



**RESPONSE BY *eircom* LTD.**

**TO**

**ACCESS SEEKERS MARKET REQUIREMENTS DOCUMENT (MRD) 'LOCAL LOOP  
UNBUNDLING; HIGH LEVEL STATEMENT OF REQUIREMENTS DOCUMENT'**

DOCUMENT CONTROL

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## EXECUTIVE SUMMARY

- The MRD contains three related requests for new forms of access to *eircom*'s network from three access seekers that plan to use LLU going forward. These are the integration of GNP into the LLU service; products that allow migration from existing wholesale services (e.g., bitstream, SB-WLR) to LLU such as would allow operators to transfer customers from wholesale products onto unbundled lines; and volume processing capabilities to manage projected LLU orders.
- The MRD requirements are unique across the EU, and involve a complexity of implementation and impacts that require careful examination and consideration.
- With respect to operators' new request for the (near-) simultaneous provision of LLU and GNP as an LLU product, *eircom* does not, of course, have any objection to developing facilities that enable customers to keep their telephone number when they switch operator. In point of fact, *eircom* ports numbers in and out of its network, and its SB-WLR service already ensures that customers can keep their telephone numbers when switching operator.
- A decision on whether to impose an obligation on *eircom* to implement such a capability as part of its obligations in relation to LLU must, however, take account of the peculiarity of porting telephone numbers (near-) simultaneously *within eircom's* infrastructure and the systems adjustments that would be necessary to allow that to happen. *eircom* proposed to implement the necessary changes in 2001 in the development phase of the LLU product, but was told they were burdensome and unnecessary. This is because OAOs have focused on using LLU to deliver broadband services, which do not require the telephone number.
- *eircom* has nonetheless analysed the new product request, and in this paper identifies the issues that need to be considered by ComReg and OAOs in determining whether development of a new LLU product with GNP to enable basic voice telephony is in fact sensible and warranted in circumstances where it will, as demonstrated below, involve complex systems development, significant cost and an appropriate implementation period.
- Specifically, the product requested would take ~18 months to complete, and cost c. €13m CAPEX and on-going OPEX of ~€3m per annum.

- With respect to the forms of access described in capability 2 of the MRD – the so-called “migration” products between wholesale services and LLU services - *eircom* does not believe it is possible or appropriate to introduce such far-reaching change to the existing model for service delivery over *eircom*’s local access network. Such a change affects not only *eircom*, but all other operators in the market who avail of wholesale services or who install their own infrastructure.
- The premise for mandating three different forms of network access - LLU, bitstream and SB-WLR – was that OAOs would not use them as substitutes for one another (i.e. an OAO purchasing bitstream would not purchase LLU, and vice versa). The premise underlying the MRD is, conversely, that wholesale services and LLU are substitutes. Either ComReg’s initial analysis was wrong, or the current analysis is wrong, but they cannot both be right.
- In order to be as constructive as possible, *eircom* has nonetheless considered whether it makes economic sense to allow migrations over its network.
- This review shows that the requirements would create significant stranded assets by *eircom* and would exacerbate the digital divide by over-subsidising service provision by OAOs in profitable urban areas. As the principal benefit of allowing the requested access is that OAOs could enter the market free of any investment risk (all of which would be borne by *eircom*), *eircom* does not believe that it is appropriate to provide the migration capabilities.
- *eircom* recognises, however, that there are conflicting views in relation to this difficult and complex issue, and will participate fully in considering all impacts with interested parties. It is essential that all views are considered since *eircom*’s access network is currently used by more than forty operators (many of whom would be “disenfranchised” by local loop unbundlers, since the LLU regime creates disaggregated monopolies).
- If it proves warranted, *eircom* will provide capability for volume processing to meet demand, subject to proper planning/forecasting and financial commitments by the OAOs.

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## **INTRODUCTION**

1. The MRD presented by ComReg to *eircom* on behalf of industry sets out high-level specifications for the development of “LLU products” in order to “facilitate the business plans of OAOs”.
2. *eircom* reviewed the MRD when it was first received by it and considered that, contrary to the impression of simplicity given by their high-level articulation in the MRD, the new forms of access sought would require significant change to the existing systems that had been developed with industry for providing access to *eircom*’s network.
3. In some respects, an effective dismantling and re-building of *eircom*’s current systems architecture would be required to give effect to the MRD.
4. This was confirmed by Mr. Justice McKechnie in the High Court when he said that:

“It is therefore clear that Decision D1/05 imposed requirements, which in some way were in addition to and/or different from those which had previously existed under the SMP decision. These were therefore new requirements and accordingly were capable of affecting the position of *eircom*.”
5. *eircom* committed to carrying out the necessary analysis. However, a number of disputes arose between *eircom* and ComReg in relation to Decision Notice D1/05 in January 2005. These have been resolved and *eircom* is pleased to provide its response to the MRD to ComReg and industry.
6. *eircom* has reviewed the newly requested forms of access in the MRD constructively and comprehensively, and believes it is important for all stakeholders to adopt the same approach. In circumstances where other operators participated fully in the development of current LLU and other wholesale products provided by *eircom* under the overall direction of ComReg, it is not, for example, helpful for the discussion to be confused by assertions that LLU is not available, or does not meet requirements or indeed that it is the only method of access to *eircom*’s network.
7. The regulatory framework contains clear criteria that must be satisfied before new obligations can be imposed on *eircom*. In summary, these are that the obligation must be imposed as an appropriate remedy to competition issues identified in accordance with the principles of competition law and in accordance with the principles set out in the Access and Framework Regulations, and the obligation must be necessary, proportionate and justified relative to the problem it is intended to

address. The need to encourage investment in infrastructure is a key consideration in this analysis.

8. In this case, however, before considering the MRD to see if these criteria are met, particularly as regards capability 2, a number of initial issues must be examined.
9. First, the regulatory framework provides for obligations to be imposed on operators with SMP *in* defined markets. The framework does not provide for obligations to be imposed *across* different market segments. As the MRD relates to a number of distinct markets identified by ComReg under the regulatory framework, and the obligations would therefore cut across markets, it does not appear to be possible to impose new obligations on *eircom* to provide the forms of access sought in the MRD. The objective of the framework to move from sector-specific regulation to competition rules, and the attendant focus on narrowly defined markets, suggests that it is inappropriate to intertwine distinct obligations imposed in distinct markets.
10. Secondly, it is necessary to recall the basis on which each of *eircom's* relevant access obligations - LLU, bitstream and SB-WLR - were mandated and the competition problems they sought to address. In this regard, *eircom* has concluded that there is a fundamental inconsistency between the premise on which the existing access obligations were mandated – *i.e.*, that LLU and bitstream, and LLU and SB-WLR were not substitutes - and the premise on which it is now proposed to introduce the new forms of access sought in the MRD – *i.e.*, that they are, in fact, substitutes.
11. In this regard, it follows from the assertion that operators would in fact switch from bitstream to LLU or from SB-WLR to LLU (and indeed there is no other explanation for the MRD), that the justification for requiring *eircom* to provide both wholesale and LLU access at different levels of the network must be re-examined. In view of the demand for wholesale services, this finding tends towards the conclusion that LLU may not be a legitimate obligation at all in this jurisdiction. If that was the case, clearly the question of migrations would not arise.
12. Notwithstanding the significant issues identified above, and with a view to providing a comprehensive response to the MRD, *eircom* has also assessed whether, absent the fundamental issues arising as to whether it would remain appropriate to have all three forms of access – LLU, bitstream and WLR – given the finding that they are substitutes for each other, the newly requested forms of access would be reasonable within the meaning of the Access Regulations.

13. In light of the foreseeable impacts of the MRD across *eircom*'s entire suite of wholesale services, *eircom* has maintained from the outset that it is necessary to take account of the views of all its wholesale customers in respect of the MRD. For that reason, this response is addressed to ComReg and all of industry.
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## THE MRD

14. The MRD (attached as Appendix 1) contains three capabilities in total, which may be summarised as follows:

- Capability 1: Integration of GNP into LLU so that they can be ordered and provided simultaneously.
- Capability 2: Bulk and single migrations from other wholesale products or to LLU.
- Capability 3: An order system/process which would cater for LLU Volume Processing.

15. With respect to Capability 1 – *Integration of GNP into LLU* - Section 2.1 of the MRD states as follows:

“An access seeker can order GNP together with LLU and have the two services delivered together, i.e. have the loop unbundled together with its number simultaneously ported to their network. The current LLU and GNP products should remain as standalone products. The integrated product will form a new LLU product .....

16. With respect to Capability 2 – *LLU Migrations* - Section 3.1 of the MRD states as follows:

“This describes the major process steps allowing an access seeker to order both bulk and single migrations. This may take the form of existing or new WLR/CPS only customer to ULMP; new or existing WLR/CPS only and existing/new bitstream customer to ULMP; existing bitstream only to line share; and line share to ULMP.”

17. With respect to Capability 3 – *LLU Volume Processing* – Section 4.1 of the MRD states as follows:

“Capability 3 requires an LLU ordering process which can accommodate scale .... And allow for migrations. .”

18. The MRD accordingly requires *eircom* to develop new products which are not currently available, and which *eircom* currently has no obligation to provide. It is also the case that the products being requested are considerably more complex than the MRD – or ComReg in its description of it - would suggest. This is discussed below.



