUNICATIONS REGULATION
THE [...] DAY OF [...] 2020

Annex: 2 Section 10.25 of the WLA DI

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom.

Annex: 3 Siro submission 18 November 2019

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom.

Annex: 4 Information Notice 19/109

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom

Annex: 5 Siro complaint to Eircom 16 October 2019

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom.

Annex: 6 Eircom Report Complaint W/SCust 16 (Complainant Version)

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom

**Annex: 7 Eircom Report Complaint W/SCust 16
(Confidential Version Redacted)**

Annex: 8 Eircom Reply 11 December 2019

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom

Annex: 9 Eircom Response to Questions 10 January 2020

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom

Annex: 10 Cover Letter from Siro 13 January 2020

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom.

Annex: 11 Siro Response to Questions 13 January 2020

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom.

Annex: 12 ComReg Consultation Document 16/96

See Document 20/13a – Annexes for Draft Determination of a dispute between Siro and Eircom.