

Market 1 and Market 2 Reviews

- Presentation of potential voluntary commitments

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• Non-Confidential • 13/02/2020

Overview of Market 1



Background Market 1

- D12/14 identified the following retail markets/services:
 - Lower Level Voice Access: PSTN & ISDN BRA
 - Bundled Lower Level Voice Access: PSTN & ISDN BRA
 - Higher Level Voice Access: ISDN FRA & ISDN PRA

} excessive pricing, price cap, transparency and undue preference removed.
- ComReg D03/07 – Separate retail price caps for PSTN & ISDN BRA subject to CPI-x; and obligation not to engage in tying
- On-going relevant considerations:
 - i. No longer recognised by EC as a market susceptible to ex-ante regulation;
 - ii. Broadband as an anchor product;
 - iii. National Broadband Plan;
 - iv. ISDN BRA end-of life;
 - v. IFN roll-out;
 - vi. VOBB; and
 - vii. Mobile as a substitute

Overview of Market 1



Voluntary Commitments: Pricing and will not engage in tying (subject to certain conditions)

- From earlier of ComReg decision or 30/6/21 for a period of 5 years:
 - ✓ Standalone PSTN can be charged at maximum of €∞
 - ✓ Standalone ISDN BRA lines can be charged at maximum of €∞

Pricing flexibility within Voluntary Commitment Period

- Pricing flexibility available on ISDN BRA, subject to appropriate notification periods (e.g., Reg. 14), after a period of 1 year following publication of address on APQ file (or equivalent) by Siro, open eir, NBI for FTTH (or NBI technology alternative for certain locations) or alternative operator
- ISDN BRAs subject to end of life and this will impact retail ability to offer new lines etc.

Overview of Market 1



Anticipated SMP remedy reliefs

- Removal of Obligation relating to Price Control
- Removal of Obligation of Transparency (if retail market subject to SMP then this is the only justifiable remedy)
- Removal of Obligation not to unreasonably bundle
- Removal of Obligation of cost accounting

Market considerations

- USO obligations and Geographically Average Price for Retail Line rental

Reporting obligations:

- D05/11: KPI indicators should be removed due to market evolution and complexity (including cost) of sub-geographic reporting
- Declining and market evolution of areas subject to SMP means additional remedies can not be justified (e.g., statement of compliance remedies)

Overview of Market 2



Background Market 2

- D05/15 identified the following wholesale services/markets:
 - Fixed Voice Call Origination (LLVA and HLVA) & Transit; and
 - WLR, ISDN BRA, ISDN PRA and ISDN FRA
- ComReg D05/15 set CPS element of WLR at TD-LRAIC+ (prices per D07/11). MST between SV and FVCO & FTR
- ComReg D03/16 set a regulated price path for WLR up to 30/6/2021 & retail margin squeeze test between standalone RLR and WLR
- ComReg D03/16 fixed prices for ISDN BRA, PRA and FRA at current prices
- On-going relevant considerations:
 - i. No longer recognised by EC as a market susceptible to ex-ante regulation
 - ii. Broadband as an anchor product;
 - iii. National Broadband Plan & IFN roll-out;
 - iv. ISDN BRA end-of life;
 - v. OAO self-provision of VOBB; and
 - vi. Substitution to mobile. Voice traffic continues to migrate from fixed to mobile. Proposed mandate of wifi calling capability spectrum auction (2012)

Overview of Market 2



Voluntary Commitments: Pricing , Access, Transparency and Non-Discrimination (subject to certain conditions)

- From earlier of ComReg decision or 30/6/21 for a period of 5 years:
 - ✓ WLR to be charged at €16.82 (or equivalent POTs-based pricing when bundled with Broadband per published price path to June '24 in Urban (CISPL) and Regional WCA areas (per D11/18))
 - ✓ ISDN BRA, ISDN FRA and ISDN PRA to be charged at respective current markets rates
 - ✓ All Current Generation FVCO to be charged at current market rates

Pricing, Access, Transparency and Non-Discrimination within Voluntary Commitment Period

- After a period of 2 years following publication of address on APQ file (or equivalent) by Siro, open eir, NBI for FTTH (or NBI technology alternative for certain locations) or alternative operator, the voluntary commitments may be subject to change, with appropriate notification periods (coterminous to the 2 years) e.g., any pricing changes will be subject to 6 month notification to industry etc.
- ISDN BRA subject to end of life timings (2024). No Access obligation for new lines

Overview of Market 2



Anticipated SMP remedy reliefs

- Obligation to provide Access & Conditions (only imposed for prospective non-competitive areas and no requirement for new Access on ISDN services and subject to voluntary commitment)
- Removal of Obligation relating to Price Control for WLR and CG FVCO (in its entirety)
- Obligation of Transparency (only imposed for prospective non-competitive areas and subject to voluntary commitment)
- Obligation of non-discrimination (only imposed for prospective non-competitive areas and subject to voluntary commitment)
- Removal of Obligation of accounting separation and cost accounting (in its entirety). For clarity, markets and services will still be part of regulatory cost model to produce regulated accounts but will not be reported on as part of HCAs or subject to additional financial information or additional financial statement reporting

Overview of Market 2



Market considerations

- Revolving and automatic SMP removal for areas/exchanges after a period of 2 years has elapsed following publication of address on APQ file (or equivalent) by Siro, open eir, NBI (or NBI alternative technology) or alternative operator
- For discussion: removal of remaining SMP once 80% of lines in eircom exchange available with alternative NGA offering (including from open eir) and ComReg's role to ensure timely relief

Reporting obligations:

- D05/11: KPI indicators should be removed due to market evolution and complexity (including cost) of sub-geographic reporting
- Declining and market evolution of areas subject to SMP means additional remedies can not be justified (e.g., SOC etc)

Other:

- SMP areas and deregulation could impact on associated WLR (POTS-based) pricing path set D11/18 (in any event, subject to voluntary commitment)
- Copper switch-off programme separate work stream and voluntary commitment may need to reflect programme

Voluntary Commitments

- What is the best way to formalise voluntary commitments to ComReg?
- Timing of voluntary commitments?
- What is the best way to ensure revolving and deregulating remaining prospective SMP areas?
- ✂
- USO consultation/designation and timing?

Thank you

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From: Kjeld Hartog [REDACTED]
Sent: Wednesday 21 April 2021 09:30
To: Donal Leavy [REDACTED]
Cc: Eric Tomkins [REDACTED]; James Mulholland [REDACTED]
Subject: Voluntary Commitments

Donal

In February 2020, eir submitted a number of voluntary commitments to ComReg in the Fixed Access and Fixed Call Origination Market ('FACO'). As of today, absent any feedback of industry views, these commitments remain largely unchanged. As identified in February 2020, copper switch-off may impact those voluntary commitments. open eir has recently published a White Paper on copper switch-off which slightly affects eir's original Access commitments. These updates have been incorporated in the attached document ("Voluntary Commitments"). eir has also in relevant responses to ComReg consultations updated its voluntary pricing commitments. The purpose of the Voluntary Commitments document is to re-state again for clarity, in a single document, each of eir's voluntary commitments. eir's voluntary commitments have been approved by the Wholesale Senior Management Team of open eir.

For illustrative purposes, the second document ("Mapping to DI") also sets out broadly how eir's FACO voluntary commitments would map to the draft FACO Decision Instrument as published in ComReg 20/46. The purpose of doing so is to demonstrate how the intentions of eir's voluntary commitments could be incorporated into ComReg's existing Market Analysis draft Decision without substantial amendment. (Note as this comparison is for illustrative purposes only, the enclosed text is not meant to be exhaustive and does not capture, for example, potential individual definitional changes or issues we separately identified - or identify in the future - as part of our formal submissions to ComReg.)

Finally, as the deadline for implementing Article 79 of the Code has passed, eir considers that ComReg is required, taking into account the doctrine of direct effect, to proceed in a manner compliant with, and not in contravention of, the requirements of Article 79, which explicitly requires ComReg to engage with commitments offered by Significant Market Power ('SMP') operators. Throughout the FACO review process, eir has made clear its availability and

willingness to engage with ComReg on the detailed voluntary commitments it has proposed, and to provide further information if needed. It is unclear to eir why ComReg has declined to do so, in particular since the expiry of the deadline to implement Article 79 in December 2020. We remain available to discuss these proposals and urge that ComReg now do so.

Regards

Kjeld

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Kjeld Hartog

Director of Regulatory & Public Affairs

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FACO market

It is expected that ComReg's on-going FACO review (the 'FACO review') will conclude in 2021 with new regulation in place until 2026. As part of the FACO review, ComReg may conclude that eir has SMP in an area defined in ComReg 20/46 as the Regional FACO market. While eir's views on ComReg's proposed SMP designation and potential remedies remain as previously set out, without prejudice to this, eir is willing to make the voluntary commitments for a duration of five years.