## **eircom's ACCESS OBLIGATIONS**

19. Since liberalisation of the telecommunications sector in 1997, *eircom* has developed and launched a complete suite of wholesale products and services in full compliance with its regulatory obligations.
20. The key products launched and associated timeframes are as follows.
  - In 1998, *eircom's* Reference Interconnect Offer (RIO) was published, which included Carrier Access (CA) and Carrier Selection (CS).
  - This was followed by Carrier Pre-Select (CPS) and Number Portability (NP) in 2000.
  - In 2001, Local Loop Unbundling (LLU) was launched.
  - Wholesale Broadband Access (WBA), also known as bitstream, was launched in 2002.
  - Single-Billing Wholesale Line Rental (SB-WLR) was launched in 2003 with further enhancements in 2004.
21. All of these products and services were developed and agreed with ComReg and industry and published in compliance with the various European Union (EU) and national regulations. In addition, most of these products have been priced at rates at or close to the EU minimum level. As a consequence of these developments Ireland is believed to be the 4<sup>th</sup> most open telecommunications market in the EU (based on penetration of OAO services).
22. *eircom's* obligation to provide LLU was originally imposed under the EU LLU Regulation before wholesale services became available. *eircom's* obligations in relation to LLU were confirmed in 2004 by Decision Notice D8/04 and the Access Regulations 2003. These obligations are given effect to in *eircom's* ARO.
23. *eircom's* obligation to provide CPS and SB-WLR to other operators arose under the Interconnection Regulations 1998 and is continued in force under the transitional provisions of Regulation 13 of the European Communities (Electronic Communications Networks and Services) (Universal Service) Regulations 2003 (the "Universal Service Regulations").

24. In its Draft Decisions on the markets for Retail Calls and Access, ComReg has proposed to continue *eircom's* obligations to provide SB-WLR as access obligation under the Access Regulations 2003.
  25. *eircom's* obligation to provide bitstream to other operators arose under the European Communities (Voice Telephony Regulations) 1999 and, since February 2005, is imposed by Decision Notice D3/05 and the Access Regulations 2003.
  26. Finally, although not an access obligation, it is useful to note that an obligation to provide GNP was imposed – on all operators, not just *eircom* – under the Interconnection Regulations 1998 (as amended by SI 249 of 1999) and is currently governed by Regulation 26 of the Universal Service Regulations.
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## **FRAMEWORK FOR MANDATING ACCESS TO *eircom*'s NETWORK**

27. In this section, *eircom* outlines its concerns that the regulatory framework does not allow ComReg to impose obligations on *eircom* to provide the new forms of access sought in the MRD. *eircom* notes that these issues arise predominantly in respect of the migration products sought in capability 2 of the MRD, and this section should be read in that context.
28. The first concern is that according to the requirements of the regulatory framework, access obligations can only be imposed in specific markets, and not across different markets.
29. The second concern is that the conclusions reached by ComReg in its market analysis consultations for purposes of mandating the existing forms of access over *eircom*'s network are inconsistent with, and would be undermined by, the rationale now advanced for seeking to require the new forms of access set out in the MRD.
30. Finally, and without prejudice to the difficulties arising from the structure of the regulatory framework itself, *eircom* considers the MRD in the context of the criteria that must be satisfied if the other pre-conditions to imposing new access obligations on it had been met.

### ***A. Access obligations can only be imposed in specific markets, and not across different markets***

31. The "capabilities" requested in the MRD are not (only) LLU products. They are new products which cut across several markets comprising LLU, bitstream and SB-WLR. Each of the underlying obligations (to provide LLU, bitstream and SB-WLR) was imposed following a separate market analysis carried out by ComReg.
32. The Directives and Regulations that provide for access obligations to be imposed on *eircom* make it clear, however, that obligations are intended to be imposed within distinct product markets. (emphasis added)
33. In this regard, the Access Directive provides as follows:

Article 8.2

"Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of

Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.”

Article 15.1

“Member States shall ensure that the specific obligations imposed on undertakings under this Directive are published and that the specific product/service and geographical markets are identified.”

34. The fact that the framework does not envisage the interweaving of SMP obligations imposed on discrete markets is confirmed by the express objective of the new framework to move from sector-specific regulation to competition rules and to remove obligations from SMP operators as soon as possible. It is obviously contrary to this objective to create unjustified links between obligations that are intended to stand apart from one another.
35. This objective was well articulated in the Communication on the 1999 Communications Review, in which the European Commission described the aim of the future regulatory framework to be the creation of:

“a regulatory regime, which can be rolled back as competition strengthens, with the ultimate objective of controlling market power through the application of Community competition law” and considered that the key issue was therefore to “strike the right balance between sector-specific regulation and the competition rules”. This objective is reiterated in the Access Directive which provides that market reviews “should be carried out using an economic market analysis based on competition law methodology with the view to reduce ex ante sector specific rules progressively as competition in the market develops”.
36. The Explanatory Memorandum to the Commission’s Recommendation on Relevant Markets provide further clarification at page 25, where it states that:

“Regulation mandating access to existing networks serves as a transitional measure to ensure services competition and consumer choice until such time as sufficient infrastructural competition exists.”
37. The restriction on only imposing obligations within relevant market presents a serious impediment to introducing the new forms of access set out in the MRD, which by definition impact three different markets, *i.e.*, the markets for SB-WLR, bitstream and LLU.

38. *eircom* believes that this difficulty is exacerbated by the basis on which ComReg considered it appropriate to impose such a broad range of access obligations on *eircom* in the first place. This is discussed in section B below.

**B. *What are the implications of ComReg’s previous findings that LLU and wholesale services are not substitute products?***

39. Even if it was possible to interweave access obligations across distinct markets (and *eircom* does not believe that it is), the justification advanced for proposing the new forms of access contained in capability 2 in the MRD is that OAOs need to be able to migrate from wholesale services to LLU. In other words, OAOs wish to pursue a dual strategy of building a customer base using *eircom*’s wholesale services and then converting those customers to LLU.

40. Implicit in this is that bitstream and LLU (and SB-WLR and LLU) are substitute products from the perspective of OAOs. While that might support ComReg’s current proposals as set out in the MRD, it is directly contrary to the findings that provided the necessary justification for mandating *eircom*’s current suite of access services.

41. In this regard, a key finding supporting the imposition of obligations to provide LLU in circumstances where bitstream and SB-WLR were also available (and vice versa) was that these services operated at distinct levels within the network and would not be considered to be substitutes by OAOs. This is best illustrated by reference to the market analysis documents themselves, where it is stated, in ComReg Doc No 04/146:

“1.8 The European Commission takes the view that an operator using unbundled local loops will not consider another form of wholesale broadband access to be a substitute. The European Commission considers that it is equally unlikely that an entity using wholesale broadband access could easily switch to unbundled loops to provide equivalent retail services.”

“1.9 In effect, the services operate at entirely different functional layers. The wholesale unbundled access acquirer must make not insignificant investments in exchange equipment and must play a much greater role in managing its services (in that it bears responsibility for identifying faults). The pricing data available to ComReg indicates that it is unlikely that an access acquirer would respond to a 5% to 10% increase in Bitstream prices by switching to unbundled loops or if an unbundled loop acquirer would respond to a similar increase by switching to Bitstream. As such,

the service price and other cost differences suggest that wholesale unbundled access services are not in the same relevant market as Bitstream services.”

42. Similarly, in proposing to require *eircom* to continue to provide access to OAOs in the form of SB-WLR services, ComReg concluded that LLU and SB-WLR are not substitutes for one another, and that SB-WLR and bitstream are complementary products. In this respect, ComReg Doc No 05/25 in relation to retail fixed narrowband access (which is still in draft form) states as follow:

“4.21 Competing operators to *eircom* currently can avail of unbundled local loop products, specifically the unbundled local metallic path (ULMP) product. This would potentially allow competing operators access to end customers for the purpose of providing narrowband access services. Although ComReg acknowledges the theoretical potential of the ULMP services to enable competition in the retail markets for access and calls (and notes that in some other jurisdictions this has actually occurred to some extent) ComReg does not believe that ULMP presents a significant competitive threat to *eircom* and its provision of narrowband access services.

4.22 ComReg notes that although ULMP can be used to provide voice services, currently the product is used predominantly for the provision of broadband access. Where ULMP lines have been purchased by OAOs, (and only a few hundred have been since the introduction of LLU in 2001) they are used to provide high capacity data services and all information available to ComReg indicates that this pattern of use is unlikely to change in the foreseeable future.”

43. This also confirms that demand for LLU has been driven in Ireland for broadband purposes, and, curiously, given that the MRD had issued by that time, that this is unlikely to change in the foreseeable future.
44. It is important to note that the market analysis process has only been recently undertaken by ComReg (beginning at the end of 2003), and that each such analysis was required to be forward looking and based on a prospective view of the market. As such, it is impossible to understand why the issues now raised as essential requirements in the MRD were not considered at the time the economic analysis was being carried out by ComReg. Indeed, it is impossible to reconcile ComReg's findings in Decision Notice D8/04 (of June 2004), Decision Notice D3/05 (of February 2005) and the Draft Decision 05/25 on Retail Fixed Narrowband Access Markets (of March 2005) and the proposals now being made by it in relation to those same products and services.

45. The fundamental inconsistency in approach between the market analysis process and the current proposals presents a real difficulty in assessing whether the new forms of access should be mandated. This is because in *eircom's* view it is not possible for ComReg to rely on one set of findings to ensure LLU and bitstream and WLR are introduced in the market, and then once these products are available, to depart from those findings in order to justify the imposition of further access obligations on *eircom*.
46. Indeed, it is *eircom's* view that the premise underlying the MRD a finding that LLU and bitstream are substitute products significantly undermines the market analysis process to the point of calling into question the justification for imposing these access obligations on *eircom* in the first place. Either ComReg's initial analysis was wrong, or the current analysis is wrong but they cannot both be right.
47. Having regard to the other reasons advanced in support of capability 2 in the MRD – for example, to drive LLU penetration - it cannot be the case that *eircom's* obligation to provide SBWLR and bitstream could have been imposed solely as “enablers” for LLU. It is equally questionable whether it is a proper application of the principles underlying the regulatory framework to prefer one form of access – LLU – over others, particularly when the vast majority of OAOs currently avail of wholesale access to *eircom's* network. In this respect, *eircom* refers to the grounds advanced by ComReg for imposing obligations to provide, for example, SB-WLR, namely that the aim of WLR was to promote competition by addressing *eircom's* dominance in the access market, and to enhance the effectiveness of the CPS remedy in the calls market.
48. *eircom* considers that these issues raise very serious doubts over the appropriateness of imposing the obligation set out in the MRD on *eircom*. At a minimum, the entire premise for the current suite of access obligations must be explored in order to ensure that they are still valid for purposes of requiring *eircom* to provide LLU, bitstream and SB-WLR.