1) Access and Conditions Attached to Access

- a) Subject to conditions set out in c) below, Eircom would be willing to meet all reasonable requests from Undertakings for the provision of Access to FNA FACO products, services or facilities in the Relevant Regional FACO Markets including Associated Facilities.
- b) Subject to conditions set out in c) below Eircom would be willing, in relation to the obligations set out in Section 9 of ComReg's 20/46 Decision Instrument, grant Undertakings Access in a fair, reasonable and timely manner.
- c) Where FTTP is available at a premises either on the Eircom access network or the network deployed to deliver the National Broadband Plan, the obligations set out in Section 9.1 to 9.3 (as presented by 1 a) and 1 b) above) and Section 10 as proposed in the Decision Instrument of ComReg 20/46 are removed with immediate effect for that premises. eir's voluntary pricing commitments set out in 4 below, will remain in effect for the duration of the market review period. All existing Access to FNA FACO products already provided to the existing Undertaking at that premises level will be maintained.
- d) Condition c) does not impact Access and conditions attached to Access for the Business to Business market¹.

2) Non-discrimination

- a) Eircom is willing to ensure there is no discrimination in its treatment of other Undertakings in respect of the provision of Access, including Access as regards those services, products and facilities in the Regional FACO market. Eircom's non-discrimination obligation would be as set out in Clause 11 of the draft Decision Instrument.

3) Transparency

- a) Eircom is willing to ensure transparency in its provision of its Access commitments. Eircom's transparency obligation would be as set out in Clause 12 of the draft Decision Instrument, save as set out in 3b) below.
- b) For the avoidance of doubt, and for the reasons set out in February 2020 and eir's response to ComReg 20/46, a Statement of Compliance and Key Performance indicators are not proportionate for the Regional FACO market and will no longer be required.

¹ Precise definition to be agreed with ComReg.



4) Price Control and cost accounting

- a) Eircom is willing to maintain appropriate cost accounting systems in respect of products, services or facilities in the FACO Markets. Its cost accounting obligation would be as set out in Clause 14 of the draft Decision Instrument, save that the relevant provisions on pricing would be replaced by the agreed maximum pricing provisions set out below.
- b) Eircom is willing to commit to continuing to price these products on a reasonable basis, and in particular, Eircom agrees that it will ensure that:
 - The prices offered or charged by Eircom to any Undertaking for the FNA FVCO element of SB-WLR shall be no more than those prevailing for FNA FVCO on the Effective Date (being the date the Decision Instrument takes effect or such other date in 2021 as may be agreed with ComReg).
 - the monthly rental charge offered or charged by Eircom to any other Undertaking in relation to the ISDN WLR element of SBWLR services shall be no more than the ISDN BRA, ISDN PRA and ISDN FRA SB-WLR rental prices prevailing on the Effective Date.
 - Ancillary Services on SB-WLR: shall be no more than the Ancillary Services on SB-WLR prices prevailing on the Effective Date.
 - Current Generation Interconnection Services: shall be no more than the Current Generation Interconnection Services prices prevailing on the Effective Date.
 - Next Generation Interconnection Services: shall be no more than the Next Generation Interconnection Services prices prevailing on the Effective Date.
 - Co-Location: shall be no more than the Co-Location prices prevailing on the Effective Date.
 - Order Handling Charge associated with the provision of FVCO and SBWLR: shall be no more than the Order Handling Charge associated with the provision of FVCO and SBWLR prices prevailing on the Effective Date.
 - For PSTN-WLR the maximum price of €16.59 per month will remain in place until 30 June 2022. From 1 July 2022 onwards the monthly price will be a maximum of €16.82 per month and will remain unchanged thereafter.
 - The regulated supplemental charge for POTS will be a maximum of €3.03 per month².

The FACO voluntary commitments have been approved by the Wholesale Senior Management Team of open eir.

² Due to the construct of eir's billing system, as is implemented today, to meet eir's regulatory obligations pursuant to ComReg D11/18, the POTS based port price for the FTTC broadband variant is added to the standalone PSTN WLR price such that cumulatively it achieves the intended voluntary committed price of €28.30 (being €25.27 + €3.03 as per ComReg D11/18). The NGA Bitstream Plus POTS based is currently €11.71 per month (when this is added to WLR at €16.59 it also achieves the price of €28.30). This billing construct will be maintained going forward.



WLA and WCA market

It is expected that ComReg's ANM Review will conclude in 2021 with new proposed regulatory wholesale pricing. Without prejudice to eir's views on the functionality of the ANM Model and ComReg's preliminary views, as per eir's response to ComReg 20/101, eir is willing to make the voluntary commitments for a duration of five years.

Subject to the condition that FTTP availability within an Eircom exchange is below 75% (see further below):

- it will continue to charge a maximum rate, for CGA SABB, CGA BMB and Bitstream BIP at $\Delta\text{CPI} + 5\%$ for the duration of price control period.
- currently CGA SABB is charged at €22.29 and €23.29 per month for 8 MB and 24 MB respectively – eir proposes that there will be no adjustment to the wholesale price using $\Delta\text{CPI} + 5\%$ for the first two years of the price control period. Bitstream usage will be charged at 0.47 per MB and will not be subject to change.
- CGA BMB will initially be charged at €8.88 per port – eir proposes that there will be no adjustment to the wholesale price using $\Delta\text{CPI} + 5\%$ for the first two years of the price control period. Bitstream usage will be charged at 0.47 per MB and will not be subject to change.
- Bitstream BIP will initially be charged at €9.37 per port – eir proposes that there will be no adjustment to the wholesale price using $\Delta\text{CPI} + 5\%$ for the first two years of the price control period. Bitstream usage will be charged at 0.47 per MB and will not be subject to change.
- When an Eircom exchange area has FTTP availability for 75% of premises within that exchange area (either on the Eircom access network or the network deployed to deliver the National Broadband Plan), Eircom will inform operators at least 6 months in advance of any proposed price increase on above existing CGA SABB, CGA BMB and Bitstream BIP wholesale central access lines within that exchange area. Such a price increase is subject to a maximum monthly wholesale price for CGA SABB, CGA BMB and Bitstream BIP and will not exceed €29.72 per month. For CGA SABB and CGA BMB the price charged for usage will be €0.31 per MB.
- charge SLU and LLU at €6.12 and €11.52 per month respectively.



- charge FTTC VUA at €20.36 per month.
- charge FTTC Bitstream at €25.27 per month. For FTTC Bitstream the price charged for usage will be remain at €0.31 per MB.
- [redacted]

The WLA and WCA voluntary commitments have been approved by the Wholesale Senior Management Team of open eir.

PART II - SMP OBLIGATIONS IN RELATION TO THE REGIONAL FACO MARKETS

8 SMP OBLIGATIONS IN RELATION TO FNA FACO PRODUCTS, SERVICES AND FACILITIES

8.1 Further to, and in accordance with, the requirements set out in Regulation 8 of the Access Regulations, in accordance with Regulations 9, 10, 11, 12 and 13 of the Access Regulations, ComReg hereby imposes certain SMP obligations on Eircom in accordance with and pursuant to Regulation 8 of the Access Regulations, obligations of access, non-discrimination, transparency, ~~accounting separation~~, cost accounting and price control on Eircom as detailed further in Sections 9 to 15 of this Decision Instrument in respect of FNA FACO in the Relevant Regional FACO Markets.

9 OBLIGATIONS TO PROVIDE ACCESS

9.1 Subject to the conditions set out in Section 9.5 and 9.6, Eircom shall meet all reasonable requests from Undertakings for the provision of Access to FNA FACO products, services or facilities in the Relevant Regional FACO Markets including Associated Facilities, where the request for the provision of Access is:

- (i) in respect of the products, services and Associated Facilities set out in Section 9.2; or
- (ii) in respect of new products, services and Associated Facilities or amendments to existing products, services and Associated Facilities requested on or before the Effective Date; or
- (iii) in connection with a product, service or facility which Eircom provides to itself; or
- (iv) in connection with the implementation of the Network Modernisation Project.

9.2 Subject to the conditions set out in Section 9.5 and Section 9.6, Eircom shall provide and grant Access to Undertakings for the following particular products, services and Associated Facilities:-

- (i) SB-WLR;
- (ii) Ancillary Services on SB-WLR;

(iii) Current Generation Interconnection Services;

(iv) Next Generation Interconnection Services which shall include Session Initiation Protocol which is a technical standard defined by the Internet Engineering Task Force and specified in Request for Comment; and

(v) Co-Location.

9.3 Subject to the conditions set out in Section 9.5 and Section 9.6, Eircom shall offer and continue to offer and provide Access to the products, services and facilities referred to in Sections 9 and 10 of this Decision Instrument in accordance with the product descriptions and terms and conditions of supply or use, as specified in the current version of the RIO (i.e. RIO version [6.0 dated 2 May 2019] as published on Eircom's wholesale website) as may be amended from time to time, and, in addition, in accordance with Eircom's obligations under this Decision Instrument.

9.4 For the purposes of the obligations set out in Sections 9.1 to 9.3 Eircom shall:

(i) negotiate in good faith with Undertakings requesting Access;

(ii) not withdraw Access to facilities already granted without the prior approval of ComReg and in accordance with terms and conditions as may be determined by ComReg;

(iii) grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of products, services or facilities;

(iv) provide Access to services needed to ensure interoperability of end-to-end services to End Users, including facilities for intelligent network services;

(v) provide Access to OSS or similar software systems necessary to ensure fair competition in the provision of services (including those products, services and facilities described in this Section 9); and

(vi) interconnect networks or network facilities.