**C. *Regulatory basis for imposing new obligations on eircom***

49. Even if the above concerns affecting the implementation of capability 2 of the MRD did not exist (and *eircom* believes that they do), it would in any event be necessary to consider the MRD in light of the requirement that any existing or potentially new obligations on *eircom* to provide access to its local infrastructure must be imposed as appropriate remedies to competition problems identified in accordance with the

principles of competition law and in accordance with the principles set out in the Access and Framework Regulations.

50. In this regard, the European Regulators Group (“ERG”) has stressed

“the importance of the role of economic analysis in being capable to identify the types of competition problems and the remedies to these problems in an effective and self-sustaining manner”(emphasis added). Of particular importance in this regard is the question of the proportionality of the remedy.”

51. The Access Directive requires in particular that obligations imposed be:

“based on the nature of the problems identified, proportionate and justified in light of the objectives laid down in Article 8 of the Framework Directive.”

52. Recital 15 makes it clear that:

“The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified.”

53. Of particular relevance in the context of proportionality of remedies and the imposition of access obligations is the case law relating to the obligation for an operator to provide access to its network under the essential facilities doctrine. In the *Access Notice* of August 1998,<sup>1</sup> the European Commission examined its application in the telecommunications sector and considered that the following conditions had to be met before an obligation to provide access could be imposed:

- Access to the facility in question is essential in order for companies to compete on a related market;
- The Commission made it clear that in determining whether a facility is essential, “It will not be sufficient that the position of the company requesting access would be more advantageous if access were granted – but refusal of access must lead to the proposed activities being made either impossible or seriously and unavoidably uneconomic.”<sup>2</sup>
- There is sufficient capacity available to satisfy the request;

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<sup>1</sup> Notice in the application of the competition rules to access agreements in the telecommunications sector – Framework, Relevant Markets and Principles, OJEC 98/C 265/02.

<sup>2</sup> At ¶ 91.



- The facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market;
- There is no objective justification for the refusal.<sup>3</sup>

54. A key condition that must be met before requiring access is that:

“the facility owner fails to satisfy demand on an existing service or product market, blocks the emergence of a potential new service or product, or impedes competition on an existing or potential service or product market”.

55. However, a review of the products available from other operators in the market demonstrates that OAOs intend to limit themselves essentially to duplicating the goods or services already offered by *eircom* (and other network operators) on the downstream market.

56. In view of the above, the forms of access sought in the MRD are clearly not “based on the nature of the problems identified, proportionate and justified in light of the objectives laid down in Article 8 of the Framework Directive”, and *eircom* believes that they would have effects that would be contrary to those requirements.

57. In particular, given the state of competition in the market, it is clearly not the case that these forms of access are indispensable to the provision of services in downstream markets and that refusal to grant access in these forms would result in the elimination of all competition.

58. It is also relevant in this regard that changing market conditions mean that fixed and mobile voice and data services are substitutable with one another at the retail level and becoming more so.

59. More importantly, operators can compete in downstream markets by availing of regulated forms of access, in particular SB-WLR and bitstream or LLU. In this regard, studies carried out for the European Commission have found that:

“the form of access ..... must be indispensable, in that there are no actual or potential substitutes. Accordingly, it will be necessary to determine whether there are

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<sup>3</sup> It is interesting to note that the relevant justifications listed by the European Commission includes “an overriding difficulty of providing access to the requesting company, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market”.

economic and technical substitutes (e.g., is there a wholesale access service offering that acts as a substitute)” (emphasis added).<sup>4</sup>

60. Given the availability of existing forms of access, it seems clear that the requests set out in the MRD are not necessary or indispensable to enable other operators to provide services, but are sought for the sole purpose of making access *easier* to achieve, and to facilitate OAOs in exploiting arbitrage opportunities created by the multiple forms of access available.
61. As against this, the European Commission has found that particular forms of access may be refused based on an overriding difficulty of providing access to the requesting company, or the need for a facility owner which has undertaken investment aimed at the introduction of a new product or service to have sufficient time and opportunity to use the facility in order to place that new product or service on the market.
62. An indication of the purported justification for seeking to impose these new obligations on *eircom* is provided in Decision Notice D1/05 (now withdrawn). *eircom* does not believe that any of the reasons for regulatory intervention identified in the decision are sustainable or satisfy the criteria of ensuring that obligations imposed be based on the nature of the problems identified, proportionate and justified in light of the objectives laid down in Article 8 of the Framework Directive.
63. First, as regards the assertion that “*Access Seekers (those operators taking the wholesale ULMP and LS products from eircom) are making more substantial infrastructural investment in LLU and seeking to develop more comprehensive retail product offerings,*” there has in fact been *minimal* investment in LLU over the past four years. Less than 10% of switches are forecast to have co-location. So while in percentage terms the increase is substantial, in real terms it is not.
64. With respect to the statement that “*While Access Seeker(s) to date have concentrated on offering broadband products over the local loop, recent technological and cost developments have made make it viable for them to offer a full suite of services (voice and broadband) over the local loop to retail customers,*” *eircom* does not believe this is accurate. While the technology being installed by Smart allows both voice and broadband to be provided using the same equipment,

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<sup>4</sup> See Squire Sanders, *Legal Study on Part II of the Local Loop Sectoral Inquiry*, February 2002, esp. p. 48.

the capability to install separate equipment to offer both services has always been an option for access seekers.

65. Most difficult of all, perhaps, is the assertion that “*There are to date fewer than 2000 unbundled local loops and ComReg has no doubt that at least in part this is due to the serious operational issues experienced by Access Seekers*”. There is no evidence that access seekers have experienced *any* operational difficulties in the provision of LLU. In addition, *eircom* has re-negotiated the SLA supporting the delivery of LLU and the industry agreed metrics are being achieved in the majority of instances.
66. Finally, insofar as it is claimed that the MRD is necessary to fulfill “*ComReg’s commitment to giving Irish consumers price, choice and quality in terms of broadband*”, in point of fact the requirement as currently specified would seriously limit consumer choice as it allows access seekers to lock-in customers and deny them further choice. This results from the complete absence of any defined return paths for customers moving to the product.
67. It is also the case that contrary to the frequent assertions of OAOs, there is no concrete example of services proposed to be provided over *eircom’s* network that are markedly different to those that are already available.
68. In this respect, there are weekly examples in the media of broadband providers alleging that difficulties in accessing LLU (which *eircom* does not accept exist) are stifling broadband competition and innovation. *eircom* has, however, found no evidence that additional and/or innovative services are offered by broadband providers via alternative infrastructure such as Cable, Wireless and Satellite. In this regard, a copper loop carries the same technical restrictions in OAO control as in *eircom* control.
69. As a point of reference *eircom* consulted the Department of Communications, Marine and Natural Resources Broadband Information site to view the “*Broadband Product Offers*” in Ireland. This is expressed to be *an impartial and confidential consumer advice website*.
70. The Department outlines to the potential Broadband customers what Broadband is and how it is delivered.

## **What is Broadband?**

Broadband is an always-on Internet connection that gives you high-speed access and downloads for a flat rate monthly charge.

Everything works faster, from downloading emails and files (such as pictures & mp3's) or streaming movies and radio.

## **How do I connect to Broadband services?**

There are different ways of accessing the Internet using a broadband connection. While many are familiar with using a connection via their existing telephone or cable-TV line, you can also have broadband access using other proven technologies including wireless-radio, satellite and power lines.

71. There is no evidence in the market that Local Loop Unbundling or any existing alternative *proven technologies* provide the broadband customer with anything more than faster access to the Internet. The Department provides the potential Broadband customer a comprehensive list<sup>5</sup> of the Broadband Services by Provider in the Republic of Ireland.
72. It is evident from the Department's list that there are only three product characteristics, speed, price and contention ratio that distinguish each operators Broadband Service. This is confirmed by viewing each operators product offering in detail, there are no additional services offered by any operator that are not available to be provided by an operator supplying Broadband via DSL technology over existing telephone lines.
73. Alternative Broadband providers are Casey Cablevision Ltd., Chorus, Crossan Cable, and NTL (Cable); AHC networks, AirWave InterNet, Alternative Broadband, Amocom (Azotel), BK Communications, C Tek, COM1 Wireless, Ice Wireless, ILDANA TEO, Irish Broadband, Kerry Computer Systems, Kinvara Network Society, Last Mile Broadband, Leap Broadband Wireless, Net1 Broadband, Nova Networks, PermaNET Broadband, Quantum Broadband Solutions Limited, Rapid Broadband Limited, and Torque Internet (Fixed Wireless); Avonline, Applied Solutions, BROADBAND4IRELAND, e3 Broadband, ehotsport, Fastnet Broadband, Digiweb, Orbitlink, Radiowave Ltd (Satellite).

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<sup>5</sup> < <http://www.broadband.gov.ie/bbinfo/ServiceListWF.aspx>>

74. Aside from Magnet Networks who offer Digital TV via Fibre to the Home and Mediasat (Satellite Provider) who offer Digital TV, the other 33 Broadband suppliers, alternative to *eircom* local loop offer no innovative services.
  75. In the interests of completeness, and without prejudice to the above, *eircom* has carried out a full assessment of the capabilities sought in the MRD according to the principles described in this section C. The remaining sections of this document contain that analysis.
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## INTERPRETATION OF THE MRD

76. The MRD presented by ComReg and agreed by the three Access Seekers currently active in the market is a high level document setting out in general terms the requirements of the three access seekers canvassed. This high-level view needs significant interpretation before any analysis can be conducted in relation to its potential reasonableness and the feasibility of its implementation. This section of the response document attempts to set out this interpretation in non-technical terms. A more detailed technical interpretation has been conducted by *eircom* to facilitate an assessment of potential impact on the networks and systems of *eircom*.
77. Some initial meetings were held in December 2004 and January 2005 in relation to the MRD in which *eircom* provided comment on the draft and agreed MRD to both ComReg and Industry.
78. This comment was substantively that the MRD could not be assessed in isolation from the current suite of regulated wholesale products available in the market. In order to support this assertion, *eircom* prepared a comprehensive matrix of the current and MRD proposed relationships between the full suite of products including those proposed in the MRD. This matrix, a current version of which is attached in Appendix 2, was then used to assist in developing a more detailed interpretation of the MRD. This interpretation analysed the contractual, consumer, technical and operational issues that would arise from the development of the MRD requirements and their incorporation into the overall regulatory regime applying in the Irish market.
79. This analysis was the foundation for the interpretation of the MRD which is presented in this document. The interpretation is not intended to represent an exhaustive document but rather concentrates on the major issues that need to be considered. A more technically focused version of this interpretation was developed to allow the IT and networks analysis to be conducted. The output on this analysis is represented in the feasibility section of this response. Thus the matrix has fulfilled its purpose as a tool to allow the issues which required to be addressed to be identified.
80. As described above, the MRD sets out three capabilities, which are:
- Integration of GNP into LLU
  - Migrations to LLU
  - LLU Volume Processing

81. The MRD also requires that backward paths be developed for both OAO to OAO and for OAO to *eircom* retail. This effectively equates to a fourth capability.