9.5 Where FTTP is available at a premises either on the Eircom access network or the network deployed to deliver the National Broadband Plan, the obligations set out in Section 9.1 to 9.3 and 10 are removed with immediate effect for that premises. The obligations as set out in Section 14 remain in place.

9.6 When 95% of all premises within an Eircom exchange area are capable of ordering fibre, the obligations set out in Section 9.4 will be removed subject to 12 months' notification to Undertakings and ComReg. The withdrawal notices will be progressively issued to the remaining 5% as premises are added to Eircom's Pre-Qualification file. The calculation of the premises capable of ordering fibre within an Eircom exchange area will include premises in the NBP Intervention Area and premises where Eircom has been denied access to prepare FTTP, for example multi-dwelling units.

10 CONDITIONS ATTACHED TO THE ACCESS OBLIGATION

10.1 Eircom shall, ~~wherein relation to~~ the obligations set out in Section 9 of this Decision Instrument ~~apply~~, grant Undertakings Access in a fair, reasonable and timely manner.

10.2 Without prejudice to the generality of Section 10.1, where Eircom receives a request for Access (including Access to those products, services and facilities referred to in Sections 9 and 10 of this Decision Instrument) in accordance with the requirements of this Decision Instrument at the same point in time as a request for another wholesale access product, service or facility, on foot of another Decision Instrument issued by ComReg, Eircom shall ensure that both access requests are met concurrently.

10.3 Without prejudice to the generality of Section 10.1 above, Eircom shall:

(i) conclude, maintain or update, as appropriate, legally binding SLAs with Undertakings, which shall include provisions for Performance Metrics;

Commented [eir1]: Not commitment related but this obligation is not practical. E.g. small development request in FACO received at same time as large development request in WHQA. This is similar to the submission eir made in WCA/WLA market review consultation

(ii) negotiate in good faith with Undertakings in relation to the conclusion of legally binding and fit-for-purpose SLAs (either in the case of a new SLA or an amendment to an existing SLA). Following a request from an Undertaking for a new SLA or an amendment to an existing SLA Eircom shall within one (1) month of the receipt of such a request provide the Undertaking with details of the SLA Negotiation Period. Negotiations in respect of a new SLA or an amendment to an existing SLA shall be concluded, unless otherwise agreed by ComReg, within six (6) months of the date the Undertaking makes such a request. Within one (1) month of the date the Undertaking makes such a request Eircom may seek an extension to the six (6) month period from ComReg;

(iii) ensure that all SLAs include provision for Service Credits arising from any breach of an SLA;

(iv) ensure that the level of the Service Credits are fair and reasonable;

(v) ensure that SLAs detail how Service Credits are calculated and shall include the provision of an example calculation; and

(vi) ensure that application of Service Credits, where they occur, shall be applied automatically, and in a timely and efficient manner.

10.4 To the extent that there is any conflict between the SLAs concluded under Section 10.3 above and Eircom's obligations set out in this Decision Instrument, it is the latter which shall prevail.

10.5 Where a request by an Undertaking for provision of Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument), or a request by an Undertaking for provision of information is refused or met only in part, Eircom shall, at the time of the refusal or partial grant, provide in detail to the Undertaking and, subject to Section 10.6 and 10.7 of this Decision Instrument ComReg, each of the objective reasons for such refusal or partial grant. Eircom's response shall be provided in a fair, reasonable and timely manner.

10.6 Eircom may satisfy its obligation at Section 10.5 in respect of ComReg, by providing ComReg, on a monthly basis, with a report which covers all requests by Undertakings for provision of Access (including Access to those products,

services and facilities described in Sections 9 and 10 of this Decision Instrument) and requests by Undertakings for provision of information which are refused or met only in part (the “Monthly Report”). The Monthly Report shall detail each request, including the name of the Undertaking who made the request, and provide in detail each of the objective reasons for each refusal or partial grant. Where the reasons provided to ComReg are different to those provided to the Undertaking as required under Section 10.5, Eircom must explain why. The Monthly Report shall be provided in the format and detail specified by ComReg and, for each month, shall be provided to ComReg no later than 5.30pm on the last Friday of the subsequent month. A Monthly Report is not required for the provision of Access (as set out in Section 10.5) where such a request is subject to those conditions set out in Section 10.7.

10.7 Where FTTP is available at the premises which is subject to the provision of Access request, section 10.5 shall not apply.

Commented [eir2]: This is not commitment related but we strongly objected to this new report due to the level of intrusive and the potentially excessively broad interpretation of a request for access, i.e. every single provisioning request could be argued to fall in scope.

11 OBLIGATION OF NON-DISCRIMINATION

11.1 Eircom shall ensure there is no discrimination in its treatment of other Undertakings in respect of the provision of Access, including Access as regards those services, products and facilities described in Sections 9 and 10 of this Decision Instrument. Without prejudice to the generality of the foregoing, Eircom shall:

(i) Apply equivalent conditions in equivalent circumstances to other Undertakings requesting, or being provided with Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument) or requesting or being provided with information in relation to such Access; and

(ii) Provide Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument) and information in relation to such Access to all other Undertakings under the same conditions and of the same quality as Eircom provides to itself or to its subsidiaries, affiliates or partners.

11.2 Without prejudice to the generality of Section 11.1 above, Eircom shall (unless otherwise specified in this Decision Instrument) provide Access, including Associated Facilities, to those products, services and facilities required in accordance with Sections 9 and 10 of this Decision Instrument on, at least, an Equivalence of Outputs basis.

11.3 Without prejudice to the generality of Section 11.1, Eircom shall provide ordering and provisioning for SB-WLR on an Equivalence of Inputs basis, when SB-WLR is ordered using a Combined SB-WLR and NGA Order. For the avoidance of doubt, if SB-WLR is ordered and provisioned separately to Next Generation Bitstream or Next Generation VUA, Eircom shall provide ordering and provisioning for SB-WLR on an Equivalence of Outputs basis.

11.4 Without prejudice to the generality of Section 11.1, Eircom shall provide fault reporting and fault repair for SB-WLR on an Equivalence of Inputs basis in all cases where SB-WLR, in conjunction with either Next Generation Bitstream or Next Generation VUA, is used by an Undertaking to provide services to an End User. For the avoidance of doubt, this obligation shall apply irrespective of

whether SB-WLR was ordered using a Combined SBWLR and NGA Order or ordered separately to Next Generation Bitstream or Next Generation VUA.

11.5 For the purposes of Sections 11.3 and 11.4, where Eircom is required to provide ordering and provisioning for SB-WLR and / or fault reporting and fault repair on an Equivalence of Inputs basis, Eircom shall ensure that for the purposes of Equivalence of Inputs, the systems and processes shall operate in the same way and with the same degree of reliability and performance as between OAOs and the Eircom's provision to itself.

11.6 For the avoidance of doubt, the obligations set out in this Section 11 apply irrespective of whether or not a specific request for products, services, facilities or information has been made by an Undertaking to Eircom.

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12 OBLIGATION OF TRANSPARENCY

12.1 Eircom shall ensure transparency in its provision of Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument).

12.2 Without prejudice to the generality of Section 12.1 of this Decision Instrument, Eircom shall make publicly available and keep updated on its website, a RIO.

12.3 The RIO shall be sufficiently unbundled so as to ensure that Undertakings availing of Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument) are not required to pay for products, services or facilities which are not necessary for the Access requested.

12.4 Eircom shall ensure that its RIO includes at least the following:

- (i) a description of the offer of contract for Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument) broken down into components according to market needs;
- (ii) a description of any associated contractual or other terms and conditions for supply of Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument) and use, including prices;
- (iii) a description of the technical specifications and network characteristics of the Access (including Access to those products, services and facilities described in Sections 9 and 10 of this Decision Instrument) being offered;
- (iv) the terms, conditions, SLAs, guarantees and other product related assurances associated with the FNA FVCO component part of any WLV Services that it provides;
- (v) all general terms and conditions of the RIO, including:
 - (a) dispute resolution procedures procedure to be used between Eircom and the Access Seeker;
 - (b) definition and limitation of liability and indemnity;

(c) glossary of terms relevant to the wholesale inputs and other items concerned; and

(d) details of duration, renegotiation and causes of termination of agreements as well as other associated contractual terms.

(vi) details of operational processes, including:

(a) pre-ordering, ordering and provisioning;

(b) migration from legacy products and infrastructure, incl. moves and ceases;

(c) rules of allocation of space between the parties when supply facilities or co-location space is limited;

(d) repair and maintenance;

(e) changes to IT systems to the extent that it impacts Access Seekers;

(f) details of the necessary interoperability tests; and

(g) specifications of equipment to be used on the network; and

(vii) procedures in the event of amendments being proposed to the service offerings, which may include a requirement for notification to ComReg for such amendments, for example, launch of new products, services or facilities, changes to existing services or change to prices.

12.5 In the event of any conflict between the RIO and associated documentation such as the RIO Price List (including where represented as updated for the purposes of this Decision Instrument), and Eircom's obligations as set out under this Decision Instrument, it is the latter which shall prevail.