**A. Integration of GNP into LLU**

ULMP

82. In normal circumstances, where *eircom* retail is providing PSTN service to a retail customer, the local loop serving the customer is connected, or jumpered, to an *eircom* Line Card (LI) at the Main Distribution Frame (MDF) in the *eircom* local exchange.
83. The current Unbundled Local Metallic Path (ULMP) product, which is the LLU product in question in this capability, removes this jumper from the *eircom* Line Card (LI) and connects it to the OAO block on the same MDF. This OAO block is then connected to the OAO equipment located in the *eircom* local exchange. Services are provided to ULMP customers through this equipment and a fibre connection to the OAO central exchange.
84. The re-jumpering requires a field technician to visit the *eircom* exchange to physically carry out this work. At low volumes such activity can be incorporated into the normal activities of such field technicians. The volumes projected by the three access seekers would, however, require significant additional resources to be allocated to ULMP activities and this is assumed for purposes of *eircom*'s response.

GNP

85. The GNP product as currently defined requires that the porting of any number out of the *eircom* network onto another network needs to be scheduled with the OAO who is importing the number. This is necessary to ensure that the capability to route calls to the number has been established in the new network in advance of the actual number being ported to that network.
86. In addition, the actual task of porting the number is currently carried out by an *eircom* switch technician directly on the exchange interface systems.

ULMP with GNP

87. The integration of GNP into ULMP, with a maximum customer down time of one hour, as requested in the MRD would have a number of major implications for the processes set out above.

88. Firstly, there would be a requirement to co-ordinate the activities of not only the *eircom* field and switch technicians but also the OAO to whom the number is being ported. New scheduling processes/systems would need to be agreed, developed and implemented to accommodate this co-ordination as well as a communications capability to alert the other parties if one party was unable to meet the appointed time. This level of internal or inter-operator co-ordination does not exist for the GNP product today. Given the volume forecasts provided by the Access Seekers an automated, electronic system with interfaces to OAO systems would need to be designed, developed and implemented if the one hour time-frame specified is to be achieved.
89. Secondly, an emergency restoration process would have to be developed to cater for situations where the tasks to be carried out by any of the three parties involved were unsuccessful. The work of all parties would have to be immediately reversed to ensure the customer was not left without service.
90. Thirdly, where the line being moved was already unbundled to a third OAO, the level of co-ordination required would be greatly increased. In this event, the ULMP part of the order would be placed by the gaining operator to *eircom* while the GNP order would be placed by the gaining operator to the losing operator. In order for the service to be moved without interruption to the customer, the following actions would have to be co-ordinated across the three operators concerned:
- The removal of the jumper from the losing operator block and connection to the gaining operator block by *eircom*
  - The porting of the number between the two networks involved at the same time
  - The updating of the national GNP database
  - The download of this update into the *eircom* and OAO call routing tables
  - The building of the customer services by the gaining operator on its network.
91. All of these activities would have to be synchronised between all networks. The systems and interfaces to achieve this would have to be developed not only in the *eircom* network but also in all other networks concerned.



92. Finally, the integration of GNP into LLU would, for the first time, draw two separate utilisations of the telephone number into a single transaction.
93. Currently, when a number is ported out of the *eircom* network through GNP, data-fill is inserted in the local switch that this number is ported and details of how calls to this number should be routed are inserted in the Intelligent Network (IN).
94. However, where a telephone line is unbundled utilising ULMP, the telephone number continues to be used to identify this particular loop in the *eircom* network inventory systems.
95. These two separate uses of the number have existed in isolation from each other: the new product requirement would require that both functions are discharged simultaneously. The capability to achieve this has to be developed and detailed analysis would be required of all network-related systems to ensure that the conflicts which will arise can be addressed.

**B. *Migration capabilities between wholesale and LLU products***

96. In the MRD, four different migrations are listed being:
  - Existing or new WLR/CPS only customer to ULMP
  - New or existing WLR/CPS only and existing/new Bitstream customer to ULMP
  - Existing Bitstream only to LS
  - LS to ULMP
97. For purposes of analysis, these requirements can be broken out into a lower level of detail whereby the migrations can be stated to include *eircom* retail service or SB-WLR at the narrowband level which may then be combined with either bitstream or *eircom* broadband at the broadband level. Thus there are potentially four different states that the line can exist in prior to a migration request to ULMP. Each of these four states requires separate analysis. For ease of reference, *eircom* has set these out clearly in Table 1 below, which also sets out which type of migration could apply.

**Table 1**

**Potential Migrations included in the MRD**

Current State	Same Operator	Between Operators
Eircom PSTN	No Requirement	Single
Eircom PSTN with CPS	No Requirement	Single
SB-WLR	Bulk	Single
Eircom PSTN with DSL	No Requirement	Single
Eircom PSTN with CPS and DSL	No Requirement	Single
SB-WLR and DSL	No Requirement	Single
Eircom PSTN with Bitstream	No Requirement	Single
Eircom PSTN with CPS and Bitstream	No Requirement	Single
SB-WLR and Bitstream	Bulk	Single
Eircom PSTN with Line Share	No Requirement	Single
Eircom PSTN with CPS and Line Share	No Requirement	Single
SB-WLR and Line Share	Bulk	Single
Line Share to ULMP	Single	Single

98. The MRD requires that these migrations would be available at both the single and bulk level. However, the MRD is silent on whether they are required only for same operator migration or whether migration between operators is also required.
99. For purposes of this response, *eircom* has assumed that the latter is the case with the following qualifications.
100. First, in the case of bulk migrations, it is assumed that these will only be required for same operator migrations. The reason for this assumption is that operators are only likely to request migrations for existing customers when they have decided to co-locate at a particular exchange.
101. Similarly, it is assumed that single migrations will only apply to transactions between operators. In other words, where an operator utilising ULMP wins a customer from an operator utilising SB-WLR or indeed an operator who only had the broadband element with the customer using Bitstream.

102. A major consideration in reviewing this capability is the incorporation of the current industry agreement relating to the losing operator veto when a request is received to migrate the broadband service between operators. This veto was agreed by all industry to recognise the investment made by the current operator and to ensure that that operator had the opportunity to recover such costs through the application of the terms of their customer contracts.

**C. *LLU volume processing***

103. This element of the MRD is driven primarily by the market forecasts that underpin the MRD. While *eircom* has significant reservations regarding the validity of this forecast we have nevertheless used the forecast to identify the process and system requirements necessitated by volume order processing.
104. These forecasts represent the inputs, which were collected from the three Access Seekers involved in the MRD but which were based on information provided separately to *eircom* on a bilateral basis. It is understood, however, that the vast majority of the forecasts relate to a single operator. There are two main consequences of this particular requirement: that an automated process is required and that there will be a significant demand on both field and exchange technicians within *eircom*.
105. Accepting that the jumper change will always have to be manually implemented, the requirement for an automated process means that significant systems development would be required not only to the inter-operator gateway but also to the internal systems of *eircom* and the involved operators.
106. The resource requirement in the field force to meet this requirement will be directly proportionate to the volume of transactions handled. The only information provided in the MRD is the industry forecast. It is not clear whether this forecast is intended to represent the gross orders generated by these operators or whether it represents the net customer numbers they expect to grow by each quarter. In either event, the level of expected churn in the market must be factored into any analysis of the resource required to implement such a requirement. As such specialist resource cannot be easily acquired, significant validation of the determined forecasts will be necessary to mitigate against the risk of putting too much resource in place. An ongoing forecasting regime with related commitments may also be necessary to consider in this context.

**D. Development of backward paths**

107. This requirement is stated simply without any emphasis in the MRD. However, on analysis, it actually transpires to be the most significant element of the MRD. This conclusion is based on the assumption that the customer would continue to have the same level of supplier choice after the implementation of this MRD as he/she currently has via *eircom*'s wholesale services.. The experience of the Irish market over the past five years is that customers have exercised this freedom of choice to a significant degree and the MRD cannot be seen as a vehicle to in any way impact on this choice. The requirement to ensure the ability to continue to deliver this level of choice to customer served through ULMP is fully analysed in this response and has thrown up some extremely complex issues. An attempt to provide a simplified description of these issues is included in the following paragraphs.

*Wholesale Services Obligation*

108. Before addressing these issues, a more basic assumption must be made: that continued customer choice will be achieved through the development of *eircom* wholesale services rather than through the provision of a similar suite of wholesale services by each OAO availing of the ULMP product. In other words, it is assumed that the OAOs would not be mandated to provide nor would they offer open access to CPS, SB-WLR or Bitstream to all other OAOs (although *eircom* sees no reason in principle why its obligations should not follow its infrastructure). Therefore the assumption underpinning the remainder of this section is that where a customer currently served through ULMP decides to move all or part of its services to another operator, this would be achieved by removing the ULMP service, restoring the *eircom* line connection and then building the required wholesale product.