12.6 Without prejudice to the generality of Sections 12.1 and 12.2, Eircom shall:

(i) continue to publish and keep updated on its publicly available website, its RIO in the same form and format as [version 6 (dated 2 May 2019)], as may be amended from time to time, insofar as those products, services or facilities contained therein relate to the obligations set out in this Decision Instrument;

(ii) publish and keep updated on its publicly available wholesale website both clean (or unmarked) and tracked changed (or marked) versions of its RIO (insofar as it relates to the products, services and facilities to be provided in accordance with the requirements of this Decision Instrument). The tracked change version of the RIO shall be sufficiently clear to allow Undertakings to clearly identify all actual and proposed amendments from the preceding version of its RIO;

(iii) publish and keep updated on its publicly available wholesale website an accompanying RIO Change Matrix which lists all of the amendments incorporated or to be incorporated in any amended RIO;

(iv) publish and keep updated on its publicly available wholesale website both clean (unmarked) and tracked changed (marked) versions of the RIO Price List(s) (insofar as it relates to the products, services and facilities to be provided in accordance with the requirements of this Decision Instrument). The tracked change version of the RIO Price List shall be sufficiently clear to allow Undertakings to clearly identify all actual and proposed amendments from the preceding version of its RIO Price List;

(v) publish and keep updated on its publicly available wholesale website a RIO Price List Change Matrix; and

(vi) maintain on its publicly available wholesale website a copy of historic versions of its RIO, RIO Price List, RIO Change Matrix and RIO Price List Change Matrix.

12.7 Eircom shall ensure that its wholesale invoices are sufficiently disaggregated, detailed and clearly presented such that an Undertaking can reconcile invoices to Eircom's RIO and RIO Price Lists.

12.8 In respect of both pricing and non-pricing amendments or changes to the RIO and/or the RIO Price List resulting from the offer of a new product, service or facility which falls within the scope of the Relevant Regional FACO Markets, the following obligations will apply:

(i) Eircom shall, unless otherwise agreed by ComReg, make publicly available and publish on Eircom's publicly available wholesale website at least six (6) months in advance of coming into effect, any proposed amendments or

changes to the RIO and/or the RIO Price List, or the making available of any product, service or facility, pertaining to information in respect of product specification, services, facilities and processes resulting from the offer of a new product, service or facility, ~~together with a Statement of Compliance which meets the requirements detailed in Section 15 of this Decision Instrument.~~

(ii) Eircom shall notify ComReg in writing with the information to be published at least one (1) month in advance of any such publication taking place, that is, seven (7) months prior to any amendments or changes coming into effect. The periods referred to in this Section may be varied with the agreement of ComReg or at ComReg's discretion. 12.9 In respect of both pricing and non-pricing amendments or changes to the RIO and/or the RIO Price List resulting from an amendment or change to an existing product, service or facility which falls within the scope of the Relevant Regional FACO Markets, the following obligations will apply:

- (i) Eircom shall, unless otherwise agreed by ComReg, make publicly available and publish on Eircom's publicly available wholesale website at least two (2) months in advance of coming into effect, any proposed amendments or changes to the RIO and/or the RIO Price List in respect of product specification, services, facilities and processes resulting from an amendment or change to an existing product, service or facility (including details of any amendment or change in the functional characteristics of an existing product, service or facility), ~~together with a Statement of Compliance which meets the requirements detailed in Section 15 of this Decision Instrument.~~
- (ii) Eircom shall notify ComReg in writing with the information to be published at least one (1) month in advance of any such publication taking place, that is, three (3) months prior to any amendments or changes coming into effect. The periods referred to in this Section may be varied with the agreement of ComReg or at ComReg's discretion. Notwithstanding this Section 12.9, material changes or material amendments shall, however, be notified and published in accordance with Section 12.8 above or as otherwise agreed with ComReg or at ComReg's discretion.

12.10 ComReg may, in accordance with Regulation 18 of the Access Regulations, issue directions to Eircom from time to time requiring it to publish and make available on its publicly available wholesale website, information such as ~~accounting information~~, technical specifications, network characteristics, terms and conditions for supply and use, and prices, in respect of the products, services and facilities referred to in Sections 9 and 10 of this Decision Instrument.

12.11 ComReg may, pursuant to Regulation 9(3) of the Access Regulations, issue directions requiring Eircom to make changes or amendments to its SLAs, the RIO (and its associated documents), RIO Price List, RIO Change Matrix or RIO Price List Change Matrix to give effect to obligations imposed by this Decision Instrument and to publish such documents with such changes.

~~12.12 12.12 Eircom shall publish Key Performance Indicators (“KPIs”) on its publicly available wholesale website. The specification of the content of the KPIs shall be in accordance with the obligations set out in ComReg Decision D05/11 (as may be amended from time to time).~~

12.13 Eircom shall publish Performance Metrics for the products, services and facilities referred to in Sections 9 and 10 of this Decision Instrument on its publicly available wholesale website.

12.14 Eircom shall make available on its publicly available wholesale website all SLAs (and any updates thereto) relating to the provision of the products, services and facilities that are to be provided in accordance with Sections 9 and 10 of this Decision Instrument.

12.15 Where Eircom considers certain aspects of information to be provided under the obligations set out in this Section 12 to be of a confidential and/or commercially sensitive nature, Eircom shall, without delay, provide ComReg with complete details of such information along with objective reasons justifying why it considers it is confidential and/or commercially sensitive. ComReg will consider the information in accordance with ComReg Document 05/24, so far as relevant or otherwise. If ComReg considers that the information is not confidential and/or commercially sensitive, it shall be published by Eircom in accordance with its obligations under this Section.

12.16 If ComReg concludes that the information is confidential and/or commercially sensitive, Eircom shall publish general details as to the nature of such information and shall make it available to an OAO that has signed a Non-Disclosure Agreement (“NDA”), the terms and conditions of which shall be fair, reasonable and non-discriminatory. The NDA shall also be published on Eircom’s publicly available website. Any confidential and/or commercially sensitive information referred to in Section 12.15 above shall not be made available by Eircom to its downstream operations until such time as it is made available to an OAO, or as otherwise agreed with ComReg.

12.17 If and when the commercially sensitive and/or confidential information referred to in Section 12.15 above ceases to be commercially sensitive and/or confidential, it shall be made available by Eircom on its publicly available wholesale website without undue delay and without the need for an NDA to be signed.

13 OBLIGATION OF ACCOUNTING SEPARATION

~~13.1 Eircom shall maintain separated accounts in respect of the products, services and facilities falling within the scope of this Decision Instrument and the Relevant Regional FACO Markets. All of the obligations in relation to accounting separation, set out at in the Decision Instrument contained in Appendix II of ComReg Decision D08/10, applying to Eircom and in force immediately prior to the Effective Date of this Decision Instrument, and relating to products, services and facilities falling within the scope of Sections 9 and 10 of this Decision Instrument shall be maintained in their entirety.~~

14 OBLIGATIONS RELATING TO PRICE CONTROL AND COST ACCOUNTING

14.1 Eircom shall maintain appropriate cost accounting systems in respect of products, services or facilities in the Relevant Regional FACO Markets.

14.2 The prices offered or charged by Eircom to any Undertaking for Access to, or use of, the products, services or facilities referred to in Section 9 of this Decision Instrument ~~shall be (except in the case of the PSTN-WLR element of SB-WLR or as -otherwise set out in Section 14.11 this Decision Instrument) shall be cost orientated.~~

14.3 The prices offered or charged by Eircom to any Undertaking for the FNA FVCO element of SB-WLR shall be no more than those prevailing for FNA FVCO on the Effective Date.

14.4 Without prejudice to the generality of Section 14.2 and notwithstanding Section 14.3, where Eircom can demonstrate, to the satisfaction of ComReg, that it is necessary in order for Eircom to be compliant with its cost orientation obligation, the prices offered or charged by Eircom to any Undertaking for the FNA FVCO element of SB-WLR may be higher than those prices prevailing for FNA FVCO on the Effective Date.

~~14.5 Without prejudice to the generality of Section 14.2 of this Decision Instrument, Eircom shall ensure that it recovers no more than its actual incurred costs adjusted for efficiencies (plus a reasonable rate of return) for the following:-~~

~~(i) Ancillary Services on SB-WLR;~~

~~(ii) Current Generation Interconnection Services;~~

~~(iii) Next Generation Interconnection Services;~~

~~(iv) Co-Location; and~~

~~(v) Order Handling Charge associated with the provision of FVCO and SBWLR.~~

~~14.6 Subject to Section 18 of this Decision Instrument, the price offered or charged by Eircom to any other Undertaking in relation to the PSTN-WLR element of SB-WLR shall be subject to a price control which shall be specified in ComReg's Response to Consultation and Final Decision on the Access Network Model Consultation.~~

14.7 Eircom shall ensure that the monthly rental charge offered or charged by Eircom to any other Undertaking in relation to the ISDN WLR element of SBWLR services shall be no more than the ISDN BRA, ISDN PRA and ISDN FRA SB-WLR rental prices prevailing on the Effective Date.