*Current Service Determination*

109. The first major issue arising from this assumption is the determination of the services currently provided to that customer. For instance, take the example of where a customer currently served through ULMP decides to move their voice calls to an alternative supplier. The customer will sign a CAF with the CPS operator who will in turn place an order with *eircom*. *eircom*, in reacting to that order, will restore the *eircom* line service and implement the CPS request. *eircom* will not know whether that customer has broadband service and even if it did, it would not know how to continue this service. A similar situation relating to ancillary services existed in the introduction of SB-WLR. The solution developed there was a facility whereby the

OAO could place an enquiry order and get full details of all voice related services on the particular line. A similar solution could be considered here but applying to all operators. The alternative is to accept that customers in exercising choice must be aware that service loss is a potential consequence.

#### *Access Line Provision*

110. The second issue is the basis on which the *eircom* line service would be restored. While it is accepted that *eircom* has a universal service obligation (USO) in relation to the provision of line service, the basis on which such service is provided is open to variation. For instance, *eircom* may decide to seek deposits from customers where it considers that credit risks exist. It is entitled to ensure that any such conditions are contractually binding before any service is delivered. Therefore, the restoration of the *eircom* line service cannot be an automated process but will require that the opportunity to put necessary contracts in place is afforded to *eircom* as part of the process. The potential failure to achieve this must also be considered.

#### *Bundled Ordering and Delivery*

111. The third issue which must be addressed is where the customer wishes to move their entire service to either *eircom* or an alternative operator using the *eircom* wholesale suite of products. In order to achieve symmetry, the application of either the *eircom* retail suite of products or indeed the *eircom* wholesale suite of products must be achieved with the same level of customer downtime as the original migration to ULMP. In order to achieve this, bundled delivery of the current retail and wholesale product portfolios would need to be developed. The definition of bundled delivery in this instance is the ability to accept a combined order for several products which would be simultaneously managed through the provisioning process to achieve synchronised delivery.

#### *Across Operator Service Delivery*

112. A further possibility would be where a customer wished to move from a single provider utilising ULMP to separate providers of narrowband and broadband services. This might result from joint marketing campaigns by specialist operators in these markets. In this event, the provision of wholesale services would have to be synchronised across the networks involved.

113. In the next section of this response, *eircorn* considers the feasibility of implementing the requirements set out in the MRD as described in detail above.

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## **FEASIBILITY OF THE NEW FORMS OF ACCESS SOUGHT IN THE MRD**

114. Based on the interpretation and assumptions presented in the previous section, *eircom* conducted a feasibility analysis on the MRD. The following summarises the outcome of *eircom*'s operational and technical feasibility assessment.
115. In short, two key functions would need to be enhanced in order to support the level of volumes anticipated. This would comprise:
- development of IT systems to automate those processes which can be automated (the process to support GNP and ULMP to date are highly manual) and
  - the operational processes involved in implementing jumpering activities for provisioning and the need to test from the MDF for line faults proven into the *eircom* network.

### **A. *IT Feasibility Assessment***

116. The high level analysis of the IT systems impacts which would result from the MRD is summarised in the paragraphs below.

#### *Number Management*

117. All of *eircom*'s major IT systems involved in the provision of Voice services hold significant information in relation to the location of numbers within the network. The current number portability regime has not resulted in significant porting transactions either in or out of the *eircom* network. Thus manual processes have sufficed in keeping these various systems updated. Because there are very few changes occurring, there has not been a requirement to automatically synchronise these various systems. The greatly increased levels of porting activity envisaged by the MRD will require that the processes for updated these systems is fully automated and that the systems are fully synchronised. In order to implement this synchronisation, it will be necessary to move from the current situation where all systems have equal significance to a new environment where one system is the master system and all others are synchronised from that master.

#### *Inventory Management*

118. The current primary identifier of all inventory associated with the provision of voice access is the telephone number. This is particularly the case in relation to the copper

loop. All loops which have dial tone or soft dial tone available are identified by the telephone number. This arrangement was incorporated into the current LLU product which was implemented some years ago. Thus unbundled loops sold to other operators are identified for provisioning, repair and billing by the telephone number which had been associated with that loop when it was connected to the *eircom* network. At the time of introduction of LLU service, the issue of providing an alternative identifier was investigated by *eircom* and the resulting proposals were presented to ComReg as part of overall proposals on the implementation of an automated solution. This proposal was rejected and instead a manual solution was chosen which allows the telephone number to identify the loop. This will suffice in a low volume regime, but given that numbers are a scarce resource that are used for customer identification and routing purposes it is deemed improper to use telephone numbers for inventory purpose going forward in a volume scenario. The above regime also sufficed when the number is not in use from a routing perspective. However, the MRD introduces a requirement to not only identify the loop but also to activate the number in the *eircom* network. Given that there will be a requirement to port the number independently of the loop, the MRD will give rise to a requirement to couple and de-couple numbers from loop. This gives rise to a requirement to have a separate mechanism to identify the loop – a so-called “loop identifier”. This loop-identifier would have to be deployed in network inventory systems, ordering, provisioning and billing systems which is in effect a complete dismantling of the current inventory management systems and their re-assembly under this new format. Indeed it may be necessary to make this new identifier visible to the end-customer to allow inter-OAO movements. In addition, allocation of loop identifier codes would have to be managed from a central repository. The telephone number could then be used for routing and end-customer identification purposes. The overall solution would also be require the loop identifier and telephone number to be cross-referenced in appropriate systems.

#### Scheduling of Delivery

119. The MRD requires the synchronised delivery of LLU with the porting of the associated telephone number with a maximum of one hour outage for the customer. The scheduling activities could consist of the following:
- Dispatch of field technician at appointed slot.
  - Await notification of completion of jumpering activities.



- Trigger notification to OAO that jumpering activities have been completed.
- Await notification from OAO that porting activities have been completed.
- Trigger update of IN with porting details.
- Trigger instruction to *eircom* network to disconnect LI from loop, keep number active in network and apply porting category.
- Await notification from OAO that the porting has been successful.
- Complete all elements of order on ordering, provisioning and billing systems and update numbering and loop inventory systems automatically.

120. This level of synchronisation is not currently supported by the provisioning systems utilised by *eircom*. IT analysis shows that a scheduling system to support this level of synchronisation will be extremely complex to develop. Another significant challenge will be to ensure efficient utilisation of the field technicians carrying out the jumpering at each MDF. The scheduler will have to ensure that the maximum number of connections will be achieved during each MDF visit while guaranteeing that the one hour outage is not exceeded. If it fails in this, there will be significant costs and therefore charges applying to all parties in the industry. It will be particularly difficult to implement this capability across operators but again this will be vital to ensure the timeframes are met.

#### *Gateway Complexity*

121. The current gateway which has been developed to support wholesale volume products will need to be enhanced to support the requirements in the MRD. There are a large number of additional order types which will need to be accommodated in the Gateway. More importantly, the Gateway will now have to accommodate linked and combined orders for different products. The business rules to facilitate this additional functionality will need to be developed and incorporated into the design of the Gateway.

#### *Recording of pre- ULMP+GNP status for Emergency Restore*

122. It is considered that there would be a requirement to store customer configuration details that existed prior to the ULMP and GNP activities so that original configuration can be re-stored upon receipt of Emergency Restore request or a Port Failure

Notification. It is expected that this will require significant development as it impacts multiple systems.

#### *Other Considerations*

123. Coupled with the above requirements, IT has to consider its development plans going forward which are intended to provide a new IT architecture to support both *eircom* Retail and Wholesale as the existing architecture is inadequate to support the more complex needs of the business going forward.
124. There is also a significant compliance exercise required to ensure legal compliance with a number of new international standards (Sarbox), and there is also the normal development and changes associated with the evolution of other Wholesale and Retail products and national reporting commitments.
125. The cost option presented in this paper is based on delivering the IT capability to support the MRD using the existing systems architecture but it must be pointed out that this is unlikely to be the case. It is more likely that the developments suggested by the MRD would be delivered in tandem with the move to a new IT architecture. The additional costs associated with this transition are not included in these estimates but would be expected to be considerable.
126. *eircom*'s IT department estimated that this would cost circa. € 13 million to develop the necessary systems and that they would have an ongoing maintenance cost of €3 million. Development timeframes will be at least 12-18 months from commencement of design. This design work could only commence after detailed design/product specifications were agreed.
127. It should be noted that the timescales above assume that full product/process development will have been completed before any development can take place. It is assumed that the external process (which it is assumed would be developed with Industry) would feed the internal process development requirements. Consideration would also have to be given to the impacts on future IT solution delivery to OAOs (e.g. to support SB-WLR or Bitstream enhancements etc..) and the existing needs of the business.

#### **B. Operational Feasibility Assessment**

128. Assuming the above IT developments take place the main impact on *eircom* field staff is the jumbling activities and associated support areas. It is also expected that

the Wholesale ordering capability will have to be increased. In short, the requirements of the MRD would require an increase in man-power to support volume.

129. To this end, a model, based on supporting 2,500 orders per week and in excess of 100,000 line steady state unbundled lines has been considered. In summary it calculates that an additional staff in the order of 38 Full Time Equivalentents (FTEs) will be required for provisioning and 10 FTEs will be required for repair. Total operational costs for provisioning (excluding appointment overhead) is € 3.7 million per annum. Total operational costs for assurance (excluding appointment overhead) is € 800,000 per annum.

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## **ANALYSIS – IS THE MRD A REASONABLE REQUEST FOR ACCESS?**

130. Obviously, the MRD raises issues of such complexity, both in terms of the capabilities themselves and relative to the market analysis carried out to date, that a consultation will be appropriate under Regulation 19 of the Framework Regulations 2003. There is no doubt but that the MRD will have a significant impact on a market for electronic communications networks or services.
131. In view of this, as indicated above, *eircom* has considered the MRD with reference to the criteria established for imposing obligations on *eircom* in SMP markets, having regard in particular to the requirement to weigh the net benefits which implementation of the obligation would bring to the national economy against the cost of implementing the measure<sup>6</sup>.
132. Proportionality is also one of the over-arching general principles of European law. It is described as the minimum intervention required, to achieve the objective set out<sup>7</sup>. The ERG states:

“In order to assess whether a remedy is proportionate and justified in the light of the objectives set out in the Framework Directive, NRAs should balance the burden of the remedy imposed on the undertaking with SMP and other costs which the imposition of a remedy may entail against its prospective benefits. Both assessments are already required by some national systems of administrative law and form part of the proportionality assessment under Community law. However, in order to make the choices involved more transparent, NRAs may carry out an assessment of the regulatory options available, including a qualitative assessment of the anticipated benefits and potential costs of the option selected (“regulatory options assessment”)<sup>8</sup>.

133. This means, for example, that obligations which are proportionate in large member states like the UK, Spain or Italy are not necessarily proportionate in a country like Ireland with a market one twentieth the size.
134. The criteria for assessing whether new access obligation should be imposed are set out in Regulation 13 of the Access Regulations:

“The Regulator may in accordance with Regulation 9 impose on an operator obligations to meet reasonable requests for access to, and use of, specific network

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<sup>6</sup> Pp.62-64, ERG Common Position on the approach to Appropriate remedies in the new regulatory framework, ERG (03) 30rev1, 1 April 2004

<sup>7</sup> Case C-331/88, 13 November 1990, FEDESA.

<sup>8</sup> p. 63 ERG Common Position on the approach to Appropriate remedies in the new regulatory framework, ERG (03) 30rev1, 1 April 2004

elements and associated facilities inter alia in situations where the Regulator considers that the denial of such access or the imposition by operators of unreasonable terms and conditions having a similar effect –

(a) would hinder the emergence of a sustainable competitive market at the retail level,

(b) would not be in the interests of end-users, or

(c) would otherwise hinder the achievement of the objectives set out in section 12 of the Act of 2002

135. However, when considering whether to impose obligations, Article 13 goes on to state :

“when assessing whether such obligations would be proportionate to the objectives set out in section 12 of the Act of 2002 the Regulator shall take into account in particular the following factors:

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

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

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

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

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

(f) the provision of pan-European services.

136. *eircom*'s assessment of the MRD suggests that considerable analysis is necessary before a determination on the reasonableness of the requests in the MRD can be made. *eircom* believes that the following issues will be relevant to that assessment.

#### **A. Context**

137. The liberalisation of the market and the development of a suite of wholesale products across *eircom*'s network, most of which are priced at close to the EU minimum, has led a dramatic increase in the level of competition at the service level with significant consumer benefits. Infrastructure competition has also emerged and grown in recent

years through wireless, satellite, cable TV and fibre based offerings and is set to intensify further as 3G and WiMax networks are rolled out and fixed and mobile networks converge.

138. The key issues to be assessed, and addressed in this part of the analysis, are whether the new forms of access specified in the MRD will support or hinder this development, whether the level of demand for this functionality justifies the cost and effort involved in providing it and whether in the light of this assessment, it is reasonable to expect that *eircom* will develop and deploy this functionality.
139. Specifically, *eircom* has found that implementation of the MRD would have a number of negative consequences, including significant stranded assets by *eircom* and the risk of a digital divide between urban and rural areas.

### **Significant Market Liberalisation And Product Development**

140. As outlined above, there are effectively two regimes for accessing *eircom*'s network, one at the Service Level (CA, CS, CPS, SB-WLR, WBA) and one at the LLU level. At the Service Level OAOs purchase the *eircom* Wholesale product, add some switching, billing and customer management functionality of their own and then sell the resulting service to the end-user either directly or via a trade reseller. The customer remains connected to the *eircom* Network at all times allowing the customer full choice in availing of similar services from different service providers without loss of service.
141. At the LLU level, some operators built their own networks using different technologies such as wireline/fixed, wireless and cable in combination with LLU from *eircom* to provide service. In this context three operators have availed of LLU services. The largest of these rolled out LLU (having received significant state funding) in 2001/2 to augment their own infrastructure in supplying services such as leased lines to the corporate market. This operator did not at that time indicate any requirement to port customer numbers or migrate lines from other wholesale services. As a result the product developed and agreed with industry supports the provision of broadband customer services, mainly to the corporate market, and not the provision of voice services (although that is possible by, for example, employing VoiP technologies or assigning a new number to the customer). It is only in the current year, following the submission of the MRD, that another operator has commenced using LLU to offer combined voice and broadband services into the residential market.

## Wholesale Services Have Driven Competition And Delivered Consumer Choice

142. The extent of competition in the Irish market and the degree of consumer choice can be seen in the fact that In the period since January 2000, over 930,000 *eircom* customer lines have moved between different operators via CPS and more recently SB-WLR. This represents more than 55% of the overall access market. In the past twelve months alone *eircom* has processed circa 400,000 CPS/SB-WLR/Bitstream transactions involving customers moving between competing operators. At this point in time c 370,000 lines (~23%) active on *eircom*'s network of the market are currently served by OAOs, while ComReg estimates that a further 36% of homeowners under the age of 34 rely on mobile networks.
143. With regard to prices *eircom*'s overall basket of prices are benchmarked below the EU average, its call charges are among the lowest in Europe and it has the third lowest 1MB DSL offer. It is clear therefore that the provision of Wholesale services has had the desired impact in terms of improving customer choice and bringing the benefits of a competitive market to the customer. Through a mixture of service, price, and innovation *eircom* has improved its product offering to customers in this period. This has had a positive benefit for the whole market encouraging competition in all of these service elements.

## The Emergence Of Platform Competition

144. *eircom* shares ComReg's view that in principle, infrastructure-based, or platform, competition, when sustainable, brings many benefits for end users and society. It should lead to competition over more elements of providers' activities, bringing real choice for customers, downward pressure on costs and prices, and incentives for service innovation. Accordingly, a key objective of the European Union New Regulatory Framework is to promote "sustainable competition" at the infrastructure level.<sup>9</sup>
145. While the regulatory focus has been on LLU as a means of promoting 'infrastructure' based competition the market reality is that the infrastructure/platform market has developed independently of this regulatory approach. Since the introduction of LLU in 2001, there has been significant technology advances made which can be used to support alternative platforms, which are now coming to market. The following are

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<sup>9</sup> Article 1, Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and services("the Access Directive"), OJ 2002 L 108/21

some of the key platforms, which are being deployed as an alternative to the existing copper access network:

- fibre (FTC, FTH)
- Wireless (WLL, WiMax, 3G)<sup>10,3</sup>
- Cable (Digital Cable Modems)
- Satellite<sup>11</sup>

146. The impact and future potential impact of these platform alternatives can be seen in the latest ComReg quarterly report which shows that 20% of all broadband enabled premises use these relatively new technologies rather than the fixed telecommunications network. It is to be noted that these figures exclude 2.5 and 3G mobile network connections which are experiencing a high rate of growth. Neither do the figures take account of the progress being made by fibre based operators<sup>12</sup> or the plans of the Cable TV operators to upgrade their networks to offer bundled TV, voice and Broadband services<sup>13</sup>. The impact of these technologies in the Irish Market is also evident in their selection by the Government as the primary means to be used in the provision of broadband to schools as part of the schools broadband project.

147. As mentioned above, *eircom's* legacy as the incumbent provider of fixed line telecommunications in Ireland, together with the considerable investment required to build and maintain a ubiquitous fixed line network, has established *eircom* as a major supplier of access and backbone network infrastructure. Any 'bottleneck' control, however, is diminishing in the face of increasing network build and competition – at retail and wholesale levels -- from other network operators and entrants.

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<sup>10</sup> In early-September 2005, FWA broadband provider Digiweb launched a 3Mbps cable and wireless broadband service called Metro to some 1.3 million people across six initial locations: Dublin, Galway, Cork, Limerick, Waterford and Dundalk. Digiweb will also be launching a full Digital TV service and home security range using the same platform during 2006.

<sup>11</sup> Irish Broadband earlier this year announced plans to expand its services in the west of Ireland, including Galway and Limerick, and secured an EUR 18 million investment from National Toll Roads (NTR) and Kilsaran Concrete Products

<sup>12</sup> As of December 2004, Magnet Networks began investing in fibre optic cable networks in new housing developments to provide triple-play digital telephony, television and high-speed broadband services to its customers in the Greater Dublin and Leinster areas. In early Sept. 2005, Magnet Networks announced plans to spend up to EUR 65 million by the end of 2008 rolling out network infrastructure outside its main customer base.<sup>12</sup> Later in the month, Magnet announced Magnet Networks has launched an ADSL2+ service, which offers fixed-line broadband, digital TV and a

In May 2005, Smart Telecom has signed a deal with a Californian networking firm, Alloptics, to deploy fibre to the premises technology in new multi-dwelling and mixed-use developments. Smart Telecom revealed it is offering developers and builders the opportunity to install the required fibre at building stage and offer individuals in new homes in new developments more than 70 digital TV channels, 15 radio channels, a telephone service and unlimited access to a 2Mbps internet connection. The service, known as Smart Vision, is available at present in 7,000 new apartment developments in Smithfield, Park West and Prospect Hill in Dublin.

<sup>13</sup> Chorus and ntl are also investing to a significant degree to roll out digital services and increase broadband availability and had a combined customer base of more than 15,000 Broadband customers by August 2005. Given that these cable networks pass almost 80% of Irish households, the possible consolidation of the two companies into a single entity and an improved investment climate overall, this may result in further upgrading of the networks and thereby spur continued roll-out and take-up of broadband.