~~14.8 14.8 In relation to ISDN BRA, ISDN PRA and ISDN FRA, notwithstanding the provisions of Section 14.7 above, where Eircom can demonstrate, to the satisfaction of ComReg, in order for Eircom to be compliant with its cost~~

~~orientation obligation, it is allowable that the monthly rental charge offered or charged by Eircom to any other Undertaking in relation to the ISDN-WLR element of SB-WLR services could be higher than the current ISDN-BRA, ISDN-PRA and ISDN-FRA SB-WLR rental prices prevailing on the Effective Date.~~

~~14.9 Eircom shall have an obligation not to cause a margin squeeze in respect of White Label Voice.~~

~~14.10 Without prejudice to the generality of Section 14.9, Eircom shall have an obligation not to cause a margin squeeze between (a) the charge for White Label Voice, and (b) the charges for the necessary regulated and unregulated components to provide the White Label Voice service. Eircom shall ensure that the charge for White Label Voice it sells or offers for sale in the Regional FACO Markets, on a per-unit basis, must be greater than the sum of the following: WLR; FNA-FVCO; CG or NG interconnection; and, as relevant, transit.~~

14.11 The prices offered or charged by Eircom to any Undertaking for Access to, or use of, the products, services or facilities referred to in Section 9 of this Decision Instrument shall be:

(i) Ancillary Services on SB-WLR: shall be no more than the Ancillary Services on SB-WLR prices prevailing on the Effective Date;

(ii) Current Generation Interconnection Services: shall be no more than the Current Generation Interconnection Services prices prevailing on the Effective Date;

(iii) Next Generation Interconnection Services: shall be no more than the Next Generation Interconnection Services prices prevailing on the Effective Date;

(iv) Co-Location: shall be no more than the Co-Location prices prevailing on the Effective Date;

(v) Order Handling Charge associated with the provision of FVCO and SBWLR: shall be no more than the Order Handling Charge associated with the provision of FVCO and SBWLR prices prevailing on the Effective Date;

(vi) For PSTN-WLR the maximum extant price of €16.59 per month will remain in place until 30 June 2022. From 1 July 2022 onwards the monthly price will be

a maximum of €16.82 per month and will remain unchanged for the remainder of the market review period; and

(vii) the regulated supplemental charge will be a maximum of €6.80 per month for NGA VUA POTS Based and a maximum of €11.71 for NGA Bitstream Plus POTS Based.

15 STATEMENT OF COMPLIANCE

15.1 Within six (6) months of the Effective Date, or as otherwise agreed with ComReg, Eircom shall submit to ComReg a written statement of compliance ("Statement of Compliance") signed by a Director or Directors of Eircom authorised to provide such statements on behalf of the Board of Directors of Eircom and which includes the following:

(i) A statement:

(a) that the Directors acknowledge that they are responsible for Eircom securing compliance with its regulatory obligations;

(b) confirming that, in their opinion, arrangements, structures and internal controls are in place that provide reasonable assurance that Eircom is compliant with its obligations as set out in this Decision Instrument; and

(c) explaining the basis upon which the confirmation in sub-paragraph b above is made, including a description of the information relied upon, and the process followed, by the Directors, in order to be satisfied that to the best of their knowledge that the arrangements, structures and internal controls in place provide reasonable assurance that Eircom is in compliance with the obligations set out in this Decision Instrument.

(ii) A description and explanation of the governance measures implemented by Eircom to ensure that it is, and remains, in compliance with the obligations set out in this Decision Instrument, in particular:

(a) a description and explanation of the relevant reporting structures and reporting processes implemented by Eircom; and

(b) a description of the information relied upon and the process followed by Eircom's management to assess the operation and effectiveness of the processes used to identify and manage risks of non-compliance in their areas of responsibility.

(iii) A description of the methodology followed to identify risks of noncompliance with the obligations imposed in Sections 9 to 14 of this Decision Instrument (the "regulatory risks") and to develop the controls required to manage the regulatory risks including in particular by reference to identifying, employing and relying on adequate expertise, material and information.

(iv) A detailed description of the regulatory risks identified utilising the methodology described in Section 15.1(iii) above for all FNA-FACO products, services and facilities in the Relevant Regional FACO Markets, including without limitation, in respect of the following activities:

(a) Pre-provisioning, provisioning and service assurance;

(b) Product development including product enhancements, and pre-product development screening of Access requests;

(c) Product prioritisation and investment decisions;

(d) Access to shared resources including IT and network development resources; and

(e) The management of information, both Structured Information and Unstructured Information, in conformance with regulatory requirements.

(v) A detailed description of the controls developed to manage the regulatory risks identified utilising the control development process described in Section 15.1(iii) above, including:

(a) a description of the relationship of each control to the underlying risk described in Section 15.1(iv) above;

(b) a description of the process used to assess the adequacy and effectiveness of the controls on an ongoing basis.

~~(c) a description of the operation of controls including the method employed by Eircom to record and store the data produced when controls are operated;~~

~~(d) a description of and the identification of the repository in which the data from the operation of each control is recorded and stored.~~

~~(vi) For each of the product, service and facility reviewed for the purpose of 15.1(iv) and 15.1(v), a description of the risk analysis and control development process carried out pursuant to Section 15.1(iii) (the "Process"), to include the following:~~

~~(a) The scope of the Process, including in particular;~~

~~(a) a description of the expertise relied on to identify the regulatory risks and develop the controls required to manage the regulatory risks, by reference to the description of the expertise of the Eircom personnel engaged in the Process; and~~

~~(b) a list of all the material used to identify the regulatory risks and develop the controls required to manage the regulatory risks including without limitation relevant product documentation, internal process information, risk analysis documentation.~~

~~(b) The outcome of the Process in respect of the identification of regulatory risks, and the justification for the outcome, to include:~~

~~(a) a description of all the potential regulatory risks identified and the associated activities and business processes, including decision making processes;~~

~~(b) the basis for concluding that regulatory risks exist, or do not exist, in respect of all the potential issues identified;~~

~~(c) where the standard of Equivalence of Inputs applies, a description of any and all differences as between systems and processes used to supply OAOs and Eircom's downstream arm and full objective justification for any such differences;~~

~~(d) Where the standard of Equivalence of Outputs applies, a description of any and all differences as between systems and processes used to supply OAOs~~

and Eircom's downstream arm, and how Equivalence of Outputs is achieved notwithstanding the differences in systems and processes used.

(c) The outcome of the Process in respect of the development of the controls required to address the regulatory risks identified, and the justification for the outcome, to include:

(a) name of Eircom business unit which is responsible for the Control; and

(b) description of the operation of the control, including the frequency of its operation;

(c) description of directory/path details for repository for control evidence.

15.2 The documentation referred to in this Section 15 shall be of sufficient clarity and detail to enable ComReg to assess whether Eircom's risk assessment and control and governance measures provide reasonable assurance as to Eircom's compliance with the obligations set out in this Decision Instrument.

15.3 Eircom shall keep the Statement of Compliance up to date. In particular and without prejudice to the generality of this obligation Eircom shall update, and submit to ComReg, an updated Statement of Compliance, duly dated and signed and meeting the requirements set out in Section 15.1(i) above, in the following circumstances:

(i) Where a material change or material changes are made to any of the governance measures referred to in Section 15.1(ii) and/or to the methodology followed to identify regulatory risks and develop associated controls referred to in Section 15.1(iii), to include any material change to the documentation and information referred to in the Statement of Compliance for the purpose of Section 15.1(ii) or Section 15.1(iii), within one (1) month of such change or changes being made;

(ii) Where a material change or material changes are made to the description of the regulatory risks and the description of the controls required to address the regulatory risks referred to respectively in Section 15.1(iv) and Section 15.1(v) above, to include any material change to the documentation and information relied on for the purpose of the Statement of Compliance, within one (1) month of such change or changes being made;

~~(iii) Where a new FNA FACO product, service or facility, or an amendment or change to an existing FNA FACO product, service or facility which falls within the scope of the Relevant Regional FACO Markets is introduced, having regard in particular to the requirements in Sections 15.1(iv), 15.1(v) and 15.1(vi), in accordance with the timeline set out in, and as part of the documentation required for the purpose of, Sections 12.8(ii) and 12.9(ii) or as otherwise may be required or agreed by ComReg.~~

~~15.4 Eircom shall ensure that updates or changes to the Statement of Compliance are easily identifiable. For that purpose Eircom shall highlight all changes made and operate a Version Control and Revision History process which shall extend to any of the documents referenced thereto, duly named and dated that are attached as appendices to the Statement of Compliance.~~

~~15.5 Eircom shall publish the Statement of Compliance, and updates to the Statement of Compliance, on its publicly available wholesale website within one (1) month of providing it to ComReg, unless otherwise agreed with ComReg.~~

From: Kjeld Hartog <[REDACTED]>
Sent: 04 May 2021 08:00
To: Donal Leavy <[REDACTED]>
Cc: Eric Tomkins <[REDACTED]>; James Mulholland <[REDACTED]>
Subject: Re: Voluntary Commitments

Donal,

You may be aware that the Code, similar to Ireland, has not been transposed into Italian law.

Nevertheless, having received voluntary commitments from TIM on 29 January 2021, the Italian Regulator has recently entered into a period of consultation (as required under Article 79 of the Code), as it considered it appropriate to start considering such voluntary commitments, and perform a market test to obtain interested parties views on the draft commitments provided. This is because, consistent with eir's view, such provisions under the Code have direct application.

Further to my last email, and continued offers since February 2020, we are happy to engage on the commitments offered to ComReg in the FACO, WLA and WCA markets, to allow ComReg publicly consult with interested parties on those commitments.

I look forward to hearing from you.

Kjeld



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Mr Kjeld Hartog,
Director of Regulatory and Public Affairs,
Eircom Limited,
2022 Bianconi Avenue,
Citywest Business Campus,
Dublin 24,
D24 HX03

BY EMAIL ([REDACTED])

10 May 2021

Eircom's Proposals re FACO market February 2020 (the "February 2020 Proposals") and April 2021 (the "April 2021 Proposals") (together the "Proposals")

Dear Kjeld,

We refer to your email of 4 May 2021 as well as previous correspondence on the Proposals offered by Eircom to ComReg in the Fixed Call Origination ("**FACO**") Market which you have referred to as the "Voluntary Commitments". We note that the February 2020 Proposals have been revised in the subsequent April 2021 Proposals.

Where appropriate, ComReg will separately address the aspects of the Proposals which relate to markets other than FACO.

Legal Status of Commitments

Under the current legal framework in Ireland, ComReg does not have an explicit power to consider and accept commitments. The EU directive establishing the European Electronic Communications Code (the "**EECC**") provides a process for considering and accepting commitments at Article 79 of the EECC. When Eircom originally provided ComReg with its February 2020 Proposals, the EECC had been published but was not yet effective. Eircom's subsequent April 2021 Proposals were provided after the date for implementation by Member States but to date, Ireland has not yet transposed the EECC. On that basis, ComReg considers that it does not have the power to apply Article 79 of the EECC. However, ComReg will treat Eircom's Proposals as an additional submission to the 2020 FACO Consultation (the February 2020 Proposals having been considered in the 2020 FACO Consultation).

You refer to recent actions taken by the Italian regulator AGCOM in response to commitments which it has received. In particular, you note that AGCOM has opened



a consultation process in relation to a set of commitments submitted by TIM. We are not aware of the details of this process or the legal basis on which AGCOM is commencing a consultation, however, this is a matter of national law. As noted in the recitals of the EECC at paragraph 205,

“It is already possible today in some markets that as part of the market analysis the undertakings designated as having significant market power are able to offer commitments which aim to address competition problems identified by the national regulatory authority and which the national regulatory authority then takes into account in deciding on the appropriate regulatory obligations”.

In your email of 21 April 2021, you had referred also to the doctrine of direct effect and you seem to suggest that “direct effect” means treating an EU directive as if it were directly applicable in Ireland on the basis that the deadline for transposition has passed. For clarity, provisions of the EU Treaty or EU regulations are directly applicable and may, as a matter of general principle, have direct effect. The position of directives (including the EECC), however, is different. According to Article 288 of the Treaty on the Functioning of the European Union (“**TFEU**”), while a regulation is “*binding in its entirety and directly applicable in all Member States*”, by contrast, a directive is “*binding as to the result to be achieved, upon each Member State to which it is addressed, but [leaves] to the national authorities the choice of form and methods*”.

In order for a provision in a directive to have vertical direct effect (i.e. where a private business or citizen relies on the provision against a Member State or an emanation of a Member State), it must be established that the particular provision is sufficiently clear, precise and unconditional to be capable of being applied directly by a national court. In the context of Eircom’s Proposals and the process set out in Article 79 of the EECC, we do not consider that the provisions in Article 79 of the EECC are sufficiently clear, precise and unconditional as to be given vertical direct effect. By way of example, under the current legal framework, there is no process available to ComReg in respect of commitments, either to consider commitments or to make them binding on undertakings. Therefore, if direct effect were to apply, it would impose a completely new process in Irish law and it is unclear what kind of enforcement regime would apply to the process. Further, we do not consider that the Article 79 provisions are sufficiently unconditional. For example, the provisions rely on the national regulatory authority assessing commitments and performing a market test by way of public consultation, except where such commitments clearly do not fulfil one or more relevant conditions or criteria.

Timing of Eircom’s Proposals

Without prejudice to ComReg’s position on the legal status of commitments set out above, we note in any event that subject to Article 76, the process set out in Article 79 of the EECC is without prejudice to the application of the market analysis procedure pursuant to Article 67 and the imposition of obligations pursuant to Article 68. ComReg



considers that the process involves an undertaking designated with SMP providing certain commitments to the national regulatory authority. Where appropriate and after a market test, these commitments can be made binding on the undertaking. It is only at that stage that the national regulatory authority will consider the consequences of the binding commitments on the obligations it has imposed or intends to impose. In contrast, Eircom seems to suggest that this a bargaining process whereby it will offer certain proposals in return for extensive SMP obligations being removed. It is clear that Article 79 envisages the analysis of any remedies to be carried out having regard to commitments which have already been made binding.

Content of Eircom's Proposals

Further, and also without prejudice to ComReg's position on the legal status of commitments set out above, ComReg does not consider that Eircom's Proposals would warrant a "market test" under the conditions of Article 79. Under that process, before submitting any proposals to a market test, the national regulatory authority shall consider whether the commitments "*clearly do not fulfil one or more relevant conditions or criteria*" and shall, when assessing SMP obligations as regards the commitments, have particular regard to "*(a) evidence regarding the fair and reasonable character of the commitments offered; (b) the openness of the commitments to all market participants; (c) the timely availability of access under fair, reasonable and non-discriminatory conditions, including to very high capacity networks, before the launch of related retail services; and (d) the overall adequacy of the commitments offered to enable sustainable competition on downstream markets and to facilitate cooperative deployment and take-up of very high capacity networks in the interest of end-users*".

In ComReg's view, Eircom's Proposals do not sufficiently address the points above in the context of the FACO markets and overall, do not include anything that is susceptible to enable sustainable competition on downstream markets and facilitate deployment and take-up of very high capacity networks in the interest of end-users.

On the FACO Markets, Eircom's February 2020 Proposals included voluntarily restricting its conduct in respect of pricing, access, transparency and non-discrimination, for a five year period, with Eircom committing as follows: WLR being charged at €16.82; ISDN BRA, ISDN FRA and ISDN PRA to be charged at respective current markets rates; and Current Generation FVCO to be charged at current market rates. These Proposals were subject to a condition whereby, after a period of two years following the availability of FTTP at a premises (whether provided by Eircom (including Open Eir), SIRO or NBI), the FACO Proposals may be subject to change, with appropriate notification periods. In return, Eircom proposed that ComReg would remove certain SMP obligations from Eircom. The April 2021 Proposals contained revised suggestions including in relation to pricing, that the FNA FVCO element of SB-WLR would be no more than the prices prevailing for FNA FVCO on the effective date of the proposed FACO decision.



We set out some examples of the insufficiencies in relation to these Proposals below:

1. Eircom's main suggestion relates to pricing, particularly in relation to FACO. While ComReg welcomes Eircom's submissions on suitable pricing, ComReg has the power to impose pricing remedies in markets where it finds SMP and does not consider that Eircom's offer is in line with the spirit of what is envisaged by the commitments process in Article 79. Rather, ComReg would expect that commitments, for the purpose of Article 79, are offered that are susceptible to improve availability of access and facilitate network deployment, in particular, high speed broadband network.
2. Eircom proposes that its obligations to provide KPIs and a Statement of Compliance should be removed. However, this is not a commitment being offered by Eircom but rather an example of obligations which Eircom would like to be removed. KPIs are the method by which Eircom transparently displays to Access Seekers and ComReg that it is meeting its non-discrimination obligations. It is difficult to see how Access Seekers or ComReg would be able to measure Eircom's compliance without the KPIs or Statement of Compliance.

On the basis of the above, ComReg's position remains that it does not have the power to follow the process set out in Article 79 of the EECC in respect of commitments and even if such a process were to be followed, the Proposals would not warrant a market test.

Next Steps

As stated above, ComReg is treating Eircom's Proposals of 21 April 2021 as additional (late) submissions to the 2020 FACO Consultation, the non-confidential version of which (with the text you bracketed with a scissors symbol, redacted) will be published in the normal way along with the final Decision in relation to the FACO Market.

Yours sincerely,

Donal Leavy
Director of Wholesale



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Director Wholesale
Commission for Communications Regulation
1 Dockland Central
Guild Street
Dublin 1
D01 E4X0

By email only: [REDACTED]

13 May 2021

Re: eir's voluntary commitments

Dear Donal,

I refer to your letter received on 10 May. It is disappointing that rather than engage with eir on its proposal, you have chosen to respond by mischaracterising eir's open and transparent commitments, downplaying the options available to ComReg, and misapplying the fact that the pricing commitments are largely fixed for five years and any pricing changes are directly in contemplation of the roll-out of very-high capacity networks including migration incentives.

For the avoidance of any doubt, eir's views on ComReg's proposed SMP designation and potential remedies remain as previously set out (including in its responses to consultation, where eir has set out its significant concerns in relation to these proposals). eir's proposed voluntary commitments are made without prejudice to these views, and eir reserves its right at all times in relation to any such designation and remedies.