## Impact Of Market Demand And Technology Alternatives On Fixed Line Access Networks

148. Given the current size of the retail market and the alternatives described above the broadband market is clearly not a natural monopoly at a *national* level; it can support multiple platforms competing effectively *i.e.*, inter-platform competition. However, a number of key questions need to be raised in the context of the MRD.
149. Firstly we need to assess if, given the size and socio-geographic characteristics of the market and the presence of competing alternatives, the fixed line access network can sustain 'intra-platform' competition. This question is particularly relevant given that in most locations (albeit covering a minority of population) the fixed line access network is likely to be the only real option available for the delivery of broadband services to consumers.<sup>14</sup> While this question exists independently of the MRD the proposed migration capability in the MRD, focussed on the small minority of unbundled exchanges, will fundamentally change the economic decisions faced by an access seeker in unbundling *eircom*'s loops and will thus change the broadband investment case faced by *eircom* not only in the exchanges to be unbundled but also in all other exchanges. Ultimately the promotion and development of ULMP could undermine the viability of the fixed line access network as a medium for broadband thus reducing the level of inter-platform competition in the broadband market in Ireland and widening the digital divide between high-density urban areas and lower density sub-urban and rural areas,
150. Secondly, we need to re-consider the case for LLU (which assumes a fixed network topography) in the context of the development of Next Generation networks based on the replacement of exchanges with router based access nodes supporting fibre to the cabinet.
151. Thirdly, if the level of consumer choice indicated at 1.2.3 above is to be protected and further increased, the functionality to be developed needs to be considered not just as a 'radial' service (from *eircom* to ULMP access seekers) but as a requirement for a 'mesh' of services which enables customers availing of ULMP services to pick and mix and move between operators with as much ease as they currently enjoy through *eircom*'s wholesale (CPS, CS, SB-WLR, BS) services. This greatly complicates the development and delivery of the required functionality.

152. Fourthly, even if the first three issues identified can be resolved, we need to consider the costs to be incurred and the benefits to be realised if the required functionality is to be developed. Given the level of demand forecast by the OAOs a significant process and systems development project needs to be implemented impacting not just *eircom* but all other operators. As identified above, *eircom* estimates its costs at circa €13 million to deliver this functionality with ongoing incremental operational costs of €3 million p.a., which given the level of demand forecast by industry equates to an increase in transaction fees of €67 to €81. The ULMP access seekers need to consider if they are prepared to pay these additional costs. Further *eircom* is concerned that the forecasts provided are unrealistic and that the actual unit costs based on a more realistic view of market demand are likely to be much higher. If market demand does not materialise as forecast these costs will have to be borne not just by the ULMP access seekers but by all operators in the market.
153. *eircom* also notes that it has received indications from OAOs of firm intentions to unbundle a maximum of just 52 exchanges (out of over 1,100 exchanges). In such circumstances where the network coverage is so small relative to the overall market the merit of incurring any of these costs must be seriously questioned.
154. As highlighted above, effective competition is developing despite capital scarcity following the bursting of the telecommunications and technology 'bubble.' Therefore, renewed emphasis on access regulation by ComReg cannot be justified simply on the grounds that short-term capital market conditions have limited infrastructure-based entry.

#### **B. Integration of LLU & GNP**

155. The feasibility of this requirement is described above, together with associated costs and time scales. ComReg and Industry needs to review this proposal in light of what is likely to be the real market demand for such a capability. The level of specification as outlined in the MRD for this capability is not the norm throughout Europe even for markets that are significantly greater than Ireland.
156. It should also be noted that the Level of IT resources required to implement this capability as currently defined would have a very significant impact on other developments for both *eircom* and Industry over the next two years. In this context

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<sup>14</sup> Somewhat perversely while LLU may appear to be the only real option available to develop infrastructure based competition in these areas the size of the local markets does not support LLU. No ULMP access seeker has sought access to or indicated an intention to unbundle any of these exchanges.

*eircom* recommends that ComReg puts in place an Industry Forum to consider the Requirements Specification and how to proceed relative to the real market demand.

157. *eircom* also believes that the emphasis on this capability is entirely misconceived given the focus on broadband growth in the Irish market. There are many alternative means of addressing the concerns identified, and these strongly suggest that it would be ill-advised to require IT and resource commitment by *eircom* to enhancements to deliver last generation services.

### **C. LLU Migrations**

158. The serious inconsistencies between the findings on which *eircom*'s access obligations were based, and the purported rationale for the current changes has been addressed elsewhere in this response.
159. This part of the response sets out the key inputs to the assessment of the MRD in terms of Regulation 13 of Access Regulations, taking into account GNP and migration impacts.
160. *eircom* has already identified some of the significant issues which are pertinent to this assessment of reasonableness; we now review these issues with reference to the first four tests outlined above.

*Technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved*

161. This test specifies that an obligation can only be considered proportionate if it is both **technically** and **economically** viable in the light of the rate of **market development** and taking into account **the nature of interconnection and access sought**.
162. In the section on feasibility above we have shown that it is **technically** feasible to develop the new facilities requested by access seekers albeit that this development would be quite complex, costly and time consuming and would entail, if prioritised, delays to the development of other systems and processes, including process and product feature developments sought by OAOs.
163. The key issue to be addressed in this test therefore is whether or not the development of these new features is **economically** viable given the rate of market development and whether in the light of this economic test an obligation to provide

this functionality would be a proportionate regulatory intervention given the nature of interconnection and access sought.

164. This economic test can be considered at a number of levels. It can be a simple matter of allocating the direct costs to be incurred by *eircom* over the level of likely demand for the new facilities to determine if the unit costs can be recovered at a price which will be acceptable to OAOs (and end user customers) in the marketplace. **(Test 1)**. In addition the 'direct' opportunity costs of mandating this new functionality (in terms of other products and services forgone or delayed while this functionality is being developed) need to be assessed **(Test 2)**. The wider economic impact on the development of telecommunications (and in particular broadband telecommunications) needs to be considered - assessing the likely impact on prices and overall investment of mandating this functionality **(Test 3)**. Finally having assessed these first three factors it needs to be considered if the nature of interconnection and access sought justifies this new functionality or if there are alternative forms of access/interconnection which are available and which satisfy the nature of the access/interconnection need. **(Test 4)**.

**Test 1: Direct costs vs market demand.**

165. *eircom* has estimated that the direct costs of providing the required facilities is in the order of €12m initial capital investment with ongoing, incremental, recurring costs of €3m p.a. Taking the total level of demand forecast by ComReg (on the basis of data submitted by access seekers) of 335,000 over three years this equates to an average increase in the charge per LLU transaction of c €67 to €81.
166. However, *eircom* has significant concerns regarding the accuracy of these forecasts. *eircom* has received firm orders and/or expressions of interest from three operators in just 52 exchange sites out of over 1,100 sites in total, while the highest figure mentioned in media reports by any operator with regard to its plans for unbundling is for just 70 sites. Even the most optimistic forecast on broadband penetration and aggressive assumptions regarding OAO market share in *eircom*'s top 70 exchange sites yields a market forecast of just under 100,000 lines. Similarly applying the UK target benchmark of 1.5m unbundled lines to Ireland suggests a total penetration of c 80,000 lines, while applying the highest EU 12 penetration rate (Netherlands) to Ireland suggests a penetration figure of 113,000 lines. It is also to be noted that the average number of lines per exchange site in these countries is significantly greater than Ireland's equivalent figure (5,500 vs 1,400) which suggests that market

penetration in Ireland will be lower than that which can be profitability achieved in these markets. In fact based on a review of equipment and set-up costs *eircom* estimates that there are just 51 exchange sites in Ireland with sufficient lines to justify an unbundling approach – yielding a total market penetration of c 80,000 lines. *eircom* also notes that the forecast provided by ComReg was based on data received from three operators and understands that, in fact, data from one operator accounted for c 90% of the volumes forecast. In the circumstances it is *eircom's* view that the forecast submitted by ComReg needs to be tempered by reference to international experience and that transaction prices should be set on the basis of total market penetration of 100,000 lines. Taking this figure and writing costs off over five years yields an increase in transaction costs of €275 per line unbundled. This is the minimum incremental revenue per unbundled line which *eircom* would require in order to justify the expenditure on system and process development.

## **Test 2: Direct Opportunity Cost**

167. The complexity of the challenge faced in developing the requested facilities has been outlined in earlier sections together with *eircom's* best estimate of the costs and timeline involved. It is to be noted that these estimates were produced on the basis of a 'stand-alone' development effort ignoring the many other developments in train within *eircom* to deliver product and services to customers. Diversion of product and systems development staff to the delivery of the requested facilities will have a direct impact on these other work-programmes. For reasons of commercial confidentiality *eircom* cannot outline the various programmes in train either for its own Retail arm or for OAOs. However, ComReg and Industry will be aware of the many developments which are the subject of industry fora (including for example upgrades to wholesale ordering systems and the introduction of a combined ordering facility for SB-WLR and Bitstream).
168. Each of these developments will need to be re-baselined in the event that *eircom* undertakes any work on the delivery of the facilities requested in the MRD. At this stage the most likely outcome of such a review is that each project will be delayed by a minimum of 18 months.

### Test 3: Wider Economic Impact – Pricing and Investment Impacts.

169. Ireland is in many ways unique in Europe having a lower population density and a higher rate of population dispersal than most other countries. The average number of lines per exchange has already been referenced above; of equal significance is the fact that the average radius of an exchange area in Ireland is 4.5 km compared for example to 3.7 km in the UK and just over 3 km in the Netherlands. In practice, given Ireland's low population density and relatively high level of population dispersion (for example just over 60% of the population is urbanised compared to 89% in the UK and 97% in Belgium) it is estimated that the average length of the local loop in Ireland is circa 50% longer than the average in the UK. These characteristics present very significant challenges to the development of Broadband in Ireland. *eircom* has been to the fore in meeting these challenges and has to date invested considerable sums to upgrade circa 320 exchanges, bringing broadband to all towns with a population of 1,000 or more and will by March 2006 have broadband enabled exchanges covering 90% of all installed lines.
170. Under the existing regulatory regime *eircom* has also provided OAOs with access to this broadband network via its wholesale bitstream offer. Other operators have also invested both in the development of customer services via this bitstream product and in the rollout of alternative platforms in selected areas (including FTTH, FWA, Cable, WiMax and Satellite). These platforms now account for c 20% of the broadband market in Ireland, measured in terms of customer numbers served. As a consequence of these developments broadband prices have reduced significantly, broadband penetration in Ireland has grown at a faster rate than any other European country and the rate of growth is higher than experienced in any other country at a same stage of development. (For example Ireland reached 10% penetration of broadband within 21 months of the launch of DSL, in the UK 30 months elapsed before this 10% penetration rate was achieved, while the equivalent period in France and Belgium was 27 months and 24 months respectively<sup>15</sup>).
171. This investment and progress has been made in a regulatory environment which, deliberately or otherwise, promotes both wholesale access via bitstream on the copper telecommunications network and the development of alternative platforms, giving effect to intra-platform choice and inter-platform competition. The requests outlined in the MRD, in particular the migration capability will alter this regulatory framework significantly and accordingly their impact on the structure of the market,

market prices and investment incentives needs to be carefully assessed and considered prior to introduction.