Without prejudice to this, I will address each issue in turn using the headings of your letter.

Legal Status of Commitments

While the most recent draft of eir's commitments were provided to ComReg on 21 April 2021, as you are aware and as indicated in my mail to you these are largely consistent with the commitments already provided to ComReg on 20 February 2020 on which ComReg did not engage. As further indicated, those pricing commitments proposed in 20 February 2020 are updated in the most recent draft to reflect eir's



response to ComReg's subsequent pricing consultation 20/101. Annex 2 of eir's response to ComReg 20/101, which was submitted to ComReg on 8 January 2021, also clearly set out eir's proposed pricing commitments – in which eir again requested ComReg to engage on those voluntary commitments.

In respect to the consultation being undertaken by AGCOM, you state that you are not aware of the legal basis they are relying on, however my email to you clearly set out that AGCOM have concluded that Article 79 is directly effective. I would encourage ComReg to use their contacts to inform itself of these important matters. In particular, you suggest that AGCOM's action is not relevant to ComReg as it is a 'matter of national law'. It is surprising as an NRA that ComReg would take this view. A key objective of both the existing Directives and the Code is to ensure a consistent approach by all NRAs in applying them. In a situation where at least one NRA has taken the view that Article 79 is directly effective, for ComReg to now unilaterally say it is not, in effect involves ComReg creating a divergent application of the Code across Member States, the very thing the Commission is seeking to avoid.

With regard to your summary of the rules on direct effect, eir is aware of them and reiterates, as set out in my initial letter that we consider Article 79 meets the relevant criteria, a view that is shared by the Italian NRA. The objections raised in your letter pre-suppose that some kind of detailed, formal process must be legislated for, for ComReg to be able to even 'consider' commitments. With respect, this comes across as ComReg simply not being willing to engage with eir and undertake the necessary consultation with interested parties.

In that regard, your letter downplays the options available to ComReg, regardless of whether Article 79 has been formally transposed or not. As you are aware, ComReg has the power to enter into legally binding agreements with undertakings. For example, ComReg and eir entered into a legally binding agreement as part of the 2018 Settlement Agreement. In addition, due to the continued refusal of ComReg to consult with interested parties in a timely manner on eir's voluntary commitments, if ComReg were to engage now as required under Article 79, the Code will most likely have been transposed by the time it concludes this necessary consultation. AGCOM has allowed 90 days for interested parties to provide their views to the voluntary commitments provided by TIM. It is completely unclear why ComReg continues to insist it must follow an outdated process which as a matter of law should have been replaced last year, and in particular for a market that has been delisted by the European Commission since 2014 — where mobile coverage already addresses a number of ComReg's concerns and where NBI will directly deploy the State-subsidised FTTH network – which as published in ComReg's strategy statement, ComReg considers that *"The State intervention area covers 538,000 premises, 1.1 million people, over 54,000 farms, 44,000 non-farm businesses, and 695 schools. Over the lifetime of this Medium-term Strategy [2021-2023], it is expected that the majority of this network rollout [from NBI] will have been completed"* [emphasis added].



In your letter you state that *“the provisions rely on the national regulatory authority assessing commitments and performing a market test by way of public consultation, except where such commitments clearly do not fulfil one or more relevant conditions or criteria”*. It is unclear, what you are referring to here in the context of eir’s voluntary commitments. As you are aware, the available remedies to ComReg must be appropriately justified, address the regulatory concerns identified and be proportionate. With the exception of Accounting Separation, all other general obligations proposed by ComReg are considered by eir’s voluntary commitments. Therefore, it is not clear, how ComReg can claim the relevant conditions or criteria are not met by eir’s voluntary commitments. Furthermore, ComReg is of course free, subject to appropriate justification, to impose remedies in addition to the voluntary commitments.

For clarity, in respect of Accounting Separation, as submitted by eir in its response to ComReg 20/46, maintaining such obligations is disproportionate in a market that is a small subset of the previously regulated market (less than 25% by any measure) and in decline due to changes in end user demand and technological advancement. As such, we do not believe the remedy proportionate.

Please see also our response under *“Content of Eircom’s Proposals”*.

Finally, it is completely disingenuous to suggest in respect to Article 79 that *“Eircom seems to suggest that this a bargaining process whereby it will offer certain proposals in return for extensive SMP obligations being removed.”* This is completely not the case. The only lightening of remedies was in respect to Access where subject to the clear availability of an alternative FTTH network from either NBI or open eir there would be a lightening of Access obligations in the FACO market for those premises. There was no quid pro quo nor are the voluntary commitments drafted as such. The voluntary commitments are clear and transparent and proposed in good faith as a proportionate means of implementing binding commitments on Access etc, in the context of a finding of SMP, which is the entire purpose of Article 79. In respect to the requirement of KPIs and Statement of Compliance the drafting noting their exclusion was for the benefit of interested parties to make clear that the commitments did not cover these aspects – one of course can only make voluntary commitment to positively do something.



Timing of Eircom's proposals

In your letter you state that *"It is clear that Article 79 envisages the analysis of any remedies to be carried out having regard to commitments which have already been made binding."*

This seems to imply that ComReg consider that the regulator must first impose an operator with SMP before voluntary commitments can be made. With respect, this is incorrect, as well as being moot in the present context, as eir is currently designated as having SMP, and ComReg proposes re-designating it as having SMP albeit in a smaller market, meaning there is no point in time at which eir will not be a designated SMP operator. This is also the case in the WLA and WCA market where eir has been designated with SMP since 2018 and for which eir has also made voluntary commitments to ComReg.

When designating an operator with SMP, ComReg must impose at the same time at least one remedy/regulatory obligation. As eir's voluntary commitments are to address the draft regulatory concerns identified by ComReg – and in this case ComReg was proposing the full suite of regulatory remedies - the voluntary commitments are structured to address those draft regulatory concerns. From a timing perspective as ComReg has already consulted on its draft decision it is clear that the voluntary commitments are made with ComReg's published "regulatory concerns" in mind. Second, eir notes that the Commission has published a new recommendation on the procedural aspects of the market analysis notification. This specifically includes a requirement for ComReg to provide information on commitments offered by the SMP operator. Therefore it is possible, for the NRA to notify voluntary commitments offered, at the same time as notifying the proposed designation of an operator with SMP. Consequently, the sequence which you appear to allude to is clearly not what is envisioned by the Commission.

Content of Eircom's Proposal

Your letter states that *"In ComReg's view, Eircom's Proposals do not sufficiently address the points above in the context of the FACO markets and overall, do not include anything that is susceptible to enable sustainable competition on downstream markets and facilitate deployment and take-up of very high capacity networks in the interest of end-users."* This is similar to an isolated statement made without cogent reasoning by ComReg in ComReg 20/46. You may recall, in eir's submission to ComReg 20/46, we specifically highlighted the insufficient nature of ComReg's response, which is set out here for completeness:

"With the exception of ComReg's single sentence on eir's pricing proposal no other consideration or justification is provided by ComReg as to how those voluntary commitments are "insufficient".



As the Code is due to become law in Ireland before a final decision is adopted, and is within the market review period (we understand ComReg is taking a 5 year view of the market in this consultation consistent with the Code), it is unclear as to why ComReg has not considered any of the voluntary commitments in detail. Similarly, in separate correspondence received from ComReg as to the matter of market review periods, ComReg appears satisfied to rely on the future transposition of the Code to negate the requirements under the current regulatory Framework. It is unclear to eir the benefits of ignoring the voluntary commitments entirely when ComReg in reaching its final decision will presumably be beyond the date the Code is transposed. Instead, ComReg has chosen to “consult” with operators on the Code with the unjustified position it has presented to interested parties that they are “insufficient”. In addition, it has provided no guidance to eir as to why those voluntary commitments are considered “insufficient” and therefore provides eir no opportunity to provide further submission on the matter which could address those deficits.”

Your letter also appears to misunderstand the context in which ComReg is required to have regard to the criteria in Article 79(2)(a)-(d). You state that eir’s proposals when considered on their own do not meet these criteria. However it is ‘*when assessing obligations pursuant to Article 68(4)*’ i.e. the obligations proposed by the NRA, that ComReg is required to consider these criteria. ComReg has not done so. ComReg also appears to assume that where Article 79(2) refers to an NRA concluding a commitment does not meet ‘*conditions or criteria*’ it is referring to Article 79(2)(a)-(d). However Article 79(2) actually refers to the ‘*conditions provided, as applicable, in Article 68, 76, or 78*’.

If we simply break down the remedies proposed by ComReg and proposed under eir’s voluntary commitment it is unclear how our proposals do not sufficiently address the regulatory concerns identified. Similarly, without justified reasoning from ComReg it does not allow eir to understand what amendments it could make to address ComReg’s view.

ComReg Draft remedy	FACO market	eir’s voluntary commitment	Comment
Obligation to provide Access	to provide	Mirrors ComReg’s draft decision with one exception. Where premises already have high-capacity networks available the Access obligation is lightened for those premises.	In the FACO market, where very high-capacity networks <u>are already in place</u> the obligation to provide Access to FACO is lightened. Existing Access can be maintained but there is no requirement to



		<p>meet new Access requests.</p> <p>Therefore, ComReg's regulatory concerns are addressed by eir's voluntary commitments as Access obligation remains in place at least until there is an alternative network available at that premises and there are specific conditions which will allow operators to extend Access at that premises.</p>
Obligation of non-discrimination	Completely mirrors ComReg's draft decision	
Obligation of Transparency	Save for KPI and Statement of Compliance, the voluntary commitment completely mirrors ComReg's draft decision	<p>eir's voluntary commitments do not cover KPIs or the Statement of Compliance and are drafted as exclusions for the avoidance of doubt.</p> <p>ComReg's remedies are required to be justified and proportionate. ComReg is free to propose additional remedies above those of eir's voluntary commitments if it so chooses. This does not mean that eir's voluntary commitments do not meet the objectives of Article 68.</p>



ComReg FACO remedy	eir's voluntary commitment	Comment
<p>Obligations relating to price control and cost accounting</p>	<p>The regulatory remedy of cost accounting is completely mirrored by eir's voluntary commitments.</p> <p>The voluntary price commitments are based on those provided to ComReg on 8 January 2020 in response to consultation 20/101.</p> <p>In areas where very high capacity networks are already available the voluntary prices are transparent. The voluntary commitments also provide a fixed WLA and WCA wholesale price for a period of five years.</p>	<p>In summary, the regulatory price control proposed by ComReg is reasoned to be required because without an alternative network:</p> <ul style="list-style-type: none"> - eir could excessively raise its prices - eir could lower its prices to disincentivise infrastructure-based investment <p>eir's voluntary committed prices are transparent and commence at those prevailing market prices on 1 July 2021.</p> <p>In the FACO market, the WLR price remains at prevailing rates and will increase slightly by a specified and published amount (i.e., an increase of €0.23)¹ on 1 July 2022 and will thereafter remain <u>completely fixed for the remainder of the price control</u>.</p> <p>Legacy broadband prices in the WCA market are transparent and commence at those prevailing market prices on 1 July 2021. These legacy broadband prices can only increase slightly subject to</p>

¹ This would return the monthly WLR price to €16.82, which is the rate specified in eir's voluntary commitments in February 2020.



		<p>the change in annual CPI plus 5% but not within the first two years of the price control. Where FTTH is available for 75% of premises within an exchange area those legacy broadband prices within that exchange area can increase to the monthly entry level FTTH profile wholesale price.</p> <p>The price of FTTC VUA in the WLA market and FTTC Bitstream in the WCA market remains completely fixed for a period of five years – save for where the specific condition in which eir has provided 12 months’ notice that the exchange is subject to copper-switch off. This, as indicated, may only occur when 95% of premises within that exchange can avail of a very-high capacity network (i.e., an FTTH network available from NBI, open eir or Siro).</p> <p>Therefore, ComReg’s regulatory concerns in the WLA, WCA and FACO markets are addressed by eir’s voluntary commitments:</p> <p>There is a permanent fixed price for FTTC as a fall-back product and this may only change when copper switch-off for that</p>
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		exchange is clearly announced. In the FACO market the relevant prices remain largely fixed for five years.
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Therefore, for ComReg to suggest that eir's commitments "clearly do not fulfil one or more relevant conditions" is without basis.

Similarly, in respect to the "insufficiencies" of eir's voluntary commitments, you appear to suggest in point 1. that commitments can only be made in respect of high speed broadband networks only. This is incorrect. Article 79 clearly states that "Undertakings designated as having significant market power may offer to the national regulatory authority commitments regarding conditions for access, co-investment, or both, applicable to their networks in relation to inter alia" [emphasis added]. In other words the list of examples in Article 79(1)(a)-(c) is not exhaustive. Furthermore, Article 79 refers to the objectives in Article 68 of the Code which does not focus on any "type" of network – save for those that may be subject to SMP. Therefore, it is clear that Article 79 can be applied to all and any market where access remedies are imposed on undertakings with significant market power. See also response to your point 2 below.

Finally, in point 2, you suggest that without KPIs or Statement of Compliance there is no way of ensuring eir's compliance in respect to its non-discrimination obligations. It is worth putting into context the FACO market in which KPIs and Statement of Compliance is sought. The FACO market proposed to be regulated largely consists of the geographic area where NBI will roll-out the State-subsidised FTTH network. The market consists of a number of small exchange areas which incorporate ca. 25% of current supply of WLR nationally. The FACO market has also been removed as a market recognised as being susceptible to SMP by the European Commission since 2014 and is subject to continued declining demand year-on-year. The voluntary commitments also mirror the exact wording of ComReg's draft decision instrument in respect to non-discrimination obligation. As stated previously, ComReg's remedies are required to be justified and proportionate. ComReg is free to propose additional remedies above those of eir's voluntary commitments if it so chooses. However, this does not mean that eir's voluntary commitments do not meet the objectives of Article 68. Similarly, for you to suggest that because Eircom does not include KPIs or Statement of Compliance within its voluntary commitments they are insufficient also runs counter to your point that voluntary commitments are only those for which it is positively imposing rather than removing something and therefore logically can only be deemed insufficient based on the limitations of what they actually do offer.



In summary therefore, ComReg has had eir's proposed voluntary commitments since February 2020 and notwithstanding eir's repeated requests, and in contravention of the provisions of Article 79, ComReg has repeatedly refused to consult on them with industry. In refusing to do so, ComReg is unilaterally choosing not to honour the requirements of Article 79, which in essence simply provide for NRAs taking a proportionate approach and not legislating on particular obligations where binding commitments, properly consulted on, will achieve the necessary end. By this unilateral action, it is creating a divergent application of the Code within the EU. Regardless of whether Article 79 is transposed, ComReg has the power to enter into binding commitments with operators, and in refusing to even engage or consult, ComReg is failing to abide by the principle of proportionality. While ComReg suggests that it is not required to consult under Article 79 on the basis that eir's proposed commitments 'clearly do not fulfil one or more relevant conditions or criteria' ComReg appear to have misunderstood the criteria being referred to, which are those in Article 68 etc, not in Article 79, and have not provided any evidence of such non-fulfilment. Finally eir notes that it is not correct to characterise eir's proposed commitment as a 'late' submission to the FACO consultation, given that they were provided over a year ago and the pricing commitments resubmitted in the most recent consultation process in January 2021.

We are confident that the commitments satisfy the criteria set out in Article 68 of the Code, and, following your preliminary conclusions arising from the necessary consultation with interested parties, we look forward to making the commitments binding.

Regards

A handwritten signature in black ink that reads "Kjeld Hartog".

Kjeld Hartog
Director of Regulatory and Public affairs



An Coimisiún um
Rialáil Cumarsáide
Commission for
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BY EMAIL ([REDACTED])

14 June 2021

Eircom's Proposals re FACO market February 2020 (the "February 2020 Proposals") and April 2021 (the "April 2021 Proposals") (together the "Proposals")

Dear Kjeld,

I refer to your letter of 13 May 2021 as well as previous correspondence on the Proposals offered by Eircom to ComReg in the Fixed Call Origination ("**FACO**") Market.

ComReg has already set out its position on the Proposals and the points raised in your letter of 13 May 2021 do not provide any new information. There are two points made in your letter, however, that require clarification by ComReg and a response on those points is set out below. For confirmation, any points not addressed in this response should not be treated as accepted by ComReg.

First, on your statement that AGCOM has undertaken a consultation pursuant to Article 79 of the European Electronic Communications Code ("**EECC**") on the basis that it is directly effective, ComReg's position remains that Article 79 does not have direct effect and accordingly, it is a matter of national law whether there are existing provisions which may be read in light of Article 79 (until such time as the EECC has been transposed into national law). That it is the case in one Member State such as Italy does not mean it will be the case in another such as Ireland.

Further, we understand that there are notable differences in the circumstances surrounding AGCOM's consultation compared to the circumstances in which Eircom has submitted its Proposals. These differences include but are not limited to, AGCOM's ability to consider commitments under current national law in Italy (in contrast to the position in Ireland).

An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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Second, you state that ComReg has had Eircom's Proposals since February 2020 but has refused to engage with Eircom on them or consult with industry in contravention of the provisions of Article 79. As you are aware, ComReg met with Eircom in February 2020 to discuss the Proposals. In addition, the February 2020 Proposals were included in the FACO Consultation (ComReg Document 20/46) and ComReg specifically requested responses from interested parties on those Proposals. As for the revised April 2021 Proposals, ComReg is treating them as a late submission which it will have regard to when finalising the decision on the FACO Market. Even if the EECC had been transposed into Irish law, Article 79 does not require NRAs to perform a market test every time an undertaking makes an offer which it considers to be commitments within the scope of Article 79. For confirmation, ComReg's position remains as stated in my letter of 10 May 2021.

Eircom's Proposals of 21 April 2021 will be published as a submission to the final Decision in relation to the FACO Market and the subsequent correspondence between ComReg and Eircom on this issue, including your letter of 13 May 2021, will also be published. I therefore request that you confirm by tomorrow if your correspondence contains any confidential information (which would be redacted in the publication).

Yours sincerely,

Donal Leavy
Director of Wholesale