172. In the meantime *eircom* offers the following comments with regard to the economic impacts of being required to provide the requested facilities.

*The proposed migration option confers a free option on LLU access seekers and will result in higher investment costs (via stranded assets) to eircom*

173. These possibly unintended but unavoidable consequences of the proposed migration facility arise because the current prices for wholesale bitstream are derived on a retail minus basis where the underlying retail price does not include any premium for the likelihood that customers, in particular exchange areas, will have the option of bulk migrating to another platform before the cost of procuring and installing the bitstream and other equipment is recovered. Put another way at present an OAO access seeker is faced with a build or buy decision; it can buy capacity from *eircom* on an incremental customer basis in a situation where *eircom* carries the investment risk or it can invest in locating its own DSLAMs in *eircom*'s exchange and take the investment risk itself. With the proposed migration option an OAO would have a third option – it could build its customer base in a particular area using the bitstream and CPS/WLR services (and under the current pricing regime will always be in a position to undercut *eircom*'s retail prices to grow its market share) and then when it had sufficient customers signed make a risk free investment in unbundling, knowing that it had the customer revenues secured to justify the investment..
174. This effectively gives the access seeker a subsidised means of building a customer base and a free option to abandon the subsidised bitstream facilities provided by *eircom* and instead unbundle the copper loop once it secures sufficient customers to cover its capital costs – this is an option which provides the OAO with zero investment risk. There is of course no such thing as a free option and in this instance the cost of the option is being borne by *eircom* - and ultimately its retail and other OAO customers using the bitstream service. *eircom* would if the MRD is implemented, have to plan on a reduced level of equipment utilisation and a shorter bitstream equipment life – increasing the costs and reducing the returns available from the service. This outcome would ultimately have to be reflected in higher prices for bitstream, broadband and other services.

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<sup>15</sup> Data supplied by Alcatel.

*Risk free migration will open a digital divide between unbundled (urban) and bundled (rural) areas.*

175. It is the case that LLU access seekers are focussed entirely on 50 – 70 of *eircom's* top exchanges (measured in terms of active customers) representing c 50% of *eircom's* customer base. This is essentially an arbitrage approach which seeks to take advantage of the fact that *eircom's* prices are geographically averaged (see below). If LLU access seekers are successful in this approach they will reduce the returns available to *eircom* (via either retail or wholesale service offers) from the lowest cost 50% of customers which will in turn reduce the level of funds available to invest not only in these exchanges but also in the other 1,000, higher cost, exchanges serving Ireland's rural and low density sub-urban population. Thus we will have a scenario where three LLU operators will be active alongside *eircom* in investing in our 70 most densely populated exchange areas but the remainder, high cost to serve, areas of the country will be dependent solely on *eircom*. Inevitably, given the lower returns available to *eircom*, this will lead to the widening of the so called 'digital divide' with 70 select urban areas witnessing investment in duplicated (if not triplicated) facilities while 1,000 rural areas experience a slowdown in broadband rollout. This is to be contrasted with the situation, supported by the existing regulatory requirements, which favours investment by *eircom* in the widespread provision of shared facilities which are accessible to all OAOs and are used today by eight active service providers in addition to *eircom*.

*The new facilities would undermine the geographically averaged pricing approach*

176. At present *eircom* operates a geographically averaged pricing approach for both its basic line rental and its broadband (wholesale and retail) service offers. This geographically averaged approach to pricing is designed to support the provision of service to the widest extent possible and is reliant on *eircom's* ability to average its costs between low cost urban areas and higher costs rural areas. However this geographic averaging of prices opens up an arbitrage opportunity for access seekers to focus on the low cost exchange areas where they can offer broadband services at prices below the geographically averaged rate. This is the approach being unambiguously followed by LLU access seekers in Ireland.

177. If *eircom* is to compete against such an approach it will have no option but to reduce its broadband prices (both wholesale and retail) in the profitable exchange areas to defend market share. While this may, prima facie, seem to be a desirable outcome



*eircom* could not sustain prices based on the low cost urban exchanges across its entire network. – Consequently broadband prices in urban areas would fall relative to prices in rural (and less densely populated suburban) areas. Evidence of this pricing trend is already emerging in other markets and has already been commented upon by ECTA in its review of broadband developments in Europe.

178. The potential for this type of adverse consequence in Ireland is currently constrained by the fact that access seekers are required to take the investment risk in installing equipment before building a customer base. By removing this restriction any implementation of the MRD will increase the likelihood that prices will become geographically localised.<sup>16</sup>

*Customer choice will be impacted – The extent of competition may decline in LLU areas*

179. At present end-user customers can choose to pick and mix and move their services between a large number of operators who use *eircom*'s wholesale services, delivered over both core and access networks, as the basis for their customer offering. The MRD is allegedly designed to improve this customer choice and promote competition by supporting the extension of OAO infrastructure to the access network.
180. However it may in fact have the opposite consequence. This potentially perverse consequence arises because LLU access seekers are not designated with SMP status and are thus are not obliged, nor are they likely to offer, open access to customers connected via LLU to all other OAOs for the provision of services such as Carrier Select, Carrier Pre-Select, Bitstream Access or Single-Billing Wholesale Line Rental.
181. In effect a customer moving off the *eircom* switch network to an LLU based service is moving from an arena of competitive choice onto an island of monopoly. By facilitating this migration the MRD could, instead of promoting competition and consumer choice, lead to a situation where a customer is effectively locked into single supplier contract. To avoid this outcome any development of migration paths from *eircom* (and by extension wholesale service based operators) to LLU access seekers would need to be accompanied by a parallel development of wholesale

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<sup>16</sup> It may be argued that this analysis is built on a false premise given that the underlying LLU prices are themselves based on geographically averaged LRIC. However while this may be true of basic LLU it is not the case with regard to the broadband element of the service. – Bitstream prices are not based on cost but are set at a discount to *eircom* retail prices. – It is this bitstream element of the price *eircom* would be forced to geographically de-average under the proposed migration regime. It is also to be noted that taken to its logical conclusion the reduction in returns which would result from LLU migrations would force an increase in LLU prices if *eircom* was to continue to develop and maintain the access network. This arises because exchange costs such as floor space, power, heating/air conditioning etc. are allocated on a shared basis across a number of services – including call origination and termination - but the volume of such services would decline with a successful LLU strategy and these shared costs would have to be increasingly allocated to LLU.

services and migration options on and from the LLU access seekers network. It is only through such a development, not provided for in the MRD, that the existing ability of customers to pick, mix and move between competing suppliers can be protected and maintained.

#### **Test 4: Nature of Access/Interconnection**

182. The facilities requested in the MRD are justified on the basis they are required in order to support the competitive supply of services by other operators. In fact as already outlined customers already have, and do exercise, choice with regard to their purchase of telecommunications services (via CS, CPS, SB-WLR and BS). In addition other operators also have and do exercise choice in their method of delivering service to customers. (via FTTH, FWA, WiMax, satellite and cable). The facilities requested are not therefore essential facilities required to provide or avail of competing services. In the circumstances it is highly questionable as to whether the development of additional forms of choice are necessary or desirable, particularly in the context of the high cost of developing the requested methods of access (Test 1 above), the limited and divisive, geographic availability of the proposed new forms of access and the potentially damaging economic consequences discussed above (Tests 2 and 3).
183. With regard to the nature of the access required it is to be noted that the facilities requested relate to *eircom*'s existing access network in which a twisted copper pair connects each premises to the main distribution frame (MDF) at the local exchange. This network topography has been in existence since the 19<sup>th</sup> century but is about to change as networks evolve to what is termed next generation networks (NGN) based on the deployment of fibre connections either to customer premises or to access nodes situated close to customer premises. This NGN will support high speed broadband capable of proving the triple play of voice, internet and TV. In this new network topography there will be no exchange-based MDF and it is questionable as to whether it will be technically possible to maintain ULMP based access without fundamentally impacting the cost (and by extension the investment case) for deploying NGN. The maintenance of ULMP access may therefore become a barrier to the roll-out of NGN, and even if it can be incorporated in the NGN model is likely to become redundant as an effective means of service delivery to customers. In the circumstances *eircom* believes that it is inappropriate to mandate the costly development of new ULMP based facilities and that as a minimum any steps to

mandate such functionality should be subject to a full consultation and regulatory impact assessment.

*The feasibility of providing the access proposed, in relation to the capacity available*

184. The matters relevant to this test have already been dealt with in the section of feasibility and in Test 1 applied to the issue of economic viability outlined above. The reader is referred to these sections.

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

185. The matters relevant to this test have been dealt with in the section on feasibility and in Tests 1, 2 and 3 applied to the issue of economic viability outlined above. The reader is referred to these sections.

*The need to safeguard competition in the long-term*

186. The matters relevant to this test have been dealt with in the section on feasibility and in Tests 3 and 4 applied to the issue of economic viability outlined above. The reader is referred to these sections.

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**CONCLUDING OBSERVATIONS**

187. As has been its position since the requests were first made, *eircom* considers that the difficult issues that arise in relation to the forms of access sought in the MRD require careful consideration by all interested parties.

188. In addition to the detailed analysis set out above, *eircom* refers to the Expert Report of J. Gregory Sidak, attached as Appendix 3 to this Response. In this Expert Report, Mr. Sidak sets out his analysis of the economic implications of the new forms of access being requested in the MRD, and, in the event it is determined to require implementation of the MRD, posits proposals for addressing the adverse consequences that would arise in relation to it.

189. *eircom* looks forward to the constructive input of all interested parties.

## **APPENDIX 1**

**See attached copy of the Market Requirements Document (MRD)**



### **APPENDIX 3**

**See attached Expert Report of Mr. J Gregory Sidak.**